

Brian J. Mankin, Esq. [CSB No. 216228]
brian@lmlfirm.com
Misty M. Lauby, Esq. [CSB No. 243009]
misty@lmlfirm.com
LAUBY, MANKIN & LAUBY LLP
4590 Allstate Drive
Riverside, CA 92501
Tel: (951) 320-1444
Fax: (951) 320-1445

Attorneys for Plaintiff and on behalf of the Proposed Class

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

NATALIE PALMER, individually, on behalf
of all similarly situated current and former
employees, and on behalf of the State of
California and all Aggrieved Employees;

Plaintiff,

vs.

CHARTER HOSPICE, INC., a California
Corporation; CHARTER HOSPICE OF
COLTON, LLC, a California Limited
Liability Company; ARCH B. GILBERT, an
individual; FRED FRANK, an individual; and
DOES 1 through 10, inclusive;

Defendants.

Case No.: CIVDS2013037
*[Assigned to Hon. Judge David Cohn, Dept
S26, for all purposes]*

**NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT;
DECLARATIONS IN SUPPORT
THEREOF; AND [PROPOSED] FINAL
ORDER AND JUDGMENT**

Hearing

Date: November 15, 2021
Time: 10:00 a.m.
Dept: S26

Complaint filed: June 25, 2020

TO THE COURT AND PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT on November 15, 2021, at 10:00 a.m., or as soon
thereafter as this matter may be heard by the Honorable David Cohn in Department S26 of the
San Bernardino County Superior Court, located at 247 West Third Street San Bernardino CA
92415, Plaintiff Natalie Palmer will respectfully move this Court for an Order granting final
approval of the class action settlement between Plaintiff and Defendants Charter Hospice, Inc.,

1 and Charter Hospice of Colton, LLC, and their owners (collectively, “Defendants” or “Charter”),
2 which was preliminarily approved by the Court on July 15, 2021. This Motion, which is
3 supported and unopposed by Defendants, seeks final approval and entry of judgment of a
4 \$750,000 settlement on behalf of the Class Members.

5 Specifically, Plaintiff will and hereby does move the Court to grant final approval of the
6 Class Action Settlement Agreement (the “Settlement Agreement”), and enter the proposed order
7 and final judgment filed concurrently herewith:

8 1. Finally certifying the Class, as defined in the Settlement Agreement and the
9 Court’s Order Granting Preliminary Approval of the Settlement;

10 2. Finally appointing Plaintiff as Class Representative for purposes of settlement;

11 3. Finally appointing Brian Mankin of Lauby Mankin Lauby LLP as Class Counsel
12 for purposes of settlement;

13 4. Finding that the Class Notice was properly provided to the Class in accordance
14 with the Court’s Order granting Preliminary Approval;

15 5. Finally approving the settlement as fair, adequate, and reasonable, based upon the
16 terms set forth in the Settlement Agreement;

17 6. Binding participating Class Members to the terms of the Settlement Agreement,
18 including the Release specified therein; and

19 7. Retaining jurisdiction to enforce the Settlement Agreement.

20 This Motion will be based upon this notice; the attached memorandum of points and
21 authorities; the Declarations of the Settlement Administrator (Norman Alcantara of Simpluris),
22 Class Counsel (Brian Mankin) and Plaintiff filed concurrently herewith; the records and files in
23 this action; and any other further evidence or argument that the Court may receive at or before
24 the hearing.

25 Dated: October 21, 2021

LAUBY, MANKIN & LAUBY LLP

26
27 BY:



28 Brian J. Mankin, Esq.
Attorneys for Plaintiff and the Class

TABLE OF CONTENTS

I.	SUMMARY OF ARGUMENT AND ESSENTIAL POINTS	1
II.	PERTINENT BACKGROUND AND SETTLEMENT TERMS.....	1
III.	THE NOTICE PROCESS.....	3
A.	Notice to the Class Members	3
B.	There are Zero Objections and Zero Opt-Outs, Resulting in an Impressive 100% Class Participation in the Settlement.....	4
IV.	EVALUATION OF THE SETTLEMENT	4
A.	The Settlement was Reached through Informed Arms-Length Negotiation	5
B.	Plaintiff's Investigation was Sufficient.....	6
C.	Class Counsel are Experienced in Similar Litigation and Endorse the Settlement	6
D.	Reasonable Estimate of the Nature and Amount of Recovery	6
V.	THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE.....	7
A.	Plaintiff is Entitled to Recover Reasonable Attorneys' Fees Under the Labor Code.....	8
B.	Class Counsel's Request for Fees is Reasonable and Properly Calculated as a Percentage of the Common Fund	9
1.	The Attorneys' Fees Requested Here Fall Within the Reasonable Range Awarded in Similar Cases Under the Well-established Common Fund Method	9
2.	The High Quality of Work and Excellent Result Obtained Support the Award	10
3.	Class Members Had Sufficient Notice of the Requested Fees	10
4.	The Contingent Nature of Class Counsel's Representation of Plaintiffs and the Class Further Supports the Fee Award at 1/3 of the Common Fund.....	11
5.	A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award	12
VI.	THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE.....	14
A.	The Requested Costs are Reasonable and Merit Approval.....	14
B.	The Requested Service Award is Reasonable and Merits Approval	14
VII.	OTHER MATTERS FOR FINAL APPROVAL	15
A.	Settlement Administration Costs	15
B.	Uncashed Checks	16
C.	Final Report	16
D.	Submission to the LWDA.....	16
VIII.	CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i> (2000) 85 Cal.App.4th 1135	6
<i>Bell v. Am. Title Ins. Co.</i> (1991) 226 Cal.App.3d 1589	4
<i>Bell v. Farmers Insurance Exchange</i> (2004) 115 Cal.App.4th 715.....	15
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472	10
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	8
<i>Ferguson v. Lieff, Cabraser, Heimann & Bernstein</i> (2003) 30 Cal.4th 1037.....	4
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	6
<i>Laffitte v. Robert Half International, Inc.</i> (2016) 1 Cal.5th 480.....	8, 9
<i>Litwin v. iRenew Bio Energy Solutions, LLC</i> (2014) 226 Cal.App.4th 877	11
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> (2010) 186 Cal.App.4th 399	6
<i>PLCM Group, Inc. v. Drexler</i> (2000) 22 Cal.4th 1084.....	12
<i>Press v. Lucky Stores, Inc.</i> (1983) 34 Cal.3d 311	12
<i>Serrano III v. Priest</i> (1977) 20 Cal.3d 25	10
<i>Wershba v. Apple Computers, Inc.</i> (2001) 91 Cal.App.4th 246	7
<i>Williams v. MGM-Pathe Communs. Co.</i> (9th Cir. 1997) 129 F.3d 1026.....	10

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT AND ESSENTIAL POINTS**

3 Pursuant to California Rules of Court, Rule 3.769 (d) and (e), Plaintiff respectfully
4 requests that this Court grant final approval of the Class Action Settlement Agreement (the
5 “Settlement Agreement” or “S.A.”) already on file in this action, which is supported and
6 unopposed by Defendants Charter Hospice, Inc., and Charter Hospice of Colton, LLC, and their
7 owners (collectively, “Defendants” or “Charter”), and enter the proposed order and final
8 judgment in this matter.

9 There are several essential reasons why this settlement should be approved, and judgment
10 entered accordingly, as follows:

- 11 • After extensive work, the Parties reached a \$750,000 settlement tailored to a
12 limited release of the claims alleged on behalf of the Class Members;
- 13 • The Class Members were deemed to participate in the Settlement, and were not
14 required to submit a Claim Form to receive funds;
- 15 • No reversion to Defendants; and
- 16 • There are zero objections and zero opt-outs to the Settlement, meaning that 100%
17 of the Class elected to participate in the Settlement;

18 In accordance with the analysis and law set forth herein, the Settlement should be
19 approved, and judgment entered based on the determination that the Settlement is fair,
20 reasonable, adequate, and in the best interests of the Class. (Declaration of Class Counsel Brian
21 J. Mankin [“Mankin Decl.”] ¶¶ 13, 32).

22 **II. PERTINENT BACKGROUND AND SETTLEMENT TERMS**

23 Plaintiff and the Class Members are and/or were employed by Defendants as non-exempt
24 employees who performed nursing duties in California (the “Class” or “Class Members”) at any
25 time during the period from June 25, 2016, through July 15, 2021 (the “Class Period”). The
26 primary claims involved allegations of failure to pay correct minimum and overtime wages, meal
27 and rest break violations, inaccurate wage statements, failure to timely pay final wages to former
28 employees, and other cascading penalties, including under PAGA.

The Settlement includes 213 Participating Class Members (which is less than the 250 employees that was projected at preliminary approval). The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Norman Alcantara (“Alcantara Decl.”), ¶ 11):

	Total Amount
<i>Gross Settlement Amount</i>	\$ 750,000.00
Attorneys’ Fees (1/3)	\$ 250,000
Litigation Costs	\$ 10,603.50
Administrator Costs	\$ 5,300.00
PAGA Penalties	\$ 25,000.00
Class Representative’s Service Award	\$ 5,000.00
<i>Net Settlement Amount</i>	\$ 454,096.50

The Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Based on a class size of 213 employees, and assuming all of the amounts are approved by the Court, the highest payment to Participating Class Members is estimated at \$3,982.19, and the average payment is \$2,131.91. Moreover, there are a total of 30,088 Weeks Worked by all Class Members, so the payment per Week Worked is approximately \$15.09. (Alcantara Decl. ¶ 12). In accordance with the settlement, 100% of the Net Settlement Amount will be distributed to the Class with no reversion to Defendants.

Additionally, the Settlement Agreement provides that the 25% PAGA allocation will be allocated only to Aggrieved Employees, rather than to all Class Members. In this case, 137 Aggrieved Employees will share in the \$6,250 award on a pro rata basis. The average payment to the Aggrieved Employees is \$45.62, and the per Work Week value is \$.57 based on the Aggrieved Employees collectively working 10,962.95 Work Weeks during the PAGA Period. (Alcantara Decl. ¶ 13).

The Parties agree that one-third of each Individual Settlement Amount shall constitute wages (for which each Participating Class Member will be issued an IRS Form W-2 for such payment), and the remaining two-thirds, as well as the PAGA payment made to Aggrieved Employees, shall constitute interest and penalties for which each Participating Class Member

1 will be issued an IRS Form 1099 for the interest and penalty allocation). (S.A. ¶ 47(d)).
2 Defendants will separately pay its share of payroll taxes and withholdings. Defendants are
3 required to deposit the Settlement Amount with the Settlement Administrator within 15 calendar
4 days after the Effective Date.

5 **III. THE NOTICE PROCESS**

6 **A. NOTICE TO THE CLASS MEMBERS**

7 Pursuant to the Court's Order and the Settlement Agreement, the Parties directed the
8 Settlement Administrator to review and update the Class Members' addresses, mail the Court-
9 approved Notice Packet, and process their responses. (Alcantara Decl. ¶ 3).

10 Prior to mailing the Notice Packet, the Settlement Administrator performed a National
11 Change of Address search on all Class Members to determine if any had moved. (*Id.* ¶ 7). Then,
12 on September 15, 2021, the Notice Packet was sent via first-class mail to 213 Class Members to
13 advise each about the suit and settlement. (*Id.* ¶ 8). For any Notice Packet that was returned by
14 the USPS as undeliverable and without a forwarding address, the Settlement Administrator
15 performed an advanced address search (i.e. skip trace). (*Id.* ¶ 9). The Settlement Administrator
16 used the advanced address search to locate updated addresses and promptly mailed the Notice
17 Packets to those updated addresses. Ultimately, there were 2 Notice Packets that were
18 undeliverable. (*Id.* ¶ 9). In sum, these figures evidence that there was a **99.1%** success rate in
19 mailing the Notice Packets.

20 In accordance with California Rules of Court, Rules 3.766(d) and 3.769(f), the Notice
21 Packet, which was provided in English and Spanish, provided Class Members with (1) a brief
22 explanation of the case; (2) an explanation of each Settlement Class Member's right to opt out of
23 the settlement class; (3) an explanation of the process (and relevant deadlines) through which a
24 Settlement Class Member could opt out of the settlement class; (4) notice about the binding
25 nature of the Judgment for Class Members who do not opt out; (5) an explanation of each
26 Settlement Class Member's right to appear through counsel; (6) an explanation of each
27 Settlement Class Member's right to appear at the fairness hearing and express views on the
28 settlement, i.e., object or otherwise respond; and (7) an explanation of each Settlement Class

Member's right to participate in the Settlement and receive payment accordingly. (See **Exhibit A** to the Alcantara Decl.).

B. THERE ARE ZERO OBJECTIONS AND ZERO OPT-OUTS, RESULTING IN AN IMPRESSIVE 100% CLASS PARTICIPATION IN THE SETTLEMENT

California law makes clear that the percentage of objectors and opt-outs is an important factor in the Court's consideration of a proposed class action settlement. *See Dunk, supra*, 48 Cal.App.4th at 1802. Indeed, the Ninth Circuit and other federal courts recognize that in the final fairness analysis, the number or percentage of class members who object to the settlement is a significant factor. *See Mandujano v. Basic Vegetable Prods., Inc.* (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY 2001) 127 F.Supp.2d 418, 425 ("[i]t is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.").

Here, there are zero objections and zero opt-outs to the Settlement, meaning that 100% of the Class Members will receive a share of the Settlement (Alcantara Decl. ¶¶ 14-16). Thus, the Class overwhelmingly viewed this as a fair and reasonable settlement.

IV. EVALUATION OF THE SETTLEMENT

It is axiomatic that California law strongly favors and encourages settlements. *See Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236. This presumption in favor of settlement applies with particular force in the context of class actions. *See Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (Kennard, J., concurring and dissenting) ("[p]ublic policy favoring settlement is especially weighty for class actions"); *Bell v. Am. Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607-1608 (affirming approval of a class settlement and implicitly endorsing its citation of federal precedent for the notion that there is a "strong public policy in favor of settlement of class actions"); *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 ("it hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits").

When entertaining a request for final approval of a class action settlement, a court's fundamental consideration is whether the settlement is fair, adequate and reasonable. *See Dunk,*

1 *supra*, 48 Cal.App.4th at 1801, fn. 7 (noting that state courts look to federal authority concerning
2 the approval of class settlements); California Rules of Court, Rule 3.769 (g).

3 Fairness is presumed when: (1) the settlement is reached through arm's-length
4 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
5 intelligently; (3) counsel is experienced in similar litigation; (4) the percentage of objectors and
6 opt outs is small, and (5) the range of reasonableness of the settlement fund to a possible
7 recovery in light of all attendant risks of litigation.” *Dunk, supra*, 48 Cal.App.4th at 1802. All
8 five of these factors are discussed in detail below.

9 **A. THE SETTLEMENT WAS REACHED THROUGH INFORMED ARMS-LENGTH**
10 **NEGOTIATION**

11 Courts presume the absence of fraud or collusion in the negotiation of a settlement,
12 unless evidence to the contrary is offered. Thus, there is a presumption here that the negotiations
13 were conducted in good faith. *See* 3 Alba Conte & Newberg, *supra*, at § 11.51. The proposed
14 settlement here was the product of arm's-length negotiation before a highly experienced and
15 reputable class action mediator to reach a settlement.

16 Here, Plaintiff and Class Counsel have diligently investigated the claims raised in this
17 litigation and, after taking into account the disputed factual and legal issues involved in this
18 action, the risks attending further prosecution, and the benefits to be received pursuant to the
19 compromise and settlement of the action as set forth in the Settlement, concluded that the
20 settlement terms are fair, reasonable, and in the best interest of the Settlement Class.

21 As the Settlement Agreement itself reveals, there is no preferential treatment for any
22 segment of the class, as the Settlement is designed to fairly and adequately compensate all Class
23 Members. And, pursuant to California Rules of Court Rule 3.769 (b), the parties have disclosed
24 the agreed upon and proposed attorney fee award, which is well within the range of
25 reasonableness for matters of this nature.

26 ///

27 ///

28 ///

1 **B. PLAINTIFF’S INVESTIGATION WAS SUFFICIENT**

2 As set forth at the time of preliminary approval, Class Counsel’s investigation into the
3 facts and merits of the wage and hour claims alleged included analyzing substantial amounts of
4 information, correspondence, documents, pay data, policies and procedures, and evidence
5 relating to the class size and the commonality of the claims. During this process, Plaintiff and
6 Class Counsel conducted investigations into the potential claims of the similarly situated
7 employees, as well as researching and investigating Defendants’ defenses. Finally, Class
8 Counsel synthesized and analyzed information provided by Defendants as to the total Class
9 Members, the number of current and former employees, the number of employees who worked
10 during various time periods, and prepared comprehensive damages calculations regarding the
11 claims at issue.

12 **C. CLASS COUNSEL ARE EXPERIENCED IN SIMILAR LITIGATION AND ENDORSE THE**
13 **SETTLEMENT**

14 Class Counsel are experienced in this type of litigation, and they have (and hereby do)
15 represent that this Settlement is fair and reasonable. (Mankin Decl. ¶¶ 13, 32); *see 7-Eleven*
16 *Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152 (Final
17 approval of settlement affirmed where counsel were all experienced litigators with class-action
18 experience and had recommended settlement based on the negotiated terms).

19 **D. REASONABLE ESTIMATE OF THE NATURE AND AMOUNT OF RECOVERY**

20 Plaintiff’s Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
21 which sufficiently provided the Court with “basic information about the nature and magnitude
22 of the claims in question and the basis for concluding that the consideration being paid for the
23 release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail,*
24 *Inc.* (2008) 168 Cal.App.4th 116, 133. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
25 (2010) 186 Cal.App.4th 399, later clarified *Kullar* by noting that an explicit statement of the
26 maximum theoretical amount that the class could recover was not part of the “basic
27 information” that counsel was required to produce:

28 ///

Greenwell misunderstands Kullar, apparently interpreting it to require the record in all cases to contain evidence in the form of an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims – a number which appears nowhere in the record of the case. But Kullar does not, as Greenwell claims, require any such explicit statement of value; it requires a record which allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.”

Of course, a settlement is not judged against what might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 246, 250 (“Compromise is inherent and necessary in the settlement process ... even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation”).

In light of the uncertainties of protracted litigation, this negotiated settlement reflects the best practicable recovery for the Class. While the total settlement amount is, of course, a compromise figure, the potential risks and opportunities of both parties were effectively weighed and considered by the parties, resulting in a fair and equitable settlement. Based upon detailed data obtained through discovery and information exchanges, and factoring in claim certification probabilities and liability probabilities, Class Counsel formulated detailed damages models to evaluate the claims for mediation in order to reach a realistic and reasonable resolution.

V. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND REASONABLE

For their efforts in creating a common fund for the benefit of the class, the Settlement Agreement provided that Class Counsel seek reasonable fees of \$250,000 (one-third of the Settlement Amount), which is the common fund. This amount will be paid from the Settlement Amount, as provided by the Settlement Agreement. These fees are warranted under the law and within the range of fees commonly awarded in similar cases.

1 As shown herein, the requested percentage of one-third of the settlement fund as payment
2 for attorneys' fees should be granted for several reasons. First, one-third is the standard
3 benchmark in California for class action settlements. *See, e.g., Chavez v. Netflix, Inc.* (2008) 162
4 Cal.App.4th 43, 66 n. 11 ("Empirical studies show that, regardless whether the percentage
5 method or the lodestar method is used, fee awards in class actions average around one-third of
6 the recovery"). Second, the California Supreme Court recently held that the percentage of the
7 fund method survives in California class action cases. *See Laffitte v. Robert Half International,*
8 *Inc.* (2016) 1 Cal.5th 480. Third, the requested amount is eminently reasonable through the
9 prism of a lodestar cross-check. Accordingly, this request should receive final approval.

10 **A. PLAINTIFF IS ENTITLED TO RECOVER REASONABLE ATTORNEYS' FEES UNDER**
11 **THE LABOR CODE**

12 Plaintiff and the Class are entitled to recover reasonable attorneys' fees, expenses and
13 costs under section 218.5 of the California Labor Code, which provides that, "[i]n any action
14 brought for the nonpayment of wages ... the Court shall award reasonable attorneys' fees and
15 costs to the prevailing party." In addition, Plaintiff and the Class are entitled to recover
16 reasonable attorneys' fees pursuant to section 1194.2 of the Labor Code, which provides that,
17 "... any employee receiving less than the legal minimum wage ... applicable to the employee is
18 entitled to recover in a civil action the unpaid balance of the full amount of this minimum
19 wage... including ... reasonable attorney's fees, and costs of suit." Plaintiff and the Class are
20 also entitled to fees and costs under section 226(e) of the Labor Code (employee who prevails on
21 claim for itemized wage statement violation "is entitled to an award of costs and reasonable
22 attorneys' fees"), under PAGA (Labor Code § 2699(g), which provides "Any employee who
23 prevails in any action shall be entitled to an award of reasonable attorney's fees and costs,
24 including any filing fee paid"), and, potentially, section 1021.5 of the California Code of Civil
25 Procedure.

26 ///

27 ///

28 ///

1 **B. CLASS COUNSEL’S REQUEST FOR FEES IS REASONABLE AND PROPERLY**
2 **CALCULATED AS A PERCENTAGE OF THE COMMON FUND**

3 Under the “common fund” doctrine, the request for attorneys’ fees in the amount of 1/3
4 of the common fund is reasonable and appropriate, because (1) it is within the approved range
5 for percentages awarded as attorneys’ fees in similar cases; (2) it is supported by the high quality
6 of Class Counsel’s work on this case and the results obtained for the Class; (3) the Class had
7 sufficient notice of the fee request; (4) it is supported by the fact that this case was handled on a
8 contingency basis and was undertaken despite various risks and expenses; and (5) the lodestar
9 cross-check supports the fee request.

10 **1. *The Attorneys’ Fees Requested Here Fall Within the Reasonable Range***
11 ***Awarded in Similar Cases Under the Well-established Common Fund***
12 ***Method***

13 Recently, the California Supreme Court approved trial courts’ usage of the common fund
14 method of awarding attorneys’ fees in wage and hour class actions, like this one, and upheld a
15 fee awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte, supra*, 1
16 Cal.5th at 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 552 (“fee awards in class actions
17 average around one-third of the recovery”). Specifically, in *Laffitte*, the Court wrote: “[w]e join
18 the overwhelming majority of federal and state courts in holding that when class action litigation
19 establishes a monetary fund for the benefit of the class members, and the trial court in its
20 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
21 of a reasonable fee by choosing an appropriate percentage of the fund created”). *Id.* at 506. The
22 California Supreme Court also noted that trial courts have the discretion to award fees as a
23 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
24 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
25 evaluate the reasonableness of a requested percentage fee.”).

26 The California Supreme Court’s recent *Laffitte* decision was consistent with its prior
27 rulings recognizing that “when a number of persons are entitled in common to a specific fund,
28 and an action brought by ... plaintiffs for the benefit of all results in the creation or preservation

1 of that fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III v.*
2 *Priest* (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A]
3 lawyer who recovers a common fund . . . is entitled to reasonable attorneys' fees from the fund
4 as a whole"). Notably, when fees are calculated as a percentage of the common fund, they should
5 be calculated based on the amount that was available to be claimed, rather than as a percentage
6 of the actual amount claimed. *See Boeing Co.*, 444 U.S. at 475-6, 480-1 (the SCOTUS held that
7 attorneys for a successful class may recover a fee based on the fund created for the class, even if
8 some class members make no claims against the fund, so that money remains in it that will be
9 returned to the Defendants, explaining: "[t]heir [class members'] right to share the harvest of the
10 lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund
11 created by the efforts of the class representatives and their counsel." *See also Williams v. MGM-*
12 *Pathe Communs. Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (trial court "abused its discretion by
13 basing the fee on the class members' claims against the fund rather than on a percentage of the
14 entire fund or on the lodestar").

15 **2. The High Quality of Work and Excellent Result Obtained Support the**
16 **Award**

17 In addition to the fact that a Class benefit was created with a \$750,000 non-reversionary
18 common fund settlement, the fairness of the requested fee award of 1/3 of the Settlement
19 Amount is supported by the high quality of work performed by Class Counsel and the positive
20 result obtained for the Class. This result occurred because Class Counsel diligently, efficiently,
21 and creatively pursued this case and reached a settlement for the benefit of the entire Class. The
22 fact that the settlement was embraced and supported by the Class, as evidenced by a 100%
23 participation rate, demonstrates that Class Counsel obtained a favorable result for the Class.

24 **3. Class Members Had Sufficient Notice of the Requested Fees**

25 Rule 3.769 of the California Rules of Court requires that the Class Members be given
26 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
27 preliminarily approved by the Court and distributed to the Class Members apprised them that
28 "Class Counsel will ask for fees of one-third (\$250,000) of the common fund Settlement Amount

1 as reasonable compensation for the work Class Counsel performed and will continue to perform
2 in this Lawsuit through finalization of the Settlement...” (Alcantara Decl., Exh. A.)

3 The Class Notice also advised the class members of the procedures for objecting to the
4 proposed settlement and appearing at the settlement hearing, where they could present their
5 objections to any aspect of the settlement, including the amount of attorneys’ fees to be awarded
6 to class counsel. *Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883
7 (“Procedural due process requires that affected parties be provided with ‘the right to be heard at a
8 meaningful time and in a meaningful manner’”). In accordance with the foregoing, it is
9 respectfully submitted that the instant notice complied with Rule 3.769 and, as a result, the Class
10 Members’ due process rights were fulfilled.

11 **4. The Contingent Nature of Class Counsel’s Representation of Plaintiffs**
12 **and the Class Further Supports the Fee Award at 1/3 of the Common**
13 **Fund**

14 An additional factor militating in favor of the granting of the requested fee award is the
15 fact that this case was both legally and financially risky for Class Counsel. *See Vizcaino v.*
16 *Microsoft Corp* (9th Cir. 2002) 290 F.3d 1043, 1048-49. Class Counsel have been representing
17 the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-
18 recovery after a substantial investment of time, money, and resources, and have done so since the
19 inception of this case without any payment or compensation.

20 Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
21 end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault of
22 counsel (i.e., bankruptcy, change in the law, consolidation/coordination/preemption, being top
23 filed, etc.). According to Mayer Brown LLP’s study entitled, An Empirical Analysis of Class
24 Actions, cited in *Laguna v. Coverall North America, Inc.* (9th Cir. 2014) 753 F.3d 918, found
25 that only one-third of class actions are successful, compared to two-thirds that are defeated and
26 result in no payment to the class members.¹

27 ///

28 _____
¹ www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf

Thus, the contingent nature of this case supports a fee of one-third of the common fund.

5. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award

Despite recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar “cross-check.”² (*Lealao, supra*, 82 Cal.App.4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees in class actions, the court ascertains Class counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”].)

The actual aggregated lodestar between the attorneys that worked on this case is approximately \$185,585. This results in a multiplier of only 1.35, which clearly demonstrates that the requested fee is justified, reasonable and appropriate. The aggregated lodestar is summarized in the following table, and in the submitted declaration of Class counsel:

///

///

///

///

///

///

///

///

² In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended. Herr, David F., *Manual for Complex Litigation*, § 14.121 (1988); See also *In re Activision* (N.D. Cal 1989) 723 F.Supp 1373.

Attorney/Timekeeper	Rate	Hours	Fee
Brian J. Mankin <i>Trial Counsel/Partner</i> (20 years)	\$695	145³	\$100,775
Misty L. Lauby <i>Partner</i> (14 years)	\$550	154.2	\$84,810
Grand Total for All Attorneys			\$185,585

(See Mankin Decl., ¶ 24.) The hourly rates above are comparable to those of other attorneys with equal or similar experience, if not somewhat lower (i.e., the Laffrey Matrix at www.laffreymatrix.com indicates that the benchmark rate for a 4-year attorney to be \$455/hour and a 12-year attorney at \$742/hour). Moreover, the Wolters Kluwer 2017 Real Rate Report (“Real Rate Report”) provides directly applicable information in this regard. The Real Rate Report is based on an enormous and statistically significant compilation of data: 25.8 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc., 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the hourly rates for partners and associates in major metropolitan areas. For the southern California area, which is based on billing entries for 1,125 partners and 1,566 associates, the Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. (*Id.*) And, perhaps most importantly,

³ Includes an estimated 35 hours of additional work in preparation for and attending the hearing, as well as the anticipated work to be performed after the final approval hearing with counsel, administrator, employees, and the court.

1 the information provided in the Real Rate Report is not based on self-reported numbers, surveys,
2 sampling, or reviews or other publications – instead, the Real Rate Report is based on the actual
3 hours and fees billed by law firms. (*Id.*) These numbers are not surprising given that a 4-year-old
4 article in the National Law Journal stated that in **2014** partners in Los Angeles charge an average
5 of \$665, while the average associate rate is \$401. (Sloan, \$1,000 Per Hour Isn't Rare Anymore;
6 Nominal Billing Levels Rise, But Discounts Ease Blow (2014) Nat. Law Journal.)⁴. (Mankin
7 Decl., ¶ 23.)

8 Thus, not only are Plaintiff's Counsel's rates reasonable and typical, but the attorneys'
9 fees requested are in line with Plaintiff's Counsel's lodestar, all of which confirms that the fee
10 request is fair and reasonable.

11 Class Counsel are also highly experienced in Class/PAGA litigation, including having
12 been selected as a "Super Lawyer" in employment litigation, and have achieved some of the
13 largest PAGA awards. (Mankin Decl. ¶¶ 2-6). Indeed, Class Counsel's rates are typical of the
14 rates charged by defense counsel with similar experience doing similar employment law work in
15 this region.

16 **VI. THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE**

17 **A. THE REQUESTED COSTS ARE REASONABLE AND MERIT APPROVAL**

18 The Settlement Agreement authorized litigation costs of up to \$15,000. (S.A. ¶ 47(f)).
19 Class Counsel's actual costs through the final approval hearing were \$10,603.50, so this is the
20 amount requested. The saving will be placed in the Net Settlement Amount for payment to the
21 Class Members. (Mankin Decl. ¶ 26). These costs include mediation fees, filing fees, online
22 research, travel/parking charges, CourtCall charges, and process server fees.

23 **B. THE REQUESTED SERVICE AWARD IS REASONABLE AND MERITS APPROVAL**

24 A named plaintiff is an essential ingredient of any class action and an incentive award
25 is appropriate to induce individuals to step forward and assume the burdens and obligations of
26 representing the Class. Courts regularly approve a service payment to compensate named

27 ⁴ The article notes that at Irell & Manella, the average partner rate is \$890/hr; Mannatt, Phelps & Phillips is \$740/hr;
28 O'Melveny & Meyers is \$715/hr; and Jeffer Mangels Butler & Mitchell is \$690/hr. *Id.*

1 plaintiffs for their service to the class and the risks they incurred during the course of the
2 litigation. *See, e.g. Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726
3 (upholding “service payments” to named Plaintiff for their efforts in bringing class action);
4 *Rodriguez v. West Publishing* (9th Cir. 2009) 563 F.3d 948, 959 (stating that incentive awards
5 are “intended to compensate class representatives for work done on behalf of the class, to make
6 up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
7 recognize their willingness to act as a private attorney general.”).

8 Under the Settlement, Defendants agreed to pay a Service Award of \$5,000 to Plaintiff
9 in recognition of her contribution as a Class Representative.

10 Plaintiff came forward and undertook significant risks, including the risk of being
11 blackballed in the industry and the risk that she could have been liable for Defendants’ costs if
12 he lost. This factor is a significant one for a wage earner, and the potential risk is very real.
13 *See Whiteway v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) 2007 WL
14 4531783, at *3 (“the few courts to consider this ‘class representatives’ dilemma’ have not
15 found it inequitable to assess costs upon the lead or named plaintiff in a class action.”).)

16 Plaintiff also committed a significant number of hours to assist with the
17 litigation/settlement processes of this case and entered into a general release of all claims
18 against Defendants, whereas the Class Members only released the claims alleged. The
19 requested Service Awards are reasonable, particularly in light of the substantial benefits
20 Plaintiff generated for the Class Members, and the risks she undertook. (*See* Plaintiff’s Decl. ¶
21 4-7).

22 The Notice sent to each Class Member detailed the proposed service award. No Class
23 Member objected to the proposed payment to Plaintiff. Thus, Plaintiff’s request that the Court
24 approve the awards because it is both reasonable and appropriate.

25 **VII. OTHER MATTERS FOR FINAL APPROVAL**

26 **A. SETTLEMENT ADMINISTRATION COSTS**

27 The Administrator, Simpluris, agreed to administer the settlement for a flat-fee of
28 \$5,300. (Alcantara Decl. ¶ 17). As such, the Parties request that the Administrator’s fee be

1 approved.

2 **B. UNCASHED CHECKS**

3 The Settlement Agreement and Final Order provides that uncashed checks will be
4 issued to the California State Controller in the name of the Class Member.

5 **C. FINAL REPORT**

6 Defendants are required to deposit the Settlement Amount within 15 calendar days after
7 the Effective Date. The Effective Date will be the date of Final Approval in light of the lack of
8 objections and requests to intervene. The Settlement Administrator will have 10 days after
9 receipt of payment to issue checks to the Class Members, who will then have 180 days to cash
10 their checks. However, the process of submitting funds to the State Controller can take an
11 additional year after the check cashing deadline, so the Parties propose submitting a final
12 report in the form of a declaration from the Administrator (setting forth the money that was
13 actually paid to the class members and potentially the State Controller) approximately 16
14 months after the check cashing deadline.

15 **D. SUBMISSION TO THE LWDA**

16 As set forth in the Mankin Declaration at ¶ 28, the settlement and this motion are
17 concurrently being submitted to the LWDA in accordance with Labor Code § 2699(1)(2).

18 **VIII. CONCLUSION**

19 Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and
20 merits approval. This motion is unopposed by Defendants.

21 Dated: October 21, 2021

LAUBY, MANKIN & LAUBY LLP

22
23 BY:



24 Brian J. Mankin, Esq.
25 Attorneys for Plaintiff and the Class
26
27
28

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 4590 Allstate Drive, Riverside, California 92501.

On October 21, 2021, I caused to be served the foregoing document(s) described as follows:

**NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; DECLARATIONS IN SUPPORT THEREOF; AND [PROPOSED] FINAL
ORDER AND JUDGMENT**

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **By Mail** I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

☐ **By Facsimile** I sent this document via fax to all parties as listed on attached service list, on

☐ **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

☐ **By Certified Mail-Return Receipt Requested** I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California

☐ **By Personal Service** I caused said document(s) to be personally served by hand on the parties listed on the attached service list.

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 21, 2021, Riverside, California.

☐ **Federal** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Tracie Chiarito, Declarant

SERVICE LIST

Varouj N. Arabian, Esq.
Gene F. Williams, Esq.
GORDON REES SCULLY MANSUKHANI
633 W. Fifth Street, 52nd Floor
Los Angeles, CA 90071
213-576-5073-Varouj direct dial
213-270-7831-Gene direct dial
213-680-4470-fax
varabian@grcm.com
gwilliams@grsm.com
Attorneys for Defendants, CHARTER HOSPICE, INC., CHARTER HOSPICE OF COLTON,
LLC, ARCH B. GILBERT, and FRED FRANK