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

KRISTY ELWELL, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

DIVERSITY WIRELESS PARTNERS LLC,
a California Limited Liability Company; and
DOES 1 through 20, inclusive;

Defendants.

Case No.: CIVSB2134554
*[Assigned to Hon. Judge David Cohn, Dept
S26, 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: August 16, 2023
Time: 9:00 a.m.
Dept: S26

Complaint filed: December 17, 2021

TO THE COURT AND PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT on August 16, 2023, at 9:00 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 Kristy Elwell will respectfully move this Court for an Order granting final approval of
the class action settlement between Plaintiff and Defendants Diversity Wireless Partners, LLC,
and its owners, Jon Garcia and Victor Chapron, Sr., (collectively, “Defendants” or “Diversity”),
which was preliminarily approved by the Court on April 19, 2023. This Motion, which is

1 supported and unopposed by Defendants, seeks final approval and entry of judgment of a
2 \$250,000 settlement on behalf of the Class Members.

3 Specifically, Plaintiff will and hereby does move the Court to grant final approval of the
4 Class Action and Private Attorney General Act Settlement Agreement and Release of Claims
5 (the "Settlement Agreement"), and enter the proposed order and final judgment filed
6 concurrently herewith:

7 1. Finally certifying the Class, as defined in the Settlement Agreement and the
8 Court's Order Granting Preliminary Approval of the Settlement;

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

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

12 4. Finding that the Class Notice was properly provided to the Class in accordance
13 with the Court's Order granting Preliminary Approval;

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

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

18 7. Retaining jurisdiction to enforce the Settlement Agreement.

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

24 Dated: July 25, 2023

LAUBY, MANKIN & LAUBY LLP

25
26 BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

3 Pursuant to California Rules of Court, Rule 3.769 (d) and (e), Plaintiff respectfully
4 requests that this Court grant final approval of the Class Action and Private Attorney General
5 Act Settlement Agreement and Release of Claims (the “Settlement Agreement” or “S.A.”)
6 already on file in this action, which is supported and unopposed by Defendants Diversity
7 Wireless Partners, LLC, and its owners, Jon Garcia and Victor Chapron, Sr., (collectively,
8 “Defendants” or “Diversity”), and enter the proposed order and final judgment in this matter.

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

- 11 • After extensive work, the Parties reached a \$250,000 settlement tailored to a
12 limited release of the claims alleged on behalf of the Class Members;
- 13 • The Class Members were deemed to participate in the Settlement, and were not
14 required to submit a Claim Form to receive funds;
- 15 • No reversion to Defendant; and
- 16 • There are zero objections and zero opt-outs, meaning that 100% of the Class
17 elected to participate in the Settlement;

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

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

23 Plaintiff and the Class Members include all current and former non-exempt employees
24 employed by Defendant Diversity Wireless in California at any time during the Class Period of
25 December 17, 2017, through December 31, 2022 (the “Class Members”). Plaintiff and the
26 putative class alleged claims for: (1) failure to pay minimum wages, (2) failure to pay overtime,
27 (3) failure to provide meal periods, (4) failure to provide rest breaks, (5) failure to pay vested
28 vacation, (6) failure to reimburse for business expenses, (7) failure to timely pay final wages, (8)

failure to provide accurate itemized wage statements, (9) unfair and unlawful competition pursuant to California Business and Professions Code §§ 17200 *et seq.*, and (10) related claims under PAGA.

The Settlement includes 342 Participating Class Members¹. The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Jarrod Salinas (“Salinas Decl.”), ¶ 11-12):

Gross Settlement Amount	\$ 250,000.00
Attorneys’ Fees (1/3)	\$ 83,333.33
Litigation Costs	\$ 9,752.92
Administrator Costs	\$ 11,000.00
PAGA Penalties	\$ 10,000.00
Class Representative Service Award	\$ 10,000.00
Net Settlement Amount	\$ 125,913.75

The Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Assuming all of the amounts are approved by the Court, the highest payment to Participating Class Members is estimated at \$2,196.61, and the average payment is \$368.17. Of course, the actual payments will be calculated on a pro-rata basis according to the number of Weeks Worked by each Class Member. The Participating Class collectively worked 8,369 Weeks during the Class Period, so each week will have a value of approximately \$15.05. (Salinas Decl. ¶ 11-12).

Additionally, 25% of the PAGA Penalties will be allocated to the Aggrieved Employees. In this case, 312 Aggrieved Employees collectively worked 7,558 Workweeks, and will share in the \$2,500 award (accounting for 25% of the total \$10,000 allocation), resulting in an average Individual PAGA Payment of \$8.01. (Salinas Decl. ¶ 13).

The Settlement Agreement provides that 20% of each Individual Class Payment shall constitute wages (for which each Participating Class Member will be issued an IRS Form W-2

¹ Based on the information provided before mediation, and in preparation for filing the Motion for Preliminary Approval (MPA), Defendant estimated that there were 300 Class Members. However, the actual numbers provided to the Administrator reveal a small increase in the class size to 342, resulting in a small decrease in the value per Workweek from \$16.52 to \$15.05. However, in light of the lack of objections or opt-outs, Defendant’s financial condition and the three part payment plan, the settlement remains fair, reasonable and adequate in the eyes in counsel.

1 for such payment), and the remaining 80% shall constitute interest and penalties (with IRS Form
2 1099 reporting). (S.A. ¶ 49(d)). Additionally, the PAGA Penalties payable to the Aggrieved
3 Employees will be classified entirely as civil penalties and shall be reported as required on an
4 IRS Form 1099. (S.A. ¶ 49(h)). Defendants will separately pay its share of employer payroll
5 taxes on the sum allocated to wages. (S.A. ¶ 49(a)).

6 Defendants are required to fund the Gross Settlement Amount under a three-part payment
7 plan that divides each payment proportionally between Plaintiff, the Participating Class
8 Members, the Aggrieved Employees, the LWDA, Class Counsel (for fees and costs), and the
9 Settlement Administrator. (S.A. ¶ 73). Under this payment plan, Defendant is required to fund:
10 (1) \$80,000 by the later of August 1, 2023, or 10 days after the Effective Date, (2) another
11 \$80,000 by the later of February 1, 2024, or 10 days after the Effective Date, and (3) the
12 remaining \$90,000 balance of the Gross Settlement Amount by the later of August 1, 2024, or 10
13 days after the Effective Date. (S.A. ¶ 73(a)-(c)). The Parties also negotiated an “Acceleration
14 Clause” which causes all remaining balances due and payable immediately if Defendants fail to
15 timely make any installment payments and fail to cure the default. (S.A. ¶ 74).

16 **III. THE NOTICE PROCESS**

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

18 Pursuant to the Court’s Order and the Settlement Agreement, the Parties directed the
19 Settlement Administrator to review and update the Class Members’ addresses, mail the Court-
20 approved Notice Packet, and process their responses. (Salinas Decl. ¶ 2).

21 Prior to mailing the Notice Packet, the Settlement Administrator performed a National
22 Change of Address search on all Class Members to determine if any had moved. (*Id.* ¶ 4). Then,
23 on May 15, 2023, the Notice Packet was sent via first-class mail to 342 Class Members to advise
24 each about the suit and settlement. (*Id.* ¶ 5). Ultimately, it was determined that only one Notice
25 Packet was undeliverable, meaning that there was a 99.7% success rate in mailing the Notice
26 Packets. (*Id.* ¶ 6-7).

27 In accordance with California Rules of Court, Rules 3.766(d) and 3.769(f), the Notice
28 Packet provided Class Members with (1) a brief explanation of the case; (2) an explanation of

1 each Class Member’s right to opt out of the settlement class; (3) an explanation of the process
2 (and relevant deadlines) through which a Class Member could opt out of the settlement class; (4)
3 notice about the binding nature of the Judgment for Class Members who do not opt out; (5) an
4 explanation of each Class Member’s right to appear through counsel; (6) an explanation of each
5 Class Member’s right to appear at the fairness hearing and express views on the settlement, i.e.,
6 object or otherwise respond; and (7) an explanation of each Class Member’s right to participate
7 in the Settlement and receive payment accordingly. (See **Exhibit A** to the Salinas Decl.).

8 **B. THERE ARE ZERO OBJECTIONS AND OPT-OUTS, RESULTING IN AN IMPRESSIVE**
9 **100% CLASS PARTICIPATION IN THE SETTLEMENT**

10 California law makes clear that the percentage of objectors and opt-outs is an important
11 factor in the Court’s consideration of a proposed class action settlement. *See Dunk, supra*, 48
12 Cal.App.4th at 1802. Indeed, the Ninth Circuit and other federal courts recognize that in the
13 final fairness analysis, the number or percentage of class members who object to the settlement is
14 a significant factor. *See Mandujano v. Basic Vegetable Prods., Inc.* (9th Cir. 1976) 541 F.2d
15 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY 2001) 127 F.Supp.2d 418, 425
16 (“[i]t is well settled that the reaction of the class to the settlement is perhaps the most significant
17 factor to be weighed in considering its adequacy.”).

18 Here, there are zero objections and zero opt-outs to the Settlement, meaning that 100% of
19 the Class Members will receive a share of the Settlement (Salinas Decl. ¶¶ 8-9). Thus, the Class
20 fully viewed this as a fair and reasonable settlement.

21 **IV. EVALUATION OF THE SETTLEMENT**

22 It is axiomatic that California law strongly favors and encourages settlements. *See*
23 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236. This presumption in favor of
24 settlement applies with particular force in the context of class actions. *See Ferguson v. Lieff,*
25 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (Kennard, J., concurring and dissenting)
26 (“[p]ublic policy favoring settlement is especially weighty for class actions”); *Bell v. Am. Title*
27 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607-1608 (affirming approval of a class settlement and
28 implicitly endorsing its citation of federal precedent for the notion that there is a “strong public

policy in favor of settlement of class actions”); *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 (“it hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits”).

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

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

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

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

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

As the Settlement Agreement itself reveals, there is no preferential treatment for any segment of the class, as the Settlement is designed to fairly and adequately compensate all Class Members. And, pursuant to California Rules of Court Rule 3.769 (b), the parties have disclosed

1 the agreed upon and proposed attorney fee award, which is well within the range of
2 reasonableness for matters of this nature.

3 **B. PLAINTIFF’S INVESTIGATION WAS SUFFICIENT**

4 As set forth at the time of preliminary approval, Class Counsel’s investigation into the
5 facts and merits of the wage and hour claims alleged included analyzing substantial amounts of
6 information, correspondence, documents, pay data, policies and procedures, and evidence
7 relating to the class size and the commonality of the claims. During this process, Plaintiff and
8 Class Counsel conducted investigations into the potential claims of the similarly situated
9 employees, as well as researching and investigating Defendants’ defenses. Finally, Class
10 Counsel synthesized and analyzed information provided by Defendants as to the total Class
11 Members, the number of current and former employees, the number of employees who worked
12 during various time periods, and prepared comprehensive damages calculations regarding the
13 claims at issue.

14 **C. CLASS COUNSEL ARE EXPERIENCED IN SIMILAR LITIGATION AND ENDORSE THE**
15 **SETTLEMENT**

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

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

22 Plaintiff’s Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
23 which sufficiently provided the Court with “basic information about the nature and magnitude
24 of the claims in question and the basis for concluding that the consideration being paid for the
25 release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail,*
26 *Inc.* (2008) 168 Cal.App.4th 116, 133. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
27 (2010) 186 Cal.App.4th 399, later clarified *Kullar* by noting that an explicit statement of the
28 maximum theoretical amount that the class could recover was not part of the “basic

1 information” that counsel was required to produce:

2 Greenwell misunderstands Kullar, apparently interpreting it to
3 require the record in all cases to contain evidence in the form of an
4 explicit statement of the maximum amount the plaintiff class could
5 recover if it prevailed on all its claims – a number which appears
6 nowhere in the record of the case. But Kullar does not, as
7 Greenwell claims, require any such explicit statement of value; it
8 requires a record which allows “an understanding of the amount
9 that is in controversy and the realistic range of outcomes of the
10 litigation.

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

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

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

27 For their efforts, the Settlement Agreement provided that Class Counsel may seek
28 reasonable fees of \$83,333.33 (one-third of the Settlement Amount). This amount will be paid
29 from the Settlement Amount, as provided by the Settlement Agreement. These fees are
30 warranted under the law and within the range of fees commonly awarded in similar cases.

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

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

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

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

27 Under the "common fund" doctrine, the request for attorneys' fees in the amount of 1/3
28 of the common fund is reasonable and appropriate, because (1) it is within the approved range

1 for percentages awarded as attorneys’ fees in similar cases; (2) it is supported by the high quality
2 of Class Counsel’s work on this case and the results obtained for the Class; (3) the Class had
3 sufficient notice of the fee request; (4) it is supported by the fact that this case was handled on a
4 contingency basis and was undertaken despite various risks and expenses; and (5) the lodestar
5 cross-check supports the fee request.

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

9 The California Supreme Court approved trial courts’ usage of the common fund method
10 of awarding attorneys’ fees in wage and hour class actions, like this one, and upheld a fee
11 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte, supra*, 1 Cal.5th
12 at 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 342 (“fee awards in class actions average
13 around one-third of the recovery”). Specifically, in *Laffitte*, the Court wrote: “[w]e join the
14 overwhelming majority of federal and state courts in holding that when class action litigation
15 establishes a monetary fund for the benefit of the class members, and the trial court in its
16 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
17 of a reasonable fee by choosing an appropriate percentage of the fund created”). *Id.* at 506. The
18 California Supreme Court also noted that trial courts have the discretion to award fees as a
19 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
20 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
21 evaluate the reasonableness of a requested percentage fee.”).

22 The California Supreme Court’s recent *Laffitte* decision was consistent with its prior
23 rulings recognizing that “when a number of persons are entitled in common to a specific fund,
24 and an action brought by ... plaintiff for the benefit of all results in the creation or preservation
25 of that fund, such ... plaintiff may be awarded attorneys’ fees out of the fund.” *Serrano III v.*
26 *Priest* (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A]
27 lawyer who recovers a common fund . . . is entitled to reasonable attorneys’ fees from the fund
28 as a whole”). Notably, when fees are calculated as a percentage of the common fund, they should

1 be calculated based on the amount that was available to be claimed, rather than as a percentage
2 of the actual amount claimed. *See Boeing Co.*, 444 U.S. at 475-6, 480-1 (the SCOTUS held that
3 attorneys for a successful class may recover a fee based on the fund created for the class, even if
4 some class members make no claims against the fund, so that money remains in it that will be
5 returned to the Defendants, explaining: “[t]heir [class members’] right to share the harvest of the
6 lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund
7 created by the efforts of the class representatives and their counsel.” *See also Williams v. MGM-*
8 *Pathe Communs. Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (trial court “abused its discretion by
9 basing the fee on the class members’ claims against the fund rather than on a percentage of the
10 entire fund or on the lodestar”).

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

13 In addition to the fact that a Class benefit was created under the common fund settlement,
14 the fairness of the requested fee award of 1/3 of the Settlement Amount is supported by the high
15 quality of work performed by Class Counsel and the positive result obtained for the Class. This
16 result occurred because Class Counsel diligently, efficiently, and creatively pursued this case and
17 reached a settlement for the benefit of the entire Class. The fact that the settlement was embraced
18 and supported by the Class, as evidenced by a 100% participation rate, demonstrates that Class
19 Counsel obtained a favorable result for the Class.

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

21 Rule 3.769 of the California Rules of Court requires that the Class Members be given
22 notice of any agreement regarding an application for attorneys’ fees. Here, the Notice
23 preliminarily approved by the Court and distributed to the Class Members apprised them that
24 “Class Counsel will ask for fees of one-third (\$83,333.33) of the common fund Settlement
25 Amount as reasonable compensation for the work Class Counsel performed and will continue to
26 perform in this Lawsuit through finalization of the Settlement...” (Salinas Decl., Exh. A.)

27 The Class Notice also advised the class members of the procedures for objecting to the
28 proposed settlement and appearing at the settlement hearing, where they could present their

1 objections to any aspect of the settlement, including the amount of attorneys' fees to be awarded
2 to class counsel. *Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883
3 ("Procedural due process requires that affected parties be provided with 'the right to be heard at a
4 meaningful time and in a meaningful manner'"). In accordance with the foregoing, it is
5 respectfully submitted that the instant notice complied with Rule 3.769 and, as a result, the Class
6 Members' due process rights were fulfilled.

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

10 An additional factor militating in favor of the granting of the requested fee award is the
11 fact that this case was both legally and financially risky for Class Counsel. *See Vizcaino v.*
12 *Microsoft Corp* (9th Cir. 2002) 290 F.3d 3123, 3128-49. Class Counsel have been representing
13 the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-
14 recovery after a substantial investment of time, money, and resources, and have done so since the
15 inception of this case without any payment or compensation.

16 Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
17 end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault of
18 counsel (i.e., bankruptcy, change in the law, consolidation/coordination/preemption, being top
19 filed, etc.). According to Mayer Brown LLP's study entitled, An Empirical Analysis of Class
20 Actions, cited in *Laguna v. Coverall North America, Inc.* (9th Cir. 2014) 753 F.3d 918, found
21 that only one-third of class actions are successful, compared to two-thirds that are defeated and
22 result in no payment to the class members.²

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

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

25 Despite recognized limitations of the so-called lodestar method, some California and
26 federal courts acknowledge the utility of a lodestar "cross-check."³ (*Lealao, supra*, 82
27

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

³ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient

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 “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, 3125-96; *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 \$110,475, resulting in a negative 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	55⁴	\$42,625
Peter Carlson <i>Senior Associate</i> (8 Years)	\$575	118	\$67,850
Grand Total for All Attorneys			\$110,475

(See Mankin Decl., ¶ 25; Carlson Decl., ¶ 5-6.)

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

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.

⁴ Includes an estimated 10 hours of additional work preparing for and attending the hearing, as well as 25 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 Rate Report is based on an enormous and statistically significant compilation of data: 25.8
2 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from
3 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer's ELM Solutions, Inc.,
4 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide
5 the hourly rates for partners and associates in major metropolitan areas. For the southern
6 California area, which is based on billing entries for 1,125 partners and 1,566 associates, the
7 Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and
8 \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los
9 Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most
10 importantly, the information provided in the Real Rate Report is not based on self-reported
11 numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is
12 based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 24.)

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

16 Class Counsel are also highly experienced in Class/PAGA litigation, including having
17 been named by the LA Times as one of "Southern California Leading Lawyers" in the May 2023
18 issue of Consumer Attorneys of Southern California (a recognition given to only 17
19 employment/labor attorneys), plus having been selected as a "Super Lawyer" in employment
20 litigation over the last five consecutive years, having achieved large settlements including one of
21 the largest PAGA awards in California's history and collecting in excess of \$250 million for
22 their clients, having prevailed at trial against two separate Fortune 100 companies, including a
23 PAGA-only action in Orange County and a Class Action jury trial in Los Angeles. (Mankin
24 Decl. ¶¶ 2-6). Indeed, Class Counsel's rates are typical of the rates charged by defense counsel
25 with similar experience doing similar employment law work in this region.

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

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

3 The Settlement Agreement authorized litigation costs of up to \$20,000. (S.A. ¶ 49(f)).
4 However, Class Counsel's actual costs through the final approval hearing were \$9,752.92, so
5 this is the amount requested. The saving will be placed in the Net Settlement Amount for
6 payment to the Class Members. (Mankin Decl. ¶ 27). These costs include mediation fees,
7 filing fees, expert data analysis costs, CourtCall charges, and process server fees.

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

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

19 Under the Settlement, Defendants agreed to pay a Service Award of \$10,000 to Plaintiff
20 in recognition of her contribution as a Class Representative.

21 Her efforts included providing factual background for the Class and PAGA complaint;
22 providing documents and information about Defendant's compensation plan; participating in
23 phone calls to discuss litigation and settlement strategy; making himself available throughout
24 the litigation to assist with analyzing the claims and defenses; helping Class Counsel prepare
25 for the mediation; and reviewing the settlement documents. The Class Representative also
26 assumed significant risk in bringing this litigation – namely, had she lost, she could have been
27 ordered to pay Defendants' costs. This factor is a significant one for a wage earner, and the
28 potential risk is very real. *See Whiteway v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal.

1 Dec. 17, 2007) 2007 WL 4531783, at *3 (“the few courts to consider this ‘class
2 representatives’ dilemma’ have not found it inequitable to assess costs upon the lead or named
3 plaintiff in a class action.”)

4 Plaintiff also committed a significant number of hours to assist with the
5 litigation/settlement processes of this case and entered into a general release of all claims
6 against Defendants, whereas the Class Members only released the claims alleged. The
7 requested Service Award is reasonable, particularly in light of the substantial benefits Plaintiff
8 generated for the Class Members, the risks she undertook, and the general release she gave in
9 order to benefit the class. (*See* Pla Decl. ¶¶ 3-9).

10 The Notice sent to each Class Member detailed the proposed service award. No Class
11 Member objected to the proposed payment to Plaintiff. Thus, Plaintiff request that the Court
12 approve the awards because it is both reasonable and appropriate.

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

14 **A. SETTLEMENT ADMINISTRATION COSTS**

15 The Administrator agreed to administer the settlement for a flat-fee of \$11,000.00,
16 which is a bit higher than normal due to the payment plan. (Salinas Decl. ¶ 15). As such, the
17 Parties request that the Administrator’s fee be approved.

18 **B. UNCASHED CHECKS**

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

21 **C. FINAL REPORT**

22 As set forth above and in the Final Order, Defendants final payment is due on about
23 August 1, 2024. As a result, the 180-day check cashing deadline is projected to occur on about
24 February 8, 2025. As such, the Parties propose submitting a final report in the form of a
25 declaration from the Administrator (setting forth the money that was actually paid to the class
26 members and will be paid to the State Controller) on approximately March 14, 2025.

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1 **D. SUBMISSION TO THE LWDA**

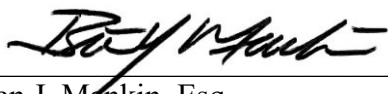
2 As set forth in the Mankin Declaration at ¶ 29, the settlement and this motion are
3 concurrently being submitted to the LWDA in accordance with Labor Code § 2699(1)(2).

4 **VIII. CONCLUSION**

5 Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and
6 merits approval. This motion is unopposed by Defendants.

7
8 Dated: July 25, 2023

LAUBY, MANKIN & LAUBY LLP

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10 BY: 
11 Brian J. Mankin, Esq.
12 Attorneys for Plaintiff and the Class
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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 July 25, 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 July 25, 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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