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9 Attorneys for Plaintiff, on a representative basis and on behalf of all others similarly situated

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE

JIMMY MACIEL, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

SHAMBAUGH & SON, L.P., a Texas
Limited Partnership; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: 20STCV30747

*[Assigned to Hon. Elihu M. Berle, Dept 6 for
all purposes]*

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

Hearing:

Date: June 1, 2023

Time: 9:00 a.m.

Dept.: 6

Complaint Filed: August 19, 2021

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 1, 2023, at 9:00 a.m., or as soon thereafter as this
3 matter may be heard by the Honorable Elihu Berle in Department 6 of the above-captioned court,
4 located at 312 North Spring Street, Los Angeles, California 90012, Plaintiff Jimmy Maciel,
5 individually and on behalf of all others similarly situated, will move this Court for an Order
6 granting final approval of the class action settlement between Plaintiff and Defendant, which was
7 preliminarily approved by the Court on January 20, 2023. This Motion, which is supported by
8 Defendant Shambaugh & Son, L.P, seeks final approval and entry of judgment of a \$450,000
9 settlement on behalf of the Class Members.

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

- 13 1. Finally certifying the Class, as defined in the Settlement Agreement and the
14 Court’s Order Granting Preliminary Approval of the Settlement;
- 15 2. Finally appointing Plaintiff as the Class Representative for purposes of settlement;
- 16 3. Finally appointing Brian Mankin and Peter Carlson as Class Counsel for purposes
17 of settlement;
- 18 4. Finding that the Class Notice was properly provided to the Class in accordance
19 with the Court’s Order granting Preliminary Approval;
- 20 5. Finally approving the settlement as fair, adequate, and reasonable, based upon the
21 terms set forth in the Settlement Agreement;
- 22 6. Binding participating Class Members to the terms of the Settlement Agreement,
23 including the Release specified therein; and
- 24 7. Retaining jurisdiction to enforce the Settlement Agreement.

25 This Motion will be based upon this notice; the attached memorandum of points and
26 authorities; the Declarations of the Settlement Administrator (Kevin Lee of Phoenix Settlement
27 Administrators), Class Counsel (Brian Mankin and Peter Carlson) and Plaintiff (Jimmy Maciel)
28 filed concurrently herewith; the records and files in this action; and any other further evidence or

1 argument that the Court may receive at or before the hearing.

2 Dated: March 30, 2023

LAUBY, MANKIN & LAUBY LLP

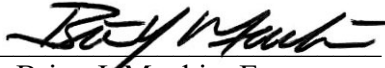
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4 BY: 
5 Brian J. Mankin, Esq.
6 Attorneys for Plaintiff and the Class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

3 Pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiff respectfully
4 requests that this Court grant final approval of the Class Action and PAGA Settlement
5 Agreement (“Settlement Agreement”) already on file in this action, which is supported and
6 unopposed by Defendant Shambaugh & Son, L.P, and enter the proposed order and final
7 judgment in this matter.

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

10 • After extensive work, the Parties reached a \$450,000 settlement with the
11 assistance of Jeff Ross, who is one of the most experienced and reputable class action mediators
12 in California, that is tailored to a limited release of the claims alleged on behalf of 98 Class
13 Members;

14 • The Class Members were deemed to participate in the Settlement, and were not
15 required to submit a Claim Form to receive funds;

16 • There is no reversion to Defendant;

17 • There are zero objections and zero opt-outs to the Settlement thus far, meaning
18 100% of the Class is currently participating in the Settlement.¹

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

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

24 Plaintiff and the Class Members are current and former non-exempt/hourly employees of
25 Defendant Shambaugh & Son, L.P., who are not represented by any union (i.e., non-union
26 employees) and who worked for Defendant in California at any time from August 19, 2017, to
27

28 ¹ The deadline for Class Members to respond to the Class Notice is April 28, 2023 (the “Response Deadline”). After the Response Deadline passes and well before the Final Approval Hearing, the administrator will file an updated declaration with the final results of the notice process.

1 November 30, 2022 (the “Class Period”). The primary claims, which Defendants dispute,
2 involved allegations that the Class Members did not receive accurate itemized wage statements,
3 were denied meal and rest breaks, were not paid all required minimum and overtime wages
4 because of the failure record and compensate for all hours worked, were not paid all required
5 vacation wages upon separation of employment, as well as claims for waiting time penalties and
6 PAGA penalties.

7 The Settlement includes 98 Class Members. The following is a breakdown reflecting
8 how the funds are allocated under the Settlement Agreement (Declaration of Administrator,
9 Kevin Lee (“Lee Decl.”), ¶ 12):

Gross Settlement Amount	\$ 450,000.00
Attorneys’ Fees (1/3)	\$ 150,000.00
Litigation Costs	\$ 12,157.93
Administrator Costs	\$ 7,060.16
PAGA Penalties	\$ 40,000.00
Class Representative Service Award	\$ 5,000.00
Net Settlement Amount	\$ 235,781.91

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15 The 98 Participating Class Members were deemed to participate and did not need to
16 submit a Claim Form to receive payment. (Settlement Agreement or “S.A.” ¶¶ 1.37). Each
17 Participating Class Member will receive a pro rata share of the Net Settlement Amount according
18 to the percentage of hours he/she worked during the Class Period, such that the amount actually
19 distributed to Participating Class Members will equal 100% of the Net Settlement Amount.
20 (Settlement Agreement ¶ 3.2.4)

21 Assuming all of the amounts in the Settlement are approved by the Court, the *average*
22 Individual Class Payment is estimated to be \$2,405.94 and the *highest* individual settlement
23 payment is approximately \$9,904.27 and the lowest payment is approximately \$4.62 for an
24 employee who only worked 6 hours in the Class Period. (Lee Decl. ¶ 10).

25 In addition, 65 Aggrieved Employees will each receive an Individual PAGA Payment
26 based on their share of the \$10,000 PAGA Penalties (25% of the total \$40,000 PAGA
27 allocation), calculated pro-rata based on the number of Pay Periods Worked during the PAGA
28 Period. (S.A. ¶ 3.2.5.1).

1 Ten percent (10%) of each Individual Settlement Amount shall constitute wages (for
2 which each participating Class Member will be issued an IRS Form W-2 for such payment), and
3 the remaining ninety percent (90%) shall constitute interest and penalties (allocated as one-third
4 each for which each participating Class Member will be issued an IRS Form 1099 for the interest
5 and penalty allocation). (S.A. ¶ 3.2.4.1). The Settlement Agreement provides that Defendant
6 shall deposit the Settlement Amount within 10 business days after the “Effective Date” (S.A. ¶
7 4.4), which will be the date Judgment is entered if no Class Member objects or moves to
8 intervene. Additionally, Defendant will separately fund its share of payroll taxes. Within 10
9 business days of receipt, the Settlement Administrator shall issue payments to cover all court-
10 approved payments. (S.A. ¶ 4.4).

11 Class Members will have 180 days to cash the settlement check. (S.A. ¶ 4.4.1). If a Class
12 Member fails to cash a check by the deadline, the Settlement Administrator shall issue unclaimed
13 funds to the California State Controller in the name of the Class Member. (S.A. ¶ 4.4.3).

14 **III. THE NOTICE PROCESS**

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

16 Pursuant to the Court’s Order and the Settlement Agreement, the Parties directed the
17 Settlement Administrator to review and update the Class Members’ addresses, mail the Court-
18 approved Notice Packet, and process their responses.

19 Prior to mailing the Class Notice, the Settlement Administrator performed a National
20 Change of Address search on all Class Members to determine if any had moved. (Lee Decl., ¶
21 4). On February 28, 2023, the Class Notice was sent via first-class mail to the Class Members.
22 (Lee Decl., ¶ 5). No packets were returned and all Class Notices were determined to be
23 deliverable. (Lee Decl., ¶ 6). Accordingly, there was a **100%** success rate in mailing the Class
24 Notice.

25 In accordance with California Rules of Court, rules 3.766 (d) and 3.769 (f), the Notice
26 provided Class Members with (1) a brief explanation of the case; (2) an explanation of each
27 Class Member’s right to opt out of the settlement class; (3) an explanation of the process (and
28 relevant deadlines) through which a Class Member could opt out of the settlement class; (4)

1 notice about the binding nature of the Judgment for Class Members who do not opt out; (5) an
2 explanation of each Class Member’s right to appear through counsel; (6) an explanation of each
3 Class Member’s right to appear at the fairness hearing and express views on the settlement, i.e.,
4 object or otherwise respond; and (7) an explanation of each Class Member’s right to participate
5 in the Settlement and receive payment accordingly. (See **Exhibit A** to the Lee Decl.)

6 **B. There are Zero Objections and Zero Opt-Outs Thus Far, Resulting In An**
7 **Impressive 100% of the Class Participating in the Settlement**

8 California law makes clear that the percentage of objectors and opt-outs is an important
9 factor in the Court’s consideration of a proposed class action settlement. (See *Dunk v. Ford*
10 *Motor Co. (198) 48 Cal.App.4th 1794* at 1802.) Indeed, the Ninth Circuit and other federal
11 courts recognize that in the final fairness analysis, the number or percentage of class members
12 who object to the settlement is a significant factor. (See *Mandujano v. Basic Vegetable Prods.,*
13 *Inc.*, (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY
14 2001) 127 F.Supp.2d 418, 425 [“[i]t is well settled that the reaction of the class to the settlement
15 is perhaps the most significant factor to be weighed in considering its adequacy.”])

16 In this case, as noted above, there are zero objections and zero opt-outs to the Settlement
17 thus far -- meaning that 100% of the Class Members are currently participating in the Settlement.
18 (Lee Decl., ¶ 7-9). The Parties will provide an updated declaration from the Administrator after
19 the Response Deadline passes, but thus far, the Class views this as a fair and reasonable
20 settlement.

21 **V. EVALUATION OF THE SETTLEMENT**

22 It is axiomatic that California law strongly favors and encourages settlements. (See
23 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236.) This presumption in favor of
24 settlement applies with particular force in the context of class actions. (See *Ferguson v. Lieff,*
25 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 [“[p]ublic policy favoring settlement is
26 especially weighty for class actions”]; *Bell v. Am. Title Ins. Co.* (1991) 226 Cal.App.3d 1589,
27 1607-1608 [affirming the trial court’s approval of a class settlement and implicitly endorsing its
28 citation of federal precedent for the notion that there is a “strong public policy in favor of

1 settlement of class actions”]; see also *Franklin v. Kaypro Corp.* (9th Cir. 1989) 884 F.2d 1222,
2 1229, quoting *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 [“it hardly
3 seems necessary to point out that there is an overriding public interest in settling and quieting
4 litigation. This is particularly true in class action suits”].)

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

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

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

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

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

27 As the Settlement Agreement itself reveals, there is no preferential treatment for any
28 segment of the class, as the Settlement is designed to compensate all Class Members fairly and

1 adequately. And pursuant to California Rules of Court Rule 3.769(b), the parties have disclosed
2 the agreed upon and proposed attorney fee award, which is well within the range of
3 reasonableness for matters of this nature.

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

5 As set forth at the time of preliminary approval, Class Counsel's investigation into the
6 facts and merits of the wage and hour claims alleged included substantial written discovery,
7 analyzing substantial amounts of information, correspondence, documents, policies and
8 procedures, pay data and timekeeping records, and evidence relating to the class size and the
9 commonality of the claims. During this process, Plaintiff and Class Counsel conducted
10 investigations into the potential claims of the similarly situated employees, as well as researching
11 and investigating Defendant's defenses. Finally, Class Counsel synthesized and analyzed
12 information provided by Defendant as to the total Class Members, the number of current and
13 former employees, the number of employees who worked during various time periods, and
14 prepared comprehensive damages calculations regarding the claims at issue.

15 **C. Class Counsel Are Experienced in Similar Litigation and Endorse the**
16 **Settlement**

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

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

24 Plaintiff's Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
25 (which sufficiently provided the Court with "basic information about the nature and magnitude
26 of the claims in question and the basis for concluding that the consideration being paid for the
27 release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail,*
28 *Inc.* (2008) 168 Cal.App.4th 116, 133.) Of course, a settlement is not judged against what

1 might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to
2 provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers,*
3 *Inc.* (2001) 91 Cal.App.4th 246, 250.) (“Compromise is inherent and necessary in the settlement
4 process ... even if the relief afforded by the proposed settlement is substantially narrower than it
5 would be if the suits were to be successfully litigated, this is no bar to a class settlement because
6 the public interest may indeed be served by a voluntary settlement in which each side gives
7 ground in the interest of avoiding litigation.”)

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

16 Of course, Defendant denies that any damages should be assessed and denies all of the
17 value assessed by Plaintiff. Notwithstanding these arguments, the Settlement commits
18 Defendant to pay \$450,000 to settle the litigation.

19 **VI. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND REASONABLE**

20 For their efforts in creating a common fund for the benefit of the Class, the Settlement
21 Agreement provided that Class Counsel may seek reasonable fees of \$150,000 (one-third of the
22 Settlement Amount). This amount will be paid from the settlement amount, as provided by the
23 Settlement Agreement. These fees are warranted under the law and within the range of fees
24 commonly awarded in similar cases.

25 As shown herein, the requested percentage of one-third of the settlement fund as payment
26 for attorneys’ fees should be granted for several reasons, including one-third is the standard
27 bench mark in California for class action settlements (see e.g., *Chavez v. Netflix, Inc.* (2008) 162
28 Cal.App.4th 43, 66 n. 11 (“Empirical studies show that, regardless whether the percentage

1 method or the lodestar method is used, fee awards in class actions average around one-third of
2 the recovery”), that the California Supreme Court recently held that the percentage of the fund
3 method survives in California class action cases (*Laffitte v. Robert Half International, Inc.*
4 (2016) 1 Cal.5th 480, and through the prism of a lodestar cross-check. Accordingly, this request
5 should receive final approval.

6 **A. Plaintiff is Entitled to Recover Reasonable Attorney’s Fees Under the**
7 **Labor Code**

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

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

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

1 cross-check supports the fee request.

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

5 Recently, the California Supreme Court approved trial courts' usage of the common fund
6 method of awarding attorneys' fees in wage and hour class actions, like this one, and upheld a
7 fee awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte v. Robert*
8 *Half Int'l Inc.* (2016) 1 Cal. 5th 480, 506 ("when class action litigation establishes a monetary
9 fund for the benefit of the class members, and the trial court in its equitable powers awards class
10 counsel a fee out of that fund, the court may determine the amount of a reasonable fee by
11 choosing an appropriate percentage of the fund created"); *see also*, 4 Newberg on Class Actions,
12 § 14:6 at 552 ("fee awards in class actions average around one-third of the recovery").

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

15 In addition to the fact that a Class benefit was created with a \$450,000 non-reversionary
16 common fund settlement, the fairness of the requested fee award of 1/3 of the Settlement
17 Amount is supported by the high quality of work performed by Class Counsel and the positive
18 result obtained for the Class. This great result occurred because Class Counsel diligently,
19 efficiently, and creatively pursued this case and reached a successful settlement for the benefit of
20 the entire Class. In fact, some Class Member will receive more than \$3,344, which is an
21 excellent result. Moreover, the fact that the settlement was embraced and supported by the
22 Class, as evidenced by a 99.8% participation rate, demonstrates that Class Counsel obtained a
23 favorable result for the Class.

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

25 Rule 3.769 of the California Rules of Court requires that the Class Members be given
26 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
27 preliminarily approved by the Court and distributed to the Class Members apprised them that
28 "Class Counsel will ask for fees of one-third (\$608,000) of the Settlement Amount as reasonable

1 compensation for the work Class Counsel performed and will continue to perform in this lawsuit
2 through Settlement finalization...” (Lee Decl., Exh. A.)

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

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

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

24 If Plaintiff had lost this case, Class Counsel would have recovered nothing, and would
25 have lost its out-of-pocket costs. This is not an easy burden for Plaintiff’s Counsel, which are
26 two small firms. (Mankin Decl. ¶ 20, Bokhour Decl. ¶ 18). If, despite these hardships and risks,
27 the best Plaintiff’s Counsel could hope for is merely to be paid its customary hourly rate
28 multiplied by the number of hours worked on all cases (including cases like this where the

1 lodestar is far greater than the potential fee award), then Class Counsel would not be
2 compensated for the hardships and serious risks they faced litigating this contingency case, and
3 would not be incentivized to take on similar cases in the future. (*Id.*)

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

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

21 *Id.* at 399-400.

22 Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
23 end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault of
24 counsel (i.e., bankruptcy, change in the law, consolidation/coordination/preemption, being top
25 filed, etc.). According to Mayer Brown LLP's study entitled, *An Empirical Analysis of Class*
26 *Actions*, cited in *Laguna v. Coverall North America, Inc.*, No. 12-55479 (9th Circuit 2014), found
27 that only one-third of class actions are successful, compared to two-thirds that are defeated and
28 result in no payment to the class members.²

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

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

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

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

14 Historically, California courts have approved multipliers of 1.5 to 4. *See Coalition for*
15 *Los Angeles County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251
16 **(multiplier of 2+ approved)**; *Sternwest Corp v. Ash* (1986) 183 Cal.App.3d 74, 75. The
17 multiplier requested by Class Counsel below is within the range of multipliers found to be
18 appropriate by various federal and state courts in California. In *Sternwest Corp. v. Ash* (1986)
19 183 Cal.App.3d 74, for instance, the Court of Appeal remanded for a lodestar enhancement of
20 **“two, three, four or otherwise.”** *Id.* At 76; *see also Wershba*, 91 Cal.App.4th at 255
21 **(“Multipliers can range from 2 to 4 or even higher”)**; *City of Oakland v. Oakland Raiders*
22 (1988) 203 Cal.App.3d 78, 83 **(affirming 2.34 multiplier)**; *Coalition for Los Angeles County*
23 *Planning in the Pub. Interest v. Board of Supervisors*, 76 Cal.App.3d 241, 251 **(affirming**
24 **multiplier of approximately 2)**; *Craft v. County of San Bernardino*, 2008 U.S. Dist. LEXIS
25 27526 (C.D. Cal. Apr. 1, 2008) **(applying 5.2 multiplier)**; *See also Steinder v. Am. Broadcasting*

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 Co., Inc. (9th Cir. 2007) 248 Fed. Appx. 780, 783 (**approving multiplier of 6.85** and citing cases
 2 with comparable or higher multipliers); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d
 3 1043, 1051 (finding no abuse of discretion in **awarding a multiplier of 3.65**). In *Torchia v. WW*
 4 *Grainger, Inc.* (E.D. Cal. 2014) 304 F.R.D. 256, 275-278, a federal magistrate in Fresno
 5 approved attorneys’ fees of \$550,000 **constituting a 3.57 multiplier** on class counsel’s total
 6 lodestar of \$153,856, in a wage and hour class action where class counsel expended 457.85 hours
 7 on the case, engaged in limited formal discovery, and where the case settled for \$2,750,000
 8 within one year from filing the Complaint with 909 class members claiming \$1,305,200 and the
 9 remainder, except for the attorneys’ fees and costs, reverting to the company.

10 However, here Class Counsel is actually seeking a negative multiplier, as set forth in the
 11 declarations of Class Counsel submitted herewith, the actual aggregated lodestar between the
 12 attorneys that have worked on this case is approximately \$158,505, resulting in a *negative*
 13 *multiplier*, which is summarized in the following table, and in the declaration of Class Counsel:

Attorney/Timekeeper	Rate	Hours	Fee
Brian J. Mankin <i>Trial Counsel / Partner</i> (22 Years)	\$775	87⁴	\$67,425
Peter J. Carlson <i>Senior Associate</i> (8 Years)	\$575	158.4	\$91,080
Grand Total for All Attorneys			\$158,505

21 (See Mankin Decl., ¶ 25; Carlson Decl. ¶ 8.)

22 Class Counsel’s requested rates of \$775 and \$575 are reasonable under the Laffey Matrix
 23 (www.laffeymatrix.com) which indicates that the benchmark rate for an attorney with 20+ years
 24 of experience (such as Mr. Mankin) is \$914, while the rate for attorneys with 8-10 years of
 25 experience (such as Mr. Carlson) is \$672. Moreover, the Wolters Kluwer 2017 Real Rate Report
 26 (“Real Rate Report”) provides directly applicable information in this regard. The Real Rate
 27 Report is based on an enormous and statistically significant compilation of data: 25.8 million

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

1 billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620
2 law firms, totaling \$9.02 billion in fees billed. (*See* Wolters Kluwer’s ELM Solutions, Inc., 2017
3 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the
4 hourly rates for partners and associates in major metropolitan areas. For the southern California
5 area, which is based on billing entries for 1,125 partners and 1,566 associates, the Real Rate
6 Report states that: (a) the rates for partners in Los Angeles is between \$640 and \$869.75 per hour
7 for the middle and upper quartiles, and (b) the rates for associates in Los Angeles is between
8 \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most importantly, the
9 information provided in the Real Rate Report is not based on self-reported numbers, surveys,
10 sampling, or reviews or other publications – instead, the Real Rate Report is based on the actual
11 hours and fees billed by law firms. These numbers are not surprising given that a 4-year-old
12 article in the National Law Journal stated that in **2014** partners in Los Angeles charge an average
13 of \$665, while the average associate rate is \$401. (Sloan, \$1,000 Per Hour Isn’t Rare Anymore;
14 Nominal Billing Levels Rise, But Discounts Ease Blow (2014) Nat. Law Journal.)⁵. (Mankin
15 Decl., ¶ 24.)

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

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

27 ⁵ The article notes that at Irell & Manella, the average partner rate is \$890/hr; Mannatt, Phelps & Phillips is \$740/hr;
28 O’Melveny & Meyers is \$715/hr; and Jeffer Mangels Butler & Mitchell is \$690/hr. *Id.*

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

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

3 The Settlement Agreement authorized a Litigation Expenses Payment of not more than
4 \$15,000. (Settlement Agreement ¶ 3.2.2). However, Class Counsel’s actual costs through the
5 final approval hearing are estimated to be \$12,157.93. (Mankin Decl. ¶ 29.) Since Class
6 Counsel’s actual costs were less than the amount allocated, the saving will be placed in the Net
7 Settlement Amount. These costs include mediation fees, filing fees, CourtCall charges, and
8 court filing fees, and process server fees.

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

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

20 Under the Settlement, Defendant agreed to pay a Service Award in the amount of
21 \$5,000 to Mr. Maciel in recognition of his contribution as the Class Representative. Mr.
22 Maciel came forward and undertook significant risk, including the risk of being blackballed in
23 the industry and the risk that he could have been liable for Defendants’ costs if he lost. This
24 factor is a significant one for a wage earner, and the potential risk is very real. (*See Whiteway*
25 *v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) No. C 05-2320 SBA,
26 2007 WL 4531783, at *3 (“the few courts to consider this ‘class representatives’ dilemma’
27 have not found it inequitable to assess costs upon the lead or named plaintiff in a class
28 action.”).)

1 Mr. Maciel also committed a significant number of hours to assist with the
2 litigation/settlement processes of this case. Finally, he entered into a general release of all
3 claims against Defendant, whereas the Class Members only released the claims alleged. The
4 requested Service Payment is reasonable, particularly in light of the substantial benefits
5 Plaintiff generated for the Class Members, the risks she undertook, and in exchange for
6 executing a general release against Defendant while giving up the right to pursue separate
7 individual claims. (See Plaintiff's Declaration ¶¶ 6-10.)

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

11 **VIII. OTHERS MATTERS RE: FINAL APPROVAL**

12 **A. Settlement Administration Costs**

13 The parties agreed that the Administrator, Phoenix Settlement Administrators, would be
14 compensated for services performed. The Administrator's flat fee is \$7,060.16, which
15 included considerable work performed by the administrator in resolving the data issues. (Lee
16 Decl., ¶ 16; Exhibit B thereto.)

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

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

21 **C. Uncashed Checks**

22 The Settlement Agreement provides that unclaimed funds will be submitted to the
23 California State Controller's Unclaimed Property Fund in the name of the Class Member
24 thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil
25 Procedure Section 384, subd. (b). (S.A. ¶ 4.4.3.)

26 **D. Final Report**

27 Defendant's payment is due 10 business days after the Effective Date. The
28 Administrator then has 10 business days thereafter process the funds and issue checks to the

1 Class Members, who will then have 180 days to cash their checks. Accordingly, the Parties
2 project that the check cashing deadline will occur approximately 7-8 months after Final
3 Approval (assuming there are no objections submitted before the Response Deadline). As
4 required by the LA Model Settlement Agreement at ¶ 8.8.6, “at least 15 days before any
5 deadline set by the Court, the Administrator will prepare, and submit to Class Counsel and
6 Defense Counsel, a signed declaration suitable for filing in Court attesting to its disbursement
7 of all payments required under this Agreement.”

8 The Parties propose submitting a final report in the form of a declaration from the
9 Administrator (setting forth the money that was actually paid to the Participating Class
10 Members, Aggrieved Employees and potentially the unclaimed funds) approximately 8 months
11 after the Final Approval hearing date (i.e., approximately February 1, 2024).

12 **E. Submission to the LWDA**

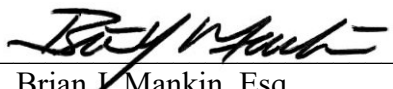
13 As set forth in the Mankin Declaration at ¶ 29, the Settlement Agreement and this
14 motion are concurrently being submitted to the LWDA in accordance with Labor Code §
15 2699(1)(2). The LWDA has not commented on the Settlement to date.

16 **IX. CONCLUSION**

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

19 Dated: March 30, 2023

LAUBY, MANKIN & LAUBY LLP

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21 BY: 
22 Brian J. Mankin, Esq.
23 Attorneys for Plaintiff and the Class
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SERVICE LIST

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