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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

PLAINTIFFS' MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS AND
REPRESENTATIVE ACTION SETTLEMENT

Date: June 22, 2023
Time: 8:30 a.m.
Dept.: S-31
Judge: Hon. John M. Pacheco

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1 **I. INTRODUCTION.**

2 Following more than two years of active litigation, including provision and review of
3 thousands of pages of documents and more than 40,000 line items of data relating to the time and
4 payroll records of a 25% sampling of the Class, participation in an all day mediation with renowned
5 class action mediator David Rotman, Esq., nearly a year of further litigation and negotiation, the
6 effective consolidation of this action with a class action filed by Plaintiffs Myrica Smith and Kevin
7 Ochonma in the United States District Court, Central District of California case number 2:20-cv-
8 03734 (the “Federal Class Action”), and notice to 1,739 current and former employees of Defendants
9 DI Logistics, LLC, DI Overnite, LLC, and DI Overnite Investments, LLC (“Defendants”, “DI”, or
10 “DI Entities”), ***not one of whom has objected and only 1 has elected to opt out***, Plaintiffs Devin
11 Smith, Myrica Smith, and Kevin Ochonma now seek final approval of the Parties’ Joint Stipulation of
12 Class and PAGA Action Settlement and Release (the “Settlement” or “SA”).¹ The Settlement secures
13 \$1,000,000 (the “MSA”) to be shared amongst approximately 1,738 Participating Class Members--
14 \$940,000 to resolve claims asserted on a class-wide basis and \$60,000 to resolve claims under the
15 Private Attorneys’ General Act (the “PAGA”).

16 The Settlement, which was preliminarily approved by this Court on February 21, 2023, (1) is
17 the product of protracted arms-length negotiations, (2) was negotiated by experienced class action
18 attorneys with the help of an experienced and respected wage and hour mediator, (3) was reached
19 subsequent to undertaking sufficient investigation, including substantial formal and informal
20 discovery and analysis, including expert review, in order to evaluate the Class’ claims, and (4)
21 reflects a logical balancing of the strength and value of the Class’ claims and the inherent risks of
22 continued litigation, including potential defeat at certification, on the merits and/or on appeal. When
23 the benefits of the Settlement are assessed against the risks of continued, protracted litigation, the
24 fairness, adequacy, and reasonableness of the Settlement is clear and this Court should grant final
25 approval of the Settlement.

26 ///

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 The Class consists of all current and former non-exempt California employees of the DI
13 Entities who worked at least one shift from April 23, 2016 to December 31, 2021. SA ¶ 17. There
14 are 1,738 Participating Class Members, 977 of whom separated from employment with the DI
15 Entities during the Class Period. Declaration of Nathalie Hernandez of ILYM Group, Inc. In Support
16 of Motion for Final Approval of Class Action Settlement (“Admin. Dec.”) ¶ 13.

17 **B. Procedural History.**

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

19 On April 23, 2020, Plaintiff Myrica Smith filed the Federal Class Action asserting the Class
20 Claims currently pending here. JDB Dec. ¶ 4. On June 25, 2020, the Federal Class Action was
21 amended to name Ochonma as a putative class representative and on September 3, 2020, a second
22 amended complaint was filed adding a PAGA claim. *Id.* ¶¶ 10, 12. The Federal Class Action was
23 again amended (by motion) January 4, 2022 to add DI Overnite, LLC and DI Overnite Investments,
24 LLC as named Defendants. *Id.* ¶ 30. The Federal Class Action was dismissed by the Court on April 5,
25 2022 so this Court could review the propriety of the negotiated Settlement. *Id.* ¶ 37.

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

27 On June 11, 2020, Devin Smith filed a Representative Action seeking to assess and collect civil
28 penalties pursuant to the PAGA in the instant matter, Superior Court of California, County of San

1 Bernardino Case No. CIVDS2011469 (the “State Court Action”). *Id.* ¶ 8. On October 31, 2022, the
2 operative First Amended Class Action Complaint was filed in this State Court Action, adding Myrica
3 Smith and Ochonma as named plaintiffs/class representatives and effectively consolidating the claims
4 from the Federal Class Action. *Id.* ¶¶ 38-39.

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

7 Through independent inquiry, research, and informal discovery, Class Counsel thoroughly and
8 diligently investigated and pursued the Class Claims. This process has included, but not been limited
9 to, (1) obtaining and reviewing Plaintiffs’ personnel files, payroll records, and time records; (2)
10 researching Defendants, the scope of their operations (both within and outside of California) and their
11 relationship with one another; (3) identifying, researching, and pleading the appropriate claims,
12 including amending the Lawsuit to assert additional claims and Defendants as they ripened and/or were
13 discovered; (4) exhausting administrative remedies; (5) identifying, requesting, securing, and reviewing
14 pertinent policies, practices, and procedures; (6) identifying, requesting, and securing the payroll and
15 time records for a statistically significant sampling of more than 25% of the 1,739 member Class (450
16 individuals); (7) propounding formal and informal discovery to secure relevant policy documents and
17 numerical information regarding the size of the class and the scope of the claims, (8) retaining an expert
18 to analyze the payroll and time data provided by Defendants and personally conducting spot checks to
19 ensure the accuracy of the damages calculations; (9) researching and evaluating the scope of additional
20 and/or previous actions and their potential impact on the Class Claims; (10) creating a reliable damages
21 model; (11) developing and implementing a strategy for mediation and settlement; and (12) reviewing
22 and evaluating financial documents provided by Defendants with an internal expert. JDB Dec. ¶ 14.

23 **D. Settlement Negotiations.**

24 At all times, the Parties’ negotiations were adversarial, non-collusive, and at arms’ length. JDB
25 Dec. ¶ 36. Between August 2020 and execution of the SA in August 2022, Defendants provided
26 thousands of pages of documents and more than 40,000 line items of data relating to the time and
27 payroll records of more than 25% of the Class (450 individuals). *Id.* ¶ 17. In conjunction with those
28 same negotiations, the Parties spoke at length about the strengths and weaknesses of each sides’ claims

1 and defenses, including Defendants’ contentions Class Members executed arbitration agreements with
2 class waivers, the DI Entities had lawful time-keeping and wage payment policies, that they had lawful
3 meal/rest period policies, that all “non-discretionary” bonuses were included in the regular rate of pay
4 and additional remuneration not included was discretionary, that Class Members actually took meal
5 periods and auto-deduction was appropriate (and fully compensated Class Members for time worked),
6 that mileage reimbursement at less than the IRS rate compensated for all costs reasonably incurred, and
7 that derivative wage statement claims did not cause harm, . *Id.* ¶¶ 75-76, 78-79, 83-94. On July 30,
8 2021, the Parties participated in an all-day mediation with Mr. Rotman, but were unable to reach an
9 agreement. At the mediation Defendants first raised the issue of their limited financial resources. *Id.* ¶
10 25. After an additional eight (8) months of negotiations, Defendants’ provision of extensive financial
11 documentation for evaluation, and multiple discussions, the Parties were able to reach an agreement in
12 principle and execute a Memorandum of Understanding. *Id.* ¶¶ 31-32. Following additional
13 negotiation, a long-form settlement agreement was executed in August 2022. *Id.* ¶ 35, Exh. 1.

14 **E. The Court Granted Preliminary Approval of the Settlement.**

15 On February 21, 2023, this Court granted preliminary approval of the Settlement. Having
16 reviewed the substantive terms of the Settlement, the Court (1) found the proposed Class appropriate
17 for conditional certification, (2) found the Class meets the requirements of CCP 382, (3) found the
18 terms of the Settlement appeared fair, adequate, and reasonable; (4) preliminarily approved the
19 amount allocated to resolve PAGA Claims, the proposed service awards of \$5,000 to each Plaintiff,
20 and the fees and costs of Class Counsel, (5) found the notice and manner of notice proposed satisfied
21 due process, and (6) scheduled a final approval hearing. Order Granting Plaintiff’s Motion for
22 Preliminary Approval of Class Action Settlement (“PAO”) at ¶ 4-12.

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

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

25 Pursuant to the Settlement, the DI Entities will pay a total MSA of \$1,000,000, on an all-in,
26 non-reversionary basis, to resolve the Released Claims—\$60,000 of the MSA is allocated to resolve
27 PAGA Claims and \$940,000 is allocated to resolve Class Claims. SA ¶ 27. In order to account for
28 Defendants’ precarious financial position, the MSA is to be remitted over time; an initial deposit of

1 \$175,000 will be made within 30 days of the Effective Date and Defendants will remit 33 monthly
2 payments in the amount of \$25,000 on or before the 15th of each month thereafter. SA ¶ 33.

3 After deducting the administration costs (\$25,000), Plaintiffs' Enhancement Payments (\$15,000
4 total), the fees (\$330,000) and costs (\$18,280.06) of Class Counsel, and the payment to the LWDA
5 relating to the PAGA Claims (\$45,000), a \$566,719.94 net amount (\$551,719.94 for Class Claims and
6 \$15,000 attributable to PAGA Claims) is expected to ultimately be distributed to participating Class
7 Members. SA ¶ 29; JDB Dec. ¶ 82. Each Participating Class Member is expected to actually receive
8 an average of \$317.44 in resolution of Class Claims (\$326.07 total). JDB Dec. ¶¶ 82.

9 **B. Scope Of Release And Final Judgment.**

10 Upon full funding of the MSA, Participating Class Members will forever and completely release
11 and discharge the DI Entities and Released Parties from the Released Claims. SA ¶¶ 34, 72, 82.
12 Additionally, Plaintiffs will each release the DI Entities and Released Parties from any and all claims
13 and will execute a Civil Code section 1542 waiver. SA ¶¶ 48-49. The Released Claims were narrowly
14 tailored to track the Class Claims and do not include a Civil Code section 1542 waiver. JDB Dec. ¶ 96.

15 **C. Settlement of the PAGA Claims.**

16 The DI Entities' payment of \$60,000 will resolve all claims for civil penalties arising out of
17 the Class Claims. SA ¶¶ 34, 72. The LWDA was advised of the Settlement and its PAGA allocation
18 and has not raised any concern or objection to date. JDB Dec. ¶ 112, Ex. 6.

19 **D. Class Representative Enhancement Payments.**

20 Plaintiffs each request a \$5,000 Enhancement Payment. SA ¶ 46. Each award is just 0.5% of
21 the MSA (1.5% total) and is fair, reasonable and appropriate under the circumstances, including each
22 Plaintiffs' provision of a general release and Civil Code section 1542 waiver. Critically, no Class
23 Member has objected to the requested Enhancement Payments. Admin. Dec. ¶ 12.

24 **E. Class Counsel's Attorneys' Fees And Costs.**

25 Class Counsel requests attorneys' fees in the amount of 33% of the \$1,000,000 MSA, or
26 \$330,000, and declared litigation costs of \$18,280.06². The propriety of the sought fees and costs are
27

28 ² This number is substantially less than the "up to \$25,000" believed at the time of Settlement and preliminarily
approved by this Court. This will result in increased recovery for the Class. JDB Dec. ¶¶ 82, 131-132.

discussed in detail in Plaintiff’s concurrently filed Motion for Attorneys’ Fees, Costs, and Enhancement Payments (“Fee Motion”). Class Members have been apprised of the requests and not one objection has been raised. Admin. Dec. ¶ 12, Exh. A.

IV. FINAL CERTIFICATION OF THE CLASSES IS APPROPRIATE

As a prerequisite to granting final approval, this Court must evaluate and determine the Class is suitable for certification. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. As outlined in Plaintiff’s Motion for Preliminary Approval, and reiterated below, the Class meets the requirements of California Code of Civil Procedure section 382. Courts have broad discretion to certify a class for purposes of settlement. *Luckey v. Sup. Ct.* (2014) 228 Cal.App.4th 81, 93-94; *Zinser v. Accuflix Research Inst., Inc.* (9th Cir. 2001) 253 F.3d 1180, 1186; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n. 19. To be certified, a settlement class must satisfy all of the following: (1) the individuals are so numerous that joinder would be impractical; (2) there is a commonality of interest between plaintiff and class members; (3) plaintiff’s claims are typical of the claims of the class; and (4) plaintiff and counsel will fully and adequately represent the interests of class members. Code. Civ. Proc. § 382; Fed. R. Civ. P. 23(a)³; *Sav-on Drug Stores, Inc. v. Sup. Court* (2004) 34 Cal.4th 319, 326-27. Since this Court already found these criteria satisfied and nothing material has changed, certification in the context of final approval is proper.

A. The Numerosity Requirement Continues To Be Met.

Numerosity is easily satisfied as there are 1,738 class members here. Admin. Dec. ¶ 13. Courts generally find numerosity when a class exceeds 40 individuals, or where joinder would impose financial burdens and clog the court’s docket—numerosity exists here. *Millan v. Cascade Water Svcs., Inc.* (E.D. Cal. 2015) 310 F.R.D. 593, 603 (class of 40 or more sufficiently numerous).

B. The Commonality Requirement Continues To Be Met.

Commonality is met if questions of law and fact that are common to the class predominate and the theory of recovery is “amenable to class treatment.” *Sav-On Drug Stores*, 34 Cal.4th p. 327; *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033. The claims of Plaintiffs

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 and each of the Class Members flow from the same facts and legal claims, i.e., application of
2 Defendants’ uniform time-keeping practices that failed to credit employees for all hours worked
3 (including auto-deducted meal periods), uniform application of facially deficient meal and rest
4 periods policies, uniform failure to include non-discretionary bonuses when calculating “regular
5 rate of pay” for overtime and sick leave, and uniform policies regarding mileage reimbursements
6 below the IRS standard rates that did not fully compensate Class Members for actual costs incurred.
7 JDB Dec. ¶¶ 85, 87-88, 90-93. Factually, the policies and practices alleged to underscore the Class
8 Claims apply class-wide and Defendants’ liability can be determined by facts, and applicable
9 California law, common to all Class Members—common issues undeniably predominate.

10 There is similarly no question that resolving the claims of Class Members through this
11 single action is superior to individual litigation or any alternative resolution method that may exist.
12 It is expected that individual claims are worth less than \$10,000 (Defendants’ data reveals a
13 maximum average liability of less than \$8,500) and such a small amount is not likely to motivate
14 individual representation and/or prosecution. *Shroyer v. New Singular Wireless Svcs., Inc.* (9th Cir.
15 2007) 498 F.3d 976, 986; *Wolin v. Jaguar Land Rover N.A., LLC* (9th Cir. 2010) 617 F.3d 1168,
16 1175-1176; JDB Dec. ¶¶ 73, 79. Class treatment is, by far, the superior procedure. Class treatment
17 provides the best, most cognizable avenue for class members to secure fair, adequate, and
18 reasonable recovery—the commonality prong continues to be met.

19 **C. Plaintiffs’ Claims Continue To Be Typical Of The Class.**

20 Each and every Class Member, including each named Plaintiff, has typical minimum wage,
21 overtime, meal and rest break, reimbursement, and derivative claims because they arise from the same
22 factual bases and uniform application of policies and procedures, and are based upon the same legal
23 theories applicable to all Class members. *Wehner v. Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641,
24 644. Typicality continues to be satisfied.

25 **D. Plaintiffs and Class Counsel Continue To Be Adequate Representatives.**

26 When considering adequacy, courts focus on 1) whether the representative and his/her counsel
27 have any conflicts of interest (adverse interests) with the Class and 2) whether the representative will
28 vigorously prosecute the action on behalf of the Class. E.g. *Staton v. Boeing, Inc.* (9th Cir. 2003) 327

1 F.3d 938, 957; *Lao v. H&M Hennes & Mauritz, L.P.* (N.D. Cal. 2018) 2018 WL 3753708 * 9; *McGhee*
2 *v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450-51. Plaintiffs' interests in prosecuting this Class Action
3 and obtaining the most beneficial recovery possible fully comports with the interests of the Class.
4 There are no conflicts between any of the Plaintiffs and the other Class Members, and each is a member
5 of the Class. *Hanlon*, 150. F 3d 1021. In addition, throughout this case Plaintiffs and Class Counsel
6 have demonstrated their commitment to prosecuting this lawsuit on behalf of the Class. Such is
7 reflected by Class Counsel's experience in wage and hour cases and the cognizable benefits they have
8 and will continue to confer upon Class Members, including securing the MSA. JDB Dec. ¶¶ 82, 114-
9 118, 134-137; Declaration of Thomas D. Rutledge ("TDR Dec.") at ¶¶ 5-22.

10 **V. THE CLASS NOTICE WAS SUCCESSFULLY DISTRIBUTED.**

11 The Court-approved Class Notice meets all of the requirements of procedural due process and
12 California Rules of Court 3.769(f) by: (1) identifying the Parties and describing the Class Claims in a
13 straightforward manner; (2) succinctly describing the essential terms of the Settlement, including the
14 MSA, the amount Class Counsel will request for attorneys' fees and costs, and Plaintiffs' requested
15 Enhancement Awards; (3) clearly identifying Released Claims and Released Parties; (4) providing
16 Class Members with information on how to participate in, opt out of, and/or object to the Settlement;
17 (5) providing all applicable deadlines; and (6) informing Class Members of the consequences if they
18 decide to opt out, object, or participate in the Settlement. Further, the Class Notice clearly explains
19 resources to obtain further information (e.g., from Class Counsel, the Administrator, or through the
20 court's website) and that the Final Approval Hearing may be moved without notice. Ex. A to Admin
21 Dec. The Class Notice provided sufficient information for Class Members to make an informed
22 decision. E.g. *Hoffman-La Roche, Inc. v. Sperling* (1989) 493 U.S. 165, 171.

23 On March 22, 2023, after completion of a National Change of Address Search, notices were
24 mailed via first class mailed to 1,739 Class Members. Although 118 of those Notices were initially
25 returned as undeliverable, the Administrator was able to locate new addresses for 62 of those
26 individuals and re-mail their Class Notices. As of the filing of this Motion, 56 notices remain
27 undelivered. Admin Dec. ¶¶ 6-10; Ex. A; JDB Dec. ¶ 104. This constitutes an over 96% (96.78%)
28

1 successful mailing rate. *Dorsette v. TA Operating, LLC* (C.D. Cal. 2010) 2010 WL 11583002 * 5
2 (92% successful mail rate acceptable).

3 **VI. THE CLASS HAS EXPRESSED ITS APPROVAL OF THE SETTLEMENT.**

4 The Class has shown its support of the Settlement. **Not one of the 1,738 Class Members has**
5 **filed an objection and only 1 has elected to opt-out to date.** Admin. Dec. ¶¶ 11-12.

6 **VII. FINAL APPROVAL OF THE SETTLEMENT SHOULD BE GRANTED.**

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

8 A class action may not be dismissed, compromised or settled without Court approval. Cal. R.
9 Court 3.769(a); Fed. R. Civ. P. 23(e). The decision to approve a proposed settlement is committed to
10 this Court's sound and broad discretion. *Dunk*, 48 Cal.App.4th 1801. Whenever a proposed class
11 action settlement is 1) reached through arm's-length bargaining, 2) negotiated after sufficient
12 investigation and discovery, 3) negotiated by experienced counsel, and 4) subjected to minimal
13 objection by class members, a presumption of fairness arises. *Id.* 1802. All factors are present here.

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

15 Law and public policy strongly favor settlement prior to trial, particularly in class actions
16 where substantial resources can be conserved by avoiding the time, expense and rigors of litigation.
17 *Churchill Village* (9th Cir. 2004) 361 F.3d 566, 576; *Class Plaintiffs v. City of Seattle* (9th Cir. 1992)
18 955 F.2d 1268, 1276. Accordingly, Courts have "wide discretion in assessing the weight and
19 applicability of each factor." California courts recognize that "the trial court's determination [of
20 fairness] is nothing more than an amalgam of delicate balancing, gross approximations, and rough
21 justice." *Dunk*, 48 Cal.App.4th 1801, quoting *Officers for Justice v. Civ. Svc. Commn.* (9th Cir.
22 1982) 688 F.2d 615, 625. To that end, the court's inquiry "into what is otherwise a private
23 consensual agreement negotiated between parties to a lawsuit must be limited to the extent necessary
24 to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
25 collusion between, the negotiating parties, and that the settlement, taken as a whole is fair, reasonable
26 and adequate to all concerned". *Officers for Justice*, 688 F.2d 626.

27 In passing on a class action settlement, a Court must determine whether it is "fair, adequate
28 and reasonable." In doing so, courts consider a number of factors, including: (1) the strength of the

1 plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk
2 of maintaining class action status through trial; (4) the amount offered; (5) the extent of discovery
3 completed and the procedural stage; (6) the experience and views of counsel; and (7) the reaction of
4 class members to the settlement. *Hanlon*, 150 F.3d 1026; *Dunk*, 48 Cal.App.4th 1802. Adequate
5 notice is also critical. *Ibid*. The factors are non-exclusive, not all need be shown, and the court is free
6 to engage in a balancing and weighing of factors depending on the circumstances of each case.
7 *Churchill Village, LLC v. General Electric Co.* (9th Cir. 2004) 361 F.3d 566, 576 n. 7; *Wershba v.*
8 *Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245. One factor alone may prove determinative.
9 See *Torrise v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (upholding settlement where
10 one factor predominated). All factors support the Settlement here.

11 **1. The Strengths and Weaknesses of the Class' Claims and the Risks of**
12 **Proceeding With Litigation Strongly Support Final Approval.**

13 This Court should reaffirm its observation on preliminary approval that the Settlement is fair,
14 adequate, and reasonable. PAO ¶ 6.a. Approval of a class settlement is proper when "there are
15 significant barriers plaintiffs must overcome in making their case." *Chun-Hoon v. McKee Foods*
16 *Corp.* (N.D. Cal. 2010) 716 F.Supp.2d 848, 851 (parties' acknowledgment of potential
17 decertification supports approval); see also *Rodriguez*, 563 F.3d at 966 (difficulties and risks of
18 litigating weigh in favor of class settlement approval).

19 While Class Counsel believes evidence exists from which the trier of fact could
20 conclude the DI Entities engaged in a pattern and practice of failing to properly reimburse
21 employee expenses, pay minimum wage and overtime, or provide meal and rest breaks or
22 associated premiums (and that such derelictions resulted in derivative wage statement deficiencies
23 and failures to pay wages on separation), continued litigation is guaranteed to be costly, time
24 consuming and uncertain. The DI Entities asserted numerous legal and factual grounds to defend
25 against the substance of the Class Claims and/or certification including, but not limited to, 1) they
26 have a valid, enforceable arbitration agreement and class action waiver, 2) the auto-deduction policy
27 was lawful and appropriate (and didn't result in actual wage loss) because employee's *actually took*
28 meal breaks, 3) they maintained a sophisticated time keeping system designed to capture all time

1 recorded, required employees to record all time worked, and paid them for all time reported, 4)
2 employees were always authorized and permitted to take meal and rest breaks because they had
3 substantial control over their own schedules and primarily worked outside the office, 5) any missed
4 breaks were the result of individual choice/election, 6) derivative wage statement and waiting time
5 penalty claims cannot be predicated on meal and rest period violations (or the law was at least
6 unsettled until 2022-after the close of the Class Period), and 7) the mere fact mileage was
7 reimbursed at something below the IRS rate does not violate the law and individualized inquiries
8 would be necessary to determine whether violations actually occurred (*Gattuso v. Harte Hanks*
9 *Shoppers, Inc.* (2007) 42 Cal.4th 554, 564-566; *Ortiz v. CVS Caremark Corp.* (N.D. Cal. 2013) 2013
10 WL 6236743 *12 [denying certification of below IRS rate mileage reimbursement claim]). JDB
11 Dec. ¶¶ 83-93. Although Class Counsel is confident certification and success on the merits were
12 feasible, continued litigation was guaranteed to be costly, time consuming, and uncertain—potential
13 appellate proceedings would only further delay and jeopardize Class recovery. The uncertainty of
14 recovery was further compounded by the DI Entities financial situation and the prospect of potential
15 bankruptcy. JDB Dec. ¶¶ 42-43, 81.

16 Considering the strengths and weaknesses of the Class Claims, combined with the risks of
17 continued litigation, weighs strongly in favor of final approval of the Settlement.

18 **2. The Risk of Maintaining Class Action Status Favors Approval.**

19 As set forth above, Plaintiff faced myriad risks maintaining class action status. Not only did
20 the DI Entities contend that they have a valid, enforceable arbitration agreement and class waiver,
21 but claims based on alleged meal and rest break violations and under-reimbursed expenses on the
22 theory advanced here—which accounted for a significant portion of the alleged liability—are
23 notoriously difficult to secure and maintain class certification of. E.g. *Ortiz*, 2013 WL 6236743 *12;
24 *Lusk v. Five Guys Enterprises, LLC* (E.D. Cal. 2019) 2019 WL 7048791 *6.

25 **3. The Amount Offered to Settle the Class’ Claims is Substantial and Weighs in** 26 **Favor of Final Approval.**

27 While it is generally accepted that “[t]he most important factor is the strength of the case
28 for plaintiffs on the merits, balanced against the amount offered in settlement,” a court must be

1 mindful that its function is limited solely to determining whether the settlement falls within the range
2 of acceptable under the circumstances. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010)
3 186 Cal.App.4th 399, 407-409. Indeed, “[t]he proposed settlement is not to be judged against a
4 hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at
5 trial,” *Wershba*, 91 Cal.App.4th 246. Moreover, the fact “the settlement could have been better . . .
6 does not mean the settlement presented was not fair, reasonable or adequate.” *Hanlon*, 150 F.3d
7 1027. Here, the Settlement has and will result in substantial benefits to all Class Members.

8 The portion of the MSA allocated to Class Claims (\$940,000) represents over 20% of the
9 realistic recovery (6% of the *maximum* potential recovery). JDB Dec. ¶¶ 74, 81. This is a positive
10 result and within the range of reasonableness, especially considering the uncertainties involved with
11 litigation, including the existence of potentially enforceable arbitration agreements, and Defendants’
12 financial challenges. See e.g., *Cavazos v. Salas Concrete* (E.D. Cal. 2022) 2022 WL 2918361 *6
13 (approving settlement representing 5.8% of maximum exposure due, in large part, to defendant’s
14 financial condition); *Jabbari v. Wells Fargo & Co.* (N.D. Cal. 2017) 2017 WL 5157608 *5 (dispute
15 over arbitration agreement and class waiver made settlement more fair in context); *In re Mego Fin.*
16 *Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 (settlement of 16.67% of potential recovery fair).
17 While the MSA represents only a fraction of the DI Entities’ maximum exposure, it represents a fair
18 compromise given the substantive risks outlined in the preceding section and the very real possibility
19 that any judgment after trial would be uncollectable. JDB Dec. ¶¶ 81, 94-95. Considering all of the
20 circumstances, the Settlement represents a fair, reasonable, and adequate outcome that affords Class
21 Members cognizable recovery they are unlikely to realize absent the negotiated resolution and should
22 be approved. JDB Dec. ¶¶ 43, 53, 73, 81; see also, *In re Wachovia Corp. “Pick-A-Payment” Mortgage*
23 *Mktg. & Sales Practices Litig.* (N.D. Cal. 2011) 2011 WL 1877630, at *3 (belief of “counsel, who are
24 experienced attorneys . . . that the settlement is extremely favorable to the class” supports approval).

25 **4. Class Counsel Had Extensive Information that Permitted Them to Calculate**
26 **Damages and Make Informed Settlement Decisions.**

27 Courts look to the amount of exchanged information to determine whether the parties
28 made an informed decision to settle. *Linney v. Cellular Alaska P’ship*, (9th Cir. 1998) 151 F.3d

1 1234. Here, Class Counsel received formal discovery responses as well as the informal production of
2 the time and wage data for more than 25% of the Class. JDB Dec. ¶¶ 14, 17. Such extensive data
3 allowed Class Counsel’s retained expert to identify violation rates and other important data points and
4 confidently extrapolate those figures to encompass the entire Class and the entire Class Period. Class
5 Counsel also had policy documents and the benefit of discussion with Plaintiffs to better understand
6 the nature of the claims and be in a position to evaluate their strengths and weaknesses. Ultimately,
7 the Settlement was only reached after two years of active litigation (in two forums), substantive
8 analysis of data by a retained expert, a full day mediation, and an additional year of negotiations to
9 finalize a long-form settlement agreement. *Id.* ¶¶ 21-39.

10 The comprehensive information exchange, as well as the protracted arms-length
11 settlement discussions, underscore the conclusion the Settlement was based on reasoned and
12 informed analysis.

13 **5. The Settlement is Supported by Skilled and Experienced Class Counsel.**

14 “‘Great weight’ is accorded to the recommendation of counsel, who are most closely
15 acquainted with the facts of the underlying litigation. This is because ‘[p]arties represented by
16 competent counsel are better positioned than courts to produce a settlement that fairly reflects each
17 party’s expected outcome in the litigation.’ Thus, ‘the trial judge, absent fraud, collusion, or the like,
18 should be hesitant to substitute its own judgment for that of counsel.’” *Nat’l Rural Telecomms. Coop.*
19 *v. DIRECTV, Inc.* (2004) 221 F.R.D. 523, 528.

20 Class Counsel, having demonstrated a high degree of competence in the litigation of this case
21 and numerous other employment class actions and PAGA representative actions, strongly believes the
22 proposed Settlement properly balances the realistic monetary relief available to the Class against the
23 magnitude of the risks of continued litigation. JDB Dec. ¶ 43, 53, 81, 94; *In re Wachovia Corp. “Pick-*
24 *A-Payment” Mortgage Mktg. & Sales Practices Litig.*, 2011 WL 1877630, *3 This factor further
25 favors approval.

26 **6. The Absence of Any Objections Any Only 1 Opt-Out Supports Approval.**

27 Multiple courts make clear that the number or percentage of class members who object to
28 or opt out of a settlement is a factor of great significance and that “the absence of a large number

1 of objections to a proposed class action settlement raises a strong presumption that the terms of a
2 proposed class action settlement are favorable to the class members.” *Dunk*, 48 Cal. App.4th 1802;
3 *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. 528-29. **Not one of the 1,738 Class Members has**
4 **objected and only 1 person opted out** which “. . . strongly supports the fairness, reasonableness,
5 and adequacy of the settlement.” *Williams v. Costco Wholesale Corp.* (S.D. Cal. 2010) 2010
6 WL 2721452 * 5. Admin Dec. ¶ 11-12. This overwhelming support strongly supports final
7 approval.

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

9 The Parties selected ILYM to serve as Administrator. ILYM has substantial experience in
10 administering class action settlements and has already handled distribution of the Class Notice.
11 Following final approval, the Administrator will handle distribution and mailing of all Individual
12 Settlement Awards⁴, calculating of all applicable taxes, and distribution to the LWDA, Class Counsel,
13 and Plaintiffs’ Enhancement Payments. Plaintiffs seek final approval of the Administrator’s fees and
14 costs of \$25,000 to be paid out of the MSA.

15 **E. Class Counsel’s Fees and Costs and the Enhancement Payments to Plaintiffs Are**
16 **Reasonable.**

17 Plaintiffs seek attorneys’ fees of 33% of the MSA, or \$330,000, declared costs of \$18,280.06,
18 and a \$5,000 Enhancement Payment to each Plaintiff (\$15,000 total). As set forth in Plaintiff’s
19 concurrently filed Motion for Attorneys’ Fees, Costs, the sought fees, costs, and Enhancement
20 Payments should be approved because they are reasonable, within the range commonly awarded by
21 state and federal courts in wage and hour class actions, and because Class Counsel and Plaintiffs
22 conferred significant monetary and non-monetary benefits upon Class. Again, not a single Class
23 Member has objected to the requested fees and costs. Admin. Dec. ¶ 12.

24 ///

25 ///

26 ///

27 _____
28 ⁴ Two distributions are contemplated in light of the protracted nature of the funding of the MSA. JDB Dec. ¶¶ 45-46. Presently, the Parties anticipate an initial pro-rata distribution in and around August 2024 and a second/final distribution in and around April 2026. *Ibid*.

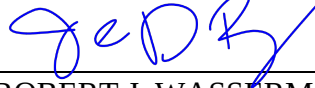
1 **VIII. CONCLUSION.**

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

3 **DATED:** May 30, 2023

MAYALL HURLEY P.C.

4 By


ROBERT J. WASSERMAN

JENNY D. BAYSINGER

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 112 S. Church Street, Lodi, California 95240 that is located in the county where the mailing and/or delivery below took place.

On May 30, 2023, I served the following document:

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE
ACTION SETTLEMENT**

addressed to:

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☒ **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.

☒ **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the offices of the addressee.

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 May 30, 2023, at Lodi, California.


LINDSAY RILEY SHIELDS