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

AMY MIGDAL, individually and on behalf of
 all similarly situated individuals,

Plaintiff,

vs.

PURPLE COMMUNICATIONS, INC., ZP
 BETTER TOGETHER, LLC, and DOES 1 to
 100,

Defendants.

CASE NO. S-CV-0046377

**PLAINTIFFS' NOTICE OF MOTION AND
 MOTION FOR FINAL APPROVAL OF
 CLASS ACTION SETTLEMENT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Date.: March 14, 2023
 Time: 8:30 a.m.
 Dept: 31

Complaint Filed: March 15, 2021
 Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 14, 2023, at 8:30 a.m., or as soon thereafter as
 may be heard, before the Honorable Colleen Nichols, judge presiding, in Department 13 of the
 above referenced Court located at 10820 Justice Center Drive, Roseville, CA 95678, Plaintiff Amy
 Migdal will move the Court for an order for final approval of the class action settlement with

1 Defendants Purple Communications, Inc., ZP Better Together, LLC. (“Defendants”). Through this
2 Motion, Plaintiffs seek further entry of an Order:

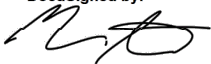
- 3 (1) Approving the parties’ class and representative action settlement in the amount of
4 \$127,500.00 (the “Gross Settlement Amount”), as memorialized in the Parties’ Joint
5 Stipulation of Class Action Settlement and Release (the “Settlement” or “Settlement
6 Agreement”);
- 7 (2) Approving the requested Class Representative Enhancement Award of \$10,000.00 to
8 Plaintiff Amy Migdal, The full amount of which is to be paid from the Gross Settlement
9 Amount;
- 10 (3) Approving the payment of \$42,500.00 (or approximately 1/3 of the Gross Settlement
11 Fund) to Class Counsel as reasonable attorney’s fees, the full amount of which is to be
12 paid from the Gross Settlement Amount;
- 13 (4) Approving the payment of \$2,104.15 to Class Counsel for reimbursement of reasonably
14 incurred litigation expenses, the full amount of which is to be paid from the Gross
15 Settlement Amount;
- 16 (5) Approving the payment of \$6,000.00 to the Claims Administrator, Phoenix Settlement
17 Administrators, for its services in administering the settlement, the full amount of which
18 is to be paid from the Gross Settlement Amount; and
- 19 (6) Approving the payment of the \$10,000.00 the parties set aside from the Gross
20 Settlement Amount as PAGA civil penalties, \$7,500 of which is to be paid to the Labor
21 & Workforce Development Agency (“LWDA), and \$2,500 of which is to be paid to the
22 Aggrieved Employees on a pro rata basis.

23 This motion is unopposed by Defendants. This motion is based upon this Notice of Motion,
24 the Memorandum of Points and Authorities, the Joint Stipulation of Class Action Settlement, the
25 proposed Notice Packet, the supporting Declarations of Manny Starr, Max Gavron, and Amy
26 Migdal, and the Declaration of Kevin Lee for Phoenix Settlement Administrators, the [Proposed]
27 Order of Final Approval and Judgment, as well as all pleadings and documents filed in this action,
28 and any other matters as may be presented at or before the final approval hearing.

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Date: February 17, 2023,

FRONTIER LAW CENTER

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Manny Starr
Attorneys for Plaintiff and the Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a wage and hour class and representative Private Attorneys General Act (“PAGA”) action seeking statutory and civil penalties under the California Labor Code. Plaintiff Amy Migdal (“Plaintiff”) alleges that Defendants Purple Communications, Inc. and ZP Better Together, LLC (together, “Defendants”) failed to timely and properly pay sick pay based on the correct regular rate of pay in violation of Labor Code §§ 201-203 and 246. Based on these violations, Plaintiff asserts class and PAGA claims for violations of Labor Code §§ 201, 202, 203, 204, and 246. The Parties have reached a class action settlement, the terms of which are reflected in the Parties’ Joint Stipulation of Class Action Settlement and Release (“Settlement” or “Settlement Agreement”).

Prior to the settlement of this action, the Parties thoroughly investigated the facts relating to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal principles applicable to the claims asserted against Defendants. Through the exchange of formal and informal discovery, Defendants provided necessary data pertaining to the number of putative class members, the hourly rates of pay for the putative class, as well as documents and information pertaining to Defendants’ policies and practices regarding the payment of sick pay wages. The information provided by Defendants allowed Plaintiff to review and analyze the liability and potential exposure. Thereafter, the Parties engaged in arm’s-length settlement discussions which resulted in the current settlement.

The terms of the Settlement Agreement provide that Defendants pay a Gross Settlement Amount of One Hundred Twenty-Seven Thousand Five Hundred Dollars (\$127,500.00) to resolve the class and PAGA claims in this case. Significantly, this is a **non-reversionary settlement**, meaning that the entirety of the Gross Settlement Amount will be distributed to the class, such that **no remaining monies will revert to Defendants**. Further, no claim forms are required. The following represents the key terms of the Settlement:

- Gross Settlement Amount of \$127,500.00;
- Estimated class size of 73 individuals in the Class;

- Enhancement Payment to the Class Representative of up to \$10,000.00;
- Class Counsel's attorneys' fees of one-third of the Gross Settlement Amount, up to \$42,500.00;
- Class Counsel's costs associated with prosecution and resolution of this action of up to \$20,000.00¹;
- Settlement administration costs of up to \$6,000.00;
- Payment to the Labor and Workforce Development Agency of \$7,500.00, representing 75% of the total PAGA allocation of \$10,000.00;
- Net Settlement Amount of approximately \$41,500.00, which will be equally apportioned among the Class Members; and
- Raw average of approximately **\$568.49** to each Participating Class Member.

The Parties and their respective counsel believe that the Settlement for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and her counsel are confident that they can prevail on class certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that the classes might not be certified and/or that Plaintiff could fail to establish liability.

The Parties believe that this amount is fair, adequate, and reasonable, especially given the risks and uncertainty of class certification and the merits of this case. Further, notice of the settlement was provided to the class by Phoenix Settlement Administrators ("Phoenix") in the manner approved by the Court, and not a single objection or opt-out was received as of the expiration of the opt-out period, suggesting approval by the Class as a whole. Therefore, the Parties respectfully request that the Court grant this Final Approval of Class Action Settlement.

¹ The final amount is considerably less than what was allocated as costs in the settlement, as discussed below. Per the agreement, the difference has been reallocated to the net settlement fund, increasing the net amount from the \$41,500 contemplated in the agreement to \$54,395.85. This increases the average recovery per class member from \$568.49 to \$745.15

II. PROCEDURAL HISTORY

On February 18, 2021, Plaintiff filed her written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging violations of Labor Code §§ 201-204 and 246 and pursuant to the PAGA, Labor Code § 2699. Declaration of Max Gavron (“Gavron Decl.”) ¶ 2. Thereafter, on March 15, 2021, Plaintiff filed her class and representative action complaint (“Complaint”) against Defendants in the Superior Court of California, County of Placer. *Id.* The Complaint alleges causes of action for (1) violation of Labor Code §§ 204 and 246 for underpayment of sick time wages, (2) violation of Labor Code §§ 201-203 for waiting time penalties, (3) violation of Business and Professions Code § 17200, *et seq.* for unfair business practices, and (4) violation of the PAGA, Labor Code § 2698, *et seq.* *Id.*

After thorough investigation and evaluation of the facts and claims, and as a result of the arm’s-length negotiations, the Parties and their counsel ultimately reached the current settlement. Gavron Decl. ¶ 3. In resolution of Plaintiff’s class and PAGA claims in this lawsuit, the Parties entered into the Settlement Agreement, which this court preliminarily approved on November 15, 2022.

III. THE SETTLEMENT TERMS

The total settlement amount is \$127,500.00. This amount is due to be paid on a non-reversionary basis to Phoenix with 10 days of the Effective Date, as defined in the Settlement. Phoenix will calculate Defendants’ share of taxes due on the wage portion of the Individual Settlement Payments and provide the same to counsel for review and approval. Within seven (7) calendar days of Phoenix receiving the settlement funds, Phoenix will send redacted class lists with calculations to the parties to confirm amounts. Within (7) The Parties will either send any proposed changes to Phoenix or confirm that no changes are requested. Within fourteen (14) days of hearing back from the Parties, Phoenix will mail Individual Settlement Payments, less applicable taxes and withholdings, to participating Settlement Class members.

According to the concurrently filed declaration of Kevin Lee, the total settlement administration costs were \$6,000.00 (Declaration of Kevin Lee (“Lee Decl.”) ¶16) The total costs of Class Counsel for moving the case forward are approximately \$2,104.15. (Declaration of Manny

1 Starr (“Starr Decl.”) ¶7; Gavron Decl. ¶16. Plaintiff requests a class representative service award
2 of \$10,000.00 (*See* Declaration of Amy Migdal (“Migdal Decl.”) ¶15.) Next, class counsel requests
3 attorney fees of approximately 33 1/3 percent, or \$42,500.00. (Starr Decl. Exh. A.)

4 Finally, \$10,000.00 of the gross settlement will be allocated to PAGA. (Starr Decl. Exh. A.)
5 This means 75% of \$10,000.00 (\$7,500.00) will be paid to LWDA and 25% of \$10,000.00
6 (\$2,500.00) will be distributed among the Class². (Starr Decl. Exh. A.) This leaves a net settlement
7 amount of \$54,395.85 (Lee Decl. ¶13.)

8 Class members’ individual settlement payments are calculated based on the number of
9 members in the class. (Starr Decl. Exh. A.) This is because the bulk of the claim is for waiting time
10 penalties, for which length of service has no bearing. (*Id.*) Additionally, the settlement payments
11 will be allocated as one hundred percent (100%) for penalties (nontaxable), and for interest
12 (nontaxable), since, again, the majority of the claim is for statutory penalties. (*Id.*)

13 With the net settlement of \$54,395.85, each class member will receive about \$745.15,
14 including the aggrieved employee portion of the PAGA payment.

15 **IV. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE**

16 Pursuant to Rule of Court 3.769(g), the court conducts a final approval hearing to inquire
17 into the fairness of a settlement. There is a presumption of fairness when the following exist: 1) the
18 settlement was reached through arm’s-length bargaining, 2) investigation and discovery are
19 sufficient to allow counsel to act intelligently, 3) counsel is experienced in similar litigation, and 4)
20 the percentage of objectors is small. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,
21 245.) All the factors are present here. The settlement is the product of significant work and effort
22 by the parties and their counsel.

23 In advance of substantive settlement discussions, and as a result of extensive informal
24 discovery, Defendant produced data relating to the number of Class Members, their average hourly
25

26
27
28 ² For purposes of the settlement, each Class Member is being treated as an Aggrieved Employee for PAGA

1 rates . (Starr Decl. ¶2). The data allowed Plaintiffs’ counsel to perform a comprehensive damage
2 analysis prior to settling. (*Id.*)

3 On November 15, 2022, the Court reviewed and granted Preliminary Approval of the
4 settlement. The Court also approved the Notice Packet to be sent to the class members. The
5 Notice Packet has been sent to the Class Members, and the Objection and Opt-out deadlines have
6 passed. To date, the Settlement Administrator has received zero objections and zero requests to opt
7 out. (Lee Decl. ¶¶8-10.) Further, Counsel provided notice to the LWDA of the settlement
8 agreement as required under Labor Code section 2699(l)(2) at the time of moving for preliminary
9 approval, and will submit a copy of this motion to the LWDA at the same time it is filed with the
10 Court. Thus, the procedural requirements for final approval have been met.

11 Frontier Law Center and Diversity Law Group have significant experience with
12 representing employees in wage and hour cases, including numerous class and PAGA actions with
13 employees who have experienced labor code violations. (Starr Decl. ¶¶5-6); (Gavron Decl. ¶¶9-
14 15);. Finally, there are no objectors. (Lee Decl. ¶9). Thus, under *Wershba* the settlement is fair. To
15 provide further substance for the settlement’s fairness, Plaintiff will analyze the *Kullar* factors
16 below.

17 **A. The Kullar Factors Weigh in Favor of Approval**

18 In applying the presumption of fairness, the court examines the following factors: 1)
19 strength of the case, 2) risk, expense, complexity, and likely duration of further litigation, 3) risk of
20 maintaining class action status through trial, 4) amount offered in settlement, 5) extent of discovery
21 completed and the stage of proceedings, 6) experience and views of counsel, 7) presence of a
22 governmental participant, and 8) reaction of the class members to the settlement. (*Kullar v. Foot*
23 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.)

24 **1. Strength of Case**

25 The test is not the maximum amount a plaintiff might have obtained at trial, but whether the
26 settlement was reasonable under the circumstances.

27 Although Plaintiffs’ counsel believes that Plaintiffs’ claims are meritorious, they are
28 experienced and realistic, and understand the possibility of non-certification on one or more of the

theories alleged in the operative complaints. (Starr Decl. ¶8). Plaintiffs’ counsel further recognizes that the outcome of a trial, and the outcome of any appeals that would inevitably follow if Plaintiffs prevailed, are inherently uncertain in terms of both outcome and duration. (*Id.*) These risks on class certification are compounded by the California Supreme Court’s holding in *Duran v. U.S. Bank Nat’l Ass’n*, (2014) 59 Cal. 4th 1.

Maximum Liability

Based on the class data provided by Defendants, Plaintiff estimated that Defendants would face potential liability of up to approximately \$479,172 (73 Class Members x (\$27.35 hourly rate x 8 hours x 30 days) for Plaintiff’s class claims for waiting time penalties if Plaintiff succeeded at trial. (Gavron Decl. ¶6). Plaintiff was able to estimate the potential class penalties based on data provided by Defendants, including the number of employees in the putative class and the average hourly rates of pay applicable to the putative class members. (*Id.*) Specifically, Plaintiff calculated waiting time penalties under Labor Code § 203 based on 73 putative class members and their average hourly rates of pay. *Id.* This maximum of course contemplates Plaintiff prevailing on all of her claims.

Numerous courts have held that **gross** settlements approximating between only 8 and 25% of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp. Secs. Litig.*, (9th Cir.2000) 213 F.3d 454, 459 (holding that class action settlement recovering 16% of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment”; noting that whether the settlement is fair and adequate depends on the “the difficulties in proving the case”); *Bellinghausen v. Tractor Supply Co.*, (N.D. Cal. Mar. 20, 2015) No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (holding that class action settlement recovering between 8.5% and 25% of the defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, (C.D. Cal. 2014) U.S. Dist. Ct. Case No. 8:12-cv-02161 (court granted preliminary approval of wage and hour class settlement which obtained only 9.1% of projected damages, given the risks of continued litigation) *Villegas v. J.P.*

1 *Morgan Chase & Co.*, (N.D. Cal. Nov. 21, 2012) No. CV 09-00261 SBA EMC, 2012 WL
2 5878390, at *6 (holding that gross class action settlement of approximately 15% of the potential
3 recovery was fair and reasonable); *Greko v. Diesel U.S.A., Inc.*, (N.D. Cal. Apr. 26, 2013) No. 10–
4 cv–02576 NC, 2013 WL 1789602, at *5 (24% was reasonable). Since the settlement in this case is
5 just over 26% of the maximum calculated liability, it is well within the range of reasonable
6 settlements by percentage.

7 **2. Risks of Further Litigation**

8 As set forth above, the risks included that Defendants might successfully argue that: 1) the
9 allegations are only that Defendant failed to use the correct formula for sick time pay, not that they
10 didn't pay it at all, meaning that the amount of wages unpaid is extremely small, even aggregated
11 among the class members; 2) that California law permits them to opt between several methods of
12 calculating sick time payments, and that the payments were made according to one of the
13 permissible methods; and 3) that even if the Court finds that Defendants are incorrect in their
14 interpretation of the sick pay requirements, their interpretation is reasonable and not contrary to any
15 published opinion, such that a good-faith dispute existed as to whether or not further wages were
16 owed, which is a complete defense to waiting time penalties under Labor Code section 203.

17 Given the above risks, Plaintiffs' counsel believes the settlement is a fair, reasonable, and
18 adequate result. (Starr Decl. ¶3).

19 **3. Risk of Maintaining Class Action Status Through Trial**

20 The primary risk of maintaining class action status through trial is the risk hinging on the
21 predominance/commonality requirement, which states that if the defendant's liability can be
22 determined by facts common to all members of the class, a class will be certified even if the
23 members must individually prove their damages." However, a class action cannot be maintained
24 where the existence of damage, the cause of damage, and the extent of damage must be determined
25 on a case-by-case basis, even if there are some common questions. (*Basurco v. 21st Century Ins.*
26 *Co.* (2003) 108 Cal.App.4th 110, 119.)

27 While Plaintiff maintains she would have been able to prove commonality, there are risks.
28 For example, Plaintiff's theory rests on the idea that the Class Members received non-discretionary

1 bonus pay and other payments that should have been factored in when calculating the sick pay rate.
2 Determining liability would require an analysis of what those payments were and why they were
3 made to determine whether they were properly excluded from sick pay calculations. Different
4 Class Members may have received different payments for different reasons. Thus, there is a risk of
5 a finding of no commonality. This is another risk that was considered in reaching the settlement at
6 mediation.

7 **4. The Amount Offered in Settlement**

8 “In determining whether the proposed settlement falls within the range of reasonableness,
9 perhaps the most important factor to consider is Plaintiffs’ expected recovery balanced against the
10 value of the settlement offer.” (*Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 176 F.Supp.3d, 390, 395.) This
11 determination requires evaluating the relative strengths and weaknesses of the plaintiffs’ case; it
12 may be reasonable to settle a weak claim for relatively little, while it is not reasonable to settle a
13 strong claim for the same amount.” (*Cotter, supra*, 176 F. Supp. at 936 (citing *In re High-Tech*
14 *Emp. Antitrust Litig.*, Case No: 11-cv-2509-LHK, 2014 WL 3917126, at *4 (N.D. Cal. Aug. 8,
15 2014)).

16 The risks described above demonstrate that 26% recovery of the total maximum liability is
17 within the range of reasonableness. (See *Stovall-Gusman v. W.W. Granger, Inc.*, (N.D. Cal. June
18 17, 2015) No. 13-CV-02540-HSG, 2015 WL 3776765, at *4 (concluding that a settlement which
19 provided 10 percent of the potential recovery was “within the range of reasonableness in light of
20 the risks and costs of litigation”); *Ma v. Covidien Holding, Inc.*, (C.D. Cal. Jan. 31, 2014) No. 12–
21 02161, 2014 WL 360196, at *5 (finding a settlement worth 9.1% of the total value of the action
22 “within the range of reasonableness”); *Balderas v. Massage Envy Franchising, LLC*, (N.D. Cal.
23 July 21, 2014) No. 12–cv–06327 NC, 2014 WL 3610945, at *5 (granting preliminary approval of a
24 net settlement amount representing 5% of the projected maximum recovery at trial).

25 **5. Extent of Discovery Completed and Stage of Proceedings**

26 To facilitate settlement and as a result of extensive informal discovery, Defendant produced
27 data relating to the number of Class Members and their average hourly rates. (Starr Decl. ¶2). The
28 data allowed Plaintiffs’ counsel to perform a comprehensive damage analysis in preparation for

1 mediation. (*Id.*)

2 Moreover, the Parties engaged in extensive research and communication prior to mediation;
3 these efforts allowed the Parties to reach a fair and reasonable agreement through arm's length
4 negotiations. (Starr Decl. ¶2.)

5 **6. Experience and Views of Counsel**

6 Class counsels are experienced in complex wage and hour class and PAGA cases, and
7 believe this settlement is a reasonable compromise given the risks and value described above.
8 (Starr Decl. ¶6); (Gavron Decl. ¶ 7).

9 **7. Presence of a Governmental Participant**

10 There are no governmental participants, however the motion for preliminary approval and
11 the settlement were uploaded to the LWDA website. To date, the LWDA has not notified the
12 parties of any perceived deficiency with the settlement or PAGA allocation.

13 **8. Reaction of Class Members to the Settlement**

14 There were no objections or requests for exclusion. These points also weigh in favor of final
15 approval. (Lee Decl. ¶8-10.)

16 **V. THE REQUESTED ATTORNEYS' FEES, COSTS, AND ENHANCEMENT** 17 **PAYMENT ARE APPROPRIATE**

18 Having obtained an excellent result for the class they represent, the Plaintiff and her
19 counsel seek Attorneys' Fees of \$42,500.00, out-of-pocket costs of \$2,104.15, costs for claims
20 administration of \$6,000.00, and \$10,000.00 for the enhancement payment to Plaintiff. The Court
21 preliminarily approved this settlement on November 15, 2022.

22 **A. Class Counsel is Experienced and Endorses the Settlement**

23 Experienced counsel, operating at arm's length, has weighed all of the foregoing factors,
24 and endorses the proposed settlement. As the Courts have explained, the view of the attorneys
25 actively conducting the litigation is "entitled to significant weight." (*Fisher Bros. V. Cambridge-*
26 *Lee Industries, Inc.*, (E.D. Pa. 1985) 630 F.Supp.482, 488); (*see also, Ellis v. Naval Air Rework*
27 *Facility* (N.D. Cal. 1980) 87 F.R.D.15, 18); (*Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485
28 F.Supp.610, 616-17). This settlement is an excellent result for the 949 class members as it results in

1 a gross non-reversionary settlement of **\$127,500.00**, and the class representative and attorneys’
2 requests should be granted.

3 **B. The Class Representative Enhancement Fee is Reasonable and Should Be Awarded**

4 A Plaintiff’s enhancement of \$10,000.00, has been preliminarily approved. Class counsel
5 strongly urges the Court to approve the enhancement request. The enhancement takes into
6 consideration the time, effort and risks incurred by Plaintiff in coming forward to litigate this
7 matter on behalf of all class members. The class representative essentially risked her future
8 employability to bring this lawsuit. (Migdal Decl. ¶¶ 11-12).

9 Plaintiff reviewed stacks of pages of documents during the pendency of the case, including
10 participating in informal discovery, providing documents, and providing invaluable information
11 regarding Defendants’ policies and payroll practices. (See Migdal Decl. ¶¶ 9-10). Further, Plaintiff
12 substantially helped the class lawyers and was always a champion for the class members. The
13 Defendants have not opposed the requested enhancement payment to the class representative, and
14 nor have the class members themselves.

15 Incentive awards “are fairly typical in class action cases.” (*Cellphone Termination Fee*
16 *Cases* (2010) 186 Cal. App. 4th 1380, 1393) [affirming incentive awards of \$10,000]; *Rodriguez v.*
17 *West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958) (citing 4 *Newberg on Class Actions* (4th
18 ed. 2002) §11:38); (*Eisenberg & Miller, Incentive Awards to Class Action Plaintiffs: An Empirical*
19 *Stud*), 53 UCLA L. Rev. 1303 (2006). Incentive awards “are intended to compensate class
20 representatives for work done on behalf of the class, to make up for financial or reputational risk
21 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private
22 attorney general.” (*Rodriguez*, 563 F.3d at 958–59). “[T]he rationale for making enhancement or
23 incentive awards to named plaintiffs is that they should be compensated for the expense or risk they
24 have incurred in conferring a benefit on other members of the class.” (*Clark v. American*
25 *Residential Services LLC* (2009) 175 Cal. App. 4th 785, 806).

26 The incentive award is fair and reasonable compensation for Plaintiff’s efforts in bringing
27 the action, serving as private attorney general under PAGA, assisting counsel with discovery and
28 regularly conferring with counsel on the status of his case and the strategies for prosecuting his

1 claims. (Starr Decl. ¶[x]). Plaintiff deserves the requested incentive award because they “remained
2 fully involved and expended considerable time and energy during the course of the litigation.” (*See*
3 *Schaffer v. Litton Loan Servicing, LP* (C.D. Cal. Nov. 13, 2012) No. 05- 07673- MMM, 2012 U.S.
4 Dist. LEXIS 189830, *61) (citation omitted). The incentive award is also appropriate because
5 Plaintiff would otherwise “not gain any benefit beyond that he [or she] would receive as an
6 ordinary class member.” (*See In re Toys “R” Us FACTA Litig.*, 295 F.R.D. at 472); (*Van Vranken*
7 *v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299) [holding that a substantial award
8 is appropriate where a class representative’s claim made up “only a fraction of the common fund.”].
9 Absent the incentive award, Plaintiffs will recover no more than other Class Members, despite
10 undergoing personal sacrifices in bringing this suit on behalf of the Class.

11 The incentive award is also justified in light of the Cal. Civ. Code section 1542 general
12 release that Plaintiff is required to provide Defendant as a condition of settlement. Under the Cal.
13 Civ. Code section 1542 release, Plaintiff will release any and all claims she may have against
14 Defendants arising out of her employment. This general release is considerably broader than the
15 separate, narrower release required of the Class, a consideration that further supports the requested
16 incentive awards. (Starr Decl. Exh. A.)

17 Separately, the incentive award is justified in light of the reputational risk that Plaintiffs
18 have assumed in bringing an action against a former employer. (*See Guippone v. BH S&B Holdings*
19 *LLC* (S.D.N.Y. Oct. 28, 2011) No. 09 Civ. 1029, 2011 U.S. Dist. LEXIS 126026, at **4, 20)
20 [“[T]he fact that a plaintiff has filed a federal lawsuit is searchable on the internet and may become
21 known to prospective employers when evaluating the person . . . Even where there is not a record
22 of actual retaliation, notoriety, or personal difficulties, class representatives merit recognition for
23 assuming the risk of such for the sake of absent class members.”)]. Employers commonly screen
24 employee candidates to determine whether they have ever filed suit, and employee candidates who
25 might be branded “litigious” are likely to be screened out of the process. In fact, an entire industry
26 has developed for providing employers with background information on employee candidates. And
27 significantly, the companies that provide these services actually promote themselves by touting
28 their ability to identify and weed out potentially litigious employee candidates:

- 1 • “In today’s litigious culture, employers simply cannot afford to hire employees who
2 will put their company at risk.” Back Track Screening, [http://www.btscreening.com/wp-](http://www.btscreening.com/wp-content/uploads/2012/09/Screening-101.pdf)
3 [content/uploads/2012/09/Screening-101.pdf](http://www.btscreening.com/wp-content/uploads/2012/09/Screening-101.pdf);
- 4 • “In today’s litigious culture, you simply cannot afford to hire employees who will put
5 your company at risk.” Credit Technologies, Inc.
6 http://www.credittechnologies.com/Employment_Screening.asp.

7 By bringing this action, Plaintiff has assumed considerable reputational risk that may
8 impact her ability to find employment in the near and distant future. Long after this action is
9 forgotten by Class Members, Plaintiffs will have to endure the risk of being branded “litigious” by
10 prospective employers and may have employment applications rejected on that basis alone.

11 The requested incentive award is fair, adequate, and reasonable compensation for Plaintiffs’
12 services on behalf of the Class and for the risks and personal sacrifices they assumed and endured.
13 The enhancement should be awarded for Plaintiff’s commitment and dedication to the litigation
14 and for their work performed. Plaintiff was unwilling to settle the class action until she felt it was
15 in the best interests of the Class. Furthermore, this litigation has resulted in a valuable benefit to the
16 73 Class Members who are participating because of Plaintiff.

17 The total number of class members is 73. (Lee Decl. ¶5.) The average settlement share for
18 the class is \$745.15. Plaintiff’s request represents only 7.8% of the Gross Settlement Amount.

19 Additionally, Plaintiff risked a potential judgment against her if this matter was
20 unsuccessful. Case law holds that a losing party is liable for the prevailing party’s costs. Therefore,
21 the Class Representative could have been liable for tens of thousands of dollars if this case was
22 unsuccessful. Few individuals are willing to take this risk, and Plaintiff was a champion on behalf
23 of others’ cause with potential monetary risks which were very significant. Accordingly, the
24 request is fair and reasonable and should be awarded.

25 It is noted that in *Garner v. State Farm Mut. Auto. Ins. Co.* the Court indicated a \$20,000
26 enhancement award was "well justified," given the plaintiff lent "her name to this case, and thus
27 subjecting herself to public attention. . . devoted considerable time and attention to this case for the
28 benefit of the Class." (*Garner v. State Farm Mut. Auto. Ins. Co.* (N.D. Cal. Apr. 22, 2010) 2010

U.S. Dist. LEXIS 49477 *46). Like Plaintiff Amy Migdal, the plaintiff in *Garner* made themselves available for meetings, and reviewed many documents:

Among other things, she has made herself available for deposition on two separate occasions, wherein she was subjected to questioning regarding her personal financial affairs and other sensitive subjects; met with Class Counsel on six separate occasions; attended the full-day Court-ordered appraisal hearing; spoke with Class Counsel and their staff on many occasions; reviewed all major pleadings; and repeatedly responded to interrogatories and document requests. (*Garner*, supra, at 46-47)

C. Plaintiffs' Request for Attorneys' Fees and Costs Should be Approved

Plaintiffs seek court approval of attorneys' fees in the sum of \$42,500.00, which equals 33 1/3% of the total settlement, plus costs of \$2,104.15. (Starr Decl. ¶¶7,10); (Gavron Decl. ¶8). The court should grant Plaintiffs' request for the following reasons:

1. Class counsel has obtained an extremely favorable settlement for the class members as evidenced by the following facts:
 - a. 100% of the \$127,500.00 gross settlement fund will be paid
 - b. All class members received notice of the amount of attorneys' fees and costs that would be requested and there have been no objections as of the date of this filing. Further, there has been zero opt outs. (Lee Decl. ¶8.)
 - c. The percentage of recovery method for determining attorneys' fees is the preferred method in a common fund case.
 - d. The settlement amount is **non-reversionary** and 33 1/3% of the common fund results in \$42,500.00 reasonable fee request under the circumstances of this case.

D. Plaintiffs' Request for Attorneys' Fees as a Percentage of the Recovery Should be Approved Because This is a Common Fund Case

Class Counsel's application for an award of attorneys' fees in an amount of 33 1/3% of the settlement created on behalf of the Class is fair and reasonable. The requested fee falls in the middle of the Ninth Circuit's historical benchmark for attorneys' fees of 20% to 50% of a common fund and is fair compensation for undertaking complex, risky, expensive, and time-consuming

1 litigation on a contingent basis.

2 The requested fees are extremely reasonable, and the results achieved for the Class
3 Members are excellent. Class Counsel respectfully requests that the Court enter an Order to that
4 effect. Class Counsel seeks a fee award calculated as a percentage of the total value of settlement,
5 for the successful prosecution and resolution of this action. California state and federal courts have
6 recognized that an appropriate method for determining award of attorneys' fees is based on a
7 percentage of the total value of benefits to Class Members by the settlement, not the amount
8 claimed. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S.
9 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769). The purpose of this
10 equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
11 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
12 burden alone." (*Id.* at 769).

13 In *Laffitte v. Robert Half International Inc.* (2016) 1 Cal.5th 480, 503, the California
14 Supreme Court affirmed the court of appeal decision and held that trial courts may grant attorneys'
15 fees in a common fund case based on a percentage of the recovery. The *Laffitte* Court explained:

16 We join the overwhelming majority of federal and state courts in holding
17 that when class action litigation establishes a monetary fund for the benefit of the
18 class members, and the trial court in its equitable powers awards class counsel a fee
19 out of that fund, the court may determine the amount of a reasonable fee by
20 choosing an appropriate percentage of the fund created. The recognized advantages
21 of the percentage method—including relative ease of calculation, alignment of
22 incentives between counsel and the class, a better approximation of market
23 conditions in a contingency case, and the encouragement it provides counsel to seek
24 an early settlement and avoid unnecessarily prolonging the litigation...—convince
25 us the percentage method is a valuable tool that should not be denied our trial courts.
26 (*Id.*)

27 Under the "common fund" doctrine, "a litigant or a lawyer who recovers a common fund
28 for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee
from the fund as a whole." (*Boeing*, supra, 444 U.S. at 478). The Supreme Court explained:

29 The doctrine rests on the perception that persons who obtain the benefit of a
lawsuit without contributing to its cost are unjustly enriched at the successful
litigant's expense. Jurisdiction over the fund involved in the litigation allows a court
to prevent this inequity by assessing attorney's fees against the entire fund, thus

1 spreading fees proportionately among those benefited by the suit. (Id. [citation
omitted].)

2 Thus, the common fund doctrine ensures that each member of the class contributes
3 proportionately to the payment of attorneys' fees recovered from monetary payments that the
4 prevailing party recovered in the lawsuit. "Put another way, in common fund cases, a variant of the
5 usual rule applies and the winning party pays his or her own attorneys' fees; in fee-shifting cases,
6 the usual rule is rejected and the losing party covers the bill." (*Stanton v. Boeing* (9th Cir. 2003) 327
7 F.3d 938, 967) (citing *Wininger v. SI Mgmt. L.P.* (9th Cir. 2002) 301 F.3d 1115). In a typical
8 "common fund" case, the defendant pays the entire lump sum settlement and has no further interest
9 in the amount of the fee award, as any reduction in the fee award reverts to the class members.
10 (*Stanton*, supra, 327 F.3d at 971). The common fund doctrine is predicated on the principle of
11 preventing unjust enrichment. When a litigant's efforts create or preserve a fund from which others
12 derive benefits, the court may spread litigation costs proportionally among all the beneficiaries to
13 compensate those who created the fund. Further, the *Rutter Group's California Practice Guide:*
14 *Civil Trials and Evidence* acknowledges the applicability of the common fund doctrine and
15 describes it as follows: "Where the lawsuit results in the recovery of a fund or property benefitting
16 others as well as the plaintiff (e.g., a class action), the court has inherent equitable power to order
17 Plaintiffs' attorney's fees paid out of the common fund or property." (*See Serrano*, supra, 20 Cal.3d
18 at 35).

19 Such 'fee spreading' assures that all those benefited by the litigation pay their fair share of
20 obtaining the recovery. (*Lealao v. Beneficial Calif., Inc.* (2000) 82 Cal.App.4th 19, 26-27)
21 ["Percentage fees have traditionally been allowed in such common fund cases."] Despite dicta in
22 one California court of appeal case critical of percentage fee awards, the Supreme Court has long
23 approved of awarding fees as a percentage of the settlement. (*Serrano*, supra, 20 Cal.3d at 35)
24 [explaining percentage fee awards, has never been overruled, and remains good law].

25 The most extensive California Court of Appeal discussion of class fee awards appears in
26 *Lealao*. (*Lealao*, supra, at 27). *Lealao* applied a lodestar analysis in favor of a percentage of the
27 settlement recovery but did not disapprove of percentage fee awards. Since *Serrano*, there has been
28

1 a “groundswell of support for mandating the percentage-of-the-fund approach in common fund
2 cases.” (*Id.*) In a case affirming the denial of fees to a successful objector to a class action
3 settlement, the court discussed the common fund doctrine developed by the U.S. Supreme Court:
4 “The common fund doctrine, frequently applied in class actions when the efforts of the attorney for
5 the named class representatives produce monetary benefits for the entire class, is rooted in the
6 ‘historic power of equity to permit ... a party preserving or recovering a fund for the benefit of
7 others in addition to himself, to recover his costs, including his attorneys’ fees, from the fund or
8 property itself or directly from the other parties enjoying the benefit.” (*Consumer Cause, Inc. v.*
9 *Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387).

10 Thus, California cases, including the California Supreme Court ruling in *Laffitte*, have
11 affirmed the continued validity of percentage fee awards in class action cases. Under these
12 principles, a percentage of the common fund fee award is properly based on the total settlement
13 value of \$127,500.00. For Class Counsel, the fees here were wholly contingent in nature and the
14 case presented far more risk than the usual contingent fee case. (Starr Decl. ¶11.) There was the
15 prospect of the enormous cost inherent in class action litigation, as well as a long battle with a
16 corporate Defendant. That prospect has previously become reality, in both trial courts and the Court
17 of Appeals in other wage and hour Class litigation. Class Counsel risked not only a great deal of
18 time, but also a great deal of expense to ensure the successful litigation of this action on behalf of
19 all Class Members.

20 Federal cases discussing and approving percentage fee awards in class cases are legion.
21 (*See, e.g., Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Staton v. Boeing Co.*, *supra*, 327
22 F.3d at 938; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) The present case
23 is a classic common fund case. Here, Plaintiffs’ counsel created a non-reversionary settlement fund
24 of \$575,000.00 for the benefit of the class members. The fund was created by counsel’s efforts.
25 (*Serrano*, *supra*, 20 Cal.3d at 35). The settlement mandates that Defendant fund the settlement.
26 (*Id.*) The value of the fund is easily calculable. (*Id.*)

27 **E. The Court Should Approve the Request for Reimbursement of Costs in the Sum of**
28 **\$2,104.15**

1 The request for reimbursement of costs is fair and reasonable. Plaintiffs' counsels' total
2 costs are \$2,104.15; (Starr Decl. ¶7); (Gavron Decl. ¶ 16). This includes filing and service costs,
3 but does not include the claims administration costs of \$6,000.00. The costs are all litigation related
4 costs (*Id.*). Since the total costs were under the amount approved in the settlement agreement, the
5 difference has been applied back to the Net Settlement amount. (Lee Decl. ¶13)

6 **F. Disclosure of Fee Splitting Arrangements**

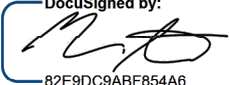
7 Class counsel has entered into a fee agreement between them that assigns 40% of the
8 attorney fee award to Frontier Law Center and 60% to Diversity Law Group (Starr Decl. ¶11.).

9 **VI. CONCLUSION**

10 Plaintiff undertook the responsibility and duty of serving as a Class Representative because
11 she felt the treatment of herself and her co-workers was unjust and brought this suit on behalf of all
12 California employees in order to benefit those workers whose rights were impinged as were her
13 own. Plaintiff did exactly that, undertaking significant action to bring this case to the substantial
14 benefit of class members, dedicating the time such responsibilities required of them, and doing so
15 at personal and financial risk to herself and their own future employment prospects. Granting this
16 service award further supports the public policy underlying the provision of such awards, and the
17 policies underlying the federal and state statutory enforcement schemes. For these reasons, Plaintiff
18 respectfully requests this Court approve the proposed incentive award. Plaintiff respectfully
19 requests that this Court approve Class Counsels' request for an award of attorneys' fees of
20 \$42,500.00 (33 1/3% of the total settlement amount), and \$2,104.15 in costs at the time of the final
21 approval hearing. Based on the above, Plaintiffs submit that the settlement is fair, reasonable, and
22 adequate. Plaintiffs respectfully requests the court to grant final approval and enter judgment.

23
24 Date: February 17, 2023

FRONTIER LAW CENTER

25
26
27 DocuSigned by:

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Manny Starr

Attorney for Plaintiff and the Class