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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

Coordination Proceeding Special Title
(Rule 3.550)

AMERICAN TIRE WAGE AND HOUR
CASES

*Rafael Martinez, et al. v. American Tire
Distributors, Inc., et al.*

Case No.: CIVSB2133396
(San Bernardino Superior Court – 12-8-21)

*Germaine Tanner Sr., et al. v. American Tire
Distributors, Inc., et al.*

Case No.: 22CECG00735
(Fresno County Superior Court – 03-8-22)

Case No.: JCCP 5239

*[Assigned to the Hon. 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: September 11, 2023

Time: 9:00 a.m.

Dept.: 26

Complaint Filed: December 8, 2021

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on September 11, 2023, at 9:00 a.m., or as soon thereafter
3 as this matter may be heard by the Honorable David Cohn in Department S26 of the San
4 Bernardino County Superior Court, located at 247 West Third Street, San Bernardino, CA
5 92415, Plaintiffs Rafael Martinez and Germaine Tanner, Sr., individually and on behalf of all
6 others similarly situated, will move this Court for an Order granting final approval of the class
7 action settlement between Plaintiffs and Defendant American Tire Distributors, Inc.
8 (“Defendant” or “ATD”) , which was preliminarily approved by the Court on April 25, 2023.
9 This Motion seeks final approval and entry of judgment of a \$2,195,000 settlement on behalf of
10 the Class Members, and is unopposed by Defendant.

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

- 14 1. Finally certifying the Class, as defined in the Settlement Agreement and the
15 Court’s Order Granting Preliminary Approval of the Settlement;
- 16 2. Finally appointing Plaintiffs as the Class Representatives for purposes of
17 settlement;
- 18 3. Finally appointing Brian Mankin, Peter Carlson and Daniel Gaines as Class
19 Counsel for purposes of settlement;
- 20 4. Finding that the Class Notice was properly provided to the Class in accordance
21 with the Court’s Order granting Preliminary Approval;
- 22 5. Finally approving the settlement as fair, adequate, and reasonable, based upon the
23 terms set forth in the Settlement Agreement;
- 24 6. Binding participating Class Members to the terms of the Settlement Agreement,
25 including the Release specified therein; and
- 26 7. Retaining jurisdiction to enforce the Settlement Agreement.

27 This Motion will be based upon this notice; the attached memorandum of points and
28 authorities; the Declarations of the Settlement Administrator (Taylor Mitzner of Phoenix

1 Settlement Administrators), Class Counsel (Brian Mankin, Peter Carlson and Daniel Gaines) and
2 Plaintiffs (Rafael Martinez and Germaine Tanner) filed concurrently herewith; the records and
3 files in this action; and any other further evidence or argument that the Court may receive at or
4 before the hearing.

5 Dated: August 17, 2023

LAUBY, MANKIN & LAUBY LLP

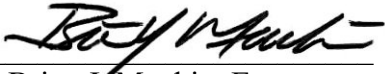
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7 BY: 
8 Brian J. Mankin, Esq.
9 Attorneys for Plaintiffs and the Class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

3 Pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiffs Rafael Martinez
4 and Germaine Tanner, Sr., respectfully request that this Court grant final approval of the Class
5 Action and PAGA Settlement Agreement and Release of Claims (“Settlement Agreement”), and
6 enter the proposed order and final judgment in this matter. This Motion is supported and
7 unopposed by Defendant American Tire Distributors, Inc. (“Defendant” or “ATD”).

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 \$2,195,000 settlement with the
11 assistance of Marc Feder, who is one of the most experienced and reputable class action
12 mediators in California, that is tailored to a limited release of the claims alleged on behalf of 834
13 Class Members;

14 • The Class Members were deemed to participate in the Settlement, and were not
15 required to submit a Claim Form to receive funds;

16 • There is no reversion to Defendant;

17 • There were zero objections and zero opt-outs to the Settlement, meaning 100% of
18 the Class is currently participating in the Settlement.

19 In accordance with the analysis and law set forth herein as well the preliminary approval
20 motion, the Settlement should be approved and judgment entered based on the determination that
21 the Settlement is fair, reasonable, adequate, and in the best interests of the Class. (Declaration of
22 Class Counsel, Brian J. Mankin; ¶¶ 13, 35 (“Mankin Decl.”).)

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

24 Plaintiffs and the Class Members include all current and former non-exempt employees
25 of Defendant, who worked in California at any time during the Class Period of June 16, 2019 to
26 February 6, 2023. The primary claims, which Defendant disputes, involved allegations that the
27 Class Members did not receive all minimum, regular and overtime wages owed, did not receive
28 accurate itemized wage statements, were denied meal and rest breaks, as well as claims for

waiting time penalties and PAGA penalties.

The Settlement includes 834 Participating Class Members (which is less than estimated at Preliminary Approval). The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Taylor Mitzner (“Mitzner Decl.”), ¶ 13):

Gross Settlement Amount	\$ 2,195,000.00
Attorneys’ Fees (1/3)	\$ 731,666.66
Litigation Costs	\$ 20,097.12
Administrator Costs	\$ 13,000.00
PAGA Penalties	\$ 150,000.00
Class Representative Service Awards	\$ 20,000.00
Net Settlement Amount	\$ 1,260,236.21

The Participating Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. (Settlement Agreement or “S.A.” ¶ 26). Each Participating Class Member will receive a pro rata share of the Net Settlement Amount according to the percentage of Workweeks worked during the Class Period, such that the amount actually distributed to Participating Class Members will equal 100% of the Net Settlement Amount. (Settlement Agreement ¶ 48(c)).

Assuming all of the amounts in the Settlement are approved by the Court, the *average* Individual Class Payment is estimated to be \$1,511.07 and the *highest* individual settlement payment is approximately \$3,863.40 and the lowest payment is approximately \$20.23 for a short term employee who worked one week during the Class Period. (Mitzner Decl. ¶ 15). The Participating Class Members collectively worked 62,304 Workweeks during the Class Period, resulting in a net Workweek value of approximately \$20.36.

In addition, 686 Aggrieved Employees, who collectively worked 37,877 Workweeks during the PAGA Period, will each receive an Individual PAGA Payment based on their share of the \$37,500 in PAGA Penalties (25% of the total \$150,000 PAGA allocation), calculated pro-rata based on the number of Weeks Worked during the PAGA Period. (S.A. ¶ 48(h)). The average payment to the Aggrieved Employees is \$54.66. (Mitzner Decl. ¶ 16).

1 Ten percent (10%) of each Individual Settlement Amount shall constitute wages (for
2 which each Participating Class Member will be issued an IRS Form W-2 for such payment), and
3 the remaining ninety percent (90%) shall constitute interest and penalties (each for which each
4 participating Class Member will be issued an IRS Form 1099). (S.A. ¶ 48(d)). The Settlement
5 Agreement provides that Defendant shall deposit the Settlement Amount within 10 days after the
6 “Effective Date” (S.A. ¶ 70), which will be 61 days after Judgment is entered assuming that no
7 appeal is filed. Additionally, Defendant will separately fund their share of payroll taxes. Within
8 10 days of receipt, the Settlement Administrator shall issue payments to cover all court-approved
9 payments. (S.A. ¶ 71).

10 Class Members will have 180 days to cash the settlement check. If a Class Member fails
11 to cash a check by the deadline, the Settlement Administrator shall issue unclaimed funds to the
12 California State Controller in the name of the Class Member. (S.A. ¶ 72).

13 **III. THE NOTICE PROCESS**

14 **A. Notice to the Class Members**

15 Pursuant to the Court’s Order and the Settlement Agreement, the Parties directed the
16 Settlement Administrator to review and update the Class Members’ addresses, mail the Court-
17 approved Notice Packet, and process their responses. The Administrator also posted the relevant
18 documents on its website for the Class Members to access.

19 Prior to mailing the Class Notice, the Settlement Administrator performed a National
20 Change of Address search on all Class Members to determine if any had moved. (Mitzner Decl.,
21 ¶ 4). On June 5, 2023, the Class Notice was initially sent via first-class mail to 813 Class
22 Members. (Mitzner Decl., ¶ 5). Initially 14 Notices were returned as undeliverable, but the
23 Administrator was able to located updated address and remail all 14 Notices. Ultimately, no
24 Class Notices were determined to be undeliverable, resulting in a 100% success rate in mailing
25 the Notice Packet. (Mitzner Decl., ¶ 7-8).

26 After the mailing was complete, Defendant discovered that 21 employees had
27 transitioned from hourly pay to salary pay, and thus were inadvertently excluded from the Class
28 for the period in which they worked as hourly employees. The Parties brought this to the Court’s

1 attention at a hearing on July 27, 2023, and the Court approved mailing the Class Notice to these
2 21 employees while briefly continuing the final approval hearing. The Notice was mailed to the
3 21 employees on July 28, 2023, and their response deadline is August 28, 2023. (Mitzner Decl.,
4 ¶ 6). The Parties will file a supplemental declaration from the Administrator with the results of
5 this mailing by approximately September 1, 2023.

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

15 **B. There are Zero Objections and Zero Opt-Outs Thus Far, Resulting In An**
16 **Impressive 100% of the Class Participating in the Settlement**

17 California law makes clear that the percentage of objectors and opt-outs is an important
18 factor in the Court's consideration of a proposed class action settlement. (See *Dunk v. Ford*
19 *Motor Co.* (1186) 48 Cal.App.4th 1794 at 1802.) Indeed, the Ninth Circuit and other federal
20 courts recognize that in the final fairness analysis, the number or percentage of class members
21 who object to the settlement is a significant factor. (See *Mandujano v. Basic Vegetable Prods.,*
22 *Inc.*, (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY
23 2001) 127 F.Supp.2d 418, 425 ["[i]t is well settled that the reaction of the class to the settlement
24 is perhaps the most significant factor to be weighed in considering its adequacy."])

25 In this case, there are zero objections and zero opt-outs to the Settlement thus far --
26 meaning that 100% of the Class Members are currently participating in the Settlement. (Mitzner
27 Decl., ¶ 9-11). The parties will file an updated declaration from the Administrator on
28 approximately September 1, 2023, after the deadline for the 21 people to respond is complete.

1 **V. EVALUATION OF THE SETTLEMENT**

2 It is axiomatic that California law strongly favors and encourages settlements. (See
3 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236.) This presumption in favor of
4 settlement applies with particular force in the context of class actions. (See *Ferguson v. Lieff,*
5 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 [“[p]ublic policy favoring settlement is
6 especially weighty for class actions”]; *Bell v. Am. Title Ins. Co.* (1991) 226 Cal.App.3d 1589,
7 1607-1608 [affirming the trial court’s approval of a class settlement and implicitly endorsing its
8 citation of federal precedent for the notion that there is a “strong public policy in favor of
9 settlement of class actions”]; see also *Franklin v. Kaypro Corp.* (9th Cir. 11869) 884 F.2d 1222,
10 1229, quoting *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 [“it hardly
11 seems necessary to point out that there is an overriding public interest in settling and quieting
12 litigation. This is particularly true in class action suits”].)

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

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

23 **A. The Settlement Was Reached Through Informed Arms-Length Negotiation**

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

1 months after mediation.

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

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

12 **B. Plaintiffs' Investigation Was Sufficient**

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

23 **C. Class Counsel Are Experienced in Similar Litigation and Endorse the**
24 **Settlement**

25 Class Counsel are experienced in this type of litigation, and they have represented (and
26 hereby do represent) that this Settlement is fair and reasonable. (Mankin Decl., ¶¶ 13, 35;
27 Carlson Decl., ¶¶ 2-6; see *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
28 Cal.App.4th 1135, 1152 [Final approval of settlement affirmed where counsel were all

1 experienced litigators with class-action experience and had recommended settlement based on
2 the negotiated terms].)

3 **D. Reasonable Estimate of the Nature and Amount of Recovery**

4 Plaintiffs' Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
5 (which sufficiently provided the Court with "basic information about the nature and magnitude
6 of the claims in question and the basis for concluding that the consideration being paid for the
7 release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail,*
8 *Inc.* (2008) 168 Cal.App.4th 116, 133.) Of course, a settlement is not judged against what
9 might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to
10 provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers,*
11 *Inc.* (2001) 91 Cal.App.4th 246, 250.) ("Compromise is inherent and necessary in the settlement
12 process ... even if the relief afforded by the proposed settlement is substantially narrower than it
13 would be if the suits were to be successfully litigated, this is no bar to a class settlement because
14 the public interest may indeed be served by a voluntary settlement in which each side gives
15 ground in the interest of avoiding litigation.")

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

24 Of course, Defendant denies that any damages should be assessed and denies all of the
25 value assessed by Plaintiffs. Notwithstanding these arguments, the Settlement commits
26 Defendant to pay \$2,195,000 to settle the litigation.

27 ///

28 ///

1 **VI. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE**

2 For their efforts in creating a common fund for the benefit of the Class, the Settlement
3 Agreement provided that Class Counsel – which includes multiple attorneys and two law firms -
4 may seek reasonable fees of \$731,666.66 (one-third of the Settlement Amount). This amount
5 will be paid from the settlement amount, as provided by the Settlement Agreement. These fees
6 are warranted under the law and within the range of fees commonly awarded in similar cases.

7 As shown herein, the requested percentage of one-third of the settlement fund as payment
8 for attorneys' fees should be granted for several reasons, including one-third is the standard
9 bench mark in California for class action settlements (see e.g., *Chavez v. Netflix, Inc.* (2008) 162
10 Cal.App.4th 43, 66 n. 11 (“Empirical studies show that, regardless whether the percentage
11 method or the lodestar method is used, fee awards in class actions average around one-third of
12 the recovery”), that the California Supreme Court recently held that the percentage of the fund
13 method survives in California class action cases (*Laffitte v. Robert Half International, Inc.*
14 (2016) 1 Cal.5th 480, and through the prism of a lodestar cross-check. Accordingly, this request
15 should receive final approval.

16 **A. Plaintiffs are Entitled to Recover Reasonable Attorney's Fees Under the**
17 **Labor Code**

18 Plaintiffs and the Class are entitled to recover reasonable attorneys' fees, expenses and
19 costs under section 218.5 of the California Labor Code, which provides that, “[i]n any action
20 brought for the nonpayment of wages ... the Court shall award reasonable attorneys' fees and
21 costs to the prevailing party.” In addition, Plaintiffs and the Class are entitled to recover
22 reasonable attorneys' fees pursuant to section 1194.2 of the Labor Code, which provides that,
23 “... any employee receiving less than the legal minimum wage ... applicable to the employee is
24 entitled to recover in a civil action the unpaid balance of the full amount of this minimum
25 wage... including ... reasonable attorney's fees, and costs of suit.” Plaintiffs are also entitled to
26 fees and costs under section 226(e) of the Labor Code (employee who prevails on claim for
27 itemized wage statement violation “is entitled to an award of costs and reasonable attorneys'
28 fees”); under PAGA (Labor Code § 2699(g), which provides “Any employee who prevails in any

1 action shall be entitled to an award of reasonable attorney's fees and costs, including any filing
2 fee paid"); and, potentially, section 1021.5 of the California Code of Civil Procedure.

3 **B. Class Counsel's Request for Fees Is Reasonable and Properly Calculated as**
4 **a Percentage of the Common Fund**

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

12 **1. *The Attorneys' Fees Requested Here Fall Within the Reasonable***
13 ***Range Awarded in Similar Cases Under the Well-established***
14 ***Common Fund Method***

15 The California Supreme Court has approved trial courts' usage of the common fund
16 method of awarding attorneys' fees in wage and hour class actions, like this one, upholding a fee
17 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte*, 1 Cal.5th at
18 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 552 ("fee awards in class actions average
19 around one-third of the recovery"). Specifically, in *Laffitte*, the Court wrote: "[w]e join the
20 overwhelming majority of federal and state courts in holding that when class action litigation
21 establishes a monetary fund for the benefit of the class members, and the trial court in its
22 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
23 of a reasonable fee by choosing an appropriate percentage of the fund created"). *Id.* at 506. The
24 California Supreme Court also noted that trial courts have the discretion to award fees as a
25 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
26 *Id.* ("...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
27 evaluate the reasonableness of a requested percentage fee.")
28

1 The California Supreme Court's *Laffitte* decision was consistent with its prior rulings
2 recognizing that "when a number of persons are entitled in common to a specific fund, and an
3 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that
4 fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III v. Priest*
5 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who
6 recovers a common fund . . . is entitled to reasonable attorneys' fees from the fund as a whole").
7 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
8 based on the amount that was available to be claimed, rather than as a percentage of the actual
9 amount claimed. *See Id.* at 475-6, 480-1 (the SCOTUS held that attorneys for a successful class
10 may recover a fee based on the fund created for the class, even if some class members make no
11 claims against the fund, so that money remains in it that will be returned to the defendant,
12 explaining: "[t]heir [class members'] right to share the harvest of the lawsuit upon proof of their
13 identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class
14 representatives and their counsel." *See also Williams v. MGM-Pathe Communs. Co.* (9th Cir.
15 1997) 129 F.3d 1026, 1027 (trial court "abused its discretion by basing the fee on the class
16 members' claims against the fund rather than on a percentage of the entire fund or on the
17 lodestar").

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

20 In addition to the fact that a Class benefit was created with a \$2,195,000 non-reversionary
21 common fund settlement, the fairness of the requested fee award of 1/3 of the Settlement
22 Amount is supported by the high quality of work performed by Class Counsel and the positive
23 result obtained for the Class. This great result occurred because Class Counsel diligently,
24 efficiently, and creatively pursued this case and reached a successful settlement for the benefit of
25 the entire Class. ***In fact, some Class Member will receive almost \$4,000 each, which is an***
26 ***excellent result, especially considering the reduced Class Period as a result from a prior***
27 ***settlement.*** Moreover, the fact that the settlement was embraced and supported by the Class, as
28 evidenced by a 100% participation rate, demonstrates that Class Counsel obtained a favorable

1 result for the Class.

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

3 Rule 3.769 of the California Rules of Court requires that the Class Members be given
4 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
5 preliminarily approved by the Court and distributed to the Class Members apprised them of the
6 requested attorneys fees, which was consistent with the Notice.

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

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

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

1 If Plaintiffs had lost this case, Class Counsel would have recovered nothing, and would
2 have lost its out-of-pocket costs. This is not an easy burden for Plaintiffs' Counsel, which are
3 two small firms. (Mankin Decl. ¶ 20). If, despite these hardships and risks, the best Plaintiffs'
4 Counsel could hope for is merely to be paid its customary hourly rate multiplied by the number
5 of hours worked on all cases (including cases like this where the lodestar is far greater than the
6 potential fee award), then Class Counsel would not be compensated for the hardships and serious
7 risks they faced litigating this contingency case, and would not be incentivized to take on similar
8 cases in the future. (*Id.*)

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

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

26 *Id.* at 399-400.

27 Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
28 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.*, No. 12-55479 (9th Circuit 2014), found
that only one-third of class actions are successful, compared to two-thirds that are defeated and

1 result in no payment to the class members.¹

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

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

5 Despite recognized limitations of the so-called lodestar method, some California and
6 federal courts acknowledge the utility of a lodestar “cross-check.”² (*Lealao, supra*, 82
7 Cal.App.4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the
8 reasonableness of attorneys’ fees in class actions, the court ascertains Class counsel’s total
9 “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or
10 legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a
11 “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its
12 contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22
13 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82
14 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is
15 within the range of fees freely negotiated in the legal marketplace in comparable litigation”].)

16 Historically, California courts have approved multipliers of 1.5 to 4. *See Coalition for*
17 *Los Angeles County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251
18 **(multiplier of 2+ approved)**; *Sternwest Corp v. Ash* (1986) 183 Cal.App.3d 74, 75. The
19 multiplier requested by Class Counsel below is within the range of multipliers found to be
20 appropriate by various federal and state courts in California. In *Sternwest Corp. v. Ash*, for
21 instance, the Court of Appeal remanded for a lodestar enhancement of “**two, three, four or**
22 **otherwise.**” *Id.* at 76; *see also Wershba*, 91 Cal.App.4th at 255 (“**Multipliers can range from 2**
23 **to 4 or even higher**”); *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 83
24 **(affirming 2.34 multiplier)**; *Coalition for Los Angeles County Planning in the Pub. Interest v.*

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

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

Board of Supervisors, 76 Cal.App.3d 241, 251 (**affirming multiplier of approximately 2**); *Craft v. County of San Bernardino*, 2008 U.S. Dist. LEXIS 27526 (C.D. Cal. Apr. 1, 2008) (**applying 5.2 multiplier**); *See also Steinder v. Am. Broadcasting Co., Inc.* (9th Cir. 2007) 248 Fed. Appx. 780, 783 (**approving multiplier of 6.85** and citing cases with comparable or higher multipliers); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 (finding no abuse of discretion in **awarding a multiplier of 3.65**). In *Torchia v. WW Grainger, Inc.* (E.D. Cal. 2014) 304 F.R.D. 256, 275-278, a federal magistrate in Fresno approved attorneys' fees of \$550,000 **constituting a 3.57 multiplier** on class counsel's total lodestar of \$153,856 in a wage and hour class action.

The actual aggregated lodestar between the Plaintiffs' attorneys that worked on this case is approximately \$303,400. This results in a fair and reasonable 2.4 multiplier, as summarized in the following table, and in the submitted declaration of Plaintiffs' counsel:

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner - LML)	Trial Counsel	22	\$775	122³	\$94,550
Peter Carlson (Senior Associate - LML)	Handling Attorney	8	\$575	248.7	\$143,002.50
Daniel Gaines (Partner - G&G)	Trial Counsel	16	\$700	29.9	\$20,930
Alex Katofsky (Attorney - G&G)	Attorney	23	\$750	33.9	\$25,425
Evan Gaines (Attorney - G&G)	Attorney	11	\$650	26.9	\$16,812.50
Amelia Booth (Paralegal - G&G)	Paralegal	5	\$200	13.4	\$2,680
Grand Total				474.8	\$303,400

(See Mankin Decl., ¶ 25; Carlson Decl. ¶ 8-9; Gaines Decl. ¶ 14).

³ Includes an estimated 35 hours that will be expended in finalizing the motion, attending the hearing, working with the parties and administrator regarding the notice and payment process, and filing any post judgment paperwork.

1 Class Counsel's requested rates are reasonable under the Laffey Matrix
2 (www.laffeymatrix.com) which indicates that the benchmark rate for an attorney with 20+ years
3 of experience (such as Mr. Mankin and Mr. Gaines) is \$914, while the rate for attorneys with 8-
4 10 years of experience (such as Mr. Carlson) is \$672. Moreover, the Wolters Kluwer 2017 Real
5 Rate Report ("Real Rate Report") provides directly applicable information in this regard. The
6 Real Rate Report is based on an enormous and statistically significant compilation of data: 25.8
7 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from
8 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer's ELM Solutions, Inc.,
9 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide
10 the hourly rates for partners and associates in major metropolitan areas. For the southern
11 California area, which is based on billing entries for 1,125 partners and 1,566 associates, the
12 Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and
13 \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los
14 Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most
15 importantly, the information provided in the Real Rate Report is not based on self-reported
16 numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is
17 based on the actual hours and fees billed by law firms. These numbers are not surprising given
18 that a 4-year-old article in the National Law Journal stated that in **2014** partners in Los Angeles
19 charge an average of \$665, while the average associate rate is \$401. (Sloan, \$1,000 Per Hour
20 Isn't Rare Anymore; Nominal Billing Levels Rise, But Discounts Ease Blow (2014) Nat. Law
21 Journal.)⁴ (Mankin Decl., ¶ 24.)

22 Thus, not only are Plaintiffs' Counsel's rates reasonable and typical, but the attorneys'
23 fees requested are in line with Plaintiffs' Counsel's lodestar, all of which confirms that the fee
24 request is fair and reasonable.

25 Class Counsel are also highly experienced in Class/PAGA litigation, including having
26 been selected as a "Super Lawyer" in employment litigation on multiple occasions, having

27 ⁴ The article notes that at Irell & Manella, the average partner rate is \$890/hr; Mannatt, Phelps & Phillips is \$740/hr;
28 O'Melveny & Meyers is \$715/hr; and Jeffer Mangels Butler & Mitchell is \$690/hr. *Id.*

1 achieved large settlements, and having prevailed at class/PAGA trials, as reflected in their
2 attached declarations. (Mankin Decl. ¶¶ 2-6; Gaines Decl. ¶¶ 2-6 & Exhibit “A”). Indeed, Class
3 Counsel’s rates are typical of the rates charged by defense counsel with similar experience doing
4 similar employment law work in this region.

5 **VII. THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE**

6 **A. The Requested Costs Are Reasonable and Merit Approval**

7 The Settlement Agreement authorized litigation expenses up to \$25,000. (Settlement
8 Agreement ¶ 48(f)). However, Class Counsel’s actual combined costs through the final
9 approval hearing are estimated to be \$20,097.12, including \$14,501.65 by Lauby Mankin
10 Lauby LLP and \$5,595.47 by Gaines and Gaines, APLC. (Mankin Decl. ¶ 27; Gaines Decl. at
11 Exhibit “B”). Since Class Counsel’s actual costs were less than the amount allocated, the
12 saving will be placed in the Net Settlement Amount. These costs include mediation fees, filing
13 fees, CourtCall charges, and court filing fees, and process server fees.

14 **B. The Requested Service Awards are Reasonable and Merit Approval**

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

25 Under the Settlement, Defendant agreed to pay Service Awards in the amount of
26 \$10,000 each to Rafael Martinez and Germaine Tanner in recognition of their contribution as
27 the Class Representatives and the fact that they agreed to a general release of all claims. In
28 addition, Plaintiffs also undertook significant risks, including the risk of being blackballed in

1 the industry and the risk that they could have been liable for Defendant's costs if they lost.
2 This factor is a significant one for a wage earner, and the potential risk is very real. (See
3 *Whiteway v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) No. C 05-2320
4 SBA, 2007 WL 4531783, at *3 ("the few courts to consider this 'class representatives'
5 dilemma' have not found it inequitable to assess costs upon the lead or named plaintiff in a
6 class action.").)

7 Plaintiffs also committed a significant number of hours to assist with the
8 litigation/settlement processes of this case. Finally, they entered into a general release of all
9 claims against Defendant, whereas the Class Members only released the claims alleged. The
10 requested Service Payment is reasonable, particularly in light of the substantial benefits
11 Plaintiffs generated for the Class Members, the risks they undertook, and in exchange for
12 executing a general release against Defendant while giving up the right to pursue separate
13 individual claims. (See Martinez's Declaration ¶¶ 3-10 and Tanner's Declaration ¶¶ 3-11.)

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

17 **VIII. OTHERS MATTERS RE: FINAL APPROVAL**

18 **A. Settlement Administration Costs**

19 The parties agreed that the Administrator, Phoenix Settlement Administrators, would be
20 compensated for services performed. The Administrator's flat fee is \$13,000.00. (Mitzner
21 Decl., ¶ 16; Exhibit C thereto.)

22 **B. Notice of Final Judgment to the Class**

23 The Proposed Final Approval Order directs the Settlement Administrator to give notice
24 of entry of judgment by including a postcard to the Class Members at the same time the checks
25 are mailed.

26 **C. Uncashed Checks**

27 The Settlement Agreement provides that unclaimed funds will be submitted to the
28 California State Controller's Unclaimed Property Fund in the name of the Class Member

1 thereby leaving no “unpaid residue” subject to the requirements of California Code of Civil
2 Procedure Section 384, subd. (b). (S.A. ¶ 72.)

3 **D. Final Report**

4 Defendant’s payment is due 10 days after the Effective Date, which will occur 61 days
5 after the final order is entered. The Administrator then has 10 days thereafter process the funds
6 and issue checks to the Class Members, who will then have 180 days to cash their checks.
7 Accordingly, the Parties project that the check cashing deadline will occur on approximately
8 June 10, 2024. Approximately 30 days after the check cashing deadline, the Parties will be
9 prepared to submit a declaration from the Administrator attesting to its disbursement of all
10 payments required under the Settlement Agreement.

11 Thus, the Parties propose submitting a final report in the form of a declaration from the
12 Administrator approximately July 1, 2024 and then holding a disbursement hearing thereafter
13 at the Court’s convenience.

14 **E. Submission to the LWDA**

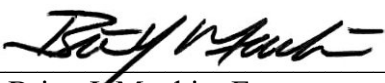
15 As set forth in the Mankin Declaration at ¶ 29, the Settlement Agreement and this
16 motion are concurrently being submitted to the LWDA in accordance with Labor Code §
17 2699(1)(2). The LWDA has not commented on the Settlement to date.

18 **IX. CONCLUSION**

19 Plaintiffs respectfully submits that the Settlement is fair, adequate, and reasonable, and
20 merits final approval.

21 Dated: August 17, 2023

LAUBY, MANKIN & LAUBY LLP

22
23 BY: 
24 Brian J. Mankin, Esq.
25 Attorneys for Plaintiffs and the Class
26
27
28

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 August 17, 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.

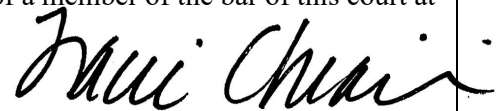
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 August 17, 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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