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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

MARLENE MOLINA, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

U.S. BANK NATIONAL ASSOCIATION;
and DOES 1 through 20, inclusive;

Defendants.

Case No.: CIVSB2300344

c/w CIVSB2302908

*[Assigned to the Hon. Christian Towns, Dept.
S26, for all purposes]*

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

Hearing:

Date: October 30, 2024

Time: 8:30 a.m.

Dept.: 26

Complaint Filed: January 24, 2023

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 30, 2024, at 8:30 a.m., or as soon thereafter as
this matter may be heard by the Honorable Christian Towns in Department S26 of the San
Bernardino County Superior Court, located at 247 West Third Street, San Bernardino, CA
92415, Plaintiff Marlene Molina, individually and on behalf of all others similarly situated, will

1 move this Court for an Order granting final approval of the class action settlement between
2 Plaintiff and Defendant U.S. Bank National Association, which was preliminarily approved by
3 the Court. This Motion seeks final approval and entry of judgment of a \$4,550,000 settlement on
4 behalf of the Class Members, and is unopposed by Defendants.

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

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

10 2. Finally appointing Plaintiff as the Class Representative for purposes of settlement;

11 3. Finally appointing Brian Mankin and Peter Carlson as Class Counsel for purposes
12 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 (Jennifer Mills of Rust Consulting),
22 Class Counsel (Brian Mankin and Peter Carlson) and Plaintiff filed concurrently herewith; the
23 records and files in this action; and any other further evidence or argument that the Court may
24 receive at or before the hearing.

25 Dated: October 8, 2024

LAUBY, MANKIN & LAUBY LLP

26
27 BY:



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

TABLE OF CONTENTS

I.	SUMMARY OF ARGUMENT AND ESSENTIAL POINTS	1
II.	PERTINENT BACKGROUND AND SETTLEMENT TERMS	1
III.	THE NOTICE PROCESS.....	3
A.	Notice to the Class Members	3
B.	There are Zero Objections and Only 9 Opt-Outs, Resulting In An Impressive 99.9% of the Class Participating in the Settlement	4
IV.	EVALUATION OF THE SETTLEMENT	4
A.	The Settlement Was Reached Through Informed Arms-Length Negotiation	5
B.	Plaintiff's Investigation Was Sufficient.....	6
C.	Class Counsel Are Experienced in Similar Litigation and Endorse the Settlement	6
D.	Reasonable Estimate of the Nature and Amount of Recovery	7
V.	THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE.....	7
A.	Plaintiff is Entitled to Recover Reasonable Attorney's Fees Under the Labor Code.....	8
B.	Class Counsel's Request for Fees Is Reasonable and Properly Calculated as a Percentage of the Common Fund	9
1.	<i>The Attorneys' Fees Requested Here Fall Within the Reasonable Range Awarded in Similar Cases Under the Well-established Common Fund Method</i>	<i>9</i>
2.	<i>The High Quality of Work and Excellent Result Obtained Support the Award.....</i>	<i>10</i>
3.	<i>Class Members Had Sufficient Notice of the Requested Fees</i>	<i>10</i>
4.	<i>The Contingent Nature of Class Counsel's Representation of Plaintiff and the Class Further Supports the Fee Award at 1/3 of the Common Fund</i>	<i>11</i>
5.	<i>A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award</i>	<i>15</i>
VI.	THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE.....	17
A.	The Requested Costs Are Reasonable and Merit Approval.....	17
B.	The Requested Service Award is Reasonable and Merits Approval	18
VII.	OTHERS MATTERS RE: FINAL APPROVAL	19
A.	Settlement Administration Costs	19
B.	Notice of Final Judgment to the Class	19
C.	Uncashed Checks	19
D.	Final Report	19
E.	Submission to the LWDA.....	19
VIII.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i> (2000) 85 Cal.App.4th 1135	6
<i>Bell v. Am. Title Ins. Co.</i> (1991) 226 Cal.App.3d 1589	5
<i>Bell v. Farmers Insurance Exchange</i> (2004) 115 Cal.App.4th 715.....	18
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472	10
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	8
<i>Ferguson v. Lieff, Cabraser, Heimann & Bernstein</i> (2003) 30 Cal.4th 1037.....	5
<i>Franklin v. Kaypro Corp.</i> (9th Cir. 1989) 884 F.2d 1222	5
<i>Horsford v. Board of Trustees of California State University</i> , 132 Cal.App.4th 359 (2005). 11, 12	
<i>In re American Bank Note Holographics, Inc.</i> (SDNY 2001) 127 F.Supp.2d 418	4
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	7
<i>Laffitte v. Robert Half International, Inc.</i> (2016) 1 Cal.5 th 480.....	8
<i>Litwin v. iRenew Bio Energy Solutions, LLC</i> , 226 Cal.App.4th at p. 883	11
<i>Mandujano v. Basic Vegetable Prods., Inc.</i> , (9th Cir. 1976) 541 F.2d 672.....	4
<i>PLCM Group, Inc. v. Drexler</i> (2000) 22 Cal.4 th 1084.....	15
<i>Press v. Lucky Stores, Inc.</i> (1983) 34 Cal.3d 311	15
<i>Rodriguez v. West Publishing</i> (9th Cir. 2009) 563 F.3d 948	18
<i>Serrano III v. Priest</i> (1977) 20 Cal.3d 25	10
<i>Stambaugh v. Super. Ct.</i> (1976) 62 Cal.App.3d 231.....	4
<i>Sternwest Corp v. Ash</i> (1986) 183 Cal.App.3d 74.....	15
<i>Wershba v. Apple Computers, Inc.</i> (2001) 91 Cal.App.4th 246	7
<i>Williams v. MGM-Pathe Communs. Co.</i> (9th Cir. 1997) 129 F.3d 1026.....	10

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 Marlene Molina
4 respectfully requests that this Court grant final approval of the Class and PAGA Action
5 Settlement Agreement and Release (“Settlement Agreement” or “S.A.”)¹, and enter the proposed
6 order and final judgment in this matter. This Motion is supported and unopposed by Defendant
7 U.S. Bank National Association (“Defendant” or “U.S. Bank”).

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

- 10 • After extensive work, discovery and mediation, the Parties reached a \$4,550,000
11 settlement with the assistance of Steve Rottman, including a release tailored to the claims that
12 were alleged, or reasonably could have been alleged, on behalf of 11,525 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 • There is no reversion to Defendant;
- 16 • There were zero objections and only nine opt-outs to the Settlement, meaning
17 99.9% of the Class is participating in the Settlement.

18 In accordance with the analysis and law set forth herein as well the preliminary approval
19 motion, the Settlement should be approved and judgment entered based on the determination that
20 the Settlement is fair, reasonable, adequate, and in the best interests of the Class. (Declaration of
21 Class Counsel, Brian J. Mankin; ¶¶ 13, 35 (“Mankin Decl.”).)

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

23 Plaintiff and the Class Members include all current and former nonexempt employees
24 employed by U.S. Bank in California who recorded hours worked during at least one Workweek
25 during the Class Period of January 24, 2019, through May 22, 2024. The primary claims, which
26 U.S. Bank vehemently disputes, involved allegations that the Class Members did not receive all
27 wages owed (such as alleged computer boot-up time, overtime on bonus payments, various types
28

¹ The Class and PAGA Action Settlement Agreement and Release is attached as Exhibit “A” to the Mankin Decl.

of pay at the regular rate, and final vacation pay), did not receive accurate itemized wage statements, were not provided with all required meal and rest breaks, were not fully reimbursed for business expenses, as well as claims for waiting time penalties and PAGA penalties. However, as set forth in the Motion for Preliminary Approval, U.S. Bank raised numerous defenses to all of these claims.

The Settlement includes 11,516 Participating Class Members (which is less than estimated at Preliminary Approval, resulting in larger payments to each Class Member than originally estimated). The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Jennifer Mills (“Mills Decl.”), ¶ 19):

<i>Gross Settlement Amount</i>	\$ 4,550,000.00
Attorneys’ Fees (1/3)	\$ 1,516,666.67
Litigation Costs	\$ 30,000.00
Administrator Costs	\$ 50,500.00
PAGA Penalties	\$ 200,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 2,742,833.33

The Participating Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. The actual payment to each Participating Class Member was calculated on a pro-rata basis according to the number of Workweeks during the Class Period, which are weighted depending on a number of factors including whether the Class Members: received a payment from prior class settlements; were considered “home-based”; and/or are former employees. (S.A. ¶ 3.2.4).

In addition, the Aggrieved Employees will receive a share of the \$50,000 PAGA Penalties (25% of the total \$200,000 PAGA allocation), calculated pro-rata based on approximate Weeks Worked during the PAGA Period. (S.A. ¶ 3.2.5).

The Class Notice informed Class Members of their estimated Workweeks, PAGA Pay Periods, Individual Class Payment and Individual PAGA Payment. Class Members could also dispute their Workweeks and PAGA Pay Periods if they feel they worked more time than Defendant’s records. (S.A. ¶ 7.6). But at the completion of the Notice process, there were no

1 objections or disputes, showing that the Class overwhelmingly supported the settlement.

2 The Parties agree that one-third of the Individual Class Payment will be allocated as
3 wages subject to withholding of all applicable local, state and federal taxes; and the remaining
4 two-thirds will be allocated as interest and penalties (pursuant to, e.g., California Labor Code
5 sections 203, 210, 226, etc.) from which no taxes will be withheld. (S.A. ¶ 3.2.4.1).
6 Additionally, the PAGA Penalties payable to the Aggrieved Employees will be classified entirely
7 as civil penalties and shall be reported as required on an IRS Form 1099. Defendant will
8 separately pay its share of employer payroll taxes on the sum allocated to wages. (S.A. ¶ 3.1).

9 The Settlement Agreement requires Defendant to fund the Settlement Amount within 15
10 days of the “Effective Date” (S.A. ¶ 4.3), which will be 61 days after Judgment is entered
11 assuming that no appeal is filed. Within 14 days of receipt, the Settlement Administrator shall
12 issue payments to cover all court-approved payments. (S.A. ¶ 4.4).

13 Participating Class Members and Aggrieved Employees will have 180 days to cash the
14 settlement check. If they fail to cash a check by the deadline, the Settlement Administrator shall
15 issue unclaimed funds to the California State Controller in the name of the Class Member. (S.A.
16 ¶ 4.4.1).

17 **III. THE NOTICE PROCESS**

18 **A. Notice to the Class Members**

19 Pursuant to the Court’s Order and the Settlement Agreement, the Parties directed the
20 Settlement Administrator to review and update the Class Members’ addresses, mail the Court-
21 approved Notice Packet, and process their responses. The Administrator also posted the relevant
22 documents on its website for the Class Members to access.

23 Prior to mailing the Class Notice, the Settlement Administrator performed a National
24 Change of Address search on all Class Members to determine if any had moved. (Mills Decl., ¶
25 9). On June 24, 2024, the Class Notice was sent via first-class mail to 11,525 Class Members as
26 required by the Settlement Agreement. (Mills Decl., ¶ 10). Initially, 407 Notices were returned
27 as undeliverable, but the Administrator was able to perform skip traces which located 326
28 updated address and then the Administrator remailed these 326 Notices. Ultimately, only 82

1 Class Notices were determined to be undeliverable, resulting in a 99.28% success rate in mailing
2 the Notice Packet. (Mills Decl., ¶ 11-13).

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

12 **B. There are Zero Objections and Only 9 Opt-Outs, Resulting In An Impressive**
13 **99.9% of the Class Participating in the Settlement**

14 California law makes clear that the percentage of objectors and opt-outs is an important
15 factor in the Court's consideration of a proposed class action settlement. (See *Dunk v. Ford*
16 *Motor Co.* (1186) 48 Cal.App.4th 1794 at 1802.) Indeed, the Ninth Circuit and other federal
17 courts recognize that in the final fairness analysis, the number or percentage of class members
18 who object to the settlement is a significant factor. (See *Mandujano v. Basic Vegetable Prods.,*
19 *Inc.*, (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY
20 2001) 127 F.Supp.2d 418, 425 ["[i]t is well settled that the reaction of the class to the settlement
21 is perhaps the most significant factor to be weighed in considering its adequacy."])

22 In this case, there are zero objections, zero workweek disputes and only 9 opt-outs to the
23 Settlement -- meaning that 99.9% of the Class Members are participating in the Settlement.
24 (Mills Decl., ¶ 14-16).

25 **IV. EVALUATION OF THE SETTLEMENT**

26 It is axiomatic that California law strongly favors and encourages settlements. (See
27 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236.) This presumption in favor of
28 settlement applies with particular force in the context of class actions. (See *Ferguson v. Lieff,*

1 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 [“[p]ublic policy favoring settlement is
2 especially weighty for class actions”]; *Bell v. Am. Title Ins. Co.* (1991) 226 Cal.App.3d 1589,
3 1607-1608 [affirming the trial court’s approval of a class settlement and implicitly endorsing its
4 citation of federal precedent for the notion that there is a “strong public policy in favor of
5 settlement of class actions”]; see also *Franklin v. Kaypro Corp.* (9th Cir. 11869) 884 F.2d 1222,
6 1229, quoting *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 [“it hardly
7 seems necessary to point out that there is an overriding public interest in settling and quieting
8 litigation. This is particularly true in class action suits”].)

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

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

19 **A. The Settlement Was Reached Through Informed Arms-Length Negotiation**

20 Courts presume the absence of fraud or collusion in the negotiation of a settlement,
21 unless evidence to the contrary is offered. Thus, there is a presumption here that the negotiations
22 were conducted in good faith. (See, 3 Alba Conte & Newberg, *supra*, at § 11.51.) The proposed
23 settlement here was the product of arm’s-length negotiation before a highly experienced and
24 reputable class action mediator to reach a settlement, which was finally consummated in the
25 months after mediation.

26 Here, Plaintiff and Class Counsel have diligently investigated the claims raised in this
27 litigation and, after taking into account the disputed factual and legal issues involved in this
28 action, the risks attending further prosecution, and the benefits to be received pursuant to the

1 compromise and settlement of the action as set forth in the Settlement, concluded that the
2 settlement terms are fair, reasonable, and in the best interest of the Class.

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

8 **B. Plaintiff's Investigation Was Sufficient**

9 As set forth at the time of preliminary approval, Class Counsel's investigation into the
10 facts and merits of the wage and hour claims alleged included written discovery, analyzing
11 substantial amounts of information, correspondence, documents, policies and procedures, pay
12 data and timekeeping records, and evidence relating to the class size and the commonality of the
13 claims. During this process, Plaintiff and Class Counsel conducted investigations into the
14 potential claims of the similarly situated employees, as well as researching and investigating
15 Defendant's defenses. Defendant also provided a robust sampling of payroll and timekeeping
16 records for Class Members, which included hundreds of pages of documentation and over
17 **1,250,000 rows** of excel data. Class Counsel and its expert statisticians synthesized and
18 analyzed information provided by Defendant as to the total Class Members, the number of
19 current and former employees, the number of employees who worked during various time
20 periods, and prepared comprehensive damages calculations regarding the claims at issue.

21 **C. Class Counsel Are Experienced in Similar Litigation and Endorse the**
22 **Settlement**

23 Class Counsel are experienced in this type of litigation, and they have represented (and
24 hereby do represent) that this Settlement is fair and reasonable. (Mankin Decl., ¶¶ 13, 35;
25 Carlson Decl., ¶¶ 2-6; see *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
26 Cal.App.4th 1135, 1152 [Final approval of settlement affirmed where counsel were all
27 experienced litigators with class-action experience and had recommended settlement based on
28 the negotiated terms].)

1 **D. Reasonable Estimate of the Nature and Amount of Recovery**

2 Plaintiff's Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
3 (which sufficiently provided the Court with "basic information about the nature and magnitude
4 of the claims in question and the basis for concluding that the consideration being paid for the
5 release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail,*
6 *Inc.* (2008) 168 Cal.App.4th 116, 133.) Of course, a settlement is not judged against what
7 might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to
8 provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers,*
9 *Inc.* (2001) 91 Cal.App.4th 246, 250.) ("Compromise is inherent and necessary in the settlement
10 process ... even if the relief afforded by the proposed settlement is substantially narrower than it
11 would be if the suits were to be successfully litigated, this is no bar to a class settlement because
12 the public interest may indeed be served by a voluntary settlement in which each side gives
13 ground in the interest of avoiding litigation.")

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

22 Of course, Defendant denies that any damages should be assessed and deny all of the
23 value assessed by Plaintiff. Notwithstanding these arguments, the Settlement commits
24 Defendant to pay \$4,550,000 to settle the litigation.

25 **V. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE**

26 For their efforts in creating a common fund for the benefit of the Class, the Settlement
27 Agreement provided that Class Counsel may seek reasonable fees of \$1,516,666.67 (one-third of
28 the Settlement Amount). This amount will be paid from the settlement amount, as provided by

1 the Settlement Agreement. These fees are warranted under the law and within the range of fees
2 commonly awarded in similar cases.

3 As shown herein, the requested percentage of one-third of the settlement fund as payment
4 for attorneys' fees should be granted for several reasons, including one-third is the standard
5 bench mark in California for class action settlements (see e.g., *Chavez v. Netflix, Inc.* (2008) 162
6 Cal.App.4th 43, 66 n. 11 ("Empirical studies show that, regardless whether the percentage
7 method or the lodestar method is used, fee awards in class actions average around one-third of
8 the recovery"), that the California Supreme Court recently held that the percentage of the fund
9 method survives in California class action cases (*Laffitte v. Robert Half International, Inc.*
10 (2016) 1 Cal.5th 480, and through the prism of a lodestar cross-check. Accordingly, this request
11 should receive final approval.

12 **A. Plaintiff is Entitled to Recover Reasonable Attorney's Fees Under the**
13 **Labor Code**

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

27 ///

28 ///

1 **B. Class Counsel’s Request for Fees Is Reasonable and Properly Calculated as**
2 **a Percentage of the Common Fund**

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

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

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

26 The California Supreme Court’s *Laffitte* decision was consistent with its prior rulings
27 recognizing that “when a number of persons are entitled in common to a specific fund, and an
28 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that

1 fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III v. Priest*
2 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who
3 recovers a common fund ... is entitled to reasonable attorneys' fees from the fund as a whole").
4 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
5 based on the amount that was available to be claimed, rather than as a percentage of the actual
6 amount claimed. *See Boeing Co.*, 444 U.S. at 475-6, 480-1 (the SCOTUS held that attorneys for
7 a successful class may recover a fee based on the fund created for the class, even if some class
8 members make no claims against the fund, so that money remains in it that will be returned to
9 the defendant, explaining: "[t]heir [class members'] right to share the harvest of the lawsuit upon
10 proof of their identity, whether or not they exercise it, is a benefit in the fund created by the
11 efforts of the class representatives and their counsel." *See also Williams v. MGM-Pathe*
12 *Communs. Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (trial court "abused its discretion by basing
13 the fee on the class members' claims against the fund rather than on a percentage of the entire
14 fund or on the lodestar").

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

17 In addition to the fact that a Class benefit was created with a \$4,550,000 non-reversionary
18 common fund settlement, the fairness of the requested fee award of 1/3 of the Settlement
19 Amount is supported by the high quality of work performed by Class Counsel and the positive
20 result obtained for the Class. This result occurred because Class Counsel diligently, efficiently,
21 and creatively pursued this case and reached a successful settlement for the benefit of the entire
22 Class. The fact that the settlement was embraced and supported by the Class, as evidenced by a
23 99.9% participation rate, demonstrates that Class Counsel obtained a favorable result for the
24 Class.

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

26 Rule 3.769 of the California Rules of Court requires that the Class Members be given
27 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
28 preliminarily approved by the Court and distributed to the Class Members apprised them of the

1 requested attorneys fees, which was consistent with the Notice.

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

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

13 An additional factor militating in favor of the granting of the requested fee award is the
14 fact that this case was both legally and financially risky for Class Counsel. *See Vizcaino v.*
15 *Microsoft Corp* (9th Cir. 2002) 290 F.3d 1043, 1048-49. Class Counsel have been representing
16 the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-
17 recovery after a substantial investment of time, money, and resources, and have done so since the
18 inception of this case without any payment or compensation. Specifically, there was the prospect
19 of enormous cost inherent in class action litigation; the risk that Defendant could prevail on its
20 argument that the class should not be certified; and the risk that Defendant could prevail on the
21 merits of some or all of the claims.

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

26 The market value of the services provided by plaintiffs' counsel in
27 a case of this magnitude must take into consideration that any
28 compensation has been deferred for up to four years from the time
an hourly fee attorney would begin collecting fees from his or her
client; that the demands of the present case substantially precluded

1 other work during that extended period, which makes the ultimate
2 risk of not obtaining fees all the greater (since the attorneys must
3 use savings or incur debt to keep their offices afloat and their
4 families fed during the years-long litigation); and that a failure to
5 fully compensate for the enormous risk in bringing even a wholly
6 meritorious case would effectively immunize large or politically
7 powerful defendants from being held to answer for constitutional
8 deprivations, resulting in harm to the public.”

9 *Id.* at 399-400.

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

17 As exemplified by the contingent nature of high-risk class action litigation, Plaintiff’s
18 Counsel can further attest to having had many cases result in (a) zero recovery, (b) negative
19 multiplier and (c) an individual settlement in lieu of a class recovery, as demonstrated below:

20 **Sample of Cases with Zero Recovery for Class Counsel**

21 The following is a small sample of cases in which Plaintiff’s Counsel have received zero
22 recovery on class/PAGA cases due to the company’s financial condition.

- 23 • Heavily litigated Class/PAGA action that Class Counsel certified as a class,
24 prevailed on summary adjudication, fully prepared for trial and one day before the
25 start of trial, ***Defendant filed for bankruptcy, resulting in complete loss of***
26 ***attorneys’ fees and all costs advanced*** (*Garza v. Quality Conversation*, San
27 Bernardino Superior Court Case No. CIVDS1506788);
- 28 • Class actions in which ***Defendants filed for bankruptcy, resulting in a loss of all***
fees and costs (*Gomez v. Ultimate Logistics*, Riverside Superior Court Case No.
RIC1723054, and *Bonilla v. Home Energy*, San Bernardino Superior Court Case

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

No. CIVSB2215927);

- ***Class Counsel have been forced to dismiss class and PAGA cases without any compensation or reimbursement of fees or costs due to the financial condition of Defendant***, (*Cox v. NurseLoop*, San Bernardino Superior Court Case No. CIVSB2225440; *Joyce v. GES Distribution*, Riverside Superior Court Case No. RIC1905739).
- Of course, there is also the reality that a Defendant may prevail on the merits, whereby Class Counsel will receive no compensation and lose it out of pocket costs entirely. Class Counsel have experienced a situation wherein it prevailed at trial on a PAGA case, only to have the appellate court reverse the decision and rule in favor of Defendant, thereby reversing the fee and cost award and resulting in no recovery of fees or costs. (Mankin Decl. ¶ 21).

Sample of Cases with Negative Multiplier for Class Counsel

Even when Plaintiff's Counsel achieved a settlement and what appears to be a "favorable" outcome, there are countless times when the fees requested by Plaintiff's Counsel still result in a ***large negative attorney fee multiplier***, including the following examples:

- ***Negative 20.0 multiplier:*** In *Carr v. Edible Arrangements*, San Bernardino Superior Court, Class Counsel has litigated the case for over ***5 years*** with 1,000 plus hours in attorney time, leading to the class certification in favor of Plaintiff. Despite all the work invested into the matter, including preparing for trial, a financial review confirmed that Defendant could only fund a \$100,000 settlement, resulting in a mere \$33,000 fee and a ***-20.0 negative multiplier***;
- ***Negative 4.26 multiplier:*** In *Pompa v. Landforce*, San Bernardino Superior Court Case No. CIVDS1700451, Class Counsel litigated for over 4.5 years, and obtained class certification. Yet, despite the fact that a settlement was eventually achieved, it resulted in a negative 4.26 multiplier for Class Counsel due to financial condition;

- **Negative 4.24 multiplier:** In *Sacks v. Natural Energy*, San Bernardino Superior Court Case No. CIVDS1811288, the matter resulted in a settlement with a negative 4.24 multiplier for Class Counsel due to financial condition;
- **Negative 2.85 multiplier:** In *Sowle v. Sherpaul*, Riverside Superior Court Case No. RIC2002410, Class Counsel’s lodestar was nearly the same amount as the gross settlement amount – thus, resulting in a negative 2.85 multiplier.

(Mankin Decl. ¶ 21).

Class/PAGA Cases Converted to Small Individual Settlements

There are also many situations when Plaintiff’s Counsel is forced to convert matters into small individual settlements (and therein lose substantial attorneys fees) for a variety of reasons, including due the financial constraints of a defendant, or because a company may engage in a “Pick-up Stix Campaign” to settle directly with the class members, or because a Defendant engages in a reverse auction and settles a class/PAGA case with another firm that will take less (i.e., cherry picking), thereby cutting off Class Counsel’s recovery. There are indeed numerous examples of this occurring that result in an individual settlement, thereby causing Class Counsel to bear the burden of a loss in attorneys’ fees. (Mankin Decl. ¶ 21).

These Factors Support the Fee Request and a Reasonable Multiplier

The situations highlight instances where Class Counsel here (Lauby Mankin Lauby LLP) has had to bear the weight of a complete loss or steep reduction in fees and costs. This is not an easy burden for Plaintiff’s Counsel, which is a small firm. (Mankin Decl. ¶ 20).

To offset these risks and unfavorable results, Courts historically award a multiplier on Class Counsel’s lodestar, as discussed further below. Because if the *best* Plaintiff’s Counsel could hope for is merely to be paid its customary hourly rate multiplied by the number of hours worked on a case, then Class Counsel would not be compensated for the hardships and serious risks they faced litigating contingency cases and incurring losses on the unfavorable results, and would not be incentivized to take on similar cases in the future. (*Id.*)

The availability of a “lodestar multiplier” allows Class Counsel to be an advocate for employees and take on risky cases where Class Counsel may have to shoulder the risks of

1 litigation in other cases, so that the class members do not have to forego their right to the justice
2 system. A multiplier ensures that class members in the future will have access to competent
3 counsel who are willing to offer contingency fee agreements in risky cases and be available and
4 willing to take on cases to help all Class Members – not just those employed by large
5 corporations.

6 For all of these reasons, the contingent nature of this case and the availability of a
7 lodestar multiplier supports a fee of one-third of the common fund and granting of fee request.

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

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

21 Historically, California courts have approved multipliers of 1.5 to 4. *See Coalition for*
22 *Los Angeles County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251
23 **(multiplier of 2+ approved)**; *Sternwest Corp v. Ash* (1986) 183 Cal.App.3d 74, 75. The
24 multiplier requested by Class Counsel below is within the range of multipliers found to be
25 appropriate by various federal and state courts in California. In *Sternwest Corp. v. Ash*, for

26
27 ³ 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.

1 instance, the Court of Appeal remanded for a lodestar enhancement of “**two, three, four or**
2 **otherwise.**” *Id.* at 76; *see also Wershba*, 91 Cal.App.4th at 255 (“**Multipliers can range from 2**
3 **to 4 or even higher**”); *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 83
4 (**affirming 2.34 multiplier**); *Coalition for Los Angeles County Planning in the Pub. Interest v.*
5 *Board of Supervisors*, 76 Cal.App.3d 241, 251 (**affirming multiplier of approximately 2**);
6 *Craft v. County of San Bernardino*, 2008 U.S. Dist. LEXIS 27526 (C.D. Cal. Apr. 1, 2008)
7 (**applying 5.2 multiplier**); *See also Steinder v. Am. Broadcasting Co., Inc.* (9th Cir. 2007) 248
8 Fed. Appx. 780, 783 (**approving multiplier of 6.85** and citing cases with comparable or higher
9 multipliers); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 (finding no abuse
10 of discretion in **awarding a multiplier of 3.65**). In *Torchia v. WW Grainger, Inc.* (E.D. Cal.
11 2014) 304 F.R.D. 256, 275-278, a federal magistrate in Fresno approved attorneys’ fees of
12 \$550,000 **constituting a 3.57 multiplier** on class counsel’s total lodestar of \$153,856 in a wage
13 and hour class action.

14 As set forth in the declarations of Class Counsel, the Plaintiff’s attorneys that worked on
15 this case spent approximately 500 hours litigating the case and achieving the settlement, thereby
16 resulting in a fair and reasonable multiplier that is directly in line with the cases cited above.
17 (Mankin Decl., ¶ 25-26; Carlson Decl. ¶ 8-9).

18 Class Counsel’s hourly rates are comparable to those of other attorneys with equal or
19 similar experience, if not somewhat lower (*i.e.*, the Laffey Matrix at www.laffeymatrix.com
20 indicates that the benchmark rates are: \$777/hour for an 8–10-year attorney, \$878/hour for a 11–
21 19-year attorney, and \$1,057/hour for a 20+ year attorney). (Mankin Decl., ¶ 25.)

22 Moreover, the Wolters Kluwer 2023 Real Rate Report (“Real Rate Report”) provides
23 directly applicable information in this regard. The Real Rate Report is based on an enormous and
24 statistically significant compilation of data, comprising millions of billing entries from a hundred
25 thousand individual timekeepers who worked at thousands of law firms. The Real Rate Report
26 then compiles and analyzes this data to provide the hourly rates for partners and associates in
27 major metropolitan areas. For the southern California area: (a) the rate for partners in Los
28 Angeles is between \$840 and \$1,159 per hour for the middle and upper quartiles, and (b) the

1 rates for associates with seven or more years of experience, the median rate is \$674 per hour, and
2 the upper quartile rate is \$888 per hour. And, perhaps most importantly, the information
3 provided in the Real Rate Report is not based on self-reported numbers, surveys, sampling, or
4 reviews or other publications – instead, the Real Rate Report is based on the actual hours and
5 fees billed by law firms, which makes it “a much better reflection of true market rates than self-
6 reported rates in all practice areas.” *Brown v. CVS Pharmacy, Inc.* (C.D. Cal. Apr. 24, 2017)
7 2017 U.S. Dist. LEXIS 182309, at *21; *PLCM Group*, 22 Cal.4th at 1085 (holding that rates
8 should be premised upon precisely this form of independent, “objective” rate data that reflects
9 “fair market” rates actually billed to clients “in the community for similar work”). (Mankin
10 Decl., ¶ 25.)

11 Class Counsel are also highly experienced in Class/PAGA litigation, including having
12 been named by the LA Times as one “Southern California Leading Lawyers” in the May 2023
13 issue of Consumer Attorneys of Southern California (a recognition given to 17
14 employment/labor law attorneys in 2023), having been selected as “Super Lawyer” in
15 employment litigation over the last 5 consecutive years, having achieved large settlements,
16 having prevailed at trial in PAGA-only actions and Class Action jury trials. (Mankin Decl. ¶¶ 2-
17 6). Indeed, Class Counsel’s rates are typical of the rates charged by defense counsel with similar
18 experience doing similar employment law work in this region.

19 Thus, Plaintiff’s Counsel’s rates reasonable and typical, and the attorneys’ fees requested
20 confirm that the fee request is fair and reasonable under the lodestar multiplier cross-check.

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

22 **A. The Requested Costs Are Reasonable and Merit Approval**

23 The Settlement Agreement authorized litigation expenses up to \$30,000. (S.A. ¶ 3.2.2).
24 Class Counsel’s actual costs through the final approval hearing are \$32,285.41, but in light of
25 the cap, Class Counsel will only be seeking \$30,000. (Mankin Decl. ¶ 27.) These costs
26 include mediation fees, filing fees, expert fees, CourtCall charges, and court filing fees, and
27 process server fees.

28 ///

1 **B. The Requested Service Award is Reasonable and Merits Approval**

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

12 Under the Settlement, Defendant agreed to pay a Service Award to Plaintiff Marlene
13 Molina in the amount of \$10,000 in recognition of her contribution as the Class Representative
14 and the fact that she agreed to a general release of all claims. In addition, Plaintiff also
15 undertook significant risks, including the risk of being blackballed in the industry and the risk
16 that she could have been liable for Defendant’s costs if she lost. This factor is a significant one
17 for a wage earner, and the potential risk is very real. (*See Whiteway v. FedEx Kinkos Office &*
18 *Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) No. C 05-2320 SBA, 2007 WL 4531783, at *3 (“the
19 few courts to consider this ‘class representatives’ dilemma’ have not found it inequitable to
20 assess costs upon the lead or named plaintiff in a class action.”).)

21 Plaintiff also committed a significant number of hours to assist with the
22 litigation/settlement processes of this case. Finally, she entered into a general release of all
23 claims against Defendant, whereas the Class Members only released the claims alleged. The
24 requested Service Payment is reasonable, particularly in light of the substantial benefits
25 Plaintiff generated for the Class Members, the risks she undertook, and in exchange for
26 executing a general release against Defendant while giving up the right to pursue separate
27 individual claims. (See Plaintiff’s Declaration ¶¶ 3-9.)
28

1 The Notice sent to each Class Member detailed the proposed service award. No Class
2 Member has objected to the proposed payment to Plaintiff. Thus, Plaintiff's request for a
3 Service Award is both reasonable and appropriate, and should be approved.

4 **VII. OTHERS MATTERS RE: FINAL APPROVAL**

5 **A. Settlement Administration Costs**

6 The parties agreed that the Administrator, Rust Consulting, would be compensated for
7 services performed. The Administrator's flat fee is \$50,500.00. (Mills Decl., ¶ 22; Exhibit C
8 thereto.)

9 **B. Notice of Final Judgment to the Class**

10 The Proposed Final Approval Order directs the Settlement Administrator to give notice
11 of entry of judgment by including a postcard to the Class Members at the same time the checks
12 are mailed.

13 **C. Uncashed Checks**

14 The Settlement Agreement provides that unclaimed funds will be submitted to the
15 California State Controller's Unclaimed Property Fund in the name of the Class Member
16 thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil
17 Procedure Section 384, subd. (b). (S.A. ¶ 4.4.1)

18 **D. Final Report**

19 Defendant's payment is due 15 days after the Effective Date, which will occur 61 days
20 after the final order is entered. The Administrator then has 14 days thereafter process the funds
21 and issue checks to the Class Members, who will then have 180 days to cash their checks.
22 Accordingly, the Parties project that the check cashing deadline will occur on approximately
23 July 28, 2025. Thus, the Parties propose submitting a final report in the form of a declaration
24 from the Administrator approximately September 5, 2025 and then holding a disbursement
25 hearing thereafter at the Court's convenience.

26 **E. Submission to the LWDA**

27 As set forth in the Mankin Declaration at ¶ 29, the Settlement Agreement and this
28 motion are concurrently being submitted to the LWDA in accordance with Labor Code §

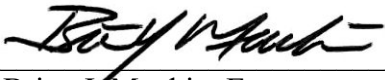
1 2699(1)(2). The LWDA has not commented on the Settlement to date.

2 **VIII. CONCLUSION**

3 Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and
4 merits final approval.

5 Dated: October 8, 2024

LAUBY, MANKIN & LAUBY LLP

6
7 BY: 
8 Brian J. Mankin, Esq.
9 Attorneys for Plaintiff and the Class
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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, CA 92504.

On October 8, 2024, 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 October 8, 2024, 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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