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

ARMANDO FLORES and WILLIAM
STOREY, individually, on a representative
basis, and on behalf of all others similarly
situated;

Plaintiffs,

v.

SUNRISE RESPIRATORY CARE, INC., a
California Corporation; SUNRISE
RESPIRATORY MANAGEMENT GROUP,
LLC, a California Limited Liability
Company, MICHAEL EILBERT, OSCAR
MUNOZ, and DOES 1 through 20, inclusive;

Defendants.

Case No.: CIVSB2127592
*[Assigned to Hon. Joseph T. Ortiz, Dept. S17,
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: June 14, 2023

Time: 1:30 p.m.

Dept: S17

Complaint filed: September 27, 2021

TO THE COURT AND PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT on June 14, 2023, at 1:30 p.m., or as soon thereafter as
this matter may be heard by the Honorable Joseph Ortiz Department S17 of the San Bernardino
County Superior Court, located at 247 West Third Street San Bernardino CA 92415, Plaintiffs
Armando Flores and William Storey will respectfully move this Court for an Order granting final
approval of the class action settlement between Plaintiffs and Defendants Sunrise Respiratory
Care, Inc., Sunrise Respiratory Management Group, LLC, Michael Eilbert, and Oscar Munoz,

1 (“Defendants”), which was preliminarily approved by the Court on February 14, 2023. This
2 Motion, which is supported and unopposed by Defendants, seeks final approval and entry of
3 judgment of a settlement on behalf of the Class Members.

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

7 1. Finally certifying the Class, as defined in the Settlement Agreement and the
8 Court’s Order Granting Preliminary Approval of the Settlement;

9 2. Finally appointing Plaintiffs Armando Flores and William Storey as Class
10 Representatives for purposes of settlement;

11 3. Finally appointing Brian Mankin and Kristina Carlson of Lauby Mankin Lauby
12 LLP as Class Counsel for purposes of settlement;

13 4. Finding that the Class Notice was properly provided to the Class in accordance
14 with the Court’s Order granting Preliminary Approval;

15 5. Finally approving the settlement as fair, adequate, and reasonable, based upon the
16 terms set forth in the Settlement Agreement;

17 6. Binding participating Class Members to the terms of the Settlement Agreement,
18 including the Release specified therein; and

19 7. Retaining jurisdiction to enforce the Settlement Agreement.

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

25 Dated: May 22, 2023

LAUBY, MANKIN & LAUBY LLP

26
27 BY:

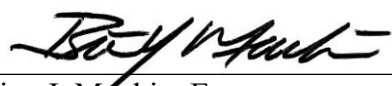

28 Brian J. Mankin, Esq.
Attorneys for Plaintiffs and the Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

3 Pursuant to California Rules of Court, Rule 3.769 (d) and (e), Plaintiffs respectfully
4 request that this Court grant final approval of the Class Action and PAGA Settlement Agreement
5 and Release of Claims (the “Settlement Agreement” or “S.A.”)¹, which is supported and
6 unopposed by Defendants Sunrise Respiratory Care, Inc., Michael Eilbert, Oscar Munoz, and
7 Sunrise Respiratory Management Group, LLC, and enter the proposed order and final judgment
8 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 settlement tailored to a limited release
12 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 only one opt-out, meaning that 99.59% 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 Sunrise Respiratory Care specializes in delivering medical equipment to patients’ homes
24 across Southern California to assist with sleep apnea and other respiratory conditions. It operates
25 from 6 locations in California out of which the Class Members were responsible for delivering
26 medical equipment. The primary claims involved allegations that Defendant Sunrise Respiratory
27 Care had an auto-deduct practice for meal periods as well as an on-call practice, failed to provide
28

¹ See Exhibit A to the Declaration of Brian Mankin in Support of Final Approval of the Class Action Settlement

meal and rest breaks, failed to timely pay all wages upon separation of employment and provided inaccurate wage statements.

The Settlement includes 242 Participating Class Members, and based on the Gross Settlement Amount of \$385,300², the following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Jarrod Salinas (“Salinas Decl.”), ¶ 11):

<i>Gross Settlement Amount</i>	\$ 385,300.00
Attorneys’ Fees (1/3)	\$ 128,433.33
Litigation Costs	\$ 14,200.93
Administrator Costs	\$ 8,000.00
PAGA Penalties	\$ 40,000.00
Class Representatives Service Awards	\$ 10,500.00
<i>Net Settlement Amount</i>	\$ 188,066.67

The Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Based on 242 Participating Class Members, and assuming all of the amounts are approved by the Court, the highest Individual Settlement Share to be paid is approximately \$3,647.73, the lowest Individual Settlement Payment to be paid is approximately \$50.00, while the average Individual Settlement Share to be paid is approximately \$714.33. Of course, the actual payment will be calculated on a pro-rata basis according to the number of Workweeks Worked by each Class Member. The Class collectively worked 13,265 Workweeks during the Class Period, so each Workweek will have a value of approximately \$15.44/week. (Salinas Decl. ¶ 10).

Additionally, the Settlement Agreement provides that the 25% PAGA allocation will be allocated only to Aggrieved Employees, rather than to all Class Members. In this case, 219 Aggrieved Employees (who collectively worked 9,225 work weeks) will share in the \$10,000 award (accounting for 25% of the total \$40,000 allocation) on a pro rata basis. (Salinas Decl. ¶ 13).

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² The “Gross Settlement Amount” includes a credit of \$9,500 for prior individual settlement payments that Defendants paid to certain Class Members during the litigation. Individual Settlement Payments will be reduced by any payment received by a Class Member from the Prior Payment (but in no instance shall the offset from the Prior Payment cause an Individual Settlement Payment to drop below \$50).

1 The Settlement Agreement provides that one-third (33.33%) of each Individual
2 Settlement Amount shall constitute wages (for which each Participating Class Member will be
3 issued an IRS Form W-2 for such payment), and the remaining two-thirds (66.67%) will be
4 considered interest and statutory penalties (for which each Participating Class Member will be
5 issued an IRS Form 1099 for the interest and penalty allocation). (S.A. ¶ 48(d)).

6 Defendants are required to deposit the Settlement Amount, along with the employers'
7 share of payroll taxes owed, with the Settlement Administrator, within 15 calendar days after the
8 "Effective Date." (S.A. ¶ 71). Within 10 days after the receipt of payment, the Settlement
9 Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 72).

10 **III. THE NOTICE PROCESS**

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

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

15 Prior to mailing the Notice Packet, the Settlement Administrator performed a National
16 Change of Address search on all Class Members to determine if any had moved. (*Id.* ¶ 3). Then,
17 on March 10, 2023, the Notice Packet was sent via first-class mail to 243 Class Members to
18 advise each about the suit and settlement. (*Id.* ¶ 4). Ultimately, zero Notice Packet were
19 determined to be undeliverable, meaning that there was a **100%** success rate in mailing the
20 Notice Packets. (*Id.* ¶ 6).

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

1 explanation of each Settlement Class Member’s right to participate in the Settlement and receive
2 payment accordingly. (See **Exhibit A** to the Salinas Decl.).

3 **B. THERE ARE ZERO OBJECTIONS AND ONE OPT-OUT, RESULTING IN AN**
4 **IMPRESSIVE 99.59% CLASS PARTICIPATION IN THE SETTLEMENT**

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

13 Here, there are zero objections and one opt-out to the Settlement, meaning that 99.59% of
14 the Class Members will receive a share of the Settlement (Salinas Decl. ¶¶ 8-10). Thus, the
15 Class fully viewed this as a fair and reasonable settlement.

16 **IV. EVALUATION OF THE SETTLEMENT**

17 It is axiomatic that California law strongly favors and encourages settlements. *See*
18 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236. This presumption in favor of
19 settlement applies with particular force in the context of class actions. *See Ferguson v. Lieff,*
20 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (Kennard, J., concurring and dissenting)
21 (“[p]ublic policy favoring settlement is especially weighty for class actions”); *Bell v. Am. Title*
22 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607-1608 (affirming approval of a class settlement and
23 implicitly endorsing its citation of federal precedent for the notion that there is a “strong public
24 policy in favor of settlement of class actions”); *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976)
25 529 F.2d 943, 950 (“it hardly seems necessary to point out that there is an overriding public
26 interest in settling and quieting litigation. This is particularly true in class action suits”).

27 When entertaining a request for final approval of a class action settlement, a court’s
28 fundamental consideration is whether the settlement is fair, adequate and reasonable. *See Dunk,*

1 *supra*, 48 Cal.App.4th at 1801, fn. 7 (noting that state courts look to federal authority concerning
2 the approval of class settlements); California Rules of Court, Rule 3.769 (g).

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

9 **A. THE SETTLEMENT WAS REACHED THROUGH INFORMED ARMS-LENGTH**
10 **NEGOTIATION**

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

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

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

26 **B. PLAINTIFFS' INVESTIGATION WAS SUFFICIENT**

27 As set forth at the time of preliminary approval, Class Counsel's investigation into the
28 facts and merits of the wage and hour claims alleged included analyzing substantial amounts of

1 information, correspondence, documents, pay data, policies and procedures, and evidence
2 relating to the class size and the commonality of the claims. During this process, Plaintiffs and
3 Class Counsel conducted investigations into the potential claims of the similarly situated
4 employees, as well as researching and investigating Defendants' defenses. Finally, Class
5 Counsel synthesized and analyzed information provided by Defendants as to the total Class
6 Members, the number of current and former employees, the number of employees who worked
7 during various time periods, and prepared comprehensive damages calculations regarding the
8 claims at issue.

9 **C. CLASS COUNSEL ARE EXPERIENCED IN SIMILAR LITIGATION AND ENDORSE THE**
10 **SETTLEMENT**

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

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

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

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

1 that is in controversy and the realistic range of outcomes of the
2 litigation.

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

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

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

19 For their efforts in creating a common fund for the benefit of the class, the Settlement
20 Agreement provided that Class Counsel seek reasonable fees of one-third of the Settlement
21 Amount (\$128,433.33). This amount will be paid from the Settlement Amount, as provided by
22 the Settlement Agreement. These fees are warranted under the law and within the range of fees
23 commonly awarded in similar cases.

24 As shown herein, the requested percentage of one-third of the settlement fund as payment
25 for attorneys’ fees should be granted for several reasons. First, one-third is the standard
26 benchmark in California for class action settlements. *See, e.g., Chavez v. Netflix, Inc.* (2008) 162
27 Cal.App.4th 43, 66 n. 11 (“Empirical studies show that, regardless whether the percentage
28 method or the lodestar method is used, fee awards in class actions average around one-third of

1 the recovery”). Second, the California Supreme Court recently held that the percentage of the
2 fund method survives in California class action cases. *See Laffitte v. Robert Half International,*
3 *Inc.* (2016) 1 Cal.5th 480. Third, the requested amount is eminently reasonable through the
4 prism of a lodestar cross-check. Accordingly, this request should receive final approval.

5 **A. PLAINTIFFS ARE ENTITLED TO RECOVER REASONABLE ATTORNEYS’ FEES**
6 **UNDER THE LABOR CODE**

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

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

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

1 cross-check supports the fee request.

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

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

18 The California Supreme Court's *Laffitte* decision was consistent with its prior rulings
19 recognizing that "when a number of persons are entitled in common to a specific fund, and an
20 action brought by ... plaintiff for the benefit of all results in the creation or preservation of that
21 fund, such ... plaintiff may be awarded attorneys' fees out of the fund." *Serrano III v. Priest*
22 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who
23 recovers a common fund . . . is entitled to reasonable attorneys' fees from the fund as a whole").
24 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
25 based on the amount that was available to be claimed, rather than as a percentage of the actual
26 amount claimed. *See Boeing Co.*, 444 U.S. at 475-6, 480-1 (the SCOTUS held that attorneys for
27 a successful class may recover a fee based on the fund created for the class, even if some class
28 members make no claims against the fund, so that money remains in it that will be returned to

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

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

8 In addition to the fact that a Class benefit was created with a non-reversionary common
9 fund settlement, the fairness of the requested fee award of 1/3 of the Settlement Amount is
10 supported by the high quality of work performed by Class Counsel and the positive result
11 obtained for the Class. This result occurred because Class Counsel diligently, efficiently, and
12 creatively pursued this case and reached a settlement for the benefit of the entire Class. The fact
13 that the settlement was embraced and supported by the Class, as evidenced by a 99.59%
14 participation rate, demonstrates that Class Counsel obtained a favorable result for the Class.

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

16 Rule 3.769 of the California Rules of Court requires that the Class Members be given
17 notice of any agreement regarding an application for attorneys’ fees. Here, the Notice
18 preliminarily approved by the Court and distributed to the Class Members apprised them that:

19 Class Counsel have been prosecuting the Lawsuit on behalf of the
20 Class Members on a contingency fee basis (that is, without being
21 paid any money to date) and have been paying all litigation costs
22 and expenses. The Court will determine the actual amount
23 awarded to Class Counsel as attorneys’ fees, which will be paid
24 from the Gross Settlement Amount. Class Members are not
25 personally responsible for any of Class Counsel’s attorneys’ fees
26 or costs. Class Counsel will ask for fees of one-third
27 (\$128,433.33) of the common fund Gross Settlement Amount as
28 reasonable compensation for the work Class Counsel performed
and will continue to perform in this Lawsuit through finalization of
the Settlement. Class Counsel also will ask for reimbursement of
up to \$20,000 for the costs Class Counsel incurred in connection
with the Lawsuit.

(Salinas Decl., Exh. A.)

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

9 **4. The Contingent Nature of Class Counsel's Representation Further**
10 **Supports the Fee Award at 1/3 of the Common Fund**

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

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

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

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³ www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf

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

2 Despite recognized limitations of the so-called lodestar method, some California and
3 federal courts acknowledge the utility of a lodestar “cross-check.”⁴ (*Lealao, supra*, 82
4 Cal.App.4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the
5 reasonableness of attorneys’ fees in class actions, the court ascertains Class counsel’s total
6 “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or
7 legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a
8 “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its
9 contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22
10 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82
11 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is
12 within the range of fees freely negotiated in the legal marketplace in comparable litigation”].)
13 The actual aggregated lodestar between attorneys that worked on this case is approximately
14 \$192,367.50, resulting in a ***negative multiplier***, as shown in the following table and declarations
15 of counsel.

16

Attorney/Timekeeper	Rate	Hours	Fee
Brian J. Mankin <i>Trial Counsel / Partner</i> (22 Years)	\$775	90⁵	\$69,750
Peter Carlson <i>Handing Attorney</i> (9 Years)	\$575	42.7	\$24,552.50
Kristina Carlson <i>Handing Attorney</i> (9 Years)	\$550	178.30	\$98,065
Grand Total for All Attorneys			\$192,367.50

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

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26
27 ⁴ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and
28 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.

⁵ Includes an estimated 30 hours of additional work preparing for and attending the hearing, as well as anticipated
work to be performed after the final approval hearing with counsel, administrator, employees, and the court.

1 The hourly rates above are comparable to those of other attorneys with equal or similar
2 experience, if not somewhat lower (i.e., the Laffey Matrix at www.laffeymatrix.com indicates that
3 the benchmark rate for an 8–10-year attorney to be \$676/hour and a 11-19 year attorney at
4 \$764/hour, and a 20+ year attorney at \$919/hour). Moreover, the Wolters Kluwer 2017 Real Rate
5 Report (“Real Rate Report”) provides directly applicable information in this regard. The Real
6 Rate Report is based on an enormous and statistically significant compilation of data: 25.8
7 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from
8 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc.,
9 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide
10 the hourly rates for partners and associates in major metropolitan areas. For the southern
11 California area, which is based on billing entries for 1,125 partners and 1,566 associates, the
12 Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and
13 \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los
14 Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most
15 importantly, the information provided in the Real Rate Report is not based on self-reported
16 numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is
17 based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 24.)

18 Thus, not only are Class Counsel’s rates reasonable and typical, but the attorneys’ fees
19 requested are well below Class Counsel’s lodestar, all of which confirms that the fee request is
20 fair and reasonable.

21 Class Counsel are also highly experienced in Class/PAGA litigation, including having
22 been selected as a “Super Lawyer” in employment litigation on multiple occasions, having
23 achieved large settlements including one of the largest PAGA awards in California’s history and
24 collecting in excess of \$250 million for their clients, having prevailed at trial against two
25 separate Fortune 100 companies, including a PAGA-only action in Orange County and a Class
26 Action jury trial in Los Angeles. (Mankin Decl. ¶¶ 2-6). Indeed, Class Counsel’s rates are
27 typical of the rates charged by defense counsel with similar experience doing similar
28 employment law work in this region.

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

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

3 The Settlement Agreement authorized litigation costs of up to \$20,000. (S.A. ¶ 47(f)).
4 Class Counsel's actual costs through the final approval hearing were \$14,200.93, so this is the
5 amount requested. The saving will be placed in the Net Settlement Amount for payment to the
6 Class Members. (Mankin Decl. ¶ 27). These costs include mediation fees, filing fees, expert
7 data analysis costs, CourtCall charges, and process server fees.

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

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

19 The Settlement Agreement provides an incentive award payment of \$7,500 to Armando
20 Flores as a Class Representative and \$3,000 to William Storey as a Class Representative,
21 which is reasonable given the large recovery Class Members will receive on average, as well as
22 the time and effort they devoted to this case. Their efforts included providing factual
23 background for the Class and PAGA complaint; providing documents and information about
24 Defendants' compensation plan; participating in phone calls to discuss litigation and settlement
25 strategy; making themselves available throughout the litigation to assist with analyzing the
26 claims and defenses; helping Class Counsel prepare for the mediation; and reviewing the
27 settlement documents.

28 ///

1 The Class Representatives also assumed significant risk in bringing this litigation—
2 namely, had they lost, they could have been ordered to pay Defendants’ costs. This factor is a
3 significant one for a wage earner, and the potential risk is very real. *See Whiteway v. FedEx*
4 *Kinkos Office & Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) 2007 WL 4531783, at *3 (“the few
5 courts to consider this ‘class representatives’ dilemma’ have not found it inequitable to assess
6 costs upon the lead or named plaintiff in a class action.”)

7 Plaintiffs also committed a significant number of hours to assist with the
8 litigation/settlement processes of this case and entered into a general release of all claims
9 against Defendants, whereas the Class Members only released the claims alleged. The
10 requested Service Award is reasonable, particularly in light of the substantial benefits Plaintiffs
11 generated for the Class Members, the risks they undertook, and the general release they gave in
12 order to benefit the class. (*See* Plaintiffs’ Declarations for supporting information).

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

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

17 **A. SETTLEMENT ADMINISTRATION COSTS**

18 The Administrator, Phoenix Settlement Administrators, agreed to administer the
19 settlement for a flat-fee of \$8,000. (Salinas Decl. ¶ 15). As such, the Parties request that the
20 Administrator’s fee be approved.

21 **B. UNCASHED CHECKS**

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

24 **C. NO OTHER PENDING CASES AFFECTED BY THIS SETTLEMENT**

25 The Court’s tentative ruling granting preliminary approval asked the Parties to confirm
26 that there are no other pending cases that will be affecting by this Settlement. The Parties
27 confirm this to be true. (Mankin Decl., at ¶ 34).

28 ///

1 **D. FINAL REPORT**

2 Defendants are required to deposit the Settlement Amount within 15 calendar days after
3 the “Effective Date.” The Effective Date will occur 61 days after Final Approval. The
4 Settlement Administrator will have 10 days after receipt of payment to issue checks to the
5 Class Members, who will then have 180 days to cash their checks. Therefore, the earliest date
6 of the check cashing deadline is March 6, 2024. As such, the Parties propose submitting a
7 final report in the form of a declaration from the Administrator (setting forth the money that
8 was actually paid to the class members and will be paid to the State Controller) on
9 approximately April 5, 2024 (30 days after the check cashing deadline).

10 **E. SUBMISSION TO THE LWDA**

11 As set forth in the Mankin Declaration at ¶ 32, the settlement and this motion are
12 concurrently being submitted to the LWDA in accordance with Labor Code § 2699(1)(2).

13 **VIII. CONCLUSION**

14 Plaintiffs respectfully submit that the Settlement is fair, adequate, and reasonable, and
15 merits approval. This motion is unopposed by Defendant.

16 Dated: May 22, 2023

LAUBY, MANKIN & LAUBY LLP

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18 BY:



19 Brian J. Mankin, Esq.
20 Attorneys for Plaintiffs and the Class
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[illegible]

On May 22, 2023, I caused to be served the foregoing document(s) described as follows:

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.

[] **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.

-17-

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