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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

KASHU XOLA, Individually, and on behalf
of other members of the general public
similarly situated,

Plaintiff,

v.

FULL PACKAGE DELIVERY, LLC, a
California Limited Liability Company;
AMAZON LOGISTICS, INC., a Delaware
Corporation; and DOES 1-10, inclusive

Defendants

CASE NO. 37-2022-00006720-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: Sept. 8, 2023

Time: 9:00 a.m.

Dept.: C-60

Judge: Hon. Matthew C. Braner

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1 **I. SUMMARY OF MOTION**

2 This motion seeks final approval of a “wage and hour” representative (“PAGA”) and class
3 action settlement, that was heavily litigated. Plaintiff KASHU XOLA has sued on behalf of a class of
4 nonexempt employees who worked for FULL PACKAGE DELIVERY, LLC, during the operative
5 class period, set forth herein.

6 Following the distribution of the approved Notice of Class Action Settlement (“Class Notice”)
7 to the Settlement Class, the proposed final settlement figures are as follows:

8	Final size of potential class:	287 Participating Class Members
9	Objections to Settlement:	Zero (0)
10	Opt-Outs:	One (1)
11	Maximum Settlement Amount (“MSA”):	\$287,290.00
12	Settlement administration:	\$6,960.34
13	Costs/expenses of litigation:	\$7,222.58
14	LWDA payment:	\$18,750.00.00 (75% Share of \$25,000
15		allocation)
16	Attorney's fees:	\$95,763.33 (1/3 of GSA)
17	Class representative incentive:	\$20,000.00

18 There have been **no (zero) objections** to this proposed settlement. The *average* gross payment
19 to each Participating Class Member based on the above figures is **\$464.64** which does not account for
20 the fact that certain Participating Class Members will receive more or less than an “average” share,
21 depending on the length of time each worked for Defendant Full Package Delivery, LLC during the
22 Class Period. (Please see the declaration of Settlement Administrator Jeffrey Johnson at ¶16.)

23 **II. UPDATED FACTUAL AND PROCEDURAL HISTORY**

24 Should the Court deem it relevant, a much more detailed procedural history of the case, and
25 summary of all claims, was already set forth in Plaintiff’s original Motion for Preliminary Approval.
26 (ROA # 23 at § II-III.) The Court **granted** Preliminary Approval of the parties’ original settlement on
27 March 17, 2023. (ROA #40.)

28 The Parties attended a highly adversarial mediation, presided over by a well respected “Wage

1 and Hour” mediator (Scott Markus). The Parties spent several additional months negotiating all final
2 settlement terms and obtaining preliminary approval from the Court. (*Id.*)

3 Most importantly for purposes of final approval, **zero** Class Members (out of **288 individuals**)
4 objected to the terms of this settlement and **only one** Class Member has opted out. (Johnson decl. ¶¶
5 11-12.) Thus the Settlement Class overwhelmingly supports the proposed settlement.

6 The Parties’ Joint Stipulation of Class and PAGA Action Settlement and Release (herein
7 referred to in this motion as “the Agreement”) contains the terms of the class and PAGA action
8 settlement and is already on file with the Court. (ROA # 27: **Exhibit A** thereto.) For ease of reference,
9 the Agreement will be cited to herein again as Agreement or Exhibit A.)¹

10 **III. SETTLEMENT TERMS**

11 The Agreement includes the following key terms:

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

13 The Parties entered into the Agreement exclusively for the purpose of resolving the Action and
14 facilitating the negotiated settlement. Should the Court, for any reason, not finally approve the
15 Agreement, or if the Agreement is terminated for any reason, then the Agreement will be null and void
16 and this action will revert to its status with respect to any and all matters as they existed prior to the
17 Parties signing the Agreement. (**Ex. A** at ¶ 38.)

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” is defined as:

21 All individuals who previously were employed by Defendant Full Package
22 Delivery, LLC in California as non-exempt employees at any time during the
23 period of February 22, 2018 to the date of entry of Preliminary Approval of this
24 settlement and who have not previously released their claims against Defendants.
25 (**Exhibit A** at ¶ 12).

26 Class Notices were sent to 288 individuals, as determined by Defendants’ employment

27
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.

1 records. (Johnson decl. ¶6(a).) **One** individual has opted out of the litigation. (Johnson decl. ¶ 11.) **No**
2 **(zero)** Participating Class Members have objected to the proposed settlement. (Johnson decl. ¶12.)
3 Following the Class Notice, there are a total of 287 total Participating Class Members who will all
4 receive a share of the settlement proceeds. (Johnson decl. ¶13.)

5 **3. Appointment of Settlement Claims Administrator**

6 CAC Services Group, LLC. (“CAC”) was used as the “Settlement Administrator” for purposes
7 of providing the Class Notice, and its instructions, to Settlement Class Members, issuing all payments
8 pursuant to the Agreement, and to track all opt-outs and objections to the Settlement.
9

10 As detailed in the accompanying declaration, CAC successfully completed all steps of the
11 Notice process. (See Johnson decl. ¶¶4-14.)
12

13 **4. Scope of the Release**

14 For purposes of the Agreement, Participating Class Members release all “Wage and Hour”
15 claims that are either or both: (1) alleged in the First Amended Complaint; or (2) or that could have
16 been alleged in the First Amended Complaint based on the facts and allegations therein including
17 claims for violations of the California Labor and any other local, state, or federal law, statute,
18 regulation ordinance through the Class Period. The precise release language is at **Exhibit A** at ¶ 43(a).
19

20 **5. Cash Payment and Allocation**

21 The Agreement provides for an automatic cash payment to the Participating Class Members
22 (who did not submit valid requests for exclusion.) The Settlement is non-reversionary, in that all of
23 the Net Settlement Amount, after all costs and fees are deducted, will be paid to the Participating Class
24 Members.
25

26 Based on the final counts after the notice period, Participating Class Members will be entitled
27 to an average share of approximately **\$464.64** (Johnson decl. ¶16.) The actual amounts received vary
28 based on length of employment during the Class Period. The highest estimated payout is \$2,553.15 and

1 the lowest amount is \$2.81. (Johnson decl. ¶16.)

2 The settlement checks returned as undeliverable and those settlement checks remaining
3 un-cashed for more than one hundred eighty (180) calendar days after issuance will be tendered to the
4 California Controller's Unclaimed Property Fund in the name of the Participating Class Member as
5 listed on the settlement check. (**Ex. A** at ¶58.)

6 **6. Contingent Costs**

7
8 The Parties agree that Ninety Five Thousand and Seven Hundred Sixty Three Dollars and
9 Thirty Three cents (\$95,763.33) in Attorneys' Fees and up to Twelve Thousand Dollars (\$12,000.00)
10 in litigation costs may be paid to Class Counsel from the Maximum Settlement Amount. (*See Exhibit*
11 **A** at ¶ 41.) The actual costs sought are less, and Plaintiff seeks reimbursement of \$7,222.58. (Yaeckel
12 decl. ¶21).

13
14 For costs incurred in administering the settlement process, the Parties agree that the actual
15 costs, quoted at not to exceed \$7,000.00, out of the settlement amount to the Settlement Administrator
16 from the Maximum Settlement Amount. (*See Exhibit A* at ¶ 7.) The actual costs sought are less, and
17 the Settlement Administrator seeks \$6,960.34 for its fees and costs. (Johnson decl. ¶17.)

18
19 The Parties also agree to allocate Twenty Five Thousand Dollars (\$25,000.00) of the
20 Maximum Settlement Amount to fully and finally resolve Plaintiff's PAGA claims with 75% of the
21 amount, or \$18,750.00, being paid to the LWDA, and 25%, or \$6,250.00, being distributed amongst
22 the Aggrieved Employees. (*See Exhibit A* at ¶ 45.)

23
24 The Parties also agree that Plaintiff may receive Twenty Thousand Dollars (\$20,000.00) from
25 the Maximum Settlement Amount, which represents (1) a Class Representative Enhancement Payment
26 in consideration for his services as Class Representative, and, (2) his agreement to sign a separate
27 broader release of claims beyond the scope of the Class Member release in this action. (*See Exhibit*
28

1 A at ¶ 42). Further details justifying said payment are provided via Plaintiff’s declaration at final
2 approval. (Xola decl. ¶11). Plaintiff would have initiated a separate individual arbitration against
3 Defendants had mediation failed. This class was notified of this payment to Xola. (See Ex. B at §
4 IV(B)).

5
6 The Class Representative Enhancement award was agreed upon following good faith
7 negotiations and is intended to recognize that it was the Class Representative who initiated the lawsuit,
8 initiated the PAGA claims, provided critical documents and witnesses to his attorneys, and worked
9 with his attorney to propound and prepare written discovery, all in an effort to obtain moneys allegedly
10 owed not only to himself, but to all other employees. For further justification of the enhancement,
11 please see below, and also see the attached declarations of Mr. Xola.

12 13 **IV. CONTROLLING LAW**

14 The following facts and law support this undisputed request.

15 **A. FINAL APPROVAL OF CLASS ACTION SETTLEMENTS**

16
17 The trial court has broad discretion to determine whether a class action settlement is fair and
18 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723.

19 Fairness is presumed where (1) the settlement is reached through arm’s-length bargaining; (2)
20 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel
21 is experienced in similar litigation; and (4) the percentage of objectors is small. *Chavez v. Netflix, Inc.*,
22 (2008) 162 Cal.App.4th 43, 52; *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th 1794, 1802. But, even
23 where it appears the settlement is fair, the court must still determine whether the settlement should be
24 approved after considering “the strengths and weaknesses of the claims and risks of the particular
25 litigation.” *Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116, 129. It considers: (i) the
26 strength of the plaintiff’s case; (ii) the risks, expense, complexity and likely duration of further
27
28

1 litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount offered
2 in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the
3 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any
4 reaction of putative class members. *Dunk, supra*, 48 Cal.App.4th, at 1800-1801; *In re Microsoft*,
5 *supra*, 135 Cal.App.4th, at 723.

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

9 **B. ATTORNEYS’ FEES**

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

14 The California Supreme Court’s rationale was as follows:

15 we clarify today that use of the percentage method to calculate a fee in a common fund
16 case, where the award serves to spread the attorney fee among all the beneficiaries of
17 the fund, does not in itself constitute an abuse of discretion. We join the overwhelming
18 majority of federal and state courts in holding that when class action litigation
19 establishes a monetary fund for the benefit of the class members, and the trial court in
20 its equitable powers awards class counsel a fee out of that fund, the court may
21 determine the amount of a reasonable fee by choosing an appropriate percentage of the
22 fund created. The *recognized advantages* of the percentage method—including relative
23 ease of calculation, alignment of incentives between counsel and the class, a better
24 approximation of market conditions in a contingency case, and the encouragement it
25 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
26 litigation (See pt. I, ante; *Lealao, supra*, 82 Cal.App.4th at pp. 48–49, 97 Cal.Rptr.2d
27 797; *Rawlings v. Prudential–Bache Properties, Inc.*, *supra*, 9 F.3d at p.
28 516)—**convince us the percentage method is a valuable tool that should not be
denied our trial courts.**

Laffitte v. Robert Half Intern. Inc. (2016) 1 Cal.5th 480, 503 (emphasis added).

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

28 In fact the *Laffitte* Court further noted how advocating a lodestar, over a percentage of the
Memorandum of Points and Authorities

1 recovery, creates perverse litigation incentives:

2 Critics of the lodestar method note, for example, the difficulty in applying the method
3 and cite the **undesirable incentives created by that approach**—i.e., a financial
4 **incentive to extend the litigation so that the attorneys can accrue additional**
5 **hours** (and thus, additional fees). Moreover, some courts and commentators have
6 criticized the lodestar method because **it gives counsel less of an incentive to**
7 **maximize the recovery** for the class.

8 *Id.* at 494 (emphasis added).

9 Finally, "regardless whether the percentage method or the lodestar method is used, **fee awards**
10 **in class actions average around one-third of the recovery.**" *Chavez v. Netflix, Inc.*, (2008) 162
11 Cal.App.4th 43, 66, n.11 (2008); See e.g., *In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d
12 454, 463 (upholding award of 33.3 percent of the settlement fund).

13 C. CLASS REPRESENTATIVE ENHANCEMENT

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

21 Additional factors to consider include:

22
23 “the actions the plaintiff has taken to protect the interests of the class, the degree to which the
24 class has benefitted from those actions, and the amount of time and effort the plaintiff
25 expended in pursuing the litigation.’ Federal district courts have identified other factors as
26 well, including ‘the risk to the class representative in commencing suit, both financial and
27 otherwise,’ ‘the notoriety and personal difficulties encountered by the class representative,’ the
28 duration of the litigation, and ‘the personal benefit (or lack thereof) enjoyed by the class
representative as a result of the litigation.’”

Clark v. Am. Residential Servs. LLC (2009) 175 Cal.App.4th 785, 804.

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V. ARGUMENT

A. THE PROPOSED SETTLEMENT IS MADE IN GOOD FAITH

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

1. Strength of Plaintiffs' Case and Investigation and Discovery

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

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

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

Plaintiff obtained verified copies of FULL PACKAGE DELIVERY, LLC's uniform time keeping, employee compensation, Meal Period, Rest Period, and reimbursement policies. In addition to Plaintiffs' time and wage records, Defendant FULL PACKAGE DELIVERY, LLC also produced a large sampling of class member's records. Including "outside" documentation, Counsel reviewed thousands of pages of documents. Through this review, Plaintiffs' counsel was able to analyze and verify the following: the uniformity of Defendant FULL PACKAGE DELIVERY, LLC's "timekeeping" and compensation practices and the average net effect it had on Defendant FULL

1 PACKAGE DELIVERY, LLC's nonexempt employees; the format and content of Defendant FULL
2 PACKAGE DELIVERY, LLC's itemized wage statements; the average rate of pay for Defendant
3 FULL PACKAGE DELIVERY, LLC's nonexempt employees; and the average number of apparent
4 meal period violations per employee based on multiple sets of timekeeping data.

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

8 While Plaintiff maintains the claims were all viable, Plaintiff (and his counsel) recognize there
9 were substantial risks to proceeding on behalf of a class and representative group. Defendants each
10 presented several potentially valid defenses to certification, liability and mitigation of damages. (*Id.*)

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

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

17 If not for this settlement, any request by Plaintiffs to certify a class would have been heavily
18 contested by Defendants. (See ROA # 23 at §VI.)

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

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

1 after a finding of liability).

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

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

7 Based on a detailed analysis of all the claims and the risks involved in continuing litigation,
8 class counsel submits the \$287,290.00 Maximum Settlement Amount represented a fair, and more than
9 reasonable, settlement. (Yaeckel decl. ¶¶ 11-12.)

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

11 Although the State is not directly involved in this action, Plaintiffs “stand in the shoes” of the
12 Labor and Workforce Development Agency (“LWDA”) by bringing a PAGA action. Part of the
13 Maximum Settlement Amount will be paid to the Labor Workforce Development Agency (“LWDA”)
14 in the amount of \$18,750.00 (which is the LWDA's 75% share of a \$25,000 allocation) to fully and
15 finally resolve Plaintiff’s claims for civil penalties for alleged Labor Code violations under PAGA..

16 The LWDA was notified of the violations alleged by Plaintiff and declined to prosecute the
17 claims itself. Counsel for the parties believe this is a fair, reasonable, and adequate allocation. (Yaeckel
18 decl. ¶12.) The LWDA was also served with copies of the Agreement and Preliminary Approval
19 Motion and has not objected or responded to date. (*Id.*) They have also been served with the notice of this
20 motion and all supporting documents. (See concurrently filed Proof of Service.) Counsel will submit
21 a 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 288 members of the Settlement Class were notified and **one** member opted out of the
24 class. (Johnson decl. ¶¶ 6(a) & 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

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

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

4 Plaintiff will seek, and Defendants will not oppose, a payment of Ninety Five Thousand and
5 Seven Hundred Sixty Three Dollars and Thirty Three cents in Attorneys’ Fees, which is 1/3 of the
6 Maximum Settlement Amount, and Seven Thousand Two Hundred, Twenty Two Dollars and Fifty-
7 Eight Cents (\$7,222.58) in litigation costs, both to be paid from the Maximum Settlement Amount.
8 (See **Exhibit A** at ¶ 41.)

9 As set forth below, the requested attorney’s fees are inherently reasonable, on the basis of both
10 a percentage of the recovery and a lodestar method, given the results obtained for the Settlement Class
11 and the Aggrieved Employees. The following factors establish the reasonableness of the attorney’s fees
12 requested.

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

15 In the instant matter, Plaintiff’s Counsel was retained on a contingency basis. (Yaeckel decl.
16 ¶15.) A percentage fee of 35 % (thirty-five percent) was freely negotiated. (*Id.*) As part of the
17 Agreement, Counsel was required to continue the prosecution of the matter regardless of the outcome
18 of the preliminary motions (i.e. class certification.) (*Id.*)

19 There is an **established practice** in the private legal market to reward attorneys for taking the
20 risk of non-payment by paying them a **premium over their normal hourly rates** for winning
21 contingency cases. *In re Washington Public Power Supply System Securities Litigation* (9th Cir. 1994)
22 19 F.3d 1291, 1299. If attorneys’ efforts create a benefit for others in addition to their own client, the
23 court is empowered to award fees from that fund. *Boeing v. Van Gemert* (1980) 444 U.S. 472, 478.

24 The rationale for fee enhancement in contingency cases has been explained as follows:

25 'A contingent fee must be higher than a fee for the same legal services paid as they
26 are performed. **The contingent fee compensates the lawyer not only for the legal
27 services he renders but for the loan of those services. The implicit interest rate
28 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

1 **the second of these functions. If he is paid no more, competent counsel will be**
2 **reluctant to accept fee award cases.'** (Leubsdorf, *The Contingency Factor in*
3 *Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct,
4 rule 4-200(B)(9) [recognizing the contingent nature of attorney representation is an
5 appropriate component in considering whether a fee is reasonable]; ABA Model
6 Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof.
7 Conduct, rule 1.5(a)(8). ¶] **Such fee enhancements are intended to compensate for**
8 **the risk of loss generally in contingency cases as a class.**
9 *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1419 (disapproved on other grounds.)

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

12 The bases of the equitable rule which permits surcharging a common fund with the
13 expenses of its protection or recovery, including counsel fees, appear to be these:
14 fairness to the successful litigant, who might otherwise receive no benefit because his
15 recovery might be consumed by the expenses; correlative prevention of an unfair
16 advantage to the others who are entitled to share in the fund and who should bear their
17 share of the burden of its recovery; **encouragement of the attorney for the**
18 **successful litigant, who will be more willing to undertake and diligently**
19 **prosecute proper litigation for the protection or recovery of the fund if he is**
20 **assured that he will be promptly and directly compensated should his efforts be**
21 **successful.**

22 *Jordan v. California Dep't of Motor Vehicles* (2002) 100 Cal.App.4th 431, 446 (with emphasis added)
23 citing *Estate of Stauffer* (1959) 53 Cal.2d 124, 132.

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

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

28 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. ¶16.)

3 **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. ¶17.)

4 **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

1 approximately 28 years. William B. Sullivan has approximately 27 years of experience in "class action"
2 litigation, both as plaintiff and defense counsel. (Yaeckel decl. ¶ 3.) Mr. Yaeckel has over 12 years
3 experience prosecuting class and representative actions on behalf of California Employees. (Yaeckel
4 decl., ¶ 4.) Class Counsel are the attorneys of record in a matter very recently (and favorably) decided
5 before the California Supreme Court titled *Donohue v. AMN Services, LLC*, 11 Cal.5th 58 (2021).
6 The *Donohue* matter is a certified class and PAGA action. (Yaeckel decl. ¶ 5.) Plaintiff's counsel, are
7 currently lead counsel on approximately 30 employment "wage and hour" claims with class action, or
8 representative action allegations. (Yaeckel decl. ¶ 6.)

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

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

16 **5. The Amount Involved and the Results Obtained on Behalf of the Class**

17 This is not a "coupon" class action case. (Yaeckel decl. ¶ 18.) The Class is set to receive
18 significant monetary benefits they would not have received if Class Counsel did not act. (*Id.*)
19 Participating Class Members will receive an average of \$464.64 with some Participating Class
20 Members receiving as much as \$2,553.15 (Johnson decl. ¶ 16.)

21 **6. A Percentage of the Common Fund Award is Proper**

22 The controlling law, is more extensively set forth above. See Section IV(B) above.

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

1 (awarding approximately 53% of the settlement fund as attorney fees).

2 California courts routinely approve class action attorneys' fee awards "averag[ing] around
3 one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (lower court
4 found 20 to 40 percent range of contingency fee in marketplace was appropriate in class actions).

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

15 7. The Lodestar Cross-Check

16 *If* deemed necessary, a "lodestar cross-check" of the settlement also confirms the propriety of
17 the request.

18 As set forth in the attached Declaration of Eric K. Yaeckel, the actual lodestar attorney's fees
19 incurred (to date) are estimated to amount to be approximately **\$98,652.00** attorney's fees and are
20 broken down as follows:

21 Mr. William Sullivan served as lead investigator and trial counsel, per the specific request of
22 Plaintiffs. (Yaeckel decl. ¶ 19(a).) The billing rate for Mr. William Sullivan is **\$720.00** per hour.
23 (Yaeckel decl. ¶ 19(a).) Over the course of the investigation (including pre-filing), Mr. William
24 Sullivan has currently expended approximately **61.1** hours in the service of this action. **61.1** hours
25 times **\$720.00** equals **\$43,992.00**. The work includes nearly all preliminary investigation, some client
26 and Class interaction/meetings, and some pre-settlement work, including the preparation of Plaintiff's
27 Mediation Brief and damages analysis. (*Id.*) This time also includes traveling to at least 4 interviews
28 with proposed Class Members . (*Id.*) The preliminary investigation included the review and analysis

1 of several documents. (*Id.*) During this time, Mr. Sullivan also investigated Defendant, its business
2 practices, and any variations in Class Members' job duties and rates of pay. (*Id.*)

3 Mr. Eric Yaeckel, was the partner primarily assigned to oversee the "day to day" activity of the
4 primary associates assigned to this case. The billing rate of Mr. Yaeckel is **\$600.00** per hour. (Yaeckel
5 Decl. ¶ 19(b)). Mr. Eric Yaeckel has currently expended approximately **56.8** hours in the service of this
6 action. **56.8** hours times **\$600.00** equals **\$34,080.00**. (Yaeckel Decl. ¶ 19(b).) Aside from supervising
7 the Associates, this work includes attending hearings and most of the day to day communication with
8 opposing counsel. Mr. Yaeckel also primarily handled the numerous exchanges between the mediator
9 and Defense counsel to negotiate and finalize the settlement following the progress made at mediation.
10 Mr. Yaeckel also undertook the review and drafting of all settlement documents and the preliminary
11 and final approval motions. (*Id.*)

12 Mr. Ryan Kuhn, Katherine Dishongh and Ms. Karoline Kitlowski (briefly) also served as
13 Associate Attorneys assigned to the case. (Yaeckel decl. ¶ 19c.) The associates' billing rate on this
14 matter is **\$420.00** per hour. The associates expended approximately **44.0** hours in the service of this
15 action. **44.0** hours times **\$420.00** equals **\$18,480.00**. The work performed by the associates consisted
16 of, for the most part, analysis of Defendants' documents and records, in preparation for mediation and
17 a class certification motion. The associates were also assigned to discovery creation/review, the
18 preparation of "meet and confer" letters and other contact with defense counsel. The associates also
19 provided an analysis of employment records to determine "commonality" and damages. (Yaeckel decl.
20 ¶ 19(c).)

21 Based on past experience, counsel estimates the associate attorneys will incur an additional 5.0
22 hours in assisting Class Members on questions and issues regarding the settlement, meeting with Class
23 Members (including those who file "late" submissions), and preparing for and attending the Final
24 Approval hearing in this matter. 5.0 times **\$420.00** equals **\$2100.00**. (Yaeckel decl. ¶ 19(d).)

25 **8. The Lodestar Multiplier**

26 Given the attorneys fees incurred – in the approximate amount of **\$98,652.00**– no lodestar
27 multiplier is necessary for the full award requested (and undisputed) by Plaintiff.

28 Moreover, the results obtained here, versus the risk of a zero recovery, given the numerous

1 asserted defenses, support this fee request. (Yaeckel decl. ¶ 22.)

2 Additionally, the Settlement provides the Participating Class Members with a substantial
3 monetary amount and the Participating Class Members strongly support the fairness of the Settlement,
4 even after being notified of the requested attorneys' fee award (**1 opt-out, and 0 objections**). In the
5 event the Court deems a lodestar analysis is necessary it will confirm that Plaintiff's attorney's fees
6 are reasonable.

7 **9. The Amount of Costs**

8 Class Counsel has expended approximately **\$7,222.58** in costs, including filing fees, travel,
9 mediation, copying and document preparation charges, expert fees, and delivery/service fees. (Yaeckel
10 decl. ¶ 20.) Defendant agreed not to oppose an amount of up to \$12,000.00 in costs, to be paid from
11 the Maximum Settlement Amount. Accordingly, Plaintiff's counsel therefore seeks approval of the
12 actual costs of \$7,222.58. (Yaeckel decl. ¶ 21.)

13 **C. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT IS REASONABLE**

14 Plaintiff requests an enhancement award of **\$20,000** to Mr. Xola (the named Plaintiff) for
15 serving as the class representative and for a full release of all claims. Defendants do **not** oppose this
16 request. The Settlement Class was notified and does **not** object.

17 **Please Note:** to confirm, in addition to his service as the named Plaintiff, Mr. Xola was also
18 asked to sign a more broad general release of any and all potential claims against Defendants as part
19 of settlement. (See **Exhibit A** at ¶ 43(b). The Participating Class Members' release was limited to
20 claims that were alleged or could have been alleged in the First Amended Complaint. Mr. Xola's
21 agreement to give up his other potential claims individual claims (including, but not limited to,
22 discrimination and retaliation) further justify this enhancement.

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

27 Plaintiff contributed extensive time and resources in the prosecution of this case. Plaintiff was
28 able to provide information instrumental to the prosecution of this matter including identifying

1 numerous witnesses that could corroborate his claims. The plaintiff also assisted with reviewing and
2 providing insight on Defendant's documents produced. (Yaeckel decl. ¶ 24; See Xola decl. ¶ 4).

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

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

10 In addition, the Plaintiff's co-workers have all been notified of the lawsuit, so there is a large
11 pool of peers who now know of each of him bringing claims against a former employer, which could
12 also jeopardize future positions.

13 Plaintiff also risked personally owing a large cost award, into the tens of thousands of dollars,
14 had his claims been unsuccessful. (See Xola decl. ¶ 9; Yaeckel decl. ¶ 29.)

15 Despite all the risks Plaintiff, at all times remained committed to securing a monetary recovery
16 on behalf of the entire class. (See Xola decl. ¶ 10.)

17 Accordingly, Plaintiff asks the Court to approve a class representative enhancement in the
18 amount of \$20,000 to Mr. Xola.
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1 **VI. CONCLUSION**

2 Based on the foregoing, Plaintiff respectfully request that this Court grant Plaintiff's Motion
3 consistent with the accompanying proposed Order: (1) Granting Final Approval Of Class Finally
4 Approving Class and PAGA Action Settlement and (2) Entering Judgment.
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7

8 Dated: August 16, 2023

SULLIVAN & YAECKEL LAW GROUP, APC

9
10 *Karoline Kitlowski*

11

Eric K. Yaeckel
12 Ryan T. Kuhn
13 Karoline Kitlowski
14 Attorneys for Plaintiff KASHU XOLA, Individually,
15 and on behalf of other members of the general public
16 similarly situated
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