Larry W. Lee (State Bar No. 228175)
Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

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

Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHARLETTE VILLATORO, as an individual and on behalf of all others similarly situated,

Plaintiffs,

vs.

WALTERS & WOLF INTERIORS, a California corporation; WALTERS & WOLF CONSTRUCTION SPECIALTIES, INC., an Arizona corporation; WALTERS & WOLF GLASS COMPANY, a California corporation; WALTERS & WOLF PRECAST, a California corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 20-CV-00609-KAW

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

Date: August 5, 2021
Time: 1:30 P.M.
Courtroom: TBD
Judge: Hon. Kandis A. Westmore

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 5, 2021, at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom TBD of the United States District Court for the Northern District of California, Oakland Courthouse, located at 1301 Clay Street, Oakland, California 94612, before the Honorable Kandis A. Westmore, Plaintiff Sharlette Villatoro ("Plaintiff") will and hereby does move the Court for preliminary approval of the proposed class action settlement. Specifically, Plaintiff respectfully requests that the Court: (1) grant preliminary approval for the proposed class action settlement; (2) grant certification of the proposed Settlement Class, for settlement purposes only, including all employees of Defendants in the State of California who were paid wages at any time during the Class Period (November 22, 2018 through January 15, 2020); (3) authorize the mailing of the proposed notice to the class of the settlement; and (4) schedule a "fairness hearing," i.e., a hearing on the final approval of the settlement.

Plaintiff makes this unopposed motion on the grounds that the proposed settlement is within the range of possible final approval, and notice should, therefore, be provided to the class. This Motion is based upon this Notice of Motion and Motion for Preliminary Approval of Class Action Settlement, the attached Memorandum of Points and Authorities in Support, the Declarations of Larry W. Lee, Max W. Gavron, William L. Marder, and Sharlette Villatoro filed herewith, the Joint Stipulation of Class Action Settlement filed herewith, any oral argument of counsel, the complete files and records in the above-captioned matter, and such additional matters as the Court may consider.

DATED: June 14, 2021

DIVERSITY LAW GROUP, P.C.

By: * /s/ Max W. Gavron*

Larry W. Lee
Max W. Gavron
Attorneys for Plaintiff and the Class

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22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF AGREEMENT 8
- **A. Factual Allegations** 8
- **B. Procedural Background** 8
  - **1. Summary of the Litigation** 8
  - **2. Summary of Investigation and Discovery** 9
- **C. Summary of the Current Settlement** 9
- **D. The Settlement is Fair, Reasonable, and Adequate** 11

II. LEGAL ANALYSIS 12
- **A. The Class at Issue and the Settlement Fund** 12
- **B. Two-Step Approval Process** 12
- **C. The Standard for Preliminary Approval** 13
- **D. The Court Should Conditionally Certify the Settlement Class** 14
  - **1. Numerosity** 15
  - **2. Ascertainability** 15
  - **3. Typicality** 15
  - **4. Commonality** 16
  - **5. Adequacy** 16
  - **6. Common Questions of Law and Fact Predominate** 16
  - **7. Superiority of Class Action** 17
- **E. The Settlement is Fair and Reasonable and Not the Result of Fraud or Collusion** 17
  - **1. The Settlement May be Presumed Fair and Reasonable** 17
    - **a. Experience of Class Counsel** 18
    - **b. Investigation and Discovery Prior to Settlement** 19
  - **2. The Settlement is Fair, Reasonable, and Adequate** 19
    - **a. Risks of Proceeding with the Decertification Motion, Trial and Any Appeals** ... 20
    - **b. The Settlement is Within the Range of Reasonableness** 21

c. The Complexity, Expense, and Likely Duration of Continued Litigation Against the Settling Defendants Favors Approval 22
d. Non-Admission of Liability by Defendant 22
F. The Notice to be Given is the Best Practicable 23
G. Attorney's Fees and Costs 23
H. Claims Administrator 24
III. CONCLUSION 24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

State Cases

Arias v. Superior Court, 46 Cal.4th 969 (2009) 23

Carrington v. Starbucks Corp., 30 Cal. App. 5th 504 (2018) 20

Federal Cases

Alonzo v. Maximus, Inc., 275 F.R.D. 513, 521 (C.D. Cal. 2011) 16

Boyd v. Bechtel Corp., 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).. 20

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975).. 20, 22

Hammon v. Barry, 752 F. Supp. 1087, 1093-1094 (D.D.C. 1990).. 18

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) 16, 17

Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14 (9th Cir. 1964).................... 15

In re Bluetooth Headset Prod. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011) 18

In re Chicken Antitrust Litig., 560 F. Supp. 957, 962 (N.D. Ga. 1980)...................................... 17

In re Excess Value Ins. Coverage Litig., No. M-21-84 (RMB), 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004) 17

In re General Motors Corp., 55 F.3d 768, 806 (3d Cir. 1995)... 20

In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 359, 380 (N.D. Ohio 2001)................... 17

In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig., 122 F.R.D. 251, 256 (C.D. Cal. 1988).. 15

Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978) 16

Magadia v. Wal-Mart, 2018 WL 339139 (N.D. Cal. Jan. 9, 2018)... 16

Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co., 834 F.2d 677, 682 (7th Cir. 1987) 17

McKenzie v. Fed. Express Corp., 275 F.R.D. 290, 299 (C.D. Cal. 2011) 16, 20

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004).... 18, 22

Officers for Justice v. Civil Serv. Comm'n of City & County of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982).. 13, 14, 22

Ortega v. J.B. Hunt Transp., Inc., 258 F.R.D. 361, 374 (C.D. Cal. 2009) 16
Philadelphia Hous. Auth. v. Am. Radiator & Standard. Sanitary Corp., 323 F. Supp. 364, 372 (E.D. Pa. 1970).. 13
Priddy v. Edelman, 883 F.2d 438, 447 (6th Cir. 1989)... 17
Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n, 79 F.R.D. 571, 576 (E.D. Pa. 1978) 18
Stafford v. Brink's, Inc., C.D. Cal. Case No. CV-14-01352-MWF (PLAx)................................ 16
Steinberg v. Carey, 470 F. Supp. 471, 478 (S.D.N.Y. 1979).. 18
Util. Reform Project v. Bonneville Power Admin., 869 F.2d 437, 443 (9th Cir. 1989).......... 13, 14
Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) 22
Wilkerson v. Martin Marietta Corp., 171 F.R.D. 273, 284 (D. Colo. 1997) 14
Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983) 17
Young v. Katz, 447 F.2d 431, 433-34 (5th Cir. 1971)... 22

Statutes

Labor Code § 226.. 8
Labor Code § 2699(e)(2) 19
Labor Code § 2698.. 8
Labor Code § 226(a) 8

Other Authorities

4 Conte & Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2010) 13, 15
4 Newberg on Class Actions, at § 11.41 22
4 Newberg on Class Actions, at § 11.45 21
4 Newberg on Class Actions, at 11.47 18
5 James Wm. Moore et al., *Moore's Federal Practice* § 23.165 (3d ed. 2010) 13
Manual for Complex Litigation ("MCL") (4th ed. 2004), § 21.632................................ 13, 14, 20

Rules

Fed. R. Civ. P. 23(a) 12
Fed. R. Civ. P. 23(a)(1)... 15

Fed. R. Civ. P. 23(a)(2) 16
Fed. R. Civ. P. 23(a)(3) 15
Fed. R. Civ. P. 23(a)(4) 16
Fed. R. Civ. P. 23(b) 12
Fed. R. Civ. P. 23(b)(3) 16, 17, 23
Fed. R. Civ. P. 23(c)(2)(B) 23
Fed. R. Civ. P. 23(e)(B) 23

1
2
3
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF AGREEMENT

Plaintiff Sharlette Villatoro ("Plaintiff") respectfully requests that the Court grant preliminary approval of the Joint Stipulation of Class Action Settlement (hereinafter referred to as "Settlement Agreement") that she has reached in the above-captioned matter with Defendants Walters & Wolf Interiors, Walters & Wolf Construction Specialties, Inc., Walters & Wolf Glass Company, and Walters & Wolf Precast (collectively, "Defendants" or "Walters & Wolf") (Plaintiff and Defendant together referred to as the "Parties").

A. Factual Allegations

Plaintiff was hired by Defendants to work as a Project Administrative Assistant on or about October 10, 2016. (Declaration of Sharlette Villatoro ("Villatoro Decl.") ¶ 2.) Plaintiff worked as a non-exempt, hourly employee. (*Id.*)

Plaintiff alleges that, as with all other non-exempt employees of Defendants in the State of California, she did not receive accurate, itemized wage statements that identified all applicable rates of pay and payroll period start date in violation of Labor Code § 226. (*Id.* ¶ 3.)

Defendants contend that Plaintiff lacks standing to pursue class and representative action claims against Defendants. Defendants further contend that its wage statements comply with the requirements of Labor Code § 226 and that Plaintiff suffered no injury as a result of any alleged noncompliance.

B. Procedural Background

1. Summary of the Litigation

On December 16, 2019, Plaintiff filed a class action complaint against Defendants in the Alameda County Superior Court, on behalf of herself and a proposed class consisting of "all current and former employees of Defendants in the State of California who earned wages at any time between November 22, 2018, through the date of class certification," and alleging the following causes of action: (1) violation of California Labor Code § 226(a) for failure to provide accurate wage statements; and (2) violation of the Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq.*, based on the underlying Labor Code section 226(a) violation. On

January 27, 2020, Defendants filed a Notice of Removal of Civil Action to the United States District Court for the Northern District of California pursuant to the Class Action Fairness Act of 2005. (Dkt. No. 1.) Plaintiff subsequently filed a First Amended Complaint on February 21, 2020, adding claims regarding Defendants' alter ego and agency liability. (Dkt. No. 15.)

2. Summary of Investigation and Discovery

With respect to investigation and discovery, Plaintiff conducted extensive investigation of the facts surrounding the claims in this action before filing suit, as well as during the course of litigating and prosecuting this case. (Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 5-9.) The Parties served their Initial Disclosures and propounded and responded to written discovery, including interrogatories and requests for production of documents. (*Id.* ¶ 5.) Plaintiff investigated the relationship between the Defendant entities and participated in significant motion practice. (*Id.* ¶ 5.) In connection with mediation, Plaintiff also obtained and reviewed information regarding the number of employees in the putative class and the number of wage statements at issue. (*Id.* ¶ 5.)

C. Summary of the Current Settlement

On October 23, 2020, the Parties attended a mediation with respected mediator, Michael Loeb, Esq. While the matter did not immediately settle, the Parties continued to negotiate over the course of many months. (Lee Decl. ¶ 9.) As a result of the mediation and discussions thereafter, the Parties reached the current settlement, as detailed fully in the Settlement Agreement. (*Id.*, Ex. A.)

The Settlement Agreement provides for a total settlement sum of One Million Four Hundred Fifty Thousand Dollars ($1,450,000.00), inclusive of payments to Settlement Class Members, payment to the Labor & Workforce Development Agency ("LWDA") pursuant to the PAGA, attorneys' fees and costs, and claims administration costs. (Settlement Agreement ¶ 9.)

Pursuant to the terms of the Settlement Agreement, the Net Settlement Amount (after deduction of attorneys' fees in the amount of up to Four Hundred Eighty-Three Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($483,333.33), costs up to Twenty Thousand Dollars ($20,000.00), PAGA payment in the amount of Seventy-Five Thousand

1 Dollars ($75,000.00) to the LWDA, or 75% of $100,000.00, and costs of claims administration
2 in the amount of approximately Twelve Thousand Seven Hundred and Fifty Dollars
3 ($12,750.00)[1] is approximately $858,916.67 (Settlement Agreement ¶¶ 3, 5, 9, 15, 16; Lee Decl.
4 ¶ 11.) As provided in the Settlement Agreement, one hundred percent of the Net Settlement
5 Amount will be allocated as penalties and will not be subject to withholdings because of the
6 nature of the claims asserted. (Settlement Agreement ¶ 55.)

7 **Significantly, this settlement is non-reversionary and does <u>not</u> involved the use of**
8 **claim forms**. (Settlement Agreement ¶¶ 43, 52.) In other words, none of the unclaimed
9 settlement funds will revert to Defendants and a Settlement Class Member need not do anything
10 to receive his or her share. Instead, the Settlement Class Member will automatically receive his
11 or her share of the settlement funds so long as he or she does not opt-out from the settlement.
12 Moreover, the Net Settlement Amount available to Settlement Class Members will
13 proportionately increase as the result of any opt-outs. (Settlement Agreement ¶ 36.) Thus, each
14 Class Member's settlement amount could be further increased depending on the number of
15 exclusions submitted.

16 Moreover, any remaining funds thereafter shall be paid to the *cy pres* beneficiary of the
17 Settlement, Legal Aid at Work. (Settlement Agreement ¶ 52.) Legal Aid at Work is a non-profit
18 organization that provides legal services to low-income individuals for issues related to
19 employment, including any wage and hour issues, like those presented in this case. (Lee Decl. ¶
20 13.) The Parties and their respective counsel do not have any relationship with Legal Aid at
21 Work. (*Id.*; Declaration of Max W. Gavron ("Gavron Decl.") ¶ 11; Declaration of William L.
22 Marder ("Marder Decl.") ¶ 13.)

23 The Class consists of all employees of Defendants in the State of California who were
24 paid wages at any time during the Class Period. (Settlement Agreement ¶ 7.) The Class Period is
25 defined as November 22, 2018 through January 15, 2020. (*Id.* ¶ 8.) The identities of Class
26

27 [1] At the time the Parties drafted the Settlement Agreement, they reserved $15,000 for anticipated
28 settlement administration. However, upon receiving multiple bids, Plaintiff's counsel was able to secure a lower estimate of $12,750.00.

1 Members can be ascertained from Defendants' payroll records. Based upon Defendants' records,
2 the estimated number of unique Class Members is approximately 1,424. (*Id.* ¶¶ 7, 35.) As
3 discussed above, Class Members have the right to opt-out and exclude themselves from the
4 settlement.

5 Through the mediation process, Plaintiff learned that Defendant modified its practices
6 with respect to the information provided on its wage statements, which resulted in the Parties
7 agreeing to a class period that is limited to the period for which Plaintiff alleged there was
8 liability.

9 **D. The Settlement is Fair, Reasonable, and Adequate**

10 Based on their own respective independent investigations and evaluations, the Parties and
11 their respective counsel are of the opinion that settlement for the consideration and on the terms
12 set forth in their Settlement Agreement is fair, reasonable, and adequate and is in the best
13 interests of the class and the Defendants in light of all known facts and circumstances and the
14 expenses and risks inherent in litigation. (Lee Decl. ¶ 15; Gavron Decl. ¶ 9; Marder Decl. ¶ 11.)

15 Defendants deny any liability or wrongdoing of any kind associated with the claims
16 alleged by Plaintiff. (Settlement Agreement ¶ 78.) Defendants deny certification of the Class for
17 any purpose other than that of settling this lawsuit. (*Id.*) If the case continued and proceeded to
18 trial, Defendants would also assert that Plaintiff would not be able to prevail on her claims.
19 Defendants also deny that Plaintiff could certify a class as to all defendant entities because, they
20 contend, only one entity employed her.

21 Based on the approximately 1,424 Class Members, each Participating Class Member will
22 receive a raw average of approximately $603.17, after deduction for attorneys' fees, payment to
23 the LWDA, claims administration costs, and litigation costs. (Lee Decl. ¶ 12.) Each individual
24 Participating Class Member's settlement amount may be more or less than this raw average,
25 depending on the number of wage statements each Participating Class Member received during
26 the Class Period. (*Id.*; Settlement Agreement ¶ 36.) In order to calculate each Participating Class
27 Member's pro-rata share, the Claims Administrator will first divide the Net Settlement Amount
28 by the total number of wage statements issued to all Participating Class Members. The resulting

amount will then be divided proportionally among Participating Class Members based upon the number of wage statements each individual Participating Class Member received. (Settlement ¶ 36.)

II. LEGAL ANALYSIS

A. The Class at Issue and the Settlement Fund

Defendants have agreed to collect information regarding the identity of the members of the Class and the number of wage statements issued during the Class Period. (Settlement Agreement ¶¶ 6, 40.) The Parties have further agreed and stipulated that the Class be certified on a provisional, non-mandatory basis for the purposes of this settlement only. (Settlement Agreement ¶ 77.) As set forth in the Settlement Agreement, the Class includes all employees of Defendants in the State of California who were paid wages at any time during the Class Period (November 22, 2018 through January 15, 2020). (Settlement Agreement ¶¶ 7, 8.) Again, the Parties have agreed that the settlement is non-reversionary and will proceed without the use of claim forms. (*Id.* ¶¶ 43, 52.)

B. Two-Step Approval Process

Any settlement of class litigation must be reviewed and approved by the Court. This is done in two steps: (1) an early (preliminary) review by the court, and (2) a final review and approval by the court after notice has been distributed to the class members for their comment or objections. The *Manual for Complex Litigation, Fourth* states:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b). If there is a need for subclasses, the judge must define them and appoint counsel to represent them. The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Manual for Complex Litigation ("*MCL*") § 21.632 (Fed. Jud. Ctr., 4th ed. 2004).

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments:

> The 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.

Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed. 2010). Accordingly, a court should grant preliminary approval of a class action settlement where it is within the "range of reasonableness." Here, the Parties have reached such an agreement that is fair, reasonable, and adequate, and have submitted it to the Court in connection with this filing.

C. The Standard for Preliminary Approval

As a matter of public policy, settlement is a strongly favored method for resolving disputes. *Util. Reform Project v. Bonneville Power Admin*., 869 F.2d 437, 443 (9th Cir. 1989). This is especially true in complex class actions such as this case. *Officers for Justice v. Civil Serv. Comm'n of City & County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Preliminary approval does not require the Court to make a final determination that the settlement is fair, reasonable, and adequate. Rather, that decision is made only at the final approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to voice their views of the settlement or to exclude themselves from the settlement. 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.165 (3d ed. 2010). In considering the settlement, the Court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute and need not engage in a trial on the merits. *Officers for Justice*, 688 F.2d at 625. Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement...may be submitted to members of the prospective class for their acceptance or rejection." *Philadelphia Hous. Auth. v. Am. Radiator & Standard. Sanitary Corp*., 323 F. Supp. 364, 372 (E.D. Pa. 1970).

"The judge should raise questions at the preliminary hearing and perhaps seek an independent review if there are reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys." *MCL* § 21.633. Here, the proposed settlement does not pose such issues. This was a highly contentious litigation with the Parties each being represented by highly competent counsel. As discussed above and in the declarations submitted herewith, the Parties engaged in substantial motion practice, including a motion to dismiss and petition to compel arbitration (*see, e.g.,* Dkt. Nos. 11, 14, 19), and conducted thorough investigations related to the claims and defenses alleged in this case. Further, the proposed settlement was reached after the Parties utilized the assistance of an experienced mediator and after substantial arm's-length negotiations between the Parties.

As detailed herein, the proposed settlement satisfies the standard for preliminary approval as it is well within the range of possible approval and there are no grounds to doubt its fairness. The Parties' attorneys have extensive experience in employment law, particularly wage and hour litigation, and reached settlement only after mediation and extensive arm's-length negotiations subsequent to the mediation.

D. The Court Should Conditionally Certify the Settlement Class

The Parties also may, at the preliminary approval stage, request that the court provisionally approve certification of the class—conditional upon final approval of the settlement. Settlements are highly favored, particularly in class actions. *Util. Reform Project v. Bonneville Power Admin*., 869 F.2d 437, 443 (9th Cir. 1989); *Officers for Justice*, 688 F.2d at 625; *Wilkerson v. Martin Marietta Corp*., 171 F.R.D. 273, 284 (D. Colo. 1997). Plaintiff requests such provisional approval at the preliminary approval hearing:

> The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal…may be set out in conditional orders granting tentative approval 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.

1 *4 Newberg on Class Actions* § 11.26.

2 Pursuant to the Settlement Agreement, the Class is defined as

3 All employees of Defendant in the State of California who were paid wages at any time during the Class Period.

4 (Settlement Agreement ¶ 7.)

5 The proposed class meets all the requirements for class certification as follows:

6 **1. Numerosity**

7 The numerosity requirement is satisfied if the proposed class is "so numerous that joinder
8 of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Impracticable does not mean
9 impossible, only that it would be difficult or inconvenient to join all members of the class. *Harris*
10 *v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). The Parties estimate
11 that as of the date of Preliminary Approval the Class will consist of approximately 1,424
12 individuals. (Lee Decl. ¶ 10.) Accordingly, here the Class is numerous and clearly satisfies the
13 numerosity prong.

14 **2. Ascertainability**

15 As stated, above, Defendants have already ascertained the Class Members through
16 Defendants' payroll records. (Lee Decl. ¶ 10.)

17 **3. Typicality**

18 Typicality under Rule 23(a)(3) is satisfied if the representative plaintiff's claims share a
19 common element with the class: i.e., those claims arise from the same course of conduct that
20 gave rise to the claims of other settlement class members. *In re United Energy Corp. Solar*
21 *Power Modules Tax Shelter Invs. Sec. Litig.*, 122 F.R.D. 251, 256 (C.D. Cal. 1988).

22 Here, Plaintiff submits that her claims are typical of those of other Class Members
23 because she alleges that she suffered injury from the same specific actions that she alleges
24 harmed other members of the Class. Specifically, Plaintiff alleges that whenever she received
25 wage statements, the wage statements only identified the number of hours worked and gross
26 wages earned, rather than the applicable rates of pay and payroll period start state. (Declaration
27 of Sharlette Villatoro ("Villatoro Decl.") ¶ 3.) Plaintiff's claims are typical of the Class as a
28 whole because they arise from the same factual basis and are based on the same legal theory as

1 those applicable to the Class Members. (*Id.*)

2 **4. Commonality**

3 Commonality relates to whether there are "questions of law or fact common to the class."
4 Fed. R. Civ. P. 23(a)(2). Commonality is satisfied if there is one issue common to class
5 members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Here, Plaintiff
6 contends the common issues include, among other things, whether Defendants failed to provide
7 accurate itemized wage statements. (Villatoro Decl. ¶ 3.) Many courts have certified Labor Code
8 Section 226(a) class actions, including in *Stafford v. Brink's, Inc.*, C.D. Cal. Case No. CV-14-
9 01352-MWF (PLAx) and *Magadia v. Wal-Mart*, 2018 WL 339139 (N.D. Cal. Jan. 9, 2018). *See*
10 *also McKenzie v. Fed. Express Corp.*, 275 F.R.D. 290, 299 (C.D. Cal. 2011); *see also Ortega v.*
11 *J.B. Hunt Transp., Inc.*, 258 F.R.D. 361, 374 (C.D. Cal. 2009); *Alonzo v. Maximus, Inc.*, 275
12 F.R.D. 513, 521 (C.D. Cal. 2011).

13 **5. Adequacy**

14 Adequacy under Rule 23(a)(4) is satisfied if the named plaintiffs have no disabling
15 conflicts of interest with other members of the class and Class Counsel are competent and well
16 qualified to undertake the litigation. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512
17 (9th Cir. 1978).

18 Plaintiff submits that no conflict exists between Plaintiff and the Class because Plaintiff
19 allegedly suffered the same alleged violations as all Class Members and has the incentive to
20 fairly represent all Class Members' claims. (Villatoro Decl. ¶ 6.) Despite the settlement, Plaintiff
21 remains willing to vigorously prosecute this action to the benefit of the Class.

22 Furthermore, Plaintiff is represented by attorneys who have extensive experience in
23 complex wage and hour litigation as is detailed in each of their declarations supported herewith.
24 (Lee Decl. ¶¶ 18-23; Gavron Decl. ¶¶ 2-8; Marder Decl. ¶¶ 3-10.)

25 **6. Common Questions of Law and Fact Predominate**

26 Plaintiff contends that common questions of law or fact predominate over individual
27 questions pursuant to Rule 23(b)(3). These issues of fact and law raised in this action are
28 common to all members of the class and predominate in this case. Here, Plaintiff contends that

Defendants failed to provide employees with accurate itemized wage statements. As set forth above, courts have granted certification of such claims. Based on discovery, Plaintiff believes and asserts that Defendants committed these violations as to Plaintiff in the same manner as to all Class Members. (Lee Decl. ¶ 4.)

7. Superiority of Class Action

Plaintiff submits that the requirement that a class action is superior to other methods of adjudication under Rule 23(b)(3) is also met. Courts have recognized that the class action device is superior to other available methods for the fair and efficient adjudication of controversies involving large number of employees in wage and hour disputes. *See*, e.g. *Hanlon*, 150 F.3d at 1022. Without class-wide relief in this action, the Class Members would be forced to litigate numerous cases on a piecemeal basis.

E. The Settlement is Fair and Reasonable and Not the Result of Fraud or Collusion

1. The Settlement May be Presumed Fair and Reasonable

There is a presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *In re Excess Value Ins. Coverage Litig*., No. M-21-84 (RMB), 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004) ("Where 'the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness'") (Citations omitted); *In re Inter-Op Hip Prosthesis Liab. Litig*., 204 F.R.D. 359, 380 (N.D. Ohio 2001) ("When a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair").

Additionally, Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *See Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co*., 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F.Supp. 957, 962 (N.D. Ga. 1980). Courts

1 do not substitute their judgment for that of the proponents, particularly where, as here, settlement
2 has been reached with the participation of experienced counsel familiar with the litigation. *Nat'l*
3 *Rural Telecomms. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v.*
4 *Barry*, 752 F.Supp. 1087, 1093-1094 (D.D.C. 1990); *Steinberg v. Carey*, 470 F.Supp. 471, 478
5 (S.D.N.Y. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571, 576
6 (E.D. Pa. 1978).

7 While the recommendations of counsel proposing the settlement are not conclusive, the
8 Court can properly take them into account, particularly where, as here, they have already
9 obtained class certification, been involved in extensive litigation, extensive informal
10 investigation and formal written discovery, depositions, and expert discovery, appear to be
11 competent, and have experience with this type of litigation. *Newberg on Class Actions* § 11.47;
12 *Nat'l Rural Telecomms. Coop*., 221 F.R.D. at 528 ("So long as the integrity of the arm's length
13 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the
14 proposed settlement…and 'great weight' is accorded to the recommendations of counsel, who
15 are most closely acquainted with the facts of the underlying litigation") (citations omitted); *In re*
16 *Bluetooth Headset Prod. Liab. Litig*., 654 F.3d 935, 946 (9th Cir. 2011) ("Prior to formal class
17 certification, there is an even greater potential for a breach of fiduciary duty owed the class
18 during settlement"; pre-certification class action settlements should be scrutinized for "clear
19 sailing" provisions "providing for the payment of attorneys' fees separate and apart from class
20 funds, which carries 'the potential of enabling a defendant to pay class counsel **excessive fees**
21 and costs in exchange for counsel accepting an unfair settlement on behalf of the class'")
22 (emphasis added). Here, this settlement was reached only after extensive litigation and
23 investigation. Thus, Plaintiff's counsel zealously litigated this case on behalf of the Class.

24 **a. Experience of Class Counsel**

25 Here, counsel for Parties have a great deal of experience in wage and hour class action
26 litigation. Plaintiff's counsel has been approved as class counsel in a number of other wage/hour
27 class actions. (Lee Decl. ¶¶ 18-23; Gavron Decl. ¶ 2-8; Marder Decl. ¶ 3-10.) Moreover,
28 Plaintiff's counsel conducted an extensive investigation and discovery of the factual allegations

involved in this case prior to filing suit and throughout the course of litigation. Thus, based upon such experience and knowledge of the current case, Plaintiff's counsel believe that the current settlement is fair, reasonable, and adequate. (Lee Decl. ¶ 15; Gavron Decl. ¶ 9; Marder Decl. ¶ 11.) Pursuant to the Northern District Procedural Guidelines for Class Settlements, information regarding Plaintiff's counsel's past comparable class settlement is detailed in their declarations. (*See* Lee Decl. ¶ 23.)

b. Investigation and Discovery Prior to Settlement

Class Counsel conducted significant investigation and discovery including, among other things: (a) exchanging initial disclosures; (b) inspection and analysis of wage statements and information produced by Defendants throughout the course of litigation and in connection with mediation; and (c) conducting an exposure analysis. (*Id.*)

2. The Settlement is Fair, Reasonable, and Adequate

The settlement for each participating Class Member is fair, reasonable, and adequate, given the inherent risk of going forward with trial, the risk of appeals, the risks in an area where it is argued that the law is unsettled, and the costs of pursuing such litigation.

Here, Defendants represented that there were 58,982 wage statements reflecting payment of wages issued to 1,424 Class Members during the Class Period. (Lee Decl. ¶ 6; Settlement Agreement ¶ 35.)

In the present case, the gross settlement of $1,450,000.00 is for approximately 58,982 wage statements. This amounts to approximately $24.58 per wage statement at issue. To put this figure in perspective, the penalty for violation of Labor Code § 226(a) is $50 for the first violation and $100 for each subsequent violation, meaning that total potential damages for violation of § 226(a) amount to $5,827,000.00 (($50 x 1,424) + ($100 x 57,558)). Thus, this settlement is for slightly more than 24% of the total value of the § 226 penalties at issue.

Plaintiff also alleged a claim for violation of PAGA; however, those penalties are entirely at the discretion of the Court. *See* Cal. Labor Code § 2699(e). Pursuant to Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust,

arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. 30 Cal.App.5th 504 (2018). Upon review, the Court of Appeal found such reduction to be proper. *Id*. at 539.

An "apples to apples" comparison with a similar case also shows that the Settlement is reasonable. The settlement in *McKenzie v. Federal Express Corp.*, 2012 US Dist Lexis 103666 (C.D. Cal. July 2, 2012), which involved a gross settlement amount of $8,250,000 for 484,928 wage statements, amounted to approximately $17.00 per wage statement. Not only did the *McKenzie* case involve the same exact types of violations as alleged in the current case, the District Court found that the *McKenzie* settlement to be fair, reasonable, and adequate. *Id*. at *6. The instant settlement is more than the amount of the *McKenzie* settlement on a per wage statement basis. This is further evidence that the current settlement is fair, reasonable, and adequate.

a. Risks of Proceeding with the Decertification Motion, Trial and Any Appeals

To assess the fairness, adequacy and reasonableness of a class action settlement, the Court must weigh the immediacy and certainty of substantial settlement proceeds against the risks inherent in continued litigation. *In re General Motors Corp*., 55 F.3d 768, 806 (3d Cir. 1995) ("present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement"); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 616-17 (N.D. Cal. 1979); MCL § 21.62 at 316.

Here, the settlement affords fair relief to the Class, while avoiding significant legal and factual battles, especially at trial, that otherwise may have prevented the Class from obtaining any recovery at all. Although Plaintiff's attorneys believe the claims are meritorious, they are experienced and realistic, and understand that the outcome of a trial, and the outcome of any appeals that would inevitably follow if the class prevailed at trial, are inherently uncertain in

terms of both outcome and duration. Defendants also argued that Plaintiff could not represent a class of individuals for all of the employees of Defendants because they contend she was only employed by one of the entities at issue. *See* Dkt. Nos. 11, 19.

In light of the risks and uncertainties in connection with proceeding with trial, Plaintiff asserts that this settlement is fair, adequate and reasonable.

b. The Settlement is Within the Range of Reasonableness

The standard of review for class settlements is whether the settlement is within a range of reasonableness. As Professor Newberg comments:

> Recognizing that there may always be a difference of opinion as to the appropriate value of settlement, the courts have refused to substitute their judgment for that of the proponents. Instead the courts have reviewed settlements with the intent of determining whether they are within a range of reasonableness.…

4 Newberg on Class Actions § 11.45.

Here, the settlement fund is non-reversionary, such that one hundred percent of the Net Settlement Amount will be available for distribution to Class Members who do not opt-out. Moreover, the settlement does not require claim forms. Rather, Class Members who do not opt-out will automatically receive a check. Assuming that every Class Member elects to participate in the settlement, each Participating Class Member will receive his or her pro rata share, with each person receiving on average an approximate amount of $603.17. (Lee Decl. ¶ 12.) Further, the settlement fund will be paid out entirely in cash (as opposed to a voucher, coupon, etc.).

In addition, as set forth in the Settlement Agreement, the release for Participating Class Members is narrowly tailored to the claims alleged in the operative complaint:

> "Released Claims" means any and all claims, rights, demands, liabilities, and causes of action, whether known or unknown, arising from, or related to, the same set of operative facts as those set forth in the operative Complaint, including claims based on the following categories of allegations: All claims for violation of Labor Code § 226, and all applicable IWC Wage Orders for failure to provide proper wage statements, as well as any and all claims for penalties under the California Private Attorneys' General Act predicated on violations of Labor Code § 226, that accrued during the Class Period.

(Settlement Agreement ¶ 23.) The Released Claims Period means "the period from November

22, 2018 through January 15, 2020." (*Id.* ¶ 24.)

For these reasons, and for the reasons set forth above relating to the total liability and the risks of prevailing on the theories of liability alleged, Plaintiff believes that the current Settlement is fair, reasonable, and adequate.

c. The Complexity, Expense, and Likely Duration of Continued Litigation Against the Settling Defendants Favors Approval

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

The Settlement Agreement provides to all Class Members fair relief in a prompt and efficient manner. Were the Parties to engage in continued litigation of this matter, including a motion for class certification and/or decertification, summary judgment, and trial proceedings, Plaintiff may risk losing based on the reasons explained above. Moreover, following a decision at trial, there is also the possibility of appeal. Given the realities of litigation, this process places ultimate relief several years away. The idea of balancing a fair recovery now, with settlement dollars being paid out now, as opposed to battling at trial and a lengthy appeal process, is a significant factor to be considered. *DIRECTV*, 221 F.R.D. at 526-27 ("Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation").

The settlement in this case is therefore consistent with the "overriding public interest in settling and quieting litigation" that is "particularly true in class action suits." *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *4 Newberg on Class Actions* § 11.41.

d. Non-Admission of Liability by Defendant

Finally, Defendants deny any liability or wrongdoing of any kind associated with the claims alleged in this lawsuit. Defendants further denies that, apart from settlement, certification

is appropriate for Plaintiff's claims. Defendants maintain that they have complied at all times with California wage and hour laws. Because of such denial, if this case is not resolved, there is a high likelihood that the case will continue even after trial and into the process of appeal.

F. The Notice to be Given is the Best Practicable

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal or compromise." Fed. R. Civ. P. 23(e)(B).

Here, the terms of the Settlement Agreement provide for a notice distribution plan that is designed to achieve the best notice that is practicable under the circumstances. The Claims Administrator is to mail via first-class U.S. mail a copy of the Court-approved Notice of Class Action Settlement ("Notice Packet") to all Class Members, using their most up-to-date address available. (Settlement Agreement ¶ 41.) The Claims Administrator will use a single skip-trace, computer or other search using the name, address and/or Social Security Number of the individual involved for undeliverable Class Notices. (*Id.* ¶ 42.) The Class Notice provides Class Members with the information needed to make an informed decision, including: a brief summary of the proposed settlement and information about the lawsuit; a summary of the allocations under the Settlement and the amount that the Settlement Class Member is estimated to receive; the Settlement Class Member's rights and claims that are included in the release; the Settlement Class Member's options including procedures on how to object and opt-out of the settlement; Class Counsel's contact information for any questions; information regarding the final approval hearing and how to appear; procedures on how to obtain more information or access Pacer and/or court records; and contact information of the Claims Administrator. It also explains that those who do not opt out will be bound by the settlement. (Settlement Agreement ¶ 43; *Arias v. Superior Court*, 46 Cal.4th 969 (2009).)

G. Attorney's Fees and Costs

Pursuant to the terms of the Settlement Agreement, and without opposition from

Defendant, Class Counsel will seek an award of attorneys' fees of not more than 1/3 of the Class Settlement Amount ($1,450,000.00). (Settlement Agreement ¶ 29.) To date, Class Counsel estimate that they have collectively incurred approximately 550 hours in the prosecution of this matter, with an average hourly rate of approximately $683.33 per hour. (Lee Decl. ¶ 24.)

Finally, Plaintiff and Class Counsel will seek the reimbursement of costs, which mainly includes filing fees, mediation costs, and other litigation-related expenses. To date, such costs are approximately $10,280.18. (Lee Decl. ¶ 25.) Both the requested attorneys' fees and costs will be requested simultaneously with Plaintiff's motion seeking final approval of this class action settlement.

H. Claims Administrator

The Parties have selected Phoenix Settlement Administrators as the Claims Administrator. (Settlement Agreement ¶ 2; Lee Decl. ¶ 16.) Pursuant to the Northern District Procedural Guidelines for Class Settlements, the selection process of the Claims Administrator is as follows: Plaintiff's counsel obtained quotes from Phoenix Settlement Administrators and Simpluris. (Lee Decl. ¶ 16.) Given that Phoenix provided the lowest quote, the Parties subsequently agreed to use Phoenix. (*Id.*) Further, notice by U.S. mail along with the National Change of Address search and skip trace for undeliverable mail has been approved by numerous courts and, therefore, the Parties agreed to notice by U.S. mail. (*Id.*) Additionally, a list of cases in which Phoenix Settlement Administrators was appointed as the claims administrator in cases involving Plaintiff's counsel over the last two years is set forth in Mr. Lee's declaration. (*Id.)*

Moreover, the anticipated costs for the claims administration are $12,750.00. (Settlement Agreement ¶ 34; Lee Decl. ¶ 16.) Plaintiff and her counsel believe that this amount is reasonable in relation to the value of the settlement, as the administration costs account for less than 1.0% of the Class Settlement Amount. (Lee Decl. ¶ 16.) The administration costs will be deducted from the Class Settlement Amount.

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court (1) grant preliminary approval for the proposed class action settlement; (2) authorize the mailing of the proposed

notice to the Settlement Class of the settlement; and (3) schedule a "fairness hearing," i.e. a hearing on the final approval of the settlement.

DATED: June 14, 2021

DIVERSITY LAW GROUP, P.C.

By: */s/ Max W. Gavron*
Larry W. Lee
Max W. Gavron
Attorneys for Plaintiff and the Class