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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

ASHLEY BROWN, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

MINUTECLINIC DIAGNOSTIC MEDICAL
GROUP OF CALIFORNIA, INC., a
California Corporation; et al.;

Defendants.

Case No.: 30-2021-01185270-CU-OE-CXC
*[Assigned to Hon. Lon F. Hurwitz, Dept
CX103, 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: June 23, 2023

Time: 1:30 p.m.

Dept: CX103

Complaint filed: February 22, 2021

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

2 PLEASE TAKE NOTICE THAT on June 23, 2023, at 1:30 p.m., or as soon thereafter as
3 this matter may be heard by the Honorable Lon F. Hurwitz in Department CX103 of the Orange
4 County Superior Court located at located at 751 W. Santa Ana Blvd., Santa Ana, CA 92701,
5 Plaintiff Ashley Brown (“Plaintiff” or “Class Representative”) will respectfully move this Court
6 for an Order granting final approval of the class action settlement between Plaintiff and
7 Defendants MinuteClinic Diagnostics Medical Group of California, Inc., MinuteClinic
8 Diagnostic Medical Group of Orange County, Inc., and MinuteClinic Diagnostic Medical Group
9 of San Diego, Inc. (collectively, “Defendants” or “MinuteClinic”), which was preliminarily
10 approved on February 16, 2023. This Motion, which is supported and unopposed by Defendants,
11 seeks final approval and entry of judgment of a \$670,000 settlement on behalf of the Class
12 Members.

13 Specifically, Plaintiff will and hereby does move the Court to grant final approval of the
14 Amended Class and PAGA Action Settlement Agreement and Release (the “Settlement
15 Agreement”), and enter the proposed order and final judgment filed concurrently herewith:

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

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

19 3. Finally appointing Plaintiff’s Counsel as Class Counsel for purposes of
20 settlement;

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

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

25 6. Binding Participating Class Members and PAGA Employees to the terms of the
26 Settlement Agreement, including the Released Class Claims and PAGA Released Claims
27 specified therein; and

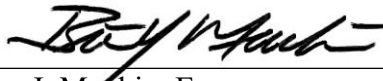
28 7. Retaining jurisdiction to enforce the Settlement Agreement.

1 This Motion will be based upon this notice; the attached memorandum of points and
2 authorities; the Declarations of the Settlement Administrator (Nathalie Hernandez of ILYM
3 Group), Class Counsel (Brian Mankin and Peter Carlson), and Plaintiff filed concurrently
4 herewith; the records and files in this action; and any other further evidence or argument that the
5 Court may receive at or before the hearing.

6 Dated: June 1, 2023

LAUBY, MANKIN & LAUBY LLP

7
8 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 Ashley Brown
4 (“Plaintiff” or “Class Representative”) respectfully requests that this Court grant final approval
5 of the Amended Class and PAGA Action Settlement Agreement and Release (the “Settlement
6 Agreement” or “S.A.”) already on file in this action, which is supported and unopposed by
7 Defendants MinuteClinic Diagnostics Medical Group of California, Inc., MinuteClinic
8 Diagnostic Medical Group of Orange County, Inc., and MinuteClinic Diagnostic Medical Group
9 of San Diego, Inc. (collectively, “Defendants” or “MinuteClinic”) and enter the proposed order
10 and final judgment in this matter.

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

- 13 • After extensive litigation, a robust pre-mediation exchange of information, and
14 arms-length negotiation brokered by an experienced mediator, the Parties reached a \$670,000
15 settlement tailored to a limited release of the claims alleged on behalf of Class Members;
- 16 • The Class Members were deemed to participate in the Settlement, and were not
17 required to submit a Claim Form to receive funds;
- 18 • No reversion to Defendants;
- 19 • There were no objections and only two opt-outs, meaning that 99.7% of the Class
20 elected to participate in the settlement.

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

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

26 MinuteClinic is a subsidiary of CVS Health and provides retail clinical services such as
27 vaccinations, family health services, and treatment of minor injuries and illnesses from within
28 CVS locations. The Class Members staffed these locations and typically consisted of one or

more nurse practitioners and one or more additional providers (such as licensed vocational nurses). The primary claims (which Defendants vehemently disputed) involved allegations that MinuteClinic failed to pay the Class all wages owed (based on the theory that Defendants' practices required the Class Members to perform pre-shift tasks work before clocking in and post-shift tasks after clocking out – without compensation), failed to provide compliant meal and rest breaks, issued inaccurate and incomplete wage statements, as well as waiting time penalties and PAGA penalties arising from the same underlying conduct.

The Settlement includes 699 Participating Class Members, and the following is a breakdown of how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Nathalie Hernandez ["Hernandez Decl."]) ¶ 14.

	Total Amount
<i>Gross Settlement Amount</i>	\$ 670,000.00
Attorneys' Fees (1/3)	\$ 233,333.33
Litigation Costs	\$ 14,120.14
Administrator Costs	\$ 9,750.00
PAGA Penalties	\$ 40,000.00
<i>Net Settlement Amount</i>	\$ 372,796.53

The Participating Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Each Participating Class Member will receive a pro rata share of the Net Settlement Amount according to the percentage of Pay Periods Worked during the Class Period, such that the amount actually distributed to Participating Class Members will equal 100% of the Net Settlement Amount. (S.A. ¶ 50(c)).

Assuming all amounts in the Settlement are approved by the Court, the average individual settlement payment is estimated to be \$533.33, the *highest* individual settlement payment is approximately \$1,844.26. There are a total of 31,938 Pay Periods Worked in the Class Period. (Hernandez Decl. ¶ 15).

In addition, there are 571 PAGA Employees who will receive a share of the PAGA Penalties based on a pro-rata basis. Thus, the \$10,000 in PAGA Penalties allocated to the PAGA Employees will be divided and paid on a Pay Periods Worked basis. (Hernandez Decl. ¶ 16; S.A. ¶ 50(h)).

1 The Settlement provides that ten percent (10%) of each Class Settlement Payment shall
2 constitute wages (for which each Participating Class Member will be issued an IRS Form W-2
3 for such payment), and the remaining ninety percent (90%) shall constitute interest and penalties
4 (for which each Participating Class Member will be issued an IRS Form 1099 for the interest and
5 penalty allocation). (S.A. ¶ 50(d)). Additionally, the PAGA Penalties payable to the PAGA
6 Employees will be classified entirely as civil penalties and shall be reported as required on an
7 IRS Form 1099. (S.A. ¶ 50(h)).

8 The Settlement Agreement provides that Defendants shall deposit the Settlement Amount
9 within 15 calendar days after the Effective Date (S.A. ¶ 71). Within 10 days of receipt, the
10 Settlement Administrator shall issue payments to cover all court-approved payments. (S.A. ¶
11 72). As set forth in the proposed Final Order, the envelope transmitting the settlement checks
12 shall bear the notation “YOUR CLASS ACTION SETTLEMENT CHECK IS ENCLOSED.”
13 (See Final Order ¶ 16.) Class Members will have 180 calendar days to cash his/her settlement
14 check. If a Class Member fails to cash his/her check within 180 calendar days of mailing, then
15 the Settlement Administrator shall issue the unclaimed funds to the State Controller’s Office for
16 the State of California in the name of the Class Member or Aggrieved Employee. (S.A. ¶ 73,
17 Final Order ¶ 17).

18 **III. THE NOTICE PROCESS**

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

20 Pursuant to the Court’s Order and the Settlement Agreement, the Parties directed the
21 Settlement Administrator to review and update the Class Members’ addresses, mail the Court-
22 approved Notice Packet, and process their responses. (Hernandez Decl. ¶ 2-3).

23 After the Administrator received the Class Data on March 9, 2023, it performed a
24 National Change of Address search on all Class Members to determine if any had moved. (*Id.* at
25 ¶ 5-6). On March 21, 2023, the Notice Packets were sent via first-class mail to 701 Class
26 Members. (*Id.* at ¶ 7). For any Notice Packet that was returned by the USPS as undeliverable
27 and without a forwarding address, the Settlement Administrator performed an advanced address
28 search (i.e. skip trace) to locate updated addresses and then promptly mailed the Notice Packets

1 to those updated addresses. Ultimately, the Settlement Administrator reports that only 3 Notice
2 Packets were undeliverable, resulting in a **99.6%** success rate in mailing the Notice Packets. (*Id.*
3 at ¶ 8-10).

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

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

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

22 Here, there were **no** objections and only two opt-outs, meaning that 99.7% of the Class
23 Members elected to participate and receive a share of the Settlement. (Hernandez Decl. ¶¶ 11-
24 13).

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

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

3 **IV. EVALUATION OF THE SETTLEMENT**

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

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

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

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

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

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

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

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

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

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

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

26 Class Counsel are experienced in this type of litigation, and they have (and hereby do)
27 represent that this Settlement is fair and reasonable. (Mankin Decl. ¶¶ 2-6, 13; Carlson Decl. ¶¶
28 2-7); *see 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135,

1 1152 (Final approval of settlement affirmed where counsel were all experienced litigators with
2 class-action experience and had recommended settlement based on the negotiated terms).

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

4 Plaintiff's Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
5 which sufficiently provided the Court with "basic information about the nature and magnitude
6 of the claims in question and the basis for concluding that the consideration being paid for the
7 release of those claims represents a reasonable compromise." *Kullar v. Foot Locker Retail,*
8 *Inc.* (2008) 168 Cal.App.4th 116, 133. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
9 (2010) 186 Cal.App.4th 399, later clarified *Kullar* by noting that an explicit statement of the
10 maximum theoretical amount that the class could recover was not part of the "basic
11 information" that counsel was required to produce:

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

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

27 In light of the uncertainties of protracted litigation, this negotiated settlement reflects the
28 best practicable recovery for the Class. While the total settlement amount is, of course, a
29 compromise figure, the potential risks and opportunities of both parties were effectively weighed
30 and considered by the parties, resulting in a fair and equitable settlement. Based upon detailed
31 data obtained through discovery and information exchanges, and factoring in claim certification

probabilities and liability probabilities, Class Counsel formulated detailed damages models to evaluate the claims for mediation in order to reach a realistic and reasonable resolution.

V. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

For their efforts in creating a common fund for the benefit of the class, the Settlement Agreement provided that Class Counsel seek reasonable fees of \$233,333.33, which is one-third of the common fund Settlement Amount. 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) 699 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 has affirmed that the percentage of the fund is the prevailing method 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 Labor Code § 218.5, 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 Labor Code § 1194.2, 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 Labor Code § 226(e) (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.

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

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

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

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

1 evaluate the reasonableness of a requested percentage fee.”).

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

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

20 In addition to the fact that a Class benefit was created with a non-reversionary common
21 fund settlement, the fairness of the requested fee award of 1/3 of the Settlement Amount is
22 supported by the high quality of work performed by Class Counsel and the excellent result
23 obtained for the Class against a well-funded Defendant. This result occurred because Class
24 Counsel diligently, efficiently, and creatively pursued this case and reached a settlement for the
25 benefit of the entire Class. The fact that the settlement was embraced and supported by the Class,
26 demonstrates that Class Counsel obtained a favorable result for the Class.

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28 ///

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

2 Rule 3.769 of the California Rules of Court requires that the Class Members be given
3 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
4 preliminarily approved by the Court and distributed to the Class Members apprised them that
5 "Class Counsel will ask for fees of one-third (\$233,333.33) of the common fund Gross
6 Settlement Amount as reasonable compensation for the work Class Counsel performed and will
7 continue to perform in this Lawsuit through finalization of the Settlement..." (Hernandez Decl.,
8 Exh. A.)

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

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

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

1 If Plaintiff had lost this case, Class Counsel would have recovered nothing, and would
2 have lost its out-of-pocket costs. This is not an easy burden for Plaintiff's Counsel, which are
3 two small firms. (Mankin Decl. ¶ 20). If, despite these hardships and risks, the best Plaintiff's
4 Counsel could hope for is merely to be paid its customary hourly rate multiplied by the number
5 of hours worked on all cases (including cases like this where the lodestar is far greater than the
6 potential fee award), then Class Counsel would not be compensated for the hardships and serious
7 risks they faced litigating this contingency case, and would not be incentivized to take on similar
8 cases in the future. (*Id.*)

9 The court in *Horsford v. Board of Trustees of California State University*, 132
10 Cal.App.4th 359 (2005) analyzed this issue and held that, when determining the market-level
11 compensation to award to contingent fee attorneys, the analysis must take into account the large
12 risk inherent in such situations:

13 The market value of the services provided by plaintiffs' counsel in a case
14 of this magnitude must take into consideration that any compensation has
15 been deferred for up to four years from the time an hourly fee attorney
16 would begin collecting fees from his or her client; that the demands of the
17 present case substantially precluded other work during that extended
18 period, which makes the ultimate risk of not obtaining fees all the greater
19 (since the attorneys must use savings or incur debt to keep their offices
20 afloat and their families fed during the years-long litigation); and that a
21 failure to fully compensate for the enormous risk in bringing even a
22 wholly meritorious case would effectively immunize large or politically
23 powerful defendants from being held to answer for constitutional
24 deprivations, resulting in harm to the public."

25 *Id.* at 399-400.

26 Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
27 end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault of
28 counsel (i.e., bankruptcy, change in the law, consolidation/coordination/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.*, No. 12-55479 (9th Circuit 2014), found
that only one-third of class actions are successful, compared to two-thirds that are defeated and

1 result in no payment to the class members.¹

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

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

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

15 Historically, California courts have approved multipliers of 1.5 to 4. *See Coalition for Los*
16 *Angeles County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251 (**multiplier of**
17 **2+ approved**); *Sternwest Corp v. Ash* (11866) 183 Cal.App.3d 74, 75. The multiplier requested
18 by Class Counsel below is within the range of multipliers found to be appropriate by various
19 federal and state courts in California. In *Sternwest Corp. v. Ash* (11866) 183 Cal.App.3d 74, for
20 instance, the Court of Appeal remanded for a lodestar enhancement of “**two, three, four or**
21 **otherwise.**” *Id.* At 76; *see also Wershba*, 91 Cal.App.4th at 255 (“**Multipliers can range from 2**
22 **to 4 or even higher**”); *City of Oakland v. Oakland Raiders* (11868) 203 Cal.App.3d 78, 83
23 (**affirming 2.34 multiplier**); *Coalition for Los Angeles County Planning in the Pub. Interest v.*
24 *Board of Supervisors*, 76 Cal.App.3d 241, 251 (**affirming multiplier of approximately 2**); *Craft*

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

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

v. County of San Bernardino, 2008 U.S. Dist. LEXIS 27526 (C.D. Cal. Apr. 1, 2008) (**applying 5.2 multiplier**); *See also Steinder v. Am. Broadcasting Co., Inc.* (9th Cir. 2007) 248 Fed. Appx. 780, 783 (**approving multiplier of 6.85** and citing cases with comparable or higher multipliers); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 (finding no abuse of discretion in **awarding a multiplier of 3.65**). In *Torchia v. WW Grainger, Inc.* (E.D. Cal. 2014) 304 F.R.D. 256, 275-278, a federal magistrate in Fresno approved attorneys’ fees of \$550,000 **constituting a 3.57 multiplier** on class counsel’s total lodestar of \$153,856, in a wage and hour class action where class counsel expended 457.85 hours on the case, engaged in limited formal discovery, and where the case settled for \$2,750,000 within one year from filing the Complaint with 909 class members claiming \$1,305,200 and the remainder, except for the attorneys’ fees and costs, reverting to the company.

The actual aggregated lodestar between the Plaintiffs’ attorneys that worked on this case is approximately \$191,325. This results in a **small 1.22 multiplier**, as summarized in the following table, and in the submitted declaration of Plaintiff’s counsel:

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner)	Trial Counsel	22	\$775	108.5³	\$84,087.50
Peter Carlson (Senior Associate)	Handling Attorney	9	\$575	186.5	\$107,237.50
Grand Total for All Attorneys					\$191,325

(Mankin Decl. ¶ 26; Carlson ¶ 8).

The hourly rates above are comparable to those of other attorneys with equal or similar experience, if not somewhat lower (*i.e.*, the Laffey Matrix at www.laffeymatrix.com indicates that the benchmark rates are: \$676/hour for an 8–10-year attorney, \$764/hour for a 11-19 year attorney, and \$919/hour for a 20+ year attorney). Moreover, the Wolters Kluwer 2017 Real Rate Report (“Real Rate Report”) provides directly applicable information in this regard. The Real Rate Report is based on an enormous and statistically significant compilation of data: 25.8

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

1 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from
2 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc.,
3 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide
4 the hourly rates for partners and associates in major metropolitan areas. For the southern
5 California area, which is based on billing entries for 1,125 partners and 1,566 associates, the
6 Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and
7 \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los
8 Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most
9 importantly, the information provided in the Real Rate Report is not based on self-reported
10 numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is
11 based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 24-25.)

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

15 Class Counsel are also highly experienced in Class/PAGA litigation, including having
16 been selected as “Super Lawyers” in employment litigation on multiple occasions, having
17 achieved large settlements, having prevailed at trial in PAGA-only actions and Class Action jury
18 trials. (Mankin Decl. ¶¶ 2-6; Carlson ¶¶ 2-7).

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

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

21 Plaintiff’s Counsel requests reimbursement of their actual out-of-pocket expenses
22 incurred to prosecute this action. These expenses were incidental and necessary to the effective
23 representation of the employees. *See Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.
24 Plaintiff’s Counsel are permitted to recover their litigation costs and expenses under the common
25 fund doctrine. *See Serrano III*, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees
26 and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6
27 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same reasons
28 discussed above with respect to the recovery of attorneys’ fees by . . . [Plaintiffs’] attorneys”).

Furthermore, Plaintiff's Counsel are entitled to recover "those out-of-pocket expenses that would normally be charged to a fee-paying client." *Harris*, 24 F.3d at 19.

The Settlement Agreement authorized litigation costs of up to \$20,000. (S.A. ¶ 50(f)). Class Counsel's actual costs through the final approval hearing are estimated to be \$14,120.14. (Mankin Decl. ¶ 28). These costs include mediation fees, filing fees, and other costs that include Attorney Service charges, expert discovery fees, CourtCall charges, and process service fees. (*Id.*) These costs are reasonable and uncontested, and should be approved, with the savings placed in the Net Settlement Amount and paid to Participating Class Members.

B. NO SERVICE AWARD IS REQUESTED

In light of Plaintiff's separate individual settlement for her alleged wrongful termination claims, Plaintiff is not seeking a service award.

VII. OTHER MATTERS FOR FINAL APPROVAL

A. SETTLEMENT ADMINISTRATION COSTS

ILYM Group agreed to administer the settlement for a flat ("not to exceed") fee of \$9,750. (Hernandez Decl. ¶ 17). This amount was fully disclosed to the Class Members in the Class Notice, and no Class Members objected to it. As such, the Parties request that the Administrator's fee request be approved.

B. UNCASHED CHECKS

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

C. FINAL REPORT

Defendants are required to issue payment to the Administrator within 15 calendar days after the Effective Date (which occurs 30 days after the Order/Judgment is entered). The Administrator will then have 10 calendar days after Defendants' deposit of the Settlement Amount into the Qualified Settlement Fund to issue payment to the Participating Class Members and PAGA Employees, who will then have 180 calendar days to cash their checks. Thus, the deadline to cash checks should occur in mid-February 2024. Therefore, the Parties

1 propose submitting a declaration from the Administrator on approximately March 15, 2024,
2 unless the Court wishes to have the declaration submitted after the Administrator transmits the
3 uncashed check fund to the State Controller which is likely to occur in about February 2025.

4 **D. SUBMISSION TO THE LWDA**

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

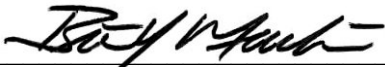
7 **VIII. CONCLUSION**

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

10 Dated: June 1, 2023

LAUBY, MANKIN & LAUBY LLP

11
12 BY:



13 Brian J. Mankin, Esq.
14 Attorneys for Plaintiff and the Class
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On June 1, 2023, I caused to be served the foregoing document(s) described as follows:

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.

[] **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. *Be. . . .*

Fanni Chauri

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