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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO**

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

Plaintiff,

vs.

WHOLE FOODS MARKET CALIFORNIA,
INC., a California corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No. CGC-20-586827

[Hon. Ethan P. Schulman, Department 304]

**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 Tessa
Franke; [Proposed] Order]*

Date: February 9, 2023
Time: 11:00 a.m.
Department: 304

Complaint Filed: September 28, 2020

ELECTRONICALLY
FILED

*Superior Court of California,
County of San Francisco*

01/18/2023
Clerk of the Court
BY: SANDRA SCHIRO
Deputy Clerk

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

2 **PLEASE TAKE NOTICE** that on February 9, 2023, at 11:00 a.m., or as soon thereafter as the
3 matter may be heard in Department 1 of the above-entitled court located at 400 McAllister St. San
4 Francisco, California 94102, Plaintiff, Tessa Franke, will and hereby does move for an Order:

- 5 1. approving the Joint Stipulation of Class Action Settlement (the “Agreement”) attached as
6 Exhibit 1 to the concurrently filed Declaration of Simon L. Yang;
- 7 2. conditionally certifying the following Class for settlement purposes only: all current and
8 former non-exempt employees who worked for Defendant, Whole Foods Market California,
9 Inc., in the State of California and received shift differential wages at any time from April 6,
10 2019, through January 29, 2021 (the “Class Period”);
- 11 1. appointing Plaintiff as the Class Representative and Larry W. Lee and Simon L. Yang of
12 Diversity Law Group, P.C. and William L. Marder of Polaris Law Group as Class Counsel;
- 13 2. approving the Agreement on a preliminary basis and finding that it, the total Gross
14 Settlement Amount in the amount of \$1,200,000.00, the amounts requested for the
15 Administration Costs, Attorneys’ Fees and Costs Award, Class Representative Award,
16 LWDA Payment, and the allocation of payments to Class Members appear to be within the
17 range of reasonableness for a settlement that could ultimately be given final approval;
- 18 3. appointing Phoenix Settlement Administrators as the Administrator;
- 19 4. approving the distribution of the Notice of Class Action Settlement attached as Exhibit A to
20 the Agreement; and
- 21 5. scheduling a Final Approval Hearing.

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

27 The Motion is based on this notice, the memorandum of points and authorities, the Agreement
28 and proposed Notice of Class Action Settlement, the supporting Declarations of Larry W. Lee, Simon L.

1 Yang, William L. Marder, and Tessa Franke, all pleadings and papers on file herein, and any further oral
2 and documentary evidence as may be presented before or at the hearing of this matter.

3 DATED: January 18, 2023

DIVERSITY LAW GROUP, P.C.

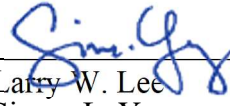
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5 By:  _____
6 Larry W. Lee
7 Simon L. Yang
8 Attorneys for Plaintiff
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SUMMARY OF MOTION

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”), Plaintiff, Tessa Franke, sues Defendant, Whole Foods Market California, Inc., for alleged failures to furnish lawful wage statements that accurately show the total hours worked to non-exempt employees who were paid shift differential wages. Defendant denies the allegations.

Based on their own independent investigations and evaluations, the Parties have agreed to a classwide resolution. The Joint Stipulation of Class Action Settlement (“Agreement”), which is attached as Exhibit 1 to the concurrently filed Declaration of Simon L. Yang, requires Defendant to pay at least \$1,200,000.00 for the classwide settlement of wage statement claims. Plaintiff and her counsel believe the settlement is an exceptional result for the Class. **Defendant will have to pay around \$24.83 for each of approximately 48,321 relevant wage statements from April 6, 2019, through January 29, 2021.** Significantly, the entire settlement amount is non-reversionary; none of the settlement amount will revert back to Defendant.

Although Plaintiff and her 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. The Parties and their counsel are of the opinion that the settlement on the terms set forth in the Agreement would be fair, reasonable, and adequate.

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 September 28, 2020, Plaintiff initiated this class and private attorney general action that seeks to remedy Defendant’s alleged failure to furnish lawful wage statements. Declaration of Simon L. Yang (“Yang Decl.”) ¶ 2. Upon the filing of the Action, Plaintiff and Defendant met and conferred about the alleged claims. *Id.* On or about November 16, 2020, Plaintiff served initial written discovery. *Id.* On or about November 20, 2020, Defendant served initial written discovery. *Id.* On December 22, 2020,

1 Plaintiff served responses to the discovery. *Id.* On January 11, 2021, Defendant served responses to the
2 discovery. *Id.*

3 Class Counsel continued investigating the alleged claims and also analyzed any defenses raised
4 by Defendant. Yang Decl. ¶ 3. The Parties supplemented formal discovery by continuing to exchange
5 information and documentation pursuant to informal methods to assist them in exploring the possibility
6 of a mediated resolution. *Id.* Defendant’s willingness to supplement formal discovery with informal
7 discovery enabled Plaintiff to evaluate the full scope of Defendant’s potential liability. *Id.* Ultimately,
8 the Parties agreed to schedule a mediation. *Id.*

9 On October 18, 2022, the Parties attended a mediation with Gig Kyriacou, an experienced
10 mediator knowledgeable of both the wage and hour laws and class and representative action claims at
11 issue in the Action. Yang Decl. ¶ 4. With the mediator’s assistance and based on a mediator’s proposal,
12 the Parties were able to negotiate the settlement terms in the Joint Stipulation of Class Action
13 Settlement. *Id.* Ex. 1 (the “Agreement”).

14 SUMMARY OF PROPOSED SETTLEMENT

15 I. Class Definition

16 The proposed settlement class of “Class Members” includes any current or former non-exempt
17 employee who worked for Defendant in the State of California and received shift differential wages at
18 any time during the Class Period. Agreement § 1.5. The Class Period is from April 6, 2019, through
19 January 29, 2021. *Id.* § 1.7. There are approximately 8,992 Class Members. *Id.* § 1.5.¹

20 II. Settlement Payments

21 The Agreement requires Defendant to pay a non-reversionary Gross Settlement Amount of
22 \$1,200,000.00. Agreement § 5.1. From the Gross Settlement Amount, the Parties will request that the
23 Court approve allocations for an LWDA Payment, Administration Costs, Attorneys’ Fees and Costs
24 Award, and Class Representative Award. *Id.* §§ 1.15, 1.16. Except for these allocations requiring Court
25 approval, the entirety of the remainder of the Gross Settlement Amount will be allocated to Class
26 Members. *Id.* ¶¶ 1.14, 1.15. It is expected that each Class Member, on average, will have received five

27
28 ¹ All Class Members are also Aggrieved Employees. Agreement § 1.5. The PAGA Period is the same as
the Class Period. *Id.* § 1.7.

relevant wage statements and would be allocated \$73.12 (*after* all requested payments from the Gross Settlement Amount). Yang Decl. ¶ 7.

III. Released Claims

Plaintiff is subject to a general release. Agreement § 6.3. Settlement Class Members release “any and all claims during the Class Period either asserted in the Action, arising from or related to the facts and claims alleged in the Action, or that could have been raised in the Actions based on the facts and claims alleged.” *Id.* § 6.1. The LWDA releases “any and all claims for civil penalties for violations of Labor Code sections 226(a) and 226.3 during the PAGA Period that were alleged in the Action or that reasonably could have been alleged based on the facts alleged in the Action.” *Id.* § 6.2.

LEGAL STANDARD

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

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

Manual for Complex Litigation (Third) § 30.41.

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

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

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

7 4 Newberg on Class Actions, at § 11.26. Indeed, “pre-certification settlements are routinely approved if
8 found to be fair and reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001);
9 accord *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (explaining that a settlement
10 before any “adversary certification” may still be approved if a court is satisfied that it is “fair, adequate
11 and reasonable”).

12 DISCUSSION

13 I. The Proposed Settlement Is Fair, Adequate, and Reasonable.

14 A. The Settlement Is Entitled to a Presumption of Fairness.

15 A trial court must determine and approve a class action settlement is fair to “prevent fraud,
16 collusion or unfairness to the class” through settlement and dismissal of the class action.” *Consumer*
17 *Advocacy Grp., Inc. v. Kintetsu Enters. of America*, 141 Cal. App. 4th 46, 60 (2006). Courts presume the
18 absence of fraud or collusion in the negotiation of settlement unless there is evidence to the contrary.
19 *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat’l*
20 *Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957,
21 962 (N.D. Ga. 1980). Indeed, a presumption of fairness exists where (i) the settlement is reached
22 through arm’s length bargaining; (ii) investigation is sufficient to allow counsel and the court to act
23 intelligently, (iii) counsel is experienced in similar litigation, and (iv) the percentage of objectors is
24 small. *Wershba*, 91 Cal. App. 4th at 245 (citing *Dunk*, 48 Cal. App. 4th at 1802).

25 While the recommendations of counsel proposing the settlement are not conclusive, the Court
26 can properly take them into account, particularly where counsel have conducted thorough investigation,
27 are experienced with this type of litigation, and agreed to a resolution through arm’s length negotiation.
28 See Newberg on Class Actions, *supra*, at § 11.47; *National Rural Telecomms. Coop.*, 221 F.R.D. at 528

1 (“So long as the integrity of the arm’s length negotiation process is preserved, however, a strong initial
2 presumption of fairness attaches to the proposed settlement ... and ‘great weight’ is accorded to the
3 recommendations of counsel, who are most closely acquainted with the facts of the underlying
4 litigation.”) (citations omitted). In such circumstances, courts do not substitute their judgment for that of
5 the proponents. *National Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal.
6 2004); *accord Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp.
7 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers*
8 *v. Abraham Lincoln Federal Sav. & Loan Ass’n*, 79 F.R.D. 571 (E.D. Pa. 1978).

9 Here, both Plaintiff’s counsel and Defendant’s counsel have a great deal of experience in wage
10 and hour class action litigation. Plaintiff’s counsel have extensive class action and litigation experience
11 and have been approved as class counsel in numerous wage and hour class actions. Declaration of Larry
12 W. Lee (“Lee Decl.”) ¶¶ 5-8; Yang Decl. ¶¶ 9-13; Declaration of William L. Marder (“Marder Decl.”)
13 ¶¶ 10-11. Each side has apprised the other of their respective factual contentions and legal theories, and
14 each side has considered the other’s contentions and theories. Defendant provided the relevant numbers
15 of individuals and wage statements, among other things—enabling Plaintiff to assess the full value of
16 Class Members’ claims and further enabling negotiations to take place between the Parties. Yang Decl. ¶
17 3. As further discussed below, the settlement is the result of extensive arm’s length negotiations between
18 the Parties and their counsel. *Id.*

19 **B. The Settlement Obtains an Excellent Result for Class Members.**

20 **1. The Settlement Amount Is Reasonable.**

21 The Agreement requires Defendant to pay at least \$1,200,000.00. Agreement § 5.1. This is an
22 excellent result for Class Members. This amounts to approximately 13.02% of Defendant’s potential
23 liability and is an excellent result for Class Members. Yang Decl. ¶ 5.

24 To wit, Plaintiff contended that class claims under Section 226(e) result in a \$50 penalty for the
25 first non-compliant wage statement to each Class Member and a \$100 penalty for each additional non-
26 compliant wage statement to the Class Member, up to a maximum of \$4,000 per class member. Lab.
27
28

1 Code § 226(e).² PAGA penalties under Section 2699(f) also result in up to \$100 per non-compliant wage
2 statement. Lab. Code § 2699(f).

3 Defendant contested the merits and denied it was liable at all. Yang Decl. ¶ 6. Moreover, even if
4 Plaintiff prevailed on the merits, Defendant contested the extent of liability. *Id.* For example, Defendant
5 contended that liability under Section 226(e) would be subject to additional defenses requiring proof of
6 injuries resulting from knowing and intentional violations. *Id.* Likewise, Defendant contended that
7 PAGA penalties in any event would be subject to discretionary reductions. *Id.*

8 While the Parties disagree on the application of the law to the facts, each Party recognized in
9 negotiations that, if taken to trial, the other Party would at least have reasonable arguments, such that the
10 Gross Settlement Amount to which the Parties ultimately agreed was reasonable. Yang Decl. ¶ 7.
11 Ultimately, Plaintiff argued that the potential total recovery amounted to \$9,214,600.00—which
12 included \$4,382,500.00 in penalties under Section 226(e)³ and \$4,382,100.00 in penalties under Section
13 2699(f).⁴ *Id.* Plaintiff contends that the Gross Settlement Amount of \$1,200,000.00—approximately
14 13.02% of the potential total recovery of \$9,214,600.00—is an excellent result. *Id.*

15 Numerous courts have held that gross settlement amounts of less than 20%—and as little as
16 8%—of a defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp. Secs.*
17 *Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement recovering 16% of
18 potential exposure was fair and reasonable; “It is well-settled law that a cash settlement amounting to
19 only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.
20 Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing
21 the litigation to judgment.”); *Bellinghausen v. Tractor Supply Co.*, 2015 WL 1289342, at *6 (N.D. Cal.
22 Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of the
23 defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, 2014 WL 2472316, at *3
24 (C.D. Cal. May 30, 2014) (acknowledging risks of continued litigation and granting preliminary
25 approval of wage and hour class action settlement obtaining 9.1% of projected damages); *Villegas v.*

26 ² Except as otherwise noted, all “Section” references are to the Labor Code.

27 ³ \$50.00 for each of 8,992 initial wage statement per Class Member and \$100 for each of 39,329
28 subsequent wage statements = \$4,382,500.00.

⁴ \$100.00 for each of 48,321 pay periods = \$4,832,100.00.

1 *J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class
2 action settlement of approximately 15% of the potential recovery was fair and reasonable).

3 Although Plaintiff and her counsel are confident that litigation of the claims would result in a
4 classwide judgment against Defendant, they recognize the inherent risks in litigation, including the
5 specific risks that class certification could be denied, liability could not be established at trial, or the
6 applicable law could change. Yang Decl. ¶ 8. The settlement for each participating Class Member is fair,
7 reasonable, and adequate, given the inherent risks of litigation, as well as the potential for appeals and
8 the costs of pursuing litigation. *Id.*

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

14 **2. The Settlement Releases Are Appropriate.**

15 As discussed above, only Plaintiff is subject to a general release. Agreement § 6.3. Settlement
16 Class Members are only subject to a release of claims that were asserted in the Action, arise from or
17 relate to the facts and claims alleged in the Action, or that could have been raised in the Actions based
18 on the facts and claims alleged. *Id.* § 6.1. Moreover, the settlement releases apply to claims arising
19 during the Class Period only. *Id.* Similarly tailored, the LWDA releases only claims for civil penalties
20 for violations of Labor Code sections 226(a) and 226.3 during the PAGA Period that were alleged in the
21 Action or that reasonably could have been alleged based on the facts alleged in the Action. *Id.* § 6.2.

22 The settlement releases are thus appropriate. *E.g.*, *Carter v. City of Los Angeles*, 224 Cal. App.
23 4th 808, 820 (2014) (“A general release—covering ‘all claims’ that were or could have been raised in
24 the suit—is common in class action settlements.”). In sum, because Plaintiff alleged targeted claims in
25 the Action, any settlement releases also are specifically tailored to the facts alleged.

26 **3. The Class Notice Is Adequate.**

27 A court has broad discretion in approving appropriate class notice. Code Civ. Proc. § 1781; *Cartt*
28 *v. Superior Court*, 50 Cal. App. 3d 960, 973-74 (1975). Here, the Agreement requires Defendant to

1 provide to the Administrator each Class Member’s last known address, among other information (the
2 “Class Data”), within 14 days of a Preliminary Approval Order. Agreement § 3.2. Within 28 days of a
3 Preliminary Approval Order, the Administrator would mail the Notice of Class Action Settlement
4 (“Class Notice”) to each Class Member to provide notice of settlement via First Class U.S. Mail, using
5 the last known address for each Class Member, based on Class Data. *Id.* §§ 3.3, 3.4. Any Class Notice
6 returned to the Administrator as undeliverable would be sent promptly via First Class U.S. Mail to the
7 forwarding address affixed thereto. *Id.* § 3.4. If no forwarding address is provided, the Administrator
8 would promptly attempt to determine the correct address using a single skip-trace search and then
9 promptly send a single re-mailing. *Id.*

10 The Class Notice accurately informs Class Members of the settlement and their rights.
11 Agreement Ex. A. For example, Class Members are informed of their rights to object or to opt out. The
12 Class Notice is adequate as it “present[s] a fair recital of the subject matter and proposed terms” of the
13 settlement. *E.g., Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980) (quoting *Marshall v.*
14 *Holiday Magic*, 550 F.2d 1173, 1177 (9th Cir. 1977)).

15 **C. The Requested Payments and Allocations Are Reasonable.**

16 The Agreement provides for a Gross Settlement Amount of \$1,200,000.00. Agreement ¶ 5.1.
17 From the Gross Settlement Amount, attorneys’ fees will be no more than 33⅓% of the Gross Settlement
18 Amount (or \$400,000.00) and litigation costs are not to exceed \$30,000. *Id.* ¶ 5.1.1; Yang Decl. ¶ 7. The
19 Class Representative Award will be no more than \$10,000.00. Agreement ¶ 5.1.2. Administration Costs
20 will be no more than \$10,000.00. *Id.* ¶ 5.1.3. The PAGA Penalty Fund will be \$80,000.00, and pursuant
21 to statute, 75% of the PAGA Penalty Fund (or \$60,000.00) would constitute the LWDA Payment, and
22 25% of the PAGA Penalty Fund shall be payable to Aggrieved Employees on a pro rata basis, based on
23 the number of relevant wage statements they received. *Id.* § 5.1.4.⁵

24 **1. Each Class Member, on Average, Would Receive Approximately \$13.60 per**
25 **Wage Statement.**

26 It is expected that, on average, each Class Member would be allocated approximately \$13.60 per
27 relevant wage statement (*after* all requested payments from the Gross Settlement Amount). Yang Decl. ¶

28 ⁵ Plaintiff files this motion with the Court and with the LWDA via online submission. Yang Decl. ¶ 14.

1 7. The amount paid on average to each Class Member may increase, depending on how many Class
2 Members opt out of the class action settlement. *Id.* The amount actually paid to any Class Member may
3 increase or decrease depending on his or her number of relevant wage statements during the Class
4 Period. *Id.* After deducting any approved payments for an Attorneys’ Fees and Costs Award, Class
5 Representative Award, Administration Costs, and PAGA Penalty Fund from the Gross Settlement
6 Amount, the entire remainder would be allocated among Settlement Class Members on a pro rata basis,
7 based on the number of relevant wage statements they received. Agreement § 5.2.

8 As Plaintiff’s lawsuit sought penalties only, 100% of Class Members’ Individual Settlement
9 Payments would be characterized as penalties. Agreement ¶ 5.5. None of the settlement funds will revert
10 to Defendant. *Id.* ¶ 5.1. The principal for any uncashed checks (upon the expiration date) would escheat
11 to the State Controller Unclaimed Property Fund in the name of the Class Member. *Id.* ¶ 5.4.

12 **2. The Requested Attorneys’ Fees and Costs Award Is Reasonable.**

13 California state and federal courts have recognized that an appropriate method for determining
14 award of attorneys’ fees is based on a percentage of the total value of settlement benefits to Class
15 Members. *E.g., Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Wershba*, 91 Cal. App. 4th at 254; *Boeing*
16 *Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th
17 Cir. 1997). The purpose of the equitable doctrine is to “spread litigation costs proportionally among all
18 the beneficiaries so that the active beneficiary does not bear the entire burden alone” so as to avoid
19 unjust enrichment. *Vincent*, 557 F. 2d at 769.

20 Under California law, the award of attorneys’ fees in common fund wage and hour class action
21 settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503
22 (2016) (“We join the overwhelming majority of federal and state courts in holding that when class action
23 litigation establishes a monetary fund for the benefit of the class members, and the trial court in its
24 equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a
25 reasonable fee by choosing an appropriate percentage of the fund created”). Under the percentage of the
26 fund method, a court’s objective remains to “mimic the market” in fixing a reasonable fee. *See Gaskill v.*
27 *Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (Posner, J.) (“When a fee is set by a court rather than by
28

1 contract, the object is to set it at a level that will approximate what the market will set The judge, in
2 other words, is trying to mimic the market in legal services.”).

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

14 Here, although the Agreement permits Plaintiff to seek an attorneys’ fee award of 35% of the
15 Gross Settlement Amount, Plaintiff will request an attorneys’ fees award of 33⅓% of the Gross
16 Settlement Amount. Agreement ¶ 5.1.1; Yang Decl. ¶ 7. Further, the Parties have agreed to
17 reimbursement of Class Counsel’s litigation costs. Class Counsel have incurred costs at their own risk,
18 for example, for filing the lawsuit, service of process, mediation fees, and payment of other litigation
19 related costs.

20 **3. The Proposed Class Representative Award Is Reasonable.**

21 Plaintiff and proposed Class Representative Tessa Franke requests a modest Class
22 Representative Award of \$10,000.00. The request is reasonable in light of the general release that the
23 Agreement requires of Plaintiff but not of any other Class Member. Independently, the request is
24 appropriate in recognition of Plaintiff’s efforts on behalf of the Class. Declaration of Tessa Franke
25 (“Franke Decl.”) ¶¶ 2-3.

26 As part of her duties as the Class Representative, Plaintiff provided all necessary information and
27 evidence that resulted in this settlement. Franke Decl. ¶¶ 2-3. Plaintiff met and conferred with Class
28 Counsel on a number of occasions to discuss the case. *Id.* ¶ 3. Plaintiff provided information and

documents to Class Counsel and made herself available to answer any questions during litigation. *Id.* Ultimately, Plaintiff's efforts secured an exceptional result for the Class.

In addition to the invaluable services that Plaintiff provided, she also took a significant risk, both professionally and monetarily. Franke Decl. ¶ 4. Because the alleged claims involve the payment of costs to the prevailing party, Plaintiff could have possibly faced paying Defendant's costs had Defendant prevailed in the action. Furthermore, Plaintiff risks prejudice in the future from other potential employers that may be less willing to hire an individual who has filed suit against a prior employer. Plaintiff took this risk upon herself and the whole class benefited. 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 potential prejudice in future employment.

4. The Administration Costs Are Reasonable.

Phoenix Settlement Administrators, a well-recognized class action settlement administrator, has quoted Administration Costs not to exceed \$42,500.00 to send notices and administer the settlement. The Administration Costs are reasonable and should be approved.

II. The Class Meets All Requirements for Certification.⁶

For purposes of settlement approval, a detailed analysis of the elements required for class certification is not required. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 620, 622-27 (1997). The trial court can appropriately utilize a lesser standard of scrutiny to determine the propriety of a settlement class as opposed to a litigation class. *Dunk*, 48 Cal. App. 4th at 1807 n.19; *see also Wershba*, 91 Cal. App. 4th at 240 (explaining there is no "ironclad requirement" to conduct an evidentiary hearing to satisfy the prerequisites for class certification). Because a settlement eliminates the need for a trial, when considering whether to certify a settlement class, the court is not faced with the case management issues present in certification of a litigation class. *Global Mins. & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003) ("[I]t is well established that trial courts should use different standards to

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

determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases.”) (citing *Dunk*, 48 Cal. App. 4th at 1807 n.19).

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

A. The Class Is Ascertainable and Sufficiently Numerous.

Class Members are identifiable from Defendant’s records. The class definition “is precise, objective and presently ascertainable.” *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (2010). Indeed, there are approximately 8,992 Class Members. Agreement § 1.5. Numerosity thus is sufficiently established. *E.g.*, *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (stating that “[n]o set number is required as a matter of law for the maintenance of a class action” and citing examples in which classes of 10—*Bowles v. Superior Court*, 44 Cal. 2d 574 (1955)—and of 28—*Hebbard v. Colgrove*, 28 Cal. App. 3d 1017 (1972)—were upheld).

B. The Class Establishes a Community of Interest.

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

1. Plaintiff’s Claims Are Typical of Those of the Class.

Plaintiff alleges that Defendant, as a matter of their corporate policy, practice, or procedure paid final wages late and furnished unlawful wage statements. With respect to typicality, Plaintiff—exactly like other members of the Class—was provided wage statements that fail to accurately itemize and show the total hours worked, based on Defendant’s common wage statement practices. Franke Decl. ¶ 2.

2. Plaintiff’s Claims Raise Common Questions of Law and Fact.

The typical claims raise questions of law and fact common to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate legal remedies within the class”). Commonality requires only that some common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation are identical. *See Richmond v. Dart Indus., Inc.*, 29 Cal. 3d

462, 473 (1981). Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer's conduct is uniformly directed at a class of employees, as it is here, the class wide impact of the Defendant's policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

3. Plaintiff and Her Counsel Adequately Represent the Class.

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

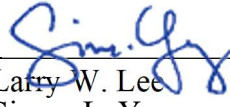
From the inception of the case, Class Counsel has zealously represented the interests of the Class. The settlement was obtained for the benefit of the Class, as opposed to the individual Class Representative. Class Counsel have been approved as class counsel in a number of prior cases, have litigated numerous other class action cases, and are competent to represent the Class. Lee Decl. ¶¶ 5-8; Yang Decl. ¶¶ 9-13; Marder Decl. ¶¶ 10-11.

CONCLUSION

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

1 DATED: January 18, 2023

DIVERSITY LAW GROUP, P.C.

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3 By: 
4 Larry W. Lee
5 Simon L. Yang
6 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 18
8 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250,
9 Los Angeles, California 90071.

10 On January 18, 2023, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
- 12 **2. DECLARATION OF SIMON L. YANG IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 13 **3. DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 14 **4. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 15 **5. DECLARATION OF TESSA FRANKE IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 16 **6. [PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY**
APPROVAL OF CLASS ACTION SETTLEMENT

17 on the interested parties in this action as follows:

18
19
20
21
22
23 Derek R. Havel
24 Matthew A. Tobias
25 David A. Alvarez
26 Brett Young
27 Ian Michalak
28 Sheppard, Mullin, Richter & Hampton LLP
333 S. Hope Street, 43rd Floor
Los Angeles, CA 90071

*Attorney for Defendant Whole Foods Market
California, Inc.*

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X BY ELECTRONIC SERVICE: Based on a court order I caused the above-entitled document(s) to be served through the File & ServeXpress E-Filing System at the website www.fileandservexpress.com, 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 January 18, 2023, at Los Angeles, California.


Erika Mejia