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

SEAN MCBURNEY, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

v.

EUROFINS AIR TOXICS, LLC, a limited
liability company; EUROFINS AIR
TOXICS, INC., a California corporation;
and DOES 1 through 50, inclusive,

Defendants.

Case No. 34-2022-00321801

[Assigned for all purposes to the Hon. Lauri
Damrell in Department 28]

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

Date: July 28, 2023
Time: 9:00 a.m.
Dept.: 28

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Attorneys for Plaintiff and the Class

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

2 **PLEASE TAKE NOTICE** that on July 28, 2023 at 9:00 a.m., or as soon thereafter as the
3 matter may be heard, before the Honorable Lauri Damrell, judge presiding, in Department 28 of
4 the above referenced Court located at 720 9th Street, Sacramento, CA 92415, Plaintiff SEAN
5 MCBURNEY (“Plaintiff”) will seek an Order: (1) preliminarily approving the Joint Stipulation of
6 Class Action Settlement and Release (“Settlement Agreement” or “Settlement”); (2) conditionally
7 certifying the following Class for settlement purposes only: all current and former employees
8 employed by Defendant in California who were paid any wages during the Class Period (June 13,
9 2021 through April 30, 2023), excluding employees who have signed individual releases of the
10 claims asserted in the lawsuit; (3) appointing Plaintiff as the Class Representative, and Larry W.
11 Lee of Diversity Law Group, P.C., Edward W. Choi of Law Offices of Choi & Associates,
12 William L. Marder of Polaris Law Group, and Dennis Hyun of Hyun Legal, APC as Class
13 Counsel; (4) preliminarily approving the Settlement Agreement and the Class Settlement Amount
14 of \$260,000.00; (5) finding on a preliminary basis that the Settlement Agreement appears to be
15 within the range of reasonableness of a settlement, including the amount of the Class
16 Representative’s Enhancement Payment, Class Counsel’s fees and costs, the settlement
17 administration fees, and the allocation of payments to Class Members, that could ultimately be
18 given final approval by this Court; (6) approving the Notice of Class Action Settlement (“Class
19 Notice”) to be sent to Class Members, which is attached as Exhibit A to the Settlement
20 Agreement; (7) approving the distribution of the Class Notice to Class Members substantially in
21 the manner and form set forth in the Settlement Agreement; (8) appointing Phoenix Settlement
22 Administrators as the Settlement Administrator; and (9) setting the matter for a Final Fairness and
23 Final Approval hearing.

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

27 The basis for this Motion, filed without any opposition from Defendant Eurofins
28 Environment Testing Northern California, LLC (formerly known as Eurofins Air Toxics, LLC)
 (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the procedures

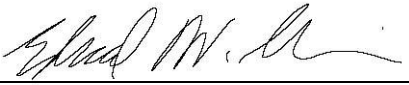
1 proposed by the Parties are adequate to ensure the opportunity of class members to participate in,
2 opt-out of, or object to the settlement.

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

10 This Motion will be based on the attached Memorandum of Points and Authorities, the
11 Settlement Agreement, the proposed Class Notice, and the supporting Declarations of Edward W.
12 Choi, Larry W. Lee, Dennis Hyun, and Plaintiff Sean McBurney, and upon the oral arguments of
13 counsel (should there be any) and on the complete records and file herein.

14
15 DATED: July 6, 2023

LAW OFFICES OF CHOI AND ASSOCIATES

16
17 By: 

18 Edward W. Choi
Attorneys for PLAINTIFF and the CLASS

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On June 13, 2022, Plaintiff SEAN MCBURNEY (“Plaintiff”) mailed a notice pursuant to the
4 Private Attorneys General Act (the “PAGA”), to the Labor Workplace Development Agency
5 (“LWDA”) alleging that Defendant Eurofins Environment Testing Northern California, LLC
6 (formerly known as Eurofins Air Toxics, LLC)’s (“Defendant”) violated Labor Code §226.
7 (Declaration of Edward W. Choi (“Choi Decl.”) ¶2, Ex. A).

8 On June 14, 2022, Plaintiff filed his Complaint as a class action against Defendant alleging,
9 (1) violation of Labor Code § 226(a). (Choi Decl. ¶3). On November 15, 2022, after the court
10 granted the Parties’ Stipulation for Leave to File a First Amended Complaint, Plaintiff filed a First
11 Amended Complaint adding a cause of action for Violation of the Private Attorneys General Act
12 (the “PAGA”), premised upon the same violation of Labor Code § 226(a). (“Operative
13 Complaint”). (*Id.* at ¶4).

14 Since the filing of the case, the Parties engaged in formal and informal discovery resulting
15 in the production of data necessary for Plaintiff to calculate the potential exposure for this matter.
16 (*Id.* at ¶5). Thereafter, the parties engaged in mediation with well-respected mediator, Steve
17 Serratore, Esq., which ultimately led to this settlement. (*Id.* at ¶6). The terms of the settlement
18 provide that Defendant shall pay the Gross Settlement Amount of Two Hundred Sixty Thousand
19 Dollars (\$260,000.00) which will be distributed to the class on a **non-reversionary** basis without
20 the need to submit claim forms. (Joint Stipulation of Class Action Settlement and Release
21 (“Settlement Agreement” or “Settlement”) ¶13). Thus, the entire settlement amount will be
22 distributed and no remaining amounts, *i.e.* unclaimed funds, will revert back to Defendant. (*Id.*)

23 Plaintiff respectfully submits that this amount is fair, adequate, and reasonable, especially
24 given the substantial risks and uncertainty of class certification and liability on the merits.
25 Although Plaintiff and his counsel have always believed that they can prevail on class certification,
26 as well as on the merits, they recognize the inherent risk in further drawn-out litigation and the
27 specific risks that a class might not be certified and/or that Plaintiff could fail to establish liability.
28 Based on their own independent investigation and evaluation, Plaintiff and his counsel are of the

1 opinion that settlement for the consideration and on the terms set forth in the Settlement Agreement
2 is fair, reasonable, and adequate and is in the best interests of the Settlement Class in light of all
3 known facts and circumstances and the expenses and risks inherent in litigation.

4 Therefore, Plaintiff respectfully requests that the Court grant this Motion for Preliminary
5 Approval of Class Action Settlement.

6 **II. DISCUSSION**

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

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

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

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

26 When the parties to an action reach a monetary settlement, they will usually prepare
27 and execute a joint stipulation of settlement, which is submitted to the court for
28 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.

1 *Id.* at § 11.24.

2 Here, the Parties have reached such an agreement and Plaintiff is concurrently filing a copy
3 of the Settlement Agreement with this Motion, fully setting forth the agreement reached among the
4 Parties. The Settlement Agreement sets forth all terms of the agreement reached by the Parties,
5 which include, among other things, the method for calculating the Class Members' Individual
6 Settlement Payments.

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

16
17 The strength of the findings made by a judge at a preliminary hearing or conference
18 concerning a tentative settlement proposal. . . . may be set out in conditional orders
19 granting tentative approval to the various items submitted to the court. Three basic
20 rulings are often conditionally entered at this preliminary hearing. These conditional
21 rulings may approve a temporary settlement class, the proposed settlement, and the
22 class counsel's application for fees and expenses.

23 4 Newberg on Class Actions, at §11.26

24 In addition to such terms as class identification, settlement amount and payment procedures,
25 the Settlement Agreement reached among the Parties contains a provision pursuant to which the
26 Parties stipulate to the Court's provisional certification of the Class, but do so for the purposes of
27 this settlement only. The Settlement Agreement further provides that if, for any reason, the
28 Settlement is not approved, the stipulation to certification will be void and Defendant has reserved
all rights to challenge certification.

A. PROPOSED CLASS DEFINITION

The current settlement is being settled on behalf of the following Class:

1 “All current and former employees employed by Defendant in California who were
2 paid any wages during the Class Period (June 13, 2021 through April 30, 2023).”

3 (Settlement Agreement ¶¶6-7).

4 **B. NUMEROSITY**

5 Courts generally find that numerosity is satisfied if the class includes forty or more
6 members. (*See Villalpando v. Excel Direct Inc.* (N.D. Cal. 2014) 303 F.R.D. 588, 605-606; *see also*
7 *Jordan v. L.A. County* (9th Cir. 1982) 669 F.2d 1311, 1320 (noting, in dicta, that the court “would
8 be inclined to find the numerosity requirement...satisfied solely on the basis of [39] ascertained
9 class members”), *vacated on other grounds*, 459 U.S. 810 (1982); *Ark. Educ. Ass’n v. Bd. of Educ.*
10 *of the Portland* (8th Cir. 1971) 446 F.2d 763, 765-66 (approving class of 20 members).)

11 In this case, there are approximately a total of 250 class members, therefore, numerosity is
12 satisfied. (Choi Decl. ¶7).

13 **C. ASCERTAINABILITY**

14 Class members are ascertainable where they may be “readily identified without
15 unreasonable expense or time by reference to official records.” (*Lee v. Dynamex, Inc.* (2008) 166
16 Cal. App. 4th 1325, 1334; *see also Faulkinbury v. Boyd & Assocs., Inc.* (2013) 216 Cal. App. 4th
17 220, 240.)

18 Here, for settlement purposes, the identity of class members is clearly ascertainable from
19 Defendant’s employment and payroll records and have already been identified during the informal
20 discovery and mediation process.

21 **D. TYPICALITY AND ADEQUACY OF REPRESENTATION**

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

23 The commonality requirement is met when there are questions of law and fact common to
24 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared
25 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts
26 couple with disparate legal remedies within the class”). Commonality requires only that some
27 common legal or factual questions exist; the Plaintiff need not show that all issues in the litigation
28 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 Ca1. 3d

1 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer's
2 conduct is uniformly directed at a class of employees, as it is here, the class wide impact of the
3 Defendant's policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward &*
4 *Co.*, 193 Cal. App. 3d 411, 421 (1987).

5 Plaintiff alleges that Defendant violated Labor Code §226 by failing to provide proper wage
6 statements that identify the address of the employer and the correct total hours worked by
7 employees during the pay period. Based on the foregoing, Plaintiff further seeks penalties under
8 Section 226(e) and the PAGA. Plaintiff alleges that he was subject to the foregoing policies,
9 practices and payment procedures. (Declaration of Sean McBurney ("McBurney Decl.") ¶ 3).

10 Plaintiff does not have any interests adverse to the Class, nor has any such issues been
11 raised or presented. (McBurney Decl. ¶ 4). Plaintiff has taken all necessary steps to represent the
12 interests of the Class, by providing information and documents. (*Id.* at ¶ 6). For such reasons,
13 Plaintiff has adequately represented the Class Members and will continue to do so.

14 2. Class Counsel Have Adequately Represented the Class and Has 15 Experience with Wage and Hour Class Actions

16 From the inception of the case, Class Counsel have solely represented the interest of the
17 Class. For example, Plaintiff conducted formal and informal discovery was directed to Defendant
18 regarding Plaintiff, the Class, and towards Class issues. (Choi Decl. ¶5). Class counsel also
19 engaged in numerous meet and confers with opposing counsel and obtained the Class data prior to
20 mediation. (*Id.*) The mediation and settlement were also obtained for the benefit of the Class, not
21 for the individual Plaintiff. Finally, Class counsel have been approved as class counsel on a
22 number of prior cases and are competent to represent the class. (Choi Decl. at ¶11; Declaration of
23 Larry W. Lee ("Lee Decl.") at ¶¶3-6; Declaration of Dennis S. Hyun ("Hyun Decl.") at ¶¶ 3-6).

24 E. SUPERIORITY

25 Class treatment is clearly superior to any other method of resolving Plaintiff's claims. (*Sav-*
26 *on Drug Stores, Inc.*, *supra*, 34 Cal. 4th 319 at p. 326) In employment actions, class actions are in
27 fact encouraged. (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal. App. 4th 1286, 1308 ("In light of
28 the numerous common issues of fact and law that predominate in this lawsuit, we conclude that

1 proceeding by way of class action is the superior method of adjudication. Doing so would further
2 judicial economy by avoiding repetitious suits, would unify what would otherwise be a series of
3 small claims so as to enhance the class members' access to redress...”).)

4 Here, Plaintiff's claims are based on the alleged Class-wide policies, procedures, and
5 practices that apply to all Class Members and can be most efficiently litigated on a Class-wide
6 basis. The alternative would be the unrealistic filing of numerous individual claims. Since the
7 putative class members are employees with relatively modest individual claims and limited
8 resources, there is a strong likelihood that individual claims would never be brought. (*See Local*
9 *Joint Exec. Bd. of Culinary/Bartender Trust Fund* (9th Cir. 2001) 244 F.3d 1152, 1163 (superiority
10 requirement met where class members would recover, at most, about \$1,330); *see also Gentry v.*
11 *Sup. Ct.* (2007) 42 Cal. 4th 443, 462.)

12 **F. SUMMARY OF THE CASE, INVESTIGATION AND DISCOVERY, AND**
13 **REASONABLE ESTIMATE OF THE NATURE AND AMOUNT OF**
14 **RECOVERY**

15 As discussed above, the Operative Complaint alleges two causes of action for violation of
16 Labor Code § 226 and the PAGA. (Choi Decl. ¶¶3-4).

17 Specifically, Plaintiff alleges that Defendant failed to provide wage statements listing its
18 name and address and correct total hours worked when overtime wages were paid to class members
19 and/or aggrieved employees. (*Id.* at ¶3). Defendant denies liability was and is prepared to continue
20 to defend the action vigorously through denial of class certification, summary judgment, and/or
21 trial.

22 Plaintiff served written discovery and engaged in extensive meet and confers with
23 Defendant to obtain the putative class members' pay data. (*Id.* at ¶5). Thereafter, the parties
24 engaged in a full-day mediation with mediator Steve Serratore, Esq. on January 31, 2023, which
25 ultimately resulted in this settlement. (*Id.* at ¶6).

26 Based on their own independent investigations and evaluations, the Parties and their
27 respective counsel are of the opinion that settlement for the consideration and on the terms set forth
28 in the Settlement Agreement is fair, reasonable, and adequate and is in the best interests of the

1 Class and Defendant in light of all known facts and circumstances and the expenses and risks
2 inherent in litigation, and is designed so that the Parties may buy their peace and avoid continuing
3 litigation and costs. (Choi Decl. ¶9).

4 As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
5 4th 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has
6 conducted sufficient discovery and the settlement is reasonable in light of the strengths of the
7 plaintiff's claims. As discussed herein, Plaintiff' counsel has conducted extensive discovery and
8 investigation and, in light of the strength and weaknesses of Plaintiff' claims, Plaintiff' attorneys
9 submit that this settlement is fair pursuant to *Kullar*.

10 Plaintiff estimated that the maximum Labor Code §226 penalties that could be awarded was
11 approximately \$573,500 (5,955 wage statements issued to 250 employees). (Choi Decl. ¶7)
12 Further, Plaintiff estimated the total potential PAGA penalties to amount to \$379,000 (3,790 pay
13 periods X \$100). (*Id.*). Thus, the current settlement is 27.30% of the total maximum exposure
14 (\$260,000 divided by \$952,500).

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

2012) (holding that gross class action settlement of approximately 15% of the potential recovery was fair and reasonable); *Greko v. Diesel U.S.A., Inc.*, No. 10–cv–02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24 percent was reasonable).

In the present case, the total amount of the settlement is well within the acceptable range when compared to the total exposure. This is especially true given that some courts have ruled that a finding of liability for violation of Labor Code section 226(a) requires that the plaintiff and class members demonstrate an “actual injury.” Under this line of cases, an actual injury is shown where “there is a need for [] additional documentation.” *Raines v. Coastal Pac. Food Distribs., Inc.*, 23 Cal. App.5th 667, 676 (2018) (internal citations omitted); *see also Hernandez v. BCI Coca-Cola Bottling Co.*, 554 Fed. App'x 661, 662 (9th Cir. 2014) (finding that a wage statement does not violate Section 226(a) if “a plaintiff employee can ascertain the required information by performing simple math, using figures on the face of the wage statement”). Defendant will almost certainly argue that the absence of a common “actual injury” serves as a barrier to class certification. Based on the foregoing a 27.30% recovery when compared to the total exposure is a good result for the class.

G. SETTLEMENT WAS NEGOTIATED AT ARMS-LENGTH AND IS NOT COLLUSIVE

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

While the recommendations of counsel proposing the settlement are not conclusive, the

1 Court can properly take them into account, particularly where, as here, they have been involved in
2 formal and informal discovery and negotiations for some period of time, appear to be competent,
3 have experience with this type of litigation, and have exchanged substantial evidence from the
4 opposing party. *See Newberg on Class Actions, supra*, at § 11.47; *Nat’l Rural Telecomms. Coop.*,
5 221 F.R.D. at 528 (quoting *In re Paine Webber Ltd. P’ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.
6 1997) (“[s]o long as the integrity of the arm’s length negotiation process is preserved, however, a
7 strong initial presumption of fairness attaches to the proposed settlement . . . [citations] and ‘great
8 weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the
9 facts of the underlying litigation”)).

10 Here, both Plaintiff and Defendant’s counsel have a great deal of experience in wage and
11 hour class action litigation. Plaintiff’s counsel have been approved as class counsel in a number of
12 wage and hour class actions and have extensive litigation experience. (Choi Decl. at ¶11; Lee Decl.
13 at ¶6; Hyun Decl. ¶¶ 3-6). Moreover, as discussed above, Plaintiff’s counsel conducted a very
14 extensive investigation of the allegations involved in this case since the inception. Each side has
15 apprised the other of their respective factual contentions, legal theories and defenses, resulting in
16 extensive arms’ length negotiations taking place among the Parties.

17 The settlement for each participating Class Member is fair, reasonable and adequate, given
18 the inherent risks of litigation, including the substantial risks relative to class certification, and the
19 costs of pursuing such litigation. The settlement is the result of extensive arms’ length negotiations
20 between the Parties and their counsel, which was achieved after a full day of mediation before a
21 highly regarded mediator.

22 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the fairness
23 of the settlement that is based on factoring in the uncertainty and risks to Plaintiff in not prevailing
24 on one or more of the causes of action or theories alleged in the Operative Complaint, the
25 possibility of non-certification, adverse disposition, and potential for appeals by one or both sides.
26 (Choi Decl. at ¶8). Despite the asserted fairness of the settlement terms, as set forth in the *Class*
27 *Notice*, should any Class Member wish to pursue his or her own case for the claims being released
28 herein, each Class Member has the right to submit a request for exclusion (*i.e.*, Opt-Out) from the

1 settlement. Moreover, as set forth in the *Class Notice*, Class Members are advised of their right to
2 attend the final approval hearing and object to any of the terms contained in the proposed
3 Settlement Agreement, provided that they give proper notice to the Parties and the Court.

4 **H. SETTLEMENT TERMS AND EVALUATION**

5 **1. Proposed Terms of the Settlement**

6 This is a non-reversionary settlement wherein Class Members will be automatically paid out
7 of the settlement if he/she does not opt-out of the settlement. The key terms of the settlement are as
8 follows.

9 The Settlement Agreement provides for a Class Settlement Amount of Two Hundred and
10 Sixty-Thousand Dollars (\$260,000.00). (Settlement Agreement ¶ 13.). Attorney's fees of up to
11 35% or \$91,000.00 will be paid to Class Counsel, along with costs of up to \$30,000.00.
12 (Settlement Agreement ¶ 33). Plaintiff will seek a Class Representative Enhancement Payment up
13 to \$10,000.00. (Settlement Agreement ¶ 34). The Settlement Administrator will be paid up to
14 \$8,000.00 for costs of administering this settlement. (Settlement Agreement ¶ 35). After deduction
15 of the foregoing, the remainder will be distributed to Class Members who do not opt-out of the
16 Settlement Agreement based on the number of wage statements a Class Member received during
17 the Class Period. (Settlement Agreement ¶ 38).

18 **2. Nature of Any Injunctive Relief**

19 The Settlement Agreement does not provide for any injunctive relief.

20 **3. Amount and Manner of Distribution of the Compensation to be** 21 **Provided to Class Members Including the Amount, or an Estimate, of** 22 **What Each Class Member Will Receive**

23 The Net Settlement Amount (calculated after deduction of attorneys' fees, costs, class
24 representative service payment, and claims administration costs) shall be paid to all Class Members
25 who do not opt out of the settlement. (Settlement Agreement ¶ 38). The amount allocated to each
26 Class Member will be based on the number of wage statements each Class Member received during
27 the Class Period. (Settlement Agreement ¶ 38(b)). The reason for such allocation is so that the
28 Class Members who suffered higher damages will be allocated greater recovery. Class Members

1 may opt-out of the Settlement if they so choose. (Settlement Agreement ¶ 26). Based on the Net
2 Settlement Amount, on a pure raw average, each class member will receive approximately \$424.00.
3 (Choi Decl. ¶7). Such amounts for each person could increase or decrease depending on a number
4 of factors, including the amount of wage statements received by each Class Member. The actual
5 amount each person will be entitled to will not be known until the class data is transferred to the
6 Settlement Administrator for processing.

7 **4. Whether, and Under What Circumstances, Amounts May Revert to**
8 **Defendant, Disposition of Any Un-cashed Checks**

9 This is a non-reversionary settlement as the entirety of the settlement amount will be fully
10 paid out. Settlement checks will remain valid for a period of 180 calendar days after they issue. Any
11 check not cashed within 180 calendar days will be distributed to the California State Controller
12 Unclaimed Property Fund and held in the name of the Settlement Class Member. (Settlement
13 Agreement ¶ 56).

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

15 The scope of the release, as listed below, is identified in the Settlement Agreement at
16 paragraph 24 as well as in each of the Notices that will be sent to Class Members.

17 “all claims under or premised on Labor Code § 226, including all claims
18 pled in the First Amended Complaint for (1) failure to furnish accurate
19 itemized wage statements or provide fully and accurately itemized wage
20 statements pursuant to Labor Code § 226; and (2) civil penalties premised
21 on Labor Code § 226 pursuant to the Private Attorney Generals Act
22 (“PAGA”) (“Released Claims”). Released Claims shall include, but are not
23 limited to, any claims alleged or that could have been alleged in the Action,
24 any claims for any pay stub, wage statement, or record keeping violation
25 and any and all associated penalties including, but not limited to, for civil
or statutory penalties under Labor Code section 2698 *et seq.*, Labor Code
sections 226, 226.3, IWC Wage Order 4-2001 and any other applicable
wage orders, and any and all claims or potential claims for attorneys’ fees,
costs, and interest for any violation alleged, or that could have been
alleged, in the Action.”

26 (Settlement Agreement ¶ 24).

27
28 As shown, the scope of the release is narrow and is limited by the claims asserted in the

1 Operative Complaint. Further, the Scope of the Release does not waive Civil Code §1542 for Class
2 Members, it does so only for and with regard to the named Class Representative.

3 **6. Tax Treatment of Settlement Amounts**

4 All Individual Settlement Payments are allocated as 100% penalties and interest and subject
5 to reporting on an IRS Form 1099. (Settlement Agreement ¶ 58).

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

8 As stated above, Class Members do not need to do anything should they wish to receive
9 their share of the settlement funds. Thus, this substantially decreases the amount of burden each
10 Class Member must bear in order to receive their settlement share. If a Class Member does not
11 wish to take part in this settlement and be bound by the release, he/she must submit an exclusion
12 request.

13 Such obligations are thoroughly identified in each class member's Class Notices.
14 (Settlement Agreement ¶ 47 & Ex. A).

15 **I. SUBMISSION OF CLAIMS/EXCLUSIONS/OBJECTIONS**

16 Class Members will not be required to submit a claim form to receive compensation.
17 Instead, this is a non-reversionary Settlement Agreement. Class Members will be provided 45
18 calendar days to opt out or object to the settlement. (Settlement Agreement ¶ 27). Any Class
19 Member who does not opt-out of the settlement will be automatically issued his/her share of the
20 settlement proceeds. Given that this is a non-reversionary settlement, the parties believe that 45
21 calendar days is sufficient time for class members to object or opt-out of the settlement. Further,
22 Class Members will be notified of the Fairness/Final Approval hearing and will have an
23 opportunity to appear at the Fairness hearing.

24 **J. CY PRES DISTRIBUTION**

25 Individual Settlement Payments checks remaining un-cashed for more than 180 days after
26 issuance will be tendered to California State Controller Unclaimed Property Fund and held in the
27 name of the Settlement Class Member. (Settlement Agreement ¶56). Thus, the Settlement
28 Agreement does not provide for a cy pres recipient.

1 **K. NOTICE TO CLASS MEMBERS**

2 Within thirty (30) calendar days of preliminary approval of this settlement, Defendant will
3 provide the Class List to the Settlement Administrator. (Settlement Agreement ¶¶ 5, 44). The
4 Settlement Administrator will mail a Class Notice to all Class Members via regular First-Class U.S.
5 Mail, using the most current, known mailing addresses identified in the Class List. (*Id.* at ¶45).
6 Prior to mailing, the Settlement Administrator will perform a search based on the National Change
7 of Address Database for information to update and correct for any known or identifiable address
8 changes. (*Id.* at ¶ 46). If a Notice is returned as non-deliverable but with a forwarding address, the
9 Settlement Administrator shall resend the Notice to the forwarding address. (*Id.*) If a Notice is
10 returned as non-deliverable with no forwarding address, the Settlement Administrator shall conduct
11 a skip trace to locate the most current address of the person to whom the Notice was addressed and
12 shall resend the Notice to any updated address. (*Id.*) Each Class Notice will provide: (i)
13 information regarding the nature of the Action; (ii) a summary of the Settlement’s principal terms;
14 (iii) the Settlement Class definition; (iv) the total number of wage statements each respective Class
15 Member received during the Class Period; (v) each Class Member’s estimated Individual
16 Settlement Payments and the formula for calculating Individual Settlement Payments; (vi) the dates
17 which comprise the Class Period; (vii) instructions on how to submit Requests for Exclusion or
18 Notices of Objection; (viii) the deadlines by which the Class Member must postmark any requests
19 for exclusions/opt-outs; and (ix) the claims to be released. (*Id.* at ¶47; Ex. A)

20 Based on the foregoing, the notice procedures fully comply with California Rules of Court
21 Rule 3.766 (d) & (e).

22 **L. COSTS AND FEES**

23 **1. Attorneys’ Fees and Costs**

24 California state and federal courts have recognized that an appropriate method for
25 determining award of attorneys’ fees is based on a percentage of the total value of benefits to Class
26 Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001);
27 *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*, 444 U.S.
28 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The

1 purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation
2 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the
3 entire burden alone.” *Vincent*, 557 F. 2d at 769.

4 Under California law, the award of attorneys’ fees in common fund wage and hour class
5 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal.
6 5th 480, 503 (Aug. 11, 2016) (“We join the overwhelming majority of federal and state courts in
7 holding that when class action litigation establishes a monetary fund for the benefit of the class
8 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
9 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
10 fund created.”). Under the percentage of the fund method, the Court’s objective remains to “mimic
11 the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (J.
12 Posner) (“When a fee is set by a court rather than by contract, the object is to set it at a level that
13 will approximate what the market will set... The judge, in other words, is trying to mimic the
14 market in legal services.”).

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

20 Moreover, in the *Laffitte* intermediate court decision, the court observed that “35 percent of
21 the common fund is consistent with, and in the range of, awards in other class action lawsuits.”
22 *Laffitte v. Robert Half Int’l*, 231 Cal. App. 4th 860, 871 (2014). Here, the fee award representing
23 35% of the fund clearly falls within that range, and is consistent with other comprehensive surveys
24 of class action settlements and fee awards. *See Fitzpatrick, An Empirical Study of Class Action*
25 *Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases
26 between 2006-2007 and concluding that “[m]ost fee awards were between 25 percent and 35
27 percent, with almost no awards more than 35 percent.”); Eisenberg & Miller, *Attorney Fees in*
28 *Class Action Settlements: An Empirical Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262,

1 fn.16 (2010) (independent studies of class action litigation nationwide conclude that fees
2 representing one-third of the total recovery is consistent with market rates).

3 The results delivered by Plaintiff's Counsel also support the requested percentage of the
4 fund. Here, the Parties have agreed to a payment of a maximum of 35% of the settlement
5 (\$91,000.00) for payment to Class Counsel as attorneys' fees. (Settlement Agreement ¶ 3).
6 Further, the parties have agreed to reimbursement of class counsel's reasonable and actual litigation
7 costs incurred of up to \$30,000.00. (*Id.*) Class counsel have, at their own risk, expended costs, for
8 example, to file this instant action, service of process, payment of mediation fees, and other
9 litigation related costs and will be submitting detailed cost sheets for the respective costs incurred
10 prior to the Motion for Final Approval. Based on the foregoing, the court should preliminarily
11 approve the attorney's fees and costs being requested by the parties.

12 **2. Proposed Payment to Class Representative**

13 Plaintiff requests a Class Representative Enhancement Payment of \$10,000.00. (Settlement
14 Agreement ¶34). Plaintiff conferred with Class Counsel about the case, provided documents and
15 information to Class Counsel, and reviewed and signed the Settlement Agreement. (McBurney
16 Decl. ¶6). Moreover, as part of Plaintiff's duties as the representative, Plaintiff provided invaluable
17 information, evidence, and documents that resulted in this settlement. (*Id.*)

18 Given that future employers are much less likely to hire individuals who have filed suit
19 against their prior employer, particularly cases of this nature, Plaintiff may face prejudice in the
20 future from other potential employers. Plaintiff assumed these risks from which the whole class
21 benefited. Class members did not have to file individual lawsuits and bear the risks of payment of
22 fees and costs if they did not prevail, nor did they have to face the potential for retaliation and not
23 getting future employment had they filed a public lawsuit.

24 Notably, courts have routinely granted approval of representative enhancements for far
25 greater amounts than the \$7,500.00 sought by Plaintiff in this case. *See, e.g., Van Vranken v.*
26 *Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000);
27 *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
28 incentive awards of \$ 55,000, and three incentive awards of \$ 35,000); *Brotherton v. Cleveland*,

1 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy*
2 *Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000
3 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist.
4 LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA
5 overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming
6 \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiff requests an
7 enhancement of \$10,00.00, which is “presumptively reasonable” and consistent with case law.

8 3. Class Administration Fees

9 The Settlement Administration Costs are currently estimated to Eight Thousand Dollars
10 (\$8,000). (Settlement Agreement ¶ 28). The Parties have agreed to Phoenix Settlement
11 Administrators, for administering this Settlement, including, but not limited to, printing,
12 distributing, and tracking documents for this Settlement, tax reporting, distributing the Maximum
13 Settlement Amount, and providing necessary reports and declarations, as requested by the Parties.
14 (*Id.*). Phoenix is a well-recognized class action Settlement Administrator. The parties believe that
15 the administration fee is reasonable and should be approved.

16 III. LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION

17 Plaintiff uploaded a copy of this Motion, Settlement Agreement and Proposed Order to the
18 LWDA. (Choi Decl. ¶12)

19 IV. PROPOSED SCHEDULE FOR CLASS NOTICE, OBJECTION, OPT OUT, 20 MOTION FOR APPROVAL, ATTORNEY’S FEES, AND FINAL ACCOUNTING

21 Description	22 Date	23 Details	24 Settlement Agreement
25 Preliminary Approval Date	26 7/28/2023		
27 Class List to Administrator	28 8/28/2023	30 calendar days	¶44
Class Notice Distribution	9/7/2023	10 calendar days	¶45
Opt Out/Objection		45 days from	¶27
Deadline	10/23/2023	Notice Mailing	
	On or after		
	December 6,		
Final Approval	2023		

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

3 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both
4 substantial monetary benefits to class members; it is non-collusive; and it was achieved as the result
5 of informed, extensive, and arms' length negotiations conducted by counsel for respective parties
6 who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff
7 respectfully request that the Court grant preliminary approval of the proposed settlement, sign the
8 proposed Order, approve and authorize mailing of the proposed Class Notice, and set a date for a
9 final approval hearing on or after December 6, 2023, or a later date that is convenient for the Court.

10
11 DATED: July 6, 2023

LAW OFFICES OF CHOI AND ASSOCIATES

12 By: 
13 Edward W. Choi
14 Attorneys for PLAINTIFF and the CLASS