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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

KALUM VAUGHNS, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

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

Defendants.

Case No. CIVSB2129167

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL 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 David J. Lee; Declaration of Kalum Vaughns; Declaration of Taylor Mitzner; [Proposed] Order and Final Judgment]

Date: September 20, 2023
Time: 9:00 a.m.
Department: S-26

Complaint Filed: November 24, 2021

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

2 **PLEASE TAKE NOTICE** that on September 20, 2023, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard in Department S26 of the above-entitled court located at 247 West Third Street,
4 San Bernardino, California 92415, Plaintiff, Kalum Vaughns, will and hereby does seek an Order:

- 5 1. granting final approval to the Stipulation re: Settlement of Class Action (the “Agreement”) in
6 this action;
- 7 2. approving distribution of the settlement funds to Settlement Class Members pursuant to the
8 terms of the Agreement;
- 9 3. approving Plaintiff’s request for a service award of \$10,000.00 to the Class Representative
10 pursuant to the terms of the Agreement;
- 11 4. approving Class Counsel’s request for an award of attorneys’ fees of 33⅓% of the
12 \$1,665,000.00 Gross Settlement Amount, or \$555,000.00, and reimbursement of litigation
13 costs of \$15,698.35 pursuant to the terms of the Agreement;
- 14 5. approving Plaintiff’s request for payment of the settlement administration costs to Phoenix
15 Settlement Administrators in the amount of \$14,500.00 pursuant to the terms of the
16 Agreement;
- 17 6. approving Plaintiff’s request for payment to the Labor & Workforce Development Agency of
18 \$75,000.00 pursuant to the terms of the Agreement, and payment to PAGA Employees of
19 \$25,000.00 to be distributed pro rata based on the number of relevant pay periods worked;
20 and
- 21 7. entering final judgment as to all members of the Settlement Class in this action.

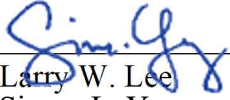
22 This motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for
23 Court approval of the settlement of a purported class action and allows the Court to grant final
24 certification of a class for settlement purposes. The overwhelmingly positive Class response—as shown
25 by the lack of any objections to the settlement (as well as the 99.71% class participation rate) supports
26 that the settlement is fair, reasonable, and adequate, and should be granted final approval.

27 This motion will be based on the attached Memorandum of Points and Authorities, the
28 supporting Declarations of Larry W. Lee, Simon L. Yang, David J. Lee, Plaintiff Kalum Vaughns, and

1 Taylor Mitzner of Phoenix Settlement Administrators, upon the oral arguments of counsel (should there
2 be any), and on the complete records and file herein.

3 DATED: August 28, 2023

DIVERSITY LAW GROUP, P.C.

4
5 By: 
6 Larry W. Lee
7 Simon L. Yang
8 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **TABLE OF CONTENTS**

	Page
SUMMARY OF MOTION.....	1
DISCUSSION	2
I. Class Members Were Provided Notice of the Settlement.....	2
II. The Fair, Adequate, and Reasonable Settlement Should Be Given Final Approval.	3
A. The Strength of the Case and Likelihood of Class Certification Support Approval.	3
1. The Class Is Ascertainable.....	3
2. There Is a Community of Interest.	4
a. There Are Predominant Common Questions of Law and Fact.....	4
b. Plaintiff’s Claims Are Typical of the Class Claims.....	5
c. Plaintiff Adequately Represented the Class.....	5
B. Defendant’s Allegations and Position on Class Certification Support Approval.	5
C. Risks, Expenses, and Complexity of Further Litigation Support Approval.	6
D. The Settlement Terms and Negotiation—as Well as the Class Member Response—All Support the Conclusion that the Settlement is Fair, Adequate, and Reasonable.	6
III. Well-Established Legal Principles Support Final Approval of the Settlement.....	7
A. The Settlement is Presumed to Be Fair.....	8
B. Two-Way Costs and Other Risks Inherent in Litigation Favor Final Approval.....	8
C. The Complexity, Expense, and Likely Duration of Continued Litigation Against Defendant Favor Final Approval.	9
D. The Opinion of Experienced Counsel Favors Final Approval.....	10
IV. The Proposed Payments and Procedures Should Be Approved.....	10
A. The Proposed Procedure for Uncashed Settlement Checks Should Be Approved.	10
B. The Requested Class Representative Service Award Should Be Approved.....	10
C. The Requested Attorneys’ Fees Should Be Approved.	11
D. The Court Should Approve the Request for Reimbursement of Costs.....	13
E. The Administrator’s Fees and Costs Should Be Approved.	13

V.	Notice to the LWDA Has Been Provided.	14
CONCLUSION.....		14

TABLE OF AUTHORITIES

Page

State Cases

<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i> , 85 Cal. App. 4th 1135 (2000)	7
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43 (2008)	12
<i>Classen v. Weller</i> , 145 Cal. App. 3d 27 (1983)	5
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996)	8
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480 (2016)	11
<i>Lockheed Martin Corp. v. Superior Court</i> , 29 Cal. 4th 1096 (2003)	5
<i>Reese v. Wal-Mart Stores, Inc.</i> , 73 Cal. App. 4th 1225 (1999)	4
<i>Reyes v. San Diego County Board of Supervisors</i> , 196 Cal. App. 3d 1263 (1987)	3, 4
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462 (1981)	4
<i>Serrano v. Priest</i> , 20 Cal. 3d 25 (1977)	11
<i>Simons v. Horowitz</i> , 151 Cal. App. 3d 834 (1984)	5
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224 (2001)	11

Federal Cases

<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980)	11
<i>Boyd v. Bechtel Corp.</i> , 485 F. Supp. 610 (N.D. Cal. 1979)	8, 10
<i>Brotherton v. Cleveland</i> , 141 F. Supp. 2d 907 (S.D. Ohio 2001)	11
<i>Class Plaintiffs v. City of Seattle</i> , 955 F.2d 1268 (9th Cir. 1992)	6, 7

1	<i>Cook v. Niedert</i> ,	
2	142 F.3d 1004 (7th Cir. 1998)	11
3	<i>Eisen v. Carlisle & Jacquelin</i> ,	
4	417 U.S. 156 (1974).....	3
5	<i>Ellis v. Naval Air Rework Facility</i> ,	
6	87 F.R.D. 15 (N.D. Cal. 1980).....	8, 10
7	<i>Fernandez v. Victoria Secret Stores LLC</i> ,	
8	2008 WL 8150856 (C.D. Cal. July 21, 2008).....	12
9	<i>Gaskill v. Gordon</i> ,	
10	160 F.3d 361 (7th Cir. 1998)	12
11	<i>Girsh v. Jepson</i> ,	
12	521 F.2d 153 (3d Cir. 1975).....	8, 9
13	<i>Hanon v. Dataproducts Corp.</i> ,	
14	976 F.2d 497 (9th Cir. 1992)	5
15	<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> ,	
16	130 F.R.D. 366 (S.D. Ohio 1990).....	11
17	<i>In re General Motors Corp.</i> ,	
18	55 F.3d 768 (3d Cir. 1995).....	8
19	<i>Linney v. Cellular Alaska P'ship</i> ,	
20	151 F.3d 1234 (9th Cir. 1998)	10
21	<i>Mullane v. Central Hanover Bank & Trust Co.</i> ,	
22	339 U.S. 306 (1950).....	3
23	<i>Officers for Justice v. Civil Serv. Comm'n</i> ,	
24	688 F.2d 615 (9th Cir. 1982)	7, 9, 10
25	<i>Phillips Petroleum Co. v. Shutts</i> ,	
26	472 U.S. 797 (1985).....	3
27	<i>Swedish Hospital v. Shalala</i> ,	
28	1 F.3d 1261 (D.C. Cir. 1993).....	13
	<i>Van Bronkhorst v. Safeco Corp.</i> ,	
	529 F.2d 943 (9th Cir. 1976)	7, 10
	<i>Van Vranken v. Atlantic Richfield Co.</i> ,	
	901 F. Supp. 294 (N.D. Cal. 1995).....	11
	<i>Vincent v. Hughes Air West, Inc.</i> ,	
	557 F. 2d 759 (9th Cir. 1997)	11, 12
	<i>Young v. Katz</i> ,	
	447 F.2d 431 (5th Cir. 1971)	9

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SUMMARY OF MOTION

On November 24, 2021, Plaintiff, Kalum Vaughns, initiated this class and Labor Code Private Attorneys General Act of 2004 (“PAGA”) action against Defendant, Berry Global, Inc. On behalf of a putative class of current and former non-exempt employees of Defendant in the State of California, and as a proxy for the State, Plaintiff pursues class action and PAGA claims under Labor Code sections 201-204, 218, 221-224, 226(a), 226.7, 246, 510, 512, 1174, 1182.12, 1197, 1198, 1198.5, and 2698 et seq., as well as Business and Professions Code sections 17200 et seq.

Plaintiff now seeks the Court’s final approval of the Stipulation re: Settlement of Class Action (the “Agreement”). The Agreement provides for a \$1,665,000.00 fund to be created for the benefit of the Class, from which attorneys’ fees, litigation costs, a service award to the Class Representative, payment to the California Labor and Workforce Development Agency (“LWDA”) and PAGA Employees, and costs of settlement administration are to be paid. The net settlement fund after these deductions—as well as a deduction for the employer share of payroll taxes, if approved by the Court¹—will be paid to Settlement Class Members.

The history of this litigation was previously detailed in Plaintiff’s Preliminary Approval Motion. On May 10, 2023, the Court held a hearing on preliminary approval of this settlement. It directed distribution of the Notice of Class Action Settlement (“Class Notice”) and scheduled the hearing for final approval of settlement (the “Preliminary Approval Order”).

As directed by the Court, the Administrator, Phoenix Settlement Administrators, distributed the Class Notice to 1,048 Class Members. Declaration of Taylor Mitzner on behalf of Phoenix Settlement Administrators (“Admin Decl.”) ¶ 4. No objections were made. *Id.* ¶ 8. Only three requests for exclusion were submitted. *Id.* ¶ 7. As such, there is a 99.71% participation rate. *Id.* ¶ 10. Based on the Class Member response, an inference can be made that the Class finds the settlement is fair and reasonable.

In addition to the results of the notice process, the points discussed in Plaintiff’s Preliminary Approval Motion also support final approval of the settlement:

¹ The Agreement does not specify how the employer’s share of payroll taxes for wage allocations is to be funded. Declaration of Simon L. Yang (“Yang Decl.”) ¶ 2. The Parties thus request that the Court approve the payment of an estimated maximum of \$20,992.03 in employer-side payroll taxes from the gross settlement amount. *Id.*; *see also* Declaration of Taylor Mitzner on behalf of Phoenix Settlement Administrators ¶ 12.

- 1 ▪ The settlement provides a total settlement sum of \$1,665,000.00;
- 2 ▪ The settlement is fair given that Class Members will receive (*after* deductions for fees, costs,
3 etc.) a substantial amount of money (on average, each Settlement Class Member will receive
4 approximately \$907.95, and each PAGA Employee will additionally receive another \$27.96,
5 *see* Admin Decl. ¶¶ 13-14);²
- 6 ▪ The allocation reflects payments to Class Members in proportion to the number of relevant
7 workweeks worked by each Class Member during the Class Period (and pay periods worked
8 by each PAGA Employee during the PAGA Period);³
- 9 ▪ Plaintiff conducted significant investigation in this case, including substantial informal
10 discovery and exchanges of information by Plaintiff and Defendant of class data for the
11 entire class necessary for Plaintiff to fully evaluate this case; and
- 12 ▪ California’s LWDA will also be the beneficiary of this settlement as it will receive
13 \$75,000.00, should this settlement be granted final approval.

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

15 DISCUSSION

16 I. Class Members Were Provided Notice of the Settlement.

17 The notice procedures required by the Preliminary Approval Order, have been followed and
18 satisfy all due process rights of Class Members. The Preliminary Approval Order contemplated that
19 Phoenix Settlement Administrators would serve as the Administrator. It also contemplated that the Class
20 Notice to be sent to all Class Members by first class mail, as specified in the Agreement, would enable
21 Class Members to contact Class Counsel, seek additional information regarding the settlement, leave
22 questions for the Administrator, and update their addresses.

23 As the Admin Declaration states, notice was provided to Class Members, as required by the
24 Preliminary Approval Order. On June 12, 2023, the Administrator received a Class Member mailing list

25 ² Because the Agreement does not specify how the employer’s share of payroll taxes is to be funded, the
26 Class Notice sent to Class Members cautiously advised Class Members of estimated settlement payment
27 amounts that presumed the employer’s share of payroll taxes would be funded from the gross settlement
28 amount. Yang Decl. ¶ 3. That way, if the Court were not to approve the payment of the employer’s share
29 of payroll taxes from the gross settlement amount, then Class Members ultimately would be allocated
30 more beneficial settlement payments than estimated in the Class Notice. *Id.* Likewise, if the Court does
31 approve the payment of the employer’s share of payroll taxes from the gross settlement amount, then
32 Class Members’ estimated settlement payments would have already reflected such allocation. *Id.*

33 ³ Although the Agreement specifies an equal allocation of the 25% of PAGA penalties to be distributed
34 to PAGA Employees, the Class Notice advised Class Members: “The remainder of the PAGA Penalty
35 Fund, or \$25,000, will be allocated to aggrieved employees on a pro rata basis.” Yang Decl. ¶ 4. The
36 Parties jointly agree that the proper distribution of the 25% of PAGA penalties to be distributed to
37 PAGA Employees would be a pro rata distribution based on the number of relevant pay periods worked.
38 *Id.*

1 from Defendant’s counsel that included 1,048 Class Members. Admin Decl. ¶ 2. On June 14, 2023, the
2 Administrator conducted a National Change of Address (“NCOA”) search to update the Class Member
3 mailing list of addresses as accurately as possible. *Id.* ¶ 3. On June 27, 2023, each of the persons
4 identified on the mailing list were sent the Class Notice via first class mail. *Id.* ¶ 5. 57 Class Notices
5 were returned as undeliverable, and a skip trace discovered updated addresses for 38 of the returned
6 Class Notices. *Id.* ¶ 6. Only 19 of the Class Notices remain undeliverable. *Id.*

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

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

20 **II. The Fair, Adequate, and Reasonable Settlement Should Be Given Final Approval.**

21 **A. The Strength of the Case and Likelihood of Class Certification Support Approval.**

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

24 **1. The Class Is Ascertainable.**

25 “Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size
26 of the class, and (3) the means available for identifying the class members.” *Reyes v. San Diego County*
27 *Board of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987); *see also* Code Civ. Proc. § 382.

1 Here, the Class includes any and all persons who are or have been employed by Defendant,
2 Berry Global, Inc., in non-exempt positions in the state of California from April 2, 2018, through
3 September 30, 2022 (the “Class Period”), except for those who worked only “Excluded Workweeks”—
4 i.e., workweeks that were already subject to settlement in (i) *Marco Rendon v. AEP Industries, Inc., et*
5 *al.*, San Bernardino County Superior Court Case No. CIVDS1621981, prior to May 8, 2018, (ii) *Huy*
6 *Trinh, et al. v. Berry Plastics Corporation*, Orange County Superior Court Case No. 30-2015-00809744-
7 CUOE-CXC, prior to April 1, 2018, and (iii) *Gonsales v. Berry Global Films, LLC*, San Bernardino
8 Superior Court Case No. CIVDS1928987, prior to December 20, 2020. Agreement §§ 1.4, 1.6, 1.11. The
9 Settlement Period or Class Period is from April 2, 2018, through September 30, 2022. *Id.* § 1.7.

10 There are 1,048 individuals that comprise the Class. Admin Decl. ¶ 3.⁴ This is more than the
11 minimum required to certify a class. Within the context of manageability, the issue is whether there
12 exists sufficient means for identifying class members at the remedial stage. *Reyes*, 196 Cal. App. 3d at
13 1274-75. Here, Class Members have already been identified and have already been sent notice.

14 **2. There Is a Community of Interest.**

15 The “community of interest” requirement embodies three separate factors: (1) predominant
16 common questions of law or fact; (2) class representatives whose claims are typical of the class; and (3)
17 class representatives who can adequately represent the class. *Richmond v. Dart Industries, Inc.*, 29 Cal.
18 3d 462, 470 (1981); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225, 1234 (1999).

19 **a. There Are Predominant Common Questions of Law and Fact.**

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

24 Here, Plaintiff alleges that Defendant, as a matter of common corporate policy, practice, or
25 procedure, allegedly failed to pay all wages, underpaid various wages based on Defendant’s failures to
26 pay the regular rate of pay, failed to provide meal and rest breaks, and failed to furnish lawful wage
27 statements, among other violations. While Defendant denies that liability could be established on a

28 ⁴ There are also 894 PAGA Employees. Admin Decl. ¶ 14.

1 class-wide basis and contends instead that liability would need to be conducted on a case-by-case basis,
2 common questions predominate Plaintiff's theories of liability.

3 **b. Plaintiff's Claims Are Typical of the Class Claims.**

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

11 Plaintiff was employed by Defendant and alleges that he was compensated based on Defendant's
12 common payroll practices and worked under Defendant's common pay and break practices. Declaration
13 of Kalum Vaughns ("Vaughns Decl.") ¶ 2. For example, Plaintiff alleges he was not paid an additional
14 hour of regular rate wages for missed rest periods or meal periods, was not paid sick pay wages at his
15 regular rate, and was not paid for all work time as a result of COVID screenings before the start of
16 shifts. *Id.* In sum, Plaintiff alleges he was subjected to the same policies and practices as other Class
17 Members. Plaintiff's claims thus are typical to those of Class Members.

18 **c. Plaintiff Adequately Represented the Class.**

19 The class representative, through qualified counsel, must be capable of "vigorously and
20 tenaciously" protecting the interests of the class members. *Simons v. Horowitz*, 151 Cal. App. 3d 834,
21 846 (1984). Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues
22 been raised or presented. Plaintiff has taken all necessary steps to represent the interests of the Class,
23 including providing information and documents to his counsel and reviewing pleadings in this case.
24 Vaughns Decl. ¶¶ 3-5. For such reasons, Plaintiff has adequately represented Class Members.

25 **B. Defendant's Allegations and Position on Class Certification Support Approval.**

26 Defendant asserts that even assuming that a class could have been certified, Plaintiff would be
27 unable to establish classwide liability. For example, Defendant provided Plaintiff with information about
28 various defenses, including for example some based on prior settlements and others based on factual

1 disputes regarding Plaintiff's allegations. Moreover, even if Plaintiff prevailed on the merits, Defendant
2 contested the extent of liability. For example, with respect to liability for underpaid wages, overtime,
3 and additional hours of regular rate wages, Defendant contended that it would not be subject to Section
4 203 penalties, based on a good faith defense.⁵ Likewise, with respect to wage statement liability,
5 Defendant contended that liability under Section 226(e) would be subject to additional defenses
6 requiring proof of injuries resulting from knowing and intentional violations. Finally, with respect to
7 PAGA penalties, Defendant contended that PAGA penalties in any event would be subject to
8 discretionary reductions. Based thereon, Defendant continues to maintain that it is not liable for the
9 allegations made by Plaintiff or for the amounts alleged by Plaintiff.

10 **C. Risks, Expenses, and Complexity of Further Litigation Support Approval.**

11 Plaintiff believes that a class can be certified. Plaintiff, however, also believes in the fairness of
12 the settlement when factoring in the uncertainty and risks involved in not prevailing on the theory of
13 liability alleged in the Complaint, the possibility of non-certification, and the potential for appeals.

14 There is always a risk that the court will not grant certification of the class. As Defendant alleges
15 that a class could not have been certified, there was at least a substantial risk that Plaintiff would not
16 have obtained the total amount of damages alleged, and a substantial number of complex issues that
17 would have necessitated significant expenditure of time and expenses. Therefore, the risks, expenses,
18 and complexity of further litigation warrant granting of this motion.

19 **D. The Settlement Terms and Negotiation—as Well as the Class Member Response—**
20 **All Support the Conclusion that the Settlement is Fair, Adequate, and Reasonable.**

21 Without reiterating the details in the Preliminary Approval Motion showing that the Agreement
22 (and the negotiation process that led up to it) is fair and adequate, Plaintiff highlights the following facts.
23 The Agreement was the product of negotiation between highly able and experienced attorneys on both
24 sides who possessed the relevant data and extensive legal research which they had carefully analyzed.
25 Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 4-5.

26 Following notice to the Class, not a single objection to the settlement has been received. Admin
27 Decl. ¶ 7. The Court may appropriately infer that the class action settlement is fair, adequate, and

28 ⁵ Except as otherwise noted, all "Section" references are to the Labor Code.

1 reasonable, given that not a single Class Member has submitted an objection. *See Class Plaintiffs v. City*
2 *of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992). Indeed, the Class Member response suggests the
3 preliminarily approved settlement should now be granted final approval.

4 **III. Well-Established Legal Principles Support Final Approval of the Settlement.**

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

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

25 As the Court of Appeal has cautioned:

26 It cannot be overemphasized that neither the trial court in approving the settlement nor
27 this Court in reviewing that approval have the right or duty to reach any ultimate
28 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

1 appellate court ‘need not and should not reach any dispositive conclusions on the
2 admittedly unsettled legal issue.

3 *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000).

4 A court’s review and approval of a PAGA settlement is subject to a similar standard as that for
5 class action settlement approval. A court should evaluate a PAGA settlement to determine whether it is
6 fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations,
7 deter future ones, and to maximize enforcement of state labor laws. *Moniz v. Adecco USA, Inc.*, 72 Cal.
8 App. 5th 56, 77 (2021).

9 **A. The Settlement is Presumed to Be Fair**

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

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

14 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1802 (1996); *accord*, *Ellis v. Naval Air Rework*
15 *Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980); *In re Wash. Pub Power Supply*, 720 F. Supp. at 1387.

16 The settlement in the case at bar warrants approval and carries a presumption of fairness. As
17 previously noted in the application for Preliminary Approval, this current settlement was negotiated at
18 arm’s length. Lee Decl. ¶¶ 4-5. Class Counsel engaged in extensive factual investigation before settling,
19 including the exchange of significant informal discovery and class data enabling Class Counsel to
20 evaluate the full extent of Defendant’s potential liability. *Id.* ¶ 4. Further, Class Counsel is highly
21 experienced in this type of litigation. As shown in the supporting declarations, Class Counsel has
22 significant experience in class actions and employment wage and hour matters. *Id.* ¶¶ 6-8; Yang Decl. ¶¶
23 6-9; Declaration of David J. Lee (“DJL Decl.”) ¶¶ 5-8.

24 **B. Two-Way Costs and Other Risks Inherent in Litigation Favor Final Approval.**

25 To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court also
26 should weigh the immediacy and certainty of substantial settlement proceeds against the risks inherent in
27 continued litigation. *See also In re General Motors Corp.*, 55 F.3d 768, 806 (3d Cir. 1995) (“[P]resent
28 value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk

1 of not prevailing, should be compared with the amount of the proposed settlement.”); *Girsh v. Jepson*,
2 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

3 If Plaintiff pursued this case without settlement and failed to prevail, Plaintiff would have been
4 potentially responsible for Defendant’s costs. Likewise, any other current or former employees that
5 bring individual claims also would face the uncertainty of prevailing and the possibility of paying costs
6 to Defendant. For that reason, many of these current and former employees likely would not pursue
7 claims. This lawsuit thus achieves a true benefit for the Class that they otherwise might not get or even
8 seek as individuals. Here, given that a fair and reasonable settlement has been reached, neither Plaintiff
9 nor any of the Class Members will be required to pay for Defendant’s litigation costs.

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

14 **C. The Complexity, Expense, and Likely Duration of Continued Litigation Against**
15 **Defendant Favor Final Approval.**

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

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

1 While continued litigation could have led to appeals on several issues, the settlement that was
2 reached provides to all Class Members—regardless of their means—fair relief in a prompt and efficient
3 manner. Were the Court to deny final approval, the Class Members would be left without a remedy as a
4 practical matter and courts across the State would have to address the issues presented here in a
5 piecemeal, costly, and time-consuming manner. The settlement in this case is therefore consistent with
6 the “overriding public interest in settling and quieting litigation” that is “particularly true in class action
7 suits.” *See Van Bronkhorst*, 529 F.2d at 950; *see also 4 Newberg* § 11.41. Here, litigation of this case
8 through trial and appeals would require extended litigation.

9 **D. The Opinion of Experienced Counsel Favors Final Approval.**

10 Class Counsel supports the settlement as fair, reasonable, and adequate, as in the best interest of
11 the Class Members as a whole, and fair, reasonable, and adequate in view of PAGA’s purposes. Lee
12 Decl. ¶ 5; Yang Decl. ¶ 5; DJL Decl. ¶ 4. Similarly, counsel for Defendant is in favor of this settlement.
13 The endorsement of qualified and well-informed counsel of a settlement as fair, reasonable, and
14 adequate is entitled to significant weight by the Court in its final approval determination. *See Officers*
15 *for Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F. Supp. at 617; *Linney v. Cellular Alaska*
16 *P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

17 **IV. The Proposed Payments and Procedures Should Be Approved.**

18 **A. The Proposed Procedure for Uncashed Settlement Checks Should Be Approved.**

19 As referenced in the Motion for Preliminary Approval, to the extent any uncashed settlement
20 funds remain after 180 days, the Parties have agreed that the funds (upon the expiration date) would
21 escheat to the State Controller Unclaimed Property Fund in the name of the Class Member. None of the
22 settlement funds will revert to Defendant or be diverted to a *cy pres* recipient.

23 **B. The Requested Class Representative Service Award Should Be Approved.**

24 Class Representative Kalum Vaughns requests a service award of \$10,000.00. Plaintiff met with
25 Class Counsel to provide substantive information regarding Defendant’s practices. Vaughns Decl. ¶ 3.
26 Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement.

27 In addition to the invaluable services that he provided and the hours he devoted to the litigation
28 on behalf of the Class, Vaughns Decl. ¶ 3, Plaintiff took significant risks, both professionally and

monetarily, in acting as Class Representative to seek benefits for the Class. Because the claims Plaintiff alleged 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, Plaintiff agreed to pursue this case on behalf of the Class. *Id.* ¶ 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 faces significant risk in not being able to find suitable employment—due to the filing of this case against Defendant. Plaintiff took these risks upon himself to the benefit of the Class. Vaughns 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 award. 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 award should be granted to Plaintiff for his commitment, dedication, and risks taken for this litigation.

Equally important, Plaintiff provided a general release and waiver of the protections of Civil Code section 1542. Vaughns Decl. ¶ 9. This is a more extensive release than that provided by the Class at large and also supports the request for the award.⁶

C. The Requested Attorneys' Fees Should Be Approved.

Class Counsel seeks a fee award calculated at 33⅓% 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

⁶ Courts have routinely granted approval of settlements containing such incentive awards. *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.*, 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).

224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *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*, 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 should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (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, a 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) (Posner, J.) (“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.”).

First, the fee award representing 33⅓% 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. Attorneys’ fees awards of 35% of the fund are within the expected range in the “market in legal services. *See Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that “[m]ost fee awards were between 25 percent and 35 percent”).⁷

⁷ Such a fee award mimics the market and “is supported by the fact that typical contingency fee agreements provide that class counsel will recover 33% if the case is resolved before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores LLC*, 2008 WL 8150856, at *16 n.59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees* (Fall 2003) 81 Wash U. L. Q. 653, 659 n. 11). Indeed, a fee award of 35% of the fund is consistent with “empirical studies [that] show that . . . fee awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

1 Second, the results delivered by Class Counsel also support the requested percentage of the fund.
2 Here, Plaintiff and his counsel secured a \$1,665,000.00 settlement and zero Class Members chose to
3 object. Only three Class Members chose to opt out—resulting in a 99.71% class participation rate.

4 Third, “the response of the class members to attorneys’ fee notice, though not decisive, is
5 relevant to the ... reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d 1261,
6 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s “approximation of the
7 market” for fees is well supported. *Id.* at 1269. Here, the Class Notice specifically notified the Class that
8 Class Counsel would be seeking \$555,000.00 in attorneys’ fees. Again, there were no objections.

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

11 No one expects a lawyer whose compensation is contingent upon his success to charge, when
12 successful, as little as he would charge a client who had agreed to pay for his services, regardless
13 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.

14 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of \$1,665,000.00 has been
15 created. For Class Counsel, the fees here were wholly contingent in nature and the case presented far
16 more risk than the usual contingent fee case. Among the risks was the cost inherent in class action
17 litigation, as well as a long battle with a corporate Defendant who had retained a premier and highly
18 experienced defense firm. For such reasons, Class Counsel’s request for attorneys’ fees in the amount of
19 \$555,000.00 is fair, reasonable, and adequate.

20 **D. The Court Should Approve the Request for Reimbursement of Costs.**

21 The request for reimbursement of costs, in the amount of \$15,698.35 is fair and reasonable. As
22 set forth in Plaintiff’s counsel’s declaration, the costs were all directly incurred in the prosecution of this
23 action. Lee Decl. ¶ 9, Ex. A (\$941.96); DJL Decl. ¶ 9, Ex. A (\$14,756.39). As such, this request should
24 be approved.

25 **E. The Administrator’s Fees and Costs Should Be Approved.**

26 Pursuant to the terms of the Agreement, the fees and costs of the Administrator, Phoenix
27 Administrators, are to be paid out of the class settlement funds. As shown in the Declaration of Taylor
28

Mitzner, the settlement administration fees expended in this matter amount to a total of \$14,500.00.
Admin Decl. ¶ 15, Ex. B. For such reasons, it is requested that the Administrator's fees be approved.

V. Notice to the LWDA Has Been Provided.

On June 8, 2023, Plaintiff uploaded the Order Granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement to the LWDA's website. Lee Decl. ¶ 10. Concurrent with the filing of this motion, Plaintiff also has uploaded the final approval motion to the LWDA. *Id.*

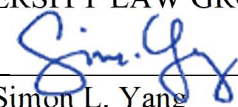
CONCLUSION

Plaintiff respectfully submits that the standards for final approval have been met and the terms of the Agreement are fair, adequate, and reasonable. Accordingly, Plaintiff respectfully requests that the Court enter an Order in the form proposed and submitted.

DATED: August 28, 2023

DIVERSITY LAW GROUP, P.C.

By: _____


Simon L. Yang

Attorneys for Plaintiff