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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO

DEVIN SMITH, individually and on behalf of
all others similarly situated, and as a proxy for
the LWDA; MYRICA SMITH, individually and
on behalf of all others similarly situated;
and KEVIN OCHONMA, individually and on
behalf of all others similarly situated and as a
proxy for the LWDA,

Plaintiffs,
vs.

DI LOGISTICS, LLC, a California limited-
liability corporation; DI OVERNITE, LLC, a
Nevada limited liability company; DI
OVERNITE INVESTMENTS, LLC, a
California limited liability company,

Defendants.

Case No.: CIV DS 2011469

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT

Date: February 21, 2023
Time: 8:30 a.m.
Dept.: S31
Judge: John M. Pacheco

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1 **I. INTRODUCTION.**

2 Plaintiffs Myrica Smith, Kevin Ochonma, and Devin Smith (collectively “Plaintiffs”), all
3 former California non-exempt employees of Defendants DI Logistics, LLC, DI Overnite, LLC, and
4 DI Overnite Investments, LLC (“Defendants”, “DI”, or “DI Entities”), negotiated a resolution of
5 pending wage and hour claims asserted on behalf of themselves and other similarly situated current
6 and former employees of Defendants that provides a total Maximum Settlement Amount of
7 \$1,000,000 (\$940,000 allocated to resolve Class Claims) to be shared amongst approximately
8 1,859 individuals as compensation for alleged failures to 1) pay minimum wage for all hours
9 worked, 2) calculate the “regular rate of pay” for overtime and sick pay wages resulting in
10 underpaid wages, 3) provide meal and rest periods and associated premiums, 4) reimburse all
11 business expenses, including mileage, 5) pay all wages due and owing on separation, and 6) furnish
12 accurate itemized wage statements (derivative of the wage errors)—**a settlement expected to**
13 **provide an average of nearly \$300 to each Class Member.** Through this action, Plaintiffs seeks to
14 redress the harm they allege Defendants inflicted on all current and former non-exempt California
15 employees of the DI Entities who worked at least one shift from April 23, 2016 to December 31,
16 2021” (the “Settlement Class”). In order to facilitate dissemination of notice of the Parties’ Joint
17 Stipulation of Class and PAGA Action Settlement and Release (the “Settlement” or “SA”)¹ and,
18 ultimately, distribution of the monetary recovery it embodies, Plaintiffs seek preliminary approval
19 of the negotiated resolution from this Court. The Settlement confers cognizable monetary benefits
20 on Class Members, benefits that are not likely to be realized through any other avenue because 1)
21 Defendants entered into arbitration agreements with the majority of Class Members and 2)
22 Defendants’ financial condition is precarious and likely could not withstand an adverse judgment
23 after trial. Since the Settlement is fair, adequate, and reasonable, and was negotiated at arm’s
24 length with the assistance of renowned wage and hour class action mediator David Rotman, Esq., it
25 should be preliminarily approved so that Class Members have an opportunity to weigh in on its
26 propriety.

27 _____
28 ¹ Capitalized terms herein shall have the same meaning as in the Joint Stipulation of Class and PAGA Action Settlement and Release (“Settlement Agreement”, “Settlement”, or “SA”), a copy of which is attached as **Exhibit 1** to the Declaration of Jenny D. Baysinger (“JDB Dec.”) filed concurrently herewith.

1 **II. SUMMARY OF THE CASE.**

2 **A. Plaintiffs' Claims.**

3 Plaintiffs contend DI failed to properly pay them and other non-exempt California employees
4 for all hours worked because (among other things) they auto-deducted meal periods that constituted
5 time worked, failed to properly calculate and pay overtime and sick pay by miscalculating the “regular
6 rate of pay”, failed to provide meal and rest periods, failed to reimburse employees because DI
7 compensated for mileage at rates less than the IRS rate, failed to issue accurate itemized wage
8 statements, failed to timely pay wages owed on separation, and engaged in unfair business practices
9 (the “Class Claims”). Plaintiffs also assert a cause of action to assess and collect civil penalties based
10 on the Class Claims (the “PAGA Claim”) that occurred during the PAGA Period.

11 **1. The Class.**

12 Plaintiffs seek to represent a single Settlement Class defined as: All current and former non-
13 exempt California employees of the DI Entities who worked at least one shift from April 23, 2016 to
14 December 31, 2021. SA ¶ 17.

15 **B. Procedural History.**

16 **1. Plaintiffs Myrica Smith and Kevin Ochonma**

17 On April 23, 2020, Plaintiff Myrica Smith filed a Class Action Complaint in the United States
18 District Court, Central District of California Case No. 2:20-CV-03734 (the “Federal Class Action”)
19 asserting the Class Claims currently pending in the instant action. JDB Dec. ¶ 4. On June 17, 2022,
20 Plaintiff Kevin Ochonma provided written notice to the LWDA and the DI Entities identifying specific
21 provisions of the California Labor Code he contends Defendants violated as to him and other non-
22 exempt California employees. *Id.* ¶ 9. On June 25, 2020, a first amended complaint was filed in the
23 Federal Class Action adding Ochonma as a named Plaintiff and putative class representative. *Id.* ¶ 10.
24 On September 3, 2020, a second amended complaint was filed in the Federal Class Action adding a
25 claim to assess and collect civil penalties pursuant to the PAGA. *Id.* ¶ 12. The Federal Class Action
26 was again amended on January 4, 2022 in order to add DI Overnite, LLC and DI Overnite Investments,
27 LLC as specifically named Defendants. *Id.* ¶ 27. The Federal Class Action was ultimately dismissed
28 on April 5, 2022 by Judge Gutierrez to facilitate this Court’s review of the Settlement. *Id.* ¶ 34.

1 **2. Plaintiff Devin Smith and the Instant State Court Action**

2 On March 12, 2020, Plaintiff Devin Smith provided written notice to the LWDA and the DI
3 Entities identifying specific provisions of the California Labor Code he contends Defendants violated
4 as to him and other aggrieved employees. On June 11, 2020, Devin Smith filed a Representative
5 Action seeking to assess and collect civil penalties pursuant to the PAGA in the instant matter, Superior
6 Court of California, County of San Bernardino Case No. CIVDS2011469 (the “State Court Action”).
7 *Id.* ¶ 8. On October 31, 2022, in order to facilitate the Settlement and this Court’s review of its
8 propriety, and pursuant to stipulation, the operative First Amended Class Action Complaint was filed in
9 the State Court Action, adding Plaintiffs Myrica Smith and Ochonma as named plaintiffs/class
10 representatives and effectively consolidating the claims from the Federal Class Action. *Id.* ¶¶ 34-35.

11 **C. Identifying the Claims, Marshalling the Evidence, Creating a Damages Model and**
12 **Developing a Strategy for Mediation.**

13 Through independent inquiry, research, and informal discovery, Class Counsel thoroughly and
14 diligently investigated and pursued the Class Claims. This process has included, but not been limited
15 to, (1) obtaining and reviewing Plaintiffs’ personnel files, payroll records, and time records; (2)
16 researching Defendants, the scope of their operations (both within and outside of California) and their
17 relationship with one another; (3) identifying, researching, and pleading the appropriate claims,
18 including amending the Lawsuit to assert additional claims and Defendants as they ripened and/or were
19 discovered; (4) exhausting administrative remedies; (5) identifying, requesting, securing, and reviewing
20 pertinent policies, practices, and procedures; (6) identifying, requesting, and securing the payroll and
21 time records for a statistically significant sampling of 20% of the 1,869 member Class; (7) propounding
22 formal and informal discovery to secure relevant policy documents and numerical information
23 regarding the size of the class and the scope of the claims, (8) retaining an expert to analyze the payroll
24 and time data provided by Defendants and personally conducting spot checks to ensure the accuracy of
25 the damages calculations; (9) researching and evaluating the scope of additional and/or previous actions
26 and their potential impact on the Class Claims; (10) creating a reliable damages model; (11) developing
27 and implementing a strategy for mediation and settlement; and (12) reviewing and evaluating financial
28 documents provided by Defendants with an internal expert. JDB Dec. ¶ 14.

1 **D. Settlement Negotiations.**

2 At all times, the Parties’ negotiations were adversarial, non-collusive, and at arms’ length. JDB
3 Dec. ¶ 33. Between August 2020 and execution of the SA in August 2022, Defendants provided
4 thousands of pages of documents and more than 40,000 line items of data relating to the time and
5 payroll records of a 20% sampling of the Class. *Id.* ¶ 17. In conjunction with those same negotiations,
6 the Parties spoke at length about the strengths and weaknesses of each sides’ claims and defenses,
7 including Defendants’ contentions Class Members executed arbitration agreements with valid and
8 enforceable class waivers, the DI Entities had lawful time-keeping and wage payment policies, that
9 they had lawful meal/rest period policies, that all “non-discretionary” bonuses were included in the
10 regular rate of pay and additional remuneration not included was discretionary and appropriately
11 excluded, that Class Members actually took meal periods and thus auto-deduction was appropriate (and
12 fully compensated Class Members for time actual time worked), that mileage reimbursement at less
13 than the IRS rate compensated for all costs reasonably incurred by Class Members, that derivative wage
14 statement claims did not cause harm, . *Id.* ¶¶ 68-69, 73-81. On July 30, 2021, the Parties participated
15 in an all-day mediation with Mr. Rotman, but were unable to reach an agreement. At the mediation
16 Defendants first raised the issue of their limited financial resources. *Id.* ¶ 25. After an additional eight
17 (8) months of negotiations, Defendants’ provision of extensive financial documentation for evaluation,
18 and multiple discussions, the Parties were able to reach an agreement in principle and execute a
19 Memorandum of Understanding. *Id.* ¶¶ 30-31. Following additional negotiation, a long-form
20 settlement agreement was executed in August 2022. *Id.* ¶ 32, Exh. 1.

21 **III. SUMMARY OF THE PROPOSED SETTLEMENT.**

22 **A. Monetary Relief Under the Settlement.**

23 Pursuant to the Settlement, the DI Entities are to remit a total Maximum Settlement Amount
24 (“MSA”) of \$1,000,000, on an all-in, non-reversionary basis, to resolve the Released Claims—\$60,000
25 of the MSA is allocated to resolve PAGA Claims and \$940,000 is allocated to resolve Class Claims.
26 SA ¶ 27. In order to account for Defendants’ precarious financial position, the MSA is to be remitted
27 over time; an initial deposit of \$175,000 will be made within 30 days of the Effective Date and
28 Defendants will remit 33 monthly payments in the amount of \$25,000 each thereafter. SA ¶ 33.

1 After deducting the expected administration costs (\$25,000), Plaintiffs' Enhancement Payments
2 (\$15,000 total), the fees (\$330,000) and costs (\$25,000) of Class Counsel, and the payment to the
3 LWDA relating to the PAGA Claims (\$45,000), a \$560,000 net amount (\$545,000 for Class Claims
4 and \$15,000 attributable to PAGA Claims) is expected to ultimately be distributed to participating
5 Class Members. SA ¶ 29; JDB Dec. ¶ 72. Each Participating Class Member is expected to actually
6 receive nearly \$300 (\$293.17) in resolution of Class Claims. JDB Dec. ¶ 72.

7 **B. Notice to Class and Participation in the Settlement.**

8 Notice will be mailed within 20 days after preliminary approval. SA ¶ 65; Exh. B. Class
9 Members are not required to file claims in order to be eligible to participate in this Settlement; all Class
10 Members who do not opt-out will be Participating Class Members. SA ¶ 65.

11 **C. Individual Settlement Payments.**

12 The portion of the NSA attributable to Class Claims will be distributed proportionally to all
13 Participating Class Members based on the number of workweeks that individual worked for Defendants
14 during the Class Period. SA ¶ 29. Participating Class Members whose employment with Defendants
15 ended during the Class Period will be assigned an additional ten (10) workweeks in order to account for
16 the value of the waiting time penalty claim those individuals possess. SA ¶ 60. Each member of the
17 Class who was employed during the PAGA period will receive a pro rata distribution of the 25%
18 portion of the PAGA Payment (\$15,000) based on the number of workweeks he/she worked during the
19 PAGA Period. SA ¶ 29. The Parties contemplate two (2) separate distributions to Class Members, one
20 approximately 14 months after the Effective Date and the second after the full MSA has been remitted
21 by Defendants. JDB Dec. ¶ 41.

22 The *average* payment to each Participating Class Member is expected to be \$293.17. JDB Dec.
23 ¶¶ 72, 97. For the purpose of taxes and withholdings, 20% of each Individual Settlement Payment will
24 be allocated as wages, 40% will be allocated as unpaid interest, and 40% will be allocated as unpaid
25 penalties. SA ¶ 77. Defendants will separately pay Employer-side Taxes. SA ¶ 29.

26 **D. Scope Of Release And Final Judgment.**

27 Upon full funding of the MSA, Participating Class Members will forever and completely release
28 and discharge the DI Entities and Released Parties from the Released Claims. SA ¶¶ 34, 72, 82.

1 Additionally, Plaintiffs will each release the DI Entities and Released Parties from any and all claims
2 and will execute a Civil Code section 1542 waiver. SA ¶ 48. The Released Claims were narrowly
3 tailored to track the claims advanced on behalf of the Class and do not include a Civil Code section
4 1542 waiver. JDB Dec. ¶ 86.

5 **E. Settlement Administration.**

6 Plaintiff solicited bids from several administrators. After negotiating to obtain the most reliable
7 and cost-effective service, ILYM was selected. Plaintiffs seek approval of up to \$25,000 for the
8 Administrator's fees and costs. SA ¶ 52; JDB Dec. ¶¶ 92-93.

9 **F. Payment To The LWDA.**

10 The SA allocates \$60,000, 6% of the MSA and 7.95% of the maximum civil penalty exposure,
11 to resolve PAGA claims. JDB Dec. ¶ 89. 75% (\$45,000) will be paid to the LWDA and the
12 remaining 25% (\$15,000) will be returned to the NSA for distribution. The Parties negotiated this
13 amount in good faith, intending to serve the punitive and deterrent purposes of the PAGA, and it
14 exceeds the range approved by courts in other class actions with PAGA components.² JDB Dec. ¶¶
15 87-91. The LWDA has been notified of the Settlement. *Id.* ¶ 98, Exh. 6.

16 **G. Service Payment To Plaintiffs For Their Service To The Class.**

17 Plaintiffs will each apply for an Enhancement Payment in the amount \$5,000, or 0.5% of the
18 MSA. Class Members will be apprised of Plaintiffs' requests as well as their ability to review the
19 moving papers on the Court's website and to object to the request if they so desire. SA ¶ 47; Exh. B.

20 **H. Class Counsel's Attorneys' Fees And Costs.**

21 Class Counsel will request attorneys' fees of 33% of the MSA, or \$330,000, as well as declared
22 litigation costs up to \$25,000. SA ¶ 46. Class Members will be apprised of Class Counsel's request as
23 well as their ability to review their moving papers on the Court's website and to object to the request if
24 they so desire. SA Exh. B.

25 **I. Proposed Implementation Schedule.**

26 Administrator to mail Class Notice	Within 20 calendar days of the POA
27 Deadline for Class Members to object or opt out	Within 45 calendar days after Notice mailed.

28 ² See, e.g., *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (\$0 PAGA allocation approved; *Munoz v. UPS Ground Freight, Inc.* (N.D. Cal. 2009) 2009 WL 1626376, at 1 (2% or \$60,000 PAGA allocation approved).

1	Plaintiff to file Motion for Attorneys' Fees, Costs and Service Payment.	Not less than 16 court days before the Final Approval hearing.
2	Deadline for Plaintiff to file Motion for Final Approval.	Not less than 16 court days before the Final Approval hearing.
3	Final Approval Hearing.	Not less than 100 days after the POA

4 **IV. PROVISIONAL CERTIFICATION OF EACH OF THE CLASSES IS APPROPRIATE**

5 Prior to obtaining class certification, the parties to a class action may appropriately negotiate a
6 proposed settlement, subject to court approval. See *Wershba v. Apple Computer, Inc.* (2001) 91
7 Cal.App.4th 224, 240. To facilitate the resolution, the parties may stipulate that a defined class be
8 conditionally certified for settlement purposes only. Cal. R. Court 3.769(d); *Hernandez v. Vitamin*
9 *Shoppe Industries, Inc.* (2009) 174 Cal.App.4th 1441, 1456-1457. This Court must review the
10 propriety of certification and independently determine the standards for class-wide treatment exist.

11 California courts have broad discretion to certify a class for purposes of settlement. *Luckey v.*
12 *Sup. Ct.* (2014) 228 Cal.App.4th 81, 93-94; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807
13 n. 19 (class certification in settlement cases is subject to a "lesser standard of scrutiny"). Provisional
14 and conditional certification is appropriate where there is an ascertainable class and a well-defined
15 community of interest among the members; when "the question is one of a common or general interest,
16 of many persons, or when the parties are numerous, and it is impracticable to bring them all before the
17 court." Code Civ. Proc. § 382; *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, 470; see also *Daar*
18 *v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704. The practical purpose of provisional/conditional
19 certification is to facilitate notice to class members of the terms of a proposed settlement, their rights
20 thereunder, and the date and time of the final approval hearing.

21 To be certified, a settlement class must meet the following criteria: (1) the individuals in the
22 class are so numerous that joinder would be impractical; (2) there is a commonality of interest between
23 the plaintiff and the members of the class; (3) plaintiff's claims are typical of the claims of the class
24 members; and (4) plaintiff and their counsel will fully and adequately represent the interests of the class
25 members. Code. Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319,
26 326-27; Fed. R. Civ. P. 23.³ All of the prerequisites to certification are met here.

27
28 ³ California courts use FRCP 23 and cases applying it for guidance on class issues. See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, federal case law will be cited.

1 **A. The Proposed Class is Ascertainable and Joinder Would be Impractical.**

2 The identity of each Class Member is ascertainable because all Class Members worked for
3 Defendants as non-exempt employees within California during the Class Period and can be easily
4 identified through Defendants’ employee and payroll records. *Rose v. City of Hayward* (1981) 126
5 Cal.App.3d 926, 932. With 1,869 individuals, joinder is impractical.

6 **B. The Commonality Requirement is Met for the Settlement Class.**

7 The commonality requirement is met if questions of law and fact common to the class
8 predominate and the theory of recovery is “amenable to class treatment.” *Sav-On Drug Stores*, 34
9 Cal.4th p. 327; *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033. The claims of
10 Plaintiffs and each of the Class Members flow from the same facts and legal claims, i.e., application
11 of Defendants’ uniform time-keeping practices that failed to credit employees for all hours worked
12 (including auto-deducted meal periods), uniform application of facially deficient meal and rest
13 periods policies, uniform failure to include non-discretionary bonuses when calculating “regular
14 rate of pay” for overtime and sick leave, and uniform policies regarding mileage reimbursements
15 below the IRS standard rates that did not fully compensate Class Members for actual costs incurred.
16 JDB Dec. ¶¶ 75, 77-78, 80-83. Factually, the policies and practices alleged to underscore the Class
17 Claims apply class-wide and Defendants’ liability can be determined by facts, and applicable
18 California law, common to all Class Members—common issues undeniably predominate.

19 There is similarly no question that resolving the claims of Class Members through this
20 single action is superior to individual litigation or any alternative resolution method that may exist.
21 The value of each individual claim is relatively insignificant and is likely not nearly enough to
22 incentivize individual action, particularly in an arbitral forum. *Shroyer v. New Singular Wireless*
23 *Svcs., Inc.* (9th Cir. 2007) 498 F.3d 976, 986; *Wolin v. Jaguar Land Rover N.A., LLC* (9th Cir.
24 2010) 617 F.3d 1168, 1175-1176; JDB Dec. ¶¶ 63, 69. It is expected that individual claims are
25 worth less than \$10,000 (Defendants’ data reveals a maximum average liability of less than \$8,500)
26 and such a small amount is not likely to motivate individual representation and/or prosecution.
27 *Ibid.* Class treatment is, by far, the superior procedure in this case. Class treatment provides the
28 best, most cognizable avenue for class members to secure fair, adequate, and reasonable recovery.

1 **C. The Typicality Requirement is Met.**

2 The typicality requirement is met if the named representatives' claims are typical of those of the
3 class, though "they need not be substantially identical." *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150
4 F.3d 1011, 1020; *Sav-On Drug Stores, Inc.*, 34 Cal.4th 326. Plaintiffs' claims are typical of the claims
5 of every Class Member because they arise from the same factual bases and uniform application of
6 policies and practices, and are based upon the same legal theories. *Wehner v. Syntex Corp.* (N.D. Cal.
7 1987) 117 F.R.D. 641, 644. Importantly, were each not serving as Class Representative, Plaintiffs
8 would unquestionably be members of the Class. Typicality is satisfied.

9 **D. The Adequacy Requirement is Met.**

10 The adequacy requirement is met if the named representatives and their counsel have no
11 interests adverse to those of the Class Members and are committed to vigorously prosecuting the case
12 on behalf of the class. *Hanlon*, 150 F. 3d 1020; *McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442,
13 450-51. Plaintiffs' interests in prosecuting this Class Action and obtaining the most beneficial recovery
14 possible fully comports with the interests of the Class. There are no conflicts between any of the
15 Plaintiffs and the other Class Members, and each is a member of the Class. *Hanlon*, 150. F 3d 1021. In
16 addition, throughout this case Plaintiffs and Class Counsel have demonstrated their commitment to
17 prosecuting this lawsuit on behalf of the Class. Such is reflected by Class Counsel's experience in
18 wage and hour cases and the cognizable benefits they have and will continue to confer upon Class
19 Members, including securing the MSA. JDB Dec. ¶¶ 72, 91, 94, 104-107; Declaration of Thomas D.
20 Rutledge ("TDR Dec.") at ¶¶ 3-23.

21 **V. PRELIMINARY APPROVAL OF THE SETTLEMENT IS WARRANTED.**

22 **A. Legal Standards for Preliminary Approval of Class Action Settlements.**

23 The purpose of the preliminary evaluation of a proposed class action settlement is to
24 determine whether it is within the range of possible approval, and thus whether notice to the class of
25 the terms and conditions are warranted. *7-Eleven Owners for Fair Franchising v. Southland Corp.*
26 (2000) 85 Cal.App.4th 1135, 1145; *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312,
27 319; 4 Newberg § 11.25. In passing on its propriety, this Court has broad discretion to determine
28 whether a settlement is fair under the unique circumstances. *Dunk, supra*, 48 Cal.App.4th 1801.

1 Indeed, the Court need only find that the settlement falls within the range of possible final approval,
2 also described as the “reasonable range.” *Cordy v. USS-Posco Indus.* (N.D. Cal. 2013) 2013 WL
3 4028627 *3; 4 Newberg on Class Actions § 11:25. To make this fairness determination, courts
4 consider several relevant factors, including “the strength of the plaintiffs’ case; the risk, expense,
5 complexity and likely duration of further litigation; the risk of maintaining class action status
6 throughout the trial; the amount offered in settlement; the extent of discovery completed and the
7 stage of the proceedings; [and] the experience and views of counsel . . .” *Hanlon*, 150 F.3d 1026
8 (citations omitted). Importantly, there is a presumption of fairness when the settlement is the result
9 of arm's-length negotiation, investigation and discovery are sufficient to permit counsel and the
10 court to act intelligently, and counsel are experienced in similar litigation, as is the case here. *Dunk*,
11 148 Cal.App.4th 1801; *Wren v. RGIS Inventory Specialties* (N.D. Cal. 2011) 2011 WL 1230826 *6.
12 California courts put a great deal of stock into what is otherwise, a private, negotiated, consensual
13 agreement. Accordingly, a court’s inquiry is limited “to the extent necessary to reach a reasoned
14 judgment that the agreement is not the product of fraud or overreaching by, or collusion between,
15 the negotiating parties, and that the settlement, taken as a whole is fair, reasonable and adequate to
16 all concerned.” *Dunk*, 148 Cal.App.4th 1801.

17 Here, the Settlement was the product of protracted arm’s length negotiations after provision
18 and evaluation of payroll and time data for a statistically significant portion of the Class and affords
19 each Class Member a gross recovery of more than 20% of his/her realistic damages and an expected
20 average payment of nearly \$300—recovery unlikely to be realized through any alternative avenue.
21 JDB Dec. ¶¶ 69, 71; *Shroyer*, 498 F.3d 986. Overall, it is fair, adequate, and reasonable.

22 **B. The Settlement Terms are Fair, Reasonable, and Adequate.**

23 The Class Action and Settlement have and will result in substantial benefits to the Class. While
24 the MSA represents only a fraction of the DI Entities’ maximum exposure, it represents a fair
25 compromise given the risks and uncertainties presented by continued litigation, including the existence
26 of arbitration agreements, coupled with the demonstrated financial challenges facing Defendants and
27 the very real possibility that any judgment after trial would be uncollectable. JDB Dec. ¶¶ 71, 84-85;
28 *Cavazos v. Salas Concrete* (E.D. Cal. 2022) 2022 WL 2918361 *6 (approving settlement representing

5.8% of maximum exposure due, in large part, to defendant's financial condition); *Jabbari v. Wells Fargo & Co.* (N.D. Cal. 2017) 2017 WL 5157608 *5 (dispute over arbitration agreement and class waiver made settlement more fair in context).

1. Defendants' Maximum and Realistic Exposure to the Class.

With the help of an expert, Class Counsel developed a damages model and determined the maximum potential exposure the DI Entities face is \$15,750,294.20. JDB Dec. ¶¶ 14, 46-63. Because 100% success in litigation is unrealistic, Class Counsel also determined a reasonable, but much more realistic estimate of potential recovery. order to account for the relative strength of the claims, Class Counsel (1) applied a 25% discount to the off-the-clock claim due to the inherent difficulty in demonstrating that off-the-clock work has occurred and certifying such claims, leaving \$2,458,031.96. *Vasquez v. Crane Cartage, LLC* (E.D. Cal. 2020) 2020 WL 4547444 *3; *In re Wells Fargo Loan Processor Overtime Pay Litigation* (N.D. Cal. 2011) 2011 WL 3352460 *6; (2) applied no discount to the regular rate claim, leaving \$71,816.00; (3) applied a 50% discount to the meal period claim to account for the likelihood that some of the auto-deducted meal periods were actually taken by Class Members who were offsite and had substantial control over their own schedules, leaving \$2,600,554.50; (4) applied a 50% discount to the rest period claim to account for the likely event that some of the breaks that were missed were voluntarily foregone by Class Members, resulting in \$667,665, (5) applied a 50% discount to the waiting time penalty claim to account for the potential that some of the Class Members who are also former employees would be unable to demonstrate any compensable wages that were actually unpaid during employment and Defendant's anticipated argument that its failure to pay any meal premium wages was not willful and the law was unsettled at the time of the non-payments (*Naranjo v. Spectrum Security Svcs., Inc.* (Cal. 2022) 13 Cal.5th 93, 102) leaving \$1,506,153.60, (6) applied a 25% discount to the wage statement claim to account for the potential that injury could not be demonstrated for derivative violations and due to the technical nature of the alleged stand-alone deficiencies in the wage statements, leaving \$1,216,842, and (7) applied a 50% discount to the reimbursement claim to reflect the cognizable risks that 1) certification would not be obtained and/or maintained and 2) that the IRS rate provides for more than the *actual* costs incurred and thus is not an appropriate or reliable measure of

1 damages, resulting in \$614,950. JDB Dec. ¶ 68. In addition to reduction based on the specific
2 defenses to each of the Class Claims, the maximum exposure was discounted by 50% because of the
3 arbitration issue.⁴ *Id.* ¶ 69. Under this more measured approach, the Class’ realistic expected
4 recovery is \$4,568,006.53, assuming 100% collectability after judgment. *Id.* ¶ 70.

5 The portion of the MSA allocated to Class Claims (\$940,000) represents over 20% of the
6 realistic recovery. *Id.* ¶ 71. This is a positive result and is within the range of reasonableness,
7 especially considering the uncertainties involved with litigation and Defendants’ financial
8 challenges. See e.g., *Cavazos*, 2022 WL 2918361 *6 (settlement of 5.8% of maximum exposure
9 reasonable in light of defendant’s financial condition); *In re Mego Fin. Corp. Sec. Litig.* (9th Cir.
10 2000) 213 F.3d 454, 459 (settlement of 16.67% of potential recovery was fair). Indeed, “it is well-
11 settled law that a cash settlement amounting to only a fraction of the potential recovery does not . .
12 . render the settlement inadequate or unfair.” *Officers for Justice v. Civil Service Com’n of City*
13 *and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 628. Of course, “the very essence of a
14 settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Linney v.*
15 *Cellular Alaska P’ship.* (9th Cir. 1998) 151 F.3d 1234, 1242. As such, “[t]he fact that a proposed
16 settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean
17 that the proposed settlement is grossly inadequate and should be disapproved.” *Id.*

18 Considering all of the circumstances here, particularly the existence of allegedly
19 enforceable arbitration agreements with class waivers, Defendants’ financial difficulties, and the
20 substantive challenges to both certification and ultimate liability facing the Class Claims, the
21 Settlement represents a fair, reasonable, and adequate outcome that affords Class Members
22 cognizable recovery they are unlikely to realize absent the negotiated resolution. JDB Dec. ¶¶ 71,
23 73-84; see also, *In re Wachovia Corp. “Pick-A-Payment” Mortgage Mktg. & Sales Practices Litig.*
24 (N.D. Cal. 2011) 2011 WL 1877630, at *3 (belief of “Plaintiffs’ counsel, who are experienced
25 attorneys . . . that the settlement is extremely favorable to the class” supports approval).

26
27 ⁴ As multiple courts recognize, the existence of an arbitration agreement threatens the ability of offended employees to
28 seek class-wide relief and substantially limits the actual exposure an employer is likely to face because only a limited
number of individuals will actually initiate arbitration on an individual basis. *Wilson v. Tesla* (N.D. Cal. 2018) 2018
WL 4616358 *6 (existence of valid arbitration agreement should be taken into account when evaluating settlement);
Jabbari 2017 WL 5157608 *5.

1 C. **The Court Should Order Dissemination of the Proposed Notice.**

2 In order to protect the rights of class members, courts must ensure each receives the best notice
3 practicable. *Phillips Petroleum Co. v. Shutts* (1985) 72 U.S. 797, 811-12. Procedural due process
4 requires that affected parties have the right to be heard at a meaningful time and in a meaningful
5 manner. It does not guarantee any particular procedure but rather only requires notice reasonably
6 calculated “to apprise interested parties of the pendency of the action and afford them an opportunity to
7 present their objections.” *Ryan v. Cal. Interscholastic Fed’n – San Diego Section* (2001) 94
8 Cal.App.4th 1048, 1072. The law typically requires notice of a proposed settlement inform class
9 members of: (1) the nature of the pending litigation; (2) the general terms of the proposed settlement;
10 (3) that complete information is available from the court files; and (4) that any class member may
11 appear and be heard at the fairness hearing. See Cal. R. Court 3.766(d)-(f) and 3.769(f).

12 1. **The Class Notice is Accurate, Informative, and Satisfies Due Process.**

13 California law vests the court with broad discretion to fashion an appropriate notice program.
14 Cal. Civ. Code §1781; Fed. R. Civ. Proc. Rule 23(e)(1); Rule 23(c)(2)(B); *Cartt v. Superior Court*
15 (1975) 50 Cal.App.3d 960, 973-74. Because all Class Members are current and former employees for
16 whom Defendants have current or last known addresses as well as SSNs, notice is simpler and more
17 reliable than in other types of class actions. The Class Notice and notice plan are consistent with those
18 approved by state and federal courts and, under the circumstances, afford the best notice practicable.

19 The Class Notice will be sent to all Class Members, will inform them of the terms of the
20 Settlement and is neutrally worded to avoid prejudice. The Class Notice meets all of the requirements
21 of procedural due process and California Rules of Court, Rules 3.766(d)-(f) and 3.769(f). The Class
22 Notice will provide Class Members all information necessary to make an informed decision.

23 D. **The Settlement Administrator’s Fees are Reasonable.**

24 The Parties have selected ILYM to serve as Administrator. ILYM has substantial experience in
25 administering class action settlements, having handled thousands of such settlements. The
26 Administrator’s fees and costs will be paid out of the MSA/QSF. The Administrator will, among other
27 things, distribute the Court-approved Class Notice, calculate Individual Settlement Payments, prepare
28 and mail settlement checks (in two separate proportional distributions due to the extended payment

period), respond to inquiries/disputes as appropriate, prepare requisite tax forms, and generally perform all normal and customary duties associated with the administration of such settlements. Plaintiffs seek preliminary approval of \$25,000 of Administrator's fees and costs. SA ¶¶ 39-40, 52; JDB Dec. ¶ 96.

E. The Enhancement Payments to Plaintiffs Are Reasonable.

Named plaintiffs in class action litigation are eligible for reasonable service payments. *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977. "Courts routinely approve incentive awards to compensate plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. Coca-Cola Co.* (N.D. Ga. 2001) 200 F.R.D. 685, 694 (approving \$300,000 payment to each class representative in employment action settling before certification).⁵ Factors used by courts in determining the amount of the service payments include (1) a comparison between service awards and the range of monetary recovery available to the class (*see Ingram*, 200 F.R.D. at 694; (2) time and effort put into the litigation (*see Van Vranken*, 901 F. Supp. at 299); (3) whether the litigation will further the public policy underlying the statutory scheme (*see Roberts*, 979 F. Supp. at 201 n.23); and (4) risks of retaliation (*see Roberts*, 979 F. Supp. at 202).

All of the aforementioned factors support the service payment requested here. Plaintiff will request \$3,500, or 1% of the MSA, as a service payment. The sought service payment is (a) equivalent to the Ninth Circuit benchmark (*Huynh v. Housing Authority of Santa Clara* (N.D. Cal. 2017) 2017 WL 1050539 *11 (noting that the benchmark for service awards is \$5,000)), (b) just of the \$350,000 MSA, and (c) fair, reasonable and appropriate under the circumstances of this case, including Plaintiffs' provision of a general release and Civil Code section 1542 waiver. Plaintiff, who has worked diligently with Class Counsel throughout this entire litigation, including participating in discovery and the Parties' informal information exchange, taking numerous calls with Class Counsel, and actively participating during the remote mediation, should be rewarded for taking the initiative to pursue these claims on behalf of his coworkers, and for his role in reaching a substantial settlement providing valuable relief to the Class. JDB Dec. ¶¶ 74-76. Further, Class Members will be apprised of Plaintiff's

⁵*Roberts v. Texaco, Inc.* (S/D.N.Y. 1997) 979 F. Supp. 185 (approving incentive payments up to \$85,000 for named plaintiffs in employment action settling before certification); *Van Vranken v. Atl. Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 300 (\$50,000 service payment for named plaintiff in class action).

request as well as their ability to review his moving papers in Court or on the Administrator’s website, and to object to his request if they so desire. SA Exh. B.

F. Class Counsel’s Attorneys’ Fees and Costs are Reasonable, Fair, and Appropriate.

Plaintiffs, in the settlement of this wage and hour class action, are entitled to payment of attorneys’ fees and costs. Cal. Lab. Code §§ 218.5, 226(e)(1), 1194, and 2699(g); *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1427. At the Final Approval Hearing, Plaintiffs will seek an award of Class Counsel’s fees under the common fund doctrine, which is customarily used in awarding fees and costs in settlement of Labor Code class actions and an approved method under California law.⁶ The traditional method for calculating a common fund fee is to award a percentage of the total fund. *Blum v. Stenson* (1984) 465 U.S. 886, 900 n. 16; *Mex. Workers v. Ariz. Citrus Growers* (9th Cir. 2002) 904 F.2d 1301, 1311. Courts customarily approve payments of attorney’s fees of as much as one-third to forty percent of the common fund in comparable wage and hour class actions.⁷ Here, Plaintiffs will seek attorneys’ fees of 33% of the MSA, or \$330,000, and declared litigation costs of up to \$25,000. Because these fees and costs are reasonable, within the range commonly awarded by state and federal courts in wage and hour class actions, and because Plaintiffs and Class Counsel have conveyed and will confer significant benefits upon the Class, the Court should preliminarily approve the requested awards as fair and reasonable. Further, Class Members will be apprised of the requests and their ability to review relevant moving papers and to object if they so desire. SA Exh. B.

VI. A FINAL APPROVAL HEARING SHOULD BE SET.

Plaintiffs request that the Court set a date for the Final Approval Hearing, deadlines for Class Members to opt-out, object, and for the submission of motions associated with final approval. In order to enable sufficient time for the Administrator to mail the Class Notice, for Class Members to decide how they wish to proceed, Plaintiff requests that the date for the Final Approval Hearing be set not less than 100 days after preliminary approval.

⁶ *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer who recovers for a common fund . . . is entitled to a reasonable attorney’s fee from the fund as a whole.”); *Wershba*, 91 Cal.App.4th 254; *Lealao v. Beneficial of Cal.* (2000) 82 Cal.App.4th 19, 26-30; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34; *Hanlon, supra*, 150 F.3d. 1029.

⁷ *Newberg*, § 14:6 (Studies show that “Fee awards in class actions average around one-third of the recovery”); *Williams v. MGM-Pathe Commc’ns Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (33% fee award); *Wren*, 2011 WL 1230826 *29 (42% fee award in common fund wage and hour class action).

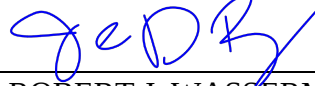
1 **VII. CONCLUSION.**

2 For all the reasons stated above, Plaintiffs' unopposed Motion should be granted.

3 **DATED:** December 8, 2022

MAYALL HURLEY P.C.

4 By



5 ROBERT J. WASSERMAN

JENNY D. BAYSINGER

6 Attorneys for Plaintiffs and the Putative Class

PROOF OF SERVICE

I, the undersigned, certify and declare as follows:

I am over the age of eighteen years and not a party to this action. My business address is 2453 Grand Canal Boulevard, Stockton, California 95207 that is located in the county where the mailing and/or delivery below took place.

On December 8, 2022, I served the following document:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

addressed to:

Thomas D. Rutledge
(thomasrutledgelaw@gmail.com)
The Law Office of Thomas D. Rutledge
16956 Via De Santa Fe, Suite 1847
Rancho Santa Fe, California 9206

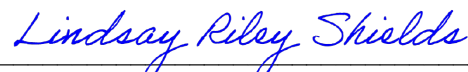
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☐ **BUSINESS PRACTICE TO ENTRUST DEPOSIT TO OTHERS:** I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On the date specified below, at my place of business at Stockton, California a copy of the document described above was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid addressed to the individuals and/or entities mentioned above; and that envelope was placed for collection and mailing on that date following ordinary business practice.

☒ **BY EMAIL:** In accordance with Code of Civil Procedure, Section 1010.6, on the date specified below, I caused a copy of the document(s) described above to be sent to the person(s) at the e-mail address(es) listed above. My business e-mail address is lriley@mayallaw.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 8, 2022, at Lodi, California.


LINDSAY RILEY SHIELDS