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

STEVE MILLER, as a private attorney general
and as an individual and on behalf of all others
similarly situated,

Plaintiffs,

vs.

BERRY GLOBAL, INC., a Delaware corporation;
and DOES 1 through 50, inclusive,

Defendants.

Case No. STK-CV-UOE-2020-0006547

[Assigned for all purposes to Department 10C,
Hon. Jayne Lee]

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

*[Filed concurrently with Declaration of Larry W.
Lee; Declaration of Simon L. Yang; Declaration
of William L. Marder; Declaration of Steve
Miller; [Proposed] Order]*

Date: May 17, 2022, May 18, 2022,
May 19, 2022, May 20, 2022,
or May 24, 2022

Time: 9:00 a.m.
Department: 10C

Complaint Filed: August 10, 2020

1 **TO THE COURT, DEFENDANT, AND ITS COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 17, 2022, May 18, 2022, May 19, 2022, May 20, 2022,
3 or May 24, 2022 at 9:00 a.m., or as soon thereafter as the matter may be heard in Department 10C, of the
4 above-entitled court located at 180 E. Weber Avenue, Stockton, California 95202, Plaintiff, Steve
5 Miller, will and hereby does seek an Order:

- 6 1. approving the Stipulation re: Settlement of Class Action (the “Agreement”) attached as
7 Exhibit 1 to the concurrently filed Declaration of Simon L. Yang;
- 8 2. conditionally certifying the following Class for settlement purposes only: all current or
9 former non-exempt employees of Defendant, Berry Global, Inc., in the State of California
10 who were paid overtime wages or shift differential wages at any time from April 9, 2019,
11 through April 1, 2022 (the “Class Period”),¹ except for *Gonsales v. Berry Global Films, LLC*
12 settlement class members, who exclusively received such payments before December 21,
13 2020;
- 14 3. appointing Plaintiff, Steve Miller, as the Class Representative and Larry W. Lee and Simon
15 L. Yang of Diversity Law Group, P.C. and William L. Marder of Polaris Law Group as Class
16 Counsel;
- 17 4. approving the Agreement on a preliminary basis and finding that it, the total Gross
18 Settlement Amount in the amount of \$1,015,835.00,² the amounts requested for the
19 Administration Costs, Attorneys’ Fees and Costs Award, Class Representative Award,
20 LWDA Payment, and the allocation of payments to Class Members appear to be within the
21 range of reasonableness for a settlement that could ultimately be given final approval;
- 22 5. approving the distribution of the Notice of Class Action Settlement attached as Exhibit A to
23 the Agreement;
- 24 6. appointing Phoenix Settlement Administrators as the Administrator; and

25
26 ¹ Pursuant to the Agreement, Defendant has elected to extend the end of the Class Period from July 14,
2021, to April 1, 2022 (and to increase the Gross Settlement Amount per the Agreement).

27 ² Pursuant to the Agreement, Defendant has elected to augment the Agreement’s minimum Gross
28 Settlement Amount of \$682,724.00 by an additional \$333,111 (for an additional 9,003 wage statements
at \$37.00 per wage statement).

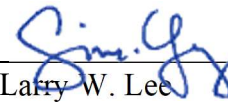
1 7. scheduling a Final Approval Hearing.

2 The Motion is made pursuant to Rule 3.769 of the California Rules of Court, which allows the
3 Court to preliminarily certify a class for settlement purposes and to approve a class action settlement.
4 The basis for the Motion is that the proposed settlement is fair, adequate, and reasonable, and the
5 procedures proposed by the Parties are adequate to ensure class members are able to participate in, opt
6 out of, or object to the settlement.

7 The Motion is based on this notice, accompanying memorandum of points and authorities, the
8 Agreement and proposed Notice of Class Action Settlement, the supporting Declarations of Larry W.
9 Lee, Simon L. Yang, William L. Marder, and Steve Miller, all pleadings and papers on file herein, and
10 any further oral and documentary evidence as may be presented before or at the hearing of this matter.

11 DATED: April 19, 2022

DIVERSITY LAW GROUP, P.C.

12 By: 
13 Larry W. Lee
14 Simon L. Yang
15 Attorneys for Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

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SUMMARY OF MOTION

This lawsuit alleges Defendant, Berry Global, Inc., violates Labor Code section 226(a) when it pays non-exempt employees overtime wages or shift differential wages. Plaintiff, Steve Miller, thus sues on a classwide basis and as a proxy for the State of California pursuant to the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Defendant denies the allegations. Based on their own independent investigation and evaluation, the Parties have agreed to a classwide resolution.

The Stipulation re: Settlement of Class Action (the “Agreement”), attached as Exhibit 1 to the concurrently filed Declaration of Simon L. Yang, will require Defendant to pay \$1,015,835.00³ for the classwide settlement of claims from April 9, 2019, through April 1, 2022 (the “Class Period”).⁴ Significantly, the entire settlement amount is non-reversionary; none of the settlement amount will revert back to Defendant. The Parties and their respective counsel are of the opinion that the settlement terms set forth in the Agreement are fair, reasonable, and adequate.

Although Plaintiff and his counsel are confident that litigation of the claims would result in a classwide judgment against Defendant, they recognize the inherent risks in litigation, including the specific risks that class certification could be denied, liability could not be established at trial, or the applicable law could change. Ultimately, Plaintiff and his counsel believe the settlement—requiring Defendant to pay **approximately \$37 per wage statement** for all Class Members—achieves an exceptional result for the Class;.

As the settlement would be in the best interests of the Class, Plaintiff respectfully requests that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

RELEVANT BACKGROUND

On August 10, 2020, Plaintiff initiated this class and representative PAGA action alleging violations of Section 226(a).⁵ Declaration of Simon L. Yang (“Yang Decl.”) ¶ 2. On behalf of current

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³ Pursuant to the Agreement, Defendant has elected to augment the Agreement’s minimum Gross Settlement Amount of \$682,724.00 by an additional \$333,111 (for an additional 9,003 wage statements at \$37.00 per wage statement). Declaration of Simon L. Yang (“Yang Decl.”) ¶ 4.

⁴ Pursuant to the Agreement, Defendant has elected to extend the Class Period through April 1, 2022 (and to increase the Gross Settlement Amount per the Agreement). Yang Decl. ¶ 4.

⁵ Except as otherwise noted, all “Section” references are to the Labor Code.

1 and former non-exempt employees in California who were paid overtime wages or shift differential
2 wages, and as a proxy for the State of California, the Complaint alleges that Defendant violates Section
3 226(a) in at least two ways: *First*, whenever Plaintiff and the Class are paid overtime, Defendant issues
4 wage statements that do not accurately itemize and show the overtime rate as 1.5 times the regular rate
5 of pay. *Second*, whenever Plaintiff and the Class are paid either overtime or shift differentials,
6 Defendant issues wage statements that do not accurately itemize and show the total hours worked.

7 From the outset of the litigation, the Parties thoroughly investigated the facts relating to the
8 claims alleged in the Complaint and engaged in a thorough study of the legal principles applicable to the
9 claims Plaintiff alleged and defenses Defendant asserted. Yang Decl. ¶ 3. Plaintiff served formal
10 discovery, and Defendant provided information related to defenses that Defendant alleged would apply
11 to Plaintiff's claims, including information relating to a class action settlement in *Gonsales v. Berry*
12 *Global Films, LLC. Id.* After approximately six months of litigation, Defendant agreed to schedule a
13 mediation. *Id.* Defendant provided information to Plaintiff that would enable a productive mediation,
14 including the numbers of non-exempt employees and wage statements for a substantial portion of the
15 period relevant to Plaintiff's allegations and Defendant's defenses, among other things. *Id.*

16 On July 14, 2021, the Parties commenced settlement negotiations through a well-respected
17 mediator, Tripper Ortman. Yang Decl. ¶ 4. Following the mediation, the Parties were ultimately able to
18 negotiate the settlement terms in the Agreement. *Id.* Pursuant to the Agreement's terms, Defendant
19 reserved the option to resolve claims from April 9, 2019, through either July 14, 2021, or a later date. *Id.*
20 On April 12, 2022, Defendant informed Plaintiff that it would extend the Class Period through April 1,
21 2022, to resolve claims for approximately 9,003 additional wage statements. *Id.*; *see also* Agreement ¶¶
22 1.4, 1.6, 1.7, 1.11.

23 LEGAL STANDARD

24 Any settlement of a class action lawsuit must be reviewed and approved by the trial court. This is
25 done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice
26 has been distributed to class members for their comment or objections. As the Manual for Complex
27 Litigation (Third) explains, in the first step "counsel submits the proposed terms of settlement and the
28 court makes a preliminary fairness evaluation":

1 If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its
2 fairness or other obvious deficiencies, such as unduly preferential treatment of class
3 representatives or of segments of the class, or excessive compensation for attorneys, and appears
4 to fall within the range of possible approval, the court should direct that notice ... be given to the
5 class members of a formal fairness hearing, at which arguments and evidence may be presented
6 in support of and in opposition to the settlement.

7 Manual for Complex Litigation (Third) § 30.41.

8 A preliminary approval by the trial court thus is a conditional finding that the settlement does not
9 appear to be unfair. As Professor Newberg comments, “[t]he strength of the findings made by a judge at
10 a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may
11 find that the settlement proposal contains some merit, is within the range of reasonableness required for
12 a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final
13 hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002).

14 The parties also may, at the preliminary approval stage, request that the court provisionally
15 approve certification of the class—conditioned upon final approval of the settlement. As further
16 explained by Professor Newberg:

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

22 4 Newberg on Class Actions, at § 11.26. Indeed, “pre-certification settlements are routinely approved if
23 found to be fair and reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001);
24 accord *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (explaining that a settlement
25 before any “adversary certification” may still be approved if a court is satisfied that it is “fair, adequate
26 and reasonable”).

27 DISCUSSION

28 I. The Proposed Settlement Terms Are Fair, Adequate, and Reasonable.

A. Proposed Class Definition

The proposed settlement class includes all current or former non-exempt employees of
Defendant, Berry Global, Inc., in the State of California who were paid overtime wages or shift
differential wages at any time during the Class Period, except for *Gonsales v. Berry Global Films, LLC*

1 settlement class members, who exclusively received such payments before December 21, 2020.
2 Agreement ¶ 1.4. The Class Period is from April 9, 2019, through April 1, 2022. Agreement ¶¶ 1.4, 1.6,
3 1.7, 1.11; Yang Decl. ¶ 4. In sum, the Class balances Plaintiff's allegations and Defendant's defenses
4 based on the *Gonsales* class action settlement to include (i) current and former non-exempt employees
5 who were not *Gonsales* settlement class members, and (ii) *Gonsales* settlement class members who
6 worked after the *Gonsales* settlement class period. There are approximately 1,000 Class Members.

7 **B. Settlement Terms and Evaluation**

8 The trial court must determine and approve a class action settlement is fair to "prevent fraud,
9 collusion or unfairness to the class" through settlement and dismissal of the class action." *Consumer*
10 *Advocacy Grp., Inc. v. Kintetsu Enters. of America*, 141 Cal. App. 4th 46, 60 (2006). Courts presume the
11 absence of fraud or collusion in the negotiation of settlement unless there is evidence to the contrary.
12 *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat'l*
13 *Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957,
14 962 (N.D. Ga. 1980). Indeed, a presumption of fairness exists where (i) the settlement is reached
15 through arm's length bargaining; (ii) investigation is sufficient to allow counsel and the court to act
16 intelligently, (iii) counsel is experienced in similar litigation, and (iv) the percentage of objectors is
17 small. *Wershba*, 91 Cal. App. 4th at 245 (citing *Dunk*, 48 Cal. App. 4th at 1802).

18 While the recommendations of counsel proposing the settlement are not conclusive, the Court
19 can properly take them into account, particularly where, as here, they have been involved in formal and
20 informal investigation and negotiations, are experienced with this type of litigation, and mediated a
21 resolution with arm's length negotiation. See Newberg on Class Actions, *supra*, at § 11.47; *National*
22 *Rural Telecomms. Coop.*, 221 F.R.D. at 528 ("So long as the integrity of the arm's length negotiation
23 process is preserved, however, a strong initial presumption of fairness attaches to the proposed
24 settlement ... and 'great weight' is accorded to the recommendations of counsel, who are most closely
25 acquainted with the facts of the underlying litigation.") (citations omitted). In such circumstances, as
26 here, courts do not substitute their judgment for that of the proponents. *National Rural Telecomms.*
27 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *accord Hammon v. Barry*, 752 F. Supp.
28 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*

1 *Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan*
2 *Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

3 Here, both Plaintiff's counsel and Defendant's counsel have a great deal of experience in wage
4 and hour class action litigation. Plaintiff's counsel have extensive class action and litigation experience
5 and have been approved as class counsel in numerous wage and hour class actions. Declaration of Larry
6 W. Lee ("Lee Decl.") ¶¶ 5-8; Yang Decl. ¶¶ 8-12; Declaration of William L. Marder ("Marder Decl.")
7 ¶¶ 10-11. Each side has apprised the other of their respective factual contentions and legal theories, and
8 each side has considered the other's contentions and theories. Defendant provided relevant numbers of
9 individuals and wage statements, among other things—enabling negotiations to take place between the
10 Parties. *Id.*

11 Plaintiff contended that class claims under Section 226(e) result in a \$50 penalty for the first
12 non-compliant wage statement to each Class Member and a \$100 penalty for each additional non-
13 compliant wage statement to the Class Member, up to a maximum of \$4,000 per class member. Lab.
14 Code § 226(e). Plaintiff also contended that PAGA penalties result in a \$250 penalty per violation per
15 employee (as opposed to a \$100 penalty per pay period per employee). Lab. Code §§ 226.3, 2699(f).
16 Defendant contended, for example, that any PAGA penalties are subject to discretionary reductions.
17 Yang Decl. ¶ 5. Defendant also contended that liability under Section 226(e) is subject to additional
18 defenses requiring proof of injuries resulting from knowing and intentional violations. *Id.*

19 Although Plaintiff and his counsel are confident that litigation of the claims would result in a
20 classwide judgment against Defendant, they recognize the inherent risks in litigation, including the
21 specific risks that class certification could be denied, liability could not be established at trial, or the
22 applicable law could change. Yang Decl. ¶ 6. The settlement for each participating Class Member is fair,
23 reasonable, and adequate, given the inherent risks of litigation, as well as the potential for appeals and
24 the costs of pursuing litigation. *Id.* The settlement is the result of extensive arm's length negotiations
25 between the Parties and their counsel. *Id.* While the Parties disagree on the application of the law to the
26 facts, each Party recognized in negotiations that, if taken to trial, the other Party would at least have
27 reasonable arguments, such that the Gross Settlement Amount to which the Parties ultimately agreed
28 was reasonable. *Id.*

1 Ultimately, the Gross Settlement Amount secures approximately \$37 per wage statement—more
2 than one third of Defendant’s potential liability for penalties not subject to discretionary reductions.
3 Yang Decl. ¶ 6. Numerous courts have held that gross settlement amounts of less than 20%—and as
4 little as 8%—of a defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
5 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement recovering
6 16% of potential exposure was fair and reasonable; “It is well-settled law that a cash settlement
7 amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or
8 unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of
9 pursuing the litigation to judgment.”); *Bellinghausen v. Tractor Supply Co.*, 2015 WL 1289342, at *6
10 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of the
11 defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, 2014 WL 2472316, at *3
12 (C.D. Cal. May 30, 2014) (acknowledging risks of continued litigation and granting preliminary
13 approval of wage and hour class action settlement obtaining 9.1% of projected damages); *Villegas v.*
14 *J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class
15 action settlement of approximately 15% of the potential recovery was fair and reasonable).

16 Class Members would not need to do anything to receive their share of settlement funds. This
17 eliminates any burden to Class Members who wish to participate in the class action settlement. Despite
18 the fairness of the settlement terms, should any Class Member wish to pursue his or her own case for the
19 claims proposed to be settled and released, each Class Member has the right to submit a request for
20 exclusion (i.e., opt out) from the settlement.

21 **1. Class Member Payments**

22 The Agreement provides for \$1,015,835.00 as the Gross Settlement Amount. Agreement ¶ 1.14.
23 From the Gross Settlement Amount, attorneys’ fees will be no more than 35% of the Gross Settlement
24 Amount. *Id.* Class Counsel’s costs are expected to be no more than \$20,000.00. *Id.* The Class
25 Representative Award will be no more than \$10,000.00. *Id.* Administration Costs are expected to be no
26 more than \$10,000.00. *Id.* \$40,000.00 will be allocated to PAGA Penalties—\$30,000.00 of which will
27 be an LWDA Payment to the California Labor and Workforce Development Agency pursuant to statute.
28 *Id.*

After deducting any approved Attorneys' Fees and Costs Award, Class Representative Award, Administration Costs, and LWDA Payment from the Gross Settlement Amount, the remaining amount would be the Net Settlement Amount, which shall be allocated among Settlement Class Members on a pro rata basis based on the number of relevant wage statements for each Settlement Class Member. Agreement ¶¶ 1.34, 1.35; *see also* Class Notice. Based on the requested payments contemplated by the Agreement, it is expected that more than \$590,000 would be available for distribution to Class Members (*after* accounting for all requested payments from the Gross Settlement Amount). Based on the anticipated 1,000 Class Members, **each Class Member, on average, would receive almost \$600 (or \$590.29)** pursuant to the settlement's terms. Yang Decl. ¶ 7. The amount paid on average to each Class Member may increase, depending on how many Class Members opt out of the class action settlement. *Id.* The amount actually paid to any Class Member may increase or decrease depending on his or her number of relevant wage statements during the Class Period. *Id.*

As Plaintiff's lawsuit sought penalties only, 100% of Class Members' Individual Settlement Sums would be characterized as penalties. Agreement ¶ 2.21. All other settlement payments also do not consist of wages and shall be characterized as IRS Form 1099 payments. *Id.* ¶ 2.8. Finally, the principal for any uncashed checks (upon the expiration date) would escheat to the State Controller Unclaimed Property Fund in the name of the Settlement Class Member. *Id.* ¶ 2.6.2; Yang Decl. ¶ 6; Agreement Ex. A at 3. None of the settlement funds will revert to Defendant.

2. Class Members' Releases of Claims

As a condition of participating in this settlement, Settlement Class Members shall waive and release all claims for statutory and civil penalties, fees and costs, actions or causes of action, and all other forms of legal or equitable relief based on federal, state, or local law, that were alleged or could have been alleged, whether such forms of relief are known or unknown, based upon the factual allegations in the operative Complaint in the Action and in Plaintiff's LWDA Letter, during the Class Period, including, but not limited to, all claims asserted in Action for: (1) Violation of Cal. Labor Code § 226 and §226.3, and all recoverable statutory penalties related thereto, whether based on federal, state or local law; and (2) Violation of Labor Code §§ 2698, et seq. (PAGA) premised upon the claims for violation of § 226 and §226.3 against Berry Global, Inc. and with respect to the penalties claimed in the

1 Action, any source of obligation as a basis for claiming such penalties during the Class Period.
2 Agreement ¶¶ 1.27, 2.7.

3 The release is thus appropriately limited. *Carter v. City of Los Angeles*, 224 Cal. App. 4th 808,
4 820 (2014) (“A general release—covering ‘all claims’ that were or could have been raised in the suit—is
5 common in class action settlements.”). Moreover, the Settlement Class Member release applies only to
6 claims arising during the Class Period. Agreement ¶¶ 1.27, 2.7.

7 **C. Notice to Class Members**

8 Within 21 days of the Preliminary Approval Order, Defendant shall provide to the Administrator
9 each Class Member’s last known mailing address, as well as data sufficient for the Administrator to
10 perform all necessary responsibilities pursuant to this Agreement (the “Class Data”) to the Administrator
11 to perform all necessary responsibilities pursuant to the settlement. Agreement ¶ 2.4.3. Prior to mailing
12 the Class Notice, the Administrator shall undertake an address verification measure to ascertain any
13 updated address, then mail the Class Notice to Class Members to provide notice of settlement via First
14 Class U.S. Mail, using the last known mailing address for each Class Member, based on class data
15 provided by Defendant and any updated address. *Id.* ¶ 2.4.6. Any Class Notice returned to the
16 Administrator as undeliverable shall be sent promptly via First Class U.S. Mail to the forwarding
17 address affixed thereto. *Id.* If no forwarding address is provided and the response deadline has not
18 passed, the Administrator shall promptly attempt to determine the correct address using a single skip-
19 trace search and shall then promptly send a single re-mailing. *Id.* As set forth in the Class Notice, Class
20 Members will be allowed to opt out of the class action settlement by a certain deadline, or object to the
21 settlement in writing or by appearing at the final approval hearing.

22 **D. Attorneys’ Fees and Costs, the Enhancement Award, and Settlement Costs**

23 **1. Attorneys’ Fees and Costs**

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

1 the beneficiaries so that the active beneficiary does not bear the entire burden alone” so as to avoid
2 unjust enrichment. *Vincent*, 557 F. 2d at 769.

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

13 Attorneys’ fees awards of 35% of the fund are within the expected range in the “market in legal
14 services. *See Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Award*, 7 J.
15 *Empirical Leg. Stud.* 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that
16 “[m]ost fee awards were between 25 percent and 35 percent”). An attorneys’ fees award of 35% of the
17 fund mimics the market and “is supported by the fact that typical contingency fee agreements provide
18 that class counsel will recover 33% if the case is resolved before trial and 40% if the case is tried.”
19 *Fernandez v. Victoria Secret Stores LLC*, 2008 WL 8150856, at *16 n.59 (C.D. Cal. July 21, 2008)
20 (citing Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-*
21 *Competitive Fees* (Fall 2003) 81 Wash U. L. Q. 653, 659 n. 11). Indeed, an attorneys’ fees award of 35%
22 of the fund is consistent with “empirical studies [that] show that ... fee awards in class actions average
23 around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

24 The Parties have agreed to a maximum attorneys’ fee award of 35% of the Gross Settlement
25 Amount. The Parties’ agreement should be presumed to be fair. Further, the Parties have agreed to
26 reimbursement of Class Counsel’s litigation costs. *Id.* Class Counsel have incurred costs at their own
27 risk, for example, for filing the lawsuit, service of process, mediation fees, and payment of other
28 litigation related costs. *Id.*

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

2 Plaintiff and proposed Class Representative Steve Miller requests a modest Class Representative
3 Award of \$10,000. The request is quite reasonable in light of the general release that the Agreement
4 requires of him but not of any other Class Member.

5 The request also is appropriate in recognition of Plaintiff's efforts on behalf of the Class. Miller
6 Decl. ¶¶ 2-3. As part of his duties as the Class Representative, Plaintiff provided invaluable information,
7 evidence, and documents that resulted in this settlement. *Id.* Plaintiff met and conferred with Class
8 Counsel on a number of occasions to discuss the case. *Id.* ¶ 2. He provided information and documents
9 to Class Counsel and made himself available to answer any questions during litigation. *Id.* Ultimately,
10 Plaintiff's efforts secured an exceptional result for the Class.

11 In addition to the invaluable services that Plaintiff provided, he also took a significant risk, both
12 professionally and monetarily. Miller Decl. ¶ 4. Because the alleged claims involve the payment of costs
13 to the prevailing party, Plaintiff could have possibly faced paying Defendant's costs had Defendant
14 prevailed in the action. Furthermore, Plaintiff risks prejudice in the future from other potential
15 employers that may be less willing to hire an individual who has filed suit against a prior employer.
16 Plaintiff took this risk upon himself and the whole class benefited. Class Members did not have to file
17 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to
18 face potential prejudice in future employment.

19 **3. Administration Costs**

20 Phoenix Settlement Administrators, a well-recognized class action settlement administrator, has
21 quoted Administration Costs not to exceed \$10,000 to send notices and administer the settlement. The
22 Administration Costs are reasonable and should be approved.

23 **II. The Class Meets All Requirements for Certification.⁶**

24 For purposes of settlement approval, a detailed analysis of the elements required for class
25 certification is not required. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 620, 622-27 (1997). The trial
26

27 ⁶ Defendant expressly reserves its objections and does not agree that class certification of any of the
28 claims would be appropriate outside of the settlement context. Plaintiff disagrees but has considered the
inherent risk of class certification motion practice.

1 court can appropriately utilize a lesser standard of scrutiny to determine the propriety of a settlement
2 class as opposed to a litigation class. *Dunk*, 48 Cal. App. 4th at 1807 n.19; *see also Wershba*, 91 Cal.
3 App. 4th at 240 (explaining there is no “ironclad requirement” to conduct an evidentiary hearing to
4 satisfy the prerequisites for class certification). Because a settlement eliminates the need for a trial, when
5 considering whether to certify a settlement class, the court is not faced with the case management issues
6 present in certification of a litigation class. *Global Mins. & Metals Corp. v. Superior Court*, 113 Cal.
7 App. 4th 836, 859 (2003) (“[I]t is well established that trial courts should use different standards to
8 determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a
9 lesser standard of scrutiny is used for settlement cases.”) (citing *Dunk*, 48 Cal. App. 4th at 1807 n.19).

10 Even under the standard applicable to litigation classes, the allegations in this lawsuit present
11 paradigmatic class action claims that satisfy the elements of class certification.

12 **A. The Class Is Ascertainable and Sufficiently Numerous.**

13 Class Members are identifiable from Defendant’s records. The class definition “is precise,
14 objective and presently ascertainable.” *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (2010).
15 Indeed, there are approximately 1,000 Class Members. Yang Decl. ¶ 4. Numerosity thus is sufficiently
16 established. *E.g., Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (stating that “[n]o set
17 number is required as a matter of law for the maintenance of a class action” and citing examples in
18 which classes of 10—*Bowles v. Superior Court*, 44 Cal. 2d 574 (1955)—and of 28—*Hebbard v.*
19 *Colgrove*, 28 Cal. App. 3d 1017 (1972)—were upheld).

20 **B. The Class Establishes a Community of Interest.**

21 “The community of interest requirement involves three factors: ‘(1) predominant common
22 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3)
23 class representatives who can adequately represent the class.’” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429,
24 435 (2000).

25 **1. Plaintiff’s Claims Are Raise Common Questions of Law and Fact.**

26 With respect to commonality, there are questions of law and fact common to the class. *See*
27 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared legal issues with
28 divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate

1 legal remedies within the class”). Commonality requires only that some common legal or factual
2 questions exist; the plaintiffs need not show that all issues in the litigation are identical. *See Richmond v.*
3 *Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant’s conduct is central to the commonality
4 inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*,
5 4 Cal. 3d 800, 812-13 (1971). Where the employer’s conduct is uniformly directed at a class of
6 employees, as it is here, the class wide impact of the Defendant’s policies satisfies the commonality
7 requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

8 **2. Plaintiff’s Claims Are Typical of Those of the Class.**

9 With respect to typicality, Plaintiff alleges that Defendant, as a matter of their corporate policy,
10 practice, or procedure violated Section 226(a) by failing to furnish employees with wage statements that
11 itemize and show all applicable hourly rates in effect during the pay period and the total hours worked.
12 As with other members of the Class, Plaintiff was provided wage statements that do not itemize and
13 show all applicable hourly rates in effect during the pay period or the total hours worked. Declaration of
14 Steve Miller (“Miller Decl.”) ¶ 2.

15 **3. Plaintiff and His Counsel Adequately Represent the Class.**

16 With respect to adequate representation, Plaintiff does not have any interests adverse to the
17 Class, and no such issues been raised or presented. Miller Decl. ¶ 3. Plaintiff has taken all necessary
18 steps to represent the interests of the Class, including by providing information and documents to Class
19 Counsel, making himself available to discuss the claims, providing wage statements that he was issued,
20 reviewing wage statements while the lawsuit was pending, and answering any questions. *Id.* For such
21 reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

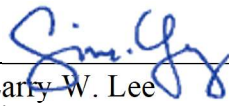
22 From the inception of the case, Class Counsel has zealously represented the interests of the
23 Class. The settlement was obtained for the benefit of the Class, as opposed to the individual Class
24 Representative. Class Counsel have been approved as class counsel in a number of prior cases, have
25 litigated numerous other class action cases, and are competent to represent the Class. Lee Decl. ¶¶ 2-9;
26 Yang Decl. ¶¶ 8-12; Marder Decl. ¶¶ 10-11.

1 **CONCLUSION**

2 The proposed settlement would result in substantial monetary benefits to class members. It was
3 the result of informed, extensive, and arm's length negotiations conducted by parties who are
4 represented by counsel experienced in wage and hour class action litigation. Its terms appear to be fair,
5 adequate, and reasonable, and there is no reason to believe the proposal is outside the range of
6 reasonableness for such a settlement. Accordingly, for the benefit of the Class, Plaintiff respectfully
7 requests that the Court (i) grant preliminary approval of the settlement, (ii) approve and authorize the
8 mailing of the proposed Class Notice, and (iii) schedule a final approval hearing.

9 DATED: April 19, 2022

DIVERSITY LAW GROUP, P.C.

10 By: 
11 Larry W. Lee
12 Simon L. Yang
13 Attorneys for Plaintiff
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1 **PROOF OF SERVICE**

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

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

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

10 On April 20, 2022, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
12 **APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF**
13 **POINTS AND AUTHORITIES IN SUPPORT**
- 14 **2. DECLARATION OF SIMON L. YANG IN SUPPORT OF PLAINTIFF'S**
15 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
16 **SETTLEMENT**
- 17 **3. DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF PLAINTIFF'S**
18 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
19 **SETTLEMENT**
- 20 **4. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
21 **FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 22 **5. DECLARATION OF STEVE MILLER IN SUPPORT OF PLAINTIFF'S MOTION**
23 **FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 24 **6. [PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL**
25 **OF CLASS ACTION SETTLEMENT**

26 on the interested parties in this action as follows:

27 Rebecca Aragon
28 RAragon@littler.com
Cliff Martin
CMartin@littler.com
Michele Morelli
MMorelli@littler.com
Littler Mendelson
633 West Fifth Street, 63rd Floor
Los Angeles, CA 90071
Attorneys for Defendant Berry Global, Inc.

1 X BY ELECTRONIC MAIL: by personally sending a true and correct copy
2 of the above-described document(s) to the party(ies) listed above or on the attached mailing list
3 from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s)
4 indicated above or on the attached mailing list. I certify that said electronic transmission was
5 completed and that all pages were received by the party(ies) identified herein or on the attached
6 mailing list.

7 I declare under penalty of perjury under the laws of the State of California that the
8 above is true and correct. Executed on April 20, 2022, at Los Angeles, California.

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Erika Mejia