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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

HERMIE EVANGELISTA, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

LINDE INC.; and DOES 1 through 50,
inclusive,

Defendant.

Case No.: 22STCV26341

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

Date: February 27, 2024

Time: 10:00 a.m.

Dept.: 7

Complaint Filed: August 15, 2022

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on a date February 27, 2024, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Lawrence P. Riff, judge presiding, in Department 7 of the above referenced Court located at 312 North Spring Street, Los Angeles, California 90012, Plaintiff Hermie Evangelista (“Plaintiff”) will seek an Order:

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

(2) conditionally certifying the following classes for settlement purposes only: (i) all employees who are or previously were employed as commercial truck drivers by Defendant in California and received “sleeper miles” pay during the period of August 15, 2021 through January 19, 2024 (the “Wage Statement Class”); and (ii) all employees who are or previously were employed as commercial truck drivers by Defendant in California during the period of August 15, 2018 through July 2, 2023 (“Expense Reimbursement Class Members”);

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

(4) preliminarily approving the Settlement and the Gross Settlement Amount of One Hundred Fifteen Thousand Dollars and Zero Cents (\$115,000.00);

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

(6) approving the Notice of Class Action Settlement (“Class Notice”) to be sent to Class Members, which is attached as an exhibit to the Settlement Agreement;

(7) approving the distribution of the Class Notice to Class Members substantially in the manner and form set forth in the Settlement Agreement;

(8) appointing Phoenix Settlement Administrators as the settlement administrator; and

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

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

5 The basis for this Motion, filed without any opposition from Defendant Linde Inc.
6 (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the procedures
7 proposed by the parties are adequate to ensure the opportunity of Class Members to participate in,
8 opt-out of, or object to the settlement.

9 This Motion will be based on the attached Memorandum of Points and Authorities, the
10 Settlement Agreement, the proposed Class Notice, and the supporting Declarations of Larry W.
11 Lee, Kristen M. Agnew, Nicholas Rosenthal, Plaintiff Hermie Evangelista, and Phoenix
12 Settlement Administrators (Jodey Lawrence), and upon the oral arguments of counsel (should there
13 be any) and on the complete records and file herein.

14
15 DATED: January 26, 2024

DIVERSITY LAW GROUP, P.C.

16
17 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

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

2 Plaintiff Hermie Evangelista (“Plaintiff”) seeks preliminary approval of the Joint
3 Stipulation of Class and Representative Action Settlement (“Settlement Agreement” or
4 “Agreement”) in this action. Plaintiff asserts a class-wide claim for violation of Labor Code
5 sections 226 and 2802, and a representative Private Attorneys General Act of 2004, California
6 Labor Code section 2698, *et seq.* (“PAGA”) claim predicated on Defendant Linde Inc.
7 (“Defendant”) alleged violation of Labor Code sections 226 and 2802.

8 Prior to the settlement of this action, Plaintiff and Defendant (collectively, the “Parties”)
9 engaged in an extensive exchange of documents and information, including, *inter alia*, data
10 regarding putative class members. With the assistance of experienced mediator, Michael Loeb, the
11 Parties reached the current settlement. The terms of the settlement provide that Defendant shall
12 pay a Gross Settlement Amount of One Hundred Fifteen Thousand Dollars (\$115,000.00).
13 **Significantly, the entire settlement amount is non-reversionary, such that no monies will**
14 **revert back to Defendant.** Further, the Class Members will not need to do anything to participate
15 in the settlement.

16 The Parties believe that this amount is fair, adequate, and reasonable, especially given the
17 risks and uncertainty of class certification and the merits of this case. Therefore, the Parties
18 respectfully request that the Court grant this Motion for Preliminary Approval of Class and
19 Representative Action Settlement.

20 **II. BACKGROUND OF THE SETTLEMENT**

21 **A. The PAGA Notice**

22 On or about August 10, 2022, Plaintiff filed a written notice to the California Labor &
23 Workforce Development Agency (“LWDA”) alleging that Defendant violated Labor Code
24 sections 201, 202, 203, 204, 226(a), 226.2, 226.7 and 2802, pursuant to Labor Code section 2699
25 (“PAGA Notice”). *See* Declaration of Nick Rosenthal (“Rosenthal Decl.”) ¶ 3, Ex. A.

26 **B. The State Court Class and PAGA Actions**

27 On August 15, 2022, Plaintiff filed a class action complaint against Defendant in Los
28 Angeles County Superior Court, entitled *Hermie Evangelista v. Linde Inc.*, Case No.

22STCV26341 (“Action”). Rosenthal Decl. ¶ 4. As set forth in the initial complaint, Plaintiff alleged causes of action for: (1) violation of Labor Code sections 226.2 and 226.7; (2) violation of Labor Code section 226; (3) violation of Labor Code section 2802; and (4) violation of Business and Professions Code section 17200, *et seq.*

On October 17, 2022, Plaintiff initiated a separate representative PAGA action entitled *Hermie Evangelista v. Linde Inc.*, in the Los Angeles County Superior Court, assigned Case No. 22STCV33708 therein (the “PAGA Action”). *See* Rosenthal Decl. ¶ 5. In the PAGA Action, Plaintiff alleged PAGA violations predicated on the Labor Code violations alleged in the PAGA Notice. *See id.*

On January 18, 2023, the Parties filed a Joint Stipulation to Consolidate the Action and PAGA Action. *See* Rosenthal Decl. ¶ 6. As part of the stipulation, Plaintiff agreed to the withdrawal of the Labor Code Section 226.2 and 226.7 claims. *See id.* The Court entered an Order granting the Joint Stipulation to Consolidate, on January 23, 2023. *See id.* The Court subsequently dismissed the PAGA Action without prejudice. *See id.*

On February 13, 2023, Plaintiff filed the operative First Amended Class and Representative Action Complaint (the “Complaint”). *See* Rosenthal Decl. ¶ 7. As alleged in the Complaint, Plaintiff alleges that Defendant: (1) failed to provide accurate itemized wage statements, in violation of Labor Code section 226; (2) failed to reimburse employees for all business expenses, in violation of Labor Code section 2802; (3) engaged in unfair business practices, in violation of Business and Professions Code section 17200 *et seq.*; and (4) violated PAGA, Labor Code section 2698 *et seq.* More specifically, Plaintiff alleges that the wage statements provided to employees paid on a piece-rate/mileage basis, did not identify the applicable rates or miles used to calculate their wages. *See id.* Rather, the wage statements simply listed the gross sum of the wages without any explanation, in violation of Labor Code section 226(a). *See id.* Furthermore, Plaintiff alleges that Defendant required employees to use their personal cell phones for work purposes, including for communication purposes, but failed to reimburse employees for such costs. *See id.*

C. A Summary of Discovery and Investigation

The Parties engaged in an extensive exchange of documents and information relevant to

1 the merits of Plaintiff’s claims and Defendant’s defenses thereto. Rosenthal Decl. ¶¶ 8-12. On
2 February 10, 2023, Plaintiff served Requests for Production of Documents (Set One) and Special
3 Interrogatories (Set One). *See id.* at ¶ 9. Amongst other relevant topics, the discovery required
4 Defendant to provide documents and information relevant to class certification, including the
5 number of putative class members, Defendant’s policies and procedures with respect to the
6 display of the number of piece-rate units earned and any applicable piece rate on the wage
7 statements, Defendant’s policies and procedures related to the use of personal cell phones for
8 work related purposes, and Defendant’s reimbursement policy. *See id.* Defendant also noticed
9 Plaintiff’s deposition. *See id.* at ¶ 10.

10 Shortly after Plaintiff propounded the initial round of discovery, the Parties agreed to
11 redirect their efforts towards an early resolution of the Action and agreed to participate in private
12 mediation. *See* Rosenthal Decl. ¶ 11. The Parties further informally agreed to stay the Action and
13 formal discovery pending the outcome of mediation. *See id.* In lieu of formal responses to the
14 discovery, the Parties agreed to the exchange of information leading up to mediation. *See id.* at ¶
15 12. Defendant produced data regarding the number of putative class members, the number of
16 wage statements reflecting the payment of “sleeper miles” issued to putative class members
17 during the period of August 15, 2021 to March 26, 2023, and the number of months worked by
18 putative class members during the period of August 15, 2018 to March 26, 2023. *See id.*
19 Defendant also produced a copy of its reimbursement policies. *See id.* Using the data provided
20 by Defendant, Class Counsel performed a comprehensive damages analysis. *See id.*

21 On May 31, 2023, the Parties engaged in a full-day mediation with mediator Michael
22 Loeb. *See* Rosenthal Decl. ¶ 14. As a result of the mediation, and after the exchange of further
23 information and extended negotiations following mediation, the Parties reached the present class-
24 wide settlement, memorialized by a written Memorandum of Understanding (“MOU”) fully
25 executed on May 15, 2023. *See id.* The Parties subsequently executed the Joint Stipulation of
26 Class and Representative Action Settlement, a true and correct copy of which is attached as
27 **Exhibit B** to the Declaration of Nicholas Rosenthal. The settlement discussions were conducted
28 at arm’s-length. *See id.*

1 The Parties recognize the risk, expense, and delay in continuing litigation with the class
2 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. *See*
3 Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 3; Declaration of Larry W. Lee (“Lee
4 Decl.”) at ¶ 2; Rosenthal Decl. at ¶ 41; Declaration of William L. Marder (“Marder Decl.”) at ¶
5 2. Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims
6 arising from or relating to the afore-referenced claims and allegations.

7 **III. THE PROPOSED TERMS OF THE SETTLEMENT**

8 **A. Class Definition**

9 The proposed Class consists of the following groups of employees: (i) all employees who
10 are or previously were employed as commercial truck drivers by Defendant in California during
11 the period of August 15, 2018 through July 2, 2023 (“Expense Reimbursement Class”); and all
12 employees who are or previously were employed as commercial truck drivers by Defendant in
13 California and received “sleeper miles” pay during the period of August 15, 2021 through January
14 19, 2024 (“Wage Statement Class”). *See* Settlement Agreement (“SA”) §§ A-14, A-16, A-40. The
15 are approximately 197 employees that comprise the Expense Reimbursement Class. *See id.* at § C-
16 9.

17 **B. Gross Settlement Amount**

18 The Settlement provides for the gross settlement amount of One Hundred Fifteen
19 Thousand Dollars (\$115,000.00) (“Gross Settlement Amount”). *See* SA § A-18. The Settlement
20 allocates Ten Thousand Dollars (\$10,000.00) of the Gross Settlement Amount to PAGA penalties
21 (“PAGA Payment”). *See id.* at § A-24. Pursuant to the PAGA, seventy-five percent of the PAGA
22 Payment, *i.e.*, the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), shall be paid to the
23 California Labor and Workforce Development Agency (“LWDA”). *See id.* The remaining
24 twenty-five percent of the PAGA Payment, *i.e.*, the sum of Two Thousand Five Hundred Dollars
25 (\$2,500.00), shall be distributed to Aggrieved Employees.¹ *See id.*

26
27 ¹ The Aggrieved Employees include all employees who are or previously were employed as
28 commercial truck drivers by Defendant in California during the period of August 10, 2021
through January 19, 2024 (the “PAGA Period”). *See* SA § A-2.

1 The amount Gross Settlement Amount was calculated with, and is premised on,
2 Defendant's representation that 197 Expense Reimbursement Class Members worked 4,614
3 months during the period of August 15, 2018 to May 31, 2023. *See* SA § C-9. In the event that
4 the number of months worked by Expense Reimbursement Class Members during the Expense
5 Reimbursement Class Period exceeds 4,614 by fifteen percent (15%) or more, the Gross
6 Settlement Amount shall be increased proportionally by the months in excess of 15%. *See id.*

7 **C. Individual Settlement Payments and Individual PAGA Payments**

8 The balance of the Gross Settlement Amount remaining after deduction of the approved
9 Settlement Administration Costs, the PAGA Payment, Attorneys' Fees and Costs, and Service
10 Award ("Net Settlement Amount"), will be available for distribution to Settlement Class
11 Members (*i.e.*, Class Members who do not opt-out). *See* SA §§ A-21, C-8. The Net Settlement
12 Amount will be allocated to each Settlement Class Member on a "point basis" such that each
13 month worked will be worth one "point" and each wage statement with sleeper miles will be
14 worth two "points." *See id.* at § C-8. A dollar value per "point" will be determined by dividing
15 the Net Settlement Amount by the total "points" accumulated by the Settlement Class. *See id.*
16 Each Settlement Class Member's allocation will be determined by multiplying their total
17 "points" by the dollar value per "point". *id.* Class Members do not need to do anything should
18 they wish to receive their share of the settlement funds.² *See id.* at § C-15.

19 On raw average, and assuming the participation of 197 Class Members, each Class
20 Member may potentially recover approximately \$198.81 from the Net Settlement. *See*
21 Rosenthal Decl. ¶ 25. The amount actually paid to each Class Member may increase or
22 decrease depending on the number of months the employee worked during the Expense
23 Reimbursement Class Period (August 15, 2018 through July 2, 2023), the number of wage
24 statement reflecting the payment of "sleeper miles" the employee received during the Wage
25

26
27 ² This substantially decreases the amount of burden each Class Member must bear in order to
28 receive his/her settlement share. If a Class Member does not wish to take part in this settlement
and be bound by the release of the class claims, he/she must submit an exclusion request. Such
obligations are thoroughly identified in the Notice Packet. *See* SA, Ex. A.

1 Statement Class Period (August 15, 2021 through January 19, 2024) and the number of opt-outs
2 received. *See* SA § C-21; Rosenthal Decl. ¶ 25. To the extent that there are valid opt-outs, the
3 Settlement Administrator will proportionately increase the Individual Settlement Payments to
4 each Settlement Class Member so that the amount distributed to Settlement Class Members
5 equals 100% of the Net Settlement Amount. *See* Rosenthal Decl. ¶ 25.

6 In addition to the Individual Settlement Payments, Class Members, who are also
7 Aggrieved Employees, will receive a pro rata share of twenty-five percent (25%) of the PAGA
8 Payment, *i.e.*, the sum of Two Thousand Five Hundred Dollars (\$2,500.00) (“Aggrieved
9 Employee Payment”). *See* SA §§ C-6, C-7. As detailed in the Settlement, the amount of the
10 payment will be based on the number of pay periods the employee worked during the PAGA
11 Period, regardless of whether the employee submits a timely and valid Request for Exclusion
12 from the Settlement Agreement. *See id.* at §§ C-7, C-18.³

13 The Settlement Agreement provides that the Individual Settlement Payments and
14 Individual PAGA Payments shall be allocated as 100% penalties. *See* SA § C-27.

15 **D. The Settlement is Non-Reversionary**

16 This is a non-reversionary settlement as the entirety of the settlement amount will be fully
17 paid out. *See* SA §C-1. Settlement Class Members and Aggrieved Employees will have 180 days
18 from the mailing of the settlement payment to cash the check. *See id.* at § C-24. After the expiration
19 of 180 days, the funds represented by uncashed settlement checks will be remitted to the California
20 State Controller’s Office—Office of Unclaimed Property Fund in the name of the Settlement Class
21 Member or Aggrieved Employee. *See id.*

22 **E. Attorneys’ Fees and Reimbursement for Litigation Costs**

23 As part of the Settlement, Defendant does not object to Class Counsel’s request for
24 attorney’s fees up to one-third (33.33%) of the Gross Settlement Amount, *i.e.*, the sum of Thirty-

25
26
27 ³ There is no right to opt-out of or object to the PAGA settlement under the Settlement
28 Agreement. Any Class Member who opts out of the Settlement Agreement for purpose of the
proposed class action settlement will still be bound by the release of the PAGA claims and
receive a portion of the Aggrieved Employee Payment. *See* SA § C-18.

Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents (\$38,333.33), plus up to Fifteen Thousand Dollars (\$15,000.00) for reimbursement of litigation costs, subject to the Court finally approving this Settlement. *See* SA § C-3. Any portion of the requested attorneys' fees and/or litigation costs not awarded to Class Counsel shall be added to the Net Settlement Amount. *See id.*

F. Service Award to Plaintiff

Subject to approval by the Court, Plaintiff may request a Service Award in the amount of Five Thousand Dollars (\$5,000.00). *See* SA § A-34. Both Plaintiff and Class Counsel expressly acknowledge that the Court has final discretion in any fee award or Service Award. *See id.* at § C-4.

G. Settlement Administration Costs

Finally, the Settlement provides for the payment of the fees and expenses reasonably incurred by the Settlement Administrator. *See* SA § C-5. The Parties have received a quote from Phoenix Settlement Administrators for a fee of approximately Seven Thousand Five Hundred Dollars (\$7,500.00). *See* Admin. Decl., Ex. B. Any portion of the Settlement Administration Costs not used or approved by the Court shall be added to the Net Settlement Amount. *See* SA § C-5.

H. Scope of the Class Members' Release

As a condition of participating in this Settlement, Settlement Class Members will provide a release to the Released Parties. The Expense Reimbursement Class, except those who opt out, will release the Released Parties from:

all claims, rights, demands, liabilities, and causes of action, whether statutory, in tort, contract or otherwise, alleged in the Action and PAGA Notice, or that could have been alleged based on the facts pleaded in the Action and PAGA Notice, arising during the Expense Reimbursement Class Period, including claims under the California Labor Code, California Industrial Welfare Commission Wage Orders, regulations, and/or other provisions of law, for failure to reimburse business expenses and unfair competition, including Labor Code section 2802 and California Business and Professions Code section 17200, *et seq.* related to the above claims. The Released Expense Reimbursement Claims include any related

claims, rights, demands, liabilities, damages, wages, benefits, expenses, penalties, debts, obligations, attorneys' fees, costs, any other form of relief or remedy in law, equity, or whatever kind or nature and causes of action, that could potentially arise from the receipt of any monies as a result of this Settlement by any member of the Expense Reimbursement Class Period [August 15, 2018 through July 2, 2023].

See SA §§ A-14, A-28. The Wage Statement Class, except those who opt out, will release the Released Parties from:

all claims, rights, demands, liabilities, and causes of action, alleged in the Action and PAGA Notice, or that could have been alleged based on the facts pleaded in the Action and PAGA Notice, arising during the Wage Statement Class Period [August 15, 2021 through January 19, 2024], including claims under the California Labor Code, California Industrial Welfare Commission Wage Orders, regulations, and/or other provisions of law, for failure to provide accurate wage statements, including Labor Code sections 226, 226(a). The Released Wage Statement Claims include any related claims, rights, demands, liabilities, damages, wages, benefits, expenses, penalties, debts, obligations, attorneys' fees, costs, any other form of relief or remedy in law, equity, or whatever kind or nature, and causes of action, that could potentially arise from the receipt of any monies as a result of this Settlement by any member of the Class.

See SA §§ A-31, A-41.

Additionally, Aggrieved Employees will enter into a release of derivative PAGA claims:

All claims, rights, demands, liabilities and causes of action, whether in law or equity, under the Private Attorneys General Act ("PAGA"), arising from the same facts and/or claims alleged against Defendant in the Action and the PAGA Notice, that were pled or that could have been pled, and arising during the PAGA Period including PAGA civil penalties for failure to provide accurate wage statements and failure to reimburse business expenses, including Labor Code sections 226, 226(a), 2802 and 2698 et seq. In light of the binding nature of a PAGA judgment on non-party employees pursuant to *Arias v. Superior Ct. (Dairy)* (2009) 46 Cal. 4th 969, Aggrieved Employees who exclude themselves from the settlement of class claims shall still receive an individual PAGA payment and be subject to this PAGA Release.

1 *See id.* The scope of the release, as listed below, is identified in the Settlement at section 42, as
2 well as in the Class Notice:

3 each Aggrieved Employee will release all claims, rights, demands,
4 liabilities and causes of action, whether in law or equity, under the
5 Private Attorneys General Act (“PAGA”), arising from the same
6 facts and/or claims alleged against Defendant in the Action and the
7 LWDA Letter(s), that were pled or that could have been pled, and
8 arising during the PAGA Period including PAGA civil penalties for
9 failure to provide accurate wage statements, failure to reimburse
10 business expenses and unfair competition including Labor Code
11 sections 226, 226(a), 2802, and 2698 et seq. In light of the binding
nature of a PAGA judgment on non-party employees pursuant to
Arias v. Superior Ct. (Dairy) (2009) 46 Cal. 4th 969, Aggrieved
Employees who exclude themselves from the settlement of class
claims shall still receive an individual PAGA payment and be
subject to this PAGA Release.

12 *See* SA §§ A-25, A-29. As shown, the scope of the release is narrow and is limited to the claims
13 asserted in the Complaint.

14 **IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE**
15 **SETTLEMENT**

16 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
17 requires court approval. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). In
18 considering whether a settlement is reasonable, the trial court should consider relevant factors,
19 which may include the strength of plaintiff’s case, the risk, expense, complexity and likely duration
20 of further litigation, the risk of maintaining class action status through trial, the amount offered in
21 settlement, the extent of discovery completed and the stage of the proceedings, the experience and
22 views of counsel, the presence of a governmental participant, and the reaction of the class members
23 to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008).

24 In order to approve a class action settlement, the court must satisfy itself that the class
25 settlement is within the “ballpark” of reasonableness. *Kullar*, 168 Cal. App. 4th. at 133. The record
26 need not contain an explicit statement of the maximum theoretical recovery. *Munoz v. BCI Coca-*
27 *Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 408-409 (2010).

28 As demonstrated in Section II-C, the settlement was reached through arm’s length

1 negotiations between experienced wage and hour attorneys. *See* Rosenthal Decl. ¶¶ 8-14. Both
2 during and prior to the mediation, the Parties spoke at length about the strengths and weaknesses
3 of each sides' claims and defenses, the certifiability of the claims, and the scope of Defendant's
4 liability. *See id.* at ¶ 13.

5 **A. The Strengths and Weaknesses of the Claims**

6 Although Class Counsel believes in the merits of Plaintiff's claims, they are experienced
7 and realistic, and understand the possibility of non-certification on one or more of the theories
8 alleged in the operative complaints. Agnew Decl. ¶ 3; Lee Decl. ¶ 2; Marder Decl. ¶ 2; Rosenthal
9 Decl. ¶ 41.

10 **1. Strength and Weaknesses of the First Cause of Action for Violation of**
11 **Labor Code Section 226**

12 Labor Code section 226(a) expressly requires that wage statements display "the number of
13 piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis."
14 Cal. Lab. Code § 226(a)(3). As touched on above, the wage statements provided to Wage
15 Statement Class Members did not identify the applicable rates used and miles used to calculate
16 "sleeper miles" compensation. *See* Rosenthal Decl. ¶ 28. Thus, a reasonable employee reviewing
17 his or her wage statement would not understand how their gross wages were calculated. *See id.*
18 Courts have consistently found employers to be in violation of Section 226(a) where their wage
19 statements failed to provide accurate rates and corresponding hours worked during the pay period.
20 *See McKenzie v. Federal Exp. Corp.*, 765 F.Supp.2d 1222 (C.D. Cal. 2011) (finding that the wage
21 statements do comply with § 226(a)(9) for failure to list the correct overtime rate and number of
22 hours worked overtime); *Lopez v. G.A.T. Airline Ground Support, Inc.*, 2010 WL 2839417, at *5
23 (S.D.Cal.,2010) (same). Furthermore, Labor Code section 226 requires that the employee be
24 permitted to readily ascertain the piece-rate units earned and the applicable piece rate from the
25 wage statement alone. Labor Code § 226(e)(2)(B) (emphasis added). Courts routinely grant class
26 certification for similar wage statement violations. *See Lubin v. The Wackenhut Corp.*, 5 Cal. App.
27 5th 926, 959 (2016); *Boyd v. Bank of America Corp.*, 300 F.R.D. 431, 440-44; *Magadia v. Wal-*
28 *Mart Associates, Inc.*, 2018 WL 339139 (N.D. Cal. 2018).

1 Plaintiff's claims are contested. Rosenthal Decl. ¶ 29. Defense counsel argues that, even if
2 Plaintiff established a technical violation of the statute, the alleged violation was not a "knowing
3 and intentional failure" by Defendant to comply with Labor Code section 226(a), and penalties are
4 therefore unwarranted. *See id.*; *see Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46
5 (N.D. Cal. 2009) (summary adjudication warranted on Section 226(e) claim where dispute existed
6 as to whether plaintiff was independent contractor or employee and record lacked evidence that
7 conduct was knowing or willful); *Woods v. Vector Mktg. Corp.*, 2015 U.S. Dist. LEXIS 67303, at
8 *8-*9, *12-*14 (N.D. Cal. May 22, 2015) (finding that when the defendant made a good faith
9 claim that the employee was properly classified as exempt its failure to provide accurate wage
10 statements was not knowing and intentional).

11 Additionally, Defendant presented argument that Plaintiff would be unable to establish a
12 common "actual injury" on a class-wide basis. Rosenthal Decl. ¶ 29. As argued by Defendant, an
13 actual injury is shown where "there is a need for [] additional documentation." *Raines v. Coastal*
14 *Pac. Food Distribs., Inc.*, 23 Cal. App.5th 667, 676 (2018) (internal citations omitted); *see also*
15 *Hernandez v. BCI Coca-Cola Bottling Co.*, 554 Fed. App'x 661, 662 (9th Cir. 2014) (finding that
16 a wage statement does not violate Section 226(a) if "a plaintiff employee can ascertain the required
17 information by performing simple math, using figures on the face of the wage statement"). Here,
18 Defendant maintains that employees fully understand the display of "sleeper miles" on their wage
19 statements. Rosenthal Decl. ¶ 29. Thus, as argued by Defendant, the wage statements provided
20 sufficient information to allow an employee promptly and easily determine their compensation.

21 **2. The Strength and Weaknesses of the Second Cause of Action for** 22 **Violation of Labor Code Section 2802.**

23 Plaintiff alleges that Defendant required Reimbursement Class Members to use their
24 personal cell phones for work related purposes, but did not reimburse employees for the associated
25 costs. *See* Rosenthal Decl. ¶ 31. Defendant disputes the existence of a common policy that requires
26 employees to use personal cell phones for work related purposes. *See id.* at 32. Defendant
27 maintains that it provides two-way radios to employees for this purpose. *See id.* Defendant further
28 contends that the law does not require an employer to be responsible for expenses it does not know

1 about. *See id.* Defendant also argues that the reimbursement claims is unmanageable because the
2 amount any unreimbursed business expenses will vary from employee to employee. *See id.*
3 Consequently, Defendant maintains that liability hinges on individualized inquiries into the actual
4 expenses incurred by class members. *See id.*

5 **3. The Strengths and Weaknesses of the Fourth Cause of Action for** 6 **Violation of PAGA**

7 Plaintiff also pursued a derivative representative PAGA claim predicated on Defendant's
8 alleged failure to provide accurate wage statements. *See* Rosenthal Decl. ¶ 3, Ex. A. For the
9 purpose of PAGA liability, a plaintiff only needs to establish a violation of Labor Code section
10 226(a) —he need not establish the “knowing and intentional” and “injury” elements of section
11 226(e) to prevail. *See Lopez v. Friant & Associates, LLC*, 15 Cal. App. 5th 773, 784-85 (2017). As
12 touched on above, Plaintiff believes that he could recover PAGA penalties had this matter
13 proceeded to trial.

14 However, even if Plaintiff was to prevail on the merits of the PAGA claim, the potential
15 recovery is uncertain. Defendant argues that a court would not award duplicative statutory and
16 PAGA civil penalties for the same alleged wage statement violations. *Guifu Li v. A Perfect Day*
17 *Franchise, Inc.*, 2012 WL 2236752, *17 (N.D. Cal. Jun. 15, 2012) (finding that the plaintiffs “are
18 not entitled to PAGA penalties for failure to provide accurate wage statements under [Section]
19 226” because “granting PAGA penalties for failure to provide accurate wage statements would be
20 duplicative recovery”). Furthermore, the trial court has the discretion to reduce PAGA civil
21 penalties “if, based on the facts and circumstances of the particular case, to do otherwise would
22 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code
23 §2699(e)(2). Defendant argues that trial courts regularly exercise this discretion to award PAGA
24 civil penalties far below the statutory maximums. For example, in *Fleming v. Covidien*, the Court
25 reduced PAGA civil penalties for wage statement violations from \$2,800,000 to \$500,000, an 82%
26 discount, because “the aggrieved employees suffered no injury” as a result of the violations, the
27 Defendant “were not aware” their wage statements violated the law, and the Defendant “took
28 prompt steps to correct all violations once notified.” 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12,

2011); *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (affirming reduction of
PAGA penalties where the trial court found the reduction was warranted based on the employer’s
“good faith attempts” to comply with the Labor Code and “because the court found the violations
were minimal”).⁴

Under the particular circumstances of this case, Defendant could make a persuasive
argument that nominal PAGA penalties should be awarded. In this respect, Defendant point to the
absence of willfulness as grounds for the Court to award modest, if not nominal, penalties.
Rosenthal Decl. ¶ 38.

B. Potential Estimated Value of the Class and Representative PAGA Claims

Based on the class data provided by Defendant, Class Counsel estimates that Defendant
would realistically face liability in the amount of approximately \$902,600 for the class and PAGA
claims. *See* Rosenthal Decl. ¶ 40. Thus, the Gross Settlement Amount represents 12.74 % of the
realistic maximum damages and penalties at issue. *See id.*⁵

1. Wage Statement Penalties

Based on Defendant’s payroll data, 31 Wage Statement Class Members received 805 wage
statements reflecting the payment of “sleeper miles” during the period spanning from August 15,
2021 to March 26, 2023. *See* Rosenthal Decl. ¶¶ 12, 30. Thus, the maximum Labor Code section
226(e) penalties total \$78,950 [(\$50 x 31 initial violations) + (\$100 x 774 subsequent violations)].

⁴ As the California Supreme Court and Courts of Appeal have held, the purpose of PAGA is not
to seek wages or recovery for the individual employees. *Arias v. Superior Court*, 46 Cal. 4th 969,
986 (2009) (holding that an action to recover civil penalties “is fundamentally a law enforcement
action designed to protect the public and **not** to benefit private parties”) (emphasis added);
Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489, 1499 (2011).

⁵ Courts have held that gross settlements approximating between only 8 and 25% of the
defendant’s potential exposure are fair and reasonable. *See Bellinghausen v. Tractor Supply Co.*,
2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (approving class settlement recovering
between 8.5% and 25% of the defendant’s potential exposure); *Van Ba Ma v. Covidien Holding
Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (approving wage and hour class
settlement which obtained only 9.1% of projected damages); *Villegas v. J.P. Morgan Chase &
Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that settlement of
approximately 15% of the potential recovery was fair and reasonable).

1 **2. Unreimbursed Business Expenses**

2 Based on Defendant’s payroll data, 197 Expense Reimbursement Class Members 4,614
3 months during the period of August 15, 2018 to March 26, 2023. *See* Rosenthal Decl. ¶ 33.
4 Assuming that each employee is owed \$10 per month in unpaid cell phone reimbursement,
5 Defendant’s potential exposure on this claim is \$461,400.

6 **3. PAGA Penalties**

7 The data produced by Defendant indicates there were approximately 1,610 pay periods
8 worked by Aggrieved Employees during the period spanning from August 15, 2021 to March 26,
9 2023. *See* Rosenthal Decl. ¶ 34. Applying the standard civil penalty of \$100 per pay period, yields
10 \$161,000 in potential civil penalties under PAGA. *See id.* In the alternative, if the Court were to
11 “stack” penalties, (*i.e.*, award multiple PAGA penalties for different Labor Code violations in the
12 same pay period), the potential PAGA penalties could total as high as \$362,250. *See id.* at ¶ 35.

13 It is unrealistic to assume that the Court will award the full amount of PAGA penalties if
14 Plaintiff is able to prevail at trial. Indeed, the potential recovery is uncertain because the Court can
15 decline to award the full amount of PAGA penalties where “...if, based on the facts and
16 circumstances of the particular case, to do otherwise, would result in an award that is unjust,
17 arbitrary and oppressive, or confiscatory.” As shown in the Court of Appeal’s decision in
18 *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
19 maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying
20 with the law. 30 Cal. App. 5th at 517. Upon review, the Court of Appeal found such reduction to
21 be proper. *Id.* at 539; *see O’Connor v. Uber Techs., Inc.*, 2016 WL 4398271, at *17 (noting that
22 even if PAGA penalties amounted to \$1 billion, such award “could well be reduced, as a court may
23 reduce the penalty when to do otherwise would result in an award that is unjust, arbitrary and
24 oppressive, or confiscatory”). Thus, assuming that the Court uses *Carrington* as a benchmark and
25 assesses PAGA penalties of approximately 10% of the total maximum, a more realistic estimate
26 of the PAGA penalties at issue is \$36,225. Rosenthal Decl. ¶ 39.

1 **C. The Court Should Preliminarily Approve the Proposed Payment to the Class**
2 **Representatives**

3 Plaintiff requests an enhancement of Five Thousand Dollars (\$5,000.00). *See* SA § A-34,
4 C-4. Plaintiff met with Class Counsel on various occasions to discuss the case, provide documents
5 and information to Class Counsel, and review the Settlement Agreement. *See* Declaration of
6 Hermie Evangelista (“Evangelista Decl.”) ¶¶ 6, 7. In addition to the invaluable services that
7 Plaintiff provided, he also took significant risks, both professionally and monetarily, in acting as
8 the Class Representatives and seeking benefits on behalf of the Class. *See id.* at ¶ 8. Because the
9 claims alleged by the Class Representative involved the payment of costs to the prevailing party,
10 Plaintiff could have possibly faced paying the fees and costs of Defendant, had Plaintiff not
11 prevailed in this action. *See id.*

12 Further, given that future employers are much less likely to hire individuals who have filed
13 suit against their prior employer, particularly cases of this nature, Plaintiff may face prejudice in
14 the future from other potential employers. Plaintiff took this risk upon himself and the whole Class
15 benefited from these risks taken by Plaintiff. Evangelista Decl. ¶ 8. Class Members did not have
16 to file individual lawsuits and bear the risks of payment of fees and costs if they did not prevail,
17 nor did they have to face the potential for retaliation and not getting future employment had they
18 filed a public lawsuit.

19 Notably, courts have routinely granted approval of representative enhancements for far
20 greater amounts than the \$5,000 sought by Plaintiff in this case. *See, e.g., Van Vranken v. Atlantic*
21 *Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re*
22 *Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
23 incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141
24 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy*
25 *Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000
26 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist.
27 LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA
28 overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming

1 \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiff requests a modest
2 enhancement of \$5,000, which is reasonable and consistent with case law.

3 **D. The Requested Attorneys' Fees and Litigation Costs Are Reasonable, Fair,**
4 **and Appropriate**

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

13 Under California law, the award of attorneys' fees in common fund wage and hour class
14 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal.
15 5th 480, 503 (Aug. 11, 2016) ("We join the overwhelming majority of federal and state courts in
16 holding that when class action litigation establishes a monetary fund for the benefit of the class
17 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
18 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
19 fund created"). Under the percentage of the fund method, the Court's objective remains to "mimic
20 the market" in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)
21 (J. Posner) ("When a fee is set by a court rather than by contract, the object is to set it at a level
22 that will approximate what the market will set...The judge, in other words, is trying to mimic the
23 market in legal services").

24 The results delivered by Class Counsel also support the requested percentage of the fund.
25 Here, the Parties have agreed to a payment of a maximum of one third (33.33%) of the Gross
26 Settlement Amount for payment to Class Counsel as attorneys' fees. The Parties have agreed to a
27 payment of the foregoing attorney's fees and, thus, this payment should be presumed to be fair.
28 Further, it is not uncommon for courts to award attorneys' fees as one-third or 33.3% of the

1 settlement amount in wage and hour class action settlements. For example, in *McKinnon v. Best*
2 *Buy Co., Inc.*, (Alameda Superior Court Case No. RG03082294), the court awarded over \$9
3 million as attorneys' fees, which was 33% of the maximum settlement amount of \$26.9 million.
4 At the time of Final Approval, Class Counsel will also provide the court with declarations and time
5 records to show that a payment of 33.33% of the recovery is justified and fair even under the
6 lodestar method.

7 Further, the Parties have agreed to reimbursement of Class Counsel's litigation costs. Class
8 Counsel have, at their own risk, expended costs, for example, to file this instant action, service of
9 process, payment of mediation fees and other litigation related costs. Lee Decl. ¶ 3; Marder Decl.
10 ¶ 3. Based on the foregoing, the court should preliminarily approve the attorney's fees and costs
11 being requested by the Parties.

12 **E. The Settlement Administrator's Fees are Reasonable**

13 The parties request that Phoenix Settlement Administrators be appointed as the claims
14 representative in this case. The Parties have agreed to an estimated payment of \$7,500 to Phoenix
15 Settlement Administrators to send notices and to administer this settlement. Phoenix Settlement
16 Administrators is a well-recognized class action settlement administrator. *See* Admin. Decl. ¶ 5,
17 Ex. A.

18 **V. THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS**

19 **A. The Class is Ascertainable and Sufficiently Numerous**

20 The Class that Plaintiff seeks to conditionally certify is ascertainable. "Class members are
21 'ascertainable' where they may be readily identified without unreasonable expense or time by
22 reference to official records." *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008); *see also*
23 *Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 240 (2013) (same). Here, members
24 of the Class are readily identifiable. Defendant have determined that there are approximately 197
25 employees that comprise the Expense Reimbursement Class. *See* SA at § C-9. Furthermore, the
26 Class is sufficiently numerous. Courts generally find that numerosity is satisfied if the class
27 includes forty or more members. *See Villalpando v. Excel Direct Inc.*, 303 F.R.D. 588, 605-606
28 (N.D. Cal. 2014); *see also Jordan v. L.A. County*, 669 F.2d 1311, 1320 (9th Cir.) (noting, in dicta,

1 that the court “would be inclined to find the numerosity requirement...satisfied solely on the basis
2 of [39] ascertained class members”), *vacated on other grounds*, 459 U.S. 810 (1982).

3 **B. There are Common Questions of Law and Plaintiff’s Claims are Typical of the**
4 **Class**

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

16 Plaintiff alleges, in part, that Defendant, as a matter of its corporate policy, practice, or
17 procedure violated the Labor Code by failing to provide accurate itemized wage statements and
18 reimburse employees for cell phones used for work related purposes. In other words, Plaintiff was
19 allegedly subjected to the same policy and practice as other Class Members. Evangelista Decl. ¶¶
20 2-4. Thus, Plaintiff’s claims are typical to those of Class Members.

21 **C. Plaintiff and Class Counsel Have Adequately Represented the Class**

22 The adequacy requirement is also met. “Adequacy of representation depends on whether
23 the plaintiff’s attorney is qualified to conduct the proposed litigation and the plaintiff’s interests
24 are not antagonistic to the interests of the class.” *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442,
25 450 (1976). Here, Plaintiff does not have any interests adverse to the Class, nor has any such issues
26 been raised or presented. Evangelista Decl. ¶ 5. Plaintiff has taken all necessary steps to represent
27 the interests of the Class, by providing information and documents. *See id.* at ¶ 6. For such reasons,
28 Plaintiff has adequately represented the Class Members and will continue to do so.

Further, as detailed in their declarations, Class Counsel are experienced and well-qualified class action litigators who have litigated many wage and hour class actions and have each been certified as class counsel in numerous other class actions, particularly wage and hour class actions. Agnew Decl. ¶¶ 4-10; Lee Decl. ¶¶ 4-8; Marder Decl. ¶¶ 4-11; Rosenthal Decl. ¶ 42-45. From the inception of the case, Class Counsel have solely represented the interest of the Class. For example, Class Counsel expended significant time and resources propounding written discovery, exchanging informal discovery, drafting a mediation statement, preparing a damages and penalties model, and attending mediation. *See* Rosenthal Decl. ¶¶ 3-15.

VI. CONCLUSION

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

DATED: January 26, 2024

DIVERSITY LAW GROUP, P.C.

By: _____

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