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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ASTRID OROZCO, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

DELPHON INDUSTRIES, LLC, a Delaware
Limited Liability Company; and DOES 1
through 20, inclusive;

Defendants.

Case No.: 22CV006597
*[Assigned to Hon. Evelio Grillo, Dept. 21, 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 15, 2023

Time: 9:00 a.m.

Dept: 21

Complaint filed: February 4, 2022

1 TO THE HONORABLE COURT AND TO ALL PARTIES AND COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on September 15, 2023, at 9:00 a.m., or as soon
3 thereafter as this matter may be heard by the Honorable Evelio Grillo in Department 21 of the
4 Alameda County Superior Court, located at 1221 Oak Street, Oakland, CA 94612, Plaintiff
5 Astrid Orozco (“Plaintiff” or “Class Representative”) will respectfully move this Court for an
6 Order granting final approval of the class action settlement between Plaintiff and Defendant
7 Delphon Industries, LLC, (“Defendant” or “Delphon”), which was preliminarily approved on
8 May 17, 2023. On July 6, 2023, the Court approved an amended order granting preliminary
9 approval of this class action settlement. This Motion, which is supported and unopposed by
10 Defendant, seeks final approval and entry of judgment of a \$775,000 settlement on behalf of the
11 Class Members.

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

- 16 1. Finally certifying the Class, as defined in the Settlement
17 Agreement and the Court’s Amended Order Granting Preliminary Approval of the
18 Settlement;
- 19 2. Finally appointing Plaintiff as Class Representative for purposes of
20 settlement;
- 21 3. Finally appointing Plaintiff’s Counsel as Class Counsel for
22 purposes of settlement;
- 23 4. Finding that the Class Notice was properly provided to the Class in
24 accordance with the Court’s Amended Order Granting Preliminary Approval;
- 25 5. Finally approving the settlement as fair, adequate, and reasonable,
26 based upon the terms set forth in the Settlement Agreement;
- 27
28

1 6. Binding Participating Class Members and Aggrieved Employees to
2 the terms of the Settlement Agreement, including the Released Class Claims and
3 PAGA Released Claims specified therein; and

4 7. Retaining jurisdiction to enforce the Settlement Agreement.

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

10 Dated: August 23, 2023

LAUBY, MANKIN & LAUBY LLP

11
12 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 Astrid Orozco
4 (“Plaintiff” or “Class Representative”) respectfully requests that this Court grant final approval
5 of the Amended Class Action and PAGA Settlement Agreement and Release of Claims (the
6 “Settlement Agreement” or “Settlement” or “S.A.”) already on file in this action, which is
7 supported and unopposed by Defendant Delphon Industries, LLC, (“Defendant” or “Delphon”)
8 and enter the proposed order and final judgment in this matter.

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

- 11 • After extensive litigation, a robust pre-mediation exchange of
12 information, and arms-length negotiation brokered by an experienced mediator,
13 the Parties reached a \$775,000 settlement tailored to a release of the claims
14 alleged on behalf of Class Members as set forth in the Settlement Agreement;
- 15 • The Class Members (which includes all current and former non-
16 exempt employees employed by Delphon Industries, LLC in California at any
17 time during the Class Period of February 4, 2018, through February 13, 2023)
18 were deemed to participate in the Settlement, and were not required to submit a
19 Claim Form to receive funds;
- 20 • No reversion to Defendant;
- 21 • There were no objections and no opt-outs, meaning that 100% of the Class elected
22 to participate in the settlement.

23 Clearly, the Class overwhelmingly supports the Settlement. Thus, in accordance with the
24 analysis and law set forth herein, the Settlement Agreement should be approved, and judgment
25 entered based on the determination that the Settlement Agreement is fair, reasonable, adequate,
26 and in the best interests of the Class. (Declaration of Class Counsel Brian J. Mankin [“Mankin
27 Decl.”] ¶¶ 13).

28 ///

II. PERTINENT BACKGROUND AND SETTLEMENT TERMS

Delphon manufactures polymer and adhesive products for the semiconductor, photonics, medical and electronics industries. The Class Members work in Delphon's warehouse and manufacturing facility. The primary claims (which Defendants vehemently disputed) involved allegations that Delphon failed to pay the Class all wages owed, including overtime, (based on theories that the Class Members worked a 4/10 schedule without a valid Alternative Workweek Schedule, performed unpaid off-the-clock work and subjected to rounding), failed to provide compliant meal and rest breaks, issued inaccurate and incomplete wage statements, untimely payment of wages each period and upon separation of employment, and PAGA penalties arising from the same underlying conduct.

The settlement includes 162 Participating Class Members, and the following is a breakdown of how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Kevin Lee ["Lee Decl."] ¶ 12.

	Total Amount
<i>Gross Settlement Amount</i>	\$ 775,000.00
Attorneys' Fees (1/3)	\$ 258,333.33
Litigation Costs	\$ 13,832.66
Administrator Costs	\$ 8,000.00
PAGA Penalties	\$ 75,000.00
Class Representative Service Award	\$ 7,500.00
<i>Net Settlement Amount</i>	\$ 412,334.01

The Participating Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Each Participating Class Member will receive a pro rata share of the Net Settlement Amount according to the percentage of Pay Periods Worked during the Class Period, such that the amount actually distributed to Participating Class Members will equal 100% of the Net Settlement Amount. (S.A. ¶ 49(c)).

Assuming all amounts in the Settlement are approved by the Court, *the average individual settlement payment is estimated to be \$2,545.27*, the *highest* individual settlement payment is approximately \$4,040.91, and the lowest is \$14.64 for an employee that only worked one week in the Class Period. The Class collectively worked a total of 28,163 workweeks in the

1 Class Period, so each workweek has a value of \$14.64. (Lee Decl. ¶ 11, 13).

2 In addition, there are 138 Aggrieved Employees who will receive a share of the PAGA
3 Penalties based on a pro-rata basis. Thus, the \$18,750 in PAGA Penalties allocated to the
4 Aggrieved Employees will be divided and paid on a Pay Periods Worked basis. (Lee Decl. ¶ 14;
5 S.A. ¶ 49(h)).

6 The Settlement provides that one-third of each Individual Settlement Payment shall
7 constitute wages (for which each Participating Class Member will be issued an IRS Form W-2
8 for such payment), and the remaining two-thirds shall constitute interest and penalties (for which
9 each Participating Class Member will be issued an IRS Form 1099 for the interest and penalty
10 allocation). (S.A. ¶ 49(d)). Additionally, the PAGA Penalties payable to the Aggrieved
11 Employees will be classified entirely as civil penalties and shall be reported as required on an
12 IRS Form 1099. (S.A. ¶ 49(h)).

13 The Settlement Agreement provides that Defendant shall deposit the Gross Settlement
14 Amount within 15 calendar days after the Effective Date (S.A. ¶ 73). Within 10 calendar days of
15 receipt, the Settlement Administrator shall issue payments to cover all court-approved payments.
16 (S.A. ¶ 74). As set forth in the proposed Final Order, the envelope transmitting the settlement
17 checks shall bear the notation “YOUR CLASS ACTION SETTLEMENT CHECK IS
18 ENCLOSED.” (See Final Order ¶ 16.) Class Members will have 180 calendar days to cash
19 his/her settlement check. If a Class Member fails to cash his/her check within 180 calendar days
20 of mailing, then the Settlement Administrator shall issue the unclaimed funds to Public Justice
21 (publicjustice.net), a non-profit organization that fights for employee rights. (S.A. ¶ 75, Final
22 Order ¶ 17).

23 **III. THE NOTICE PROCESS**

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

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

1 After the Settlement Administrator received the Class Data on May 30, 2023, it
2 performed a National Change of Address search on all Class Members to determine if any had
3 moved. (*Id.* at ¶ 3-4). On June 16, 2023, the Notice Packets were sent via first-class mail to 162
4 Class Members. (*Id.* at ¶ 5). For any Notice Packet that was returned by the USPS as
5 undeliverable and without a forwarding address, the Settlement Administrator performed an
6 advanced address search (i.e., skip trace) to locate updated addresses and then promptly mailed
7 the Notice Packets to those updated addresses. Ultimately, the Settlement Administrator reports
8 that only 5 Notice Packets were undeliverable, resulting in a **97%** success rate in mailing the
9 Notice Packets. (*Id.* at ¶ 6-7).

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

19 **B. THERE ARE NO OBJECTIONS AND NO OPT-OUTS TO THE SETTLEMENT**

20 California law makes clear that the percentage of objectors and opt-outs is an important
21 factor in the Court’s consideration of a proposed class action settlement. *See Dunk v. Ford*
22 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1802. Indeed, the Ninth Circuit and other federal courts
23 recognize that in the final fairness analysis, the number or percentage of class members who
24 object to the settlement is a significant factor. *See Mandujano v. Basic Vegetable Prods., Inc.*
25 (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY 2001)
26 127 F.Supp.2d 418, 425 (“[i]t is well settled that the reaction of the class to the settlement is
27 perhaps the most significant factor to be weighed in considering its adequacy.”).

1 Here, there were **no** objections and **no** opt-outs, meaning that 100% of the Class
2 Members elected to participate and receive a share of the Settlement. (Lee Decl. ¶¶ 8-10).

3 Considering this positive reaction to the Settlement Agreement and its overall terms, it is
4 clear that the Settlement, which was the product of arm's-length negotiations, is fair and
5 reasonable and the Parties therefore respectfully request that the Court grant final approval and
6 enter the proposed judgment as requested. *See Dunk*, 48 Cal.App.4th at 1800-1802 (class action
7 settlements should be approved if they are fair and reasonable, and a low percentage of objectors
8 and opt-outs is evidence of an agreement's fairness).

9 **IV. EVALUATION OF THE SETTLEMENT**

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

20 When entertaining a request for final approval of a class action settlement, a court's
21 fundamental consideration is whether the settlement is fair, adequate and reasonable. *See Dunk*,
22 48 Cal.App.4th at 1801, fn. 7 (noting that state courts look to federal authority concerning the
23 approval of class settlements); California Rules of Court, Rule 3.769 (g).

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

1 these factors are discussed in detail below.

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

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

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

14 As the Settlement Agreement itself reveals, the Settlement is designed to fairly and
15 adequately compensate all Class Members. And, pursuant to California Rules of Court Rule
16 3.769(b), the parties have disclosed the agreed upon and proposed attorney fee award, which is
17 well within the range of reasonableness for matters of this nature.

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

19 As set forth at the time of preliminary approval, Class Counsel aggressively litigated this
20 matter and performed a comprehensive investigation into the facts and merits of the wage and
21 hour claims alleged. Notably, in preparation for mediation, the Parties informally exchanged
22 documents and information that allowed both sides to calculate the potential damages and
23 evaluate potential risk, including extensive policies and procedures pertaining to each claim
24 alleged, and statistics relating to the number of current and former employees, number of shifts,
25 pay periods and other things. In this regard, Defendant provided timekeeping and payroll
26 records in the pre-mediation period, which allowed both parties and their experts to thoroughly
27 analyze each potential claim. Additionally, during this process, Plaintiff's counsel analyzed,
28 researched, and investigated the potential issues, including matters related to the calculation of

1 damages, trial, and appellate issues and risks.

2 **C. CLASS COUNSEL ARE EXPERIENCED IN SIMILAR LITIGATION AND ENDORSE THE**
3 **SETTLEMENT**

4 Class Counsel are experienced in this type of litigation, and they have (and hereby do)
5 represent that this Settlement is fair and reasonable. (Mankin Decl. ¶¶ 2-6, 13; Carlson Decl. ¶¶
6 2-7); *see 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135,
7 1152 (Final approval of settlement affirmed where counsel were all experienced litigators with
8 class-action experience and had recommended settlement based on the negotiated terms).

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

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

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

25 Of course, a settlement is not judged against what might have been recovered had a
26 plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought
27 to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 246, 250
28 ("Compromise is inherent and necessary in the settlement process ... even if the relief afforded
by the proposed settlement is substantially narrower than it would be if the suits were to be
successfully litigated, this is no bar to a class settlement because the public interest may indeed
be served by a voluntary settlement in which each side gives ground in the interest of avoiding

litigation”).

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

V. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND REASONABLE

For their efforts in creating a common fund for the benefit of the class that will result in an *average payment to the Class of \$2,545.27*, the Settlement Agreement provided that Class Counsel seek reasonable fees of \$258,333.33, which is one-third of the common fund Settlement Amount. In light of the excellent result and high quality of work performed, these fees are warranted under the law and within the range of fees commonly awarded in similar cases.

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

A. PLAINTIFF IS ENTITLED TO RECOVER REASONABLE ATTORNEYS’ FEES UNDER THE LABOR CODE

Plaintiff and the Class in this action are entitled to recover reasonable attorneys’ fees, expenses and costs under Labor Code § 218.5, which provides that, “[i]n any action brought for the nonpayment of wages ... the Court shall award reasonable attorneys’ fees and costs to the

prevailing party.” In addition, Plaintiff and the Class are entitled to recover reasonable attorneys’ fees pursuant to Labor Code § 1194.2, which provides that, “... any employee receiving less than the legal minimum wage ... applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage... including ... reasonable attorney’s fees, and costs of suit.” Plaintiff is also entitled to fees and costs under Labor Code § 226(e) (employee who prevails on claim for itemized wage statement violation “is entitled to an award of costs and reasonable attorneys’ fees”), under PAGA (Labor Code § 2162(g), which provides “Any employee who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs, including any filing fee paid”), and, potentially, section 1021.5 of the California Code of Civil Procedure.

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

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

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

The California Supreme Court has approved trial courts’ usage of the common fund method of awarding attorneys’ fees in wage and hour class actions, like this one, upholding a fee awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte*, 1 Cal.5th at 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 552 (“fee awards in class actions average around one-third of the recovery”). Specifically, in *Laffitte*, the Court wrote: “[w]e join the overwhelming majority of federal and state courts in holding that when class action litigation

1 establishes a monetary fund for the benefit of the class members, and the trial court in its
2 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
3 of a reasonable fee by choosing an appropriate percentage of the fund created”). *Id.* at 506. The
4 California Supreme Court also noted that trial courts have the discretion to award fees as a
5 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
6 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
7 evaluate the reasonableness of a requested percentage fee.”).

8 The California Supreme Court’s *Laffitte* decision was consistent with its prior rulings
9 recognizing that “when a number of persons are entitled in common to a specific fund, and an
10 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that
11 fund, such ... plaintiffs may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest*
12 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer who
13 recovers a common fund . . . is entitled to reasonable attorneys’ fees from the fund as a whole”).
14 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
15 based on the amount that was available to be claimed, rather than as a percentage of the actual
16 amount claimed. *See Id.* at 475-6, 480-1 (the SCOTUS held that attorneys for a successful class
17 may recover a fee based on the fund created for the class, even if some class members make no
18 claims against the fund, so that money remains in it that will be returned to the defendant,
19 explaining: “[t]heir [class members’] right to share the harvest of the lawsuit upon proof of their
20 identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class
21 representatives and their counsel.” *See also Williams v. MGM-Pathe Communs. Co.* (9th Cir.
22 1997) 129 F.3d 1026, 1027 (trial court “abused its discretion by basing the fee on the class
23 members’ claims against the fund rather than on a percentage of the entire fund or on the
24 lodestar”).

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

26 In addition to the fact that a Class benefit was created with a non-reversionary common
27 fund settlement, the fairness of the requested fee award of 1/3 of the Settlement Amount is
28 supported by the high quality of work performed by Class Counsel and the excellent result

1 obtained for the Class against a well-funded Defendant, as evidenced by *an average individual*
2 *settlement payment of \$2,545.27*. This result occurred because Class Counsel diligently,
3 efficiently, and creatively pursued this case and reached a settlement for the benefit of the entire
4 Class. The fact that the settlement was embraced and supported by the Class, demonstrates that
5 Class Counsel obtained a favorable result for the Class.

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

7 Rule 3.769 of the California Rules of Court requires that the Class Members be given
8 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
9 preliminarily approved by the Court and distributed to the Class Members apprised them that
10 "Class Counsel will ask for fees of one-third (\$258,333.33) of the Gross Settlement Amount as
11 reasonable compensation for the work Class Counsel performed and will continue to perform in
12 this Lawsuit through finalization of the Settlement..." (Lee Decl., Exh. A.)

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

21 **4. The Contingent Nature of Class Counsel's Representation of Plaintiff**
22 **and the Class Further Supports the Fee Request**

23 An additional factor militating in favor of the granting of the requested fee award is the
24 fact that this case was both legally and financially risky for Class Counsel. *See Vizcaino v.*
25 *Microsoft Corp* (9th Cir. 2002) 290 F.3d 1043, 1048-49. Class Counsel have been representing
26 the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-
27 recovery after a substantial investment of time, money, and resources, and have done so since the
28 inception of this case without any payment or compensation. Specifically, there was the prospect

1 of enormous cost inherent in class action litigation; the risk that Defendant could prevail on its
2 argument that the class should not be certified; and the risk that Defendant could prevail on the
3 merits of some or all of the claims.

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

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

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

28 *Id.* at 399-400.

Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
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

1 Actions, cited in *Laguna v. Coverall North America, Inc.*, No. 12-55479 (9th Circuit 2014), found
2 that only one-third of class actions are successful, compared to two-thirds that are defeated and
3 result in no payment to the class members.¹

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

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

6 Despite recognized limitations of the so-called lodestar method, some California and
7 federal courts acknowledge the utility of a lodestar “cross-check.”² *Lealao v Beneficial*
8 *California, Inc.* (2000) 82 Cal.App.4th 19, 46-47. Under the “lodestar multiplier” method of
9 cross-checking the reasonableness of attorneys’ fees in class actions, the court ascertains Class
10 counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by
11 each attorney or legal staff member by their hourly rates, and then enhances or reduces this
12 lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or
13 difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM Group,*
14 *Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d
15 311, 322; *Lealao*, 82 Cal.App.4th at 43 [court has discretion to use multiplier to ensure fee award
16 is within “range of fees freely negotiated in the legal marketplace in comparable litigation”].

17 Historically, California courts have approved multipliers of 1.5 to 4. *See Coalition for*
18 *Los Angeles County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251
19 **(multiplier of 2+ approved)**; *Sternwest Corp v. Ash* (11866) 183 Cal.App.3d 74, 75. The
20 multiplier requested by Class Counsel below is within the range of multipliers found to be
21 appropriate by various federal and state courts in California. In *Sternwest Corp. v. Ash* (11866)
22 183 Cal.App.3d 74, for instance, the Court of Appeal remanded for a lodestar enhancement of
23 **“two, three, four or otherwise.”** *Id.* At 76; *see also Wershba*, 91 Cal.App.4th at 255
24 **(“Multipliers can range from 2 to 4 or even higher”)**; *City of Oakland v. Oakland Raiders*

25
26
27 ¹ www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf

28 ² 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.

(11868) 203 Cal.App.3d 78, 83 (**affirming 2.34 multiplier**); *Coalition for Los Angeles County Planning in the Pub. Interest v. 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 where class counsel expended 457.85 hours on the case, engaged in limited formal discovery, and where the case settled for \$2,750,000 within one year from filing the Complaint with 909 class members claiming \$1,305,200 and the remainder, except for the attorneys' fees and costs, reverting to the company.

The actual aggregated lodestar between the Plaintiffs' attorneys that worked on this case is approximately \$198,570. This results in a **small 1.3 multiplier**, as summarized in the following table, and in the submitted declaration of Plaintiff's counsel:

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner)	Trial Counsel	22	\$775	97³	\$75,175
Peter Carlson (Senior Associate)	Handling Attorney	9	\$575	214.6	\$123,395
Grand Total for All Attorneys					\$198,570

(Mankin Decl. ¶ 26; Carlson ¶ 8).

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 rates are: \$676/hour for an 8–10-year attorney, \$764/hour for a 11-19 year attorney, and \$919/hour for a 20+ year attorney). Moreover, the Wolters Kluwer 2017 Real Rate

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

14 Thus, not only are Plaintiff’s Counsel’s rates reasonable and typical, but the attorneys’
15 fees requested are in line with Plaintiff’s Counsel’s lodestar, all of which confirms that the fee
16 request is fair and reasonable.

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

27 It should also be noted that the Settlement Agreement and Final Order require the
28 Administrator to hold 10% of the fee awarded until the Court approves the final disbursement.

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

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

3 Plaintiff's Counsel requests reimbursement of their actual out-of-pocket expenses
4 incurred to prosecute this action. These expenses were incidental and necessary to the effective
5 representation of the employees. *See Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.
6 Plaintiff's Counsel are permitted to recover their litigation costs and expenses under the common
7 fund doctrine. *See Serrano III*, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees
8 and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6
9 (costs are recoverable from the common fund "[o]f necessity, and for precisely the same reasons
10 discussed above with respect to the recovery of attorneys' fees by . . . [Plaintiffs'] attorneys").
11 Furthermore, Plaintiff's Counsel are entitled to recover "those out-of-pocket expenses that would
12 normally be charged to a fee-paying client." *Harris*, 24 F.3d at 19.

13 The Settlement Agreement authorized litigation costs of up to \$20,000. (S.A. ¶ 50(f)).
14 Class Counsel's actual costs through the final approval hearing are estimated to be \$13,832.66.
15 (Mankin Decl. ¶ 28). These costs include mediation fees, filing fees, and other costs that include
16 Attorney Service charges, expert discovery fees, CourtCall charges, and process service fees.
17 (*Id.*) These costs are reasonable and uncontested, and should be approved, with the savings
18 placed in the Net Settlement Amount and paid to Participating Class Members.

19 **B. THE SERVICE AWARD IS FAIR AND REASONABLE**

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

1 willingness to act as a private attorney general.”).

2 The Settlement Agreement provides an incentive award payment to Plaintiff of \$7,500.
3 This amount is reasonable given the average recovery that Class Members will receive, as well
4 as the time and effort Plaintiff devoted to this case, and the risk that accompanied the litigation.
5 Her efforts included providing factual background for the Class and PAGA complaint;
6 providing documents and information about Defendant’s compensation plan; participating in
7 phone calls to discuss litigation and settlement strategy; making herself available throughout
8 the litigation to assist with analyzing the claims and defenses; helping Class Counsel prepare
9 for the mediation; and reviewing the settlement documents. The Class Representative also
10 assumed significant risk in bringing this litigation – namely, had she lost, she could have been
11 ordered to pay Defendant’s costs.

12 Plaintiff also committed a significant number of hours to assist with the
13 litigation/settlement processes of this case and entered into a general release of all claims
14 against Defendant arising out of, based upon, or relating to Plaintiff’s employment with
15 Defendant or the remuneration for or termination of such employment, as alleged in the
16 operative Complaint, whereas the Class Members and Aggrieved Employees only released the
17 claims that Plaintiff alleged. The requested Service Award is reasonable, particularly in light
18 of the substantial benefits Plaintiff generated for the Class Members, the risks she undertook,
19 and in exchange for executing a general release against Defendant while giving up the right to
20 pursue separate individual claims. (*See* Plaintiff Decl. for supporting information).

21 The Notice sent to each Class Member detailed the proposed service award. No Class
22 Member objected to the proposed payment to Plaintiff. Thus, Plaintiff requests that the Court
23 approve the award because it is both reasonable and appropriate.

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

25 **A. SETTLEMENT ADMINISTRATION COSTS**

26 Phoenix Settlement Administrators agreed to administer the settlement for a flat (“not
27 to exceed”) fee of \$8,000. (Lee Decl. ¶ 16). This amount was fully disclosed to the Class
28 Members in the Class Notice, and no Class Members objected to it. As such, the Parties

request that the Administrator's fee request be approved.

B. UNCASHED CHECKS

The Settlement Agreement provides that uncashed checks (following a 180-day check cashing period) will be submitted to the to Public Justice (publicjustice.net), a cy pres that supports employees.

C. FINAL REPORT

Defendant is required to issue payment to the Administrator within 15 calendar days after the Effective Date (which occurs 61 calendar days after the Order/Judgment is entered). The Administrator will then have 10 calendar days after Defendant's deposit of the Gross Settlement Amount into the Qualified Settlement Fund to issue payment to the Participating Class Members and Aggrieved Employees, who will then have 180 calendar days to cash their checks. This process adds up to 266 days from the date that the final order is entered. Thus, if the court signs and enters the order on September 15th (the day of the final approval hearing), the deadline to cash checks should occur on June 7, 2024. The final order proposes that the check to the cy pres be mailed 10 days after the deadline, and that counsel submit a declaration from the Settlement Administrator 15 days after the check cashing deadline. Thus, the Parties should be ready for a final disbursement hearing about 290 days after the Court enters the final order (or about July 1, 2024).

D. SUBMISSION TO THE LWDA

As set forth in the Mankin Declaration at ¶ 29, the settlement and this motion are concurrently being submitted to the LWDA in accordance with Labor Code § 2162(l)(2).

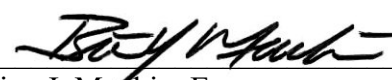
VIII. CONCLUSION

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

Dated: August 23, 2023

LAUBY, MANKIN & LAUBY LLP

BY:



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 23, 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.

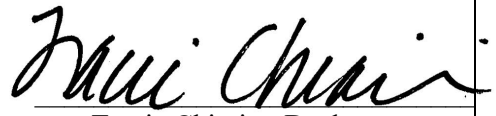
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 23, 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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