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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

DANIEL DOMINGUEZ, on behalf of all
Aggrieved Employees and the State of
California;

Plaintiff,

vs.

KENCO LOGISTIC SERVICES, LLC, a
Delaware Limited Liability Company; and
DOES 1 through 20, inclusive;

Defendants.

Case No.: CVRI2105393
*[Assigned to Hon. Harold Hopp, Dept 1, 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: October 11, 2023
Time: 8:30 a.m.
Dept: 1

Complaint filed: August 18, 2020

TO THE COURT AND PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT on October 11, 2023, at 8:30 a.m., or as soon thereafter
as this matter may be heard by the Honorable Harold Hopp in Department 1 of the Riverside
County Superior Court located at 4050 Main Street, Riverside, CA 92501, Plaintiff Daniel
Dominguez respectfully moves this Court for an Order granting final approval of the class action
settlement between Plaintiff and Defendant Kenco Logistic Services, LLC, which was
preliminarily approved by the Court. This Motion, which is supported and unopposed by
Defendant, seeks final approval and entry of judgment of a \$1,624,068.84 settlement on behalf of

632 Participating Class Members.

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

1. Finally certifying the Class, as defined in the Settlement Agreement and the Court’s Order Granting Preliminary Approval of the Settlement;
2. Finally appointing Plaintiff as Class Representative for purposes of settlement;
3. Finally appointing Brian Mankin and Kristina Carlson of Lauby Mankin Lauby LLP as Class Counsel for purposes of settlement;
4. Finding that the Class Notice Packet was properly provided to the Class in accordance with the Court’s Order granting Preliminary Approval;
5. Finally approving the settlement as fair, adequate, and reasonable, based upon the terms set forth in the Settlement Agreement;
6. Binding Participating Class Members, Plaintiff and the State of California to the terms of the Settlement Agreement, including the Released Class Claims and PAGA Released Claims specified therein; and
7. Retaining jurisdiction to enforce the Settlement Agreement.

This Motion will be based upon this notice; the attached memorandum of points and authorities; the Declarations of the Settlement Administrator (Taylor Mitzner of Phoenix Settlement Administrators), Class Counsel (Brian Mankin, Kristina Carlson, and Peter Carlson) and Plaintiff Daniel Dominguez filed concurrently herewith; the records and files in this action; and any other further evidence or argument that the Court may receive at or before the hearing.

Dated: September 14, 2023

LAUBY, MANKIN & LAUBY LLP

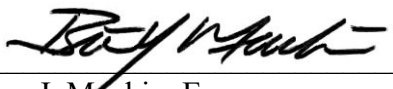
BY: 
Brian J. Mankin, Esq.
Attorneys for Plaintiff and the Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

3 Pursuant to California Rules of Court, Rule 3.769 (d) and (e), Plaintiff Daniel Dominguez
4 respectfully requests that this Court grant final approval of the Class Action and PAGA
5 Settlement Agreement and Release of Claims (the “Settlement Agreement” or “S.A.”) on file in
6 this action, which is supported and unopposed by Defendant Kenco Logistic Services, LLC, and
7 enter the proposed order and final judgment in this matter.

8 There are several essential reasons why this settlement should be approved. First, after
9 considerable work, preparation, exchange of data and mediation, the Parties reached a
10 \$1,455,000 settlement on behalf of the Class Members and Aggrieved Employees (the “Gross
11 Settlement Amount”), subject to an Escalator Clause that Class Counsel negotiated on behalf of
12 the Class that would increase the Gross Settlement Amount by \$33.06 per week worked if the
13 total weeks worked by the Class Members exceeded the cap of 48,400 workweeks. In fact, after
14 Defendant provided the final Class Data to the Settlement Administrator, it was determined that
15 the Escalator Clause was triggered because the final number of workweeks worked by all Class
16 exceeded the cap by 5,114 workweeks. This resulted in an upward adjustment of \$169,068.84 to
17 the Gross Settlement Amount, bringing the new Gross Settlement Amount to \$1,624,068.84
18 (plus Defendant will separately pay its share of payroll taxes on the wage portion of the
19 Individual Class Payments). (See Declaration of Settlement Administrator, Taylor Mitzner
20 (“Mitzner Decl.”), ¶ 12).

21 Second, the Class Members were deemed to participate in the Settlement, and were not
22 required to submit a Claim Form to receive fund. Plus, there is no reversion to Defendant, so all
23 funds will be distributed to the employees.

24 Third, there were no objections and only 1 opt-out out of 633 Class Members, meaning
25 that **99.8%** of the Class elected to participate in the settlement.

26 Finally, the release language (that was approved by the Court at Preliminary Approval) is
27 narrowly tailored to the claims alleged.
28

Thus, in accordance with the analysis and law set forth herein, the Settlement should be approved, and judgment entered based on the determination that the Settlement is fair, reasonable, adequate, and in the best interests of the Class. (Declaration of Class Counsel, Brian J. Mankin [“Mankin Decl.”] ¶¶ 13, 34).

II. SUMMARY OF THE SETTLEMENT

Defendant Kenco Logistic Services provides logistic services for a multitude of clients, that includes warehousing, distribution, and transportation of goods and materials. Plaintiff and the Class Members (the “Class” or “Class Members”) worked for Defendant in California as hourly non-exempt employees during the Class Period of November 19, 2017, through April 24, 2023. The primary claims (which Defendant vehemently disputed) involved allegations that Defendant failed to pay the Class all wages owed (due to an alleged rounding practice and off the clock work), failed to provide compliant meal and rest breaks, failed to reimburse for business expenses, as well as wage statement violations, waiting time penalties, and PAGA penalties arising from the same underlying conduct.

The Settlement includes 632 Participating Class Members (excluding the 1 opt-out), and the following is a breakdown of how the funds are allocated under the Settlement Agreement (Mitzner Decl. ¶ 14):

	Total Amount
<i>Gross Settlement Amount</i>	\$ 1,624,068.84
Attorneys’ Fees (1/3)	\$ 541,356.28
Litigation Costs	\$ 13,624.93
Administrator Costs	\$ 10,000.00
PAGA Penalties	\$ 150,000.00
Class Representative Service Award	\$ 5,000.00
<i>Net Settlement Amount</i>	\$ 904,087.63

The Participating Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. (S.A. ¶ 23). Each Participating Class Member will receive an Individual Class Payment which will be calculated and apportioned from the Net Settlement Amount based on the number of Weeks Worked by each Class Member during the Class Period. (S.A. ¶ 49(c)).

1 Assuming all of the amounts in the Settlement are approved by the Court, the highest
2 payment to Participating Class Members is estimated to be approximately \$4,799.82, the average
3 payment is estimated to be \$1,430.52 and the lowest is \$16.90 for a short term employee who
4 only worked one week during the Class Period. (Mitzner Decl. ¶ 14).

5 In addition, the 494 Aggrieved Employees will share in the \$37,500 PAGA Payment
6 based on Weeks Worked, who will receive \$75.91 each on average. (Mitzner Decl. ¶ 15).

7 The Individual Settlement Payments to Participating Class Members will be allocated as
8 15 percent to wages subject to standard withholdings and 85 percent for interest and statutory
9 penalties (pursuant to, e.g., California Labor Code sections 203, 210, 226) from which no taxes
10 will be withheld. The Settlement Administrator will issue to each Participating Class Member an
11 Internal Revenue Service Form W-2 and comparable state forms with respect to the wage
12 allocation and a Form 1099 with respect to the penalties and interest allocations. (S.A. ¶ 49(d)).
13 Payments to Aggrieved Employees will be treated as civil penalties and paid on a Form 1099.

14 The Settlement Agreement provides that Defendant shall fund the Settlement Amount
15 within 30 days of the Effective Date, which is anticipated to be the date the Court enters an order
16 granting Final Approval. The Settlement Administrator is then required to issue payments within
17 10 calendar days of receipt of the payment. (S.A. ¶ 71-72). Class Members will have 180 days
18 to cash the settlement check. (S.A. ¶ 73). If a Class Member fails to cash a check by the deadline,
19 the Administrator shall issue unclaimed funds to the California State Controller in the name of
20 the Participating Class Member/Aggrieved Employee.

21 **III. THE NOTICE PROCESS**

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

23 Pursuant to the Court's Order and the Settlement Agreement, the Parties directed the
24 Settlement Administrator to review and update the Class Members' addresses, mail the Court-
25 approved Notice Packet, and process their responses. (Mitzner Decl. ¶ 3).

26 Prior to mailing the Notice Packet, the Settlement Administrator performed a National
27 Change of Address search on all Class Members to determine if any had moved. (*Id.* at ¶ 4).
28 Then, on July 11, 2023, the Notice Packet was sent via first-class mail to the 633 Class Members

1 to advise each about the suit and settlement. There were initially 17 undeliverable or returned
2 notices, so the Administrator used updated tracking methods and remailed 11 Notice Packets.
3 Ultimately, there were 6 undeliverable Notices, resulting in a 99% success rate in mailing the
4 Notice Packets. (*Id.* at ¶ 6-7).

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

15 **B. THERE WERE NO OBJECTIONS AND 1 OPT-OUT, RESULTING IN AN IMPRESSIVE**
16 **99.8% CLASS PARTICIPATION IN THE SETTLEMENT**

17 California law makes clear that the percentage of objectors and opt-outs is an important
18 factor in the Court's consideration of a proposed class action settlement. *See Dunk v. Ford*
19 *Motor Co. (1996) 48 Cal.App.4th 1794, 1802.* Also, the Ninth Circuit recognize that in the final
20 fairness analysis, the number or percentage of class members who object to the settlement is a
21 significant factor. *See Mandujano v. Basic Vegetable Prods., Inc. (9th Cir. 1976) 541 F.2d 672,*
22 *677.*

23 Here, no objections were submitted and only 1 opt-out, meaning that 99.8% of the Class
24 Members elected to participate and receive a share of the Settlement. (Mitzner Decl. ¶¶ 8-9, see
25 also Exhibit "B" for true and correct copies of the opt-outs).

26 In light of this positive reaction to the Settlement and its overall terms, it is clear that the
27 Settlement, which was the product of arm's-length negotiations, is fair and reasonable and the
28 Parties therefore respectfully request that the Court grant final approval and enter the proposed

1 judgment as requested. *See Dunk*, 48 Cal.App.4th at 1800-1802 (class action settlements should
2 be approved if they are fair and reasonable, and a low percentage of objectors and opt-outs is
3 evidence of an agreement’s fairness).

4 **IV. EVALUATION OF THE SETTLEMENT**

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

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

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

25 **A. THE SETTLEMENT WAS REACHED THROUGH INFORMED ARMS-LENGTH** 26 **NEGOTIATION**

27 Courts presume the absence of fraud or collusion in the negotiation of a settlement,
28 unless evidence to the contrary is offered. Thus, there is a presumption here that the negotiations

1 were conducted in good faith. *See* 3 Alba Conte & Newberg, *supra*, at § 11.51. The proposed
2 settlement here was the product of arm's-length negotiation before a highly experienced and
3 reputable class action mediator to reach a settlement.

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

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

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

14 As set forth at the time of preliminary approval, Class Counsel's investigation into the
15 facts and merits of the wage and hour claims alleged included analyzing substantial amounts of
16 information, correspondence, documents, pay data, policies and procedures, and evidence
17 relating to the class size and the commonality of the claims. During this process, Plaintiff and
18 Class Counsel conducted investigations into the potential claims of the similarly situated
19 employees, as well as researching and investigating Defendant's defenses. Finally, Class
20 Counsel synthesized and analyzed information provided by Defendant as to the total Class
21 Members, the number of current and former employees, the number of employees who worked
22 during various time periods, and prepared comprehensive damages calculations regarding the
23 claims at issue.

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

26 Class Counsel are experienced in this type of litigation, and they have (and hereby do)
27 represent that this Settlement is fair and reasonable. (Mankin Decl. ¶¶ 13, 34); *see 7-Eleven*
28 *Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152 (Final

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

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

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

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

18
19 Of course, a settlement is not judged against what might have been recovered had a
20 plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought
21 to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 246, 250
22 ("Compromise is inherent and necessary in the settlement process ... even if the relief afforded
23 by the proposed settlement is substantially narrower than it would be if the suits were to be
24 successfully litigated, this is no bar to a class settlement because the public interest may indeed
25 be served by a voluntary settlement in which each side gives ground in the interest of avoiding
26 litigation").

27 In light of the uncertainties of protracted litigation, this negotiated settlement reflects the
28 best practicable recovery for the Class. While the total settlement amount is, of course, a

1 compromise figure, the potential risks and opportunities of both parties were effectively weighed
2 and considered by the parties, resulting in a fair and equitable settlement. Based upon detailed
3 data obtained through informal discovery and information exchanges, and factoring in class
4 certification probabilities and liability probabilities, Class Counsel formulated detailed damages
5 models to evaluate the claims for mediation in order to reach a realistic and reasonable resolution
6 as set forth at preliminary approval.

7 **V. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE**

8 For their efforts in creating a common fund for the benefit of the class, the Settlement
9 Agreement provided that Class Counsel seek reasonable fees of one-third of the Gross
10 Settlement Amount, which is \$541,356.28. Not only did Class Counsel negotiate a fair and
11 reasonable settlement, but also negotiated an Escalator Clause that resulted in the total Gross
12 Settlement Amount increasing by \$169,068.84. These fees are warranted under the law and
13 within the range of fees commonly awarded in similar cases.

14 As shown herein, the requested percentage of one-third of the settlement fund as payment
15 for attorneys' fees should be granted for several reasons. First, one-third is the standard
16 benchmark in California for class action settlements. *See, e.g., Chavez v. Netflix, Inc.* (2008) 162
17 Cal.App.4th 43, 66 n. 11 ("Empirical studies show that, regardless whether the percentage
18 method or the lodestar method is used, fee awards in class actions average around one-third of
19 the recovery"). Second, the California Supreme Court upheld that the percentage of the fund
20 method survives in California class action cases. *See Laffitte v. Robert Half International, Inc.*
21 (2016) 1 Cal.5th 480. Third, the requested amount is eminently reasonable through the prism of
22 a lodestar cross-check. Accordingly, this request should receive final approval.

23 **A. PLAINTIFF IS ENTITLED TO RECOVER REASONABLE ATTORNEYS' FEES UNDER**
24 **THE LABOR CODE**

25 Plaintiff and the Class in this action are entitled to recover reasonable attorneys' fees,
26 expenses and costs under section 218.5 of the California Labor Code, which provides that, "[i]n
27 any action brought for the nonpayment of wages ... the Court shall award reasonable attorneys'
28 fees and costs to the prevailing party." In addition, Plaintiff and the Class are entitled to recover

1 reasonable attorneys' fees pursuant to section 1194.2 of the Labor Code, which provides that,
2 "... any employee receiving less than the legal minimum wage ... applicable to the employee is
3 entitled to recover in a civil action the unpaid balance of the full amount of this minimum
4 wage... including ... reasonable attorney's fees, and costs of suit." Plaintiff is also entitled to
5 fees and costs under section 226(e) of the Labor Code (employee who prevails on claim for
6 itemized wage statement violation "is entitled to an award of costs and reasonable attorneys'
7 fees"), under PAGA (Labor Code § 2699(g), which provides "Any employee who prevails in any
8 action shall be entitled to an award of reasonable attorney's fees and costs, including any filing
9 fee paid"), and, potentially, section 1021.5 of the California Code of Civil Procedure.

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

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

19 ***1. The Attorneys' Fees Requested Here Fall Within the Reasonable Range***
20 ***Awarded in Cases Under the Established Common Fund Method***

21 The California Supreme Court approved trial courts' usage of the common fund method
22 of awarding attorneys' fees in wage and hour class actions, like this one, and upheld a fee
23 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte, supra*, 1 Cal.5th
24 at 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 552 ("fee awards in class actions average
25 around one-third of the recovery"). Specifically, in *Laffitte*, the Court wrote: "[w]e join the
26 overwhelming majority of federal and state courts in holding that when class action litigation
27 establishes a monetary fund for the benefit of the class members, and the trial court in its
28 equitable powers awards class counsel a fee out of that fund, the court may determine the amount

1 of a reasonable fee by choosing an appropriate percentage of the fund created”). *Id.* at 506. The
2 California Supreme Court also noted that trial courts have the discretion to award fees as a
3 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
4 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
5 evaluate the reasonableness of a requested percentage fee.”).

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

23 **2. The High Quality of Work and Excellent Result Support the Award**

24 In addition to the fact that a Class benefit was created with a non-reversionary common
25 fund settlement, the fairness of the requested fee award of 1/3 of the Settlement Amount is
26 supported by the high quality of work performed by Class Counsel and the positive result
27 obtained for the Class in spite of the risks of ongoing litigation. This result occurred because
28 Class Counsel diligently, efficiently, and creatively pursued this case and reached a settlement

1 for the benefit of the entire Class. The fact that the settlement was embraced and supported by
2 the Class, as evidenced by a 99.8% participation rate, demonstrates that Class Counsel obtained a
3 favorable result for the Class.

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

5 Rule 3.769 of the California Rules of Court requires that the Class Members be given
6 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
7 preliminarily approved by the Court and distributed to the Class Members apprised them that
8 Class Counsel will ask for fees of one-third of the Gross Settlement Amount. (Mitzner Decl.,
9 Exh. A.)

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

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

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

merits of some or all of the claims.

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

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

Id. at 399-400.

Indeed, as Plaintiff's Counsel can attest, not all class/PAGA cases are successful. Many cases end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault of counsel (i.e., bankruptcy, change in the law, consolidation or coordination or preemption, being top filed, etc.). According to Mayer Brown LLP's study entitled, *An Empirical Analysis of Class Actions*, cited in *Laguna v. Coverall North America, Inc.* (9th Cir. 2014) 753 F.3d 918, found that only one-third of class actions are successful, compared to two-thirds that are defeated and result in no payment to the class members.¹

As exemplified by the contingent nature of high risk class action litigation, Plaintiff's Counsel can further attest to having had many cases result in (a) zero recovery, (b) negative multiplier and (c) an individual settlement in lieu of a class recovery, as demonstrated below:

Sample of Cases with Zero Recovery for Class Counsel

The following is a small sample of cases in which Plaintiff's Counsel have received zero recovery on class/PAGA cases due to the company's financial condition.

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

- Heavily litigated Class/PAGA action that Class Counsel certified as a class, prevailed on summary adjudication, fully prepared for trial and one day before the start of trial, ***Defendant filed for bankruptcy, resulting in complete loss of attorneys fees and all costs advanced*** (*Garza v. Quality Conversation*, San Bernardino Superior Court Case No. CIVDS1506788);
- Class actions in which ***Defendants filed for bankruptcy, resulting in a loss of all fees and costs*** (*Gomez v. Ultimate Logistics*, Riverside Superior Court Case No. RIC1723054, and *Bonilla v. Home Energy*, San Bernardino Superior Court Case No. CIVSB2215927);
- In a pending matter, Class Counsel has litigated the case for over **5 years** with an estimated 1,000 plus hours in attorney time, leading to the class certification in favor of Plaintiff on all claims for over 1,500 class members. Despite all the work invested into the matter, including preparing for an upcoming trial, the likely outcome will either be (1) defendants filing bankruptcy that will result in zero recovery, or (2) a greatly discounted settlement based on defendant's financial obstacles and ability-to-pay;
- ***Class Counsel have been forced to dismiss class and PAGA cases without any compensation or reimbursement of fees or costs due to the financial condition of Defendant***, (*Cox v. NurseLoop*, San Bernardino Superior Court Case No. CIVSB2225440; *Joyce v. GES Distribution*, Riverside Superior Court Case No. RIC1905739).
- Of course, there is also the reality that a Defendant may prevail on the merits, whereby Class Counsel will receive no compensation and lose it out of pocket costs entirely. Class Counsel have experienced a situation wherein it prevailed at trial on a PAGA case, only to have the appellate court reverse the decision and rule in favor of Defendant, thereby reversing the fee and cost award and resulting in no recovery of fees or costs. (Mankin Decl. ¶ 21).

///

1 **Sample of Cases with Zero Recovery for Class Counsel**

2 Even when Plaintiff’s Counsel achieved a settlement and what appears to be a
3 “favorable” outcome, there are countless times when the fees requested by Plaintiff’s Counsel
4 still result in a ***large negative attorney fee multiplier***, including the following examples:

- 5 • ***Negative 4.26 multiplier:*** In *Pompa v. Landforce*, San Bernardino Superior Court
6 Case No. CIVDS1700451, Class Counsel litigated for over 4.5 years, and
7 obtained class certification. Yet, despite the fact that a settlement was eventually
8 achieved, it resulted in a negative 4.26 multiplier for Class Counsel due to
9 financial condition;
- 10 • ***Negative 4.24 multiplier:*** In *Sacks v. Natural Energy*, San Bernardino Superior
11 Court Case No. CIVDS1811288, the matter resulted in a settlement with a
12 negative 4.24 multiplier for Class Counsel due to financial condition;
- 13 • ***Negative 2.85 multiplier:*** In *Sowle v. Sherpaul*, Riverside Superior Court Case
14 No. RIC2002410, Class Counsel’s lodestar was nearly the same amount as the
15 gross settlement amount – thus, resulting in a negative 2.85 multiplier.

16 (Mankin Decl. ¶ 21).

17 **Class/PAGA Cases Converted to Small Individual Settlements**

18 There are also many situations when Plaintiff’s Counsel is forced to convert matters into
19 small individual settlements (and therein lose substantial attorneys fees) for a variety of reasons,
20 including due the financial constraints of a defendant, or because a company may engage in a
21 “Pick-up Stix Campaign” to settle directly with the class members, or because a Defendant
22 engages in a reverse auction and settles a class/PAGA case with another firm that will take less
23 (i.e., cherry picking), thereby cutting off Class Counsel’s recovery. There are indeed numerous
24 examples of this occurring that result in an individual settlement, thereby causing Class Counsel
25 to bear the burden of a loss in attorneys’ fees. (Mankin Decl. ¶ 21).

26 **These Factors Support the Fee Request and a Reasonable Multiplier**

27 The situations highlight instances where Class Counsel here (Lauby Mankin Lauby LLP)
28 has had to bear the weight of a complete loss or steep reduction in fees and costs. This is not an

1 easy burden for Plaintiff's Counsel, which is a small firm. (Mankin Decl. ¶ 20).

2 To offset these risks and unfavorable results, Courts historically award a multiplier on
3 Class Counsel's lodestar, as discussed further below. Because if the *best* Plaintiff's Counsel
4 could hope for is merely to be paid its customary hourly rate multiplied by the number of hours
5 worked on a case, then Class Counsel would not be compensated for the hardships and serious
6 risks they faced litigating contingency cases and incurring losses on the unfavorable results, and
7 would not be incentivized to take on similar cases in the future. (*Id.*)

8 The availability of a "lodestar multiplier" allows Class Counsel to be an advocate for
9 employees and take on risky cases where Class Counsel may have to shoulder the risks of
10 litigation in other cases, so that the class members do not have to forego their right to the justice
11 system. A multiplier ensures that class members in the future will have access to competent
12 counsel who are willing to offer contingency fee agreements in risky cases and be available and
13 willing to take on cases to help all Class Members – not just those employed by large
14 corporations.

15 For all of these reasons, the contingent nature of this case and the availability of a
16 lodestar multiplier supports a fee of one-third of the common fund and granting of fee request.

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

18 Despite recognized limitations of the so-called lodestar method, some California and
19 federal courts acknowledge the utility of a lodestar "cross-check."² (*Lealao, supra*, 82
20 Cal.App.4th at 46-47.) Under the "lodestar multiplier" method of cross-checking the
21 reasonableness of attorneys' fees in class actions, the court ascertains Class counsel's total
22 "lodestar" amount by multiplying the number of hours reasonably expended by each attorney or
23 legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a
24 "multiplier" to account for a range of factors, such as the novelty or difficulty of the case, its
25 contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22

26 ² In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and
27 capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient
28 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 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82
2 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is
3 within the range of fees freely negotiated in the legal marketplace in comparable litigation”].)

4 Historically, California courts have approved multipliers of 1.5 to 4. *See Coalition for*
5 *Los Angeles County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251
6 **(multiplier of 2+ approved)**; *Sternwest Corp v. Ash* (1986) 183 Cal.App.3d 74, 75. The
7 multiplier requested by Class Counsel below is within the range of multipliers found to be
8 appropriate by various federal and state courts in California. In *Sternwest Corp. v. Ash*, for
9 instance, the Court of Appeal remanded for a lodestar enhancement of “**two, three, four or**
10 **otherwise.**” *Id.* at 76; *see also Wershba*, 91 Cal.App.4th at 255 (“**Multipliers can range from 2**
11 **to 4 or even higher**”); *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 83
12 **(affirming 2.34 multiplier)**; *Coalition for Los Angeles County Planning in the Pub. Interest v.*
13 *Board of Supervisors*, 76 Cal.App.3d 241, 251 **(affirming multiplier of approximately 2)**;
14 *Craft v. County of Los Angeles*, 2008 U.S. Dist. LEXIS 27526 (C.D. Cal. Apr. 1, 2008)
15 **(applying 5.2 multiplier)**; *See also Steinder v. Am. Broadcasting Co., Inc.* (9th Cir. 2007) 248
16 Fed. Appx. 780, 783 **(approving multiplier of 6.85** and citing cases with comparable or higher
17 multipliers); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 (finding no abuse
18 of discretion in **awarding a multiplier of 3.65**). In *Torchia v. WW Grainger, Inc.* (E.D. Cal.
19 2014) 304 F.R.D. 256, 275-278, a federal magistrate in Fresno approved attorneys’ fees of
20 \$550,000 **constituting a 3.57 multiplier** on class counsel’s total lodestar of \$153,856 in a wage
21 and hour class action.

22 The actual aggregated lodestar between the Plaintiff’s attorneys that worked on this case
23 is approximately \$294,295. This results in a fair and reasonable multiplier of 1.6 based on the
24 original Gross Settlement Amount (before the Escalator Clause was triggered) and a 1.8
25 multiplier based on the current Gross Settlement Amount (after the triggering of the Escalator
26 Clause). The hours and rates are summarized in the following table, and in the submitted
27 declarations of Plaintiff’s counsel:
28

Attorney/Timekeeper	Rate	Hours	Fee
Brian J. Mankin <i>Trial Counsel / Partner</i> (22 Years)	\$775	193.3³	\$149,807.50
Kristina Carlson <i>Associate</i> (9 Years)	\$550	218.9	\$120,395.00
Peter Carlson <i>Senior Associate</i> (9 Years)	\$575	41.9	\$24,092.50
Grand Total for All Attorneys			\$294,295.00

(Mankin Decl. ¶ 25; P. Carlson Decl. ¶ 9; K. Carlson Decl. ¶ 5).

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

³ Includes an estimated 15 hours of additional work preparing for and attending the hearing, as well as 20 hours in anticipated work to be performed after the final approval, particularly in light of the payment plan, as it will require considerable more work with counsel, administrator, and Class Members.

1 based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 24.)

2 Class Counsel are also highly experienced in Class/PAGA litigation, including having
3 been named by the LA Times as one “Southern California Leading Lawyers” in the May 2023
4 issue of Consumer Attorney’s of Southern California (a recognition given to 17
5 employment/labor law attorneys in 2023), having been selected as “Super Lawyer” in
6 employment litigation over the last 5 consecutive years, having achieved large settlements,
7 having prevailed at trial in PAGA-only actions and Class Action jury trials. (Mankin Decl. ¶¶ 2-
8 6). Indeed, Class Counsel’s rates are typical of the rates charged by defense counsel with similar
9 experience doing similar employment law work in this region.

10 Thus, Plaintiff’s Counsel’s rates reasonable and typical, and the attorneys’ fees requested
11 confirm that the fee request is fair and reasonable under the lodestar multiplier cross-check.

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

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

14 The Settlement Agreement authorized litigation costs of up to \$25,000. (S.A. ¶ 49(f)).
15 Class Counsel’s actual costs through the final approval hearing are estimated to be \$13,624.93.
16 (Mankin Decl. ¶ 28, and Exhibit “D” thereto). These costs include mediation fees, filing fees,
17 expert charges, CourtCall charges, and process server fees.

18 **B. THE REQUESTED SERVICE AWARD IS REASONABLE AND MERIT APPROVAL**

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

1 Defendant agreed to pay a Service Award of \$5,000 to Plaintiff in recognition of his
2 contribution as Class Representative. (See Plaintiff's Decl. ¶ 3-8). Moreover, Plaintiff came
3 forward and undertook significant risks, including the risk of being blackballed in the industry
4 and the risk that he could have been liable for Defendant's costs if he lost. This factor is a
5 significant one for a wage earner, and the potential risk is very real. See *Whiteway v. FedEx*
6 *Kinkos Office & Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) 2007 WL 4531783, at *3 ("the few
7 courts to consider this 'class representatives' dilemma' have not found it inequitable to assess
8 costs upon the lead or named plaintiff in a class action.").

9 Plaintiff also committed a significant number of hours to assist with the
10 litigation/settlement processes of this case. The requested Service Award is reasonable,
11 particularly in light of the substantial benefits Plaintiff generated for the Class Members, the
12 risks he undertook and the time and effort devoted to assisting with the Class/PAGA
13 settlement. (See Plaintiff's Decl. ¶ 4-8).

14 The Notice sent to each Class Member detailed the proposed service award. No Class
15 Member objected to the proposed service award to Plaintiff. Thus, Plaintiffs request that the
16 Court approve the award because it is both reasonable and appropriate.

17 **VII. OTHER MATTERS FOR FINAL APPROVAL**

18 **A. SETTLEMENT ADMINISTRATION COSTS**

19 The Administrator, Phoenix Settlement Administrators, agreed to administer the
20 settlement for a flat-fee of \$10,000. (Mitzner Decl. ¶ 17-21). This amount was fully disclosed
21 to the Class Members in the Class Notice, and no Class Members objected to it. Phoenix
22 Settlement Administrator's declaration also fully complies with the CMO in regards to the
23 fixed fee and other work to be performed. As such, the Parties request that the Administrator's
24 fee request be approved.

25 **B. UNCASHED CHECKS**

26 The Settlement Agreement provides that if checks are not cashed within the 180 day
27 check cashing period, then the uncashed funds will be issued to the California State Controller's
28 Office in the name of the Class Member and/or Aggrieved Employee.

1 **C. FINAL REPORT**

2 Defendant will issue payment to the Administrator within 30 days of the Effective Date,
3 which is expected to occur on the day that Final Approval is granted. The Administrator will
4 then have 10 days to issue payment to the Class Members, who will then have 180 days to cash
5 their checks. Thus, the Parties propose submitting a declaration from the Administrator setting
6 forth the money that was actually paid to the class members and potentially to the State on
7 approximately June 17, 2024.

8 **D. SUBMISSION TO THE LWDA**

9 As set forth in the Mankin Declaration at ¶ 30, the settlement and this motion were
10 concurrently submitted to the LWDA in accordance with Labor Code § 2699(1)(2).

11 **VIII. CONCLUSION**

12 Plaintiff respectfully submit that the Settlement is fair, adequate, and reasonable, and
13 merits approval. This motion is unopposed by Defendant.

14 Dated: September 14, 2023

LAUBY, MANKIN & LAUBY LLP

15
16 BY:



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 September 14, 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.

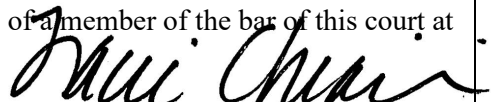
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 September 14, 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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