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

DEVIN TEAGUE, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

HAPPY EXPRESS, INC., a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2203408
*[Assigned to 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 19, 2023

Time: 9:00 a.m.

Dept: S26

Complaint filed: February 14, 2022

TO THE COURT AND PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT on September 19, 2023, at 9:00 a.m., or as soon
thereafter as this matter may be heard by the Honorable David Cohn in Department S26 of the
San Bernardino County Superior Court, located at 247 West Third Street San Bernardino CA
92415, Plaintiff Devin Teague will respectfully move this Court for an Order granting final
approval of the class action settlement between Plaintiff and Defendants Happy Express, Inc.,
and Andrey Oganessian (collectively, “Defendants” or “Happy Express”), which was
preliminarily approved by the Court. This Motion, which is supported and unopposed by

Defendants, seeks final approval and entry of judgment of a \$200,000 settlement on behalf of the Class Members.

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

1. Finally certifying the Class, as defined in the Settlement Agreement and the Court's Order Granting Preliminary Approval of the Settlement;
2. Finally appointing Plaintiff as Class Representative for purposes of settlement;
3. Finally appointing Brian Mankin and Kristina Carlson of Lauby Mankin Lauby LLP as Class Counsel for purposes of settlement;
4. Finding that the Class Notice was properly provided to the Class in accordance with the Court's Order granting Preliminary Approval;
5. Finally approving the settlement as fair, adequate, and reasonable, based upon the terms set forth in the Settlement Agreement;
6. Binding participating Class Members to the terms of the Settlement Agreement, including the Release specified therein; and
7. Retaining jurisdiction to enforce the Settlement Agreement.

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

Dated: August 25, 2023

LAUBY, MANKIN & LAUBY LLP

BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

3 Pursuant to California Rules of Court, Rule 3.769 (d) and (e), Plaintiff respectfully
4 requests that this Court grant final approval of the Class Action and PAGA Settlement
5 Agreement and Release of Claims (the “Settlement Agreement” or “S.A.”) already on file in this
6 action, which is supported and unopposed by Defendants Happy Express, Inc., and Andrey
7 Oganessian (collectively, “Defendants” or “Happy Express”), and enter the proposed order and
8 final judgment in this matter.

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

- 11 • After extensive work, the Parties reached a \$200,000 settlement tailored to a
12 limited release of the claims alleged on behalf of the Class Members;
- 13 • The Class Members were deemed to participate in the Settlement, and were not
14 required to submit a Claim Form to receive funds;
- 15 • No reversion to Defendants; and
- 16 • There are zero objections and zero opt-outs, meaning that 100% of the Class
17 elected to participate in the Settlement;

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

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

23 Plaintiff and the Class Members include all current and former California resident truck
24 drivers who were classified as independent contractors and performed services for Happy
25 Express at any time during the Class Period of February 14, 2018, through January 30, 2023 (the
26 “Class Members”). Plaintiff and the putative class alleged claims for: (1) failure to pay
27 minimum wages, (2) failure to pay for rest and recovery periods, (3) failure to reimburse for
28 business expenses, (4) failure to timely pay final wages, (5) failure to provide accurate itemized

wage statements, (6) unfair and unlawful competition pursuant to California Business and Professions Code §§ 17200 *et seq.*, and (7) related claims under PAGA, including misclassification.

The Settlement includes 51 Participating Class Members¹. The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Taylor Mitzner (“Mitzner Decl.”), ¶ 11-12):

Gross Settlement Amount	\$ 200,000.00
Attorneys’ Fees (1/3)	\$ 66,666.67
Litigation Costs	\$ 8,840.87
Administrator Costs	\$ 6,000.00
PAGA Penalties	\$ 20,000.00
Class Representative Service Award	\$ 7,500.00
Net Settlement Amount	\$ 90,992.46

The Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Assuming all of the amounts are approved by the Court, the highest payment to Participating Class Members is estimated at \$11,070.30, and the average payment is \$1,784.17. Of course, the actual payments will be calculated on a pro-rata basis according to the number of Weeks Worked by each Class Member. The Participating Class collectively worked 1,685 Weeks during the Class Period, so each week will have a value of approximately \$54. (Mitzner Decl. ¶ 13).

Additionally, 25% of the PAGA Penalties will be allocated to the Aggrieved Employees. In this case, 47 Aggrieved Employees collectively worked 1,288 Workweeks, and will share in the \$5,000 award (accounting for 25% of the total \$20,000 allocation), resulting in an average Individual PAGA Payment of \$106.38. (Mitzner Decl. ¶ 14).

Since the Class Members performed contract services for Defendants as independent contractors, rather than employees, and because Defendants fully dispute the allegations alleged herein, the Parties agree that 100% will be allocated for contract compensation, interest, and penalties (pursuant to, *e.g.*, California Labor Code §§ 203, 210, 226, 2699 etc.) from which no taxes will be withheld. (S.A. ¶ 47(d)). The Individual PAGA Payments will be classified

¹ This is less than the number estimated at the time of preliminary approval (58).

1 entirely as civil penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶ 47(h)).

2 Defendants are required to fund the Gross Settlement Amount under a two-part payment
3 plan that divides each payment proportionally between Plaintiff, the Participating Class
4 Members, the Aggrieved Employees, the LWDA, Class Counsel (for fees and costs), and the
5 Settlement Administrator. (S.A. ¶ 69). Under this payment plan, Defendant is required to fund:
6 (1) \$100,000 by the later of October 1, 2023, or 10 days after the Effective Date, and (2) the
7 remaining \$100,000 by the later of June 1, 2024, or 10 days after the Effective Date. (S.A. ¶ 69).

8 **III. THE NOTICE PROCESS**

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

10 Pursuant to the Court's Order and the Settlement Agreement, the Parties directed the
11 Settlement Administrator to review and update the Class Members' addresses, mail the Court-
12 approved Notice Packet, and process their responses. (Mitzner Decl. ¶ 2).

13 Prior to mailing the Notice Packet, the Settlement Administrator performed a National
14 Change of Address search on all Class Members to determine if any had moved. (*Id.* ¶ 4). Then,
15 on June 27, 2023, the Notice Packet was sent via first-class mail to 51 Class Members to advise
16 each about the suit and settlement. (*Id.* ¶ 5). Ultimately, it was determined that all Notice
17 Packets were deliverable, meaning that there was a 100% success rate in mailing the Notice
18 Packets. (*Id.* ¶ 6).

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

28 ///

1 **B. THERE ARE ZERO OBJECTIONS AND OPT-OUTS, RESULTING IN AN IMPRESSIVE**
2 **100% CLASS PARTICIPATION IN THE SETTLEMENT**

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

11 Here, there are zero objections and zero opt-outs to the Settlement, meaning that 100% of
12 the Class Members will receive a share of the Settlement (Mitzner Decl. ¶¶ 7-8). Thus, the Class
13 fully viewed this as a fair and reasonable settlement.

14 **IV. EVALUATION OF THE SETTLEMENT**

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

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

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

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

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

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

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

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

25 As set forth at the time of preliminary approval, Class Counsel's investigation into the
26 facts and merits of the wage and hour claims alleged included analyzing substantial amounts of
27 information, correspondence, documents, pay data, policies and procedures, and evidence
28 relating to the class size and the commonality of the claims. During this process, Plaintiff and

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

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

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

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

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

23 Greenwell misunderstands *Kullar*, apparently interpreting it to
24 require the record in all cases to contain evidence in the form of an
25 explicit statement of the maximum amount the plaintiff class could
26 recover if it prevailed on all its claims – a number which appears
27 nowhere in the record of the case. But *Kullar* does not, as
28 Greenwell claims, require any such explicit statement of value; it
 requires a record which allows "an understanding of the amount
 that is in controversy and the realistic range of outcomes of the
 litigation.

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

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

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

17 For their efforts, the Settlement Agreement provided that Class Counsel may seek
18 reasonable fees of \$66,666.67 (one-third of the Settlement Amount). This amount will be paid
19 from the Settlement Amount, as provided by the Settlement Agreement. These fees are
20 warranted under the law and within the range of fees commonly awarded in similar cases.

21 As shown herein, the requested percentage of one-third of the settlement fund as payment
22 for attorneys’ fees should be granted for several reasons. First, one-third is the standard
23 benchmark in California for class action settlements. *See, e.g., Chavez v. Netflix, Inc.* (2008) 162
24 Cal.App.4th 43, 66 n. 11 (“Empirical studies show that, regardless whether the percentage
25 method or the lodestar method is used, fee awards in class actions average around one-third of
26 the recovery”). Second, the California Supreme Court recently held that the percentage of the
27 fund method survives in California class action cases. *See Laffitte v. Robert Half International,*
28 *Inc.* (2016) 1 Cal.5th 480. Third, the requested amount is eminently reasonable through the

1 prism of a lodestar cross-check. Accordingly, this request should receive final approval.

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

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

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

19 Under the "common fund" doctrine, the request for attorneys' fees in the amount of 1/3
20 of the common fund is reasonable and appropriate, because (1) it is within the approved range
21 for percentages awarded as attorneys' fees in similar cases; (2) it is supported by the high quality
22 of Class Counsel's work on this case and the results obtained for the Class; (3) the Class had
23 sufficient notice of the fee request; (4) it is supported by the fact that this case was handled on a
24 contingency basis and was undertaken despite various risks and expenses; and (5) the lodestar
25 cross-check supports the fee request.
26
27
28

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

4 The California Supreme Court approved trial courts' usage of the common fund method
5 of awarding attorneys' fees in wage and hour class actions, like this one, and upheld a fee
6 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte, supra*, 1 Cal.5th
7 at 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 51 ("fee awards in class actions average
8 around one-third of the recovery"). Specifically, in *Laffitte*, the Court wrote: "[w]e join the
9 overwhelming majority of federal and state courts in holding that when class action litigation
10 establishes a monetary fund for the benefit of the class members, and the trial court in its
11 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
12 of a reasonable fee by choosing an appropriate percentage of the fund created"). *Id.* at 506. The
13 California Supreme Court also noted that trial courts have the discretion to award fees as a
14 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
15 *Id.* ("...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
16 evaluate the reasonableness of a requested percentage fee.").

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

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

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

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

3. Class Members Had Sufficient Notice of the Requested Fees

Rule 3.769 of the California Rules of Court requires that the Class Members be given notice of any agreement regarding an application for attorneys’ fees. Here, the Notice preliminarily approved by the Court and distributed to the Class Members apprised them that “Class Counsel will ask for fees of one-third (\$66,666.67) of the common fund Settlement Amount as reasonable compensation for the work Class Counsel performed and will continue to perform in this Lawsuit through finalization of the Settlement...” (Mitzner Decl., Exh. A.)

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

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

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

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

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

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

19 Despite recognized limitations of the so-called lodestar method, some California and
20 federal courts acknowledge the utility of a lodestar “cross-check.”³ (*Lealao, supra*, 82
21 Cal.App.4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the
22 reasonableness of attorneys’ fees in class actions, the court ascertains Class counsel’s total
23 “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or
24 legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a
25 “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its
26

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

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

contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 3125-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”].) The actual aggregated lodestar between attorneys that worked on this case is approximately \$119,885, resulting in a negative multiplier, as shown in the following table and declarations of counsel.

Attorney/Timekeeper	Rate	Hours	Fee
Brian J. Mankin <i>Trial Counsel / Partner</i> (22 Years)	\$775	52⁴	\$40,300
Kristina Carlson <i>Associate</i> (9 Years)	\$550	144.7	\$79,585
Grand Total for All Attorneys			\$119,885

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

The hourly rates above are comparable to those of other attorneys with equal or similar experience, if not somewhat lower (i.e., the Laffey Matrix at www.laffeymatrix.com indicates that the benchmark rate for an 8–10-year attorney to be \$676/hour and a 11-19 year attorney at \$764/hour, and a 20+ year attorney at \$919/hour). Moreover, the Wolters Kluwer 2017 Real Rate Report (“Real Rate Report”) provides directly applicable information in this regard. The Real Rate Report is based on an enormous and statistically significant compilation of data: 25.8 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc., 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the hourly rates for partners and associates in major metropolitan areas. For the southern California area, which is based on billing entries for 1,125 partners and 1,566 associates, the

⁴ Includes an estimated 10 hours of additional work preparing for and attending the hearing, as well as 20 hours in anticipated work to be performed after the final approval, particularly in light of the payment plan, as it will require considerable more work with counsel, administrator, and Class Members.

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

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

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

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

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

22 The Settlement Agreement authorized litigation costs of up to \$20,000. (S.A. ¶ 47(f)).
23 However, Class Counsel's actual costs through the final approval hearing were \$8,840.87, so
24 this is the amount requested. The saving will be placed in the Net Settlement Amount for
25 payment to the Class Members. (Mankin Decl. ¶ 27). These costs include mediation fees,
26 filing fees, expert data analysis costs, CourtCall charges, and process server fees.

27 ///

28 ///

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

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

12 Under the Settlement, Defendants agreed to pay a Service Award of \$7,500 to Plaintiff
13 in recognition of his contribution as a Class Representative.

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

25 Plaintiff also committed a significant number of hours to assist with the
26 litigation/settlement processes of this case and entered into a general release of all claims
27 against Defendants, whereas the Class Members only released the claims alleged. The
28 requested Service Award is reasonable, particularly in light of the substantial benefits Plaintiff

1 generated for the Class Members, the risks he undertook, and the general release he gave in
2 order to benefit the class. (*See* Pla Decl. ¶¶ 3-9).

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

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

7 **A. SETTLEMENT ADMINISTRATION COSTS**

8 The Administrator agreed to administer the settlement for a flat-fee of \$6,000.00, which
9 is a bit higher than normal due to the payment plan. (Mitzner Decl. ¶ 15). As such, the Parties
10 request that the Administrator's fee be approved.

11 **B. UNCASHED CHECKS**

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

14 **C. FINAL REPORT**

15 As set forth above and in the Final Order, Defendants final payment is due on about
16 June 1, 2024. As a result, the 180-day check cashing deadline is projected to occur on about
17 December 8, 2024. As such, the Parties propose submitting a final report in the form of a
18 declaration from the Administrator (setting forth the money that was actually paid to the class
19 members and will be paid to the State Controller) on approximately January 8, 2025.

20 **D. SUBMISSION TO THE LWDA**

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

23 **VIII. CONCLUSION**

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

26 Dated: August 25, 2023

LAUBY, MANKIN & LAUBY LLP

27 BY:


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

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 5198 Arlington Avenue, PMB 513, Riverside, California 92504.

On August 25, 2023, I caused to be served the foregoing document(s) described as follows:

**NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; DECLARATIONS IN SUPPORT THEREOF; AND [PROPOSED] FINAL
ORDER AND JUDGMENT**

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **By Mail** I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

☐ **By Facsimile** I sent this document via fax to all parties as listed on attached service list, on

☐ **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

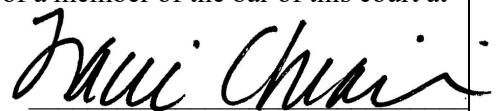
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

☐ **By Certified Mail-Return Receipt Requested** I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California

☐ **By Personal Service** I caused said document(s) to be personally served by hand on the parties listed on the attached service list.

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 25, 2023, Riverside, California.

☐ **Federal** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


Tracie Chiarito, Declarant

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