Larry W. Lee (State Bar No. 228175)
Kristen M. Agnew (State Bar No. 247656)
Nicholas Rosenthal (State Bar No. 268297)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

William L. Marder, Esq. (State Bar No. 170131)
Polaris Law Group LLP
501 San Benito Street, Suite 200
Hollister, CA 95023
Tel: (831) 531-4214
Fax: (831) 634-0333

Attorneys for Plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SONOMA

JOSE VASQUEZ RUIZ, as an individual and on behalf of all others similarly situated, Plaintiff, vs. PERDUE FOODS, LLC., a Maryland limited liability company; and DOES 1 through 50, inclusive, Defendants.	Case No.: SCV 264649 (Assigned to the Honorable Patrick M. Broderick, Dept. 16) **PLAINTIFF JOSE VASQUEZ RUIZ'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: May 12, 2021 Time: 3:00 P.M. Dept.: 16

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 12, 2021, at 3:00 p.m., or as soon thereafter as the matter may be heard, before the Honorable Patrick M. Broderick, judge presiding, in Department 16 of the above referenced Court located at 3035 Cleveland Avenue, Suite 200, Santa Rosa, California 95403, Plaintiff Jose Vasquez Ruiz ("Plaintiff") will seek an Order:

(1) granting final approval to the Joint Stipulation of Class Action and PAGA Settlement and Release of Claims ("Settlement Agreement" or "Joint Stipulation") in this action;

(2) approving distribution of the settlement funds to the Class Members pursuant to the terms of the Settlement Agreement;

(3) approving Plaintiff's request for an award of the Class Representative Service Award of $10,000.00 to Plaintiff pursuant to the terms of the Settlement Agreement;

(4) approving Class Counsel's request for an award of attorneys' fees of approximately thirty-three and one-third percent of the $859,237.50 maximum settlement amount, and reimbursement of litigation costs of $3,088.63, pursuant to the terms of the Settlement Agreement;

(5) approving Plaintiff's request for payment of the settlement administration costs to Phoenix Settlement Administrators in the amount of $9,500.00 pursuant to the terms of the Settlement Agreement;

(6) approving Plaintiff's request for payment to the LWDA for $15,000.00 pursuant to the terms of the Settlement Agreement; and

(7) entering final judgment as to all members of the Settlement Class in this action.

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

This Motion will be based on the attached Memorandum of Points and Authorities and the supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, William L.

Marder, Plaintiff Jose Vasquez Ruiz, and Elizabeth Kruckenberg of Phoenix Settlement Administrators, upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

DATED: April 20, 2021

DIVERSITY LAW GROUP, P.C.

By:____________________________________
Larry W. Lee
Kristen M. Agnew
Nicholas Rosenthal
Attorneys for Plaintiff and the Class

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I. INTRODUCTION

On June 17, 2019, Plaintiff Jose Vasquez Ruiz ("Plaintiff") filed a complaint on behalf of himself and all similarly situated employees against Defendant Perdue Foods, LLC ("Defendant") in the Superior Court of California for the County of Sonoma. On August 24, 2019, Plaintiff filed a First Amended Complaint. The First Amended Complaint is the operative complaint ("Complaint"). The Complaint alleged class and representative action claims for violation of Labor Code sections 226(a) and 2698, *et seq*., asserting that the wage statements provided to Plaintiff failed to identify the correct rate of pay for overtime and double overtime wages, and sought damages, penalties, attorneys' fees, and costs.

Plaintiff now seeks the Court's final approval of the Joint Stipulation of Class Action and PAGA Settlement and Release of Claims ("Settlement Agreement" or "Joint Stipulation"). The Settlement Agreement provides for a $859,237.50 fund to be created for the benefit of the Class, from which attorneys' fees, litigation costs, service award to the named Plaintiff, payment to the California Labor and Workforce Development Agency ("LWDA"), and costs of settlement administration are to be paid. The entire net settlement fund after these deductions will be paid to all Class Members who did not opt-out of the Settlement.

The history of this litigation was previously detailed in Plaintiff's Preliminary Approval Motion. This Court preliminarily approved this Settlement on December 18, 2020, directing distribution of Notice of Class Action Settlement ("Notice") and scheduling the hearing for final approval of settlement (the "Preliminary Approval Order").

As directed by the Court, the Settlement Administrator distributed the Notice to 576 Class Members. (Declaration of Elizabeth Kruckenberg on behalf of Phoenix Settlement Administrators ("Phoenix") ["Kruckenberg Decl."] ¶ 5.) To date, no requests for exclusion have been received, and there have been no objections filed. (*Id* at ¶¶ 8, 9.) As such, there is a 100% participation rate. Thus, an inference can be made that the Class supports the Court's Preliminary Approval Order finding that the Settlement Agreement is fair and reasonable.

In addition to the results of the notice process, for the same reasons as set forth earlier in Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement, the following represent the basic points supporting approval of the Settlement:

- The Settlement provides a total settlement sum of $859,237.50;
- The Settlement is fair given that Settlement Class Members will receive (*after deductions for fees, costs, etc.*) a substantial amount of money (on average, each Settlement Class Member will receive approximately $929.23) (*See* Kruckenberg Decl. ¶ 11);
- Class Members did not need to submit claim forms to participate in the settlement, but are being paid automatically;
- The allocation reflects that payment of claims will be paid to all Class Members in proportion to the number of pay periods wherein each Class Member was paid overtime and/or double overtime wages;
- Plaintiff conducted significant investigation in this case, including formal and informal discovery and exchanges of information by Plaintiff and Defendant of class data for the entire class necessary for Plaintiff to fully evaluate this case;
- A highly regarded administrator, Phoenix Settlement Administrators, was retained for fees estimated to be $9,500.00; and
- California's LWDA will also be the beneficiary of this Settlement as it will receive $15,000.00, should this Settlement be granted final approval.

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

II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE SETTLEMENT

The notice procedures required by the Preliminary Approval Order, have been followed and satisfy all due process rights of Class Members. The Preliminary Approval Order contemplated that the Notice of Class Action Settlement ("Notice"), as approved in the Preliminary Approval Order, be sent to all Class Members by first class mail, as specified in the Settlement. Furthermore, the Preliminary Approval Order contemplated that Phoenix Settlement Administrators would serve as the Settlement Administrator.

As clearly stated in the Kruckenberg Declaration, notice was provided to Class Members, as required by the Preliminary Approval Order. On January 28, 2021, the Settlement Administrator received a Class Member mailing list from Defendant's counsel that included 576 Class Members. (Kruckenberg Decl. ¶ 3.) On February 23, 2021, each of the persons identified on the mailing list were sent the Class Notice via first class mail. (*Id*. ¶ 5.) From the date of mailing, 28 Class Notices were returned due to an incorrect address and 26 were then re-mailed to an updated address after performing an address trace. (*Id*.) As of the date of this filing, 2 Class Notices remain undeliverable because an updated address could not be located despite skip tracing efforts for the other Notice. (*Id*. at ¶ 6, 7.) Further, the Class Notice provided Class Members with Class Counsel's contact information, where they could further seek information regarding the class settlement, leave questions for the Settlement Administrator, and update their address.

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

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

III. <u>THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE, AND THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL</u>

A. Strength of Plaintiff's Case and Likelihood of Certifying the Class

The Court already addressed the requirements for certifying a class for settlement purposes in its Order granting preliminary approval. Plaintiff briefly addresses the requirements again here.

1. The Class is Ascertainable

Whether a class is "ascertainable" within the meaning of Code of Civil Procedure section 382 "is determined by examining (1) class definition, (2) the size of the class, and (3) the means available for identifying the class members." *Reyes v. San Diego County Board of Supervisors,* 196 Cal.App.3d 1263, 1271 (1987). Here, the Class is defined as: "all current and former non-exempt employees of Defendant in the State of California who were paid overtime or double overtime wages at any time from May 26, 2019 through July 17, 2020." There are 576 individuals that comprise the Class. (Kruckenberg Decl. ¶ 3.) This is more than the minimum required to certify a class. Within the context of manageability, the issue is whether there exists sufficient means for identifying class members at the remedial stage. *Reyes*, 196 Cal.App.3d at 1274-75. Class Members have already been identified by Defendant and notice was provided to all of the above Class Members.

2. There is a Community of Interest

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

a. There are Predominant Common Questions of Law and Fact

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

Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure, violated the Labor Code by its failure to provide accurate wage statements. Defendant denies that liability could be established on a class-wide basis and contends instead that liability and damages would need to be conducted on a case-by-case basis.

b. Plaintiff's Claims are Typical of the Class Claims

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

Plaintiff was employed by Defendant and he alleges he was subjected to the same payroll policies as all other Class Members. Specifically, like other members of the Class, Plaintiff received wage statements that he alleges did not include the correct rate of pay for overtime and double overtime wages. (Declaration of Jose Vasquez Ruiz ["Vasquez Ruiz Decl."] ¶3.) Plaintiff alleges he was subjected to the same policies and practices as other Class Members. Thus, Plaintiff's claims are typical to those of Class Members.

c. Plaintiff Adequately Represented the Class

The class representative, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of the class members. *Simons v. Horowitz*, 151 Cal.App.3d 834, 846 (1984). Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues been raised or presented. Plaintiff has taken all necessary steps to represent the interests of the Class, including providing information and documents to his counsel and reviewing pleadings in this case. (Vasquez Ruiz Decl. ¶¶4-6.) For such reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

B. Defendant's Allegations and Unlikelihood of Class Certification

Defendant asserts that individualized issues predominate in this case, including without limitation, whether Defendant provided accurate wage statements in compliance with the law. In any event, even assuming that a class could have been certified, Defendant asserts that it has complied with all laws. Based thereon, Defendant continues to maintain that it is not liable for the allegations made by the Plaintiff.

C. Risks, Expenses, and Complexity of Further Litigation

Plaintiff believes that a class can be certified. However, Plaintiff also believes in the fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action or theories alleged in his Complaint, the possibility of non-certification, and potential for appeals. These risks on class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal.4th 1 (2014).

Defendant alleges that a class could not have been certified. There is always a risk that the court will not grant certification of the class, wherein the class will not be entitled to any damages. Based on the foregoing, there was a substantial risk that Plaintiff would not have obtained the total amount of damages alleged, and a substantial amount of complex issues that would have necessitated significant expenditure of time and expenses. Therefore, the risks, expenses, and complexity of further litigation warrant granting of this Motion.

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

Without reiterating the Parties' showing that the Settlement Agreement and the negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The Settlement Agreement was the product of negotiation between highly able and experienced attorneys on both sides who possessed the relevant data and extensive legal research which they had carefully analyzed. (Declaration of Kristen M. Agnew ("Agnew Decl.") ¶¶ 4, 5.)

The results after mailing of the Notice support confirmation of the Court's preliminary approval of the settlement with final approval of the settlement, as evidenced by the fact that to date, no requests for exclusion and no objections to the settlement have been received. (Kruckenberg Decl. ¶¶ 8, 9.) The Court may appropriately infer that the class action settlement is fair, adequate, and reasonable, given that not a single class member has submitted an objection. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

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

1. Standard of Review

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

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

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

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

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

85 Cal.App.4th 1135, 1146 (2000).

2. The Settlement is Presumed to Be Fair

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

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

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

The settlement in the case at bar warrants approval and carries a presumption of fairness. As previously noted in the application for Preliminary Approval, this current settlement was negotiated at arm’s length. (Agnew Decl. ¶¶ 4, 5.)

Second, Class Counsel engaged in extensive factual investigation before settling, including reviewing class data. (Agnew Decl. ¶ 4.) Further, Class Counsel is highly experienced in this type of litigation. As shown in the supporting declarations, Class Counsel has significant experience in class actions and employment wage and hour matters. (Agnew Decl. ¶¶ 6-12; Declaration of Larry W. Lee ["Lee Decl."] ¶¶ 4-6; Declaration of Nicholas Rosenthal ["Rosenthal Decl."] ¶¶ 4, 5, 8; Declaration of William L. Marder ["Marder Decl."] ¶¶ 3-7, 9.)

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

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

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

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

The Settlement Agreement also affords the Class prompt, fair relief while avoiding significant legal and factual battles that otherwise may have prevented the Class from obtaining any recovery at all. While Class Counsel believe the Class Members' claims are meritorious and can be successfully litigated, they are experienced and fully understand the inherent risks and uncertainty involved with such matters as the resolution of class certification, the outcome of a potential trial, and the outcome of any appeals that would inevitably follow should the Class prevail at trial. Class Counsel has also assessed the same risks in connection with the current settlement. Because the settlement provides immediate and substantial relief, without the attendant risks and delay of continued litigation—not to mention the threat of litigation fees and costs—Class Counsel believe that the settlement warrants the Court's final approval.

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

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

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

5. The Opinion of Experienced Counsel Favors Final Approval

Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best interest of the Class Members as a whole. (Lee Decl. ¶ 3; Agnew Decl. ¶ 5; Rosenthal Decl. ¶ 3; Marder Decl. ¶ 2.) Similarly, counsel for Defendant is in favor of this settlement. The endorsement of qualified and well-informed counsel of a settlement as fair, reasonable, and adequate is entitled to significant weight by the Court in its final approval determination. *See Officers for Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F.Supp. at 617; *Linney*, 151 F.3d at 1242.

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

As referenced in the Motion for Preliminary Approval, to the extent any uncashed settlement funds remain after 180 days, the Parties have agreed that all funds shall be distributed to the Controller of the State of California, to be held pursuant to the Unclaimed Property Law, California Civil Code section 1500 *et seq*., for the benefit of the Settlement Class Member.

V. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT SHOULD BE APPROVED

Class Representative Jose Vasquez Ruiz requests a total enhancement of $10,000.00. Plaintiff met with Class Counsel, including providing substantive information regarding Defendant's practices. (Vasquez Ruiz Decl. ¶¶ 4, 5.) Accordingly, Plaintiff provided invaluable information, evidence, and documents that resulted in this Settlement.

In addition to the invaluable services that he provided, Plaintiff took significant risks, both professionally and monetarily, in acting as Class Representative, seeking benefits on behalf of the Class. Because the claims alleged by the Class Representative involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant, had he not prevailed in this action. Moreover, Plaintiff understood that an individual case would have resolved much faster than a class action and involved much less financial risk than a class action. Despite this, however, Plaintiff agreed to pursue this case on behalf of the Class. (Vasquez Ruiz Decl. ¶ 8.)

Also, given that future employers are much less likely to hire individuals who have filed employment-related lawsuits, particularly cases of this nature, the Class Representative also faced significant risk in not being able to find suitable employment, all as a result of filing of this case against Defendant. Plaintiff took these risks upon himself to the benefit of the Class. (Vasquez Ruiz Decl. ¶ 8.) Class Members did not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a lawsuit which is a public record. These are significant benefits that weigh in favor of granting the requested enhancement. Moreover, this litigation has resulted in a significantly valuable benefit to the Class, and Plaintiff took on substantial risks in helping to get this financial benefit to the Class. As such, the enhancement should be awarded to Plaintiff for his commitment, dedication, and risks taken for this litigation.

Finally, Plaintiff provided a general release and waiver of the protections of Civil Code § 1542. (Settlement Agreement, pgs. 10-12.) This is a more extensive release than that provided by the Class at large, also supporting the request for the enhancement. (Vasquez Ruiz Decl. ¶ 9.)

Courts have routinely granted approval of settlements containing such enhancements. *See Van Vranken v. Atlantic Richfield Co*., 901 F.Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of $50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig*., 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of $55,000, and three incentive awards of $35,000); *Brotherton v. Cleveland*, 141 F.Supp.2d 907, 913-14 (S.D. Ohio 2001) (granting a $50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp*., 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) ($50,000 awarded to each class representative); *Glass v. UBS Fin. Servs*., No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding $25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming $25,000 Incentive award to class representative in ERISA case).

VI. <u>THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED</u>

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

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

Here, the fee award representing thirty-three and one-third percent of the fund clearly falls within that range and is consistent with other rulings of other courts and comprehensive surveys of class action settlements and fee awards. *See Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011) (recognizing that "courts may award attorney's fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million"); *see also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action litigation nationwide conclude that fees in the range sought here are consistent with market rates).

The results delivered by Class Counsel also support the requested percentage of the fund. Here, Plaintiff and his counsel secured a $859,237.50 settlement.

Finally, "the response of the class members to attorneys' fee notice, though not decisive, is relevant to the... reasonable determination" regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court's "approximation of the market" for fees is well supported. *Id*. at p. 1269. In this case, the Notice specifically notified Class Members that Class Counsel would be seeking $286,412.50 in attorneys' fees. To date, no Class Member has objected to the Settlement. This strong favorable response also supports the requested fees.

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

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

495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of $859,237.50 has been created. For Class Counsel, the fees here were wholly contingent in nature and the case presented far more risk than the usual contingent fee case. Among the risks was the cost inherent in class action litigation, as well as a long battle with a corporate Defendant who had retained a premier and highly experienced defense firm. As such, the requested fee should be awarded.

As secondary support for the percentage of the fund method, courts have discretion to "cross-check" the fees awarded through the lodestar method. However, the *Laffitte* Court "emphasize[d] [that] the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award." *Laffitte*, 1 Cal.5th at 505 (emphasis added); *In re Rite Aid Corp. Secs. Litig*., 396 F.3d 294, 306-307 (3d Cir. 2005) ("[The lodestar cross-check does not trump the primary reliance on the percentage of common fund method").

The Supreme Court in *Laffitte* stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." *Id*. Thus, a lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases, performing a cross-check "undermines" one of the primary reasons for using the percentage method: aligning counsel's incentives with the benefits delivered to the class and discouraging protracted litigation. *Id*. at 506 (finding trial courts "retain the discretion to forgo a lodestar cross-check"); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 29-30 (2000) (citing the recommendations of the Third Circuit Task Force with approval and observing that "[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many authorities, who have been most vocal about the manner in which it exacerbates the problem of 'cheap settlements' and burdens already overworked trial judge").

Courts have defined reasonable multipliers on a lodestar cross-check to "range from 2 to 4 or even higher." *Wershba v. Apple Computer, Inc*., 91 Cal.App.4th 224, 255 (2001); *see also, e.g., Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512 (2009) (applying a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal.App.4th at 60 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal.App.3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in *Laffitte*, after finding that "2 to 4" is a reasonable range for multipliers on a cross-check, affirmed a 2.13 multiplier. *Laffitte*, 231 Cal.App.4th at 881-82. The intermediate court opinion was affirmed in full by the California Supreme Court in its new decision guiding lower courts on assessing fees.

With respect to Class Counsel's lodestar, to date, approximately 202.90 hours have been expended by Class Counsel in this matter. (Lee Decl. ¶ 7, Ex. A; Agnew Decl. ¶ 13, Ex. A; Rosenthal Decl. ¶6, Ex. A; Marder Decl. ¶ 8, Ex. A.) Moreover, Class Counsel expects to incur approximately 21 additional hours of attorney time in finalizing this settlement. (Lee Decl. ¶ 8; Agnew Decl. ¶13; Rosenthal Decl. ¶ 7.) The courts are quite liberal in the evidence required to prove an attorney's hours. Detailed time records are not required. An attorney's testimony alone may suffice: "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." *Martino v. Denevi*, 182 Cal.App.3d 553, 559 (1986).

Reasonable hours include, in addition to time spent during litigation, the time spent before the action is filed, including time spent interviewing the clients, investigating the facts and the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 62 (1980). Further, the fee award should include fees incurred to establish and defend the attorneys' fee claim. *Serrano v. Unruh*, 32 Cal.3d 621, 639 (1982) [*Serrano IV*]. Thus, Class Counsel requests that the court find that these hours were reasonable in this litigation.

A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 1095 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the attorney's skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal.App.4th 629, 632-33 (1998).

Class Counsel's skill and experience justify the requested rate. As shown in the supporting declarations, Class Counsel have significant experience in the area of employment and wage and hour class actions. Specifically, Class Counsel's practice focuses on representing employees in employment matters, particularly wage and hour cases. (Lee Decl. ¶¶ 4-6; Agnew Decl. ¶¶ 6, 8-11; Rosenthal Decl. ¶¶ 4, 5, 8; Marder Decl. ¶¶ 3-7, 9.) As such, based on the hours and applicable rate, the total lodestar to be expended by Class Counsel through finalizing this settlement will be approximately $159,885. (Lee Decl. ¶¶ 7-9; Agnew Decl. ¶¶ 13, 14; Rosenthal Decl. ¶ 8; Marder Decl. ¶ 9.)

Once the court establishes the lodestar amount, it may enhance the fee award by a multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal.3d at 48. The pertinent factors include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market. *Id.*, *Lealao*, 82 Cal.App.4th at 49. However, this list is not exhaustive and the court can consider other factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24 Cal.4th 1122, 1139 (2001).

Lealao contains several factors justifying an enhancement based on the percentage-of-the-benefit, namely, no objections by Class Members, commendable conduct by counsel, and significant recoveries by Class Members, all of which were previously detailed above. *Lealao*, 82 Cal.App.4th at 51-53. As in *Lealao*, the Class was notified of the settlement and attorney's fee with no objections. The extreme effort undertaken by counsel, as shown by their hours and the significantly high amount of claims being paid out, shows commendable conduct.

It is also critical to note that prompt settlement cannot be used to diminish the fee or the enhancement based on a percentage-of-the-fund. *Lealao*, 82 Cal.App.4th at 52 (the promptness of settlement "cannot be used to justify the refusal to apply a multiplier"). According to *Lealao*, courts placed "an extraordinarily high value" on settlement, and counsel should be rewarded, not punished, for achieving this goal in a timely fashion. *Id*.

The multiplier should be enhanced by the contingent nature of counsel's fee recovery. The risks in taking on a class action case are enormous, not the least of which is time and effort. Not only was there significant risk taken upon by Plaintiff's counsel, but their ability to obtain the current settlement should be seen as quite commendable.

As explained previously, Defendant maintained that there were significant obstacles. Thus, the risk involved in this case was quite significant for Plaintiff and his counsel, and in the face of such risks, the current settlement was still able to be obtained by Plaintiff's counsel.

Here based upon Plaintiff's counsel's lodestar of $159,885, Plaintiff's requested fees result in a multiplier of 1.791 ($286,412.50 (requested fees) ÷ $159,885 (lodestar amount)). This demonstrates that the requested fees are reasonable and fair, particularly based on the factors described above. *Wershba v. Apple Computer, Inc*., 91 Cal.App.4th 224 (Ct. App. 2001) (noting that courts using the lodestar method to calculate attorney fees awards in class actions typically apply multipliers in the range of 2 to 4); *Boyd v. Bank of Am. Corp*., 2014 U.S. Dist. LEXIS 162880 (C.D. Cal. Nov. 18, 2014) (awarding 33% of the common fund, based on a multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa Capital Corp*., 8 F.Supp.3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of the common fund, based on a multiplier of 2.52).

As such, the requested fee award is fair and reasonable, and should be awarded in its entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to ensure the successful litigation of this action on behalf of all Class Members. For such reasons, Class Counsel's request for attorneys' fees in the amount of $286,412.50 is fair, reasonable, and adequate.

VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

The request for reimbursement of costs, in the amount of $3,088.63 is fair and reasonable. The costs are all litigation related costs. (Lee Decl. ¶ 10, Ex. B.) The authority for the Court to award this is the Parties' Settlement Agreement and Labor Code sections 226 and 2699. As such, this request should be approved.

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

Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement funds. As shown on the Declaration of Elizabeth Kruckenberg, the class administration fees expended in this matter amount to a total of $9,500.00, which is the amount that was agreed upon by the Parties. (Kruckenberg Decl. ¶ 12, Ex. B.) For such reasons, it is requested that the Settlement Administrator's fees be approved.

IX. CONCLUSION

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

Accordingly, Plaintiff respectfully requests that the Court enter an Order in the form proposed and submitted:

1. Granting final approval to the proposed Settlement Agreement in this action;

2. Approving distribution of the settlement funds to the Class Members pursuant to the terms of the Settlement Agreement;

3. Approving Plaintiff's request for an award of the class representative service award of $10,000.00, with payments pursuant to the terms of the Settlement Agreement;

4. Approving Class Counsel's request for an award to Class Counsel for

$286,412.50 in attorneys' fees and $3,088.63 in costs with payment pursuant to the terms of the Settlement Agreement;

5. Approving Plaintiff's request for payment of the settlement administration costs to Phoenix Settlement Administrators in the amount of $9,500.00 with payment pursuant to the terms of the Settlement Agreement;

6. Approving Plaintiff's request for payment to the LWDA for $15,000.00 with payment pursuant to the terms of the Settlement Agreement; and

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

DATED: April 20, 2021

DIVERSITY LAW GROUP, P.C.

By:______________________________
Larry W. Lee
Kristen M. Agnew
Nicholas Rosenthal
Attorneys for Plaintiff and the Class

PROOF OF SERVICE

(Code of Civil Procedure Sections 1013a, 2015.5)

STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

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

On April 20, 2021, I served the following document(s) described as:

1. **PLAINTIFF JOSE VASQUEZ RUIZ'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

2. **DECLARATION OF NICHOLAS ROSANTHAL IN SUPPORT OF PLAINTIFF JOSE VASQUEZ RUIZ'S MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**

3. **DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFIF JOSE VASQUEZ RUIZ'S MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**

4. **DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF JOSE VASQUEZ RUIZ'S MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**

5. **DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF PLAINTIFF JOSE VASQUEZ RUIZ'S MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**

6. **DECLARATION OF ELIZABETH KRUCKENBERG REGARDING NOTICE AND SETTLEMENT ADMINISTRATION**

7. **DECLARATION OF JOSE VASQUEZ RUIZ IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**

8. **[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**

on the interested parties in this action as follows:

Michael J. Nader
Ogletree, Deakins, Nash,
Smoak & Stewart, P.,C.
500 Capitol Mall, Suite 2500
Sacramento, California 95814
Attorney for Defendant Perdue Foods, LLC

Aaron H. Cole
Ogletree, Deakins, Nash,
Smoak & Stewart, P.,C.
400 South Hope Street, Suite 1200
Los Angeles, California 90071
Attorney for Defendant Perdue Foods, LLC

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 20, 2021, at Los Angeles, California.

Erika Mejia