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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

SAUL ELIZARRARAS, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

FUTURE FOAM, INC., a Nebraska
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: 30-2020-01152286-CU-OE-CXC
[Assigned to Hon. Glenda Sanders, CX101]

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

Hearing

Date: August 5, 2022

Time: 9:30 a.m.

Dept: CX101

Complaint filed: July 31, 2020

1 TO THE HONORABLE COURT AND TO ALL PARTIES AND COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on August 5, 2022, at 9:30 a.m., or as soon thereafter as
3 this matter may be heard by the Honorable Glenda Sanders in Department CX101 of the Orange
4 County Superior Court located at located at 751 W. Santa Ana Blvd., Santa Ana, CA 92701,
5 Plaintiff Saul Elizarraras will respectfully move this Court for an Order granting final approval
6 of the class action settlement between Plaintiff and Defendant Future Foam, Inc., which was
7 preliminarily approved on April 18, 2022. This Motion, which is supported and unopposed by
8 Defendant, seeks final approval and entry of judgment of a \$1,200,000 settlement on behalf of
9 150 Class Members.

10 Specifically, Plaintiff will and hereby does move the Court to grant final approval of the
11 Class Action Settlement Agreement and Release of Claims (the "Settlement Agreement"), and
12 enter the proposed order and final judgment filed concurrently herewith:

- 13 1. Finally certifying the Class, as defined in the Settlement Agreement and the
14 Court's Order Granting Preliminary Approval of the Settlement;
- 15 2. Finally appointing Plaintiff as Class Representative for purposes of settlement;
- 16 3. Finally appointing Plaintiff's Counsel as Class Counsel for purposes of
17 settlement;
- 18 4. Finding that the Class Notice Packet was properly provided to the Class in
19 accordance with the Court's Order granting Preliminary Approval;
- 20 5. Finally approving the settlement as fair, adequate, and reasonable, based upon the
21 terms set forth in the Settlement Agreement;
- 22 6. Binding Participating Class Members to the terms of the Settlement Agreement,
23 including the Release specified therein; and
- 24 7. Retaining jurisdiction to enforce the Settlement Agreement.

25 This Motion will be based upon this notice; the attached memorandum of points and
26 authorities; the Declarations of the Settlement Administrator (Lluvia Islas of ILYM Group),
27 Class Counsel (Brian Mankin and Peter Carlson), and Plaintiff filed concurrently herewith; the
28 records and files in this action; and any other further evidence or argument that the Court may

1 receive at or before the hearing.

2 Dated: July 21, 2022

LAUBY, MANKIN & LAUBY LLP

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4 BY: 
5 Brian J. Mankin, Esq.
6 Attorneys for Plaintiff and the Class
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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 request that this Court grant final approval of the Class Action Settlement Agreement and
5 Release of Claims (the “Settlement Agreement” or “S.A.”) already on file in this action, which is
6 supported and unopposed by Defendant Future Foam, Inc. (“Defendant” or “Future Foam”), and
7 enter the proposed order and final judgment in this matter.

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

- 10 • After extensive litigation, a robust pre-mediation exchange of information, and
11 arms-length negotiation brokered by an experienced mediator, the Parties reached a \$1,200,000
12 settlement tailored to a limited release of the claims alleged on behalf of 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 Defendant;
- 16 • There were no objections;
- 17 • There were only two requests for exclusion out of 152 Class Members, meaning
18 that 98.69% of the Class elected to participate in the settlement.

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

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

25 Future Foam is a company that manufactures and distributes polyurethane foam products,
26 such as carpet underlayment, mattress toppers, and other items. Plaintiff and the Class Members
27 (the “Settlement Class”) worked for Defendant at its facility in Fullerton during the “Class
28 Period” defined as July 31, 2016, through April 18, 2022 (the date preliminary approval was

granted). The primary claims (which Defendant vehemently disputed) involved allegations that Future Foam failed to pay the Settlement Class all wages owed, failed to provide compliant meal and rest breaks, to go with claims for wage statement violations, waiting time penalties, and PAGA penalties arising from the same underlying conduct.

The Settlement includes 150 Participating Class Members, and the following is a breakdown of how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Lluvia Islas [“Islas Decl.”] ¶ 17.

	Total Amount
<i>Gross Settlement Amount</i>	\$ 1,200,000.00
Attorneys’ Fees (1/3)	\$ 400,000.00
Actual Litigation Costs	\$ 11,052.88
Administrator Costs	\$ 6,000.00
PAGA Penalties (75% to LWDA; 25% to AEs)	\$ 50,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 722,947.12

The Participating Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Each Participating Class Member will receive a pro rata share of the Net Settlement Amount according to the percentage of Pay Periods Worked during the Class Period, such that the amount actually distributed to Participating Class Members will equal 100% of the Net Settlement Amount. (S.A. ¶ 46(c)).

Assuming all amounts in the Settlement are approved by the Court, *the average individual settlement payment is estimated to be \$4,756.23*, the highest individual settlement payment is approximately \$8,966.41, and the lowest is \$121.17 for an employee who worked a short period of time. There are a total of 11,933 Pay Period Worked in the Class Period, resulting in a per Pay Period value of approximately \$60.58. (Islas Decl. ¶ 17).

In addition, there are 108 Aggrieved Employees that will receive a share of the PAGA Penalties based on a pro-rata basis. Thus, the \$12,500 PAGA Penalties allocated to the Aggrieved Employees will be divided and paid on a Pay Periods Worked basis with an average pay of \$115.74 to each. (Islas Decl. ¶ 18; S.A. ¶ 46(h)).

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1 The Settlement provides that twenty percent (20%) of each Individual Settlement
2 Payment shall constitute wages (for which each Participating Class Member will be issued an
3 IRS Form W-2 for such payment), and the remaining eighty percent (80%) shall constitute
4 interest and penalties (for which each Participating Class Member will be issued an IRS Form
5 1099 for the interest and penalty allocation). (S.A. ¶ 46(d)). Additionally, the PAGA Penalties
6 payable to the Aggrieved Employees will be classified entirely as civil penalties and shall be
7 reported as required on an IRS Form 1099. (S.A. ¶ 46(h)).

8 The Settlement Agreement provides that Defendant shall deposit the Settlement Amount
9 within fifteen (15) calendar days after the Effective Date (S.A. ¶ 69). Within 10 days of receipt,
10 the Settlement Administrator shall issue payments to cover all court-approved payments. (S.A. ¶
11 70). Class Members will have 180 days to cash his/her settlement check. If a Class Member fails
12 to cash his check by the deadline, then the Settlement Administrator shall issue the unclaimed
13 funds to the State Controller's Office for the State of California in the name of the Class
14 Member. (S.A. ¶ 71).

15 **III. THE NOTICE PROCESS**

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

17 Pursuant to the Court's Order and the Settlement Agreement, the Parties directed the
18 Settlement Administrator to review and update the Class Members' addresses, mail the Court-
19 approved Notice Packet, and process their responses. (Islas Decl. ¶ 3-16).

20 After the Administrator received the Class Data, it performed a National Change of
21 Address search on all Class Members to determine if any had moved. (*Id.* at ¶ 6). On April 18,
22 2022, the Notice Packets were sent via first-class mail to 143 Class Members. However, it was
23 discovered that a small group of individuals were inadvertently excluded in the initial Class
24 Data; thus, the Administrator mailed Notice Packets to 8 Class Members on May 18, 2022, and
25 to 1 additional Class Member on June 2, 2022. (*Id.* at ¶¶ 7-9). For any Notice Packet that was
26 returned by the USPS as undeliverable and without a forwarding address, the Settlement
27 Administrator performed an advanced address search (i.e. skip trace) to locate updated addresses
28 and then promptly mailed the Notice Packets to those updated addresses. Ultimately, the

1 Settlement Administrator reports that only 1 Notice Packet was undeliverable, resulting in a
2 **99.3%** success rate in mailing the Notice Packets. (*Id.* at ¶ 13).

3 In accordance with California Rules of Court, Rules 3.766 (d) and 3.769(f), the Notice
4 Packet provided Class Members with (1) a brief explanation of the case; (2) an explanation of
5 each Settlement Class Member’s right to opt out of the settlement class; (3) an explanation of the
6 process (and relevant deadlines) through which a Settlement Class Member could opt out of the
7 settlement class; (4) notice about the binding nature of the Judgment for Class Members who do
8 not opt out; (5) an explanation of each Settlement Class Member’s right to appear through
9 counsel; (6) an explanation of each Settlement Class Member’s right to appear at the fairness
10 hearing and express views on the settlement, i.e., object or otherwise respond; and (7) an
11 explanation of each Settlement Class Member’s right to participate in the Settlement and receive
12 payment accordingly. (See **Exhibit A** to the Islas Decl.).

13 **B. THERE ARE NO OBJECTIONS AND ONLY TWO OPT-OUTS TO THE SETTLEMENT**

14 California law makes clear that the percentage of objectors and opt-outs is an important
15 factor in the Court’s consideration of a proposed class action settlement. *See Dunk v. Ford*
16 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1802. Indeed, the Ninth Circuit and other federal courts
17 recognize that in the final fairness analysis, the number or percentage of class members who
18 object to the settlement is a significant factor. *See Mandujano v. Basic Vegetable Prods., Inc.*
19 (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY 2001)
20 127 F.Supp.2d 418, 425 (“[i]t is well settled that the reaction of the class to the settlement is
21 perhaps the most significant factor to be weighed in considering its adequacy.”).

22 Here, there have been no objections, and/or disputes as to the Pay Periods credited, and
23 only two individuals opted out, meaning that 98.69% of the Class Members have elected to
24 participate and receive a share of the Settlement. (Islas Decl. ¶¶ 14-16).

25 Considering this positive reaction to the Settlement and its overall terms, it is clear that
26 the Settlement, which was the product of arm’s-length negotiations, is fair and reasonable and
27 the Parties therefore respectfully request that the Court grant final approval and enter the
28 proposed judgment as requested. *See Dunk*, 48 Cal.App.4th at 1800-1802 (class action

1 settlements should be approved if they are fair and reasonable, and a low percentage of objectors
2 and opt-outs is evidence of an agreement's fairness).

3 **IV. EVALUATION OF THE SETTLEMENT**

4 It is axiomatic that California law strongly favors and encourages settlements. *See*
5 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236. This presumption in favor of
6 settlement applies with particular force in the context of class actions. *See Ferguson v. Lieff,*
7 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (Kennard, J., concurring and dissenting)
8 (“[p]ublic policy favoring settlement is especially weighty for class actions”); *Bell v. Am. Title*
9 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607-1608 (affirming approval of a class settlement and
10 implicitly endorsing its citation of federal precedent for the notion that there is a “strong public
11 policy in favor of settlement of class actions”); *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976)
12 529 F.2d 943, 950 (“it hardly seems necessary to point out that there is an overriding public
13 interest in settling and quieting litigation. This is particularly true in class action suits”).

14 When entertaining a request for final approval of a class action settlement, a court's
15 fundamental consideration is whether the settlement is fair, adequate and reasonable. *See Dunk,*
16 48 Cal.App.4th at 1801, fn. 7 (noting that state courts look to federal authority concerning the
17 approval of class settlements); California Rules of Court, Rule 3.769 (g).

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

24 **A. THE SETTLEMENT WAS REACHED THROUGH INFORMED ARMS-LENGTH** 25 **NEGOTIATION**

26 Courts presume the absence of fraud or collusion in the negotiation of a settlement,
27 unless evidence to the contrary is offered. Thus, there is a presumption here that the negotiations
28 were conducted in good faith. *See* 3 Alba Conte & Newberg, *supra*, at § 11.51. The proposed

1 settlement here was the product of arm's-length negotiation before a highly experienced and
2 reputable class action mediator to reach a settlement.

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

8 As the Settlement Agreement itself reveals, the Settlement is designed to fairly and
9 adequately compensate all Class Members. And, pursuant to California Rules of Court Rule
10 3.769(b), the parties have disclosed the agreed upon and proposed attorney fee award, which is
11 well within the range of reasonableness for matters of this nature.

12 **B. PLAINTIFF'S INVESTIGATION WAS SUFFICIENT**

13 As set forth at the time of preliminary approval, Class Counsel aggressively litigated this
14 matter and performed a comprehensive investigation into the facts and merits of the wage and
15 hour claims alleged. Notably, in preparation for mediation, the Parties informally exchanged
16 documents and information that allowed both sides to calculate the potential damages and
17 evaluate potential risk, including extensive policies and procedures pertaining to each claim
18 alleged, and statistics relating to the number of current and former employees, number of shifts,
19 pay periods and other things. In this regard, Defendant provided timekeeping and payroll
20 records covering almost 9,900 pay periods and 100,000 total shifts worked by the Class
21 Members which allowed both parties and their experts to thoroughly analyze each potential
22 claim. Additionally, during this process, Plaintiff's counsel analyzed, researched, and
23 investigated the potential issues, including matters related to the calculation of damages, trial,
24 and appellate issues and risks.

25 **C. CLASS COUNSEL ARE EXPERIENCED IN SIMILAR LITIGATION AND ENDORSE THE**
26 **SETTLEMENT**

27 Class Counsel are experienced in this type of litigation, and they have (and hereby do)
28 represent that this Settlement is fair and reasonable. (Mankin Decl. ¶¶ 2-6, 13; Carlson Decl. ¶¶

2-7); see *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152 (Final approval of settlement affirmed where counsel were all experienced litigators with class-action experience and had recommended settlement based on the negotiated terms).

D. REASONABLE ESTIMATE OF THE NATURE AND AMOUNT OF RECOVERY

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

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

1 data obtained through discovery and information exchanges, and factoring in claim certification
2 probabilities and liability probabilities, Class Counsel formulated detailed damages models to
3 evaluate the claims for mediation in order to reach a realistic and reasonable resolution.

4 **V. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE**

5 For their efforts in creating a common fund for the benefit of the class, the Settlement
6 Agreement provided that Class Counsel seek reasonable fees of \$400,000, which is one-third of
7 the common fund Settlement Amount. These fees are warranted under the law and within the
8 range of fees commonly awarded in similar cases.

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

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

21 Plaintiff and the Class in this action are entitled to recover reasonable attorneys' fees,
22 expenses and costs under Labor Code § 218.5, which provides that, "[i]n any action brought for
23 the nonpayment of wages ... the Court shall award reasonable attorneys' fees and costs to the
24 prevailing party." In addition, Plaintiff and the Class are entitled to recover reasonable
25 attorneys' fees pursuant to Labor Code § 1194.2, which provides that, "... any employee
26 receiving less than the legal minimum wage ... applicable to the employee is entitled to recover
27 in a civil action the unpaid balance of the full amount of this minimum wage... including ...
28 reasonable attorney's fees, and costs of suit." Plaintiff is also entitled to fees and costs under

1 Labor Code § 226(e) (employee who prevails on claim for itemized wage statement violation “is
2 entitled to an award of costs and reasonable attorneys’ fees”), under PAGA (Labor Code §
3 2699(g), which provides “Any employee who prevails in any action shall be entitled to an award
4 of reasonable attorney’s fees and costs, including any filing fee paid”), and, potentially, section
5 1021.5 of the California Code of Civil Procedure.

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

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

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

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

1 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
2 evaluate the reasonableness of a requested percentage fee.”).

3 The California Supreme Court’s *Laffitte* decision was consistent with its prior rulings
4 recognizing that “when a number of persons are entitled in common to a specific fund, and an
5 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that
6 fund, such ... plaintiffs may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest*
7 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer who
8 recovers a common fund . . . is entitled to reasonable attorneys’ fees from the fund as a whole”).
9 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
10 based on the amount that was available to be claimed, rather than as a percentage of the actual
11 amount claimed. *See Id.* at 475-6, 480-1 (the SCOTUS held that attorneys for a successful class
12 may recover a fee based on the fund created for the class, even if some class members make no
13 claims against the fund, so that money remains in it that will be returned to the defendant,
14 explaining: “[t]heir [class members’] right to share the harvest of the lawsuit upon proof of their
15 identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class
16 representatives and their counsel.” *See also Williams v. MGM-Pathe Communs. Co.* (9th Cir.
17 1997) 129 F.3d 1026, 1027 (trial court “abused its discretion by basing the fee on the class
18 members’ claims against the fund rather than on a percentage of the entire fund or on the
19 lodestar”).

20 **2. High Quality of Work and Excellent Result Obtained Support the Award**

21 In addition to the fact that a Class benefit was created with a non-reversionary common
22 fund settlement, the fairness of the requested fee award of 1/3 of the Settlement Amount is
23 supported by the high quality of work performed by Class Counsel and the excellent result
24 obtained for the Class – **who will receive nearly \$5,000 each on average** – in spite of the risks of
25 ongoing litigation against a well-funded Defendant. This result occurred because Class Counsel
26 diligently, efficiently, and creatively pursued this case and reached a settlement for the benefit of
27 the entire Class. The fact that the settlement was embraced and supported by the Class,
28 demonstrates that Class Counsel obtained a favorable result for the Class.

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

2 Rule 3.769 of the California Rules of Court requires that the Class Members be given
3 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
4 preliminarily approved by the Court and distributed to the Class Members apprised them that
5 "Class Counsel will ask for fees of one-third (\$737,500) of the common fund Settlement Amount
6 as reasonable compensation for the work Class Counsel performed and will continue to perform
7 in this Lawsuit through finalization of the Settlement..." (Holman Decl., Exh. A.)

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

16 **4. The Contingent Nature of Class Counsel's Representation of Plaintiff**
17 **and the Class Further Supports the Fee Award at 1/3 of the Common**
18 **Fund**

19 An additional factor militating in favor of the granting of the requested fee award is the
20 fact that this case was both legally and financially risky for Class Counsel. *See Vizcaino v.*
21 *Microsoft Corp* (9th Cir. 2002) 290 F.3d 1043, 1048-49. Class Counsel have been representing
22 the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-
23 recovery after a substantial investment of time, money, and resources, and have done so since the
24 inception of this case without any payment or compensation. Specifically, there was the prospect
25 of enormous cost inherent in class action litigation; the risk that Defendant could prevail on its
26 argument that the class should not be certified; and the risk that Defendant could prevail on the
27 merits of some or all of the claims.

28 ///

1 If Plaintiff lost this case, Class Counsel would have recovered nothing, and would have
2 lost its out-of-pocket costs. Indeed, as Plaintiff's Counsel can attest, not all class/PAGA cases
3 are successful. Many cases end with no fees or a greatly reduced fee that is far less than lodestar,
4 often due to no fault of counsel (i.e., bankruptcy, change in the law, consolidation or
5 coordination or preemption, being top filed, etc.). According to Mayer Brown LLP's study
6 entitled, An Empirical Analysis of Class Actions, cited in *Laguna v. Coverall North America,*
7 *Inc.* (9th Cir. 2014) 753 F.3d 918, found that only one-third of class actions are successful,
8 compared to two-thirds that are defeated and result in no payment to the class members.¹

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

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

11 Despite recognized limitations of the so-called lodestar method, some California and
12 federal courts acknowledge the utility of a lodestar "cross-check."² *Lealao v Beneficial*
13 *California, Inc.* (2000) 82 Cal.App.4th 19, 46-47. Under the "lodestar multiplier" method of
14 cross-checking the reasonableness of attorneys' fees in class actions, the court ascertains Class
15 counsel's total "lodestar" amount by multiplying the number of hours reasonably expended by
16 each attorney or legal staff member by their hourly rates, and then enhances or reduces this
17 lodestar figure by a "multiplier" to account for a range of factors, such as the novelty or
18 difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM Group,*
19 *Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d
20 311, 322; *Lealao*, 82 Cal.App.4th at 43 [court has discretion to use multiplier to ensure fee award
21 is within "range of fees freely negotiated in the legal marketplace in comparable litigation"].

22 The actual aggregated lodestar for Plaintiff's counsel is approximately \$241,852.50. This
23 results in a multiplier of only 1.65, as summarized in the following table, and in the submitted
24 declaration of Plaintiff's counsel:

25
26
27 ¹ www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf

28 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	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner)	Trial Counsel	21	\$775	155³	\$120,125.00
Peter Carlson (Senior Associate)	Handling Attorney	8	\$575	211.7	\$121,727.50
Grand Total for All Attorneys				366.7	\$241,852.50

(Mankin Decl. ¶ 25; Carlson ¶ 8).

The hourly rates above are comparable to those of other attorneys with equal or similar experience, if not somewhat lower (*i.e.*, the Laffey Matrix at www.laffeymatrix.com indicates that the benchmark rates are: \$676/hour for an 8–10-year attorney, \$764/hour for a 11-19 year attorney, and \$919/hour for a 20+ year attorney). 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. And, perhaps most importantly, the information provided in the Real Rate Report is not based on self-reported numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 23-24.)

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

³ Includes an estimated 35 hours that will be expended in finalizing the motion, attending the hearing, working with the parties and administrator regarding the notice and payment process, and filing any post judgment paperwork.

1 Class Counsel are also highly experienced in Class/PAGA litigation, including having
2 been selected as “Super Lawyers” in employment litigation on multiple occasions, having
3 achieved large settlements, having prevailed at trial in PAGA-only actions and Class Action jury
4 trials. (Mankin Decl. ¶¶ 2-6; Carlson ¶¶ 2-7). Indeed, Class Counsel’s rates are typical of the
5 rates charged by defense counsel with similar experience doing similar employment law work in
6 this region.

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

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

9 Plaintiff’s Counsel requests reimbursement of their actual out-of-pocket expenses
10 incurred to prosecute this action. These expenses were incidental and necessary to the effective
11 representation of the employees. *See Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.
12 Plaintiff’s Counsel are permitted to recover their litigation costs and expenses under the common
13 fund doctrine. *See Serrano III*, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees
14 and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6
15 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same reasons
16 discussed above with respect to the recovery of attorneys’ fees by . . . [Plaintiffs’] attorneys”).
17 Furthermore, Plaintiff’s Counsel are entitled to recover “those out-of-pocket expenses that would
18 normally be charged to a fee-paying client.” *Harris*, 24 F.3d at 19.

19 The Settlement Agreement authorized litigation costs of up to \$20,000. (S.A. ¶ 46(f)).
20 Class Counsel’s actual costs through the final approval hearing are estimated to be \$11,052.88.
21 (Mankin Decl. ¶¶ 27; Exhibit C to same). These costs include mediation fees, filing fees, and
22 other costs that include Attorney Service charges, expert discovery fees, CourtCall charges, and
23 process service fees. (*Id.*) These costs are reasonable and uncontested, and should be approved,
24 with the savings placed in the Net Settlement Amount and paid to Participating Class Members.

25 **B. THE REQUESTED SERVICE AWARD IS REASONABLE AND MERIT APPROVAL**

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

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

8 The Settlement Agreement provides an incentive award payment to Plaintiff of
9 \$10,000. This amount is reasonable given the average recovery that Class Members will
10 receive, as well as the time and effort Plaintiff devoted to this case, and the risk that
11 accompanied the litigation. His efforts included providing factual background for the Class
12 and PAGA complaint; providing documents and information about Defendant’s compensation
13 plan; participating in phone calls to discuss litigation and settlement strategy; making himself
14 available throughout the litigation to assist with analyzing the claims and defenses; helping
15 Class Counsel prepare for the mediation; and reviewing the settlement documents. The Class
16 Representative also assumed significant risk in bringing this litigation – namely, had the case
17 lost, he could have been ordered to pay Defendant’s costs.

18 Plaintiff also committed a significant number of hours to assist with the
19 litigation/settlement processes of this case and entered into a general release of all claims
20 against Defendant, whereas the Class Members only released the claims alleged. The
21 requested Service Award is reasonable, particularly in light of the substantial benefits Plaintiff
22 generated for the Class Members, the risks he undertook, and in exchange for executing a
23 general release against Defendant while giving up the right to pursue separate individual
24 claims. (*See* Plaintiff Decl. for supporting information).

25 The Notice sent to each Class Member detailed the proposed service award. No Class
26 Member objected to the proposed payment to Plaintiff. Thus, Plaintiff requests that the Court
27 approve the award because it is both reasonable and appropriate.
28

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

2 **A. SETTLEMENT ADMINISTRATION COSTS**

3 The Administrator, ILYM Group, agreed to administer the settlement for a flat-fee of
4 \$6,000. (Islas Decl. ¶ 19). This amount was fully disclosed to the Class Members in the Class
5 Notice, and no Class Members objected to it. As such, the Parties request that the
6 Administrator's fee request be approved.

7 **B. UNCASHED CHECKS**

8 The Settlement Agreement provides that uncashed checks (following a 180-day check
9 cashing period) will be submitted to the to the California State Controller's Office in the name
10 of the Class Member and/or Aggrieved Employee.

11 **C. FINAL REPORT**

12 Defendant is required to issue payment to the Administrator within fifteen calendar (15)
13 days after the Effective Date. The Administrator will then have 10 days to issue payment to
14 the Class Members and Aggrieved Employees, who will then have 180 days to cash their
15 checks. Thus, the deadline to cash checks should end in February or March 2023. The
16 Administrator may impose a hold onto the uncashed check fund before transmitting those
17 funds to the State Controller. Therefore, the Parties propose submitting a declaration from the
18 Administrator on approximately April 20, 2023.

19 **D. SUBMISSION TO THE LWDA**

20 As set forth in the Mankin Declaration at ¶ 29, the settlement and this motion are
21 concurrently being submitted to the LWDA in accordance with Labor Code § 2699(1)(2).

22 **VIII. CONCLUSION**

23 Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and
24 merits approval. This motion is unopposed by Defendant.

25 Dated: July 21, 2022

LAUBY, MANKIN & LAUBY LLP

26
27 BY:



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

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 July 21, 2022, 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 July 21, 2022, 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

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