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

ELIZABETH MORENO, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

J.J. KANE ASSOCIATES, INC., a New
Jersey Corporation; and DOES 1 through 10,
inclusive;

Defendants.

Case No.: CVRI2101236
*[Assigned to Hon. Judge Craig Riemer, Dept
1, 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: September 7, 2022

Time: 8:30 a.m.

Dept: 1

Complaint filed: March 9, 2021

TO THE COURT AND PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT on September 7, 2022, at 8:30 a.m., or as soon
thereafter as this matter may be heard by the Honorable Craig Riemer in Department 1 of the
Riverside County Superior Court located at 4050 Main Street, Riverside, CA 92501, Plaintiff
Elizabeth Moreno will respectfully move this Court for an Order granting final approval of the
class action settlement between Plaintiff and Defendant J.J. Kane Associates, Inc., which was
preliminarily approved by the Court on May 9, 2022. This Motion, which is supported and

unopposed by Defendant, seeks final approval and entry of judgment of a \$235,000 settlement on behalf of 43 Class Members.

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

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

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

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

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

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

6. Binding participating Class Members, Plaintiff and the State of California to the terms of the Settlement Agreement, including the Released Class Claims and PAGA Released Claims specified therein; and

7. Retaining jurisdiction to enforce the Settlement Agreement.

This Motion will be based upon this notice; the attached memorandum of points and authorities; the Declarations of the Settlement Administrator (Kevin Lee of Phoenix Administration), Class Counsel (Brian Mankin and Misty Lauby) and Plaintiff filed concurrently herewith; the records and files in this action; and any other further evidence or argument that the Court may receive at or before the hearing.

Dated: August 15, 2022

LAUBY, MANKIN & LAUBY LLP

BY:



Brian J. Mankin, Esq.
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 requests that this Court grant final approval of the Second Amended Class Action Settlement
5 Agreement and Release of Claims (the “Settlement Agreement” or “S.A.”) on file in this action,
6 which is supported and unopposed by Defendant J.J. Kane Associates, Inc., and enter the
7 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 work, the Parties reached a \$235,000 settlement tailored to a
11 limited release of the claims alleged on behalf of Class Members and the Aggrieved Employees;
- 12 • The Class Members were deemed to participate in the Settlement, and were not
13 required to submit a Claim Form to receive funds;
- 14 • No reversion to Defendant;
- 15 • There were no objections;
- 16 • There was 1 opt-out out, meaning that **97.7%** of the Class elected to participate in
17 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, 35).

22 **II. SUMMARY OF THE SETTLEMENT**

23 Defendant J.J. Kane Associates, Inc. (“Defendant” or “J.J. Kane”) is a company that
24 operates auction sites in California of used cars, trucks, cargo vans, construction
25 equipment, and other equipment. Plaintiff and the Class Members (the “Settlement Class”)
26 worked for Defendant during the Class Period of November 1, 2018, through January 7, 2022.
27 The primary claims (which Defendant vehemently disputed) involved allegations that J.J. Kane
28 failed to pay the Settlement Class all wages owed (due to an alleged rounding policy), failed to

provide compliant meal and rest breaks, wage statement violations, waiting time penalties, and PAGA penalties arising from the same underlying conduct.

The Settlement includes 42 Participating Class Members, and the following is a breakdown of how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Kevin Lee (“Lee Decl.”), ¶ 12):

	Total Amount
<i>Gross Settlement Amount</i>	\$ 235,000.00
Attorneys’ Fees (1/3)	\$ 78,333.33
Litigation Costs	\$ 11,013.68
Administrator Costs	\$ 5,000.00
PAGA Penalties	\$ 20,000.00
Class Representative Service Award	\$ 5,000.00
<i>Net Settlement Amount</i>	\$ 115,652.99

The Participating Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. (S.A. ¶ 24). Each Participating Class Member will receive an Individual Settlement Amount which will be calculated and apportioned from the Net Settlement Amount based on the number of Weeks Worked by each Settlement Class Member during the Class Period. (S.A. ¶ 47(c)).

Assuming all of the amounts in the Settlement are approved by the Court, the highest payment to Participating Class Members is estimated to be approximately \$5,252.72, and the average payment is estimated to be \$2,753.64. (Lee Decl. ¶ 13).

In addition, the 41 Aggrieved Employees will share in the \$5,000 PAGA Payment based on Weeks Worked, who will receive \$121.95 each on average. (Lee Decl. ¶ 14).

The Individual Settlement Payments to Participating Class Members will be allocated as one-third to wages subject to standard withholdings and two thirds for interest and statutory penalties from which no taxes will be withheld. The Settlement Administrator will issue to each Participating Class Member an Internal Revenue Service Form W-2 and comparable state forms with respect to the wage allocation and a Form 1099 with respect to the penalties and interest allocations. (S.A. ¶ 47(d)).

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1 The Settlement Agreement provides that Defendant shall fund the Settlement Amount
2 within 15 days of the Effective Date, which is anticipated to be the date the Court enters an order
3 granting Final Approval. The Settlement Administrator is then required to issue payments within
4 10 calendar days of receipt of the payment. (S.A. ¶ 68-69).

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. (Lee Decl. ¶ 2).

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.* at ¶ 4).
12 Then, on June 7, 2022, the Notice Packet was sent via first-class mail to the Class Members to
13 advise each about the suit and settlement. There were no undeliverable or returned notices, so
14 the Administrator was not required to update and/or remail any Notice Packets, resulting in a
15 **100%** success rate in mailing the Notice Packets. (*Id.* at ¶ 5-7).

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

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1 **B. THERE WERE NO OBJECTIONS AND ONLY 1 OPT-OUTS, RESULTING IN AN**
2 **IMPRESSIVE CLASS PARTICIPATION IN THE SETTLEMENT**

3 California law makes clear that the percentage of objectors and opt-outs is an important
4 factor in the Court’s consideration of a proposed class action settlement. *See Dunk, supra*, 48
5 Cal.App.4th at 1802. Indeed, the Ninth Circuit and other federal courts recognize that in the
6 final fairness analysis, the number or percentage of class members who object to the settlement is
7 a significant factor. *See Mandujano v. Basic Vegetable Prods., Inc.* (9th Cir. 1976) 541 F.2d
8 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY 2001) 127 F.Supp.2d 418, 425
9 (“[i]t is well settled that the reaction of the class to the settlement is perhaps the most significant
10 factor to be weighed in considering its adequacy.”).

11 Here, no objections were submitted and only 1 opt-out, meaning that 97.7% of the Class
12 Members elected to participate and receive a share of the Settlement. (Lee Decl. ¶¶ 9-10,
13 Exhibit “B”).

14 In light of this positive reaction to the Settlement and its overall terms, it is clear that the
15 Settlement, which was the product of arm’s-length negotiations, is fair and reasonable and the
16 Parties therefore respectfully request that the Court grant final approval and enter the proposed
17 judgment as requested. *See Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1802
18 (class action settlements should be approved if they are fair and reasonable, and a low percentage
19 of objectors and opt-outs is evidence of an agreement’s fairness).

20 **IV. EVALUATION OF THE SETTLEMENT**

21 It is axiomatic that California law strongly favors and encourages settlements. *See*
22 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236. This presumption in favor of
23 settlement applies with particular force in the context of class actions. *See Ferguson v. Lieff,*
24 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (Kennard, J., concurring and dissenting)
25 (“[p]ublic policy favoring settlement is especially weighty for class actions”); *Bell v. Am. Title*
26 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607-1608 (affirming approval of a class settlement and
27 implicitly endorsing its citation of federal precedent for the notion that there is a “strong public
28 policy in favor of settlement of class actions”); *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976)

1 529 F.2d 943, 950 (“it hardly seems necessary to point out that there is an overriding public
2 interest in settling and quieting litigation. This is particularly true in class action suits”).

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

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

13 **A. THE SETTLEMENT WAS REACHED THROUGH INFORMED ARMS-LENGTH**
14 **NEGOTIATION**

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

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

25 As the Settlement Agreement itself reveals, the Settlement is designed to fairly and
26 adequately compensate all Class Members. And, pursuant to California Rules of Court Rule
27 3.769 (b), the parties have disclosed the agreed upon and proposed attorney fee award, which is
28 well within the range of reasonableness for matters of this nature.

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 Defendant’s defenses. Finally, Class
8 Counsel synthesized and analyzed information provided by Defendant 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, 35); *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:

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

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

18 In light of the uncertainties of protracted litigation, this negotiated settlement reflects the
19 best practicable recovery for the Class. While the total settlement amount is, of course, a
20 compromise figure, the potential risks and opportunities of both parties were effectively weighed
21 and considered by the parties, resulting in a fair and equitable settlement. Based upon detailed
22 data obtained through informal discovery and information exchanges, and factoring in class
23 certification probabilities and liability probabilities, Class Counsel formulated detailed damages
24 models to evaluate the claims for mediation in order to reach a realistic and reasonable resolution
25 as set forth at preliminary approval.

26 **V. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND REASONABLE**

27 For their efforts in creating a common fund for the benefit of the class, the Settlement
28 Agreement provided that Class Counsel seek reasonable fees of \$78,333.33, which is one-third
of the common fund Settlement Amount and is substantially lower than Class Counsel’s actual
lodestar, resulting in a *significant negative multiplier*. These fees are warranted under the law
and within the range of fees commonly awarded in similar cases.

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

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

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

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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 The California Supreme Court approved trial courts’ usage of the common fund method
14 of awarding attorneys’ fees in wage and hour class actions, like this one, and upheld a fee
15 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte, supra*, 1 Cal.5th
16 at 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 552 (“fee awards in class actions average
17 around one-third of the recovery”). Specifically, in *Laffitte*, the Court wrote: “[w]e join the
18 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 *Laffitte* decision was consistent with its prior rulings
27 recognizing that “when a number of persons are entitled in common to a specific fund, and an
28 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that

1 fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III v. Priest*
2 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who
3 recovers a common fund . . . is entitled to reasonable attorneys' fees from the fund as a whole").
4 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
5 based on the amount that was available to be claimed, rather than as a percentage of the actual
6 amount claimed. *See Boeing Co.*, 444 U.S. at 475-6, 480-1 (the SCOTUS held that attorneys for
7 a successful class may recover a fee based on the fund created for the class, even if some class
8 members make no claims against the fund, so that money remains in it that will be returned to
9 the defendant, explaining: "[t]heir [class members'] right to share the harvest of the lawsuit upon
10 proof of their identity, whether or not they exercise it, is a benefit in the fund created by the
11 efforts of the class representatives and their counsel." *See also Williams v. MGM-Pathe*
12 *Communs. Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (trial court "abused its discretion by basing
13 the fee on the class members' claims against the fund rather than on a percentage of the entire
14 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 non-reversionary common
18 fund settlement, the fairness of the requested fee award of 1/3 of the Settlement Amount is
19 supported by the high quality of work performed by Class Counsel and the positive result
20 obtained for the Class in spite of the risks of ongoing litigation against a well funded Defendant.
21 This result occurred because Class Counsel diligently, efficiently, and creatively pursued this
22 case and reached a settlement for the benefit of the entire Class. The fact that the settlement was
23 embraced and supported by the Class, as evidenced by a 97.7% participation rate, demonstrates
24 that Class Counsel obtained a favorable result for the Class.

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

26 Rule 3.769 of the California Rules of Court requires that the Class Members be given
27 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
28 preliminarily approved by the Court and distributed to the Class Members apprised them that

1 “Class Counsel will ask for fees of one-third (\$78,333.33) of the common fund Settlement
2 Amount as reasonable compensation for the work Class Counsel performed and will continue to
3 perform in this Lawsuit through finalization of the Settlement...” (Lee Decl., Exh. A.)

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

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

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

24 If Plaintiff lost this case, Class Counsel would have recovered nothing, and would have
25 lost its out-of-pocket costs. Indeed, as Plaintiff’s Counsel can attest, not all class/PAGA cases
26 are successful. Many cases end with no fees or a greatly reduced fee that is far less than lodestar,
27 often due to no fault of counsel (i.e., bankruptcy, change in the law, consolidation or
28 coordination or preemption, being top filed, etc.). According to Mayer Brown LLP’s study

entitled, *An Empirical Analysis of Class Actions*, cited in *Laguna v. Coverall North America, Inc.* (9th Cir. 2014) 753 F.3d 918, found that only one-third of class actions are successful, compared to two-thirds that are defeated and result in no payment to the class members.¹

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*

The “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees also supports the fee request. While a positive multiplier is routinely approved in class actions ranging between 1.5 and 4.0, here Class Counsel are seeking a *negative multiplier*, as the lodestar exceeds the one-third common fund request.

As set forth in the declaration of Class Counsel submitted herewith, the actual aggregated lodestar between the attorneys that have worked on this case is approximately \$154,592.50 through the conclusion of this matter, resulting in a *negative multiplier*, which is summarized in the following table, and in the declaration of Class Counsel:

Attorney/Role	Rate	Hours	Fee
Brian J. Mankin <i>Trial Counsel</i> (21 years)	\$775	120.3 ²	\$93,232.50
Misty M. Lauby <i>Partner/Handling Atty</i> (14 years)	\$650	94.4	\$61,360.00
Grand Total for All Attorneys		214.7	\$154,592.50

(Mankin Decl. ¶ 25; Lauby Decl. ¶ 11).

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

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

² Includes an estimated 40 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 attorney, and \$919/hour for a 20+ year attorney). Moreover, the Wolters Kluwer 2017 Real Rate
2 Report (“Real Rate Report”) provides directly applicable information in this regard. The Real
3 Rate Report is based on an enormous and statistically significant compilation of data: 25.8
4 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from
5 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc.,
6 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide
7 the hourly rates for partners and associates in major metropolitan areas. For the southern
8 California area, which is based on billing entries for 1,125 partners and 1,566 associates, the
9 Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and
10 \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los
11 Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most
12 importantly, the information provided in the Real Rate Report is not based on self-reported
13 numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is
14 based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 24.)

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

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

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

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

25 The Settlement Agreement authorized litigation costs of up to \$15,000. (S.A. ¶ 47(f)).
26 Class Counsel’s actual costs through the final approval hearing are estimated to be \$11,013.68.
27 (Mankin Decl. ¶ 27, 33). These costs include mediation fees, filing fees, expert charges,
28 CourtCall charges, and process server fees.

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

2 A named plaintiff is an essential ingredient of any class action and an incentive award
3 is appropriate to induce individuals to step forward and assume the burdens and obligations of
4 representing the Class. Courts regularly approve a service payment to compensate named
5 plaintiffs for their service to the class and the risks they incurred during the course of the
6 litigation. *See, e.g. Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726
7 (upholding “service payments” to named Plaintiff for their efforts in bringing class action);
8 *Rodriguez v. West Publishing* (9th Cir. 2009) 563 F.3d 948, 959 (stating that incentive awards
9 are “intended to compensate class representatives for work done on behalf of the class, to make
10 up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
11 recognize their willingness to act as a private attorney general.”).

12 Under the Settlement, Defendant agreed to pay a Service Award of \$5,000 to Plaintiff
13 in recognition of her contribution as Class Representative. (*See* Plaintiff Decl. ¶ 6-8).
14 Moreover, Plaintiff came forward and undertook significant risks, including the risk of being
15 blackballed in the industry and the risk that she could have been liable for Defendant’s costs if
16 she lost. This factor is a significant one for a wage earner, and the potential risk is very real.
17 *See Whiteway v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) 2007 WL
18 4531783, at *3 (“the few courts to consider this ‘class representatives’ dilemma’ have not
19 found it inequitable to assess costs upon the lead or named plaintiff in a class action.”).)

20 Plaintiff also committed a significant number of hours to assist with the
21 litigation/settlement processes of this case. The requested Service Award is reasonable,
22 particularly in light of the substantial benefits Plaintiff generated for the Class Members, the
23 risks she undertook and the time and effort devoted to assisting with the Class/PAGA
24 settlement. (*See* Plaintiff Decl. ¶ 4-8). The terms of Plaintiff’s separate individual settlement
25 relating to her alleged discrimination claims are set forth in her declaration and reveal that she
26 received a small amount by settling those claims out of court, which further supports the basis
27 for a service award. (*See* Plaintiff Decl. ¶ 12-16).

28 / / /

1 The Notice sent to each Class Member detailed the proposed service award. No Class
2 Member objected to the proposed service award to Plaintiff. Thus, Plaintiff's request that the
3 Court approve the award because it is both reasonable and appropriate.

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

5 **A. SETTLEMENT ADMINISTRATION COSTS**

6 The Administrator, Phoenix Administration, agreed to administer the settlement for a
7 flat-fee of \$5,000. (Lee Decl. ¶ 20). This amount was fully disclosed to the Class Members in
8 the Class Notice, and no Class Members objected to it. Phoenix's declaration also fully
9 complies with the CMO in regards to the fixed fee and other work to be performed. (Lee Decl.
10 ¶ 18-19). As such, the Parties request that the Administrator's fee request be approved.

11 **B. UNCASHED CHECKS**

12 The Settlement Agreement provides that if checks are not cashed within the 180 day
13 check cashing period, then the uncashed funds will be handled as follows:

- 14 a. Participating Class Member's uncashed checks will be issued to the California
15 State Controller's Office in the name of the Class Member.
16 b. Aggrieved Employee's uncashed check will be issued to the California Labor
17 Workforce and Development Agency.

18 **C. FINAL REPORT**

19 Defendant will issue payment to the Administrator within 15 days of the Effective Date,
20 which is expected to occur on the day that Final Approval is granted. The Administrator will
21 then have 10 days to issue payment to the Class Members, who will then have 180 days to cash
22 their checks. Thus, the Parties propose submitting a declaration from the Administrator setting
23 forth the money that was actually paid to the class members and potentially to the State on
24 approximately April 28, 2023.

25 **D. SUBMISSION TO THE LWDA**

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

28 ///

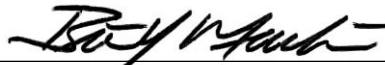
1 **VIII. CONCLUSION**

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

4 Dated: August 15, 2022

LAUBY, MANKIN & LAUBY LLP

6 BY:



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 5198 Arlington Avenue, PMB 513, Riverside, California 92504.

On August 15, 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.

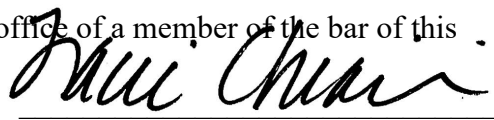
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 August 15, 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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