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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JALEEN ROBERTS, in a Representative capacity only, and on behalf of other members of the general public similarly situated,

Plaintiff,

v.

ENCONTRO NORTH PARK, LLC, a California Limited Liability Company; and DOES 1-10, inclusive

Defendants

CASE NO. 37-2022-00030477-CU-OE-CTL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF (1) CLASS ACTION SETTLEMENT; (2) ATTORNEYS' FEES AND COSTS; and (3) CLASS REPRESENTATIVE AWARD

Date: January 19, 2024

Time: 1:30 p.m.

Judge: Hon. Marcella O. McLaughlin

Dept.: C-72

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I. SUMMARY OF REQUEST

This motion seeks final approval of a “Wage and Hour” class action settlement, that has been litigated over the last year. Plaintiff JALEEN ROBERTS (“Plaintiff”) claims on behalf of a class of nonexempt employees who worked for the named Defendant during the operative class period, set forth herein.

Following the distribution of the approved Notice to the class, the proposed final settlement figures are as follows:

- Final size of potential class: **442 Participating Class Members**
- Objections to Settlement: **Zero (0)**
- Opt-Outs: **One (1)**
- Gross settlement amount (“GSA”): **\$120,000.00**
- Claims administration: **\$10,572.74**
- Costs/expenses of litigation: **\$5,494.40**
- LWDA payment: **\$7,500.00** (75% Share of \$10,000 allocation)
- Attorney's fees: **\$40,000.00** (1/3 of Settlement)
- Class representative incentive: **\$5,000.00**

Please Note: There have been **no** (zero) objections to this proposed settlement. The *average* gross payment to each participating Class Member based on the above figures is **\$103.67** which does not account for the fact that certain class members will receive more or less than an “average” share, depending on the length of time each worked for Defendants during the class period. (Please see the declaration of Settlement Administrator Jeffrey Johnson at ¶16).

II. PROCEDURAL HISTORY

Should the Court deem it relevant, a much more detailed procedural history of the case, and summary of all claims, was already set forth in Plaintiff’s original Motion for Preliminary Approval. (ROA #32). The Court **granted** Preliminary Approval of the parties’ original settlement on August, 4, 2023. (ROA #40).

The parties attended a highly adversarial mediation, presided over by a well respected “Wage and Hour” mediator (Michael Roberts). The parties spent several additional months negotiating all

1 final settlement terms and obtaining preliminary approval from the Court. (*Id.*)

2 Most importantly for purposes of final approval, zero employees (out of 443 individuals)
3 objected, and only one individual has opted out. (Johnson decl. ¶¶ 11-12). Thus, the class
4 overwhelmingly supports the proposed settlement.

5 The parties' Joint Stipulation of Class and PAGA Action (hereinafter the "Agreement")
6 contains the terms of the class action settlement and is already on file with the Court. (ROA # 33:
7 **Exhibit A** thereto). For ease of reference, the Agreement will be cited to herein again as Agreement
8 or Exhibit A)¹.

9 **III. SETTLEMENT TERMS**

10 The Agreement includes the following key terms:

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

12 This Agreement is contingent upon preliminary and final approval by the Court, and
13 certification of the Settlement Class is only for purposes of Settlement. If, for any reason, the
14 Settlement does not become final, any certification of any Settlement Class will be vacated, and the
15 Parties will be returned to their positions with respect to the Action as if the Agreement had not been
16 entered into.(**Ex. A** at ¶¶ 1, 32).

17 **2. Description of the Settlement Class**

18 Solely for the purposes of the Agreement, the parties have agreed that the term "Class
19 Member" is defined as:

20 all current and former non-exempt persons employees of Defendant who were
21 employed in California between June 7, 2019 through August 4, 2023 (the date of
22 Preliminary Approval). (**Exhibit A** at ¶ Z).

23 Notices were sent to 443 individuals, as determined by Defendant's employment records.
24 (Johnson decl. ¶ 6(a).) One individual has opted out of the litigation. (Johnson decl. ¶ 11.) **No** Class
25 Members (**zero**) have objected to the proposed settlement. (Johnson decl. ¶12.) Following the Notice,
26
27

28 ¹ This Memorandum incorporates by reference the definitions in the Agreement and the terms used
herein are intended to have the same meaning as set forth in the Agreement.

1 there are a total of 442 total class members who will all receive a share of the settlement proceeds.
2 (Johnson decl. ¶13.)

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

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

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

9 **4. Scope of the Release**

10 For purposes of the Agreements, Class Members release all claims that are either or both: (1)
11 alleged in the First Amended Complaint (“FAC”); or (2) which relate to or arise out of the allegations
12 and claims asserted in the FAC and could have been alleged in the FAC relating in any way to
13 violations of the wage and hour provisions of the California Labor Code or the California Wage
14 Orders, or any wage and hour provisions of California law. The precise release language is reflected
15 in **Exhibit A** at ¶ R).

16 **5. Cash Payment and Allocation**

17 The Agreement provides for an automatic cash payment to the members of the class who did
18 not opt out. The settlement is non-reversionary, in that all of the Net Settlement Amount, after all costs
19 and fees are deducted, will be paid to the participating Class Members. 10% of each Individual
20 Settlement Payment will be allocated as wages, 90% of each Individual Settlement Payment will be
21 allocated to penalties, interest and expenses.(**Exhibit A** at ¶ 27).

22 Based on the final counts after the notice period, participating Class Members will be entitled
23 to an average share of approximately **\$103.67**. (Johnson decl. ¶16.) The actual amounts received vary
24 based on length of employment during the class period. The highest estimated payout is
25 \$1,034.98 and the lowest amount is \$0.45. (Johnson decl. ¶16.)

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1 **6. Contingent Costs**

2 The Agreement provides for Forty Thousand Dollars and Zero cents (\$40,000.00) in Attorneys’
3 Fees, which is one-third (1/3%) of the total Settlement, and up to Eleven Thousand Dollars
4 (\$11,000.00) in litigation costs. (See Exhibit A at ¶ 4.) Plaintiff is only seeking \$5,494.40 in actual
5 costs. (Yaeckel decl. ¶ 23).

6 For costs incurred in administrating the claims process, Defendants will pay the actual fees
7 and costs, out of the settlement amount to the Settlement Administrator. (See **Exhibit A** at ¶ 34 and
8 ¶ 45). The administration costs total \$10,572.74. (Johnson decl. ¶ 17.) **Please Note:** as was previously
9 addressed with the Court, the parties were required to send an amended class notice due to an error in
10 the pay period counts by Defendant’s statistician. (See ROA # 50). Defendant agreed to pay CAC’s
11 fees associated with the issuance of the Amended Class Notice. (See ROA #59). This ensures class
12 members recovery would not be impacted by the costs of sending the Amended notice. Accordingly,
13 Defendant will be separately funding an additional \$572.74, which is the amount that exceeds the
14 original estimate for settlement administration of \$10,000.

15 The Agreement also provides for Ten Thousand Dollars(\$10,000.00) to be allocated for
16 Plaintiff’s PAGA claims with 75% of the amount, or Seven Thousand Five Hundred Dollars
17 (\$7,500.00) being paid to the LWDA, and 25%, or \$2,500.00, being distributed amongst the employees
18 who worked during the PAGA period. (See **Exhibit A** at ¶ 7).

19 Defendant also agrees to pay Plaintiff Five Thousand Dollars (\$5,000.00) as an enhancement
20 award in consideration for his service as Class Representative. (See **Exhibit A** at ¶ 44). The
21 enhancement award was decided pursuant to good faith negotiations and is intended to recognize that
22 it was the class representative who initiated the lawsuit, initiated the PAGA claims, provided critical
23 documents and witnesses to her attorneys, and worked with her attorney to propound and prepare
24 written discovery, all in an effort to obtain moneys allegedly owed not only to himself, but to all other
25 employees. For further justification of the enhancement, please see the attached declaration of Ms.
26 Roberts. The class was notified of this payment to Ms. Roberts and did not object.

27 Plaintiff has submitted a declaration attesting to the time and services performed related to this
28

litigation. (Roberts decl. ¶¶ 3-7; See also section, V(C) below.)

IV. CONTROLLING LAW

The following facts and law support this unopposed request.

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

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

Fairness is presumed where (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Chaves v. Netflix, Inc.*, (2008) 162 Cal.App.4th 43, 52; *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th 1794, 1802. But, even where it appears the settlement is fair, the court must still determine whether the settlement should be approved after considering "the strengths and weaknesses of the claims and risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116, 129. It considers: (i) the strength of the plaintiff's case; (ii) the risks, expense, complexity and likely duration of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount offered in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any reaction of putative class members. *Dunk, supra*, 48 Cal.App.4th, at 1800-1801; *In re Microsoft, supra*, 135 Cal.App.4th, at 723.

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

B. **ATTORNEYS' FEES**

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

The California Supreme Court's rationale was as follows:

we clarify today that use of the percentage method to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all the beneficiaries of

1 the fund, does not in itself constitute an abuse of discretion. We join the overwhelming
2 majority of federal and state courts in holding that when class action litigation
3 establishes a monetary fund for the benefit of the class members, and the trial court in
4 its equitable powers awards class counsel a fee out of that fund, the court may
5 determine the amount of a reasonable fee by choosing an appropriate percentage of the
6 fund created. The *recognized advantages* of the percentage method—including relative
7 ease of calculation, alignment of incentives between counsel and the class, a better
8 approximation of market conditions in a contingency case, and the encouragement it
9 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
10 litigation (See pt. I, ante; *Lealao, supra*, 82 Cal.App.4th at pp. 48–49, 97 Cal.Rptr.2d
11 797; *Rawlings v. Prudential–Bache Properties, Inc., supra*, 9 F.3d at p.
12 516)—**convince us the percentage method is a valuable tool that should not be
13 denied our trial courts.** *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 503
14 (emphasis added).

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

17 In fact the *Laffitte* Court further noted how advocating a lodestar, over a percentage of the
18 recovery, creates perverse litigation incentives:

19 Critics of the lodestar method note, for example, the difficulty in applying the method and cite
20 the **undesirable incentives created by that approach**—i.e., a financial **incentive to extend
21 the litigation so that the attorneys can accrue additional hours** (and thus, additional fees).
22 Moreover, some courts and commentators have criticized the lodestar method because **it gives
23 counsel less of an incentive to maximize the recovery** for the class. *Id.* at 494 (emphasis
24 added).

25 Finally, “regardless whether the percentage method or the lodestar method is used, **fee awards
26 in class actions average around one-third of the recovery.**” *Chavez v. Netflix, Inc.*, (2008) 162
27 Cal.App.4th 43, 66, n.11 (2008); See e.g., *In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d
28 454, 463 (upholding award of 33.3 percent of the settlement fund).

29 C. CLASS REPRESENTATIVE ENHANCEMENTS

30 An incentive award may be appropriate to induce someone to serve as a class representative.
31 In determining whether to make an incentive award, the court may consider (1) the risk, both financial
32 and otherwise, the class representative faced in bringing the suit; (2) the notoriety and personal
33 difficulties encountered by the class representative; (3) the amount of time and effort spent by the class
34 representative; (4) the duration of the litigation; and (5) the personal benefit received by the class
35 representative as a result of the litigation. *Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th
36 1251, 1270 citing *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395.

37 Additional factors to consider include:

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

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

9 **V. ARGUMENT**

10 **A. THE PROPOSED SETTLEMENT IS MADE IN GOOD FAITH**

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

12 **1. Strength of Plaintiffs Case and Discovery**

13 The most important factor courts consider when evaluating the fairness of the class action
14 settlement is the strength of the plaintiff’s case balanced against the amount offered in settlement.

15 *Kullar, supra*, 168 Cal.App.4th at 130.

16 This is a class and representative action, with Plaintiff’s claims premised on Labor Code
17 violations, established (in part) from Defendants’ uniform policies. *Brinker Rest. v. Superior Court*,
18 (2012) 53 Cal. 4th 1004, 1051 (holding that, where a company’s uniform policy prohibits off-the-clock
19 work, certification of claims for such off-the-clock work is inappropriate, especially where the court
20 is merely “presented with anecdotal evidence of a handful of individual instances in which employees
21 worked off the clock.”) Thus, Plaintiff’s counsels’ approach was to investigate Defendants’ uniform
22 employment policies by, *inter alia*, scrutinizing putative class members’ time and wage records, as well
23 as Defendants’ written meal and rest period policies.

24 As detailed more thoroughly in the preliminary approval motion, extensive discovery occurred,
25 followed by additional informal exchanges prior to mediation. (See ROA # 32 at § II).

26 Plaintiff obtained verified copies of Defendant’s uniform time keeping, employee
27 compensation, Meal Period, Rest Period, and reimbursement policies. In addition to Plaintiff’s time
28 and wage records, Defendant also produced a large sampling of class member’s records. Through a
thorough review, Plaintiff’s counsel was able to analyze and verify the following: the uniformity of
Defendant’s “timekeeping” and compensation practices and the average net effect it had on
Defendants’ nonexempt employees; the format and content of Defendant’s itemized wage statements;

1 the average rate of pay for Defendant's nonexempt employees; and the average number of apparent
2 meal period violations per employee based on multiple sets of timekeeping data.

3 From this data, a detailed valuation of all claims was performed, and was presented to this
4 Court at the preliminary approval stage. (See ROA # 32 at § IV and the declaration of Eric Yaeckel
5 in Support of Preliminary Approval.) (ROA #33).

6 While Plaintiff maintained the claims were all viable, Plaintiff (and her counsel) recognize
7 there were substantial risks to proceeding on behalf of a class and representative group. Defendant
8 presented several potentially valid defenses to certification, liability and mitigation of damages.
9 (Yaeckel decl. ¶13).

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

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

16 If not for this settlement, any request by Plaintiff to certify a class would have been heavily
17 contested by Defendant. (See ROA # 32 at § IV).

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

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

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

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

8 Based on a detailed analysis of all the claims and the risks involved in continuing litigation,
9 class counsel submits the \$120,000.00 Gross Settlement Fund represented a fair, and more than
10 reasonable, settlement. (Yaeckel decl. ¶¶ 3-13).

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

12 Although the State is not directly involved in this action, Plaintiff "stands in the shoes" of the
13 Labor and Workforce Development Agency ("LWDA") by bringing a PAGA action. Consideration
14 has been made to compensate to Labor Workforce Development Agency ("LWDA") in the amount of
15 \$7,500.00 (which is the LWDA's 75% share of a \$10,000 allocation).

16 The LWDA was notified and declined to prosecute the claims itself. Counsel for the parties
17 believe this is a fair, reasonable, and adequate allocation. (Yaeckel decl. ¶¶ 12, 15). The LWDA was
18 also served with copies of the Settlement and Preliminary Approval Motion and has not objected or
19 responded to date. (*Id.*) They have also been served with the notice of this motion and all supporting
20 documents. (See concurrently filed Proof of Service). Counsel will submit a declaration updating
21 the Court should the LWDA provide any response.

22 **5. Reaction of the Class Members to the Proposed Settlement**

23 A total of 443 members of the settlement class were notified of the settlement. **One** (1) member
24 opted out of the class. (Johnson decl. ¶¶ 6, 10, 11).

25 Perhaps most importantly, **there have been No (Zero) objections to the terms of the**
26 **proposed settlement.** (Johnson decl. ¶ 12).

27 “By any standard, the lack of objection of the Class Members favors approval of the
28 Settlement.” *In re Omnivision Technologies, Inc.*, (N.D. Cal. 2008) 559 F.Supp.2d 1036, 1043; see also

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

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

4 Plaintiff seeks, and Defendant will not oppose, a payment of Forty Thousand Dollars and Zero
5 cents (\$40,000.00) in Attorneys’ Fees, which is one-third (1/3%) of the total Settlement, and up to
6 Fifteen Thousand Dollars (\$11,000.00) in litigation costs. (*See Exhibit A* at ¶ 4).

7 As set forth below, the requested attorney’s fees are inherently reasonable, on the basis of both
8 a percentage of the recovery and a lodestar method, given the results obtained for the class. The
9 following factors establish the reasonableness of the attorney’s fees requested.

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

12 In the instant matter, Plaintiff’s Counsel was retained on a contingency basis. (Yaeckel decl.
13 ¶16). A percentage fee of 35% (thirty five percent) was freely negotiated. (*Id.*) As part of the
14 Agreement, Counsel was required to continue the prosecution of the matter regardless of the outcome
15 of the preliminary motions (*i.e.*, class certification.) (*Id.*) Here, however, Plaintiff’s Counsel has agreed
16 to a 33 and 1/3 % share of the recovery in order to maximize the recovery on behalf of the class. (*Id.*)

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

22 The rationale for fee enhancement in contingency cases has been explained as follows:
23 'A contingent fee must be higher than a fee for the same legal services paid as they
24 are performed. **The contingent fee compensates the lawyer not only for the legal
25 services he renders but for the loan of those services. The implicit interest rate
26 on such a loan is higher because the risk of default (the loss of the case, which
27 cancels the debt of the client to the lawyer) is much higher than that of
28 conventional loans.'** (Prosner, *Economic Analysis of Law* (4th ed.1992) pp. 534,
567.) 'A lawyer who both bears the risk of not being paid and provides legal
services is not receiving the fair market value of his work if he is paid only for
the second of these functions. If he is paid no more, competent counsel will be
reluctant to accept fee award cases.' (Leubsdorf, *The Contingency Factor in
Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct,
rule 4-200(B)(9) [recognizing the contingent nature of attorney representation is an
appropriate component in considering whether a fee is reasonable]; ABA Model
Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof.

1 Conduct, rule 1.5(a)(8). [] **Such fee enhancements are intended to compensate for**
2 **the risk of loss generally in contingency cases as a class.**
3 *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1419 (disapproved on other grounds.)

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

6 The bases of the equitable rule which permits surcharging a common fund with the
7 expenses of its protection or recovery, including counsel fees, appear to be these:
8 fairness to the successful litigant, who might otherwise receive no benefit because his
9 recovery might be consumed by the expenses; correlative prevention of an unfair
10 advantage to the others who are entitled to share in the fund and who should bear their
11 share of the burden of its recovery; **encouragement of the attorney for the**
12 **successful litigant, who will be more willing to undertake and diligently**
13 **prosecute proper litigation for the protection or recovery of the fund if he is**
14 **assured that he will be promptly and directly compensated should his efforts be**
15 **successful.**
16 *Jordan v. California Dep't of Motor Vehicles* (2002) 100 Cal.App.4th 431, 446 (with emphasis added)
17 citing *Estate of Stauffer* (1959) 53 Cal.2d 124, 132.)

18 As a result, the percentage of the recovery (routinely approved in California at 33 & 1/3%),
19 properly incentivizes and awards counsel for diligently pursuing this matter in the face of numerous
20 obstacles to both certification, and liability.

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

22 Since the tentative agreement, Plaintiff's Counsel has had to devote considerable time to
23 maintain the litigation, achieve Court approval for the proposed settlement, and assist the proposed
24 Class Members. (Yaeckel decl. ¶17).

25 **3. The Extent to which the Litigation Precluded Other Employment**

26 Plaintiff's counsel was precluded from accepting other employment and clients due to the
27 necessity of maintaining the prosecution of the instant matter and also precluded them from bringing
28 clients to the firm. (Yaeckel decl. ¶ 18).

29 **4. The Experience, Reputation, and Ability of the Attorneys who Performed the** 30 **Services, and the Skill They Displayed in Litigation**

31 Plaintiff's counsel, William B. Sullivan, has been a California-licensed attorney for
32 approximately 28 years. William B. Sullivan has approximately 27 years of experience in "class action"
33 litigation, both as plaintiff and defense counsel. (Yaeckel decl. ¶ 3).

34 Mr. Yaeckel has over 12 years experience prosecuting class and representative actions on
35 behalf of California Employees. (Yaeckel decl., ¶ 4). Mr. Kuhn has over 4 years of experience as an

1 attorney who is primarily engaged in prosecuting class and representative actions. (*Id.*). Class counsel
2 are the attorneys of record in a matter very recently (and favorably) decided before the California
3 Supreme Court titled *Donohue v. AMN Services, LLC*, (2021) 11 Cal.5th 58. The *Donohue* matter is
4 a certified class and PAGA action. (Yaeckel decl. ¶ 5). Plaintiff's counsel are currently lead counsel
5 on approximately 30 employment "wage and hour" claims with class action, or representative action
6 allegations. (Yaeckel decl. ¶6).

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

13 Based on said experience, it is the opinion of counsel that this settlement represents a fair and
14 adequate payment. (Yaeckel decl. ¶¶8-9).

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

16 This is not a "coupon" class action case. (Yaeckel decl. ¶19). The Class is set to receive
17 significant monetary benefits they would not have received if Class Counsel did not act. (*Id.*)
18 Participating members of the Class will receive an average of \$103.67 with some class members
19 receiving as much as \$1,034.98. (Johnson decl. ¶ 16.)

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

21 The controlling law on this issue is set forth above in Section IV(B).

22 Plaintiff's counsel submits that the request for 33 & 1/3 % in attorneys fees from the "common
23 fund" settlement is proper. *Laffitte v. Robert Half Intern. Inc.*, (2016) 1 Cal.5th 480, 503, 506.
24 Historically, courts have awarded fees as high as fifty percent (50%) of the common fund, depending
25 on the circumstances of the case. *Newberg*, § 14.03; *see also In re Ampicillin Antitrust Litig.* (D.D.C.
26 1981) 526 F.Supp.494 (awarding attorneys' fees in the amount of 45% of the \$7.3 million settlement
27 fund); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.* (S.D.N.Y. 1979) 480 F.Supp. 1195
28 (awarding approximately 53% of the settlement fund as attorney fees).

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

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

14 **7. The Lodestar Cross-Check**

15 *If* deemed necessary, a "lodestar cross-check" of the settlement also confirms the propriety of
16 the request. Here, **no** lodestar amount is presently requested by Plaintiff. Further, and as set forth
17 below, there is actually a **negative** lodestar in this instance, as the actual fees incurred are more than
18 the amount requested by Plaintiff's Counsel.

19 As set forth in the attached Declaration of Eric K. Yaeckel, the actual lodestar attorney's fees
20 incurred (to date) are estimated to amount to be approximately **\$58,532.00**. The Attorney's fees are
21 broken down as follows:

22 Mr. Sullivan served as lead investigator and trial counsel, per the specific request of Plaintiffs.
23 Over the course of the investigation (including pre-filing), Mr. William Sullivan has currently
24 expended approximately **22.8** hours in the service of this action. **22.8** hours times **\$720.00** equals
25 **\$16,416.00**. The work includes nearly all preliminary investigation and supervising the preparation of
26 Plaintiff's Mediation Brief and damages analysis. Mr. Sullivan undertook a significant pre-filing
27 investigation, wherein some Class Member interviews took place. During this time, Mr. Sullivan also
28 investigated Defendant, its business practices, and any variations in Class Members' job duties and

1 rates of pay. (Yaeckel Decl. ¶21(b)).

2 Mr. Eric Yaeckel, was the partner primarily assigned to oversee the “day to day” activity of the
3 primary associates assigned to this case. The billing rate of Mr. Yaeckel is **\$600.00** per hour. (Kuhn
4 Decl. ¶21(b)). Mr. Eric Yaeckel has currently expended approximately **44.3** hours in the service of this
5 action. **44.3** hours times **\$600.00** equals **\$50,820.00**. This work includes attending hearings and most
6 of the day to day communication with opposing counsel. Mr. Yaeckel also primarily handled the
7 numerous exchanges between the mediator and Defense counsel to negotiate and finalize the settlement
8 following the progress made at mediation. Mr. Yaeckel also undertook the review and drafting of all
9 settlement documents and the preliminary and final approval motions. (Yaeckel Decl. ¶21(b)).

10 Ryan Kuhn was the primary associate assigned to this case. Mr. Kuhn’s billing rate is **\$420.00**
11 per hour. He expended approximately **26.3** hours in preparing the motion. **26.3** hours times **\$420.00**
12 equals **\$11,046.00**. The work performed by Mr. Kuhn consisted of, for the most part, analysis of
13 Defendants' documents and records, in preparation for mediation and a potential class certification
14 motion. He was also assigned to discovery creation and review, the preparation of "meet and confer"
15 letters and other contact with defense counsel, and analysis of employment records to determine
16 "commonality" and damages.(Yaeckel Decl. ¶21(c)).

17 Based on past experience, counsel estimates Mr. Yaeckel will incur an additional 7.5 hours in
18 assisting Class Members on questions and issues regarding the settlement, meeting with Class
19 Members (including those who file "late" submissions), and preparing for and attending the Final
20 Approval hearing in this matter. 7.5 times \$600.00 equals **\$4,500.00**.(Yaeckel decl. ¶21(d)).

21 **8. The Lodestar Multiplier**

22 Bluntly, **no** multiplier is requested, or necessary, as the fees requested are **less** than the actual
23 fees incurred. Specifically, Plaintiff’s Counsel has incurred approximately **\$58,532.00** in actual fees.
24 However, no multiplier is necessary as Plaintiff is only requesting **\$40,000.00** in fees. (Yaeckel decl.
25 ¶24).

26 Given fees incurred here, no lodestar multiplier is necessary. (Yaeckel decl. ¶24).

27 Additionally, the settlement provides the class with a substantial monetary amount and the class
28 strongly supports the fairness of the settlement, even after being notified of the requested attorneys’

1 fee award (**1 opt-out, and 0 objections**). In the event the Court deems a lodestar analysis is necessary
2 it will confirm that Plaintiff's fees are reasonable.

3 **9. The Amount of Costs**

4 Class Counsel has expended **\$5,494.40** in costs, including filing fees, travel, mediation, copying
5 and document preparation charges, investigative fees, and delivery/service fees. (Yaeckel decl. ¶22).
6 Defendant agreed not to oppose an amount of up to \$11,000.00 in costs. Accordingly, Plaintiff's
7 counsel therefore seeks approval of the actual costs of **\$5,494.40** (Yaeckel decl. ¶23).

8 **C. THE REQUESTED REPRESENTATIVE ENHANCEMENT IS REASONABLE**

9 Plaintiff requests an enhancement award of **\$5,000.00** for serving as the class representative.
10 Defendant does **not** oppose this request. The class was notified and does **not** object.

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

15 Plaintiff contributed extensive time and resources in the prosecution of this case. Plaintiff was
16 able to provide information instrumental to the prosecution of this matter including identifying
17 numerous witnesses that could corroborate her claims. Plaintiff also assisted with reviewing and
18 providing insight on Defendant's documents produced. (See Roberts decl. ¶¶ 3-8).

19 Moreover, by "sticking her neck out" as a Class Representative in a publicly filed lawsuit,
20 Plaintiff took a substantial risk that may adversely impact her ability to work in the future.

21 Any company who does a detailed background check, will be able to determine that Plaintiff
22 asserted legal claims against her former employer. An entire industry exists that allows employers to
23 run extensive background searches on potential employees. Companies who provide these services
24 specifically highlight the fact that their services allows employers to weed out litigious employment
25 candidates. (Yaeckel decl. ¶¶ 25-30).

26 In addition, Plaintiff's co-workers have all been notified of the lawsuit, so there is a large pool
27 of peers who now know she brought claims against a former employer, which could also jeopardize
28 future positions.

1 Plaintiff also risked personally owing a large cost award, into the tens of thousands of dollars,
2 had her claims been unsuccessful. (See Yaeckel decl. ¶ 29).

3 Despite all the risks, Plaintiff at all times remained committed to securing a monetary recovery
4 on behalf of the entire class. (See Yaeckel decl. ¶30).

5 Accordingly, Plaintiff asks the Court to approve a class representative enhancement in the
6 amount of \$5,000.00 to Ms. Roberts.

7 **VI. CONCLUSION**

8 Based on the foregoing, Plaintiff respectfully requests that this Court grant Plaintiff's Motion
9 consistent with the accompanying proposed Order and Final Judgment.

10
11
12 Dated: December 19, 2023

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Representative capacity only, and on behalf of other
members of the general public similarly situated