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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - SPRING STREET COURTHOUSE

TAMARA WHITMER, in a Representative
capacity, and on behalf of the proposed class

CASE NO. 20CHCV00209

Plaintiff,

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
FINAL APPROVAL OF (1) CLASS
ACTION SETTLEMENT; (2)
ATTORNEYS' FEES AND COSTS; and (3)
CLASS REPRESENTATIVE AWARD**

v.

USP MISSION HILLS, INC., a California
Corporation, and DOES 1-10, inclusive

Defendants

Date: March 23, 2023

Time: 10:00 a.m.

Dept.: 11

Judge: Hon. David S. Cunningham

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1 **I. SUMMARY OF REQUEST**

2 This motion seeks final approval of a “Wage and Hour” class action and PAGA settlement.
3 Plaintiff TAMARA WHITMER (“Plaintiff” or “Whitmer”) has sued on behalf of a class of nonexempt
4 employees who worked for Defendant USP MISSION HILLS, INC. (“Defendant” or “USP”) during
5 the operative class period, set forth herein.

6 Following several months of pre-filing investigation and almost two years of litigation, and
7 lengthy class mediation and follow up settlement discussions, the parties agreed to the terms of a
8 proposed class action settlement. Preliminary Approval of the proposed class action settlement was
9 granted by this Court on November 28, 2022.

10 Following the distribution of the approved Notice to the class, the proposed final settlement
11 figures are as follows:

- | | | |
|----|-----------------------------------|--|
| 12 | • Final size of potential class: | 224 Participating Class Members |
| 13 | • Objections to Settlement: | Zero (0) |
| 14 | • Opt-Outs: | Zero (0) |
| 15 | • Settlement Fund (“GSA”): | \$375,000.00 |
| 16 | • Settlement Administration: | \$6,750.00 |
| 17 | • Costs/expenses of litigation: | \$10,358.90 |
| 18 | • PAGA Penalties | \$60,000.00 [75% (\$45,000.00) to the State of |
| 19 | | California and 25% (\$15,000.00) to PAGA members] |
| 20 | • Attorney’s fees: | \$125,000.00 (1/3 OF TOTAL)) |
| 21 | • Class representative incentive: | \$5,000.00 |

22 **Please Note:** there have been **no (zero) objections** to this proposed settlement. The estimated
23 *average* payment (before taxes) to each participating Class Member based on the above figures is
24 **\$749.51**. There is an additional average payment of **\$86.71** to each Class Member who worked during
25 the PAGA Period. These averages do not account for the fact that certain Class Members will receive
26 more or less than an “average” share, depending on the length of time each worked for Defendant.
27 (Please see the declaration of Settlement Administrator Taylor Mitzner at ¶¶ 14-15.)
28

II. PROCEDURAL HISTORY

The settlement agreement was reached after protracted exchange of information and both formal and informal discovery, a full day of mediation with an experienced wage and hour class action mediator, Louis Marlin, Esq., and numerous follow up discussions between the parties to negotiate the final settlement terms.

Should the Court deem it relevant, a much more detailed procedural history of the case, and summary of all claims, was already set forth in Plaintiff's Motion for Preliminary Approval filed on May 31, 2022, and in supplemental briefing filed on September 15, 2022. Preliminary Approval of the proposed class action settlement was granted by this Court on November 28, 2022.

The parties "Joint Stipulation Re: Class Action Settlement" contains the terms of the class action settlement (herein referred to in this motion as "the Agreement") and was filed with the Court on September 15, 2022.) For ease of reference, the Agreement is attached again to the declaration of counsel as **Exhibit 1**. (Yaeckel decl. ¶ 4.)

III. SETTLEMENT TERMS

The Agreement includes the following key terms:

1. Contingent Nature of the Settlement

The parties entered into the Agreement exclusively for the purpose of resolving this action and facilitating the negotiated settlement. Should the Court, for any reason, not finally approve the Agreement, or if the Agreement is otherwise terminated for any reason, then the parties have acknowledged that the Agreement will be null and void and this action will revert to its status with respect to any and all matters as they existed prior to the parties signing the Agreement. (See Exhibit 1 at ¶ 33.)

2. Description of the Settlement Class

The "Settlement Class" is comprised of:

All persons who have worked for defendant USP Mission Hills, Inc. as non-exempt employees in the State of California at any time during the Class Period. The term "Class Period" shall mean the time period from March 18, 2016 to December 31, 2021. (See Ex. 1 at § I, ¶¶ 1(e)-(f).)

1 Notices were sent to 224 individuals, as determined by Defendant's employment records. A
2 change of address search was ran prior to sending the notice. (Mitzner decl. ¶¶ 4-6.) **No (zero)**
3 individuals have opted out of the litigation. (Mitzner decl. ¶ 9.) **No (zero)** Class Members have
4 objected to the proposed settlement. (Mitzner decl. ¶10.) Accordingly, there are 224 total class
5 members who will all receive a share of the settlement proceeds. (Mitzner decl. ¶ 12.)

6 **3. Appointment of Settlement Claims Administrator**

7 Phoenix Class Action Administration Solutions ("Phoenix") was used as the "Settlement
8 Claims Administrator" for purposes of providing the Notice packet to Settlement Class Members,
9 issuing all payments pursuant to the Agreement, and to track all opt-outs and objections to the
10 settlement.

11 As detailed in the accompanying declaration, Phoenix successfully completed all steps of the
12 Notice process. (Mitzner decl. ¶¶ 3-17.) **Please Note:** Due to some delays from Defendant's payroll
13 provider to compile the class list, the notice period will not officially conclude until March 6, 2023.
14 The parties and settlement administrator will update the Court at that time if there are any changes to
15 the final Class numbers and responses reported here. (Yaeckel decl. ¶ 3.)

17 **4. Scope of the Release**

18 Upon deposit of all Settlement Funds by Defendant, participating Class Members will release
19 "Any and all claims, actions, demands, causes of action, suits, debts, obligations, damages, rights or
20 liabilities alleged in, or arising out of the facts and claims asserted in, the operative Third Amended
21 Complaint." The full release language is found at **Exhibit 1** at ¶ 15. There is a separate PAGA release
22 for the employees who worked during the PAGA Period. (**Exhibit 1** at ¶ 16.)

24 **Please Note:** As detailed in the Preliminary Approval Motion, Plaintiff executed a separate
25 individual settlement agreement and release. This amount being paid to Plaintiff is in addition to the
26 amount negotiated for the class. This was separately negotiated with the assistance of the mediator
27 and provides a much broader release of claims (and a resignation from her position with Defendant)
28

1 in exchange for the consideration. The class was notified and did not object. (Mitzner decl. ¶ 10; Ex.
2 A thereto at §IV, para. 3.)

3 **5. Cash Payment and Allocation**

4 The Agreement provides for an automatic cash payment to the members of the class who do
5 not submit valid requests for exclusion. The settlement is non-reversionary, in that all of the Net
6 Settlement Amount, after all costs and fees are deducted, will be paid to the participating Class
7 Members. (Exhibit 1 at ¶ 20.) The estimated *average* payment (before taxes) to each participating
8 Class Member is **\$749.51**. There is an additional average payment of **\$86.71** to each Class Member
9 who worked during the PAGA Period. These averages do not account for the fact that certain class
10 members will receive more or less than an “average” share, depending on the length of time each
11 worked for Defendant. (Mitzner decl. at ¶¶ 14-15.)

12 In the event that an Individual Settlement Award is issued to a Class Member by check and the
13 check is not cashed on or before the Check Cashing Deadline of one hundred eighty (180) calendar
14 days from the mailing, the amount of the Individual Settlement Award shall be considered unclaimed.
15 Each unclaimed Individual Settlement Award paid to a Class Member but not cashed on or before the
16 Check Cashing Deadline shall be tendered to the State of California Unclaimed Property Fund in the
17 Class Member’s name. (Exhibit 1 at ¶¶ 1(b), 20.)

18 **6. Contingent Costs**

19 Defendant agreesto pay One Hundred and Twenty-Five Thousand Dollars (\$125,000.00) in
20 attorneys’ fees, which is 1/3 of the total settlement, and up to Fifteen Thousand Dollars (\$15,000.00)
21 in litigation costs. (Exhibit 1 at ¶ 19(a),(c) .) As set forth in the declaration of counsel, Plaintiff is
22 limiting the costs request to \$10,358.90.

23 For costs incurred in administrating the claims process, Defendant will pay the Settlement
24 Administrator, \$6,750.00. (Mitzner decl. at ¶¶ 17.) This is the same estimate submitted at Preliminary
25 Approval. (Exhibit 1 at ¶ 19(d).)

26 The parties have agreed to allocate Sixty Thousand (\$60,000.00) to Plaintiff’s representative
27
28

1 claims under California Labor Code 2698, et seq., with 75% of this amount (\$45,000.00) being paid
2 directly to the LWDA, and the remaining 25% (\$15,000.00), being distributed amongst the PAGA
3 Members. (Exhibit 1 at ¶ 19(e).)

4 Defendant also agrees to pay Plaintiff Five Thousand Dollars (\$5,000.00) as an enhancement
5 award in consideration for her service as Class Representative. (Exhibit 1 at ¶ 19(c).) Plaintiff
6 WHITMER has previously submitted a declaration attesting to the time and services performed related
7 to this litigation. (See Register of Actions Entry on 9/15/22: Whitmer decl. ¶¶ 2-11.)

8 **IV. CONTROLLING LAW**

9 **A. FINAL APPROVAL OF CLASS ACTION SETTLEMENTS**

10 The trial court has broad discretion to determine whether a class action settlement is fair and
11 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723.

12 Fairness is presumed where (1) the settlement is reached through arm's-length bargaining; (2)
13 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel
14 is experienced in similar litigation; and (4) the percentage of objectors is small. *Chaves v. Netflix, Inc.*,
15 (2008) 162 Cal.App.4th 43, 52; *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th 1794, 1802. But, even
16 where it appears the settlement is fair, the court must still determine whether the settlement should be
17 approved after considering "the strengths and weaknesses of the claims and risks of the particular
18 litigation." *Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116, 129. It considers: (i) the
19 strength of the plaintiff's case; (ii) the risks, expense, complexity and likely duration of further
20 litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount offered
21 in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the
22 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any
23 reaction of putative class members. *Dunk, supra*, 48 Cal.App.4th, at 1800-1801; *In re Microsoft*,
24 *supra*, 135 Cal.App.4th, at 723.

25 The court should approve a class action settlement when the settlement is fair and falls "within
26 the range of reasonableness." *Hernandez v. Vitamin Shoppe*, (2009) 174 Cal.App.4th 1441, 1446.
27
28

1 **B. ATTORNEYS' FEES**

2 A trial court has broad discretion in determining a reasonable amount of attorney fees. *PLCM*
3 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.

4 The California Supreme Court has recently determined that the percentage of the benefit,
5 (“percentage method”) is proper for determining a reasonable attorney fee award in an employment
6 class action case. *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480.

7 The California Supreme Court’s rationale was as follows:

8 we clarify today that use of the percentage method to calculate a fee in a common fund
9 case, where the award serves to spread the attorney fee among all the beneficiaries of
10 the fund, does not in itself constitute an abuse of discretion. We join the overwhelming
11 majority of federal and state courts in holding that when class action litigation
12 establishes a monetary fund for the benefit of the class members, and the trial court in
13 its equitable powers awards class counsel a fee out of that fund, the court may
14 determine the amount of a reasonable fee by choosing an appropriate percentage of the
15 fund created. The *recognized advantages* of the percentage method—including relative
16 ease of calculation, alignment of incentives between counsel and the class, a better
17 approximation of market conditions in a contingency case, and the encouragement it
18 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
19 litigation (See pt. I, ante; *Lealao, supra*, 82 Cal.App.4th at pp. 48–49, 97 Cal.Rptr.2d
20 797; *Rawlings v. Prudential–Bache Properties, Inc., supra*, 9 F.3d at p.
21 516)—**convince us the percentage method is a valuable tool that should not be
22 denied our trial courts.**

23 *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 503 (emphasis added).

24 The Court also determined that while permissible, a lode-star “cross check” of the percentage
25 method was **not** required of California’s trial courts. *Id.* at 506.

26 Similarly, “[t]he Ninth Circuit, responding perhaps to the growing complaints of trial judges
27 in the circuit and elsewhere that lodestar analyses ‘consume an undue amount of court time with little
28 resulting advantage to anyone, but operate to the detriment of class members’ (*In re Activision*
29 *Securities Litigation* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375; *see also Mashburn v. Nat’l*
30 *Healthcare, Inc.* (M.D. Ala. 1988) 684 F.Supp. 679, 689-92) has made the percentage-of-the-benefit
31 approach the preferred method for determining fees in common fund cases.” *Lealao v. Beneficial*
32 *California, Inc.* (2000) 82 Cal.App.4th 19, 30-31 (emphasis added).

1 In class action common fund cases, the better practice is to set a percentage fee. *In Re*
2 *Activision Securities Litigation*, *supra*, 723 F.Supp. at 1378.

3 While not required pursuant to the above authorities, Plaintiff's Counsel's declaration has
4 attested to the exact hours incurred and corresponding rates by the attorneys who worked on this case.

5 If a lodestar "cross check" is conducted, in determining the appropriate amount of attorneys'
6 fees to be awarded, a court will consider the following factors: (1) the continuing obligation of counsel
7 to devote time and effort to the litigation; (2) the extent to which the litigation precluded other
8 employment by the attorneys; (3) the contingent nature of the fee agreement, both from the point of
9 view of eventual success on the merits and securing a fee award; (4) the experience, reputation, and
10 ability of the attorneys who performed the services, and the skill they displayed in litigation; and (5)
11 the amount involved and the results obtained on behalf of the class by plaintiff's counsel. *Serrano v.*
12 *Priest* (1977) 20 Cal.3d 25, 35. However, no rigid formula applies and each factor should be
13 considered only "where appropriate." *Id.*

14 **C. CLASS REPRESENTATIVE ENHANCEMENTS**

15 An incentive award may be appropriate to induce someone to serve as a class representative.
16 In determining whether to make an incentive award, the court may consider (1) the risk, both financial
17 and otherwise, the class representative faced in bringing the suit; (2) the notoriety and personal
18 difficulties encountered by the class representative; (3) the amount of time and effort spent by the class
19 representative; (4) the duration of the litigation; and (5) the personal benefit received by the class
20 representative as a result of the litigation. *Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th
21 1251, 1270 citing *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395.

22 Additional factors to consider include:

23 "the actions the plaintiff has taken to protect the interests of the class, the degree to
24 which the class has benefitted from those actions, and the amount of time and effort
25 the plaintiff expended in pursuing the litigation.' Federal district courts have
26 identified other factors as well, including 'the risk to the class representative in
27 commencing suit, both financial and otherwise,' 'the notoriety and personal
28 difficulties encountered by the class representative," the duration of the litigation, and
'the personal benefit (or lack thereof) enjoyed by the class representative as a result

1 of the litigation.”

2 *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 804.

3 **V. ARGUMENT**

4 **A. THE PARTIES’ PROPOSED SETTLEMENT IS MADE IN GOOD FAITH**

5 As specifically set forth below, the settlement meets all requirements for Court approval.

6 **1. Strength of Plaintiff’s Case**

7 The most important factor courts consider when evaluating the fairness of the class action
8 settlement is the strength of the plaintiff’s case balanced against the amount offered in settlement.
9 *Kullar, supra*, 168 Cal.App.4th at 130.

10 As this is a class and representative action, Plaintiff’s claims are premised on Labor Code
11 violations which can be established from Defendants’ **uniform policies**. *Brinker Rest. Corp. v.*
12 *Superior Court*, (2012) 53 Cal. 4th 1004, 1051 (holding that, where a company’s uniform policy
13 prohibits off-the-clock work, certification of claims for such off-the-clock work is inappropriate,
14 especially where the court is merely “presented with anecdotal evidence of a handful of individual
15 instances in which employees worked off the clock.”) Thus, Plaintiff’s counsels’ approach was to
16 investigate Defendant’s uniform employment policies by, *inter alia*, scrutinizing putative class
17 members’ time and wage records, as well as Defendant’s written meal and rest period policies.

18 As was detailed more thoroughly in the preliminary approval motion, through informal
19 discovery, Plaintiff’s counsel obtained **verified** copies of Defendant’s **uniform** time keeping,
20 employee compensation, meal period, rest break, and reimbursement policies. In addition to Plaintiff’s
21 time and wage records, Defendant also produced a large sampling of putative class member’s records.
22 Through this sampling, Plaintiff’s counsel was able to analyze and verify the following: the uniformity
23 of Defendant’s “timekeeping” and compensation practices and the average net effect it had on
24 Defendant’s nonexempt employees; the format and content of Defendant’s itemized wage statements;
25 the average rate of pay for Defendant’s nonexempt employees; and the average number of apparent
26 meal period violations per employee based on multiple sets of timekeeping data. (See ROA Entry for
27 5/31/22 at § II, and the declaration of Eric Yaeckel in Support of Preliminary Approval.)
28

1 From this data a detailed valuation of all claims was performed, as was presented to this Court
2 at the preliminary approval stage.

3 While Plaintiff maintained her (and other employees) claims were all viable, Plaintiff (and her
4 counsel) recognize there were substantial risks to proceeding on behalf of a class and representative
5 group. Defendants presented several potentially valid defenses to class certification, liability and
6 damages.

7 Based on a detailed analysis of all the claims and the risks involved in continuing litigation,
8 class counsel submits the **\$375,000.00** Gross Settlement Fund represented a fair, and more than
9 reasonable, settlement. (Yaeckel decl. ¶¶ 12-14.)

10 **2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

11 Plaintiff's Counsel's effectiveness in prosecuting this case has translated into tangible monetary
12 benefits for the Settlement Class Members in the following respects: **(a)** a guaranteed favorable result;
13 **(b)** guaranteed monetary recovery over a reasonably short period of time, as opposed to possibly
14 waiting additional years for a potentially worse result; and **(c)** significant savings in attorney's fees and
15 costs, which would have greatly increased had the case progressed through trial and possible appeals.

16 Without entering into the Agreement, there existed a significant chance that Defendants would
17 prevail on the merits of some or all claims, and that Class Members would receive nothing. Through
18 the Agreement, participating Class Members receive guaranteed cash now.

19 If the litigation were to proceed in lieu of settlement, additional and substantial attorneys fees
20 and costs and expert witnesses fees would be incurred. Given the numerous claims being litigated, the
21 parties may be required to hire multiple experts each (as many as 3 per side). This would result in not
22 only the production of six expert reports, but six depositions as well. And, based on previous
23 discussions between counsel regarding the remaining claims (including the PAGA claims), the parties
24 anticipated (at the very least) that there would be at least one discovery motion, a Motion for Class
25 Certification and at least two dueling motions for summary judgment / adjudication (one from each
26 side). (Yaeckel decl. ¶ 16.)

27 Importantly, even after engaging in all of the potential continued and protracted litigation set
28

1 forth above, the putative class would continue to have no guarantee of success on any of the claims
2 advanced in this case. Even if Plaintiff was successful at trial, it is very likely an appeal would follow
3 delaying recovery for many additional months, or even years. Thus, the parties and their counsel
4 believe in good faith that the proposed resolution is a fair, reasonable, and adequate compromise.

5 **3. The Risk of Maintaining Class Action Status Through Trial**

6 The parties have stipulated to add Class Action claims as Defendant had a desire to settle all
7 PAGA claims, as well as the underlying wage and statutory violations claims. However, if not for this
8 settlement, any request by Plaintiff to certify a class would have been heavily contested by Defendant.

9 Therefore this class action settlement is a superior result for both parties. In exchange for a full
10 release, Class members are given a guaranteed monetary recovery now. Defendant is also able to “buy
11 the peace” and avoid the costs of defending all future proceedings.

12 Regarding Plaintiff’s representative (PAGA) claims, there is also a substantial risk that, at trial,
13 Plaintiff will either fail to obtain a favorable judgment on one or more of the claims, or that a favorable
14 award on one or more PAGA claims may be greatly reduced, as these claims are subject to mitigation
15 by the Court. *See Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135.

16 **4. The Extent of Discovery Completed and the Stage of the Proceedings**

17 **a. Discovery**

18 The full scope of the discovery and investigation was detailed more fully in the preliminary
19 approval motion. (See ROA Entry for 5/31/22: Memorandum at § II.)

20 Plaintiff’s counsel have interviewed numerous Class Members in the course of investigating
21 and litigating this matter. (See ROA Entry for 5/31/22: Yaeckel decl. at ¶¶ 7-13.) Counsel has also
22 reviewed and analyzed hundreds of pages of documents produced by Defendant, Plaintiff, and Class
23 Members. (*Id.*) These documents included Time Records, payroll statements, and other documents
24 containing the standard policies of Defendant.

25 Additionally, to ensure a fruitful mediation attempt, Plaintiff requested, and Defendant
26 provided, additional informal discovery and verifications. Such information included verification of
27 policies and procedures of Defendant as well as the parameters (workweeks at issue, current
28

employees, and ex-employees) of any potential Class. (*Id.*)

From that record it is clear sufficient discovery has been conducted to allow the parties to participate in an informed, arms-length negotiation process.

b. The Stage of the Proceedings

The parties proceeded to a watershed moment in the litigation, as the majority of discovery was already completed and Plaintiff's counsel was in possession of all records necessary to prepare motions for class certification and/or final expert reports. Depending on the outcome of this motion, Plaintiff may have lost her ability to negotiate a classwide or representative settlement agreement on certain issues. Alternatively, Defendant stood to lose a key negotiating tool in the event the Motion was decided in Plaintiff's favor. Therefore, the parties achieved a settlement agreement at a point when neither side had a stated advantage in the litigation.

5. The Experience and Views of Counsel

Class Counsel has considerable experience in wage and hour and class action litigation. Mr. William Sullivan has over 28 years of experience, 27 years of which has been devoted to both prosecuting and defending class action litigation. Mr. Eric Yaeckel has over 12 years of experience as an attorney who is primarily engaged in prosecuting class and representative actions. (Yaeckel decl. ¶¶ 6-7.)

Plaintiff's counsel considers the Agreement to represent a fair, adequate and reasonable settlement that is well within the accepted range of recoveries for similar class actions. Counsel believes the Agreement is in the best interests of the settlement Class. (Yaeckel decl. ¶¶ 12-15.)

6. Presence of a Governmental Actor

Although the State is not directly involved in this action, Plaintiff "stands in the shoes" of the Labor and Workforce Development Agency ("LWDA") by bringing his PAGA action. Consideration has been made to compensate to Labor Workforce Development Agency ("LWDA") in the amount of \$45,000.00 (which is the LWDA's 75% share of a \$60,000.00 allocation). (Exhibit 1 at ¶ 19)e.)

The LWDA was notified and declined to prosecute the claims itself. Counsel for the parties believe this is a fair, reasonable, and adequate allocation. (Yaeckel decl. ¶ 15.) The LWDA was served

1 with copies of the Settlement and has not objected or responded to date. (Yaeckel decl. ¶ 17.)

2 Pursuant to Labor Code 2699(l) the LWDA was also provided with this entire motion including
3 notice of the March 23, 2023, 2020, final approval hearing. (See the concurrently filed Proof of Service
4 for this Motion.)

5 **7. Reaction of the Class Members to the Proposed Settlement**

6 A total of 224 members of the settlement class were notified and **no (zero)** members opted out
7 of the class. (Mitzner decl. ¶ 9.)

8 Perhaps most importantly, **there have been No (Zero) objections to the terms of the**
9 **proposed settlement.** (Mitzner decl. ¶ 10.)

10 “By any standard, the lack of objection of the Class Members favors approval of the
11 Settlement.” *In re Omnivision Technologies, Inc.*, (N.D. Cal. 2008) 559 F.Supp.2d 1036,1043; see also
12 *Ross v. A.H. Robins*, (S.D.N.Y. 1988) 700 F. Supp. 682, 684 [“The absence of objectants may itself
13 be taken as evidencing the fairness of a settlement.”]

14 **B. THE REQUESTED ATTORNEY’S FEES AND COSTS ARE REASONABLE**

15 Plaintiff’s counsel seeks an award of attorney’s fees in the amount of 1/3 (one-third) of the
16 Gross Settlement Amount, or **\$125,000.00**. (Yaeckel decl.¶ 22.) Defendant will **not** be filing an
17 Opposition to this request.

18 As set forth below, the requested attorney’s fees are inherently reasonable, on the basis of both
19 a percentage of the recovery and a lodestar method, given the results obtained for the class. The
20 following factors establish the reasonableness of the attorney’s fees requested.

21 **1. The Contingent Nature of the Fee Agreement, and Inherent Risk Therein,**
Supports Awarding a Percentage of the Recovery

22 In the instant matter, Plaintiff’s Counsel was retained on a contingency basis. (Yaeckel decl.
23 ¶ 18.) A percentage fee of 35% (thirty five percent) was freely negotiated. (*Id.*) As part of the
24 Agreement, Counsel was required to continue the prosecution of the matter regardless of the outcome
25 of the preliminary motions (*i.e.*, class certification.) (*Id.*) Here, however, Plaintiff’s Counsel has agreed
26 to a 33 and 1/3 % share of the recovery in order to maximize the recovery on behalf of the class. (*Id.*)

27 There is an **established practice** in the private legal market to reward attorneys for taking the
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1 risk of non-payment by paying them a **premium over their normal hourly rates** for winning
2 contingency cases. *In re Washington Public Power Supply System Securities Litigation* (9th Cir. 1994)
3 19 F.3d 1291, 1299. If attorneys' efforts create a benefit for others in addition to their own client, the
4 court is empowered to award fees from that fund. *Boeing v. Van Gemert* (1980) 444 U.S. 472, 478.

5 The rationale for fee enhancement in contingency cases has been explained as follows:

6 'A contingent fee must be higher than a fee for the same legal services paid as they
7 are performed. **The contingent fee compensates the lawyer not only for the legal
8 services he renders but for the loan of those services. The implicit interest rate
9 on such a loan is higher because the risk of default (the loss of the case, which
10 cancels the debt of the client to the lawyer) is much higher than that of
11 conventional loans.'** (Prosner, *Economic Analysis of Law* (4th ed.1992) pp. 534,
12 567.) 'A lawyer who both bears the risk of not being paid and provides legal
13 services is not receiving the fair market value of his work if he is paid only for
14 the second of these functions. If he is paid no more, competent counsel will be
15 reluctant to accept fee award cases.' (Leubsdorf, *The Contingency Factor in
16 Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct,
17 rule 4-200(B)(9) [recognizing the contingent nature of attorney representation is an
18 appropriate component in considering whether a fee is reasonable]; ABA Model
19 Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof.
20 Conduct, rule 1.5(a)(8). **Such fee enhancements are intended to compensate for
21 the risk of loss generally in contingency cases as a class.**

22 *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1419 (disapproved on other grounds.)

23 The percentage of the fund approach also sets expectations and incentivizes counsel in taking
24 on the risk of a contingency case:

25 The bases of the equitable rule which permits surcharging a common fund with the
26 expenses of its protection or recovery, including counsel fees, appear to be these:
27 fairness to the successful litigant, who might otherwise receive no benefit because his
28 recovery might be consumed by the expenses; correlative prevention of an unfair
29 advantage to the others who are entitled to share in the fund and who should bear their
30 share of the burden of its recovery; **encouragement of the attorney for the
31 successful litigant, who will be more willing to undertake and diligently
32 prosecute proper litigation for the protection or recovery of the fund if he is
33 assured that he will be promptly and directly compensated should his efforts be
34 successful.**

35 *Jordan v. California Dep't of Motor Vehicles* (2002) 100 Cal.App.4th 431, 446 (with emphasis added)
36 citing *Estate of Stauffer* (1959) 53 Cal.2d 124, 132.)

37 As a result, the percentage of the recovery (routinely approved in California at 33 & 1/3%),
38 properly incentivizes and awards counsel for diligently pursuing this matter in the face of numerous
39 obstacles to both certification, and liability.

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1 **2. The Continuing Obligation to Devote Time and Effort to the Litigation**

2 Since the tentative agreement, Plaintiff's Counsel has had to devote considerable time to
3 maintain the litigation, achieve Court approval for the proposed settlement, and assist the proposed
4 Class Members. (Yaeckel decl. ¶ 19.)

5 **3. The Extent to which the Litigation Precluded Other Employment**

6 Plaintiff's counsel was precluded from accepting other employment and clients due to the
7 necessity of maintaining the prosecution of the instant matter and also precluded them from bringing
8 clients to the firm. (Yaeckel decl. ¶ 20.)

9 **4. The Experience, Reputation, and Ability of the Attorneys who Performed the**
10 **Services, and the Skill They Displayed in Litigation**

11 Plaintiff's counsel, William B. Sullivan, has been a California-licensed attorney for
12 approximately 28 years. William B. Sullivan has approximately 27 years of experience in "class action"
13 litigation, both as plaintiff and defense counsel. (Yaeckel decl. ¶ 6.)

14 Mr. Yaeckel has over 12 years experience prosecuting class and representative actions on
15 behalf of California Employees. (Yaeckel decl., ¶ 7.) Class counsel are the attorneys of record in a
16 matter very recently decided before the California Supreme Court titled *Donohue v. AMN Services,*
17 *LLC*, (2021) 11 Cal.5th 58. The *Donohue* matter is a certified class and PAGA action. (Yaeckel decl.
18 ¶ 8.) Plaintiff's counsel are currently lead counsel on approximately 30 employment "wage and hour"
19 claims with class action, or representative action allegations. (Yaeckel decl. ¶ 9.)

20 Plaintiff's counsel has recent (and successful) Trial experience in "wage and hour" cases. In
21 a recent successful PAGA trial, before the Hon. Katherine Bacal of the San Diego Superior Court,
22 Plaintiff's counsel was awarded their full requested attorneys fees and the hourly rates (which are
23 similar to the fees/rates billed here) billed were all approved. See *Carrington v. Starbucks Corp.* San
24 Diego Superior Court, Case No. 37-2014-00018637-CU-OE-CTL and published appellate opinion at
25 30 Cal.App.5th 504. (Yaeckel decl. ¶ 10.)

26 Based on said experience, it is the opinion of counsel that this settlement represents a fair and
27 adequate payment. (Yaeckel decl. ¶¶ 12-15.)

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1 **5. The Amount Involved and the Results Obtained on Behalf of the Class**

2 This is not a “coupon” class action case. (Yaeckel decl. ¶ 21.) The Class is set to receive
3 significant monetary benefits they would not have received if Class Counsel did not act. (*Id.*)

4 Based upon the calculations stipulated in the Settlement, the highest Individual Settlement
5 Share to be paid to Class Members is approximately \$3,199.55, the lowest Individual Settlement Share
6 to be paid is approximately \$10.67, while the average Individual Settlement Share to be paid is
7 approximately **\$749.51**. (Mitzner decl. ¶ 14.)

8 For employees who worked during the PAGA Period, the highest Individual PAGA Payment
9 to be paid is approximately \$253.41, and the average Individual PAGA Payment to be paid is
10 approximately **\$86.71**. (Mitzner decl. ¶ 15.)

11 **6. A Percentage of the Common Fund Award is Proper**

12 Plaintiff’s counsel submits that the request for 33 & 1/3 % in attorneys fees from the “common
13 fund” settlement is proper. *Laffitte v. Robert Half Intern. Inc.*, (2016) 1 Cal.5th 480, 503, 506.
14 Historically, courts have awarded fees as high as fifty percent (50%) of the common fund, depending
15 on the circumstances of the case. *Newberg*, § 14.03; *see also In re Ampicillin Antitrust Litig.* (D.D.C.
16 1981) 526 F.Supp.494 (awarding attorneys' fees in the amount of 45% of the \$7.3 million settlement
17 fund); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.* (S.D.N.Y. 1979) 480 F.Supp. 1195
18 (awarding approximately 53% of the settlement fund as attorney fees).

19 California Courts routinely approve class action attorneys' fee awards "averag[ing] around
20 one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (lower court
21 found 20 to 40 percent range of contingency fee in marketplace was appropriate in class actions).

22 Additionally, a common fund award is not dependent on a determination of the actual amount
23 claimed out of the fund by those entitled-it is the creation of the fund that is the crucial fact. In *Winslow*
24 *v. Harold G. Ferguson Corp.*, the California Supreme Court expressly held that “it is equitable that
25 [the attorney's] compensation and expenses should come from the entire fund saved for all classes
26 concerned before it is distributed.” *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 284.
27 Likewise, *Lealao* expressly recognizes that “in a traditional common fund case, [a percentage-based
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1 fee] may be calculated on the basis of the total fund made available rather than the actual payments
2 made to the class.” *Lealao, supra*, 82 Cal.App.4th at p. 51; *see also Boeing, supra*, 444 U.S. at p. 478
3 (“a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or
4 his client is entitled to a reasonable attorneys’ fee from the fund as a whole”).

5 **7. The Lodestar Cross-Check**

6 *If deemed necessary*, a “lodestar cross-check” also confirms the propriety of the request.

7 As set forth in the attached Declaration of Eric Yaeckel, the actual lodestar attorney’s fees
8 incurred (to date) are estimated to amount to approximately **\$131,412.00**. (Yaeckel decl. ¶ 22.) Given
9 this amount, no lodestar multiplier is necessary. The Attorneys’ fees re broken down as follows:

10 a. Mr. Sullivan served as lead investigator and trial counsel, per the specific request of
11 Plaintiff. The billing rate for Mr. William Sullivan is **\$660.00** per hour. Mr. William Sullivan has
12 currently expended approximately **77.8** hours in the service of this action. **77.8** hours times **\$660.00**
equals **\$51,348.00**. (Yaeckel decl. ¶ 22(a).)

13 b. The work includes nearly all preliminary investigation, interviews with putative class
14 members and some client interaction/meetings. The preliminary investigation includes the review and
15 analysis of several hundred documents. During this time, Mr. Sullivan also investigated Defendant,
16 its business practices, and any variations in employees duties and rates of pay. (Yaeckel decl. ¶ 22(a).)

17 c. Mr. Yaeckel was the partner primarily assigned to oversee the "day to day" activity of
18 the primary associates assigned to this case. His billing rate is **\$540.00** per hour. Mr. Yaeckel have
19 currently expended approximately 120.0 hours in the service of this action. **120.0** hours times **\$540.00**
20 equals **\$64,800.00**. Mr. Yaeckel handled the majority of all pre-settlement work, including document
21 review and the preparation of Plaintiff’s Mediation Brief and damages analysis. He also had numerous
22 client interaction meetings and attended the full day mediation. Moreover, he helped draft and review
23 all settlement document and prepared all Preliminary and Final Approval motions and supplemental
filings related thereto. (Yaeckel decl. ¶ 22(b).)

24 d. Mr. Ryan Kuhn, and Mr. William Anderson have each worked as associates assigned
25 to the case at different times. The associate’s billing rate on this matter is **\$360.00** per hour. The
26 associates have currently expended approximately **34.4** hours in the service of this action. **34.4** hours
27 times **\$360.00** equals **\$12,384.00**. The work performed by the associates consisted of, for the most part,
28 analysis of Defendant’s documents and records, in preparation for mediation. The associates were also
assigned to discovery creation and review, the preparation of "meet and confer" letters and other

1 contact with defense counsel, and analysis of employment records to determine "commonality" and
2 damages. (Yaeckel decl. ¶ 22(c).)

3 Based on past experience, counsel estimates the associate attorneys will incur an additional **8.0**
4 hours in assisting Class Members on questions and issues regarding the settlement, meeting with Class
5 Members (including those who file "late" submissions), and preparing for and attending the Final
6 Approval hearing in this matter. **8.0 times \$360.00 equals \$2,880.00.** (Yaeckel decl. ¶ 22(d).)

7 **8. The Lodestar Multiplier**

8 Given the attorneys fees incurred no multiplier is necessary for the full award of **\$125,000.00.**

9 Additionally, the settlement provides the class with a substantial monetary amount and the class
10 strongly supports the fairness of the settlement, even after being notified of the requested attorneys'
11 fee award (**0 opt-outs, and 0 objections**). In the event the Court deems a lodestar analysis is necessary
12 it will confirm that Plaintiff's fees are reasonable.

13 **9. The Amount of Costs**

14 Class Counsel has expended approximately **\$10,358.90** in costs, including filing fees, travel,
15 mediation, copying and document preparation charges, investigative costs, and delivery fees. (Yaeckel
16 decl. ¶ 23.) Defendant agreed not to oppose an amount of up to \$15,000.00. Plaintiff's Counsel limits
17 the Costs Request to an amount of **\$10,358.90**, and requests Court Approval of that specific amount.
18 (Yaeckel decl. ¶ 24.)

19 **C. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT IS REASONABLE**

20 Plaintiff requests an enhancement award of **\$5,000** for serving as the class representative.
21 Defendant does **not** oppose this request.

22 Plaintiff put her future employment prospects at risk by becoming a class representative as the
23 fact that they filed a class action lawsuit "is searchable on the internet and may become known to
24 prospective employers when evaluating" her for employment. *Guippone v. BH S&B Holdings, LLC*,
25 2011 U.S., Dist. LEXIS 126026, *20 (S.D.N.Y. Oct. 28, 2011).

26 Ms. Whitmer contributed extensive time and resources in the prosecution of this case. Plaintiff
27 has met with Plaintiff's counsel **3** separate times during the course of this litigation. Ms. Whitmer also
28 spoke to her Attorneys - over the phone - on at least **15** occasions. During those meetings, she was able

1 to provide information instrumental to the prosecution of this matter including identifying numerous
2 witnesses that could corroborate her claims. She also assisted with reviewing and providing insight on
3 Defendant's documents produced. She brought to counsel's attention numerous Labor Code violations
4 that formed the basis of the litigation. (Whitmer decl. ¶¶ 4-7, previously lodged on the ROA on
5 9/15/22; Yaeckel decl. ¶ 25.)

6 In sum, Ms. Whitmer spent approximately **30.5** hours assisting with the prosecution of this
7 case. (See ROA entry 9/15/22: Whitmer decl. ¶ 8.)

8 Moreover, by "sticking her neck out" as a Class Representative in a publicly filed lawsuit,
9 Plaintiff took a substantial risk that may adversely impact her ability to work in this field in the future.
10 (See ROA entry 9/15/22: Whitmer decl. ¶ 9.) Any company who does a detailed background check,
11 will be able to determine that Ms. Whitmer filed a lawsuit against her former employer. An entire
12 industry exists that allows employers to run extensive background searches on potential employees.
13 Companies who provide these services specifically highlight the fact that their services allows
14 employers to weed out litigious employment candidates. (Yaeckel decl. ¶¶ 26-28.) In addition, as Ms.
15 Whitmer's co-workers have all been notified of the lawsuit, there is a large pool of peers who now
16 know of her bringing claims against a former employer which will also jeopardize future positions.
17 (See ROA entry 9/15/22: Whitmer decl. ¶ 9.)

18 Ms. Whitmer also risked personally owing a large cost award, into the tens of thousands of
19 dollars, had her claims been unsuccessful. (See ROA entry 9/15/22: Whitmer decl. ¶ 10.)

20 Despite all the risks Ms. Whitmer, at all times remained committed to securing a monetary
21 recovery on behalf of the entire class. (See ROA entry 9/15/22: Whitmer decl. ¶ 11.)

22 Accordingly, Plaintiff asks the Court to approve a class representative enhancement in the
23 amount of \$5,000.

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VI. CONCLUSION

Based on the foregoing, Plaintiff Ms. Whitmer respectfully requests that this Court grant Plaintiff's Motion consistent with the accompanying proposed Order and Final Judgment.

Dated: March 1, 2023

SULLIVAN & YAECKEL LAW GROUP, APC

Eric Yaeckel

Eric K. Yaeckel
Attorneys for Plaintiff TAMARA WHITMER, in a
Representative capacity only, and on behalf of other
members of the general public similarly situated