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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

JUAN NIEVES, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

KLLM TRANSPORT SERVICES, LLC, a
Texas Limited Liability Company; and DOES
1 through 20, inclusive;

Defendants.

Case No.: CIVSB2134796
*[Assigned to Hon. Judge David Cohn,
Dept 26, 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: March 23, 2023
Time: 10:00 a.m.
Dept: S26

Complaint filed: December 21, 2021

TO THE COURT AND PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT on March 23, 2023, at 10:00 a.m., or as soon thereafter
as this matter may be heard by the Honorable David Cohn in Department S26 of the San
Bernardino County Superior Court, located at 247 West Third Street San Bernardino CA 92415,
Plaintiff Juan Nieves will respectfully move this Court for an Order granting final approval of
the class action settlement between Plaintiff and Defendant KLLM Transport Services, LLC,
which was preliminarily approved by the Court on November 29, 2022. This Motion, which is
supported and unopposed by Defendant, seeks final approval and entry of judgment of a

1 \$535,000 settlement on behalf of the Class Members.

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

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

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

8 3. Finally appointing Brian Mankin and Peter Carlson of Lauby Mankin Lauby LLP
9 as Class Counsel for purposes of settlement;

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

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

14 6. Binding participating Class Members to the terms of the Settlement Agreement,
15 including the Release specified therein; and

16 7. Retaining jurisdiction to enforce the Settlement Agreement.

17 This Motion will be based upon this notice; the attached memorandum of points and
18 authorities; the Declarations of the Settlement Administrator (Cassandra Polites of ILYM
19 Group), Class Counsel (Brian Mankin and Peter Carlson) and Plaintiff filed concurrently
20 herewith; the records and files in this action; and any other further evidence or argument that the
21 Court may receive at or before the hearing.

22 Dated: March 1, 2023

LAUBY, MANKIN & LAUBY LLP

23
24 BY:


25 Brian J. Mankin, Esq.
26 Attorneys for Plaintiff and the Class
27
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

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

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

- 10 • After extensive work, the Parties reached a \$535,000 settlement tailored to a
11 limited release of the claims alleged on behalf of the Class Members;
- 12 • The Class Members were deemed to participate in the Settlement, and were not
13 required to submit a Claim Form to receive funds;
- 14 • No reversion to Defendant; and
- 15 • There are zero objections and one opt-out, meaning that 99% of the Class elected
16 to participate in the Settlement;

17 In accordance with the analysis and law set forth herein, the Settlement should be
18 approved, and judgment entered based on the determination that the Settlement is fair,
19 reasonable, adequate, and in the best interests of the Class. (Declaration of Class Counsel Brian
20 J. Mankin [“Mankin Decl.”] ¶¶ 13, 33).

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

22 KLLM is a logistics and transportation company, which transports perishable
23 commodities to customers throughout the United States. Plaintiff and the Class Members include
24 all current and former truck drivers who resided in California and who were employed by
25 Defendant (“Class Members”) at any time from December 21, 2017 through August 31, 2022
26 (the “Class Period”). Plaintiff and the putative class alleged claims for: (1) failure to pay
27 minimum and regular wages, (2) failure to provide meal periods, (3) failure to provide rest
28 breaks, (4) failure to reimburse for business expenses, (5) failure to timely pay final wages, (6)

failure to provide accurate itemized wage statements, (7) unfair and unlawful competition pursuant to Business and Professions Code §17200 *et seq.*, and (8) related claims under PAGA.

The Settlement includes 99 Participating Class Members. The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Cassandra Polites (“Polites Decl.”), ¶ 13-14):

	Total Amount
<i>Gross Settlement Amount</i>	\$ 535,000.00
Attorneys’ Fees (1/3)	\$ 178,333.33
Litigation Costs	\$ 7,486.58
Administrator Costs	\$ 6,500.00
PAGA Penalties	\$ 50,000.00
Class Representative’s Service Award	\$ 5,000.00
<i>Net Settlement Amount</i>	\$ 287,680.09

The Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Based on 99 Participating Class Members, and assuming all of the amounts are approved by the Court, the highest payment to Participating Class Members is estimated at \$7,776.00, and the average payment is \$2,876.80. Of course, the actual payment will be calculated on a pro-rata basis according to the number of Pay Periods Worked by each Class Member. The Participating Class collectively worked 9,064 Pay Periods during the Class Period, so each Pay Period will have a value of approximately \$31.74 on average. (Polites Decl. ¶ 14-15).

Additionally, the Settlement Agreement provides that the 25% of the PAGA Penalties will be allocated to the Aggrieved Employees. In this case, 63 Aggrieved Employees collectively worked 3,618 Pay Periods, and will share in the \$12,500 award (accounting for 25% of the total \$50,000 allocation), resulting in an average payment of \$304.04 each. (Polites Decl. ¶ 16-17).

The Settlement Agreement provides that one-third of each Individual Settlement Amount shall constitute wages (for which each Participating Class Member will be issued an IRS Form W-2 for such payment), and the remaining two-thirds shall constitute interest and penalties (with

1 IRS Form 1099 reporting). (S.A. ¶ 49(d)). Additionally, the PAGA Penalties payable to the
2 Aggrieved Employees will be classified entirely as civil penalties and shall be reported as
3 required on an IRS Form 1099. (S.A. ¶ 49(h)). Defendant will separately pay its share of
4 employer payroll taxes on the sum allocated to wages. (S.A. ¶ 49(a)).

5 Defendant is required to deposit the Settlement Amount, along with the employers' share
6 of payroll taxes owed, within 15 calendar days after the "Effective Date." (S.A. ¶ 73). Within
7 10 days after the receipt of payment, the Settlement Administrator shall issue payments to cover
8 all court-approved payments. (S.A. ¶ 74).

9 **III. THE NOTICE PROCESS**

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

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

14 Prior to mailing the Notice Packet, the Settlement Administrator performed a National
15 Change of Address search on all Class Members to determine if any had moved. (*Id.* ¶ 5). Then,
16 on December 23, 2022, the Notice Packet was sent via first-class mail to 100 Class Members to
17 advise each about the suit and settlement. (*Id.* ¶ 6). Ultimately, after efforts to ensure delivery of
18 all Notice Packets, it was determined that 6 of the Notice Packet were deemed to be
19 undeliverable, meaning that there was a 94% success rate in mailing the Notice Packets. (*Id.* ¶ 8).

20 In accordance with California Rules of Court, Rules 3.766(d) and 3.769(f), the Notice
21 Packet provided Class Members with (1) a brief explanation of the case; (2) an explanation of
22 each Settlement Class Member's right to opt out of the settlement class; (3) an explanation of the
23 process (and relevant deadlines) through which a Settlement Class Member could opt out of the
24 settlement class; (4) notice about the binding nature of the Judgment for Class Members who do
25 not opt out; (5) an explanation of each Settlement Class Member's right to appear through
26 counsel; (6) an explanation of each Settlement Class Member's right to appear at the fairness
27 hearing and express views on the settlement, i.e., object or otherwise respond; and (7) an
28 explanation of each Settlement Class Member's right to participate in the Settlement and receive

1 payment accordingly. (See **Exhibit A** to the Polites Decl.).

2 **B. THERE ARE ZERO OBJECTIONS AND ONE OPT-OUT, RESULTING IN AN**
3 **IMPRESSIVE 99% CLASS PARTICIPATION IN THE SETTLEMENT**

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

12 Here, there are zero objections and one opt-out to the Settlement, meaning that 99% of
13 the Class Members will receive a share of the Settlement (Polites Decl. ¶¶ 10-11). Thus, the
14 Class fully viewed this as a fair and reasonable settlement.

15 **IV. EVALUATION OF THE SETTLEMENT**

16 It is axiomatic that California law strongly favors and encourages settlements. *See*
17 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236. This presumption in favor of
18 settlement applies with particular force in the context of class actions. *See Ferguson v. Lieff,*
19 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (Kennard, J., concurring and dissenting)
20 (“[p]ublic policy favoring settlement is especially weighty for class actions”); *Bell v. Am. Title*
21 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607-1608 (affirming approval of a class settlement and
22 implicitly endorsing its citation of federal precedent for the notion that there is a “strong public
23 policy in favor of settlement of class actions”); *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976)
24 529 F.2d 943, 950 (“it hardly seems necessary to point out that there is an overriding public
25 interest in settling and quieting litigation. This is particularly true in class action suits”).

26 When entertaining a request for final approval of a class action settlement, a court’s
27 fundamental consideration is whether the settlement is fair, adequate and reasonable. *See Dunk,*
28 *supra*, 48 Cal.App.4th at 1801, fn. 7 (noting that state courts look to federal authority concerning

1 the approval of class settlements); California Rules of Court, Rule 3.769 (g).

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

8 **A. THE SETTLEMENT WAS REACHED THROUGH INFORMED ARMS-LENGTH**
9 **NEGOTIATION**

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

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

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

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

26 As set forth at the time of preliminary approval, Class Counsel's investigation into the
27 facts and merits of the wage and hour claims alleged included analyzing substantial amounts of
28 information, correspondence, documents, pay data, policies and procedures, and evidence

1 relating to the class size and the commonality of the claims. During this process, Plaintiff and
2 Class Counsel conducted investigations into the potential claims of the similarly situated
3 employees, as well as researching and investigating Defendant's defenses. Finally, Class
4 Counsel synthesized and analyzed information provided by Defendant as to the total Class
5 Members, the number of current and former employees, the number of employees who worked
6 during various time periods, and prepared comprehensive damages calculations regarding the
7 claims at issue.

8 **C. CLASS COUNSEL ARE EXPERIENCED IN SIMILAR LITIGATION AND ENDORSE THE**
9 **SETTLEMENT**

10 Class Counsel are experienced in this type of litigation, and they have (and hereby do)
11 represent that this Settlement is fair and reasonable. (Mankin Decl. ¶¶ 13, 33); *see 7-Eleven*
12 *Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152 (Final
13 approval of settlement affirmed where counsel were all experienced litigators with class-action
14 experience and had recommended settlement based on the negotiated terms).

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

16 Plaintiff's Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
17 which sufficiently provided the Court with "basic information about the nature and magnitude
18 of the claims in question and the basis for concluding that the consideration being paid for the
19 release of those claims represents a reasonable compromise." *Kullar v. Foot Locker Retail,*
20 *Inc.* (2008) 168 Cal.App.4th 116, 133. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
21 (2010) 186 Cal.App.4th 399, later clarified *Kullar* by noting that an explicit statement of the
22 maximum theoretical amount that the class could recover was not part of the "basic
23 information" that counsel was required to produce:

24 Greenwell misunderstands *Kullar*, apparently interpreting it to
25 require the record in all cases to contain evidence in the form of an
26 explicit statement of the maximum amount the plaintiff class could
27 recover if it prevailed on all its claims – a number which appears
28 nowhere in the record of the case. But *Kullar* does not, as
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.

1 Of course, a settlement is not judged against what might have been recovered had a
2 plaintiff prevailed at trial, nor does the settlement have to provide 99% of the damages sought to
3 be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 246, 250
4 (“Compromise is inherent and necessary in the settlement process ... even if the relief afforded
5 by the proposed settlement is substantially narrower than it would be if the suits were to be
6 successfully litigated, this is no bar to a class settlement because the public interest may indeed
7 be served by a voluntary settlement in which each side gives ground in the interest of avoiding
8 litigation”).

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

16 **V. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND REASONABLE**

17 For their efforts in creating a common fund for the benefit of the class – **netting the**
18 **Class Members over \$2,800 each on average** – the Settlement Agreement provided that Class
19 Counsel may seek reasonable fees of \$178,333.33 (one-third of the Settlement Amount). This
20 amount will be paid from the Settlement Amount, as provided by the Settlement Agreement.
21 These fees are warranted under the law and within the range of fees commonly awarded in
22 similar cases.

23 As shown herein, the requested percentage of one-third of the settlement fund as payment
24 for attorneys’ fees should be granted for several reasons. First, one-third is the standard
25 benchmark in California for class action settlements. *See, e.g., Chavez v. Netflix, Inc.* (2008) 162
26 Cal.App.4th 43, 66 n. 11 (“Empirical studies show that, regardless whether the percentage
27 method or the lodestar method is used, fee awards in class actions average around one-third of
28 the recovery”). Second, the California Supreme Court recently held that the percentage of the

1 fund method survives in California class action cases. *See Laffitte v. Robert Half International,*
2 *Inc.* (2016) 1 Cal.5th 480. Third, the requested amount is eminently reasonable through the
3 prism of a lodestar cross-check. Accordingly, this request should receive final approval.

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

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

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

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

28 ///

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

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

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

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

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

In addition to the fact that a Class benefit was created with a \$535,000 non-reversionary common fund settlement, the fairness of the requested fee award of 1/3 of the Settlement Amount is supported by the high quality of work performed by Class Counsel and the positive result obtained for the Class. This result occurred because Class Counsel diligently, efficiently, and creatively pursued this case and reached a settlement for the benefit of the entire Class. The fact that the settlement was embraced and supported by the Class, as evidenced by a 99% participation rate, demonstrates that Class Counsel obtained a favorable result for the Class.

3. Class Members Had Sufficient Notice of the Requested Fees

Rule 3.769 of the California Rules of Court requires that the Class Members be given notice of any agreement regarding an application for attorneys’ fees. Here, the Notice preliminarily approved by the Court and distributed to the Class Members apprised them that “Class Counsel will ask for fees of one-third (\$178,333.33) of the common fund Settlement Amount as reasonable compensation for the work Class Counsel performed and will continue to perform in this Lawsuit through finalization of the Settlement...” (Polites Decl., Exh. A.)

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

Members' due process rights were fulfilled.

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

An additional factor militating in favor of the granting of the requested fee award is the fact that this case was both legally and financially risky for Class Counsel. *See Vizcaino v. Microsoft Corp* (9th Cir. 2002) 290 F.3d 1043, 1048-49. Class Counsel have been representing the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-recovery after a substantial investment of time, money, and resources, and have done so since the inception of this case without any payment or compensation.

Indeed, as Class 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/coordination/preemption, being top filed, etc.). According to Mayer Brown LLP's study entitled, *An Empirical Analysis of Class Actions*, cited in *Laguna v. Coverall North America, Inc.* (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

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

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

Despite recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar "cross-check."² (*Lealao, supra*, 82 Cal.App.4th at 46-47.) Under the "lodestar multiplier" method of cross-checking the reasonableness of attorneys' fees in class actions, the court ascertains Class counsel's total "lodestar" amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a

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

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

“multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”].) The actual aggregated lodestar between attorneys that worked on this case is approximately \$168,065, resulting in a tiny 1.06 multiplier, as shown in the following table and declarations of counsel.

Attorney/Timekeeper	Rate	Hours	Fee
Brian J. Mankin <i>Trial Counsel / Partner</i> (22 Years)	\$775	98³	\$75,950
Peter J. Carlson <i>Senior Associate</i> (8 Years)	\$575	160.2	\$92,115
Grand Total for All Attorneys			\$168,065

(See Mankin Decl., ¶ 25; Carlson Decl., ¶ 8-9.)

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 rate for an 8–10-year attorney to be \$676/hour and a 11-19 year attorney at \$764/hour, and a 20+ year attorney at \$919/hour). 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

³ Includes an estimated 30 hours of additional work preparing for and attending the hearing, as well as anticipated work to be performed after the final approval hearing with counsel, administrator, employees, and the court.

1 Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and
2 \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los
3 Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most
4 importantly, the information provided in the Real Rate Report is not based on self-reported
5 numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is
6 based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 24.)

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

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

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

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

20 The Settlement Agreement authorized litigation costs of up to \$20,000. (S.A. ¶ 49(f)).
21 However, Class Counsel's actual costs through the final approval hearing were \$7,486.58, so
22 this is the amount requested. The saving will be placed in the Net Settlement Amount for
23 payment to the Class Members. (Mankin Decl. ¶ 27). These costs include mediation fees,
24 filing fees, expert data analysis costs, CourtCall charges, and process server fees.

25 **B. THE REQUESTED SERVICE AWARD IS REASONABLE AND MERITS APPROVAL**

26 A named plaintiff is an essential ingredient of any class action and an incentive award
27 is appropriate to induce individuals to step forward and assume the burdens and obligations of
28 representing the Class. Courts regularly approve a service payment to compensate named

1 plaintiff for their service to the class and the risks they incurred during the course of the
2 litigation. *See, e.g. Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726
3 (upholding “service payments” to named Plaintiff for their efforts in bringing class action);
4 *Rodriguez v. West Publishing* (9th Cir. 2009) 563 F.3d 948, 959 (stating that incentive awards
5 are “intended to compensate class representatives for work done on behalf of the class, to make
6 up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
7 recognize their willingness to act as a private attorney general.”).

8 Under the Settlement, Defendant agreed to pay a Service Award of \$5,000 to Plaintiff
9 in recognition of his contribution as a Class Representative.

10 His efforts included providing factual background for the Class and PAGA complaint;
11 providing documents and information about Defendant’s compensation plan; participating in
12 phone calls to discuss litigation and settlement strategy; making himself available throughout
13 the litigation to assist with analyzing the claims and defenses; helping Class Counsel prepare
14 for the mediation; and reviewing the settlement documents. The Class Representative also
15 assumed significant risk in bringing this litigation – namely, had he lost, he could have been
16 ordered to pay Defendant’s costs. This factor is a significant one for a wage earner, and the
17 potential risk is very real. *See Whiteway v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal.
18 Dec. 17, 2007) 2007 WL 4531783, at *3 (“the few courts to consider this ‘class
19 representatives’ dilemma’ have not found it inequitable to assess costs upon the lead or named
20 plaintiff in a class action.”)

21 Plaintiff also committed a significant number of hours to assist with the
22 litigation/settlement processes of this case and entered into a general release of all claims
23 against Defendant, whereas the Class Members only released the claims alleged. The
24 requested Service Award is reasonable, particularly in light of the substantial benefits Plaintiff
25 generated for the Class Members, the risks he undertook, and the general release he gave in
26 order to benefit the class. (*See* Pla Decl. ¶¶ 3-8).

27 The Notice sent to each Class Member detailed the proposed service award. No Class
28 Member objected to the proposed payment to Plaintiff. Thus, Plaintiff request that the Court

1 approve the awards because it is both reasonable and appropriate.

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

3 **A. SETTLEMENT ADMINISTRATION COSTS**

4 The Administrator agreed to administer the settlement for a flat-fee of \$6,500. (Polites
5 Decl. ¶ 18). As such, the Parties request that the Administrator's fee be approved.

6 **B. UNCASHED CHECKS**

7 The Settlement Agreement and Final Order provides that uncashed checks will be
8 issued to the California State Controller in the name of the Class Member.

9 **C. FINAL REPORT**

10 Defendant is required to deposit the Settlement Amount within 15 calendar days after
11 the "Effective Date". The Effective Date will be the date of Final Approval in light of the lack
12 of objections and requests to intervene. The Settlement Administrator will have 10 days after
13 receipt of payment to issue checks to the Class Members, who will then have 180 days to cash
14 their checks. Therefore, the earliest date of the check cashing deadline is October 14, 2023.
15 As such, the Parties propose submitting a final report in the form of a declaration from the
16 Administrator (setting forth the money that was actually paid to the class members and will be
17 paid to the State Controller) on approximately November 15, 2023.

18 **D. SUBMISSION TO THE LWDA**

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

21 **VIII. CONCLUSION**

22 Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and
23 merits approval. This motion is unopposed by Defendant.

24 Dated: March 1, 2023

LAUBY, MANKIN & LAUBY LLP

25
26 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 March 1, 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.

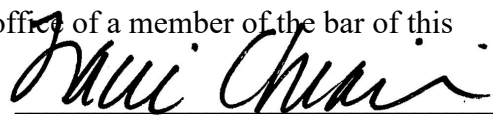
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 March 1, 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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