

Larry W. Lee (State Bar No. 228175)
Kristen M. Agnew (State Bar No. 247656)
Nicholas Rosenthal (State Bar No. 268297)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

Kelsey A. Webber (State Bar No. 303721)
Kelsey.Webber@WebberLawGroup.com
Shaelyn A. Stewart (State Bar No. 335149)
Shaelyn.Stewart@webberlawgroup.com
WEBBER LAW GROUP
333 University Ave, Suite 200
Sacramento, California 95825
Telephone: (916) 588-0683

Attorneys for Plaintiff and the Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO**

JAMIE ELLSWORTH, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

LECLAIR FITNESS II, LLC, a California
limited liability company; LECLAIR
FITNESS III, LLC, a California limited
liability company; LECLAIR FITNESS IV,
LLC, a California limited liability company;
and DOES 1 through 50, inclusive,

Defendants.

Case No.: 34-2021-00295114-CU-OE-GDS

**PLAINTIFF JAMIE ELLSWORTH'S
NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF CLASS AND
REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

Date: September 20, 2022

Time: 9:00 a.m.

Dept.: 54

Reservation #: 2658341

Complaint Filed: February 23, 2021

FAC Filed: May 6, 2022

Trial Date: None

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 20, 2022 at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Christopher E. Krueger, judge presiding, in Department 54 of the above referenced Court, located at 813 6th Street, Sacramento, California 95814, Plaintiff Jamie Ellsworth (“Plaintiff”) will seek an Order:

(1) granting final approval of the Joint Stipulation of Class Action and PAGA Settlement and Release (“Settlement Agreement” or “Settlement”) in this matter;

(2) approving distribution of the settlement funds to the Class Members pursuant to the terms of the Settlement Agreement;

(3) approving Plaintiff’s request for an Enhancement Payment of \$10,000.00, pursuant to the terms of the Settlement Agreement;

(4) approving Class Counsel’s request for an award of attorneys’ fees in the amount of approximately thirty-five percent of the \$178,721.01 Gross Settlement Amount, or \$62,552.35, and reimbursement of actual litigation costs in the amount of \$11,535.55, pursuant to the terms of the Settlement Agreement;

(5) approving the \$10,000 PAGA Payment, with the sum of \$7,500.00 to be paid to the California Labor and Workforce Development Agency (“LWDA”) and the remaining sum of \$2,500.00 to be paid to PAGA Aggrieved Employees, pursuant to the terms of the Settlement Agreement;

(6) approving Plaintiff’s request for payment of the Settlement Administration Costs to Phoenix Settlement Administrators in the amount of \$6,250.00, pursuant to the terms of the Settlement Agreement; and

(7) entering final judgment as to all members of the Settlement Class and Aggrieved Employees in this action.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for court approval of the settlement of a purported class action and allows the Court to grant final certification of a class for settlement purposes. In light of the overwhelmingly positive response, as shown by the lack of objections to the Settlement and only two opt-outs, there is no

1 question that the Settlement is fair, reasonable, and adequate and thus should be granted final
2 approval.

3 This Motion will be based on the attached Memorandum of Point and Authorities and the
4 supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, Kelsey A.
5 Webber, Shaelyn A. Stewart, Plaintiff Jamie Ellsworth, and Phoenix Settlement Administrators
6 (Taylor Mitzner), and upon the oral arguments of counsel (should there be any), and on the
7 complete records and file herein.

8
9 Dated: August 26, 2022

DIVERSITY LAW GROUP, P.C.

10
11 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

12
13 Attorneys for Plaintiff and the Class
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	7
II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE SETTLEMENT	9
III. THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL	11
A. Standard of Review.....	11
B. The Settlement is Presumed to Be Fair.....	12
C. Two-Way Costs and Other Risks Inherent in Continued Litigation Favor Final Approval	13
D. The Complexity, Expense, and Likely Duration of Continued Litigation Against Defendants Favor Final Approval.....	14
E. The Opinion of Experienced Counsel Favors Final Approval	15
F. Discovery and the Settlement Discussions Undertaken in this Action Favor Final Approval	15
IV. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT AWARD SHOULD BE APPROVED	16
V. THE REQUESTED CLASS COUNSEL AWARD SHOULD BE APPROVED	17
A. The Requested Attorneys' Fees Should Be Approved.....	17
B. The Litigation Costs Should Be Approved.....	19
VI. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE APPROVED	19
VII. NOTICE TO THE LWDA & FINAL JUDGMENT	20
VIII. CONCLUSION	20

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i> , 85 Cal. App. 4th 1135, 1146 (2000)	12
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1801 (1996)	12
<i>Laffitte v. Robert Half Int'l</i> , 1 Cal. 5th 480, 503 (2016)	18
<i>Serrano v. Priest</i> , 20 Cal.3d 25, 34 (1977)	17
<i>Vasquez v. Superior Court</i> , 4 Cal. 3rd 800, 820-821 (1971)	11
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224, 254 (2001)	17

Federal Cases

<i>Ackerman v. Kassar</i> , 1993 WL 326453 (9th Cir. 1993)	12
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980)	17
<i>Boyd v. Bechtel Corp.</i> , 485 F. Supp. 610, 616-17 (N.D. Cal. 1979)	14, 15
<i>Brotherton v. Cleveland</i> , 141 F.Supp.2d 907, 913-14 (S.D. Ohio 2001)	17
<i>Chun-Hoon v. McKee Foods Corp.</i> , 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010)	13
<i>Church v. Consolidated Freightways, Inc.</i> , 1993 WL 149840 (N.D. Cal. 1993)	11
<i>Churchill Vill. LLC v. Gen. Elec.</i> , 361 F.3d 566, 577 (9th Cir. 2004)	13
<i>City of Detroit v. Grinnell Corp.</i> 495 F. 2d 448, 470 (2d Cir. 1974)	19
<i>Class Plaintiffs v. City of Seattle</i> , 955 F.2d 1268, 1276 (9th Cir. 1992)	11, 12, 13
<i>Cook v. Niedert</i> , 142 F.3d 1004, 1016 (7th Cir. 1998)	17
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156, 174-75 (1974)	10
<i>Ellis v. Naval Air Rework Facility</i> , 87 F.R.D. 15, 18 (N.D. Cal. 1980)	12, 15
<i>Enter. Energy Corp. v. Columbia Gas Transmission Corp.</i> , 137 F.R.D. 240, 251-52 (S.D. Ohio 1991)	17
<i>Fernandez v. Victoria Secret Stores LLC</i> , 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008)	18
<i>Gaskill v. Gordon</i> , 160 F.3d 361, 363 (7th Cir. 1998)	18

1	<i>Girsh v. Jepson</i> , 521 F.2d 153, 157 (3d Cir. 1975).....	14
2	<i>Glass v. UBS Fin. Servs.</i> , No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007)	17
3		
4	<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374 (S.D. Ohio 1990) .	17
5	<i>In re General Motors Corp.</i> , 55 F.3d 768, 806 (3d Cir. 1995).....	13
6	<i>In re Wash. Pub Power Supply</i> , 720 F. Supp. 1379, 1387 (D. Ariz. 1989)	12
7	<i>In re Wash. Pub. Power Supply Sys. Sec. Litig.</i> , 720 F. Supp. 1379 (D. Ariz. 1989).....	11
8	<i>Linney v. Cellular Alaska P’ship</i> , 151 F.3d 1234, 1238 (9th Cir. 1998)	12, 15
9	<i>Martin v. AmeriPride Servs.</i> , 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011).....	18
10	<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 314 (1950)	10
11	<i>Officers for Justice v. Civil Serv. Comm’n</i> , 668 F.2d 615, 625 (9th Cir. 1982), <i>cert. denied</i> <i>subnom.</i> , <i>Byrd v. Civil Serv. Comm’n</i> , 459 U.S. 1217 (1983)	11, 12, 14, 15
12		
13	<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797, 811-12 (1985)	10
14	<i>Swedish Hospital v. Shalala</i> , 1 F.3d 1261, 1272 (D.C. Cir. 1993)	18
15	<i>Van Bronkhorst v. Safeco Corp.</i> , 529 F.2d 943, 950 (9th Cir. 1976)	11, 15
16	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F.Supp. 294, 299-300 (N.D. Cal. 1995)	16
17	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F.2d 759, 769 (9th Cir. 1997)	17
18	<i>Vincent v. Hughes Air West, Inc.</i> , <i>supra</i> , 557 F.2d at 769	17
19	<i>Young v. Katz</i> , 447 F.2d 431, 433-434 (5th Cir. 1971).....	15
20	<u>Statutes</u>	
21	Civil Code § 1781(f)	11
22	Labor Code § 1194.....	19
23	Labor Code § 226.....	19
24	Labor Code § 2699.....	19
25	Labor Code § 2802.....	19
26	<u>Other Authorities</u>	
27	Brickman, <i>Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees</i> , 81 Wash U. L. Q. 653, 659 n. 11 (Fall 2003)	18
28	Eisenberg & Miller, <i>Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008</i> ,	

1	7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010)	18
2	<i>Manual for Complex Litigation, Fourth</i> § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004)	11, 12
3	<i>Newberg on Class Actions</i> § 11.41 (2008)	11, 15
4	<u>Rules</u>	
5	Federal Rules of Civil Procedure (“FRCP”) Rule 23(e)	11

1 **I. INTRODUCTION**

2 Plaintiff Jamie Ellsworth (“Plaintiff”) seeks the Court’s final approval of the class and
3 representative PAGA action settlement with Defendants LeClair Fitness II, LLC, LeClair Fitness
4 III, LLC, and LeClair Fitness IV, LLC (“Defendants”). The Settlement provides for a
5 \$178,721.01 **non-reversionary** fund to be created for the benefit of the Class, from which
6 attorneys’ fees, litigation costs, Enhancement Payment to Plaintiff, Settlement Administration
7 Costs and PAGA penalties are to be paid. After these deductions, the Net Settlement Amount
8 will be paid to all Class Members who did not opt-out of the Settlement.

9 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
10 Approval of Class and Representative Action Settlement. The Court preliminarily approved this
11 Settlement on April 29, 2022, directing distribution of the Class Notice and scheduling the
12 hearing for final approval of settlement (the “Preliminary Approval Order”).

13 As directed by the Court, the Settlement Administrator distributed the Class Notice to one
14 hundred fifty-five (155) Class Members. Declaration of Taylor Mitzner (“Mitzner Decl.”) ¶ 3. To
15 date, two (2) requests for exclusion have been received. *Id.* at ¶ 8. Zero (0) objections to the
16 settlement were received. *Id.* at ¶ 9. Thus, there is over a 98.71% participation rate. *Id.* at ¶ 11.
17 This favorable response by the Class supports the Court’s Preliminary Approval Order finding
18 that the Settlement was fair, adequate, and reasonable and the granting of the instant Motion.

19 In addition to the results of the notice process, for the same reasons as set forth earlier in
20 Plaintiff’s Motion for Preliminary Approval of Class and Representative Action Settlement, the
21 following represent the basic points previously covered supporting approval of the Settlement:

- 22 ■ The Settlement provides a non-reversionary Gross Settlement Amount of
23 \$178,721.01 for a class size of 155 Class Members;¹

25 ¹ Due to the triggering of the escalator clause, the Gross Settlement Amount increased from
26 \$175,000 to \$178,721.01. *See* Declaration of Kristen M. Agnew [“Agnew Decl.”] ¶ 6. The
27 original Gross Settlement Amount [\$175,000.00] was premised on Defendants’ representation
28 that Class Members worked 3,579 pay periods during the Class Period. *See* Settlement
Agreement § C-10. However, the actual number of pay periods at issue was 4,013. *See* Agnew
Decl. ¶ 6. As a result of the increase in pay periods, and pursuant to Section C-10 of the

- 1 ▪ Settlement Class Members will receive (*after deductions for fees, costs, etc.*) a
- 2 substantial amount of money (on average, each Settlement Class Member will
- 3 receive approximately \$512.31)²;
- 4 ▪ Class Members did not need to submit claim forms to participate in the
- 5 settlement, but are being paid automatically;
- 6 ▪ The allocation reflects that payment of claims will be paid to all Settlement Class
- 7 Members in proportion to the number of pay periods each Settlement Class
- 8 Member worked during the Class Period;
- 9 ▪ Plaintiff conducted significant investigation in this case, including conducting
- 10 informal discovery and review of class data necessary for Plaintiff to fully
- 11 evaluate this case;
- 12 ▪ In conjunction with this Motion, Plaintiff will upload a copy of this motion to the
- 13 LWDA's online portal; and
- 14 ▪ A highly regarded administrator, Phoenix Settlement Administrators, was retained
- 15 at the competitive price \$6,250.00.

16 With this additional information, the Court should grant Final Approval consistent with
17 the Preliminary Approval Order.

18 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE**

19 **SETTLEMENT**

20 The notice procedures required by the Preliminary Approval Order have been followed
21 and satisfy all due process rights of Class Members. The Preliminary Approval Order
22 contemplated that the Class Notice be sent to all Class Members by first class mail, as specified
23

24 Settlement Agreement, Defendants agreed to pay an additional \$3,721.01 to the Gross Settlement
25 Amount for an updated Gross Settlement Amount of \$178,721.01 (\$175,000 [Original Gross
26 Settlement Amount] + \$3,721.01). *See id.*

27 ² In addition, all Class Members who worked during the PAGA Period will receive an Individual
28 PAGA Payment based on the number of pay periods the employee worked during the PAGA
Period. There are ninety-one (91) Class Members who worked during the PAGA Period. The
average Individual PAGA Payment to these individuals is \$27.47. *See* Mitzner Decl. ¶ 12.

1 in the Settlement. The Preliminary Approval Order further contemplated that Phoenix Settlement
2 Administrators would serve as the Settlement Administrator.

3 As clearly stated in the Mitzner Declaration, notice was provided to Class Members, as
4 required by the Preliminary Approval Order. On May 16, 2022, the Settlement Administrator
5 received a Class Data and List from Defendants' counsel that included one hundred fifty-five
6 (155) Class Members. Mitzner Decl. ¶ 3. On July 12, 2022, each of the persons identified on the
7 mailing list were sent the Class Notice via first class mail. *Id.* at ¶ 5. As part of the administration
8 process, the Settlement Administrator has re-mailed Class Notices to five (5) Class Members
9 using newly updated addresses after performing a skip-trace using the U.S. Postal Service
10 National Change of Address Database, one of the most comprehensive address databases
11 available for skip tracing. *Id.* at ¶ 6. As of the date of this filing, no Class Notices remain
12 undeliverable. *Id.* at ¶ 7. Further, the Class Notice provided Class Members with the Class
13 Counsel's contact information, where they could further seek information regarding the
14 Settlement, leave questions for the Settlement Administrator, and update their address.

15 The provision of sending the notice to Class Members as described above meets the
16 requirements for the "best notice practicable" in this case as necessary to protect the due process
17 rights of class members. *See, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)
18 (provision of "best notice practicable" with description of the litigation and explanation of opt-
19 out rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974)
20 (individual notice must be sent to class members who can be identified through reasonable
21 means); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best
22 practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise
23 interested parties of the pendency of the action and afford them an opportunity to present their
24 objections"). The Class Members were provided with a mailing regarding the settlement that
25 explained the settlement and allowed Class Members to seek information, ask questions, seek
26 additional forms, and object, if so desired. As such, proper notice has been given to the Class
27 Members.

28 Thus, the Court may proceed to determine the fairness and adequacy of the Settlement

1 and enter its Order granting final approval, secure in the knowledge that all absent Class
2 Members have been given the opportunity to participate fully in the claims, exclusion, and the
3 approval process.

4 **III. THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL**

5 **A. Standard of Review**

6 On a motion for final approval of a class action settlement under Civil Code section
7 1781(f) and Federal Rules of Civil Procedure (“FRCP”) Rule 23(e), a court’s inquiry is whether
8 the settlement is “fair, adequate and reasonable.”³ *Officers for Justice v. Civil Serv. Comm’n*, 668
9 F.2d 615, 625 (9th Cir. 1982), *cert. denied subnom.*, *Byrd v. Civil Serv. Comm’n*, 459 U.S. 1217
10 (1983). A settlement is fair, adequate, and reasonable, and therefore merits final approval, when
11 “the interests of the class are better served by the settlement than by further litigation.” *See*
12 *Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“Manual”).

13 The law favors settlement, particularly in class actions and other complex cases, where
14 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
15 *See* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (2008); *Class*
16 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco*
17 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

18 Although the Court possesses “broad discretion” in determining that a proposed class
19 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a
20 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
21 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
22 adequate to all concerned. *See Officers for Justice, supra* 688 F.2d at 625. Accordingly, the
23 Court should give due regard to what is otherwise a “private consensual agreement” between the
24 parties. *Id.*; *see also Church v. Consolidated Freightways, Inc.*, 1993 WL 149840 (N.D. Cal.
25 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), *aff’d*
26

27 ³ Both Civil Code § 1781(f) and FRCP Rule 23 have been expressly authorized by the California
28 Supreme Court for use in all California class action litigation. *See Vasquez v. Superior Court*, 4
Cal. 3rd 800, 820-821 (1971).

1 *sub nom.*, *City of Seattle*, 955 F.2d 1268; Manual § 21.6 at 309 (“The judicial role in reviewing a
2 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
3 or imposing conditions on it. The judge cannot rewrite the agreement.”)

4 A court’s approval of a class action settlement will only be reversed for a clear abuse of
5 discretion. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *see also Officers*
6 *for Justice*, 688 F.2d at 626 (“reverse only upon a strong showing that the district court’s
7 decision was a clear abuse of discretion”); *City of Seattle*, 955 F.2d at 1276; *Ackerman v. Kassar*,
8 1993 WL 326453 (9th Cir. 1993); *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th
9 Cir. 1998). As the court in *7-Eleven Owners for Fair Franchising v. Southland Corp* cautioned:
10 “[i]t cannot be overemphasized that neither the trial court in approving the settlement nor this
11 Court in reviewing that approval have the right or duty to reach any ultimate conclusions on the
12 issues of fact and law which underlie the merits of the dispute. It is well settled that in the
13 judicial consideration of proposed settlements, ‘the [trial] judge does not try out or attempt to
14 decide the merits of the controversy,’ [citation] and the appellate court ‘need not and should not
15 reach any dispositive conclusions on the admittedly unsettled legal issue.’” *7-Eleven Owners for*
16 *Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000).

17 **B. The Settlement is Presumed to Be Fair**

18 The Court should begin its analysis with the presumption that the settlement is fair and
19 should be approved:

20 [A] presumption of fairness exists where: (1) the settlement is reached through
21 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow
22 counsel and the court to act intelligently; (3) counsel is experienced in similar
litigation; and (4) the percentage of objectors is small.

23 *Dunk*, 48 Cal. App. 4th at 1802; *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at
24 1146; *accord, Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980); *In re Wash.*
25 *Pub Power Supply*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989).

26 The Settlement in the case at bar warrants approval and carries a presumption of fairness.
27 As previously noted in the Motion for Preliminary Approval, the Settlement Agreement was the
28 product of negotiation between highly able and experienced attorneys, facilitated by a well-

1 regarded neutral with experience mediating employment matters. Agnew Decl. ¶¶ 2, 3, 7-14;
2 Declaration of Larry W. Lee (“Lee Decl.”) ¶ 3; Declaration of Nicholas Rosenthal (“Rosenthal
3 Decl.”) ¶ 4; Declaration of Kelsey A. Webber (“Weber Decl.”) ¶¶ 3-8; Declaration of Shaelyn A.
4 Stewart (“Stewart Decl.”) ¶ 3. In advance of the mediation, Defendants produced data regarding
5 the number of putative class members and sub-class members, the number of workweeks and
6 pay periods during the liability period, the average hourly rate of putative class members, and the
7 number of putative class members who separated employment during the liability period. Agnew
8 Decl. ¶ 3. Defendants also provided a copy of its employee handbooks, which included the meal
9 and rest period policies and cellphone reimbursement policy. *Id.* Based on the class data, Class
10 Counsel was able to calculate a range of potential damages and penalties. *Id.* at ¶ 4. In the
11 present case, the Gross Settlement Amount is approximately 12.50% of Defendants’ realistic
12 maximum exposure. *Id.*

13 Furthermore, the results after mailing of the Class Notice support confirmation of the
14 Court’s preliminary approval of the Settlement, as evidenced by the fact that ***there is not a single***
15 ***Class Member who has objected to the current Settlement and only two Class Members who***
16 ***submitted a request to opt-out.*** The lack of any objections and nominal opt-outs to this current
17 settlement is an indication that Class Members themselves view the settlement as fair, adequate,
18 and reasonable. *See Class Plaintiffs v. City of Seattle*, 955 F.2d at 1291; *Churchill Vill. LLC v.*
19 *Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (approving settlement with 45 objections and 500
20 opt-outs from a 90,000-person class, representing 0.05% and 0.56% of the class, respectively);
21 *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (where 16 of 329
22 class members opted out, court found that positive class reaction “strongly supports settlement”).

23 **C. Two-Way Costs and Other Risks Inherent in Continued Litigation Favor**
24 **Final Approval**

25 To assess the fairness, adequacy, and reasonableness of a class action settlement, the
26 Court also should weigh the immediacy and certainty of substantial settlement proceeds against
27 the risks inherent in continued litigation. *See also In re General Motors Corp.*, 55 F.3d 768, 806
28 (3d Cir. 1995) (“present value of the damages plaintiffs would likely recover if successful,

1 appropriately discounted for the risk of not prevailing, should be compared with the amount of
2 the proposed settlement”) (internal citations omitted); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d
3 Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

4 If Plaintiff pursued this case without settlement and failed to prevail, Plaintiff may have
5 been responsible for Defendants’ costs. As such, should individual current or former employees
6 of Defendants want to bring individual claims on the same causes of action, they would each
7 face the uncertainty of prevailing and the possibility of paying costs to Defendants. Accordingly,
8 such claims likely would not be brought by many of these current and former employees—thus,
9 this lawsuit achieves a true benefit for the Class that they might not otherwise get or seek as
10 individuals. Here, given that a fair and reasonable settlement has been reached, neither Plaintiff
11 nor any of the Class Members will be required to pay for Defendants’ litigation costs.

12 The Settlement Agreement also affords the Class prompt, fair relief, while avoiding
13 significant legal and factual battles that otherwise may have prevented the Class from obtaining
14 any recovery at all. While Class Counsel believe the Class Members’ claims are meritorious and
15 can be successfully litigated, they are experienced and fully understand the inherent risks and
16 uncertainty involved with such matters as the resolution of class certification, the outcome of a
17 potential trial, and the outcome of any appeals that would inevitably follow should the Class
18 prevail at trial. Agnew Decl. ¶ 5.

19 Class Counsel have also assessed the same risks in connection with the current
20 Settlement. Because the Settlement provides immediate and substantial relief, without the
21 attendant risks and delay of continued litigation – not to mention the threat of litigation costs –
22 Class Counsel believe that the settlement warrants the Court’s final approval.

23 **D. The Complexity, Expense, and Likely Duration of Continued Litigation**
24 **Against Defendants Favor Final Approval**

25 Another factor considered by courts in approving a settlement is the complexity, expense,
26 and likely duration of the litigation. *See Officers for Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at
27 157. In applying this factor, the Court must weigh the benefits of the settlement against the
28 expense and delay involved in achieving an equivalent or more favorable result at trial. *See*

1 *Young v. Katz*, 447 F.2d 431, 433-434 (5th Cir. 1971).

2 As noted in the Motion for Preliminary Approval, continued litigation could have led to
3 appeals on a number of issues. On the other hand, the Settlement that was reached provides to all
4 Class Members — regardless of their means — fair relief in a prompt and efficient manner.
5 Were the Court to deny final approval, the Class Members would be left without a remedy as a
6 practical matter and courts across the State would have to address the issues presented here in a
7 piecemeal, costly, and time-consuming manner. The Settlement in this case is therefore
8 consistent with the “overriding public interest in settling and quieting litigation” that is
9 “particularly true in class action suits.” *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d at 950
10 (footnote omitted); *see also* 4 *Newberg* at § 11.41.

11 **E. The Opinion of Experienced Counsel Favors Final Approval**

12 Class Counsel support the settlement as fair, reasonable and adequate, and in the best
13 interest of the Class Members as a whole. Agnew Decl. ¶ 5; Lee Decl. ¶ 2; Rosenthal Decl. ¶ 2;
14 Weber Decl. ¶ 2; Stewart Decl. ¶ 2. Similarly, counsel for Defendants is also in favor of this
15 settlement. The endorsement of qualified and well-informed counsel of a settlement as fair,
16 reasonable, and adequate is entitled to significant weight by the Court in its final approval
17 determination. *See Officers for Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F.
18 Supp. at 617; *Linney*, 151 F.3d at 1242.

19 **F. Discovery and the Settlement Discussions Undertaken in this Action Favor**
20 **Final Approval**

21 Prior to negotiating the settlement, Class Counsel engaged in significant investigation of
22 the claims at issue. Defendants also produced key data pertaining to the Class Members that
23 allowed Plaintiff to ascertain and determine the potential amount of damages that Defendants
24 possibly could be liable for if Plaintiff prevailed at trial. Agnew Decl. ¶¶ 2, 3. It was only after
25 the production of such information and data that the Parties engaged in settlement discussions
26 which ultimately led to this settlement. *Id.* at ¶ 3.

27 //

28 //

IV. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT AWARD SHOULD BE APPROVED

Plaintiff requests an Enhancement Payment in the amount of \$10,000.00. As part of her duties as Class Representative, Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement. Plaintiff spent time with Class Counsel on a number of occasions to discuss the case, including providing substantive information regarding Defendants' practices, and providing documents related to her claims and the claims of the Class. Ellsworth Decl. ¶¶ 7, 9, 10.

In addition to the invaluable services she provided, Plaintiff also took a significant risk, both professionally and monetarily, in acting as Class Representative. Because the claims alleged by Plaintiff involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendants had she not prevailed in this action. Ellsworth Decl. ¶ 11. Moreover, given that future employers are much less likely to hire individuals who have filed suit against their prior employer, particularly cases of this nature, Plaintiff could face negative employment prospects in the future. *Id.* at ¶ 12.

Plaintiff took such risks upon herself and the whole Class benefited from this. Class Members did not have to file individual lawsuits and bear the risks of payment of fees and costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a lawsuit which is a public record. These are significant benefits, even apart from the time Plaintiff has spent working on this case, that weigh in favor of granting the requested enhancement.

Finally, as part of the Settlement, Plaintiff also agreed to give a general release of her individual claims, something that the Class Members did not have to do. Ellsworth ¶ 13. Thus, Plaintiff has sacrificed her own individual rights for those of the Class Members. This is a significant factor to take into account that further warrants the award of the requested service amount.

Courts have routinely granted approval of settlements containing such enhancements. *See Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299-300 (N.D. Cal. 1995) (incentive

award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F.Supp.2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 incentive award to class representative in ERISA case).

Here, this litigation has resulted in a significantly valuable benefit to the Class, and the Class Representative took on substantial risk and sacrifice in helping to get this financial benefit to the Class. Furthermore, there are no objections filed by any individual to the requested Enhancement Payment. As such, one can infer that none of the Class Members have any disagreement with the Enhancement Payment. Accordingly, the Court should find the service awards as fair and reasonable.

V. THE REQUESTED CLASS COUNSEL AWARD SHOULD BE APPROVED

A. The Requested Attorneys' Fees Should Be Approved

Class Counsel seeks a fee award calculated at thirty-five percent (35%) of the Gross Settlement Sum for the successful prosecution and resolution of this action. California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977) [*Serrano III*]; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment to the Class and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent v. Hughes Air West, Inc.*, *supra*, 557 F.2d at 769.

Under California law, the award of attorneys' fees in common fund wage and hour class

1 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1
2 Cal. 5th 480, 503 (2016) (“We join the overwhelming majority of federal and state courts in
3 holding that when class action litigation establishes a monetary fund for the benefit of the class
4 members, and the trial court in its equitable powers awards class counsel a fee out of that fund,
5 the court may determine the amount of a reasonable fee by choosing an appropriate percentage
6 of the fund created.”). Under the percentage of the fund method, the Court’s objective remains to
7 “mimic the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th
8 Cir. 1998) (J. Posner) (“When a fee is set by a court rather than by contract, the object is to set it
9 at a level that will approximate what the market will set.... The judge, in other words, is trying to
10 mimic the market in legal services.”).

11 An award of thirty-five percent (35%) of the Gross Settlement Amount in attorneys’ fees
12 mimics the marketplace as it “is supported by the fact that typical contingency fee agreements
13 provide that class counsel will recover 33.33% if the case is resolved before trial and 40% if the
14 case is tried.” *Fernandez v. Victoria Secret Stores LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal.
15 July 21, 2008) (citing Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers:
16 Competing Data and Non-Competitive Fees*, 81 Wash U. L. Q. 653, 659 n. 11 (Fall 2003);
17 *Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011)
18 (recognizing that “courts may award attorney’s fees in the 30-40% range in wage and hour class
19 actions that result in recovery of a common fund under \$10 million”); *see also* Eisenberg &
20 Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*, 7 J. of
21 Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action litigation
22 nationwide conclude that fees in the range sought here are consistent with market rates).

23 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
24 is relevant to the... reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d
25 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s
26 “approximation of the market” for fees is well supported. *Id.* at p. 1269. In this case, the Class
27 Notice specifically notified Class Members that Class Counsel would be seeking 35% of the
28 Gross Settlement Amount as attorneys’ fees. To date, no Class Member has objected to the

1 Settlement. This strong favorable response also supports the requested fees.

2 In addition, it is recognized that one of the primary factors justifying an enhanced
3 attorney's fees reward is the attendant risks inherent in the litigation. As observed in *City of*
4 *Detroit v. Grinnell Corp.*:

5 No one expects a lawyer whose compensation is contingent upon his success to
6 charge, when successful, as little as he would charge a client who had agreed to
7 pay for his services, regardless of success. Nor, particularly in complicated cases
8 producing large recoveries, is it just to make a fee depend solely on the reasonable
9 amount of time expended.

10 495 F. 2d 448, 470 (2d Cir. 1974) Here, it is clear that a common fund of \$178,721.01 has been
11 created. For Class Counsel, the fees here were wholly contingent in nature and the case presented
12 far more risk than the usual contingent fee case. *See* Agnew Decl. ¶ 7. Among the risks was the
13 cost inherent in class action litigation, as well as a long battle with corporate Defendants who
14 retained a premier and highly experienced defense firm. As such, the requested fee should be
15 awarded.

16 **B. The Litigation Costs Should Be Approved**

17 The request for reimbursement of costs, in the amount of \$11,535.55 is fair and
18 reasonable. The costs are all litigation related costs. Lee Decl. ¶ 4, Ex. A. The authority for the
19 Court to award this is the Parties' Settlement Agreement and Labor Code sections 226, 1194,
20 2699 and 2802. As such, this request should be approved.

21 **VI. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE** 22 **APPROVED**

23 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
24 Administrator, Phoenix Settlement Administrators, are to be paid out of the Gross Settlement
25 Amount. As shown on the Declaration of Taylor Mitzner, the settlement administration fees
26 expended in this matter amount to a total of \$6,250.00. Mitzner Decl. ¶ 16, Ex. B. For such
27 reasons, it is requested that the Settlement Administrator's fees be approved.
28

1 **VII. NOTICE TO THE LWDA & FINAL JUDGMENT**

2 Plaintiff will provide notice of this Motion to the LWDA in conjunction with this filing.
3 Agnew Decl. ¶15.

4 **VIII. CONCLUSION**

5 For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiff
6 respectfully submits that the standards for final approval have been met, and the terms of the
7 Settlement Agreement are fair, adequate and reasonable.

8 Accordingly, Plaintiff respectfully request that the Court enter an Order in the form
9 proposed and submitted:

- 10 1. Granting final approval to the proposed Settlement Agreement in this action;
 - 11 2. Approving the Gross Settlement Amount of \$178,721.01;
 - 12 3. Approving distribution of the Net Settlement Amount to the Settlement Class
13 Members, with payments pursuant to the terms of the Settlement Agreement;
 - 14 4. Approving the award of the Enhancement Payment in the amount \$10,000.00 to
15 Plaintiff, with payments pursuant to the terms of the Settlement Agreement;
 - 16 5. Approving the award of attorneys' fees in the amount of \$62,552.35 and actual
17 litigation costs in the amount of \$11,535.55 to Class Counsel, with payment pursuant to the
18 terms of the Settlement Agreement;
 - 19 6. Approving the payment Settlement Administration Costs in the amount of
20 \$6,250.00 to Phoenix Settlement Administrators, with payment pursuant to the terms of the
21 Settlement Agreement;
 - 22 7. Approving the \$10,000 PAGA Payment, with the sum of \$7,500.00 to be paid to
23 the California Labor and Workforce Development Agency ("LWDA") and the remaining sum of
24 \$2,500.00 to be paid to PAGA Aggrieved Employees, pursuant to the terms of the Settlement
25 Agreement; and
 - 26 8. Entering final judgment as to all members of the Class in this action.
- 27
28

1
2 Dated: August 25, 2022

DIVERSITY LAW GROUP, P.C.

3
4 By:

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3 STATE OF CALIFORNIA]
4]ss.
5 COUNTY OF LOS ANGELES]

6 I am employed in the County of Los Angeles, State of California. I am over the age of 18
7 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250,
8 Los Angeles, California 90071.

9 On August 26, 2022, I served the following document(s) described as:

- 10 **1. PLAINTIFF JAMIE ELLSWORTH'S NOTICE OF MOTION AND MOTION**
- 11 **FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE ACTION**
- 12 **SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
- 13 **SUPPORT**
- 14 **2. [PROPOSED] ORDER GRANTING FINAL APPROVAL OF CLASS AND**
- 15 **REPRESENTATIVE ACTION SETTLEMENT AND JUDGMENT**
- 16 **3. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S**
- 17 **MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE**
- 18 **ACTION SETTLEMENT**
- 19 **4. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
- 20 **FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE ACTION**
- 21 **SETTLEMENT**
- 22 **5. DECLARATION OF NICHOLAS ROSENTHAL IN SUPPORT OF PLAINTIFF'S**
- 23 **MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE**
- 24 **ACTION SETTLEMENT**
- 25 **6. DECLARATION OF SHAELYN A. STEWART IN SUPPORT OF PLAINTIFF'S**
- 26 **MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE**
- 27 **ACTION SETTLEMENT**
- 28 **7. DECLARATION OF KELSEY A. WEBBER IN SUPPORT OF PLAINTIFF'S**
- MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE**
- ACTION SETTLEMENT**
- 8. DECLARATION OF TAYLOR MITZNER ON BEHALF OF SETTLEMENT**
- ADMINISTRATOR WITH RESPECT TO SETTLEMENT NOTICE**
- ADMINISTRATION**
- 9. DECLARATION OF JAMIE ELLSWORTH IN SUPPORT OF PLAINTIFF'S**
- MOTION FOR PRELIMINARY APPROVAL OF CLASS AND**
- REPRESENTATIVE ACTION SETTLEMENT**

on the interested parties in this action as follows:

Todd B. Scherwin
tscherwin@fisherphillips.com
Shaun J. Voigt
svoigt@fisherphillips.com

1 Drew M. Rate
2 dtate@fisherphillips.com
3 Melody Biglay
4 mbiglay@fisherphillips.com
5 Amy Stark
6 astark@fisherphillips.com
7 Natalie Larios
8 nlarios@fisherphillips.com
9 Karla Gonzalez
10 kgonzalez@fisherphillips.com
11 Fisher & Phillips LLP
12 444 S. Flower Street, Suite 1500
13 Los Angeles, California 90071
14 *Attorneys for Defendants Leclair Fitness II, LLC, Leclair Fitness III, LLC, and Leclair Fitness*
15 *IV, LLC*

16 X BY ELECTRONIC MAIL: by personally sending a true and correct copy of
17 the above-described document(s) to the party(ies) listed above or on the attached mailing list
18 from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s)
19 indicated above or on the attached mailing list. I certify that said electronic transmission was
20 completed and that all pages were received by the party(ies) identified herein or on the attached
21 mailing list.

22 I declare under penalty of perjury under the laws of the State of California that the above
23 is true and correct. Executed on August 26, 2022, at Los Angeles, California.

24 
25 Erika Mejia