

Eric K. Yaeckel [CSB No. 274608]
yackel@sullivanlawgroupapc.com

Ryan T. Kuhn [CSB No. 324538]
ryan@sullivanlawgroupapc.com

SULLIVAN & YAECKEL LAW GROUP, APC

2330 Third Avenue
San Diego, California 92101
(619) 702-6760 * (619) 702-6761 FAX

Attorneys for Plaintiff ARATH RODRIGUEZ, Individually, and on behalf of other members of the general public similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

ARATH RODRIGUEZ, Individually, and
on behalf of other members of the general
public similarly situated

Plaintiff

v.

ANV INVESTMENTS, INC., a California
Corporation and DOES 1-10, inclusive.

Defendants.

CASE NO. 37-2022-00006121-CU-OE-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION
FOR FINAL APPROVAL OF (1) CLASS
ACTION SETTLEMENT; (2)
ATTORNEYS' FEES AND COSTS; and
(3) CLASS REPRESENTATIVE AWARD**

Date: January 12, 2024

Time: 9:00 a.m.

Judge: Hon. Eddie C. Sturgeon

Dept.: C-67

TABLE OF CONTENTS

1		
2	I.	Summary of Request 1
3	II.	Procedural History.....1
4	III.	Settlement Terms.....2
5	1.	Contingent Nature of the Settlement.....2
6	2.	Description of the Settlement Classes.....2
7	3.	Appointment of Settlement Claims Administrator.....3
8	4.	Scope of the Release.....3
9	5.	Cash Payment and Allocation.....3
10	6.	Contingent Costs.....4
11	IV.	Controlling Law.....5
12	A.	Final Approval of Class Settlements.....5
13	B.	Attorneys’ Fees6
14	C.	Class Representative Enhancements7
15	V.	Argument.....7
16	A.	The Proposed Settlement Is Made in Good Faith.....7
17	1.	Strength of Plaintiffs’ Case and Investigation and Discovery.....7
18	2.	The Risk, Expense, Complexity, and Likely Duration of Further Litigation.....8
19	3.	The Experience and Views of Counsel.....9
20	4.	Presence of a Governmental Actor.....9
21	5.	Reaction of the Class Members to the Proposed Settlement.....9
22	B.	The Requested Attorney’s Fees and Costs are Reasonable.....10
23	1.	The Contingent Nature of the Fee Agreement, and Inherent Risk Therein, Supports Awarding a <i>Percentage of the Recovery</i>10
24	2.	The Continuing Obligation to Devote Time and Effort to the Litigation.....11
25	3.	The Extent to which the Litigation Precluded Other Employment.....12
26	4.	The Experience, Reputation and Ability of the Attorneys who Performed the Services, and the Skill They Displayed in Litigation.....13
27		
28		

1	5.	The Amount Involved and the Results Obtained on behalf of the Class.....	13
2	6.	A Percentage of the Common Fund Award is Proper.....	13
3	7.	The Lodestar Cross-check.....	14
4	8.	The Lodestar Multiplier.....	14
5	9.	The Amount of Costs.....	15
6	C.	The Requested Class Representative Enhancement is Reasonable.....	15
7	VI.	Conclusion.....	16
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

CASES

<i>Beasley v. Wells Fargo Bank</i> (1991) 235 Cal. App. 3d 1407, 1419	12
<i>Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.</i> (S.D.N.Y. 1979) 480 F.Supp. 1195	14
<i>Brinker Rest. Corp. v. Superior Court</i> (2012) 53 Cal. 4 th 1004.....	8
<i>Boeing v. Van Gemert</i> (1980) 444 U.S. 472, 478.....	11,14
<i>Carrington v. Starbucks Corp.</i> (2018) 30 Cal. App. 5 th 504	13
<i>Cellphone Termination Fee Cases</i> (2010) 186 Cal.App.4 th 1380.....	7
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal. App. 4 th 43.....	5,7,14
<i>Clark v. Am. Residential Servs. LLC</i> (2009) 175 Cal. App. 4 th 785, 804.....	8
<i>Donohue v. AMN Services LLC</i> (2021) 11 Cal. 5 th 58.....	13
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4 th 1794.....	5,6
<i>Estate of Stauffer</i> (1959) 53 Cal. 2d 124, 132.....	12
<i>Golba v. Dick's Sporting Goods, Inc.</i> (2015) 238 Cal. App. 4 th 1251, 1270	7
<i>Guippone v. BHS & B Holdings, LLC</i> (S.D.N.Y. Oct. 28, 2011) 2011 U.S. Dist. LEXIS 126026 *20.....	17
<i>Hernandez v. Vitamin Shoppe Indust., Inc.</i> (2009) 174 Cal. App. 4 th 1441.....	6
<i>In re Ampicillin Antitrust Litig.</i> (DDC 1981) 526 F. Supp. 494.....	13
<i>In re Mego Fin. Corp. Sec. Litig.</i> (9 th Cir. 2000) 213 F.3d 454, 463	7
<i>In re Microsoft I-V Cases</i>	

1	(2006) 135 Cal. App. 4th 706.....	5,6
2	<i>In re Omnivision Technologies, Inc.</i>	
3	(N.D. Cal. 2008) 559 F.Supp.2d 1036,1043	11
4	<i>In re Washington Public Power Supply System Securities Litigation</i>	
5	(9 th Cir. 1994) 19 F.3d 1291, 1299.....	11
6	<i>Jordan v. California Dept of Motor Vehicles</i>	
7	(2002) 100 Cal. App. 4 th 431, 446	12
8	<i>Kullar v. Foot Locker Retail, Inc.</i>	
9	(2008) 168 Cal. App. 4th 116.....	5,8
10	<i>Laffitte v. Robert Half Intern. Inc.</i>	
11	(2016) 1 Cal.5th 480.....	6,7,14
12	<i>Lealao v. Beneficial California, Inc.</i>	
13	(2000) 82 Cal. App. 4 th 51.....	14
14	<i>Ross v. A.H. Robins,</i>	
15	(S.D.N.Y. 1988) 700 F. Supp. 682, 684	11
16	<i>Thurman v. Bayshore Transit Mgmt, Inc.</i>	
17	(2012) 203 Cal. App. 4th 1112.....	10
18	<i>Winslow v. Harold G. Ferguson Corp.</i>	
19	(1944) 25 Cal. 2d 274, 284.....	14
20	OTHER	
21	Newberg §14.03.....	14

I. SUMMARY OF REQUEST

This motion seeks final approval of a “Wage and Hour” class action settlement, that has been litigated over the last year. Plaintiff ARATH RODRIGUEZ, Individually, and on behalf of other members of the general public similarly situated, (“Plaintiff”) claims on behalf of a class of nonexempt employees who worked for the named Defendant during the operative class period, set forth herein.

Following the distribution of the approved Notice to the class, the proposed final settlement figures are as follows:

- Final size of potential class: **323 Participating Class Members**
- Objections to Settlement: **Zero (0)**
- Opt-Outs: **Zero (0)**
- Gross settlement amount (“GSA”): **\$250,000.00**
- Claims administration: **\$8,964.64**
- Costs/expenses of litigation: **\$9,058.90**
- LWDA payment: **\$18,000.00** (75% Share of \$24,000 allocation)
- Attorney's fees: **\$83,333.33 (1/3 of Settlement)**
- Class representative incentive: **\$7,500.00**

Please Note: There have been **no** (zero) objections to this proposed settlement. The *average* gross payment to each participating Class Member based on the above figures is **\$375.24** which does not account for the fact that certain class members will receive more or less than an “average” share, depending on the length of time each worked for Defendant during the class period. (Please see the declaration of Settlement Administrator Jeffrey Johnson at ¶16).

II. PROCEDURAL HISTORY

Should the Court deem it relevant, a much more detailed procedural history of the case, and summary of all claims, was already set forth in Plaintiff’s original Motion for Preliminary Approval. (ROA # 23). The Court **granted** Preliminary Approval of the parties’ original settlement on October, 3, 2023. (ROA # 40).

The parties attended a highly adversarial mediation, presided over by a well respected “Wage and Hour” mediator Doug Glass). The parties spent several additional months negotiating all final

1 settlement terms and obtaining preliminary approval from the Court. (ROA # 23, p. 3).

2 Most importantly for purposes of final approval, zero employees (out of 323 individuals)
3 objected, and zero have opted out. (Johnson decl. ¶¶ 11-12). Thus, the class overwhelmingly supports
4 the proposed settlement.

5 The parties' Joint Stipulation of Class and PAGA Action (hereinafter the "Agreement")
6 contains the terms of the class action settlement and is already on file with the Court. (ROA # 30:
7 **Exhibit A** thereto). Although it is not being re-lodged, for ease of reference, the Agreement will be
8 cited to herein again as Agreement or Exhibit A)¹.

9 **III. SETTLEMENT TERMS**

10 The Agreement includes the following key terms:

11 **1. Contingent Nature of the Settlement**

12 This Agreement is contingent upon preliminary and final approval by the Court, and
13 certification of the Settlement Class is only for purposes of Settlement. If, for any reason, the
14 Settlement does not become final, any certification of any Settlement Class will be vacated, and the
15 Parties will be returned to their positions with respect to the Action as if the Agreement had not been
16 entered into. (Ex. A at ¶34).
17

18 **2. Description of the Settlement Class**

19 Solely for the purposes of the Agreement, the parties have agreed that the term "Class
20 Member"
21 all current and former non-exempt employees of Defendants who were
22 employed in California between February 16, 2018 through June 1, 2023.
23 (**Exhibit A** at § (I)(LL).)

24 Notices were sent to 323 individuals, as determined by Defendant's employment records.
25 (Johnson decl.¶ 6(a).) Zero individuals have opted out of the litigation. (Johnson decl. ¶ 11.) **No**
26 Class Members (**zero**) have objected to the proposed settlement. (Johnson decl. ¶12.) Following the
27 Notice, there are a total of 323 total class members who will all receive a share of the settlement
28

¹ This Memorandum incorporates by reference the definitions in the Agreement and the terms used herein are intended to have the same meaning as set forth in the Agreement.

proceeds. (Johnson decl. ¶13.)

3. Appointment of Settlement Claims Administrator

CAC Services Group, LLC (“CAC”) was used as the “Settlement Administrator” for purposes of providing the Notice (and its instructions) to Settlement Class Members, issuing all payments pursuant to the Agreement, and to track all opt-outs and objections to the settlement.

As detailed in the accompanying declaration, CAC successfully completed all steps of the Notice process. (See Johnson decl. ¶¶ 4-14).

4. Scope of the Release

For purposes of the Agreements, Class Members release all claims that are either or both: (1) alleged in the Complaint; or (2) which relate to or arise out of the allegations and claims asserted in the Complaint and could have been alleged in the Complaint relating in any way to violations of the wage and hour provisions of the California Labor Code or the California Wage Orders, or any wage and hour provisions of California law. The precise release language is reflected in **Exhibit A** at § (I)¶ DD. There is a separate release of the PAGA claims for anyone who worked within the PAGA period. **Exhibit A** at § (I)¶ EE.

5. Cash Payment and Allocation

The Agreement provides for an automatic cash payment to the members of the class who did not opt out. The settlement is non-reversionary, in that all of the Net Settlement Amount, after all costs and fees are deducted, will be paid to the participating Class Members. The Cash Payment will be allocated as follows: twenty-five percent (25%) constitutes wages (subject to withholdings and deductions and reported as wage income on a Form W-2) and seventy-five percent (75%) constitutes non-wage penalties, and interest. (**Exhibit A** at ¶ 3(d).)

Based on the final counts after the notice period, participating Class Members will be entitled to an average share of approximately **\$375.24**. (Johnson decl ¶16.) The actual amounts received vary based on length of employment during the class period. The highest estimated payout is \$1,457.79 and the lowest amount is \$0.86. (Johnson decl. ¶16.)

1 Fairness is presumed where (1) the settlement is reached through arm's-length bargaining;
2 (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)
3 counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Chaves v.*
4 *Netflix, Inc.*, (2008) 162 Cal.App.4th 43, 52; *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th 1794,
5 1802. But, even where it appears the settlement is fair, the court must still determine whether the
6 settlement should be approved after considering "the strengths and weaknesses of the claims and
7 risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116,
8 129. It considers: (i) the strength of the plaintiff's case; (ii) the risks, expense, complexity and likely
9 duration of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv)
10 the amount offered in settlement; (v) the extent of discovery completed; (vi) the stage of the
11 proceedings; (vii) the experience and views of counsel; (viii) the presence of a governmental
12 participant; and (ix) any reaction of putative class members. *Dunk, supra*, 48 Cal.App.4th, at 1800-
13 1801; *In re Microsoft, supra*, 135 Cal.App.4th, at 723.

15 The court should approve a class action settlement when the settlement is fair and falls
16 "within the range of reasonableness." *Hernandez v. Vitamin Shoppe*, (2009) 174 Cal.App.4th 1441,
17 1446.

18 **B. ATTORNEYS' FEES**

19 The California Supreme Court has recently determined that the percentage of the benefit,
20 ("percentage method") is proper for determining a reasonable attorney fee award in an employment
21 class action case. *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480.

23 The California Supreme Court's rationale was as follows:

24 we clarify today that use of the percentage method to calculate a fee in a common
25 fund case, where the award serves to spread the attorney fee among all the
26 beneficiaries of the fund, does not in itself constitute an abuse of discretion. We join
27 the overwhelming majority of federal and state courts in holding that when class
28 action litigation establishes a monetary fund for the benefit of the class members, and
the trial court in its equitable powers awards class counsel a fee out of that fund, the
court may determine the amount of a reasonable fee by choosing an appropriate
percentage of the fund created. The *recognized advantages* of the percentage
method—including relative ease of calculation, alignment of incentives between
counsel and the class, a better approximation of market conditions in a contingency
case, and the encouragement it provides counsel to seek an early settlement and
avoid unnecessarily prolonging the litigation (See pt. I, ante; *Lealao, supra*, 82

1 Cal.App.4th at pp. 48–49, 97 Cal.Rptr.2d 797; *Rawlings v. Prudential–Bache*
2 *Properties, Inc.*, *supra*, 9 F.3d at p. 516)—**convince us the percentage method is**
3 **a valuable tool that should not be denied our trial courts.** *Laffitte v. Robert Half*
4 *Intern. Inc.* (2016) 1 Cal.5th 480, 503 (emphasis added).

5 The Court also determined that while permissible, a lode-star “cross check” of the percentage
6 method was **not** required of California’s trial courts. *Id.* at 506.

7 In fact the *Laffitte* Court further noted how advocating a lodestar, over a percentage of the
8 recovery, creates perverse litigation incentives:

9 Critics of the lodestar method note, for example, the difficulty in applying the method and
10 cite the **undesirable incentives created by that approach**—i.e., a financial **incentive to**
11 **extend the litigation so that the attorneys can accrue additional hours** (and thus,
12 additional fees). Moreover, some courts and commentators have criticized the lodestar
13 method because **it gives counsel less of an incentive to maximize the recovery** for the
14 class. *Id.* at 494 (emphasis added).

15 Finally, “regardless whether the percentage method or the lodestar method is used, **fee**
16 **awards in class actions average around one-third of the recovery.**” *Chavez v. Netflix, Inc.*,
17 (2008) 162 Cal.App.4th 43, 66, n.11 (2008); See e.g., *In re Mego Fin. Corp. Sec. Litig.* (9th Cir.
18 2000) 213 F.3d 454, 463 (upholding award of 33.3 percent of the settlement fund).

19 C. CLASS REPRESENTATIVE ENHANCEMENTS

20 An incentive award may be appropriate to induce someone to serve as a class representative.
21 In determining whether to make an incentive award, the court may consider (1) the risk, both
22 financial and otherwise, the class representative faced in bringing the suit; (2) the notoriety and
23 personal difficulties encountered by the class representative; (3) the amount of time and effort spent
24 by the class representative; (4) the duration of the litigation; and (5) the personal benefit received
25 by the class representative as a result of the litigation. *Golba v. Dick's Sporting Goods, Inc.* (2015)
26 238 Cal.App.4th 1251, 1270 citing *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380,
27 1394-1395.

28 Additional factors to consider include:

“the actions the plaintiff has taken to protect the interests of the class, the degree to which
the class has benefitted from those actions, and the amount of time and effort the plaintiff
expended in pursuing the litigation.’ Federal district courts have identified other factors as
well, including ‘the risk to the class representative in commencing suit, both financial and
otherwise,’ ‘the notoriety and personal difficulties encountered by the class representative,’
the duration of the litigation, and ‘the personal benefit (or lack thereof) enjoyed by the class

1 representative as a result of the litigation.”
2 *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 804.

3 **V. ARGUMENT**

4 **A. THE PROPOSED SETTLEMENT IS MADE IN GOOD FAITH**

5 As specifically set forth below, the settlement meets all requirements for Court approval.

6 **1. Strength of Plaintiffs Case and Discovery**

7 The most important factor courts consider when evaluating the fairness of the class action
8 settlement is the strength of the plaintiff’s case balanced against the amount offered in settlement.
9 *Kullar, supra*, 168 Cal.App.4th at 130.

10 This is a class and representative action, with Plaintiff’s claims premised on Labor Code
11 violations, established (in part) from Defendants' uniform policies. *Brinker Rest. v. Superior Court*,
12 (2012) 53 Cal. 4th 1004, 1051 (holding that, where a company's uniform policy prohibits
13 off-the-clock work, certification of claims for such off-the-clock work is inappropriate, especially
14 where the court is merely "presented with anecdotal evidence of a handful of individual instances
15 in which employees worked off the clock.") Thus, Plaintiff's counsels' approach was to investigate
16 Defendants' uniform employment policies by, *inter alia*, scrutinizing putative class members' time
17 and wage records, as well as Defendants' written meal and rest period policies.

18
19 As detailed more thoroughly in the preliminary approval motion, extensive discovery
20 occurred, followed by additional informal exchanges prior to mediation. (See ROA # 23 at § II).

21 Plaintiff obtained verified copies of Defendant’s uniform time keeping, employee
22 compensation, Meal Period, Rest Period, and reimbursement policies. In addition to Plaintiff’s time
23 and wage records, Defendant also produced a large sampling of class member's records. Including
24 “outside” documentation, Counsel reviewed thousands of pages of documents. Through this review,
25 Plaintiff’s counsel was able to analyze and verify the following: the uniformity of Defendant’s
26 "timekeeping" and compensation practices and the average net effect it had on Defendant’s
27 nonexempt employees; the format and content of Defendant’s itemized wage statements; the average
28 rate of pay for Defendant’s nonexempt employees; and the average number of apparent meal period

1 violations per employee based on multiple sets of timekeeping data.

2 From this data, a detailed valuation of all claims was performed, and was presented to this
3 Court at the preliminary approval stage. (See ROA # 23 at § IV and ROA # 24: the declaration of
4 Eric Yaeckel in Support of Preliminary Approval.)

5 While Plaintiff maintained the claims were all viable, Plaintiff (and his counsel) recognize
6 there were substantial risks to proceeding on behalf of a class and representative group. Defendant
7 presented several potentially valid defenses to certification, liability and mitigation of damages.
8 (Yaeckel decl. ¶¶ 11-13).

9
10 **2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

11 Plaintiff's Counsel's effectiveness in prosecuting this case has translated into tangible
12 monetary benefits for the Settlement Class Members in the following respects: **(a)** a guaranteed
13 favorable result; **(b)** guaranteed monetary recovery over a reasonably short period of time, as
14 opposed to possibly waiting additional years for a potentially worse result; and **(c)** significant
15 savings in attorney's fees and costs, which would have greatly increased had the case progressed
16 through trial and possible appeals.

17 If not for this settlement, any request by Plaintiff to certify a class would have been heavily
18 contested by Defendant.

19 Given the existence of viable defenses, for the vast majority of the class claims, it was
20 unlikely that all class claims could have been certified and brought to trial. Therefore, this class
21 action settlement is a superior result for both parties. In exchange for a full release, Class members
22 are able to recover substantial monetary amounts *now*. Defendant is also able to "buy its peace," and
23 avoid the costs of defending all future claims stemming from the same wage and hour issues in this
24 case.

25 Regarding Plaintiff's PAGA representative claims, there is also a substantial risk that
26 Plaintiff would either fail to obtain a favorable judgment on one or more of these claims, or that a
27 favorable award on one or more PAGA claims can be reduced. *See Thurman v. Bayshore Transit*
28 *Mgmt., Inc.*, (2012) 203 Cal.App.4th 1112, 1135 (holding the Superior Court may "mitigate" PAGA
penalties, even after a finding of liability.)

1 **3. The Experience and Views of Counsel**

2 Class Counsel has considerable experience in wage and hour and class action litigation. Mr.
3 William Sullivan has over 28 years of experience, 27 years of which has been devoted to both
4 prosecuting and defending class action litigation. Mr. Eric Yaeckel has over 12 years of experience
5 as an attorney who is primarily engaged in prosecuting class and representative actions. Mr. Ryan
6 Kuhn has 5 years of experience as an attorney who is primarily engaged in prosecuting class and
7 representative actions. (Yaeckel decl. ¶¶ 3-9).

8 Based on a detailed analysis of all the claims and the risks involved in continuing litigation,
9 class counsel submits the \$250,000.00 Gross Settlement Fund represented a fair, and more than
10 reasonable, settlement. (Yaeckel decl. ¶¶ 11-13).

11 **4. Presence of a Governmental Actor**

12 Although the State is not directly involved in this action, Plaintiff "stands in the shoes" of
13 the Labor and Workforce Development Agency ("LWDA") by bringing a PAGA action.
14 Consideration has been made to compensate to Labor Workforce Development Agency ("LWDA")
15 in the amount of \$18,000.00 (which is the LWDA's 75% share of a \$25,000 allocation).

16 The LWDA was notified and declined to prosecute the claims itself. Counsel for the parties
17 believe this is a fair, reasonable, and adequate allocation. (Yaeckel decl. ¶15). The LWDA was also
18 served with copies of the Settlement and Preliminary Approval Motion and has not objected or
19 responded to date. (*Id.*) They have also been served with the notice of this motion and all supporting
20 documents. (See concurrently filed Proof of Service). Counsel will submit a supplemental
21 declaration updating the Court should the LWDA provide any response.

22 **5. Reaction of the Class Members to the Proposed Settlement**

23 A total of **323** members of the settlement class were notified of the settlement. **Zero** (0)
24 members opted out of the class. (Johnson decl. ¶¶ 6, 11).

25 Perhaps most importantly, **there have been No (Zero) objections to the terms of the**
26 **proposed settlement.** (Johnson decl. ¶ 12).

27 "By any standard, the lack of objection of the Class Members favors approval of the
28 Settlement." *In re Omnivision Technologies, Inc.*, (N.D. Cal. 2008) 559 F.Supp.2d 1036,1043; see

also *Ross v. A.H. Robins*, (S.D.N.Y. 1988) 700 F. Supp. 682, 684 [“The absence of objectants may itself be taken as evidencing the fairness of a settlement.”]

B. THE REQUESTED ATTORNEY’S FEES AND COSTS ARE REASONABLE

Plaintiff seeks, and Defendant will not oppose, a payment of Eighty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents (\$83,333.33) in Attorneys’ Fees, which is one-third (1/3%) of the total Settlement, and up to Eleven Thousand Dollars (\$11,000.00) in litigation costs. (See **Exhibit A** at ¶ 3(b)).

As set forth below, the requested attorney’s fees are inherently reasonable, on the basis of both a percentage of the recovery and a lodestar method, given the results obtained for the class. The following factors establish the reasonableness of the attorney’s fees requested.

1. The Contingent Nature of the Fee Agreement, and Inherent Risk Therein, Supports Awarding a Percentage of the Recovery

In the instant matter, Plaintiff’s Counsel was retained on a contingency basis. (Yaeckel decl. ¶16). A percentage fee of 35% (thirty five percent) was freely negotiated. (*Id.*) As part of the Agreement, Counsel was required to continue the prosecution of the matter regardless of the outcome of the preliminary motions (*i.e.*, class certification.) (*Id.*) Here, however, Plaintiff’s Counsel has agreed to a 33 and 1/3 % share of the recovery in order to maximize the recovery on behalf of the class.(*Id.*)

There is an **established practice** in the private legal market to reward attorneys for taking the risk of non-payment by paying them a **premium over their normal hourly rates** for winning contingency cases. *In re Washington Public Power Supply System Securities Litigation* (9th Cir. 1994) 19 F.3d 1291, 1299. If attorneys’ efforts create a benefit for others in addition to their own client, the court is empowered to award fees from that fund. *Boeing v. Van Gemert* (1980) 444 U.S. 472, 478.

The rationale for fee enhancement in contingency cases has been explained as follows: 'A contingent fee must be higher than a fee for the same legal services paid as they are performed. **The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.**' (Prosner, *Economic Analysis of Law* (4th ed.1992) pp. 534, 567.) 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.' (Leubsdorf, *The Contingency Factor* in

Attorney Fee Awards (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct, rule 4-200(B)(9) [recognizing the contingent nature of attorney representation is an appropriate component in considering whether a fee is reasonable]; ABA Model Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof. Conduct, rule 1.5(a)(8). [] **Such fee enhancements are intended to compensate for the risk of loss generally in contingency cases as a class.**
Beasley v. Wells Fargo Bank (1991) 235 Cal.App.3d 1407, 1419 (disapproved on other grounds.)

The percentage of the fund approach also sets expectations and incentivizes counsel in taking on the risk of a contingency case:

The bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appear to be these: fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; **encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful.**
Jordan v. California Dep't of Motor Vehicles (2002) 100 Cal.App.4th 431, 446 (with emphasis added) citing *Estate of Stauffer* (1959) 53 Cal.2d 124, 132.)

As a result, the percentage of the recovery (routinely approved in California at 33 & 1/3%), properly incentivizes and awards counsel for diligently pursuing this matter in the face of numerous obstacles to both certification, and liability.

2. The Continuing Obligation to Devote Time and Effort to the Litigation

Since the tentative agreement, Plaintiff's Counsel has had to devote considerable time to maintain the litigation, achieve Court approval for the proposed settlement, and assist the proposed Class Members. (Yaeckel decl ¶17).

3. The Extent to which the Litigation Precluded Other Employment

Plaintiff's counsel was precluded from accepting other employment and clients due to the necessity of maintaining the prosecution of the instant matter and also precluded them from bringing clients to the firm. (Yaeckel decl. ¶ 18)

4. The Experience, Reputation, and Ability of the Attorneys who Performed the Services, and the Skill They Displayed in Litigation

Plaintiff's counsel, William B. Sullivan, has been a California-licensed attorney for approximately 28 years. William B. Sullivan has approximately 27 years of experience in "class action" litigation, both as plaintiff and defense counsel. (Yaeckel decl. ¶ 3).

Mr. Yaeckel has over 12 years experience prosecuting class and representative actions on behalf of California Employees. (Yaeckel decl., ¶ 4). Mr. Kuhn has 5 years of experience as an

1 attorney who is primarily engaged in prosecuting class and representative actions. (*Id.*) Class counsel
2 are the attorneys of record in a matter very recently (and favorably) decided before the California
3 Supreme Court titled *Donohue v. AMN Services, LLC*, (2021) 11 Cal.5th 58. The *Donohue* matter
4 is a certified class and PAGA action. (Yaeckel dec. ¶ 5). Plaintiff's counsel are currently lead
5 counsel on approximately 30 employment "wage and hour" claims with class action, or
6 representative action allegations. (Yaeckel decl. ¶ 6).

7 Plaintiff's counsel has recent (and successful) Trial experience in "Wage and Hour" cases.
8 In a recent successful PAGA trial, before the Hon. Katherine Bacal of the San Diego Superior Court,
9 Plaintiff's counsel was awarded their full requested attorneys fees and the hourly rates (which are
10 similar to the fees/rates billed here) billed were all approved. See *Carrington v. Starbucks Corp.* San
11 Diego Superior Court, Case No. 37-2014-00018637-CU-OE-CTL and published appellate opinion
12 at 30 Cal.App.5th 504. (Yaeckel dec. ¶ 7).

13 Based on said experience, it is the opinion of counsel that this settlement represents a fair
14 and adequate payment. (Yaeckel decl. ¶¶8 -9).

15 **6. The Amount Involved and the Results Obtained on Behalf of the Class**

16 This is not a "coupon" class action case. (Yaeckel decl. ¶19). The Class is set to receive
17 significant monetary benefits they would not have received if Class Counsel did not act. (*Id.*)
18 Participating members of the Class will receive an average of **\$375.24** with some class members
19 receiving as much as **\$1,457.79**. (Johnson decl. ¶ 16.)

20 **7. A Percentage of the Common Fund Award is Proper**

21 The controlling law on this issue is set forth above in Section IV(B).

22 Plaintiff's counsel submits that the request for 33 & 1/3 % in attorneys fees from the
23 "common fund" settlement is proper. *Laffitte v. Robert Half Intern. Inc.*, (2016) 1 Cal.5th 480, 503,
24 506. Historically, courts have awarded fees as high as fifty percent (50%) of the common fund,
25 depending on the circumstances of the case. *Newberg*, § 14.03; *see also In re Ampicillin Antitrust*
26 *Litig.* (D.D.C. 1981) 526 F.Supp.494 (awarding attorneys' fees in the amount of 45% of the \$7.3
27 million settlement fund); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.* (S.D.N.Y. 1979)
28 480 F.Supp. 1195 (awarding approximately 53% of the settlement fund as attorney fees).

California Courts routinely approve class action attorneys' fee awards "averag[ing] around

one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (lower court found 20 to 40 percent range of contingency fee in marketplace was appropriate in class actions).

Additionally, a common fund award is not dependent on a determination of the actual amount claimed out of the fund by those entitled-it is the creation of the fund that is the crucial fact. In *Winslow v. Harold G. Ferguson Corp.*, the California Supreme Court expressly held that "it is equitable that [the attorney's] compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed." *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 284. Likewise, *Lealao* expressly recognizes that "in a traditional common fund case, [a percentage-based fee] may be calculated on the basis of the total fund made available rather than the actual payments made to the class." *Lealao, supra*, 82 Cal.App.4th at p. 51; *see also Boeing, supra*, 444 U.S. at p. 478 ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole").

8. The Lodestar Cross-Check

If deemed necessary, a "lodestar cross-check also confirms the propriety of the requested attorneys fees. Plaintiff's seek attorneys fees in the amount of one third of the total settlement amount, which is **\$83,333.33**. of the settlement also confirms the propriety of the request. Here, **no** lodestar amount is presently requested by Plaintiff. Further, and as set forth below, there is actually a **negative** lodestar in this instance, as the actual fees incurred are slightly more than the amount requested by Plaintiff's Counsel.

As set forth in the attached Declaration of Eric K. Yaeckel, the actual lodestar attorney's fees incurred (to date) are estimated to amount to be approximately **\$93,150.00**. The Attorney's fees are broken down as follows:

Mr. Sullivan served as lead investigator and trial counsel, per the specific request of Plaintiff. Over the course of the investigation (including pre-filing), Mr. William Sullivan has currently expended approximately **42.5** hours in the service of this action. **42.5** hours times **\$720.00** equals **\$30,780.00**. The work includes nearly all preliminary investigation, This time also includes interviews with proposed Class Members. The preliminary investigation included the review and analysis of several thousand documents, as well as additional phone interviews with other Class

Members. During this time, Mr. Sullivan also investigated Defendant, its business practices, and any variations in Class Members' job duties and rates of pay. Mr. Sullivan also supervised and helped create the mediation brief and damage analysis used at mediation. (Yaeckel Decl. ¶ 21(a)).

Mr. Eric Yaeckel, was the partner primarily assigned to oversee the "day to day" activity of the primary associates assigned to this case. The billing rate of Mr. Yaeckel is **\$600.00** per hour. Mr. Eric Yaeckel has currently expended approximately **68.1** hours in the service of this action. **68.1** hours times **\$600.00** equals **\$40,860.00**. This work includes attending hearings and most of the day to day communication with opposing counsel. Mr. Yaeckel also primarily handled the numerous exchanges between the mediator and Defense counsel to negotiate and finalize the settlement following the progress made at mediation. Mr. Yaeckel also undertook the review and drafting of all settlement documents and the preliminary and final approval motions. (Yaeckel Decl. ¶21(b)).

Ryan Kuhn was the primary associate assigned to this case. Mr. Kuhn's billing rate is **\$420.00** per hour. He expended approximately **40.5** hours in preparing the motion. **40.5** hours times **\$420.00** equals **\$17,010.00**. The work performed by Mr. Kuhn consisted of, for the most part, analysis of Defendants' documents and records, in preparation for mediation and a potential class certification motion. Mr. Kuhn was also assigned to discovery creation and review, the preparation of "meet and confer" letters and other contact with defense counsel, and analysis of employment records to determine "commonality" and damages..(Yaeckel Decl. ¶21(c)).

Based on past experience, counsel estimates Mr. Yaeckel will incur an additional 10 hours in assisting Class Members on questions and issues regarding the settlement, meeting with Class Members (including those who file "late" submissions), and preparing for and attending the Final Approval hearing in this matter. **7.5** times **\$600.00** equals **\$4,500.00**.(Yaeckel decl. ¶21(d)).

9. The Lodestar Multiplier

Bluntly, **no** multiplier is requested, or necessary, as the fees requested are **less** than the actual fees incurred. Specifically, Plaintiff's Counsel has incurred approximately **\$93,150.00** in actual fees. However, no multiplier is necessary as Plaintiff is only requesting **\$83,333.33** in fees. (Yaeckel decl. ¶ 24).

Additionally, the settlement provides the class with a substantial monetary amount and the class strongly supports the fairness of the settlement, even after being notified of the requested attorneys' fee award (**0** opt-outs, and **0** objections). In the event the Court deems

1 a lodestar analysis is necessary it will confirm that Plaintiff's fees are reasonable.

2 **10. The Amount of Costs**

3 Class Counsel has expended approximately **\$9,058.90** in costs, including filing fees,
4 travel, mediation, copying and document preparation charges, and delivery/service fees.
5 (Yaeckel decl. ¶22). Defendant agreed not to oppose an amount of up to \$11,000.00 in costs.
6 Accordingly, Plaintiff's counsel therefore seeks approval of the actual costs of **\$9,058.90**.
7 (Yaeckel decl. ¶23).

8 **C. THE REQUESTED REPRESENTATIVE ENHANCEMENT IS REASONABLE**

9 Plaintiff requests an enhancement award of **\$7,500.00** for serving as the class
10 representative. Defendant does **not** oppose this request. The class was notified and does **not**
11 object.

12 A Plaintiff put their future employment prospects at risk by becoming a class representative
13 as the fact that they filed a class action lawsuit "is searchable on the internet and may become known
14 to prospective employers when evaluating" the employee as a candidate. *Guippone v. BH S&B*
15 *Holdings, LLC*, 2011 U.S., Dist. LEXIS 126026, *20 (S.D.N.Y. Oct. 28, 2011).

16 Plaintiff contributed extensive time and resources in the prosecution of this case. Plaintiff
17 was able to provide information instrumental to the prosecution of this matter including identifying
18 numerous witnesses that could corroborate his claims. Plaintiff also assisted with reviewing and
19 providing insight on Defendant's documents produced. (See Rodriguez decl. ¶¶ 3-7).

20 Moreover, by "sticking his neck out" as a Class Representative in a publicly filed
21 lawsuit, Plaintiff took a substantial risk that may adversely impact his ability to work in the
22 future.

23 Any company who does a detailed background check, will be able to determine that
24 Plaintiff asserted legal claims against his former employer. An entire industry exists that
25 allows employers to run extensive background searches on potential employees. Companies
26 who provide these services specifically highlight the fact that their services allows employers
27 to weed out litigious employment candidates. (Yaeckel decl. ¶¶ 26-28).

28 In addition, Plaintiff's co-workers have all been notified of the lawsuit, so there is a
large pool of peers who now know he brought claims against a former employer, which could

1 also jeopardize future positions.

2 Plaintiff also risked personally owing a large cost award, into the tens of thousands
3 of dollars, had his claims been unsuccessful. (See Yaeckel decl. ¶ 29).

4 Despite all the risks, Plaintiff at all times remained committed to securing a monetary
5 recovery on behalf of the entire class. (See Yaeckel decl. ¶30).

6 Accordingly, Plaintiff asks the Court to approve a class representative enhancement
7 in the amount of \$7,500.00 to Mr. Rodriguez.

8 **VI. CONCLUSION**

9 Based on the foregoing, Plaintiff respectfully requests that this Court grant Plaintiff's
10 Motion consistent with the accompanying proposed Order and Final Judgment.

11 Dated: December 19, 2023

SULLIVAN & YAECKEL LAW GROUP, APC

Eric Yaeckel

13

Eric K. Yaeckel

14 Ryan T. Kuhn

15 Attorneys for Plaintiff ARATH RODRIGUEZ,
16 Individually, and on behalf of other members of the
17 general public similarly
18
19
20
21
22
23
24
25
26
27
28