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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF COUNTY OF STANISLAUS

SCOTT KLIMEK, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

KINGSPAN INSULATED PANELS, INC., a
Florida Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CV-21-004201
*[Assigned to Hon. John D. Freeland, Dept 23,
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 9, 2023

Time: 8:30 a.m.

Dept.: 23

Complaint Filed: August 5, 2021

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 9, 2023, at 8:30 a.m., or as soon thereafter as this
3 matter may be heard by the Honorable John D. Freeland in Department 23 of the Stanislaus
4 County Superior Court, located at 801 10th Street, 4th Floor, Modesto, CA 95354, Plaintiff Scott
5 Klimek, individually and on behalf of all others similarly situated, will move this Court for an
6 Order granting final approval of the class action settlement between Plaintiff and Defendant,
7 which was preliminarily approved by the Court on February 3, 2023. This Motion seeks final
8 approval and entry of judgment of a \$876,036 settlement on behalf of the Class Members, and is
9 unopposed by Defendant Kingspan Insulated Panels, Inc.

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

- 13 1. Finally certifying the Class, as defined in the Settlement Agreement and the
14 Court’s Order Granting Preliminary Approval of the Settlement;
- 15 2. Finally appointing Plaintiff as the Class Representative for purposes of settlement;
- 16 3. Finally appointing Brian Mankin, Peter Carlson and Mehrdad Bokhour as Class
17 Counsel for purposes of settlement;
- 18 4. Finding that the Class Notice was properly provided to the Class in accordance
19 with the Court’s Order granting Preliminary Approval;
- 20 5. Finally approving the settlement as fair, adequate, and reasonable, based upon the
21 terms set forth in the Settlement Agreement;
- 22 6. Binding participating Class Members to the terms of the Settlement Agreement,
23 including the Release specified therein; and
- 24 7. Retaining jurisdiction to enforce the Settlement Agreement.

25 This Motion will be based upon this notice; the attached memorandum of points and
26 authorities; the Declarations of the Settlement Administrator (Kaylie O’Connor of CPT Group),
27 Class Counsel (Brian Mankin, Peter Carlson and Mehrdad Bokhour) and Plaintiff (Scott Klimek)
28 filed concurrently herewith; the records and files in this action; and any other further evidence or

1 argument that the Court may receive at or before the hearing.

2 Dated: May 17, 2023

LAUBY, MANKIN & LAUBY LLP

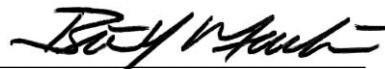
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4 BY: 
5 Brian J. Mankin, Esq.
6 Attorneys for Plaintiff and the Class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT AND ESSENTIAL POINTS**

3 Pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiff respectfully
4 requests that this Court grant final approval of the Class Action and PAGA Settlement
5 Agreement (“Settlement Agreement”) already on file in this action, and enter the proposed order
6 and final judgment in this matter. This Motion is supported and unopposed by Defendant
7 Kingspan Insulated Panels, Inc.

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

10 • After extensive work, the Parties reached a \$876,036 settlement with the
11 assistance of Lynn Frank, who is one of the most experienced and reputable class action
12 mediators in California, that is tailored to a limited release of the claims alleged on behalf of 882
13 Class Members;

14 • The Class Members were deemed to participate in the Settlement, and were not
15 required to submit a Claim Form to receive funds;

16 • There is no reversion to Defendant;

17 • There were zero objections and zero timely opt-outs¹ to the Settlement, meaning
18 100% of the Class is participating in the Settlement.

19 In accordance with the analysis and law set forth herein as well the preliminary approval
20 motion, the Settlement should be approved and judgment entered based on the determination that
21 the Settlement is fair, reasonable, adequate, and in the best interests of the Class. (Declaration of
22 Class Counsel, Brian J. Mankin; ¶¶ 13, 35 (“Mankin Decl.”).)

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

24 The Class Members here fall into two categories of employees who worked at a Kingspan
25 Insulated Panels’ facility in California at any time during the period of August 5, 2017, through
26 October 1, 2022 (the “Class Period”), including: (1) “Direct Hires” of Defendant Kingspan, and
27 (2) “Temporary Employees” that were placed at Kingspan’s facility by a staffing agency. The
28

¹ The Settlement Administrator reports that there was one untimely Request for Exclusion that was determined to be invalid. See O’Connor Decl. ¶ 13, and exhibits thereto.

primary claims, which Defendant disputes, involved allegations that the Class Members did not receive all minimum, regular and overtime wages owed, did not receive accurate itemized wage statements, were denied meal and rest breaks, were not paid all vested vacation owed at termination, as well as claims for waiting time penalties and PAGA penalties.

The Settlement includes 882 Participating Class Members. The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Kaylie O'Connor ("O'Connor Decl."), ¶ 16):

<i>Gross Settlement Amount</i>	\$ 876,036.00
Attorneys' Fees (1/3)	\$ 292,012.00
Litigation Costs	\$ 14,245.99
Administrator Costs	\$ 18,250.00
PAGA Penalties	\$ 50,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 491,528.01

The 882 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 number of Weeks Worked during the Class Period, such that the amount actually distributed to Participating Class Members will equal 100% of the Net Settlement Amount. (Settlement Agreement ¶ 54).

Assuming all of the amounts in the Settlement are approved by the Court, the *average* Individual Class Payment is estimated to be \$557.29 and the *highest* individual settlement payment is approximately \$6,625.25. (O'Connor Decl. ¶ 17).

In addition, 511 Aggrieved Employees will each receive an Individual PAGA Payment based on their share of the \$12,250 in PAGA Penalties (25% of the total \$50,000 PAGA allocation), calculated pro-rata based on the number of Weeks Worked during the PAGA Period. (S.A. ¶ 54(g)).

Twenty percent (20%) of each Individual Settlement Amount shall constitute wages (for which each participating Class Member will be issued an IRS Form W-2 for such payment), and the remaining eighty percent (80%) shall constitute interest and penalties (each for which each

1 participating Class Member will be issued an IRS Form 1099). (S.A. ¶ 54(d)). The Settlement
2 Agreement provides that Defendant shall deposit the Settlement Amount within 30 days after the
3 “Effective Date” (S.A. ¶¶ 16, 80), which will be the date Judgment is entered since no Class
4 Member objected or moved to intervene. Additionally, Defendant will separately fund their
5 share of payroll taxes. Within 10 days of receipt, the Settlement Administrator shall issue
6 payments to cover all court-approved payments. (S.A. ¶¶ 80-81).

7 Class Members will have 180 days to cash the settlement check. If a Class Member fails
8 to cash a check by the deadline, the Settlement Administrator shall issue unclaimed funds to the
9 California State Controller in the name of the Class Member. (S.A. ¶ 82).

10 **III. THE NOTICE PROCESS**

11 **A. Notice to the Class Members**

12 Pursuant to the Court’s Order and the Settlement Agreement, the Parties directed the
13 Settlement Administrator to review and update the Class Members’ addresses, mail the Court-
14 approved Notice Packet, and process their responses. The Administrator also posted the relevant
15 documents on its website for the Class Members to access.

16 Prior to mailing the Class Notice, the Settlement Administrator performed a National
17 Change of Address search on all Class Members to determine if any had moved and to locate
18 addresses that were not in Defendant’s possession. (O’Connor Decl., ¶ 5-7). On March 20,
19 2023, the Class Notice was sent via first-class mail to the Class Members. (O’Connor Decl., ¶
20 8). Ultimately, only 29 Class Notices were determined to be undeliverable. (O’Connor Decl., ¶
21 9).

22 In accordance with California Rules of Court, rules 3.766 (d) and 3.769 (f), the Notice
23 provided Class Members with (1) a brief explanation of the case; (2) an explanation of each
24 Class Member’s right to opt out of the settlement class; (3) an explanation of the process (and
25 relevant deadlines) through which a Class Member could opt out of the settlement class; (4)
26 notice about the binding nature of the Judgment for Class Members who do not opt out; (5) an
27 explanation of each Class Member’s right to appear through counsel; (6) an explanation of each
28 Class Member’s right to appear at the fairness hearing and express views on the settlement, i.e.,

1 object or otherwise respond; and (7) an explanation of each Class Member’s right to participate
2 in the Settlement and receive payment accordingly. (See **Exhibit A** to the O’Connor Decl.)

3 **B. There are Zero Objections and Zero Valid Opt-Outs, Resulting In An**
4 **Impressive 100% of the Class Participating in the Settlement**

5 California law makes clear that the percentage of objectors and opt-outs is an important
6 factor in the Court’s consideration of a proposed class action settlement. (See *Dunk v. Ford*
7 *Motor Co. (1889) 48 Cal.App.4th 1794* at 1802.) Indeed, the Ninth Circuit and other federal
8 courts recognize that in the final fairness analysis, the number or percentage of class members
9 who object to the settlement is a significant factor. (See *Mandujano v. Basic Vegetable Prods.,*
10 *Inc.*, (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY
11 2001) 127 F.Supp.2d 418, 425 [“[i]t is well settled that the reaction of the class to the settlement
12 is perhaps the most significant factor to be weighed in considering its adequacy.”])

13 In this case, as noted above, there were zero objections and zero valid opt-outs, meaning
14 that 100% of the Class Members are participating in the Settlement. (O’Connor Decl., ¶ 12-14).

15 **V. EVALUATION OF THE SETTLEMENT**

16 It is axiomatic that California law strongly favors and encourages settlements. (See
17 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236.) This presumption in favor of
18 settlement applies with particular force in the context of class actions. (See *Ferguson v. Lieff,*
19 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 5117 [“[p]ublic policy favoring settlement is
20 especially weighty for class actions”]; *Bell v. Am. Title Ins. Co.* (1991) 226 Cal.App.3d 1589,
21 1607-1608 [affirming the trial court’s approval of a class settlement and implicitly endorsing its
22 citation of federal precedent for the notion that there is a “strong public policy in favor of
23 settlement of class actions”]; see also *Franklin v. Kaypro Corp.* (9th Cir. 18899) 884 F.2d 1222,
24 1229, quoting *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 [“it hardly
25 seems necessary to point out that there is an overriding public interest in settling and quieting
26 litigation. This is particularly true in class action suits”].)

27 When entertaining a request for final approval of a class action settlement, a court’s
28 fundamental consideration is whether the settlement is fair, adequate and reasonable. (See *Dunk,*

1 *supra*, 48 Cal.App.4th at 1801, fn. 7 [noting that state courts look to federal authority concerning
2 the approval of class settlements]; California Rules of Court, rule 3.769(g).)

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

9 **A. The Settlement Was Reached Through Informed Arms-Length Negotiation**

10 Courts presume the absence of fraud or collusion in the negotiation of a settlement,
11 unless evidence to the contrary is offered. Thus, there is a presumption here that the negotiations
12 were conducted in good faith. (See, 3 Alba Conte & Newberg, *supra*, at § 11.51.) The proposed
13 settlement here was the product of arm's-length negotiation before a highly experienced and
14 reputable class action mediator to reach a settlement, which was finally consummated in the
15 months after mediation.

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

21 As the Settlement Agreement itself reveals, there is no preferential treatment for any
22 segment of the class, as the Settlement is designed to compensate all Class Members fairly and
23 adequately. And pursuant to California Rules of Court Rule 3.769(b), the parties have disclosed
24 the agreed upon and proposed attorney fee award, which is well within the range of
25 reasonableness for matters of this nature.

26 **B. Plaintiff's Investigation Was Sufficient**

27 As set forth at the time of preliminary approval, Class Counsel's investigation into the
28 facts and merits of the wage and hour claims alleged included an informal production of

1 information and documents by Defendant sufficient to assess potential damages and prepare for
2 mediation, analyzing substantial amounts of information, correspondence, documents, policies
3 and procedures, pay data and timekeeping records, and evidence relating to the class size and the
4 commonality of the claims. During this process, Plaintiff and Class Counsel conducted
5 investigations into the potential claims of the similarly situated employees, as well as researching
6 and investigating Defendant's defenses. Finally, Class Counsel synthesized and analyzed
7 information provided by Defendant as to the total Class Members, the number of current and
8 former employees, the number of employees who worked during various time periods, and
9 prepared comprehensive damages calculations regarding the claims at issue.

10 **C. Class Counsel Are Experienced in Similar Litigation and Endorse the**
11 **Settlement**

12 Class Counsel are experienced in this type of litigation, and they have represented (and
13 hereby do represent) that this Settlement is fair and reasonable. (Mankin Decl., ¶¶ 13, 35;
14 Carlson Decl., ¶¶ 2-6; see *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
15 Cal.App.4th 1135, 1152 [Final approval of settlement affirmed where counsel were all
16 experienced litigators with class-action experience and had recommended settlement based on
17 the negotiated terms].)

18 **D. Reasonable Estimate of the Nature and Amount of Recovery**

19 Plaintiff's Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
20 (which sufficiently provided the Court with "basic information about the nature and magnitude
21 of the claims in question and the basis for concluding that the consideration being paid for the
22 release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail,*
23 *Inc.* (2008) 168 Cal.App.4th 116, 133.) Of course, a settlement is not judged against what
24 might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to
25 provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers,*
26 *Inc.* (2001) 91 Cal.App.4th 246, 250.) ("Compromise is inherent and necessary in the settlement
27 process ... even if the relief afforded by the proposed settlement is substantially narrower than it
28 would be if the suits were to be successfully litigated, this is no bar to a class settlement because

1 the public interest may indeed be served by a voluntary settlement in which each side gives
2 ground in the interest of avoiding litigation.”)

3 In light of the uncertainties of protracted litigation, this negotiated settlement reflects the
4 best practicable recovery for the Class. While the total settlement amount is, of course, a
5 compromise figure, the potential risks and opportunities of both parties were effectively weighed
6 and considered by the parties, resulting in a fair and equitable settlement. Based upon detailed
7 data obtained through discovery and information exchanges, and factoring in claim certification
8 probabilities and liability probabilities, Class Counsel formulated detailed damages models to
9 evaluate the claims in preparation for mediation and in order to reach a realistic and reasonable
10 resolution.

11 Of course, Defendant denies that any damages should be assessed and denies all of the
12 value assessed by Plaintiff. Notwithstanding these arguments, the Settlement commits
13 Defendant to pay \$876,036 to settle the litigation.

14 **VI. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND REASONABLE**

15 For their efforts in creating a common fund for the benefit of the Class, the Settlement
16 Agreement provided that Class Counsel may seek reasonable fees of \$292,012 (one-third of the
17 Settlement Amount). This amount will be paid from the settlement amount, as provided by the
18 Settlement Agreement. These fees are warranted under the law and within the range of fees
19 commonly awarded in similar cases.

20 As shown herein, the requested percentage of one-third of the settlement fund as payment
21 for attorneys’ fees should be granted for several reasons, including one-third is the standard
22 bench mark in California for class action settlements (see e.g., *Chavez v. Netflix, Inc.* (2008) 162
23 Cal.App.4th 43, 66 n. 11 (“Empirical studies show that, regardless whether the percentage
24 method or the lodestar method is used, fee awards in class actions average around one-third of
25 the recovery”), that the California Supreme Court recently held that the percentage of the fund
26 method survives in California class action cases (*Laffitte v. Robert Half International, Inc.*
27 (2016) 1 Cal.5th 480, and through the prism of a lodestar cross-check. Accordingly, this request
28 should receive final approval.

1 **A. Plaintiff is Entitled to Recover Reasonable Attorney’s Fees Under the**
2 **Labor Code**

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

16 **B. Class Counsel’s Request for Fees Is Reasonable and Properly Calculated as**
17 **a Percentage of the Common Fund**

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

25 ///

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

4 The California Supreme Court has approved trial courts’ usage of the common fund
5 method of awarding attorneys’ fees in wage and hour class actions, like this one, upholding a fee
6 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte*, 1 Cal.5th at
7 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 552 (“fee awards in class actions average
8 around one-third of the recovery”). Specifically, in *Laffitte*, the Court wrote: “[w]e join the
9 overwhelming majority of federal and state courts in holding that when class action litigation
10 establishes a monetary fund for the benefit of the class members, and the trial court in its
11 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
12 of a reasonable fee by choosing an appropriate percentage of the fund created”). *Id.* at 506. The
13 California Supreme Court also noted that trial courts have the discretion to award fees as a
14 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
15 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
16 evaluate the reasonableness of a requested percentage fee.”)

17 The California Supreme Court’s *Laffitte* decision was consistent with its prior rulings
18 recognizing that “when a number of persons are entitled in common to a specific fund, and an
19 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that
20 fund, such ... plaintiffs may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest*
21 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer who
22 recovers a common fund . . . is entitled to reasonable attorneys’ fees from the fund as a whole”).
23 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
24 based on the amount that was available to be claimed, rather than as a percentage of the actual
25 amount claimed. *See Id.* at 475-6, 480-1 (the SCOTUS held that attorneys for a successful class
26 may recover a fee based on the fund created for the class, even if some class members make no
27 claims against the fund, so that money remains in it that will be returned to the defendant,
28 explaining: “[t]heir [class members’] right to share the harvest of the lawsuit upon proof of their

1 identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class
2 representatives and their counsel.” *See also Williams v. MGM-Pathe Communs. Co.* (9th Cir.
3 1997) 129 F.3d 1026, 1027 (trial court “abused its discretion by basing the fee on the class
4 members’ claims against the fund rather than on a percentage of the entire fund or on the
5 lodestar”).

6 **2. *The High Quality of Work and Excellent Result Obtained Support***
7 ***the Award***

8 In addition to the fact that a Class benefit was created with a \$876,036 non-reversionary
9 common fund settlement, the fairness of the requested fee award of 1/3 of the Settlement
10 Amount is supported by the high quality of work performed by Class Counsel and the positive
11 result obtained for the Class. This great result occurred because Class Counsel diligently,
12 efficiently, and creatively pursued this case and reached a successful settlement for the benefit of
13 the entire Class. In fact, some Class Member will receive more than \$3,344, which is an
14 excellent result. Moreover, the fact that the settlement was embraced and supported by the
15 Class, as evidenced by a 100% participation rate, demonstrates that Class Counsel obtained a
16 favorable result for the Class.

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

18 Rule 3.769 of the California Rules of Court requires that the Class Members be given
19 notice of any agreement regarding an application for attorneys’ fees. Here, the Notice
20 preliminarily approved by the Court and distributed to the Class Members apprised them of the
21 requested attorneys fees, which was consistent with the new LA Model Agreement and Notice.

22 The Class Notice also advised the class members of the procedures for objecting to the
23 proposed settlement and appearing at the settlement hearing, where they could present their
24 objections to any aspect of the settlement, including the amount of attorneys’ fees to be awarded
25 to class counsel. (*Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883
26 “[p]rocedural due process requires that affected parties be provided with ‘the right to be heard at
27 a meaningful time and in a meaningful manner’”].) In accordance with the foregoing, it is
28 respectfully submitted that the instant notice Complied with Rule 3.769 and, as a result, the Class

1 Members' due process rights were fulfilled.

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

5 An additional factor militating in favor of the granting of the requested fee award is the
6 fact that this case was both legally and financially risky for Class Counsel. (*See Vizcaino v.*
7 *Microsoft Corp* (9th Cir. 2002) 290 F.3d 1043, 1048-49.) Class Counsel have been representing
8 the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-
9 recovery after a substantial investment of time, money, and resources, and have done so since the
10 inception of this case without any payment or compensation. Specifically, there was the prospect
11 of enormous cost inherent in class action litigation, as well as a battle with a well-funded
12 corporation who was represented by an experienced law firm; the risk that Defendant could
13 prevail on its argument that the class should not be certified; and the risk that Defendant could
14 prevail on the merits of some or all of the claims.

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

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

27 ///

28 ///

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

14 *Id.* at 399-400.

15 Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
16 end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault of
17 counsel (i.e., bankruptcy, change in the law, consolidation/coordination/preemption, being top
18 filed, etc.). According to Mayer Brown LLP's study entitled, An Empirical Analysis of Class
19 Actions, cited in *Laguna v. Coverall North America, Inc.*, No. 12-55479 (9th Circuit 2014), found
20 that only one-third of class actions are successful, compared to two-thirds that are defeated and
21 result in no payment to the class members.²

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

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

25 Despite recognized limitations of the so-called lodestar method, some California and
26 federal courts acknowledge the utility of a lodestar "cross-check."³ (*Lealao, supra*, 82
27 Cal.App.4th at 46-47.) Under the "lodestar multiplier" method of cross-checking the
28 reasonableness of attorneys' fees in class actions, the court ascertains Class counsel's total
"lodestar" amount by multiplying the number of hours reasonably expended by each attorney or

² www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf

³ 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.

1 legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a
2 “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its
3 contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22
4 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (18893) 34 Cal.3d 311, 322; *Lealao, supra*, 82
5 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is
6 within the range of fees freely negotiated in the legal marketplace in comparable litigation”].)

7 Historically, California courts have approved multipliers of 1.5 to 4. *See Coalition for*
8 *Los Angeles County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251
9 (**multiplier of 2+ approved**); *Sternwest Corp v. Ash* (18896) 183 Cal.App.3d 74, 75. The
10 multiplier requested by Class Counsel below is within the range of multipliers found to be
11 appropriate by various federal and state courts in California. In *Sternwest Corp. v. Ash* (18896)
12 183 Cal.App.3d 74, for instance, the Court of Appeal remanded for a lodestar enhancement of
13 “**two, three, four or otherwise.**” *Id.* At 76; *see also Wershba*, 91 Cal.App.4th at 255
14 (“**Multipliers can range from 2 to 4 or even higher**”); *City of Oakland v. Oakland Raiders*
15 (18898) 203 Cal.App.3d 78, 83 (**affirming 2.34 multiplier**); *Coalition for Los Angeles County*
16 *Planning in the Pub. Interest v. Board of Supervisors*, 76 Cal.App.3d 241, 251 (**affirming**
17 **multiplier of approximately 2**); *Craft v. County of San Bernardino*, 2008 U.S. Dist. LEXIS
18 27526 (C.D. Cal. Apr. 1, 2008) (**applying 5.2 multiplier**); *See also Steinder v. Am. Broadcasting*
19 *Co., Inc.* (9th Cir. 2007) 248 Fed. Appx. 780, 783 (**approving multiplier of 6.85** and citing cases
20 with comparable or higher multipliers); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d
21 1043, 1051 (finding no abuse of discretion in **awarding a multiplier of 3.65**). In *Torchia v. WW*
22 *Grainger, Inc.* (E.D. Cal. 2014) 304 F.R.D. 256, 275-278, a federal magistrate in Fresno
23 approved attorneys’ fees of \$550,000 **constituting a 3.57 multiplier** on class counsel’s total
24 lodestar of \$153,856, in a wage and hour class action where class counsel expended 457.85 hours
25 on the case, engaged in limited formal discovery, and where the case settled for \$2,876,036
26 within one year from filing the Complaint with 909 class members claiming \$1,305,200 and the
27 remainder, except for the attorneys’ fees and costs, reverting to the company.

28 ///

The actual aggregated lodestar between the Plaintiffs’ attorneys that worked on this case is approximately \$251,077. This results in a *small 1.16 multiplier*, as summarized in the following table, and in the submitted declaration of Plaintiffs’ counsel:

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner – LML)	Trial Counsel	22	\$775	104 ⁴	\$80,600
Peter Carlson (Senior Associate – LML)	Handling Attorney	8	\$575	181.7	\$104,477
Mehrdad Bokhour (Principal – Owner)	Trial Counsel	10	\$600	110	\$66,000
Grand Total for All Attorneys					\$251,077

(See Mankin Decl., ¶ 25; Carlson Decl. ¶ 8; Bokhour Decl. ¶ 20).

Class Counsel’s requested rates are reasonable under the Laffey Matrix (www.laffeymatrix.com) which indicates that the benchmark rate for an attorney with 20+ years of experience (such as Mr. Mankin) is \$914, while the rate for attorneys with 8-10 years of experience (such as Mr. Carlson) is \$672. 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 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc., 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the hourly rates for partners and associates in major metropolitan areas. For the southern California area, which is based on billing entries for 1,125 partners and 1,566 associates, the Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most importantly, the information provided in the Real Rate Report is not based on self-reported numbers, surveys,

⁴ 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.

sampling, or reviews or other publications – instead, the Real Rate Report is based on the actual hours and fees billed by law firms. These numbers are not surprising given that a 4-year-old article in the National Law Journal stated that in **2014** partners in Los Angeles charge an average of \$665, while the average associate rate is \$401. (Sloan, \$1,000 Per Hour Isn't Rare Anymore; Nominal Billing Levels Rise, But Discounts Ease Blow (2014) Nat. Law Journal.)⁵. (Mankin Decl., ¶ 24.)

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

Class Counsel are also highly experienced in Class/PAGA litigation, including having been selected as a "Super Lawyer" in employment litigation on multiple occasions, having achieved large settlements including one of the largest PAGA awards in California's history and collecting in excess of \$250 million for their clients, having prevailed at trial against two separate Fortune 100 companies, including a PAGA-only action in Orange County and a Class Action jury trial in Los Angeles. (Mankin Decl. ¶¶ 2-6). Indeed, Class Counsel's rates are typical of the rates charged by defense counsel with similar experience doing similar employment law work in this region.

VII. THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE

A. The Requested Costs Are Reasonable and Merit Approval

The Settlement Agreement authorized a Litigation Expenses Payment of not more than \$20,000. (Settlement Agreement ¶ 54(f)). However, Class Counsel's actual combined costs through the final approval hearing are estimated to be \$14,245.99, including \$8,112.69 by Lauby Mankin Lauby LLP and \$6,133.30 by Bokhour Law Group. (Mankin Decl. ¶ 29; Bokhour Decl. ¶ 23.) Since Class Counsel's actual costs were less than the amount allocated, the saving will be placed in the Net Settlement Amount. These costs include mediation fees, filing fees, CourtCall charges, and court filing fees, and process server fees.

⁵ The article notes that at Irell & Manella, the average partner rate is \$890/hr; Mannatt, Phelps & Phillips is \$740/hr; O'Melveny & Meyers is \$715/hr; and Jeffer Mangels Butler & Mitchell is \$690/hr. *Id.*

1 **B. The Requested Service Award is Reasonable and Merits Approval**

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

12 Under the Settlement, Defendant agreed to pay a Service Award in the amount of
13 \$10,000 to Mr. Klimek in recognition of his contribution as the Class Representative. He
14 undertook significant risks, including the risk of being blackballed in the industry and the risk
15 that he could have been liable for Defendant’s costs if he lost. (See Plaintiff’s Declaration ¶
16 8.) This factor is a significant one for a wage earner, and the potential risk is very real. (*See*
17 *Whiteway v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) No. C 05-2320
18 SBA, 2007 WL 4531783, at *3 (“the few courts to consider this ‘class representatives’
19 dilemma’ have not found it inequitable to assess costs upon the lead or named plaintiff in a
20 class action.”).)

21 Mr. Klimek also committed a significant number of hours to assist with the
22 litigation/settlement processes of this case. Finally, he entered into a general release of all
23 claims against Defendant, whereas the Class Members only released the claims alleged. The
24 requested Service Payment is reasonable, particularly in light of the substantial benefits
25 Plaintiff generated for the Class Members, the risks he undertook, and in exchange for
26 executing a general release against Defendant while giving up the right to pursue separate
27 individual claims. (See Plaintiff’s Declaration ¶¶ 6-10.)

28 ///

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

4 **VIII. OTHERS MATTERS RE: FINAL APPROVAL**

5 **A. Settlement Administration Costs**

6 The parties agreed that the Administrator, CPT Group, would be compensated for
7 services performed. The Administrator's flat fee is \$18,250.00, which included considerable
8 work performed by the administrator in resolving the data issues. (O'Connor Decl., ¶ 19;
9 Exhibit B thereto.)

10 **B. Notice of Final Judgment to the Class**

11 The Proposed Final Approval Order directs the Settlement Administrator to give notice
12 of entry of judgment by including a postcard to the Class Members at the same time the checks
13 are mailed.

14 **C. Uncashed Checks**

15 The Settlement Agreement provides that unclaimed funds will be submitted to the
16 California State Controller's Unclaimed Property Fund in the name of the Class Member
17 thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil
18 Procedure Section 384, subd. (b). (S.A. ¶ 82.)

19 **D. Final Report**

20 Defendant's payment is due 30 days after the Effective Date. The Administrator then
21 has 10 days thereafter process the funds and issue checks to the Class Members, who will then
22 have 180 days to cash their checks. Accordingly, the Parties project that the check cashing
23 deadline will occur on approximately October 7, 2023.

24 The Parties propose submitting a final report in the form of a declaration from the
25 Administrator setting forth the disbursements and status of any uncashed checks by
26 approximately November 7, 2023.

27 ///

28 ///

As set forth in the Mankin Declaration at ¶ 29, the Settlement Agreement and this motion are concurrently being submitted to the LWDA in accordance with Labor Code § 2699(1)(2). The LWDA has not commented on the Settlement to date.

Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and merits final approval.

LAUBY, MANKIN & LAUBY LLP

BY: Brian J. Mankin
 Brian J. Mankin, Esq.
 Attorneys for Plaintiff and the Class

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 5198 Arlington Avenue, PMB 513, Riverside, California 92504.

On May 17, 2023, I caused to be served the foregoing document(s) described as follows:

**NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; DECLARATIONS IN SUPPORT THEREOF; AND [PROPOSED] FINAL
ORDER AND JUDGMENT**

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **By Mail** I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

☐ **By Facsimile** I sent this document via fax to all parties as listed on attached service list, on

☐ **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

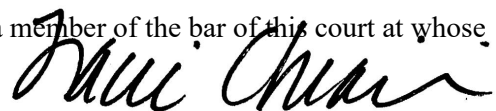
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

☐ **By Certified Mail-Return Receipt Requested** I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California

☐ **By Personal Service** I caused said document(s) to be personally served by hand on the parties listed on the attached service list.

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 17, 2023, Riverside, California.

☐ **Federal** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Tracie Chiarito, Declarant

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