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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN BERNARDINO**

12 ROMUALDA RAZO, on behalf of herself,
13 the State of California, and others similarly
situated and aggrieved,

14
15 PLAINTIFF,

16 v.

17 DIVERSE FACILITY SOLUTIONS,
18 INC., an Illinois corporation; and DOES 1-
19 100, inclusive,

20 Defendants.
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Case No.: CIVSB2133307

Assigned for All Purposes to:
Hon. Jessica Morgan
Dept. S26

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND REQUEST
FOR ATTORNEY'S FEES AND COSTS**

[Filed concurrently with Notice of Motion and
Motion; Declarations of Chad Saunders and
Madely Nava; [Proposed] Order]

Date: December 4, 2023
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1 **I. INTRODUCTION**

2 Plaintiff and Class Representative Romualda Razo seeks final approval of a non-
3 reversionary class action settlement resolving wage and hour claims on behalf of 328 individuals
4 who worked for defendant Diverse Facility Solutions, Inc. (“DFS” or “Defendant”) as non-exempt
5 employees in California during the period of the period of December 7, 2017, to December 4,
6 2023. The proposed \$450,000 total settlement provides about \$227,930 in cash payments to the
7 Class, with an average award of about \$695, plus additional amounts payable under PAGA. The
8 remaining balance will cover a modest service award to Plaintiff, settlement administration costs,
9 civil penalties to the state, and reasonable attorney’s fees and costs. The parties and their counsel
10 finalized the settlement after extensive and difficult arms-length negotiations overseen by an
11 experienced and highly-regarded mediator. The Court conditionally certified the Class and
12 preliminarily approved the settlement on December 4, 2023. Since then, the Court-approved notice
13 form was mailed to the Class Members on January 2, 2024, and they reacted very favorably to the
14 settlement. As of the filing of this motion, there are no objections, and no class member has
15 requested exclusion.

16 Class Counsel secured an excellent settlement with Defendant after some two
17 years of investigation, litigation, and settlement negotiation and administration, all
18 without any compensation for services rendered or costs expended. The class notice duly
19 informed the class members that Class Counsel would request attorney’s fees not to
20 exceed 33.33% of the Gross Settlement Amount, along with reimbursement of no more
21 than \$15,000 for actual costs incurred litigating this matter. As of the filing of this
22 motion, *not one Class Member objected* to the proposed fee award. Consistent with the
23 Settlement and notice, Plaintiff now respectfully requests the Court award Class
24 Counsel's fees in the amount of \$150,000 and costs in the amount of \$14,069.68, as
25 described in the Declaration of Chad Saunders (“Saunders Decl.”) filed herewith. The
26 requested attorney’s fees are well within the range of reasonableness, especially
27 considering the complex and risky nature of this litigation, the contingent risk assumed,
28

1 the two-plus year delay in payment and, when subjected to a lodestar crosscheck, results
2 in a base lodestar that is slightly higher than the actual fee request.

3 Accordingly, on behalf of herself and the Settlement Class, Plaintiff respectfully
4 requests the Court grant this motion, give full and final approval to the settlement, grant Class
5 Counsel's request for attorney's fees and costs, and enter judgment accordingly.

6 **II. BACKGROUND/LITIGATION HISTORY**

7 The details of the procedural and factual background of this matter were outlined in
8 the Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (filed on or about
9 September 29, 2023). To re-familiarize the Court with this litigation, Defendant DFS provides
10 janitorial and maintenance services for airports, schools/colleges, recreation parks, hospitals, and
11 government buildings across the United States (specifically, California, Texas, Illinois, Florida,
12 Michigan, New York and Washington). Plaintiff was employed by DFS as a non-exempt
13 janitor/maintenance worker until separation of her employment in December 2020, and Plaintiff
14 performed janitorial and disinfecting duties at the Ontario International Airport. Plaintiff was not
15 provided with her own badge to clock herself in and out for shifts or meal breaks – her supervisor did
16 it for her. [Declaration of Chad Saunders ("Saunders Decl."), ¶ 4.]

17 Plaintiff filed her lawsuit on December 7, 2021, alleging causes of action for unpaid
18 minimum wages, unpaid overtime wages, failure to provide meal and rest breaks, wage statement
19 violations, waiting time penalties, business expense reimbursements, unfair competition, and civil
20 penalties under the Private Attorneys General Act ("PAGA"). Plaintiff alleges a number of wage
21 and hour violations by Defendant. First, she alleges DFS of failing to pay all wages due, including
22 minimum and overtime wages, because DFS rounded employee time punches to the nearest
23 quarter-hour which policy, per Plaintiff, resulted in a significant net loss of compensable time for
24 the class members. Next, Plaintiff alleged DFS failed to provide timely and uninterrupted duty
25 free meal and rest periods. Plaintiffs argued that, in addition to maintaining non-compliant written
26 meal and rest break policies, review of the time and payroll data provided by Defendant suggests
27 significant de facto break violations for late, short, or missed meal breaks and further that second
28 meal breaks were practically non-existent on shifts of 10+ hours. Plaintiffs also alleged she and

1 the class members were required to use their personal cell phones for work purposes without any
2 reimbursement. Finally, Plaintiff alleges derivative violations for failing to provide accurate
3 itemized wage statements and failing to timely pay wages upon separation of employment.

4 [Saunders Decl., ¶ 5.]

5 DFS has at all times denied Plaintiff's allegations and maintained its meal break and
6 payroll policies and procedures comply with California law, that it provided its employees with
7 required meal and rest breaks, that it properly tracked employee time and paid Plaintiff and all
8 other employees all wages due, and that any use of personal cell phones was for the employee's
9 own convenience and not reimbursable as a necessary business expense. Additionally, Defendant
10 strongly contends the case cannot be maintained as any kind of class or representative action,
11 arguing that to the extent class members missed meal breaks, that such breaks were non-
12 compliant, or that any unpaid "off the clock" work occurred, whether by rounding our otherwise, it
13 was intermittent and infrequent, against company policy, and done without the company's
14 knowledge. Thus, per DFS, evidence of such violations would be purely anecdotal and therefore
15 individualized issues predominate and trial would be unmanageable. [Saunders Decl., ¶ 7.]

16 After Plaintiff filed his complaint, the Parties initiated discovery and also engaged in
17 numerous meet and confer discussions regarding discovery, potential law and motion, and
18 potential ADR. Ultimately, the Parties agreed to mediation and also agreed to an informal
19 exchange of information to facilitate meaningful settlement discussions. The Parties then retained
20 Michael Young, Esq., a highly respected mediator with extensive wage and hour class action
21 experience and, in April 2023 and June 2023, the Parties participated in mediations with Mr.
22 Young, which led to this Agreement to settle the Action after the Parties accepted a mediator's
23 proposal. The Court granted preliminary approval to the settlement on December 4, 2023.

24 [Saunders Decl., ¶ 7.]

25 Class Notices were mailed to class members on January 2, 2024, and Class Members
26 had until February 16, 2024 to opt out or object to the proposed settlement. [Declaration of
27 Madely Nava ("Nava Decl."), ¶¶ 7, 11-13.]

1 **III. THE PROPOSED SETTLEMENT TERMS**

2 Under the proposed settlement, DFS will pay \$450,000.00 into a common fund, the Gross
3 Settlement Amount (“GSA”). Reasonable attorney’s fees of up to one-third of the GSA, or
4 \$150,000, actual litigation costs of up to \$15,000 (only \$14,069.68 is requested), a modest
5 enhancement award of up to \$5,000 for plaintiff, settlement administration costs of \$8,000, and
6 \$45,000 for alleged civil penalties under PAGA,¹ all will be paid from the GSA. The remainder of
7 approximately \$227,930 will be allocated among the Participating Class Members based on their
8 total weeks worked during the Class Period. No portion of the GSA will revert to Defendant.
9 [Saunders Decl., ¶ 10.]

10 **A. Certification of the Settlement Class**

11 The Court conditionally certified a settlement class including all individuals who worked for
12 Defendant as a non-exempt employee in California during the Class Period, which runs from
13 December 7, 2017 through December 4, 2023. The Settlement Administrator ultimately mailed
14 class notices to 328 individuals identified as members of the Class. [Nava Decl., ¶ 7.] Nothing
15 has changed to require reconsideration of the Court’s certification of the Settlement Class.

16 **B. The Benefit Conferred on the Settlement Class**

17 As noted, the settlement obligates DFS to pay \$450,000 to resolve the Settlement Class’s
18 claims, inclusive of attorney’s fees and costs. At least \$227,930 from the GSA will be distributed
19 to the Participating Class Members. This is a cash settlement that does not require Participating
20 Class Members to submit a claim form to receive their settlement share. Participating Class
21 Members will receive their settlement checks automatically via First Class U.S. Mail. Twenty
22 percent of each settlement share will be allocated to wages and the remaining eighty percent will
23 be allocated to penalties and interest. DFS will pay any and all applicable employer-side payroll
24 taxes separately and in addition to the GSA. Subject to the Court’s approval, any amounts not
25 claimed (because a class member does not cash his or her settlement check) will be forwarded to
26 _____

27 ¹ Consistent with PAGA, \$33,750 of that amount will go the LWDA for the State’s share of the civil
28 penalties, and the remaining \$11,250 will be distributed pro rata to the Aggrieved Employees (defined as
all individuals employed as non-exempt employees during the PAGA period of October 3, 2020 to
December 4, 2023).

1 the California State Controller's Unclaimed Property Fund. [Saunders Decl., ¶ 12.]

2 Each Participating Class Member will receive a share of the Net Settlement Amount based
3 on his or her position held and total weeks worked for DFS during the Class Period while
4 employed as a non-exempt employee. Thus, each Class Member's Individual Settlement Payment
5 will be calculated using criteria typically used in determining appropriate amounts of alleged
6 unpaid wages, unpaid premium wages for missed meal breaks, and potential statutory penalties
7 under applicable law. These methods are intended to ensure each Class Member receives a portion
8 of the available settlement funds corresponding to the relative value of his or her potential claims.
9 The proposed allocation provides a reasonable way to compensate Class Members based on the
10 amount of time they worked for Defendant, and the number of instances they missed a break, were
11 not provided compensation in lieu of such missed breaks, or lost wages due to Defendant's alleged
12 improper payroll practices. [Saunders Decl., ¶ 10.]

13 The average class settlement award is estimated to be around \$695, with a maximum
14 award of about \$3,500. There are approximately 214 Aggrieved Employees, and their average
15 PAGA award will be about \$53. [Nava Decl., ¶¶ 15-18.]

16 **C. Settlement Administration**

17 Apex Class Action, LLC, as the Court-approved Settlement Administrator, mailed the
18 Notice Packet to the Class members after making all reasonable effort to ascertain the best
19 mailing address, including running each address through the National Change of Address
20 database and "skip-tracing" any Notice Packets returned as undeliverable. [Nava Decl., ¶¶ 3-
21 8.] The Class Notice, previously approved by the Court, duly informed Class Members of the
22 settlement terms, including the estimated relief each Class Member will receive, the amounts
23 to be requested for attorney's fees and the class representative enhancement awards, and the
24 right to opt out of or object to the settlement. [Nava Decl., ¶ 7; Exh. A.] Phoenix mailed 328
25 Notice Packets on January 2, 2024. [Nava Decl., ¶ 7.] Ultimately, twenty six Notice Packet
26 were deemed undeliverable, representing a 92% success rate. [Nava Decl., ¶ 7.] The response
27 window for opting out of or objecting to the settlement expired on February 16, 2024. [Nava
28 Decl., ¶¶ 11-13.] As of the filing of this motion, Phoenix has received zero requests for

1 exclusion (for a 100% participation rate), and zero objections to the settlement. No disputes
2 have been submitted regarding the information used to calculate class member settlement
3 shares. [Nava Decl., ¶¶ 11-13.]

4 **D. Release of Claims**

5 All Participating Class Members will be deemed to release Defendant from all class claims
6 alleged in the operative complaint, or that could have been brought based on the allegations in the
7 operative complaint from December 7, 2017 through December 4, 2023, and the Aggrieved
8 Employees will release all claims under PAGA for the PAGA Period of October 3, 2020 to
9 December 4, 2023. The releases are limited to the claims that were actually pleaded or could have
10 been pleaded based on the alleged facts in the operative complaint. [Saunders Decl., ¶ 17.]

11 **E. PAGA Claims and Notice to the LWDA**

12 The Parties allocated \$45,000 to payment of civil penalties under PAGA for such claims
13 against DFS, as addressed in more detail below, and Plaintiff requests the Court approve that
14 amount as fair, reasonable, adequate, and in furtherance of PAGA's goals. As required by Labor
15 Code section 2699(l)(2), Plaintiff gave notice of the settlement and final approval hearing to the
16 LWDA via its online portal. [Saunders Decl., ¶ 19; Exh. 1.]

17 **IV. ARGUMENT**

18 The law favors settlement, particularly in class actions where substantial resources can
19 be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg & A.
20 Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of Seattle
21 (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v. Safeco
22 Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d
23 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly
24 compromised, the settlement of a class action requires court approval. Cal. Rule of Court
25 3.769; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple Computer
26 (2001) 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect against fraud
27 or collusion, and to ensure fairness to absent class members. Dunk, 48 Cal.App.4th at 1800-01;
28 Newberg, at §§ 11.22, *et seq.* Review is accomplished through a two-step process intended to

1 determine whether, under the totality of circumstances, the settlement is fair, reasonable and
2 adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91 Cal.App.4th at 245.

3 On a motion for final approval, the trial court is charged with determining whether, in
4 light of the total circumstances of the action and the response of the class members to the
5 proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at
6 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad discretion in making that
7 determination and may consider a number of relevant factors, including: the strength of
8 plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of
9 further litigation; the amount offered in settlement; the extent of discovery and stage of the
10 proceedings; the experience and opinion of counsel; and the reaction of class members to the
11 settlement. Id. In light of the strong judicial policy favoring the settlement of class actions,
12 courts generally apply a presumption of fairness to a proposed class action settlement when:
13 (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery
14 are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
15 similar litigation; and (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802;
16 Wershba, 91 Cal.App.4th at 245.

17 **A. The Proposed Settlement Merits Final Approval**

18 The proposed settlement of this action warrants final approval under the standards
19 summarized above. The settlement is fair, reasonable and adequate, and represents a favorable
20 resolution of highly disputed claims. Further, the settlement was overwhelmingly approved by
21 the class members, as there were no objections and no class members opted out.

22 **1. The Settlement Is the Product of Arm's-Length, Informed Negotiations**

23 The settlement is not the result of fraud or collusion. Rather, the proposed settlement
24 was reached following arm's-length negotiations presided over by Michael Young, Esq., a
25 highly respected and well-known mediator with extensive experience mediating wage and hour
26 class actions. [Saunders Decl., ¶ 7.] Moreover, Plaintiff and her counsel were well-informed
27 about the facts and the law, and counsel Zachary M. Crosner, Jamie Serb, and Chad Saunders have
28 years of litigation experience, including litigating wage and hour class actions. Plaintiff's counsel

1 are well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the
2 matter. [Saunders Decl., ¶¶ 29-37.] Defendant likewise was represented by highly-qualified and
3 experienced defense counsel. Both sides advocated vigorously for their clients, and nothing
4 was "left on the table."

5 **2. The Class Reacted Favorably to the Settlement**

6 The settlement was well-received by the class. As of the filing of this motion, no
7 objections have been filed, and zero Class Members requested exclusion. [Nava Decl., ¶¶ 11-12.]
8 As many courts recognize, class member reaction to the settlement is one of the most important
9 factors to consider in determining if final approval should be granted. Mandujano v. Basic Vegetable
10 Prods., Inc., 541 F.2d 832, 837 (9th Cir. 1976); see also In re: American Bank Note Holographics,
11 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is well-settled that the reaction of the class to the
12 settlement is perhaps the most significant factor to be weighed in considering its adequacy")
13 (internal quotation marks omitted).

14 **3. The Settlement Is Fair and Reasonable Considering the Benefits** 15 **Conferred, the Case Value, and Significant Litigation Risks**

16 The proposed settlement involves a substantial sum of money that, when distributed,
17 will confer meaningful monetary benefits on the Class Members. As described above, each
18 individual award will be based on an allocation consistent with the nature of the claims asserted
19 and will fairly and equitably allocate the available funds in relation to the degree of damage
20 each Class member incurred. While Class members who worked for only a short period of time
21 will receive relatively small sums, those with longer tenures and who worked more hours and
22 shifts throughout the class period will receive appropriately larger awards.

23 Prior to mediation, the parties engaged in extensive formal informal discovery to facilitate
24 settlement discussions. As a result, Plaintiff reviewed documents and information regarding DFS's
25 payroll practices, pay stubs and time records for a sampling of class members, meal and rest break
26 policies, etc., and information from Defendant regarding class size and breakdown of job positions,
27 work weeks, rates of pay, and other information used to formulate a damages model. This extensive
28 information then was analyzed by a consulting expert to look for meal and rest break violation rates,

1 time spent working off the clock due to donning/doffing, security checks, etc., and other issues
2 relevant to liability and damages. Plaintiff's counsel are confident they obtained sufficient
3 information to enable them to understand the law and facts of this case and make an informed
4 decision regarding the proposed settlement and whether it is in the best interests of the class.
5 [Saunders Decl., ¶¶ 8, 24.]

6 Using that data, Plaintiff ran various calculations and estimated DFS's likely maximum
7 exposure on the class claims at approximately \$3,648,000, including \$355,000 on the unpaid wage
8 claims, \$1,000,000 on the meal break claims, \$1,190,000 on the rest break claims, \$46,000 on the
9 expense reimbursement claim, \$286,000 on the wage statement claims, and \$771,000 on the
10 waiting time penalty claims. [Saunders Decl., ¶¶ 25-26.] Plaintiff and her counsel substantially
11 discounted the value of these claims, however, in light of Defendant's multi-layered defenses on
12 both class certification and on the merits, and the multiple and considerable risks posed by
13 proceeding with the litigation.

14 The unpaid wage claims focus primarily on DFS's alleged policy of rounding employee
15 time punches off to the nearest quarter-hour. Per Plaintiff, this policy unduly favored DFS as the
16 majority of time punches were rounded down and resulted in class members losing compensable
17 hours worked. In response, DFS argued its payroll policies are fully compliant, that it properly
18 tracked and paid for all hours worked at the appropriate hourly wage. Defendant also emphasized
19 time rounding is permissible under California law so long it has an overall neutral effect on
20 employee time and compensation. See's Candy Shops, Inc. v. Superior Court (2012) 210
21 Cal.App.4th 889. Finally, Defendant argued the issue would not be certifiable since it would
22 require individualized inquiries whether any compensable "off the clock" work occurred if an
23 employee clocked in a few minutes early or late, and why it was or was not documented and paid
24 for. [Saunders Decl., ¶ 27.]

25 On the meal and rest break claims, Plaintiff contends DFS's written policies are not fully
26 compliant, and Plaintiff's review of the time and payroll records provided suggested these
27 deficiencies in the written policies affected employee breaks and resulted in substantial "de facto"
28 violations. For example, Plaintiff's analysis showed an overall 85% violation rate for meal

1 periods with a least one unique violation, and a 100% violation for second meal periods. Plaintiff
2 also contends she and the class members were consistently required to work in excess of four
3 hours without receiving lawful ten minute rest periods. Even when they were provided an
4 opportunity to take such a break within each four hour period, they were consistently denied
5 compliant rest periods because such rest periods were interrupted and/or cut short by management
6 and other employees requiring assistance, and management would insist the work be done
7 immediately rather than after the rest period or they would be required to perform more work than
8 could possibly performed in their allotted time order to take such breaks. [Saunders Decl., ¶ 28.]

9 In response, DFS argued its written policies are fully compliant, that it provided
10 employees with the opportunity to receive all required breaks, and that many class members
11 waived their second meal periods. Defendant further maintained that, in light of its compliant
12 policies, whether a class member missed a meal period, received a late meal period, or missed a
13 rest break would have been aberrational and against company policy. Thus, per DFS, these issues
14 are not amenable to class or representative treatment since their resolution would require
15 individualized inquiries as to why a break was missed or non-compliant. [Saunders Decl., ¶ 29.]

16 On the expense reimbursement claim, Plaintiff alleges use of personal cellular phones was
17 necessary and consequential to employment duties for purposes of group messaging, and receiving
18 work-related calls and texts, and that some employees used their phones to clock in and out. Cochran
19 v. Schwan's Home Services, Inc. (2014) 228 Cal.App.4th 1137, 1144. In response, DFS argued it
20 provided employees with all tools and equipment necessary to perform their job duties and, to the
21 extent employees used their own phones, it was purely for personal convenience, was not necessary
22 to their employment, and therefore was not reimbursable. [Saunders Decl., ¶ 30.]

23 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid
24 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks
25 posed by the need to take into account the discretionary nature of such awards and the “good
26 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
27 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203
28 even though class prevailed on underlying claim for failure to pay living wages). Thus, while

1 these claims largely are derivative of the unpaid wage claim, they also are subject to additional
2 defenses. [Saunders Decl., ¶ 31.]

3 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
4 entitled to penalties totaling over \$2.6 million in civil penalties should Plaintiffs prevail on all claims
5 and establish violations of the multiple Labor Code sections at issue. [Saunders Decl., ¶ 32.] As
6 with the class claims, Plaintiff discounted the potential PAGA penalties based on Defendant's
7 various defenses on the merits and also accounted for the Court's wide discretion to reduce such
8 penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v. Starbucks
9 Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period after a bench
10 trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr.
11 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after trial). Accordingly, the Parties
12 allocated \$45,000 to PAGA penalties, and Plaintiffs submit this amount is reasonable under the
13 circumstances and in line with comparable settlements in other wage and hour class actions in
14 California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist.
15 LEXIS 137182 (granting final approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4
16 percent of total settlement); Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017
17 U.S. Dist. LEXIS 116303 (finding a \$7,500 PAGA payment reasonable when measured against the
18 overall settlement of \$345,000 and the possible weaknesses in Plaintiffs' case, or 2.2 percent of total
19 settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the
20 settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal.
21 Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of
22 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA
23 has not objected to the settlement.

24 The settlement obviates the significant risk that this Court may find any kind of class or
25 representative resolution unachievable or deny certification of all or some of Plaintiff's claims.
26 Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued
27 litigation would be lengthy and expensive as the parties pursued merits discovery, a probable
28 motion to decertify, as well as trial and possible appeals, and would further and substantially delay

1 any recovery by the class with no assurance of recovering significantly more than the proposed
2 settlement. While Plaintiff is confident in the merits of these claims, legitimate controversies exist
3 regarding each one of them. Plaintiff also recognizes proving the amount of wages and penalties
4 due each Class Member would be an expensive, time-consuming, and uncertain proposition.

5 [Saunders Decl., ¶ 33.]

6 Plaintiff and her counsel discounted the value of the class claims consistent with the risks
7 discussed above, and carefully weighed the likelihood of the class receiving substantially greater
8 benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and
9 substantial risks – settlement on the proposed terms and without prolonged and costly litigation
10 was in the best interests of the class, and the overall \$450,000 recovery represents a significant
11 percentage of Defendant’s potential exposure. Given these risks, a total recovery for the class of
12 \$450,000, which will result in average award of some \$695 per class member, is a significant
13 result well within the range of reasonableness considering all potential outcomes, and it will
14 provide monetary awards to all Class Members without further delay. [Saunders Decl., ¶ 34.]

15 Importantly, the mere fact that a settlement does not provide the same recovery as might be
16 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
17 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the
18 settlement process...even if the relief afforded by the proposed settlement is substantially
19 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
20 settlement because the public interest may indeed be served by a voluntary settlement in which
21 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.
22 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
23 different from the question whether the settlement is perfect in the estimation of the reviewing
24 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,
25 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential recovery
26 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
27 disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d
28 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented

1 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement
2 is non-reversionary and will provide timely benefits to the Class Members without a claims
3 process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action
4 Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at [http://](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)
5 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
6 claims process may indicate lack of fairness). Plaintiffs and their counsel submit the settlement is
7 within the “range of reasonableness,” and is fair and adequate for the Class.

8 **V. PLAINTIFF’S ENHANCEMENT AWARD**

9 Pursuant to the terms of the settlement, Plaintiff seeks a modest incentive award of
10 \$10,000 for her service in bringing these claims on behalf of the Class. The request is reasonable
11 given the risks she undertook on behalf of the Class Members, and by contacting and retaining
12 counsel to pursue these claims, Plaintiff helped make this settlement possible for the absent
13 Class Members, while shouldering the risk of being liable for Defendant’s litigation costs.
14 Plaintiff also exposed herself to unwanted notoriety related to filing a public lawsuit
15 (discoverable even through a simple google search) for the benefit of other employees, placing
16 himself at risk of discrimination by future prospective employers. As set forth in more detail in
17 her declaration filed at preliminary approval, among taking many other actions assisting in the
18 successful litigation of this case, Plaintiff provided substantial factual information and
19 documents to counsel, attended numerous meetings/phone conferences with counsel to discuss
20 the case, and kept abreast of all significant developments. [Declaration of Romualda Rao, ¶¶ 2-
21 9; Saunders Decl., ¶ 25.] Accordingly, the requested enhancement payments to Plaintiff is
22 appropriate and justified as part of the settlement. Staton v. Boeing (9th Cir. 2003) 327 F.3d
23 938, 977 (collecting cases awarding class representatives service and incentive payments ranging
24 from \$2,000 to \$25,000).

25 **VI. SETTLEMENT ADMINISTRATION COSTS**

26 The settlement provides for a payment to Apex for its services as the Settlement
27 Administrator. As set forth in the Declaration of Madely Nava, Apex has performed and will
28 continue to perform its required duties through final distribution of the settlement funds and

1 incurred \$8,000 in fees and expenses. [Nava Decl., ¶ 16.] Plaintiff accordingly requests the Court
2 approve payment of \$8,000 to Apex from the GSA. [Saunders Decl., ¶ 26.]

3 **VII. ATTORNEY'S FEES AND COSTS**

4 **A. The Attorney's Fees Requested Are Fair and Reasonable and Should Be**
5 **Approved**

6 This Court has discretion over the amount of attorneys' fees awarded and court
7 approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota
8 Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000) 82
9 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the
10 marketplace for cases involving significant contingent risk, such as this one. Deposit
11 Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446 U.S.
12 947; Lealao, 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed
13 private bargaining, if it were truly possible, might have reached" in determining a reasonable
14 fee, and a fee award should approximate a "range of fees freely negotiated in comparable
15 litigation"). Here, Class Counsel's request for attorney's fees and costs is reasonable and
16 justified by the work performed, the benefits obtained, and the contingent risk assumed.

17 As addressed in detail above, at the time the parties reached the tentative settlement
18 success for Plaintiff and the putative class was far from certain. Plaintiff faced a real risk that
19 some or all the claims would not be certified for class treatment, as Defendant had strong
20 arguments that its compensation policies were legal and properly compensated the class
21 members. Even if Plaintiff certified some or all of the claims and ultimately prevailed on the
22 merits, it undoubtedly would have taken several years to realize any recovery while they
23 pursued class certification, trial, and an almost certain appeal. [Saunders Decl., ¶¶ 15-20.]

24 Nonetheless, Plaintiff succeeded and expeditiously obtained the relief she set out to
25 obtain, and the settlement provides substantial cash payments to Class Members, with an
26 average award of over \$690, and with a maximum award of some \$3,500. Importantly as
27 well, the Class Members have been overwhelmingly supportive of the Settlement – as of the
28

1 filing of this motion, there are no objections and no opt outs to the settlement. [Nava Decl., ¶¶
2 11-12.]

3 **B. The Requested Fee Award Is Reasonable and Appropriate**

4 The United States Supreme Court has ruled the parties to a class action properly may
5 negotiate not only the settlement of the action itself but also the payment of attorney's fees.
6 Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983)
7 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee
8 provisions are the ideal towards which the parties should strive: "A request for attorney's fees
9 should not result in a second major litigation. Ideally, of course, litigants will settle the
10 amount of a fee." The United States Supreme Court has reemphasized this policy and further
11 stressed trial courts have "a responsibility to encourage agreement" on fees. Blum v. Stenson
12 (1984) 465 U.S. 886, 902 n.19.

13 As part of the Settlement, DFS agreed not to object to an award of no more than one-
14 third of the GSA for attorney's fees, or \$150,000, and up to \$15,000 in reimbursement for
15 litigation costs and expenses (although only \$14,069.68 is requested). Such a fee is
16 commensurate with what the market would provide for similar services and the Court
17 therefore can most certainly enforce the agreement. As California's Court of Appeal has
18 instructed:

19 Given the unique reliance of our legal system on private litigants to enforce
20 substantive provisions of law through class and derivative actions, attorneys
21 providing the essential enforcement services must be provided incentives roughly
22 comparable to those negotiated in the private bargaining that takes place in the
legal marketplace, as it will otherwise be economic for defendants to increase
injurious behavior.

23 Lealao, 82 Cal.App.4th at 47.

24 Here, the parties did not negotiate the inclusion of attorney's fees until after extensive
25 arms-length bargaining regarding relief to the Class was completed. [Saunders Decl.,
26 ¶ 27.] The requested fee and cost award was a product of these arms-length negotiations and
27 fairly reflects the marketplace value of the services rendered by Class Counsel in this case. As
28 a result, the fee agreed to by the parties should be approved.

1 C. **Class Counsel's Fees are Justified When Calculated as a Percentage of the**
2 **Common Fund**

3 In approving fee applications, courts typically apply either a percentage-of-recovery
4 method or the lodestar method. Laffitte v. Robert Half Int'l., Inc. (2016) 1 Cal.5th 480, 489;
5 Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other
6 grounds, Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. The California
7 Supreme Court recently recognized the advantages and equities of calculating attorney's fees
8 using the percentage-of-the-common-fund method in another wage-and-hour case:

9 The recognized advantages of the percentage method-including relative ease of
10 calculation, alignment of incentives between counsel and the class, a better
11 approximation of market conditions in a contingency case, and the
12 encouragement it provides counsel to seek an early settlement and avoid
unnecessarily prolonging the litigation convince us the percentage method is a
valuable tool that should not be denied our trial courts.

13 Laffitte, 1 Cal.5th at 503 (citations omitted).

14 Indeed, both California and federal courts have long recognized an appropriate method
15 for determining the award of attorney's fees is based on a percentage of the total value of
16 benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20 Cal.3d 25,
17 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air West, Inc.
18 (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the common fund
19 recovered operates to "spread litigation costs proportionately among all the beneficiaries so
20 that the active beneficiary does not bear the entire burden alone." Vincent, 557 F.2d at 769.

21 In determining a reasonable common fund fee award, courts should also consider the
22 fact that fees serve as an economic incentive for lawyers to bring class action litigation to
23 achieve increased access to the judicial system for meritorious claims and to enhance
24 deterrents to wrongdoing. Conte, Attorney Fee Awards (2d ed. 1993) § 104. Without
25 prosecution on a contingent basis and use of the class action mechanism, the courthouse door
26 would effectively be closed to most class members due to the relatively small size of their
27 individual claims in relation to the enormous time and cost associated with class action
28 litigation.

1 Here, Class Counsel seek a fee award for their successful prosecution and resolution of
2 this action of no more than one-third of the GSA, and specifically \$150,000. The percentage
3 requested is justified for the reasons set forth further below, and comports with fee awards
4 calculated on a percentage-of-the-benefit basis. Indeed, review of class action settlements
5 shows that courts have historically awarded fees in the range of 20 to 50 percent, depending
6 upon the circumstances of the case. In re Warner Communications Sec. Litig. (S.D.N.Y.
7 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range
8 from 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp. 13-14
9 ("Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund
10 in order to assure that the fees do not consume a disproportionate part of the recovery
11 obtained for the class, although somewhat larger percentages are not unprecedented.").

12 **D. A Lodestar Cross-Check Also Supports Class Counsel's Fee Request**

13 To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar
14 cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for bringing
15 an objective measure of the work performed into the calculation of a reasonable attorney fee."
16 Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent 210.5 hours of time on this matter,
17 resulting in a modest and very reasonable lodestar of \$159,320.

18 As is fully detailed in the Saunders Declaration, Class Counsel's efforts included: (1)
19 extensive pre-lawsuit investigation of the claims of Plaintiff and the putative class, including legal
20 research, research into similar claims and claims against other employers in the same industry, and
21 attempts to locate and contact other employees of the Defendant; (2) drafting a PAGA notice
22 letter; (3) drafting the initial complaint and related documents; (4) case management, including
23 communications with defense counsel, meeting and conferring/preparing case management
24 statements, etc.; (5) lengthy discussions with defense counsel regarding settlement/mediation and
25 informal discovery needed for meaningful settlement discussions; (6) engaging in substantial
26 informal discovery, including propounding informal discovery "requests" and reviewing
27 documents and other information produced; (7) working with a consulting expert on the analysis
28 of Defendant's production; (8) drafting two mediation briefs and accompanying damages models

1 after review and analysis of defendant's formal and informal discovery production; (9) attending
2 two all-day mediations; (10) negotiating and drafting the settlement agreement and related
3 documents; (11) drafting the motion for preliminary approval, and attending the hearing; (12)
4 administration of the settlement, including communications with the Settlement Administrator and
5 settlement class members; (13) drafting the motion for reconsideration as to the enhancement
6 award, (14) final approval and attorney's fees, and attending the final approval hearing; and (15)
7 extensive communications with the Plaintiff regarding case status, case investigation and
8 document review, mediation, and settlement terms. Additionally, Class Counsel will incur
9 additional time following final approval to, inter alia, respond to class member inquiries, attend to
10 distribution of settlement funds, and on the compliance hearing. [Saunders Decl., ¶ 28, Exh. 2.]

11 In pursuing this matter, Class Counsel incurred total attorney's fees of \$159,320, and
12 the lodestar is based on an eminently reasonable number of hours worked to litigate this matter to
13 a successful conclusion (210.5 attorney hours), and the requested attorney hourly rates are
14 reasonable and comport with hourly rates charged by other attorneys with similar experience in
15 this practice area in California. On a lodestar basis, the fee request of \$150,000 results in a base
16 lodestar that is slightly higher than the actual fee request and, accordingly, there is no request
17 for a multiplier. Class Counsel submits shows that the percentage fee request is reasonable
18 considering it is slightly less than the market value of the work performed when valued via
19 traditional hourly billing.

20 E. **The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill**
21 **Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar**
22 **Cases.**

23 What has now emerged in most fee award decisions is the recognition that fee
24 determinations in both common fund and statutory fee situations are incapable of
25 mathematical precision because of the intangible factors that must be resolved in the court's
26 discretion based on the circumstances of each particular case. Conte, § 207, p. 44. In
27 determining an appropriate fee in a common fund case, a Court must decide, based on the
28 unique posture of each case, what percentage of the common fund would most reasonably
compensate Class Counsel given the nature of the litigation and the performance of counsel.

1 Paul, Johnson, Alston & Hunt v. Graulty (9th Cir. 1989 886 F.2d 268, 272) (the benchmark
2 percentage fee may be adjusted to account for the circumstances involved in a case).

3 Courts apply a five-part test in calculating a reasonable percentage fee in common
4 fund cases: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the
5 quality of work; (4) the contingent nature of the fee and the financial burden carried by the
6 plaintiffs; and (5) awards made in similar cases. Laffitte, 1 Cal.5th at 489.

7 **1. The Results Achieved.**

8 Class Counsel obtained an excellent result in this case for the Class Members. The
9 Settlement provides real monetary benefits to the Class Members, and the Settlement is
10 particularly advantageous to the Class Member because the proceeds will be distributed
11 shortly as opposed to waiting additional years for a similar, or possibly, less favorable result.
12 Considering many individual claims would be very modest and would not be cost-effective to
13 pursue successfully, the Settlement provided them with fair compensation for their claims.
14 Moreover, the absence of any objection to either the Settlement or the attorney's fee request
15 bolsters the excellent results. Indeed, the approval of the Class is overwhelming as indicated
16 by the fact that not only one class member opted out. Additionally, the settlement amounts to
17 a substantial percentage of the maximum value of the amount the Class might have obtained if
18 it had tried the case and recovered on all theories seeking recovery of wages and penalties.
19 "It is well-settled law that a cash settlement amounting to only a fraction of the potential
20 recovery does not per se render the settlement inadequate or unfair." In re Omnivision Techs.,
21 Inc., 559 (N.D. Cal. 2008) F.Supp.2d 1036, 1042.

22 **2. Class Counsel Bore Considerable Risk.**

23 At the time of filing the complaint, Class Counsel recognized that they would have to
24 expend a substantial amount of time and advance significant costs to prosecute a statewide
25 class action suit with no guarantee of compensation or reimbursement, in the hope of
26 prevailing against a sophisticated company represented by first-rate attorneys. Despite
27 their belief in the validity of Plaintiff's claims, they also knew they faced substantial risks
28 of class certification and the ability to prove class-wide and individual damages. In light of

1 the highly uncertain nature of this suit, Class Counsel also bore the risk that Defendant would
2 dig in and attempt to bury their small firm in work. Given the small size of Class Counsel's
3 firm, not receiving any compensation for several years while simultaneously advancing
4 litigation costs posed considerable risk and difficulty. [Saunders Decl., ¶¶ 43-44.]

5 **3. The Skill Required and the Quality of Work.**

6 Practice in the narrow area of wage and hour litigation requires skill, knowledge and
7 experience. The issues presented in this case required more than just a general appreciation of
8 wage and hour law and class action procedure. This Settlement was possible only because
9 counsel persuaded Defendant that Plaintiff and the putative class had a realistic chance of
10 prevailing on their claims despite Defendant's contrary arguments, and that the case
11 would be pursued through class certification and trial if necessary. In successfully
12 navigating these hurdles, Class Counsel displayed appropriate skill while pursuing a risky
13 and difficult case.

14 **4. The Contingent Nature of the Fee and Risk Assumed**

15 There is a substantial difference between the risk assumed by attorneys being paid
16 by the hour and attorneys working on a contingent fee basis. The attorney being paid by
17 the hour can go to the bank with his fee. Powers v. Eichen (9th Cir. 2000) 229 F.3d 1249,
18 1256. The attorney working on a contingent basis can only log hours while working
19 without pay towards a result that will hopefully entitle him to a market fee considering
20 the risk and other factors of the undertaking. Id. at 1257. Otherwise, the contingent fee
21 attorney receives nothing. Id. In this case, Class Counsel subjected themselves to this
22 risk in this all or nothing contingent fee case wherein the necessity and financial burden
23 of private enforcement makes the requested award appropriate.

24 Counsel retained on a contingency fee basis, whether in private matters or in class
25 action litigation, is entitled to a premium beyond their standard, hourly, non-contingent
26 fee schedule to compensate for both the contingent risk assumed and the delay in
27 payment. The simple fact is that despite the most vigorous and competent of efforts,
28 success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d 872, 875.

1 Indeed, if counsel is not adequately compensated for the risks inherent in difficult class
2 actions, competent attorneys will be discouraged from prosecuting similar cases.
3 Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz (1989) 208
4 Cal.App.3d 279, 287.

5 Here, the contingent fee practices of Plaintiff's counsel simply do not accommodate
6 the investment of unnecessary time in a case, and the adverse resolution of any one of several
7 difficult issues present in this matter could have doomed the entire effort. As discussed, the
8 attorney's fees in this case were not only contingent but fairly risky, and there was always a
9 distinct possibility Plaintiff's counsel would receive nothing for any number of reasons.
10 [Saunders Decl., ¶¶ 43-44.] Accordingly, the contingent nature of the fee and the financial
11 burdens on Class Counsel also support the fee requested.

12 **5. Awards in Other Cases**

13 As discussed, the attorney's fees requested by Class Counsel are within the range of
14 fees awarded in comparable cases, as California courts regularly approve class action fee
15 awards amounting to 1/3 of a common fund, as approved by the California Supreme Court in
16 Lafitte. Additionally, review of class action settlements over the past 10 years shows that the
17 courts have historically awarded fees in the range of 20 to 50 percent, depending upon the
18 circumstances of the case. In re Warner Communications Sec. Litig. (S.D.N.Y. 1985) 618
19 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range from 20 to
20 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50%
21 of the fund is the upper limit on a reasonable fee award from a common fund in order to
22 assure that the fees do not consume a disproportionate part of the recovery obtained for the
23 class, although somewhat larger percentages are not unprecedented."). Class Counsel's
24 requested fees equal to one-third the gross amount recovered on behalf of the class and are
25 well within the range of reasonableness under either the percentage of the recovery or the
26 lodestar method in light of the contingent risk assumed, the delay in payment, the result
27 achieved, and the overall quality of the representation.

28 /////

1 **F. Class Counsel’s Costs and Expenses are Reasonable**

2 Plaintiff’s counsel also requests reimbursement of actual out-of-pocket expenses incurred
3 to prosecute this action. These expenses were incidental and necessary to the effective
4 representation of the employees, and Plaintiffs’ counsel is permitted to recover litigation costs and
5 expenses under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35
6 (common fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San
7 Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f
8 necessity, and for precisely the same reasons discussed above with respect to the recovery of
9 attorneys’ fees by ... [Plaintiffs’] attorneys”). Plaintiff’s counsel also is entitled to recover “those
10 out-of-pocket expenses that would normally be charged to a fee-paying client.” Harris v.
11 Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

12 As explained in the Saunders Declaration, Class Counsel incurred a total of
13 \$14,069.68 in expenses incurred in connection with this litigation. These expenses include
14 the amounts paid for court filing fees, service of process, expert fees, postage, and
15 mediation fees, all of which are costs normally billed to and paid by the client. These
16 costs were reasonably incurred in the prosecution of this matter, and were necessary for
17 the successful prosecution of the case, and accordingly, Plaintiff’s counsel requests they
18 be reimbursed in full. [Saunders Decl., ¶¶ 45-46.]

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1 **VIII. CONCLUSION**

2 For all the foregoing reasons, Plaintiff Romualda Razo respectfully requests that the Court
3 grant this motion and grant final approval of the proposed class action settlement and approve the
4 payment of PAGA penalties to the State. Plaintiff further requests the Court approve payment of
5 the Settlement Administrator's fees and expenses, approve the requested class representative
6 enhancement payment, approve the award of attorney's fees and costs as requested, and enter
7 judgment in this action. Finally, Plaintiff request the Court set a final compliance hearing for May
8 1, 2025, or a later date convenient for the Court.

9 Dated: March 28, 2024

CROSNER LEGAL, PC

10
11 By:


Chad Saunders

Attorneys for Plaintiff ROMUALDA RAZO