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on behalf of all others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

MICHELLE KUSSNER, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

MV PUBLIC TRANSPORTATION, INC, a
California Corporation; MV
TRANSPORTATION, INC., a California
Corporation; DOES 1 through 25,

Defendants.

Case No.: 21STCV12259
Assigned to Hon. Carolyn B. Kuhl
Department SSC-12

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

[Filed concurrently with Declarations of
Aaron Gundzik, Daniel Holzman,
Michelle Kussner and Jarrod Salinas of
Phoenix Settlement Administrators;
[Proposed] Order and [Proposed]
Judgment]

Date: January 16, 2024
Time: 10:00 a.m.
Place: Department SSC-12

Complaint Filed: March 30, 2021

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 16, 2024, at 10:00 a.m. in Department
3 12 of the above-entitled Court, located at 312 N. Spring St, Los Angeles, CA 90012,
4 Plaintiff Michelle Kussner will and, by this Notice of Motion and Motion, hereby does,
5 move for an Order as follows:

6 1. Granting final approval of a class action and Private Attorneys’ General Act
7 (“PAGA”) settlement in the gross amount of one million three hundred fifty thousand
8 dollars (\$1,350,000);

9 2. Approving a service and release payment in the amount of \$10,000 to the
10 named plaintiff, Michelle Kussner;

11 3. Approving of the payment of settlement administration costs of \$46,250 to
12 the third-party settlement administrator, Phoenix Class Action Settlement Administrators
13 (“Phoenix” or “Settlement Administrator”);

14 4. Approving of a payment to the California Labor Workforce Development
15 Agency (“LWDA”) in the amount of \$56,250, which is 75% of the \$75,000 amount
16 allocated to settle the PAGA claims, with the other 25% (\$18,750) being distributed to the
17 PAGA employees;

18 5. Approving the payment of attorneys’ fees of \$450,000, which is one-third of
19 the gross settlement amount, and costs and expenses of \$25,000 to Class Counsel; and

20 6. Entering final judgment implementing the release of participating Class
21 Members’ claims.

22 Plaintiff’s motion is made pursuant to California Rule of Court 3.769 and is based on
23 this Notice of Motion and Motion and Memorandum of Points and Authorities submitted
24 herewith, the [Proposed] Final Approval order and [Proposed] Judgment, the Declaration of
25 Class Counsel Aaron C. Gundzik, the Declaration of Class Counsel Daniel Holzman, the
26 Declaration of named Plaintiff Michelle Kussner, the Declaration of Jarrod Salinas, on
27 behalf of the Settlement Administrator, Phoenix, the pleadings and other papers filed in this
28

1 action, and such further argument or evidence as may be considered at the hearing on the
2 motion.

3 As this Motion will be unopposed, Plaintiff respectfully requests relief from the page
4 limit requirement set by California Rules of Court, Rule 3.1113(d).

5 DATED: December 20, 2023

GUNDZIK GUNDZIK HEEGER LLP

6
7 By: 

8 Rebecca G. Gundzik
9 Attorneys for Plaintiff Michelle Kussner,
10 individually and on behalf of all others
11 similarly situated
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On August 29, 2023, this Court granted preliminary approval to the wage and hour
4 class and Private Attorneys' General Act ("PAGA") action settlement of one million three
5 hundred fifty thousand dollars (\$1,350,000) that is the subject of this Motion. In doing so,
6 the Court preliminarily concluded that the proposed settlement is fair and reasonable,
7 preliminarily appointed the named Plaintiff as the Class Representative, and preliminarily
8 appointed Aaron C. Gundzik of Gundzik Gundzik Heeger LLP and Daniel Holzman of
9 Caskey & Holzman as Class Counsel. As ordered, notice of the proposed settlement has
10 been distributed to all 8,711 Class Members. Declaration of Jarrod Salinas ("Salinas
11 Decl."), ¶¶ 5-9. Only two Class Members have opted out of the settlement, and no
12 objections have been received. Salinas Decl., ¶¶ 10-11.

13 As this Court is aware, this is a class action filed by Plaintiff Michelle Kussner
14 against her former employer Defendants MV Public Transportation, Inc, and MV
15 Transportation, Inc. (collectively "Defendants" or "MV") on behalf of a class consisting of
16 all persons employed by Defendants in California who worked for Defendants in a non-
17 exempt position during the Class Period (June 11, 2020 through August 29, 2023) for at least
18 one week and performed services as drivers, or assisting drivers, including bus operators,
19 bus aides, road supervisors and dispatchers. Generally, the terms of the parties' settlement
20 require Defendants to pay the sum of \$1,350,000. By this Motion, Plaintiff seeks approval
21 for the distribution of these funds to the Class, less a service and release payment to the
22 named Plaintiff, attorneys' fees and costs, a payment to the LWDA, a payment to the
23 aggrieved employees and settlement administration expenses. If this Motion is granted in
24 full, 8,709 Class Members will receive a settlement payment resulting in individual gross
25 payments to Class Members ranging between \$1.57 and \$263.01. Salinas Decl., ¶ 17.

26 Nothing material concerning the proposed settlement has changed since the Court's
27 preliminary approval order. The Court should grant final approval.

28 //

II. FACTUAL BACKGROUND

A. Plaintiff's Factual Allegations

As discussed in Plaintiff's Motion for Preliminary Approval, based upon her investigation, Plaintiff made the following contentions: During the Class Period, which begins on June 11, 2020, Defendants have been in the business of providing bus services to its customers in California and elsewhere. Plaintiff was employed by Defendants as a bus driver. She worked for Defendants from 2005 to 2006 and then from 2007 until December 2020. Declaration of Aaron C. Gundzik ("Gundzik Decl."), ¶ 12; Declaration of Michelle Kussner ("Kussner Decl."), ¶ 2.

Plaintiff alleges that Defendants did not provide employees with compliant meal periods or rest breaks or provide required premium wages as compensation. Kussner Decl., ¶ 3; Gundzik Decl., ¶ 13. Moreover, Plaintiff alleges Defendants did not pay employees for all hours worked at the applicable minimum wage or at the wage promised by Defendants. *Id.* In addition, Plaintiff alleges that Defendants failed to provide accurate wage statements that reflected the unpaid premium wages and failed to pay these unpaid wages when employees separated. *Id.* Plaintiff also contended that Defendants did not reimburse employees for using their personal cell phones for navigation and communicating with dispatchers and supervisors. *Id.* Finally, Plaintiff contended that Defendants failed to pay overtime or sick leave at the regular rate of pay because Defendants did not include periodic bonuses in calculating the regular rate. *Id.*

The Class Period in the operative complaint and agreed upon in the settlement begins on June 11, 2020. Gundzik Decl. ¶ 18, Ex 1. Although the class period in a wage and hour action typically begins on the date that is four years before the action is filed, here Defendants were also defendants in an several earlier wage and hour class actions that were coordinated as *MV Transportation Wage & Hour Cases*, JCCP No. 4993. Gundzik Decl. ¶ 14. Those cases settled collectively in 2019 and the settlement class period ended on June 10, 2020. *Id.* The class period for this action picks up on the date after the class period for the previously settled actions ends. *Id.* That case settled for \$4,425,000 but covered almost

1 seven years and more than twice as many employees, and involved five separate actions and
2 law firms representing plaintiffs. *Id.*

3 **B. Procedural History and Investigation and Discovery Prior to Settlement**

4 Plaintiff Michelle Kussner filed her initial complaint against Defendant MV Public
5 Transportation, Inc. (“MVP”) on March 30, 2021, filed her First Amended Complaint on
6 June 21, 2021, and on July 7, 2023, Plaintiff filed her Second Amended Complaint (SAC),
7 which is the operative complaint. Gundzik Decl. ¶¶ 25-7. The SAC alleges causes of action
8 against MVP and its sister entity MV Transportation, Inc. (“MVT”) (collectively
9 “Defendants”) for (1) failure to pay wages; (2) failure to pay overtime; (3) failure to provide
10 meal and rest breaks; (4) inaccurate wage statements; (5) failure to pay unpaid wages at
11 separation; (6) failure to reimburse necessary expenditures; (7) violation of the Unfair
12 Practices Act; and (8) recovery of civil penalties under the California Labor Code Private
13 Attorneys’ General Act (“PAGA”).

14 On March 28, 2023, Plaintiff’s counsel, co-counsel Daniel Holzman, and their client
15 Michelle Kussner, as well as Defendants and Defendants’ counsel, attended a mediation
16 session with Michael Loeb in San Francisco (Plaintiff attended virtually). Gundzik Decl. ¶
17 15. Mr. Loeb has substantial experience mediating wage and hour class actions like this one.
18 The mediation ended with a mediator’s proposal, which was accepted by the parties on April
19 4, 2023. *Id.*

20 In connection with Plaintiff’s investigation and formal discovery, Plaintiff and
21 Plaintiff’s counsel extensively investigated Plaintiff’s claims against Defendants. Gundzik
22 Decl. ¶¶ 8-10. They engaged in formal and informal discovery, including taking depositions
23 of Defendants’ representatives and defending Plaintiff’s deposition. *Id.* And they obtained
24 from Defendants, and then reviewed and analyzed policy documents, which included almost
25 100 collective bargaining agreements, time and pay records for approximately 10% of class
26 members and other information concerning class member wages and reimbursements. *Id.*
27 They also obtained class member contact information and interviewed about 60 class
28

1 members. *Id.* In addition, they investigated and compiled publicly-available information
2 about Defendants. *Id.*

3 They also met and conferred extensively with Defendants' counsel regarding the
4 scope and type of additional documents and information Plaintiff was seeking in advance of
5 the mediation. Gundzik Decl. ¶ 9. As a result of these negotiations, Defendants provided
6 additional information including, the number of Class Members and PAGA Aggrieved
7 Employees, total Class Member workweeks and pay periods, total PAGA Aggrieved
8 Employee workweeks and pay periods, and other data. *Id.*

9 Plaintiff's counsel reviewed and analyzed the records and information produced by
10 Defendants, together with the information provided by the class members and Plaintiff, to
11 assess Defendants' potential liability. Gundzik Decl. ¶ 10. And, they worked with a
12 consultant to prepare an estimate of the damages incurred by the Class and the PAGA
13 Aggrieved Employees. *Id.*

14 **C. Plaintiff's Counsel's Estimate of Potential Recovery**

15 The First Cause of Action is for failure to pay for all hours worked. This claim was
16 based on information provided by Plaintiff that she and some other class members were
17 required to remain with their buses when they took meal breaks. Gundzik Decl., ¶ 21. Class
18 member interviews suggested that only about 12% of class members occasionally worked
19 during meal periods while clocked out. *Id.* Most of those employees reported that this
20 occurred about once per week. *Id.* Using this information, Plaintiff's counsel estimated the
21 maximum value of this claim to be \$1,076,694. 437,254 total workweeks x 12% of class
22 members who worked through meals x \$20.52 average hourly rate = \$1,076,692.25. *Id.*
23 However, there was no documentation evidencing this alleged off the clock work and no
24 written policies that require drivers to remain with their buses. *Id.* Accordingly, in light of
25 the lack of documentary evidence supporting this claim, Plaintiff's counsel concluded that
26 the potential range of recovery for this claim would be between \$0 and \$750,000. *Id.*

27 The Second Cause of Action is for failure to pay overtime. This claim was based on
28 the manner in which Defendants calculated hourly overtime when a bonus is paid. Gundzik

Decl., ¶ 22. After further investigation, Plaintiff’s counsel determined the Defendants’ policy is compliant. As a result, no value was assigned to this claim. *Id.*

The Third Cause of Action is for failure to provide compliant meal and rest periods. The sample time and pay records produced by Defendants, indicated that employees frequently did not record facially compliant meal breaks and that a significant percentage of the meal breaks were not legally compliant based on the records. Gundzik Decl., ¶ 23. According to Defendants’ data, meal breaks were recorded as missed, late or short on about 35% of shifts, which results in about 703,979 violations during the class period. *Id.* However, about 15% of those violations were late or short by only a few minutes. *Id.* Defendants’ records also showed that Defendants paid meal period premium wages on about 21% of potential violations. *Id.*

Based upon this information, Plaintiff’s counsel estimated the maximum value of the meal break claim to be about \$9,700,252. 437,254 workweeks x 4.6 shifts per workweek x 35% violation rate x 79% non-compensated violations x 20.52 average hourly rate – 15% for de minimis violations = \$9,700,252. Gundzik Decl., ¶ 23. However, this maximum number must be discounted due to Defendants’ defenses. Defendants contended that pursuant to Labor Code section 512(e), Plaintiff would not be able to maintain her meal break claim for the many class members who were covered by CBAs. *Id.* Under section 512(e), California’s meal period requirements do not apply to employees in certain occupations, including commercial drivers, where a CBA is in place that “expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.”

In addition, because the CBAs provide for arbitration of claims and exclude class claims, Defendants contended that many employees would be precluded from participating in a class action. Gundzik Decl., ¶ 23. In light of the CBAs, and other defenses that would

1 impact class certification and damages, Plaintiff's counsel determined that the potential
2 range of recovery on this claim is between zero and \$5 million. *Id.*

3 The Third Cause of Action also includes a claim for non-compliant rest breaks.
4 Defendants did not track rest breaks, but Plaintiff and a small majority of others reported
5 that they occasionally missed breaks due to the press of work or because they were
6 interrupted while on break. Gundzik Decl., ¶ 24. Based on this information, Plaintiff's
7 counsel estimated that about 60% of class members did not have a compliant rest period
8 about once per week. *Id.* Counsel therefore calculated the maximum value of the rest break
9 claim to \$5,383,471. 437,254 workweeks x 60% of class members reporting violations x 1
10 violation per week x \$20.52 average hourly pay = \$5,383,471. *Id.* However, because of the
11 lack of documentary evidence regarding rest break violations, the arbitration provisions in
12 the CBAs and the possibility that Defendants could successfully contend that individualized
13 issues predominate on this claim, Plaintiff's counsel determined that the potential range of
14 recovery on this claim is between zero and \$3 million. *Id.*

15 The Fourth Cause of Action is for failure to provide compliant wage statements. The
16 statute of limitations on such a claim is one year. This claim is derivative of Plaintiff's other
17 wage claims, as it is based on the fact that the wage statements issued to Plaintiff and the
18 class are incorrect in that they do not reflect meal and rest break wage premiums that should
19 have been paid. Gundzik Decl., ¶ 25. The penalties for inaccurate wage statements are \$50
20 per employee for the first violation and \$100 per employee per violation for all subsequent
21 violations. Penalties per employee are limited to \$4,000. Cal. Lab. Code § 226(e). During
22 the relevant limitations period, Defendants issued a total of 218,627 wage statements to
23 about 7,800 class members. *Id.* The meal period violation rate and class member interviews
24 indicated that only about 45% of wage statements (about 98,382) would include a potential
25 violation that was greater than just a few minutes. *Id.* Based on this figure, the maximum
26 amount recoverable on this claim is \$9,448,215. 218,627 total wage statements x 45%
27 violation rate x \$100 per violation – (\$50 per violation x 7,800 employees) = \$9,448,215. *Id.*

1 Considering the defenses to the wage claims discussed above, Plaintiff's counsel determined
2 that the potential range of recovery on this claim is between zero and \$5 million. *Id.*

3 The Fifth Cause of Action is for failure to pay separated employees all wages due at
4 the time of separation. This claim is based on Defendants' alleged failure to pay Class
5 Members amounts due for meal or rest period premiums. Gundzik Decl., ¶ 26. The data and
6 employee interviews suggested that about 60% of employees were subject to an alleged
7 meal or rest period violation and that about 3,015 putative class members were separated
8 during the relevant statutory period. *Id.* Plaintiff's counsel calculated that the maximum
9 value of this claim is approximately \$8,797,601. \$20.52 average hourly wage x 7.9 hours per
10 shift x 30 days x 3,015 employees x 60% = \$8,797,601. *Id.* However, in light of the defenses
11 identified above applicable to Plaintiff's wage claims, Plaintiff's counsel concluded that the
12 potential range of recovery on this claim is between zero and \$4.5 million. *Id.*

13 The Sixth Cause of Action is for failure to reimburse employees for necessary
14 expenses in violation of Labor Code section 2802. That section provides, in part: "An
15 employer shall indemnify his or her employee for all necessary expenditures or losses
16 incurred by the employee in direct consequence of the discharge of his or her duties, or of
17 his or her obedience to the directions of the employer." Cal. Lab. Code § 2802(a). Plaintiff
18 contends that class members occasionally used their own cell phones to navigate and
19 communicate with supervisors and dispatchers. Gundzik Decl., ¶ 27. Interviews of class
20 members suggested that many class members did not use cell phones at all and those that
21 reported doing so, advised that they were used on limited occasions. *Id.* As a result,
22 Plaintiff's counsel estimated that only about 30% of class members were entitled to some
23 reimbursement and that reimbursement should be limited to four times per year. *Id.* Using
24 these assumptions and a bi-weekly reimbursement amount of \$20, Plaintiff's counsel
25 calculated that class members should have received reimbursements totaling \$196,764.
26 437,254 workweeks x 30% class members entitled to reimbursement x 15% of workweeks
27 in which cell phone was used x \$20 per pay period = \$196,764. *Id.* Defendants contended
28 that the use of cell phones was very rare, even for those employees who used them. *Id.*

1 Plaintiff's counsel therefore concluded that the recovery range on this claim is between
2 \$100,000 and \$0. *Id.*

3 The Seventh Cause of Action is for violation of Business & Professions Code section
4 17200, *et. seq.* The forgoing analysis assumes the longer four-year statute of limitations that
5 is available under the UCL for the meal and rest period violations. For the most part, this
6 cause of action is derivative of the other claims that have already been analyzed. This cause
7 of action includes a recovery for underpaid sick leave. This claim is based on Defendants'
8 alleged practice of paying sick leave at the standard hourly rate, not the regular rate.
9 Gundzik Decl., ¶ 28. Class members' regular rate will be different for those employees who
10 receive a bonus. *Id.* On occasion, Defendants granted bonuses of a few hundred dollars to
11 some employees during the class period. *Id.* For the most part, these are safety and
12 attendance bonuses that are paid annually. *Id.* About 35% of employees received such a
13 bonus in the average amount of \$227. *Id.* Class members worked an average of 1,817 hours
14 per year. *Id.* Dividing the \$227 bonus by 1,817 hours results in 12.5 cent increase in the
15 regular rate for only those employees who received a bonus. *Id.* Assuming that employees
16 took three sick leave days per year, the 35% of employees that received bonuses would be
17 entitled to recover about \$4.50 each for a total of about \$12,285. *Id.* Thus, the maximum
18 potential recovery on this claim is \$12,285 and the minimum is \$0. *Id.*

19 The Eighth Cause of Action is for recovery of civil penalties under PAGA for the
20 forgoing alleged Labor Code violations. The PAGA claim is limited in time to one year. The
21 strength of the PAGA claim would be impacted by the factors discussed above for the non-
22 PAGA claims. Gundzik Decl., ¶ 29.

23 Based upon the forgoing, the class claims in this case have a minimum value of
24 nothing and the maximum potential recovery is \$18 million, not including the PAGA
25 penalties. Gundzik Decl., ¶ 30. A reasonable estimate of the average amount that Class
26 members could have obtained if Plaintiff prevailed at trial on behalf of the entire Class, if
27 the Class was certified, would be a minimum of about \$0 and a maximum of about \$2,354.
28 *Id.* However, the maximum amount is almost never recovered at trial and never in a

1 settlement. *Id.* Settlements, by their nature, must account for the weaknesses in a plaintiff's
2 case, which are discussed above. *Id.* Indeed, because Defendants raised a colorable legal or
3 factual defense to each of the claims Plaintiff alleged, it is possible that, after trial, the Class
4 would recover nothing. *Id.*

5 The PAGA settlement satisfies the criteria in *Moniz v. Adecco USA, Inc.*, 72 Cal.
6 App. 5th 56, 77 (2021), because “it is fair, reasonable, and adequate in view of PAGA’s
7 purposes to remediate present labor law violations, deter future ones, and to maximize
8 enforcement of state labor laws.” The settlement allocates \$75,000 to Plaintiff’s PAGA
9 claim. Gundzik Decl., ¶ 31. In conjunction with the class settlement, this settlement will
10 serve to remediate Defendants’ alleged Labor Code violations. *Id.* Given that Defendants
11 will be paying \$1,350,000 as a result of the alleged violations, the class and PAGA
12 settlement is a large disincentive for Defendants to engage in similar Labor Code violations
13 in the future. *Id.* And, because Defendants are aware that Plaintiff’s counsel has been in
14 contact with class members and aggrieved employees as a result of the litigation and
15 because all class members will receive a Class Notice with counsel’s contact information,
16 those employees will be able to contact Plaintiff’s counsel in the future if Defendants
17 attempt to engage in similar practices. *Id.* These factors—the payment of a large sum and
18 employee notice of violations and potential violations—serve to maximize enforcement of
19 state labor laws. *Id.* Also, unlike in *Moniz*, here there is no unsubstantiated and
20 disproportionate allocation of civil penalties between different groups of employees. *Id.* All
21 aggrieved employees will receive an allocation of PAGA civil penalties based on the
22 number of qualifying months that they worked for Defendants. *Id.*

23 **D. The Settlement Negotiations**

24 On March 28, 2023, Plaintiff’s counsel, their client, Plaintiff Michelle Kussner, as
25 well as Defendants and Defendants’ counsel, attended a mediation session with Michael
26 Loeb. Gundzik Decl., ¶ 15. Mr. Loeb has substantial experience mediating wage and hour
27 class actions like this one. *Id.* The mediation ended with a mediator’s proposal, which was
28

1 accepted by the parties on April 4, 2023. *Id.* The settlement was negotiated at arms' length
2 and was in no sense collusive. Gundzik Decl., ¶ 16.

3 Plaintiff and Plaintiff's counsel have concluded, after taking into account the sharply
4 disputed factual and legal issues involved in the lawsuit, the risks attending further
5 prosecution, and the substantial benefits to be received pursuant to the compromise and
6 settlement of the action, that the settlement is in the best interests of the Class and is fair and
7 reasonable. Gundzik Decl., ¶ 16. They also considered the possibility that the Class would
8 not be certified and factored in the additional delay in recovery for Class members if the
9 settlement were rejected and the case went to trial. *Id.*

10 **E. The Representative Plaintiff's Involvement and Release**

11 Both before and after deciding to become class representatives and take on the
12 lawsuit, Plaintiff Michelle Kussner met with and engaged in lengthy conversations with
13 Class Counsel about all aspects of the case, her employment, and her job and job duties for
14 MV. Declaration of Michelle Kussner ("Kussner Decl."), ¶ 17. She was prompt and
15 responsive and spoke with Class Counsel's office many times regarding the case, discovery
16 responses and documents for production, her deposition, the mediation and the settlement.
17 Kussner Decl., ¶¶ 17-18. She identified relevant witnesses to Class Counsel and provided
18 Class Counsel with relevant documents. *Id.* She spoke with other employees regarding their
19 treatment while employed by Defendants and provided this information to Class Counsel.
20 *Id.* She was proactive and requested regular updates from Class Counsel and inquired as to
21 how class actions worked so she could understand the process. *Id.*

22 To assist Class Counsel, Plaintiff reviewed and collected all of her documents in
23 connection with her employment for Defendants. Kussner Decl., ¶ 18. She spent a great deal
24 of time assisting Class Counsel identifying witnesses, discussing discovery responses,
25 preparing for her deposition and consulting with Class Counsel in advance of the mediation.
26 She missed several days of work to prepare for her deposition, attend her deposition, and to
27 attend and participate in the mediation. *Id.* And, she had several meetings with Class
28 Counsel to discuss the proposed settlement, the initial settlement agreement and the

1 amended settlement agreement. *Id.* In all, Plaintiff spent in excess of 100 hours on the
2 lawsuit. *Id.*

3 Filing the lawsuit posed risks for Ms. Kussner. Kussner Decl., ¶ 17. She understood
4 that if the class action was unsuccessful, she could be responsible for Defendants’ litigation
5 costs, which could have been substantial. *Id.* She was concerned about the attention a
6 publicly-filed lawsuit, and especially a class action, would attract, as her name would be
7 associated with a lawsuit that she has filed against her former employer. *Id.* She was aware
8 that it is possible and relatively easy to perform background checks of publicly-filed
9 documents on the internet and was concerned that future prospective employers and others
10 might find out that she had sued Defendants, which could hurt her future job prospects and
11 business relationships. *Id.*

12 In addition, the settlement agreement required Ms. Kussner to sign a broad general
13 release which is broader than the release that will bind other Class Members and requires her
14 to waive Section 1542 of the California Civil Code. Gundzik Decl., ¶¶ 18, 72, Ex. 1, ¶ 5.1.

15 **F. The Preliminarily-Approved Settlement**

16 On August 29, 2023, the Court granted preliminary approval to the settlement of this
17 matter. See Gundzik Decl., ¶ 36, Ex. 2. The terms of the settlement are more specifically set
18 forth in the parties’ Settlement Agreement. Gundzik Decl., ¶ 18, Ex. 1.

19 The provisionally-certified settlement class is defined as “all persons employed by
20 MV in California who worked for MV in a non-exempt position during the Class Period
21 (June 11, 2020, to August 29, 2023) for at least one week and performed services as drivers,
22 or assisting drivers, including bus operators, bus aides, road supervisors and dispatchers.”
23 Gundzik Decl., ¶ 18, and Ex. 1, ¶¶ 1.5; 1.12. There are 8,709 Class members. Salinas Decl.,
24 ¶¶ 3, 14.

25 The Settlement Agreement provides that Defendants will pay a gross settlement
26 amount of \$1,350,000 (“Gross Settlement Amount”). Gundzik Decl., ¶ 18, Ex. 1, ¶ 3.1.
27 Defendants are required to deliver the Gross Settlement Amount to Phoenix within ten (10)
28 calendar days after the Effective Date (which is the date of entry of the order of the Final

1 Approval Order and the date that the Judgment is final). Gundzik Decl., ¶ 18, Ex. 1, ¶¶ 1.18;
2 4.3.

3 **G. Notice of Preliminary Settlement Provided to the Settlement Class and**
4 **the Claims Process**

5 Pursuant to the time-table established in the Settlement Agreement and previously
6 approved by this Court, Phoenix mailed the Notice of Proposed Class Action Settlement
7 (“Notice of Settlement”) to 8,711 Class Members on September 28, 2023. Salinas Decl., ¶ 7.
8 As a result of this mailing, Phoenix has provided all of the Class Members with a notice of
9 the settlement which calculates the approximate value of their settlement payment and
10 information on how to opt out of and object to the proposed settlement. Salinas Decl., ¶¶ 6-
11 9.

- 12 ➤ On September 18, 2023, Phoenix received from Defendants complete
13 information including the names, last known addresses, applicable employment
14 information and Social Security numbers for 8,711 class members.

15 Salinas Decl., ¶ 3.

- 16 ➤ On September 19, 2023, Phoenix completed a National Change of Address
17 (NCOA) search for new addresses.

18 Salinas Decl., ¶ 6.

- 19 ➤ On September 28, 2023, the Notices of Settlement were mailed to the 8,711
20 Class Members at the most recent addresses available to Phoenix. The notices
21 provided information about the action, the proposed settlement and instructions
22 on how to opt out, object, or obtain further information. The notices advised
23 Class Members that any objections or opt outs had to be postmarked within 45
24 days of the notice date.

25 Salinas Decl., ¶ 7, and Ex. A thereto.

- 26 ➤ Subsequent to these mailings, 383 notices were returned after the initial mailing,
27 315 of those were re-mailed, and 100 were determined to be undeliverable.

28 Salinas Decl., ¶¶ 8-9, and Ex. A thereto.

➤ Phoenix has received two requests to opt out and no objections. Class Counsel has not received any opt-out requests or objections to the proposed settlement. Salinas Decl., ¶¶ 10-11, and Ex. B thereto; Gundzik Decl., ¶ 39.

H. Proposed Distributions from Gross Settlement Amount

Based upon the Settlement Agreement and this Court’s preliminary approval order, Plaintiff proposes that within ten (10) days of the receipt of the Gross Settlement Amount from Defendants, the Gross Settlement Amount be disbursed as follows:

- Settlement administration costs, in the amount of \$46,250, to Phoenix;
- A service and release payment in the amount of \$10,000 to Plaintiff Michelle Kussner;
- An allocation of \$75,000 to Plaintiff’s PAGA claims (the “PAGA Amount”), \$56,250 of which will be paid to the California Labor and Workforce Development Agency, and the remaining \$18,750 of which will be distributed to the Aggrieved Employees.
- Class Counsel’s attorneys’ fees, in the amount of \$450,000, which is one-third of the gross settlement amount;
- Class counsel’s costs of \$25,000;
- The remainder of the gross settlement amount (the “Net Settlement Amount”), in the amount of approximately \$743,750, will be distributed to Class Members based on the formula contained in the Settlement Agreement (which is based on the number of Qualifying Workweeks that they were employed by Defendants during the Class Period).

Gundzik Decl., ¶ 18, Ex. 1, ¶¶ 1.45; 3.2.4.

I. Determination of Settlement Payments to Individual Class Members and PAGA Employees

The Settlement Agreement provides that all payments to Class Members shall be made by the Settlement Administrator, based on the number of Qualifying Workweeks that each Class Member worked during the Class Period. Gundzik Decl., ¶ 18, and Ex. 1, ¶ 3.2.4.

1 ➤ Phoenix determined each Settlement Class Member's individual Qualifying
2 Workweeks by adding the total number of Qualifying Workweeks in which he or
3 she was employed in a Class Member position by Defendants during the Class
4 Period.

5 Salinas Decl., ¶ 16.

6 ➤ Phoenix then determined the total of all of the Qualifying Workweeks of all the
7 Settlement Class Members. Each Class Member's settlement payment was
8 determined by dividing his or her Qualifying Workweek Number by the total
9 number of Workweeks worked by all Class Members during the Class Period and
10 multiplying the result by each Class Members's Workweeks. The amount of the
11 individual settlement payment was then indicated on each Class Member's Notice.

12 Salinas Decl., ¶ 17.

13 ➤ Based on these calculations, Phoenix determined the estimated amount of the
14 class settlement payment due to each Class Member. The approximate range of
15 class settlement pay-outs is expected to be between \$1.57 and \$263.01, and the
16 average settlement payment will be in the amount of approximately \$85.40.

17 Salinas Decl., ¶ 17.

18 The Settlement Agreement also provides that all payments to Aggrieved Employees
19 shall be made by the Settlement Administrator, based on the number of Qualifying Pay
20 Periods that each Aggrieved Employee worked during the PAGA Period. Those payments
21 were calculated by:

22 dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties of
23 \$18,750 by the total number of PAGA Pay Periods for all Aggrieved Employees
24 during the PAGA Period and multiplying the result by each Aggrieved Employee's
25 PAGA Pay Periods.

26 Salinas Decl., ¶ 19.

27
28

➤ Based on these calculations, Phoenix determined the estimated amount of the
PAGA settlement payment due to each Aggrieved Employee. The average
PAGA settlement payment will be in the amount of approximately \$2.15.

Salinas Decl., ¶ 20.

➤ The payments to Settlement Class Members will be characterized as one-third
wages, to be reports on a W-2 form, and two-thirds as interest and penalties. The
amount of unreimbursed expenses, interest and penalties will be reported on IRS
1099 Forms.

Gundzik Decl., ¶ 18, Ex. 1, ¶ 3.2.4.1.

J. Proposed Release of Defendants by Class Members

If the Court gives final approval to the proposed settlement, the Settlement
Agreement provides that the Court shall enter a final approval Order (“Final Approval
Order”) and a judgment implementing the release of the released claims as described in the
Settlement Agreement. Gundzik Decl., ¶ 18, Ex. 1, ¶ 5. As part of the Final Approval Order
and judgment, Class Members who do not opt out will be deemed to have released the
specific Released Claims. Gundzik Decl., ¶ 18, Ex. 1, ¶ 5. The release applicable to the
Class Members provides:

All Participating Class Members, on behalf of themselves and their respective
former and present representatives, agents, attorneys, heirs, administrators,
successors, and assigns, release Released Parties from all causes of action and
factual or legal theories arising during the Class Period that were alleged in the
Operative Complaint (or LWDA notice) or arise from facts alleged in the
Operative Complaint (or LWDA notice), including all damages, penalties, interest
and other amounts recoverable under said claims, causes of action or legal theories
of relief, including but not limited to claims for failure to provide meal periods,
failure to provide rest periods, failure to pay wages or other compensation earned
(including at the proper regular rate), failure to pay overtime, failure to indemnify
business expenses, failure to provide accurate wage statements, failure to timely
pay all final wages, unfair competition, civil penalties under PAGA, Labor Code
sections 201, 202, 203, 204, 510, 512, 226, 226.7, 246, 1194, 1194.2, 2802, and
2699, Business and Professions Code section 17200 et seq., and Wage Order 9.
Class Members shall not waive section 1542 of the California Civil Code.

1 Gundzik Decl., ¶ 18; Ex. 1, ¶¶ 1.39; 5.2. This release does not include any claims that are
2 outside of the scope of the facts alleged in the operative pleadings and does not include the
3 PAGA Released Claims. *Id.*

4 The release applicable to the Aggrieved Employees provides:

5 All Participating and Non-Participating Class Members who are Aggrieved
6 Employees are deemed to release, on behalf of themselves and their respective
7 former and present representatives, agents, attorneys, heirs, administrators,
8 successors, and assigns, the Released Parties from any liability for civil penalties
9 recoverable under PAGA for violations during the PAGA Period under PAGA
10 based on any factual or legal theories that were alleged in the Operative Complaint
11 or LWDA notice or arise from facts alleged in the Operative Complaint or LWDA
12 notice, including for the following California Labor Code sections: 201, 202, 203,
13 204, 226, 226.7, 246, 510, 512 and 2802. PAGA Employees shall not waive
14 section 1542 of the California Civil Code.

15 Gundzik Decl., ¶ 18, Ex. 1, ¶¶ 1.40; 5.3.

16 The Settlement Agreement defines “Released Parties” as:

17 MV and each of their former and present directors, officers, shareholders, owners,
18 attorneys, insurers, predecessors, successors, assigns, subsidiaries, and affiliates.

19 Gundzik Decl., ¶ 18, Ex. 1, ¶ 1.41.

20 The Settlement Agreement does not constitute an admission of the merits of any
21 claim by Plaintiff or the Class or address any defense of Defendants. Gundzik Decl., ¶ 18,
22 Ex. 1, ¶ 2.1.

23 **III. THE COURT SHOULD GIVE FINAL APPROVAL TO THE SETTLEMENT.**

24 The law favors settlement, particularly in class actions and other complex cases in
25 which substantial resources can be conserved by avoiding the time, cost and rigors of formal
26 litigation. *Potter v Pacific Coast Lumber Company*, 37 Cal.2d. 592, 602-603 (1951); *Class*
27 *Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1991). When faced with a motion for
28 final approval of a class action settlement under Code of Civil Procedure § 382, the
appropriate inquiry is whether the settlement is “fair, adequate, and reasonable.” *See*
Wershba v. Apple Computer, Inc., 91 Cal.App.4th 224, 244-245 (2001); *Dunk v. Ford Motor*
Co., 48 Cal.App.4th 1794, 1801 (1996). If so, the settlement should be approved. *Id.* And, “a

1 presumption of fairness exists where: (1) the settlement is reached through arm's-length
2 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
3 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
4 objectors is small.” *Dunk v Ford Motor Co.*, 48 Cal.App.4th 1794, 1802 (1996).

5 **A. Nothing Has Occurred in the Interim That Should Affect This Court's**
6 **Preliminary Findings.**

7 Before granting preliminary approval of a class and PAGA action settlement, this
8 Court was required to find—and did find—that there is sufficient evidence that the proposed
9 settlement would be fair, reasonable, and adequate, and not a product of fraud, overreaching,
10 or collusion. See Gundzik Decl., ¶ 44, Ex. 2; Cal. Rules of Court, Rule 3.769 (g); Cal. Civ.
11 Proc. § 382; *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th at 1801. In order to preliminarily
12 determine that the proposed settlement was fair, reasonable, and adequate, and thus
13 appropriate for preliminary approval, the Court was required to find that the following three
14 factors were satisfied: (1) the parties reached settlement after arms-length negotiations;
15 (2) counsel conducted sufficient investigation and discovery to allow themselves and the
16 court to act intelligently; and (3) counsel is experienced in similar litigation. *Id.* at 1802. *See*
17 *also 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1146
18 (2000). In applying this determination for the purpose of granting final approval, as
19 discussed below, although not determinative, the Court may also consider the percentage of
20 objectors in determining whether a presumption of fairness exists. *Id.*

21 All of these considerations are satisfied here. The parties conducted significant
22 formal and informal discovery and investigation and participated in a full-day mediation,
23 and thereafter continued to negotiate regarding the Settlement Agreement which is the
24 subject of this motion. Gundzik Decl., ¶¶ 6-37. Moreover, one two of 8,711 Class Members
25 opted out of the settlement, and not one has objected to it. Salinas Decl., ¶¶ 10-11.

26 **B. The Settlement Resulted from Non-Collusive, Arms-Length Negotiations.**

27 There was no collusion between the parties in this case. After extensive formal and
28 informal discovery and the exchange of information and voluminous pages of documents,

1 the parties engaged in mediation with a well-respected and highly knowledgeable wage and
2 hour mediator, Michael Loeb. Gundzik Decl., ¶¶ 8-15. The involvement of a neutral third-
3 party mediator is a factor that favors approval and evidences the presumptive fairness of the
4 arms-length negotiations. Indeed, the California Court of Appeal in *Kullar v. Foot Locker*
5 *Retail, Inc.* expressed that courts should give considerable weight to the competency and
6 integrity of counsel and the involvement of a neutral mediator in assuring themselves that a
7 settlement agreement represents an arms-length transaction entered without self-dealing or
8 other potential misconduct. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129
9 (2008).

10 **C. The Settlement is Supported by Substantial Investigative and Discovery**
11 **Efforts.**

12 As set forth in the Declaration of Aaron Gundzik, Class Counsel engaged in
13 substantial investigation and discovery. This investigation included (1) preparing pleadings
14 and other documents filed with the Court, (2) extensively investigating Plaintiff's claims, (3)
15 engaging in informal discovery and reviewing and analyzing numerous handbooks, policies
16 and documents regarding Class Member reimbursements, including records and information
17 produced by Defendants, (4) propounding and responding to formal discovery and document
18 requests and meet and conferring extensively regarding the information and documents
19 being sought, (5) deposing Defendants' PMQ representatives and defending the Plaintiff at
20 her deposition, (6) interviewing approximately 60 Class Members, (7) reviewing and
21 analyzing policies and pay records for the proposed Class Members, including Plaintiff, as
22 well as records for the PAGA Aggrieved Employees, (8) reviewing and analyzing nearly
23 100 collective bargaining agreements, (9) investigating and compiling publicly-available
24 information about Defendants and their business, (10) negotiating extensively with
25 Defendants regarding the mediation, its scope, and the information to be exchanged in
26 connection with the mediation, and (11) working to develop information on potential
27 damages. Gundzik Decl., ¶¶ 8-14, 21-31, 46-50, and Ex. 4.

1 Class Counsel's analysis enabled them to pinpoint the relevant issues and claims and
2 to assess potential liability and damages. These efforts resulted in the parties having a clear
3 view of the strengths and weaknesses of their respective cases and achieving a resolution on
4 favorable terms. Gundzik Decl., ¶¶ 8-14, 21-31.

5 **D. As Previously Found by this Court, Class Counsel is Experienced in**
6 **Similar Litigation.**

7 The endorsement of qualified and well-informed counsel of the settlement as fair is
8 entitled to significant weight. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th at 1802; *Ellis v.*
9 *Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980). As discussed in the motion
10 for preliminary approval papers and the declarations supporting both that motion and the
11 instant motion, Class Counsel have represented, litigated, mediated and settled many other
12 employee class actions in wage and hour litigation and have knowledge of the strengths and
13 weaknesses of the claims against Defendants and the benefits of the proposed settlement
14 under the circumstances of the case. Gundzik Decl., ¶¶ 21-36, 41-43. Class Counsel believes
15 that the settlement is fair, adequate, reasonable and in the best interests of the Class as a
16 whole. Gundzik Decl., ¶ 34.

17 **E. The Class Members' Positive Reaction to the Settlement Favors Final**
18 **Approval.**

19 The reaction of the Class to proposed settlement to date has been extremely positive.
20 Only two of 8,711 of the Class Members has opted out of the proposed settlement, which is
21 a 99.9% participation rate. Salinas Decl., ¶¶ 11-12. And, not one of the Class Members has
22 filed an objection to settlement. *Id.*

23 Although a court may appropriately infer that a class action settlement is fair,
24 adequate, and reasonable even when a significant percentage of class members object to it
25 (*See Boyd v Betchel Corp.*, 485 F. Supp. 610, 624 (C. D. Cal 1976); *see also Reed v.*
26 *General Motors*, 703 F.2d 170, 174 (5th Cir. 1983)), the fact that only two of 8,711 have
27 opted out and none have objected to it provides much stronger grounds for granting final
28

1 approval. In this action, the Court should construe this as a further indication of Class
2 Members' support for the settlement as being fair, adequate, and reasonable.

3 **F. The Proposed Service and Release Payment to the Named Plaintiff is**
4 **Reasonable and Should be Approved.**

5 The Settlement Agreement provides for a service and release payment in the amount
6 of \$10,000 to class representative Michelle Kussner. The purpose of this payment is to
7 provide additional compensation to Plaintiff for the time and effort that she put into the
8 litigation and the settlement of this matter, as well as the risks she undertook by agreeing to
9 sue her former employer.

10 "In determining whether to make an incentive award, the court may consider (1) the
11 risk, both financial and otherwise, the class representative faced in bringing the suit; (2) the
12 notoriety and personal difficulties encountered by the class representative; (3) the amount of
13 time and effort spent by the class representative; (4) the duration of the litigation; and (5) the
14 personal benefit received by the class representative as a result of the litigation." *Golba v.*
15 *Dick's Sporting Goods, Inc.*, 238 Cal. App. 4th 1251, 1272 (2015). Additional factors to be
16 considered include "the actions the plaintiff has taken to protect the interests of the class, the
17 degree to which the class has benefitted from those actions, and the amount of time and
18 effort the plaintiff expended in pursuing the litigation." *Clark v. American Residential*
19 *Services LLC*, 175 Cal. App. 4th 785, 804 (2009).

20 The factors enunciated in both *Golba* and *Clark* favor the approval of the requested
21 service and release payment to Plaintiff. She undertook significant risks in getting involved
22 in the lawsuit, knowing that it could impact her future employment. Kussner Decl., ¶ 15. She
23 understood that if the class action was unsuccessful, she could be responsible for
24 Defendants' litigation costs, which could have been substantial. *Id.* She was concerned by
25 the attention of a publicly-filed lawsuit, and especially a class action, would attract, as her
26 name would be associated with a lawsuit that she had brought against her employer. She was
27 reasonably concerned about the notoriety that would attend her involvement, as she knew
28 that it is possible and relatively easy to perform background checks of publicly-filed

1 documents on the internet and was concerned that it could hurt her future employment
2 prospects. *Id.*

3 Plaintiff spent a significant amount of time on the lawsuit. She had many telephone
4 and Zoom conferences with Class Counsel regarding the case and the mediation. Kussner
5 Decl., ¶¶ 17-18. She spent a great deal of time preparing for her deposition and missed two
6 days of work in order to prepare for and attend her deposition. *Id.* And, she missed a third
7 day of work to attend the mediation via Zoom. Kussner Decl., ¶ 18. She had conferences to
8 discuss the proposed settlement with Class Counsel, and to discuss the Settlement
9 Agreement and related motions. *Id.*

10 To assist Class Counsel, Ms. Kussner reviewed and collected all of her documents in
11 connection with her employment for Defendants. Kussner Decl., ¶ 18. And she spent a great
12 deal of time assisting Class Counsel identifying witnesses, consulting with Class Counsel in
13 advance of the PMQ depositions and the mediation, and she missed three days of work to
14 attend and prepare for her deposition and the mediation. *Id.* In all, Plaintiff spent in excess of
15 100 hours on the lawsuit. *Id.*

16 Had she been unwilling to step up, none of the Class Members would have received
17 any amounts whatsoever. By agreeing to serve as the class representative, Ms. Kussner has
18 taken significant action to protect the interests of the Class, and the Class has significantly
19 benefitted from those actions. *Clark v. American Residential Services LLC*, 175 Cal. App.
20 4th at 804. Although she could have filed a claim with the Department of Labor and possibly
21 received more money, instead of acting in her own self-interest she got involved in this
22 lawsuit to protect the interests of the Class. And as a result of those efforts, 8,709 Class
23 Members will be receiving settlement payments.

24 The additional payment proposed for the named Plaintiff is also intended to
25 compensate her for the broader release that Defendants have demanded of her. While all
26 other Class Members will only be releasing the Released Claims, Plaintiff will also be
27 releasing any and all known or unknown claims that she might have against Defendants.
28 Gundzik Decl., ¶ 18, Ex. 1, ¶¶ 5.1; 5.1.1.

1 Awarding larger amounts to class representatives is permissible and is often
2 approved by the courts. See, e.g., *Bell v Farmers Ins. Exchange*, 115 Cal.App.4th 715, 726
3 (2004) (upholding “service payments” to named plaintiffs for their efforts in bringing class
4 case). As explained by the court in the *Cellphone Termination Fee Cases*, incentive awards
5 are “intended to compensate class representatives for work done on behalf of the class, to
6 make up for financial or reputational risk undertaken in bringing the action, and, sometimes,
7 to recognize their willingness to act as a private attorney general.” *Cellphone Termination*
8 *Fee Cases*, 186 Cal.App.4th 1380, 1393-1394 (2010).

9 “Incentive awards are fairly typical in class action cases.” *Rodriguez v. West*
10 *Publication Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citing 4 Newberg on Class Actions
11 (4th ed. 2002) § 11:38, p. 81); Eisenberg & Miller, Incentive Awards to Class Action
12 Plaintiff: An Empirical Study (2006) 53 UCLA L.Rev. 1303. “Since without a named
13 plaintiff there can be no class action, such compensation as may be necessary to induce him
14 to participate in the suit could be thought the equivalent of the lawyers' nonlegal but
15 essential case-specific expenses, such as long-distance phone calls, which are reimbursable.”
16 *Clark v. American Residential Services LLC*, 175 Cal.App.4th at 804 (fn. omitted), citing
17 *Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 571 (7th Cir. 1992).

18 The additional payment to the named Plaintiff also takes into account the additional
19 risks that she incurred in acting on behalf of the Class. These risks included the potential of
20 a judgment against her if this case had been unsuccessful, as class representatives are
21 deemed the losing party that is liable for the prevailing party’s costs. *Earley v. Superior*
22 *Court*, 79 Cal.App.4th 1420, 1433-1434 (2000). Taking that risk here resulted in substantial
23 benefit to the Class. Plaintiff also took the very real risk that this lawsuit would have a
24 negative impact on her future employment. Kussner Decl., ¶ 15; see, e.g., *Staton v. Boeing*,
25 327 F.3d 938, 977 (9th Cir 2003) (fear of workplace retaliation is one justification behind
26 reasonable class representative incentive payments).

27 If Plaintiff had not come forward, or had not agreed to take on the risks of stepping
28 up and taking on the class action, Plaintiff may have recovered compensation for herself, but

1 no compensation would have been received by 8,709 current and former employees.
2 Because Plaintiff has advanced California’s public policy goal of enforcing wage and hour
3 laws (*See Sav-On Drug Stores, Inc. v. Super.Ct.*, 34 Cal.4th 319, 340 (2004)), the Court
4 should approve of the proposed service and release payments to the Representative Plaintiff.

5 **G. The Court Should Approve the Request for Class Counsel’s Fees.**

6 Subject to Court approval, the settlement amount of \$1,350,000 includes Class
7 Counsel’s attorneys’ fees of \$450,000. Gundzik Decl., ¶¶ 18, 40, Ex. 1, ¶ 3.2.2; Declaration
8 of Daniel Holzman (“Holzman Decl.”), ¶¶ 6-9. It is well-settled that representative plaintiffs
9 and class members are entitled to recover their attorneys’ fees and costs in wage and hour
10 class action disputes. California Labor Code § 218.5; Cal. Code Civ. Proc. § 1021.5(a);
11 *Earley v. Super. Ct.*, 79 Cal. App. 4th at 1420.

12 A fee award is justified when benefits are obtained for the class irrespective of
13 whether there is a final judgment in its favor, such as when those benefits are the result of a
14 settlement. *See Westside Cmty. for Indep. Living, Inc. v. Obledo*, 33 Cal.3d 348, 352-353
15 (1983). “Courts recognize two methods for calculating attorney fees in civil class actions:
16 the lodestar/multiplier method and the percentage of recovery method.” *Wershba v. Apple*
17 *Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *See Lealao v. Beneficial California, Inc.*,
18 82 Cal.App.4th 19, 27 (2000). In California, both methods are proper, although courts often
19 use a lodestar-multiplier method as a check against the reasonableness of a percentage fee
20 award. *See, e.g., Serrano v. Priest (Serrano III)*, 20 Cal.3d 25, 48-49, at fn. 23 (1977);
21 *People ex rel. Dept. of Transportation v. Yuki*, 31 Cal.App.4th 1754, 1769-1772 (1995);
22 *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914, 954 (1985).

23 **1. Class Counsel’s Requested Fee Award is Within California’s**
24 **Benchmark Awards and Thus Reasonable Under the Percentage of**
25 **The Benefit or Common Fund Method.**

26 In *Laffitte v. Robert Half Internat., Inc.*, 1 Cal. 5th 480, 503 (2016), the California
27 Supreme Court approved the use of “percentage of the benefit” attorney fee awards in class
28 actions. “[W]hen class action litigation establishes a monetary fund for the benefit of the

1 class members, and the trial court in its equitable powers awards class counsel a fee out of
2 that fund, the court may determine the amount of a reasonable fee by choosing an
3 appropriate percentage of the fund created.” The *Laffitte* court explained that “[t]he
4 percentage method ‘is easy to calculate; it establishes reasonable expectations on the part of
5 plaintiffs’ attorneys as to their expected recovery; and it encourages early settlement, which
6 avoids protracted litigation.” 1 Cal. 5th at 490 (quoting *Rawlings v. Prudential-Bache*
7 *Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). Pursuant to the “percentage of the benefit”
8 doctrine, “a litigant or lawyer who recovers a common fund for the benefit of persons other
9 than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”
10 *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). “The ultimate goal ... is the award of a
11 reasonable fee to compensate counsel for their efforts, irrespective of the method of
12 calculation. It is not an abuse of discretion to choose one method over another as long as the
13 method chosen is applied consistently using percentage figures that accurately reflect the
14 marketplace.” *Consumer Privacy Cases*, 175 Cal.App.4th 545, 557-558 (2009).

15 Class Counsel’s request for one-third of the monetary fund recovered is California’s
16 standard benchmark and well within the range customarily approved by the California
17 courts in comparable class actions and other class actions, as well as the standard
18 contingency contracts negotiated by plaintiffs and their counsel. “Empirical studies also
19 show that regardless [of] whether the percentage method or the lodestar method is used, fee
20 awards in class actions average around one-third of the recovery.” *See e.g., Chavez v.*
21 *Netflix, Inc.*, 162 Cal.App.4th 43, 66, at fn. 11 (2008); *In re California Indirect Purchases*
22 (October 22, 1998) WL 1031494 at * 9; *Romero v. Producers Dairy Food, Inc.*, WL
23 3492841 at * 4 (E.D. Cal. Nov. 14, 2007), quoting Newberg on Class Actions § 14.6 (4th
24 ed.2007) (“fee awards in class actions average around one-third of the recovery.”); *See also*
25 T. Cohelan, *On California Class Actions* (2016), § 10.5 at 481 (“nearly all common fund
26 awards fall into the neighborhood of 30%.”)

27 Class Counsel seek \$450,000, which is one third of the \$1,350,000 Gross Settlement
28 Amount. This request is reasonable and justified considering the settlement secured for the

1 Class Members. It is also consistent with both the Settlement Agreement (See Gundzik
2 Decl., ¶¶ 18, 40, Ex. 1, ¶ 3.2.2) and the engagement agreement the named Plaintiff entered
3 into with Class Counsel. In that agreement, Plaintiff agreed that Class Counsel would be
4 paid the greater of 1) one-third of all amounts obtained or received in the lawsuit, or 2) the
5 hours worked multiplied by the hourly rates of the attorneys working on the case, plus any
6 additional multiplier awarded by the Court. Gundzik Decl., ¶ 70.

7 Thus, as per the Settlement Agreement, Plaintiff respectfully requests that this Court
8 award Class Counsel's requested attorneys' fees.

9 **2. Class Counsel's Requested Fees Are Reasonable Under the**
10 **Lodestar/Multiplier Method.**

11 Under the lodestar/multiplier method of determining an attorneys' fee award, "the
12 lodestar is calculated by multiplying the reasonable hours expended by a reasonable hourly
13 rate. The court may then enhance the lodestar with a multiplier, if appropriate." *Wershba v.*
14 *Apple Computer, Inc.*, 91 Cal.App.4th at 254; *Rebney v. Wells Fargo Bank*, 232 Cal.App.3d
15 1344, 1347 (1991). "California case law permits fee awards in the absence of detailed time
16 sheets." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th at 254, citing *Sommers v. Erb*, 2
17 Cal.App.4th 1644, 1651 (1992). And, "[m]ultipliers can range from 2 to 4 or even higher."
18 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th at 254, citing *Coalition for L.A. County*
19 *Planning etc. Interest v. Board of Supervisors*, 76 Cal.App.3d 241, 251 (1977); accord, *In re*
20 *Lugo*, 164 Cal.App.4th 1522, 1546 (2008); See, e.g., *Vizcaino v. Microsoft Corp.*, 290 F.3d
21 1043, 1050 (9th Cir. 2002) (multiplier of 3.65); *Craft v. Cnty. of San Bernardino*, 624 F.
22 Supp. 2d 1113, 1125 (C.D. Cal. 2008) (multiplier of 5.2); See also *Galeener v. Source*
23 *Refrigeration & HVAC, Inc.*, 2015 U.S. Dist. LEXIS 193096 (N.D. Cal. Aug. 21, 2015)
24 (multiplier of 2.67 approved in granting award of \$3,000,000 in attorneys' fees from a \$10
25 million common fund); See also *Lazarin v. Pro Unlimited, Inc.*, 2013 U.S. Dist. LEXIS
26 97213 (N.D. Cal. July 11, 2013, *28-29) (multiplier of 3.36 approved in granting attorneys'
27 fee award of \$312,500 where loadstar was \$92,824).

1 Here, Class Counsel has expended more time on this matter than the \$450,000 fee
2 award being requested. Gundzik Decl., ¶¶ 59-60, and Ex. 4 thereto. Class Counsel's total
3 lodestar is \$487,017.50. Gundzik Decl., ¶¶ 59-60, Ex. 4; Holzman Decl., ¶ 9. Class Counsel
4 has attached detailed timesheets and well as a chart specifying the tasks performed on behalf
5 of the Class. *Id.* Because the lodestar exceeds the \$450,000 that Class Counsel is requesting,
6 the Court need not consider any multiplier. Instead, the Court need only determine if the
7 \$450,000 award is reasonable compensation for Class Counsel's efforts.
8 Class Counsel's hourly rates of \$825 (Aaron Gundzik and Rebecca Gundzik) and \$750
9 (Daniel Holzman) for this matter are reasonable based upon their qualifications and
10 experience. Gundzik Decl., ¶¶ 41-44; Holzman Decl., ¶¶ 2-5.

11 Both Aaron Gundzik and Rebecca Gundzik have been practicing law in Southern
12 California for over 30 years, and Mr. Holzman has been practicing for 25 years. Gundzik
13 Decl., ¶¶ 41-44; Holzman Decl., ¶ 2. Aaron Gundzik worked for many years at and was an
14 equity partner of the international law firm formerly known as LeBoeuf, Lamb, Greene &
15 MacRae, and has been involved in the litigation of complex cases throughout his career.
16 Gundzik Decl., ¶ 41. Rebecca Gundzik also worked at well-respected law firms and handled
17 complex litigation matters for many years. Gundzik Decl., ¶ 42. Aaron Gundzik has served
18 as Class Counsel on many wage and hour class action matters, and he and Rebecca Gundzik
19 tried and prevailed on appeal in *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th
20 36 (2013), which helped establish the law regarding an employee's right to be paid for all
21 time under an employer's control. Gundzik Decl., ¶¶ 41-43. Mr. Holzman also has
22 significant experience with wage and hour class actions. Holzman Decl., ¶¶ 2-3.
23 Class Counsel's rates for this case are within the range of prevailing market rates. Gundzik
24 Decl., ¶¶ 66-67, and Ex. 5, National Association of Legal Fee Analysis, 2020 Class Action
25 Hourly Rate Survey (hourly rates for attorneys in 16 largest U.S. legal markets for attorneys
26 with 20 or more years in practice range from \$801-\$900 per hour); Holzman Decl., ¶ 4.

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1 **a. Time and Effort**

2 Class Counsel, who are experienced wage and hour class action attorneys, have put a
3 significant number of hours into prosecuting this case. Class Counsel had to conduct
4 substantial investigation, engage in formal written discovery, depose PMQ witnesses, defend
5 their client’s deposition, interview approximately 60 Class Members, review and analyze
6 nearly 100 collective bargaining agreements, research numerous issues and review and
7 analyze policies, independently analyze time records, as well as dedicate substantial time to
8 analyze data and other documents related to Defendant’s compensation policies. Gundzik
9 Decl., ¶¶ 8-11, 45-47, and Ex. 4 thereto. Those efforts, along with negotiating the settlement
10 and obtaining preliminary and final approval, required a significant amount of time and
11 labor. The total amount of attorney time expended through August 30, 2021, is 266.6 hours.
12 Class Counsel’s base lodestar for these hours equates to attorneys’ fees of \$208,792.50.
13 Gundzik Decl., ¶¶ 46-60, and Ex. 4 thereto; Holzman Decl., ¶ 9.

14 **b. Extent Litigation Precluded Other Employment**

15 Inherent to class action litigation is the large amount of time and labor required to
16 properly adjudicate the case. From start to settlement, judgment or verdict, class action
17 litigation commands commitment, an extensive amount of time, labor and resources.
18 Although this litigation did not conclusively preclude other employment, it did impact
19 Plaintiff’s counsel’s ability to take on other class action cases. Plaintiff’s counsel are small
20 law firms with few attorneys and staff. Gundzik Decl., ¶ 62.

21 **c. Continent Nature of the Agreement**

22 Class counsel agreed to work on this case on a contingency basis. If they had not
23 successfully resolved the case, they would not have earned any fees. Moreover, they would
24 not have recouped the substantial litigation expenses that they incurred. Gundzik Decl., ¶¶
25 61-63. The courts have recognized that higher attorneys’ fees are justified in contingency
26 matters because of the contingent nature of their recovery. *See Ketchum v. Moses*, 24 Cal.
27 4th 1122, 1132 (2001). Class action contingency cases are inherently risky. Upon retention,
28 class counsel makes a commitment to litigate the case through trial. These types of cases can

1 take years, hundreds of hours of work and cost an enormous amount of money—risks which
2 are known upon retention. Class Counsel has had to front significant litigation expenses, as
3 well as office overhead expenses. Gundzik Decl., ¶¶ 61-63, and Ex. 4 thereto; Holzman
4 Decl., ¶ 10, Ex. A. The risks involved coupled with the contingency basis of this case further
5 support Class Counsel’s request for attorneys’ fees and costs.

6 In *Ketchum v. Moses*, *supra*, 24 Cal.4th at 1132, the court explained the economic
7 rationale for awarding higher fees in contingency cases as follows:

8 A contingent fee must be higher than a fee for the same legal services paid as they
9 are performed. The contingent fee compensates the lawyer not only for the legal
10 services he renders but also for the loan of those services. The implicit interest rate
11 on such a loan is higher because the risk of default (the loss of the case, which
12 cancels the debt of the client to the lawyer) is much higher than that of conventional
13 loans. (Citation omitted.) A lawyer who both bears the risk of not being paid and
14 provides legal services is not receiving the fair market value of his work if he is paid
15 only for the second of these functions. If he is paid no more, competent counsel will
16 be reluctant to accept fee award cases.

17 Class Counsel represented the Class Members in this matter and have borne the entire risk
18 and costs of litigation on a pure contingency basis. To date, Class Counsel have not received
19 any compensation and have expended significant litigation costs on behalf of the Class.

20 **d. Experience, Reputation, and Ability of Plaintiff’s Counsel**

21 As set forth in the Declarations of Aaron Gundzik and Dan Holzman, Class
22 Counsel’s skill and experience in litigating wage and hour class actions, in state and federal
23 forums, contributed to the results obtained on behalf of the Class Members. All three
24 attorneys who were primarily responsible for the case have significant experience litigating
25 wage and hour class actions, and each have been practicing law for over 25 years. Gundzik
26 Decl., ¶¶ 41-43; Holzman Decl., ¶¶ 2-3.

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1 **e. Results Obtained On Behalf of the Class by Plaintiff's**
2 **Counsel**

3 An award of attorneys' fees should reflect the successful outcome of the case.
4 *Hensley v Eckerhart*, 461 U.S. 424, 440 (1983), abrogated in part as stated in *McKee v.*
5 *Comm'r of Soc. Sec.*, 2008 U.S. Dist. LEXIS 86793 (M.D. Fla. 2008), superseded by statute
6 as stated in *Laube v. Allen*, 506 F. Supp. 2d 969, 2007 U.S. Dist. LEXIS 64916 (M.D. Ala.
7 2007). As already discussed herein and in the Motion for Preliminary Approval, this case
8 involves numerous and difficult issues requiring a highly technical analysis and largely
9 precluding a clear-cut outcome as to liability. There also were significant issues regarding
10 Defendants' ultimate liability, as Defendants consistently denied that they had violated
11 California's wage and hour laws. In fact, Defendants raised a colorable legal or factual
12 defense to each claim Plaintiff alleged. Gundzik Decl., ¶ 30.

13 Nevertheless, despite these obstacles, Class Counsel obtained significant financial
14 compensation for the Class Members. Defendants will pay a gross settlement amount of
15 \$1,350,000 to the 8,709 Settlement Class Members, as well as the employer's portion of all
16 payroll taxes. After payment of attorneys' fees and costs, service and release payments and
17 class administration costs, the remainder of the Net Settlement Amount will be
18 approximately \$743,750. Despite the complexity of the case, Class Counsel have, through
19 the investment of substantial effort, and the resources of their law firm, been able to secure
20 an outstanding settlement on behalf of the Class Members.

21 **f. Reaction of Putative Class Members**

22 As already discussed herein, the reaction of the Class Members has been very
23 positive. Not one of the Class Members objected to Class Counsel's request for attorneys'
24 fees, which also provide compelling evidence that the request is fair, adequate and
25 reasonable. Salinas Decl., ¶ 11.

26 In sum, based on the six factors discussed above, Class Counsel's requested fees
27 should be awarded.

28 //

1 **H. Class Counsel’s Requested Costs are Reasonable.**

2 The settlement provides for repayment of Class Counsel’s actual and reasonable
3 costs of litigation in an amount not to exceed \$25,000. Gundzik Decl., ¶ 18, Ex. 1, ¶ 3.2.2.
4 Class Counsel incurred reasonable litigation costs in bringing this matter to a resolution
5 before trial. The total of out-of-pocket costs incurred and to be incurred by Class Counsel in
6 this litigation are \$28,233.64. Gundzik Decl., ¶ 61, Ex. 4; Holzman Decl., ¶ 10, Ex. A.
7 Because this exceeds the amount agreed to in the Settlement Agreement, Class Counsel is
8 therefore only seeking an award of costs in the amount of \$25,000.

9 **I. The Settlement Administrator’s Requested Expenses are Reasonable.**

10 Plaintiff retained a neutral third-party administrator, Phoenix, to administer the
11 notice and claims process. Phoenix’s duties included and include, among other things: (a)
12 translating, printing and mailing the Notice of Settlement to all Class Members; (b) locating
13 updated addresses for class members; (c) receiving other communications about the
14 settlement; (d) preparing weekly reports notifying the parties of the number of class
15 members who filed objections or requests for exclusion; and (e) notifying the parties of the
16 number of class members who filed untimely or deficient requests for exclusion, and taking
17 steps to cure the deficiencies. Salinas Decl., ¶ 2. If final approval is granted, Phoenix will
18 receive and assume stewardship of the settlement funds, make final calculations of
19 individual settlement payments, mail checks to class members and aggrieved employees,
20 prepare and distribute tax documents and arrange for transfer of funds from any un-
21 negotiated settlement checks to the state as unclaimed property. Phoenix will be charging
22 \$46,250 to perform this work, which is the amount it estimated in connection with the
23 Motion for Preliminary Approval. Kruckenberg Decl., ¶ 22, and Ex. D. Because this amount
24 is reasonable in light of the administrator’s significant duties, it should be approved.

25 **IV. CONCLUSION**

26 For the foregoing reasons, Plaintiff, on behalf of herself and the Class, respectfully
27 requests that the Court grant final approval of the settlement, award a service and release
28 payment to the named Plaintiff in the amount of \$10,000, approve of the payment to the

1 LWDA in the amount of \$56,250 and \$18,750 to the Aggrieved Employees, award
2 attorneys' fees in the amount of \$450,000 and Class Counsel's costs in the amount of
3 \$25,000, and award the Settlement Administrator its fees in the amount of \$46,250, all of
4 which will be paid from the Gross Settlement Amount.
5

6 DATED: December 20, 2023

GUNDZIK GUNDZIK HEEGER LLP

7
8 By: 

Rebecca G. Gundzik
Attorneys for Plaintiff Michelle Kussner,
individually and on behalf of all others
similarly situated
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 14011 Ventura Blvd., Suite 206E, Sherman Oaks, CA 91423.

On December 20, 2023, I served the following document described as

- **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**

on the interested parties in this action:

(X) by serving () the original (X) true copies thereof as follows:

Please see attached service list

() BY MAIL I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with 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 (1) day after date of deposit for mailing in affidavit.	() BY FACSIMILE TRANSMISSION I caused said document(s) to be transmitted by facsimile transmission to the name(s) and facsimile telephone number(s) of the person(s) named on the attached service list. The facsimile machine telephone number of the sending facsimile machine was (818) 918-2316. A transmission report was issued by the sending facsimile machine confirming that the transmission was completed without error. A true and correct copy of said transmission report is attached hereto.
() BY OVERNIGHT DELIVERY Said document was placed in an envelope designated by the express service center and placed for collection in a box regularly maintained by said carrier with whom we have a direct billing account, to be delivered to the office of the addressee listed above on the next business day.	(XX) BY ELECTRONIC TRANSMISSION I caused the above-described document to be electronically served through Case Anywhere pursuant to the Court's Order Authorizing Electronic Service dated June 18, 2021, to the names and email addresses listed on the Service List attached hereto.

(X) STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

() 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.

(X) EXECUTED on December 20, 2023, at Sherman Oaks, California.



Nicole Salazar

Case Anywhere Electronic Service List

Case Name: **Kussner, et al. v. MV Public Transportation, Inc.**

Case Info: **21STCV12259, Los Angeles Superior Court**

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