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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

SAUL ELIZARRARAS, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

FUTURE FOAM, INC., a Nebraska
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: 30-2020-01152286-CU-OE-CXC
*[Assigned to Hon. James J. DiCesare, Dept
C16, for all purposes]*

**PLAINTIFF'S UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT;
DECLARATION IN SUPPORT
THEREOF; [PROPOSED] ORDER**

Hearing

Date: January 21, 2022

Time: 9:30 a.m.

Dept.: C16

RES#: 73623082

Complaint filed: July 31, 2020

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 21, 2022, at 9:30 a.m. or as soon thereafter as
3 the matter may be heard by the Honorable James J. Di Cesare in Department C16 of the Orange
4 County Superior Court, 700 Civic Center Drive West, Santa Ana, California 92701, Plaintiff
5 Saul Elizarraras, individually and on behalf of all others similarly situated, will and hereby does
6 move the Court for entry of an Order preliminarily approving the Parties' class action settlement,
7 including:

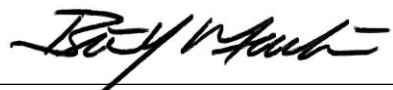
- 8 1. Certifying the class for purposes of settlement only;
- 9 2. Preliminarily appointing Plaintiff as class representative for settlement purposes;
- 10 3. Appointing Plaintiff's counsel as class counsel for purposes of settlement only;
- 11 4. Preliminarily approving the class action settlement as fair, adequate, and reasonable,
12 based upon the terms set forth in the Settlement Agreement;
- 13 5. Directing distribution of the Class Notice, including notice of the opportunity to
14 exclude oneself from, or object to, the settlement;
- 15 6. Setting a date for a final fairness hearing to determine, following dissemination of the
16 Class Notice, whether to grant final approval of the Settlement.

17 This motion is based upon this Memorandum of Points and Authorities in Support
18 thereof; the Declaration of Plaintiff's counsel (Brian Mankin) in support thereof; the Class
19 Action Settlement Agreement (the "Settlement Agreement" or "S.A."); the proposed Order
20 granting Preliminary Approval of the Settlement; all other records, pleadings, and papers filed in
21 this action; and upon such other evidence or argument as may be presented to the Court at the
22 hearing of this motion.

23 Dated: October 8, 2021

LAUBY, MANKIN & LAUBY LLP

24
25 BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this motion, Plaintiff Saul Elizarraras, individually and on behalf of all others
4 similarly situated, seeks preliminary approval of a \$1,200,000 wage-and-hour class action
5 settlement (the “Settlement Amount”) between the putative class members and Defendant Future
6 Foam, Inc. (“Defendant” or “Future Foam”).

7 Plaintiff seeks to represent a class of similarly situated non-exempt employees of
8 Defendant who worked in California (the “Class” or “Class Members”) at any time during the
9 period of July 31, 2016, through the Preliminary Approval Date (the “Class Period”).

10 Under the terms of the Settlement Agreement, Defendant will not oppose Plaintiff’s
11 Counsel’s application for a reasonable award of attorney’s fees not to exceed the total amount of
12 \$400,000 (1/3 of the Settlement Amount), Plaintiff’s Counsel’s litigation expenses not to exceed
13 \$20,000, settlement administrator expenses not to exceed \$6,000, PAGA penalties of \$50,000 (of
14 which \$37,500 or 75% will be paid to the LWDA and the remaining \$12,500 or 25% will be paid
15 pro-rata to the Aggrieved Employees), and a Service Payment of \$10,000 to Plaintiff Saul
16 Elizarraras. (S.A. ¶ 46(a-h)). The Settlement Amount is the maximum amount that will be paid
17 (except for Defendant’s share of the payroll taxes which it will separately pay).

18 After all Court-approved deductions from the Settlement Amount, it is estimated that
19 \$714,000 will be available to pay the Individual Settlement Amounts of approximately 150 Class
20 Members, who do not opt-out of the settlement, as follows:

21

	Total Amount
<i>Gross Settlement Amount</i>	\$ 1,200,000.00
Attorneys’ Fees (1/3)	\$ 400,000.00
Litigation Costs	\$ 20,000.00
Administrator Costs	\$ 6,000.00
PAGA Penalties	\$ 50,000.00
Class Representatives Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 714,000.00

26

27 Assuming a class size of 150 Class Members, the average payment will be approximately
28 \$4,760 to each Class Member (\$714,000 / 150). Of course, the actual payments will be

1 calculated on a pro-rata basis according to the number of Pay Periods Worked by each Class
2 Member through the Preliminary Approval Date. Assuming an estimated 10,000 Pay Periods
3 Worked through the Preliminary Approval, each Pay Period will have a value of approximately
4 \$71.40. In addition, Aggrieved Employees (*i.e.*, Class Members that worked during the PAGA
5 Period) will receive a pro rata share of the \$12,500 PAGA Penalties (accounting for 25% of the
6 total \$50,000 allocation). (S.A. ¶¶ 46(c), 46(h)).

7 The settlement is non-reversionary and Class Members will not be required to submit
8 claim forms to receive payment, but each Class Member will receive the Class Notice containing
9 information about his/her share, the opportunity to dispute the number of Pay Periods Worked,
10 and the opportunity to opt-out or object to the settlement as to the Class Claims. All Class
11 Members who do not affirmatively opt-out will receive a settlement check upon the Court
12 granting final approval. Likewise, all Aggrieved Employees will receive a share of the PAGA
13 Penalties once the settlement receives final approval.

14 Because the settlement is fair and reasonable and was negotiated at arm's length by
15 experienced counsel and an experienced mediator following a sufficient exchange of information
16 and documents prior to mediation, it should be preliminarily approved. Plaintiff respectfully
17 requests that the Court enter an order preliminarily approving the settlement, conditionally
18 certifying the Class under Code of Civil Procedure § 382 for settlement purposes, approving the
19 proposed Class Notice, appointing Plaintiff's counsel as class counsel, appointing ILYM Group
20 as the Settlement Administrator, and scheduling a hearing for final approval of the Settlement.

21 **II. BACKGROUND**

22 **A. The Parties and the Proposed Settlement Class**

23 Defendant employs workers that allow the company to carry out its core business:
24 manufacturing and distributing polyurethane foam products, such as carpet underlayment,
25 mattress toppers, and other items. The putative Class in this case consists of:

26 All current and former non-exempt employees of Defendant
27 who worked in California at any time during the Class
28 Period. (S.A. ¶ 37).

1 **B. Procedural History**

2 Plaintiff Elizarraras submitted a letter to the California Labor Workforce Development
3 Agency (the “LWDA”) for civil penalties under the Private Attorney General Act of 2004 (the
4 “PAGA”), and simultaneously sent a letter to Defendant requesting the production of his
5 personnel and timekeeping records to further evaluate the wage and hour claims. (Mankin Decl.
6 ¶ 11, Exhibit C). Then, on July 31, 2020, Plaintiff filed a putative class and representative action
7 Complaint, alleging claims arising out of Defendant’s alleged: (1) Failure to Pay Minimum
8 Wages; (2) Failure to Pay Overtime Wages, (3) Failure to Provide Meal Periods; (4) Failure to
9 Provide Rest Breaks; (5) Failure to Timely Pay Wages Each Period and Upon Separation of
10 Employment; (6) Failure to Provide Accurate Itemized Wage Statements; (7) Unfair and
11 Unlawful Competition, and (8) related PAGA claims. (Mankin Decl. ¶ 12).

12 Defendant fully denied the allegations. However, before incurring significant costs and
13 expenses in protracted discovery and litigation, the parties agreed to explore an early resolution
14 through mediation. In preparation for the mediation, the Parties informally exchanged
15 documents and information that allowed both sides to calculate the potential damages and
16 evaluate potential risk, including extensive policies and procedures pertaining to each claim
17 alleged, and statistics relating to the number of current and former employees, number of shifts,
18 pay periods and other things. In this regard, Defendants provided a comprehensive database of
19 timekeeping and payroll records of the Class Members that consisted of nearly 100,000 shifts
20 (and almost 9,900 Pay Periods) worked by the Class Members. This robust sampling enabled
21 both parties and their experts to take a deep dive into the claims. During this process, Plaintiff’s
22 counsel and their retained expert evaluated the potential claims, risks, and defenses as to all
23 similarly situated employees. (Mankin Decl. ¶ 13).

24 On May 20, 2021, the Parties participated in a full-day mediation with Lynn Frank, a
25 highly experienced wage and hour class action mediator. At the conclusion of mediation, Ms.
26 Frank issued a mediator’s proposal calling for a class-wide settlement for \$1,200,000. The
27 Parties accepted the mediator’s proposal and memorialized the terms of the settlement in a long-
28 form settlement agreement (Mankin Decl. ¶ 14; Exhibit A to Mankin Decl.). The Parties now

1 seek the Court’s preliminary approval of the Settlement.

2 **C. Summary of the Claims and Defenses**

3 Plaintiff alleged numerous wage and hour violations on behalf of the Class Members.
4 However, Defendant vigorously contested and denied each of Plaintiff’s material allegations on
5 the merits and as to the propriety of a class action or PAGA representative action, as discussed
6 herein. (Mankin Decl. ¶ 15). There were two primary claims at issue in this matter.

7 First, Plaintiff claimed that Defendant failed to pay proper minimum and overtime wages
8 due to its “rounding” policy that only paid in quarter-hour increments (*i.e.*, Class Members were
9 paid for .00 / .25 / .50 / .75 hours but never other fractions of time). Based on the class-wide
10 timekeeping data, Plaintiff alleged that the Class Members were routinely undercompensated, in
11 violation of California law. Therefore, Plaintiff argued that these violations resulted in unpaid
12 minimum wages and overtime, as well as waiting time penalties under Labor Code § 203 and
13 other derivative penalties. However, Defendant opposed this claim and argued that its rounding
14 policy was neutral both on its face and in application. (Mankin Decl. ¶ 16).

15 Second, Plaintiff argued that the Class members were often denied compliant meal and
16 rest breaks due to the nature of the work. However, Defendant argued that it provided and made
17 available meal and rest breaks to all employees, and any employee who did not take a meal or
18 rest break did so entirely of his or her own volition. In this regard, Defendant produced its
19 written policies and practices, which it argued show full compliance with the law. As such,
20 Defendant argued that these claims were without merit because, for each violation, a fact-finder
21 would have to determine why a break was noncompliant/nonexistent, because if it was by the
22 employee’s choice, no liability attaches to the Defendant. (Mankin Decl. ¶ 17).

23 Plaintiff also claimed, among other things, that Defendant failed to timely pay final
24 wages, failed to provide accurate itemized wage statements, and alleged various PAGA claims
25 arising out of the claimed violations mentioned above. However, Defendant argued that claims
26 for wage statements, waiting time penalties and PAGA penalties were derivative of other claims,
27 which it argued have no merit. (Mankin Decl. ¶ 18).

28 ///

1 Despite the disputed nature of the claims, the Parties concluded that this Settlement was
2 the best result to limit further risk, expense, and protracted litigation.

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

4 The following is a summary of the principal terms of the Settlement Agreement.

5 **A. Settlement Consideration and Allocation**

6 The \$1,200,000 Settlement Amount is non-reversionary and will be paid out to Class
7 Members without the need to submit a claim form or take any affirmative action. It includes (1)
8 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service award of \$10,000 to
9 Plaintiff, subject to approval by the Court; (3) settlement administrator expenses of \$6,000; (4) a
10 \$50,000 PAGA award, 75 percent of which is to be paid to the LWDA pursuant to California
11 Labor Code § 2699(i) and 25 percent to the Aggrieved Employees; and (5) the aggregate of all
12 Individual Settlement Payments of the Participating Class Members. (S.A. ¶ 46(a-h)). Defendant
13 will separately pay its share of employer's payroll taxes and withholdings.

14 After all Court-approved deductions from the Settlement Amount, it is estimated that
15 \$710,000.00 will be available to pay the Individual Settlement Amounts to approximately 150
16 Class Members through the Preliminary Approval Date. Thus, the average settlement payment is
17 approximately \$4,760.

18 **B. Notice Procedures**

19 The proposed Class Notice will be provided to the Class Members showing the estimated
20 amount that each Class Member will receive and the number of Pay Periods Worked for which
21 he/she is credited (Exhibit B to the Mankin Decl.). Within 30 days of the Preliminary Approval
22 Order, Defendant shall provide the Settlement Administrator with a list of Class Members
23 containing names, addresses, telephone numbers, Social Security Numbers, and the total Pay
24 Periods Worked in the Class and PAGA Periods (the "Class Data"). (S.A. ¶¶ 5, 63).

25 Within 10 days of receipt of the Class Data, the Settlement Administrator shall calculate
26 the number of weeks worked for each Class Member, populate the Class Notice for each, and
27 send each Class Member the Class Notice via first-class, United States mail. (S.A. ¶ 64).

28 ///

1 In the event that any Class Notice mailed to a Class Member is returned as having been
2 undelivered by the U.S. Postal Service, the Settlement Administrator shall perform a skip trace
3 search and seek an address correction for such Class Member(s), and a second Class Notice will
4 be sent to any new or different address obtained. (S.A. ¶¶ 65).

5 **C. Exclusion and Objection Procedures**

6 Class Members who do not timely Opt-Out of the Settlement as to the Class Claims will
7 be deemed to participate in the Settlement and shall become a Participating Class Member
8 without having to submit a claim form or take any other action. In order to Opt-Out of the
9 Settlement of the Class Claims, the Class Member must submit a written request to the
10 Settlement Administrator no later than 45 days after being mailed by the Settlement
11 Administrator (“Notice Response Deadline”). (S.A. ¶¶ 19, 68). Any Opt-Out request that is not
12 postmarked by the Notice Response Deadline will be invalid. (S.A. ¶ 68(a)).

13 The Class Notice shall inform the Class Members of their right to object to the
14 Settlement. Any Class Member who wishes to object to the Settlement must submit a written
15 objection to the Settlement Administrator no later than the Notice Response Deadline. The
16 objection must include the case name and number and must set forth, in clear and concise terms,
17 a statement of the reasons why the objector believes that the Court should find that the proposed
18 Settlement is not in the best interest of the Class and the reasons why the Settlement should not
19 be approved, including the legal and factual arguments supporting the objection. (S.A. ¶ 68(c)).

20 **D. Settlement Allocation Formula for Settlement Shares**

21 Individual Settlement Payments will be calculated and apportioned from the Net
22 Settlement Amount based on the number of Eligible Pay Periods a Settlement Class Member
23 worked during the Class Period. Specific calculations of Individual Settlement Payments will be
24 made as follows:

25 • Defendant will calculate the total number of Pay Periods Worked by each
26 Settlement Class Member during the Class Period and the aggregate total number of Pay Periods
27 Worked by all Settlement Class Members during the Class Period.

28 ///

1 • To determine each Settlement Class Member’s estimated Individual
2 Settlement Payment, the Settlement Administrator will use the following formula: The Net
3 Settlement Amount will be divided by the aggregate total number of Pay Periods Worked,
4 resulting in the “Pay Period Value.” Each Settlement Class Member’s Individual Settlement
5 Payment will be calculated by multiplying his or her total number of Pay Periods Worked during
6 the Class Period by the Pay Period Value.

7 • Individual Settlement Payments will be reduced by any required
8 deductions for each Participating Class Member as specifically set forth herein, including
9 employee-side tax withholdings or deductions.

10 • The entire Net Settlement Amount will be disbursed to all Participating
11 Class Members. If there are any valid and timely Requests for Exclusion as to the Class Claims,
12 the Settlement Administrator shall proportionally increase the Individual Settlement Payment for
13 each Participating Class Member according to the number of Pay Periods Worked, so that the
14 amount actually distributed to the Settlement Class equals 100% of the Net Settlement Amount.
15 (S.A. ¶ 46(c)).

16 Additionally, each “Aggrieved Employee” will receive a share of the PAGA Penalties
17 based on a pro-rata basis. Thus, the \$12,500 PAGA Penalties allocated to the Aggrieved
18 Employees will be divided and paid on a Pay Periods Worked basis. (S.A. ¶ 46(h)). Aggrieved
19 Employees may not opt-out of the PAGA Penalties.

20 The Class Notice will inform Class Members of the estimated share and the number of
21 Pay Periods Worked during the Class Period. Class Members may dispute their Pay Periods
22 Worked if they feel they worked more weeks in the Class or PAGA Periods than Defendant’s
23 records show by timely submitting evidence to the Settlement Administrator. (S.A. ¶ 66).

24 As noted, assuming a class size of approximately 150 Class Members through
25 Preliminary Approval, the average payment to each class member will be approximately \$4,760,
26 although the actual payment will be calculated on a pro-rata basis as shown above, and may be
27 slightly more or less due to scheduling of the Preliminary Approval Hearing. Assuming an
28 estimated 10,000 Pay Periods Worked through Preliminary (which again may be slightly more or

1 less), each Pay Period will have a value of approximately \$71.40 on average. Indeed, this is an
2 excellent result for the Class Members.

3 Moreover, it is estimated that there will be approximately 100 Aggrieved Employees who
4 will share in the \$12,500 PAGA award on a pro rata basis.

5 **E. Timing of Settlement Disbursements**

6 Within 15 calendar days of the Effective Date, Defendant shall deposit the Settlement
7 Amount with the Settlement Administrator to pay: (1) the class attorney fees and expenses, as
8 approved by the Court; (2) the service award, as approved by the Court; (3) administrative costs,
9 as approved by the Court; (4) the PAGA award; and (5) the aggregate of all Individual
10 Settlement Amounts of participating Class Members. (S.A. ¶ 69). Defendant shall also fund its
11 share of payroll taxes, as directed by the Settlement Administrator. Within 10 days thereafter, the
12 Settlement Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 70).

13 Class Members will have 180 days to cash his/her settlement check. If a Class Member
14 fails to cash his check by the deadline, then the Settlement Administrator shall issue the
15 unclaimed funds to the State Controller's Office for the State of California in the name of the
16 Class Member. (S.A. ¶ 71).

17 **F. Tax Treatment**

18 The Parties agree that 20% of each Individual Settlement Payment shall constitute wages
19 (for which each Participating Class Member will be issued an IRS Form W-2 for such payment),
20 and the remaining 80% shall constitute interest and penalties (for which each Participating Class
21 Member will be issued an IRS Form 1099 for the interest and penalty allocation). (S.A. ¶ 46(d)).
22 Additionally, the PAGA Penalties payable to the Aggrieved Employees will be classified entirely
23 as civil penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶ 46(h)).

24 **G. Participating Class Members' Release of Claims**

25 In exchange for these payments, the Settlement Agreement ¶ 30 provides that the
26 Participating Class Members will release the Released Parties of the claims alleged or could have
27 been alleged based on the facts stated in the operative complaint, as follows:

28 ///

1 any and all claims, demands, rights, liabilities, and causes of action that
2 were or could have been pled under local, state or federal law arising out of
3 or based on the facts alleged in the operative Complaint against Defendant
4 for the duration of the Release Period, including but not limited to claims
5 for (a) failure to pay minimum and regular wages, (b) failure to pay
6 overtime wages, (c) failure to provide meal periods, (d) failure to provide
7 rest breaks, (e) failure to failure to timely pay wages each period and upon
8 separation of employment, (f) failure to provide accurate itemized wage
9 statements, (g) failure to pay sick pay at the proper rate, and (h) unfair and
unlawful business practices. In addition, each Participating Class Member
who cashes their Individual Settlement Payment shall be deemed to have
released claims alleged in the operative Complaint or that could have been
alleged based on the facts therein under the FLSA.

10 The time governing the release (*i.e.*, the “Release Period”) shall be the same as the Class
11 Period. (S.A. ¶ 32).

12 It is understood and agreed that the Settlement Agreement will not release any person,
13 party or entity from claims, if any, by Class Members for workers compensation, unemployment,
14 or disability benefits of any nature, nor does it release any claims, actions, or causes of action
15 which may be possessed by Settlement Class Members under state or federal discrimination
16 statutes including, without limitation, the Cal. Fair Employment and Housing Act, the Cal.
17 Government Code § 12940, et seq.; the Unruh Civil Rights Act, the Cal. Civil Code § 51, et seq.;
18 the California Constitution; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq.;
19 the Americans with Disabilities Act, as amended, 42 U.S.C. § 12101, et seq.; the Employee
20 Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq.; and all of their
21 implementing regulations and interpretive guidelines.

22 **H. Aggrieved Employees’ Release of Claims**

23 The Settlement Agreement ¶ 23 also defines the “PAGA Released Claims” as follows:

24 any and all claims for civil penalties under the Private Attorneys General
25 Act, Labor Code § 2698 *et seq.*, that Plaintiff alleged against the Released
26 Parties, on behalf of Aggrieved Employees and State of California, based
27 on the facts stated in Plaintiff’s operative Complaint and in Plaintiff’s
28 LWDA notice letter, including all PAGA claims seeking civil penalties for
(a) failure to pay minimum and regular wages, (b) failure to pay overtime
wages, (c) failure to provide meal periods, (d) failure to provide rest breaks,
(e) failure to failure to timely pay wages each period and upon separation
of employment, (f) failure to provide accurate itemized wage statements,

1 (g) failure to provide suitable seating and (h) failure to pay sick pay at the
2 proper rate.

3 The time period governing the PAGA Released Claims is July 31, 2019, to the
4 Preliminary Approval Date (the “PAGA Period”; see S.A. ¶¶ 22, 23). Moreover, the PAGA
5 Released Claims do not release any Aggrieved Employee’s claims for wages of statutory
6 penalties. (S.A. ¶ 23). Finally, even if an Aggrieved Employee requests exclusion from the Class
7 settlement, that individual will still be subject to the PAGA Released Claims to the fullest extent
8 permitted by law and will receive a pro-rata share of PAGA Penalties. (S.A. ¶ 68(a)).

9 **IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS**
10 **APPROPRIATE FOR PURPOSES OF SETTLEMENT**

11 California Rule of Court 3.769(d) provides that the Court may make an order approving
12 certification of a provisional settlement class at the preliminary approval stage. It is well-
13 established that trial courts should use a “lesser standard of scrutiny” for determining the
14 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor*
15 *Co.* (1996) 48 Cal.App.4th 1794, 1807 at n.19. The reasons include that no trial is anticipated in
16 a settlement class, so the case management issues inherent in determining if the class should be
17 certified need not be confronted; and the trial court’s fairness review of the settlement protects
18 the interests of the non-representative class members. *Id.*; *see also Officers for Justice v. Civil*
19 *Service Com.* (9th Cir. 19150) 688 F.2d 615, 633 (“Th[e] relationship between the certification
20 determination and the merits of the case is further attenuated within the context of the settlement
21 evaluation process . . . [C]ertification issues raised by class action litigation that is resolved short
22 of a decision on the merits must be viewed in a different light.”); *Amchem Prods., Inc. v.*
23 *Windsor* (1997) 521 U.S. 591, 620 (“Confronted with a request for settlement-only class
24 certification, a district court need not inquire whether the case, if tried, would present intractable
25 management problems . . . for the proposal is that there be no trial.”).

26 As discussed below, for the purposes of this settlement only, Plaintiff requests that this
27 Court provisionally certify the Class, as defined above, under Code of Civil Procedure § 3150.

28 ///

1 **A. Numerosity and Ascertainability**

2 Numerosity is met if a proposed class is so large that joinder of all members would be
3 impracticable. See Cal. Code Civ. Proc. § 3150. A proposed settlement class is ascertainable if
4 the class members can be objectively identified and given notice of the litigation without
5 unreasonable time or expense. See *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th
6 89, 101. Here, according to Defendant’s records, there were approximately 140 Class Members
7 at the time of the May 20, 2021, mediation, which is expected to increase to approximately 150
8 as of the Preliminary Approval Hearing. This figure satisfies the numerosity requirement.

9 **B. Well-Defined Community of Interest**

10 1. Commonality

11 To justify certification, the class proponent must show that questions of law or fact
12 common to the class predominate over the questions affecting the individual members. See
13 *Arenas v. El Torito Rests., Inc.* (2010) 183 Cal.App.4th 723, 732 (citing *Washington Mut. Bank*
14 *v. Superior Court* (2001) 24 Cal.4th 906, 913). Plaintiff contends that the Class was subject to
15 common policies and practices relating to the payment of wages, the provision of meal and rest
16 breaks, among other things. While the Parties dispute whether a class would be appropriate if the
17 litigation were to continue, they agree to class certification for the purposes of this settlement.

18 2. Typicality

19 Typicality “focuses on whether there exists a relationship between the Plaintiff’s claims
20 and the claims alleged on behalf of the class.” See Herbert B. Newberg & Alba Conte, *Newberg*
21 *on Class Actions* (“*Newberg*”) § 3:13 (4th ed. 2002). Again, the Parties dispute whether
22 Plaintiff’s claims are typical of the Class for any continued litigation of the Action, but agree for
23 the purposes of this settlement only, that Plaintiff asserts claims regarding Defendant’s rounding
24 practice, meal and rest break practices, wage statements, and the provisions governing the timely
25 and complete payment of wages, which are at the core of the lawsuit.

26 3. Adequacy of Representation

27 The proposed class representative must establish that he or she will adequately represent
28 the proposed class. See *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540,

546. Specifically, Plaintiff is adequate to represent the class because he was employed by Defendant during the Class Period, experienced the same wage and hour practices as the rest of the Class, understood his duties as a Class Representative, has been willing to undergo the risks of litigation, and has no conflict of interest.

Adequacy may be established by the fact that counsel are experienced practitioners. See *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F.3d 1152, 1162. Here, Plaintiff is represented by Class Counsel with extensive experience in wage and hour class actions like the instant matter. (Mankin Decl. ¶¶ 2-6).

4. Superiority

Certification of the Class for settlement purposes is superior here because there will be a global resolution of all claims at once, which fosters judicial economy. Class certification for settlement purposes is also vastly superior to litigation of numerous individual claims because most of the claims are too small to litigate outside of the class context.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, WHICH IS FAIR, ADEQUATE, AND REASONABLE

A. Class Action Settlements are Subject to Judicial Review

The law favors settlements. *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374. This is particularly true in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. However, a class action may not be dismissed, compromised, or settled without the Court's approval. Cal. R. Ct. 3.769(a). The California Rules of Court set forth the procedures for court approval of a class action settlement: (1) the Court preliminarily approves the settlement; (2) class members receive notice as directed by the Court; and (3) the Court conducts a final approval hearing to inquire into the fairness of the proposed settlement. See Cal. R. Ct. 3.769(c), (e-g).

The decision to approve or reject a proposed settlement lies within the Court's sound discretion. See *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35. Nevertheless, in considering a potential settlement for approval, a court is not to turn the approval hearing "into a trial or rehearsal for trial on the merits . . . [or] to reach any ultimate

1 conclusions on the contested issues of fact and law which underlie the merits of the dispute.”
2 *Officers for Justice*, 688 F.2d at 625.

3 The Court’s ultimate duty is to determine whether the settlement is fair, adequate, and
4 reasonable. See *Dunk*, 48 Cal.App.4th at 1801 (setting forth the “fair, adequate, and reasonable”
5 standard) (citing *Officers for Justice*, *supra*); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177
6 Cal.App.4th 734, 742-43 (a trial court must approve a class action settlement agreement, but only
7 after determining that it is “fair, adequate and reasonable,” considering factors such as the
8 “risk, expense, [and] complexity” of continued litigation)). The Court enjoys broad discretion
9 in making its fairness determination, and should consider factors including, but not limited to:

10 [T]he strength of Plaintiff’s case, the risk, expense, complexity and likely duration
11 of further litigation, the risk of maintaining class action status through trial, the
12 amount offered in settlement, the extent of discovery completed and the stage of
13 the proceedings, the experience and views of counsel . . . and the reaction of the
14 class members to the proposed settlement.

14 *Dunk*, *supra* (detailing non-exhaustive list of factors for court’s consideration at final approval).

15 The above factors are not exclusive “and the court is free to engage in a balancing and
16 weighing of factors depending on the circumstances of each case.” *Wershba*, 91 Cal.App.4th at
17 245. However, in doing so, the Court must give “[due] regard to what is otherwise a private
18 consensual agreement between the parties.” *Id.* The inquiry must be limited “to the extent
19 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
20 overreaching by, or collusion between, the negotiating parties.” *Id.* (citation and internal
21 quotation marks omitted).

22 At the preliminary approval stage, the Court need only determine that the settlement falls
23 within the “range of possible judicial approval,” so that notice to the class and the scheduling of
24 the fairness hearing are worthwhile. See *Newberg* § 11:25. Indeed, the Court should grant
25 preliminary approval if there are no “grounds to doubt its fairness or other obvious deficiencies .
26 . . and [the settlement] appears to fall within the range of possible approval.” *Manual For*
27 *Complex Litigation* (Third) § 30.41 (1995); see *Dunk*, 48 Cal.App.4th at 1802. A “presumption
28 of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2)

1 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)
2 counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Dunk*,
3 *supra* (citing *Newberg* § 11:41). As shown below, the settlement falls well within the range of
4 approval because there are no grounds to doubt its fairness.

5 **B. The Settlement Resulted from Serious, Informed, Non-Collusive Negotiations**

6 The settlement was the product of extensive arm’s length negotiations between counsel
7 and was facilitated by an experienced wage-and-hour class action mediator. Though cordial and
8 professional, the settlement negotiations were adversarial and non-collusive in nature. The
9 settlement reached is the product of substantial effort by the parties and their counsel. Although
10 Plaintiff and his counsel believed that there was a possibility of certifying the claims, they
11 recognized the potential risk, expense, and complexity posed by litigation, such as unfavorable
12 decisions on class certification, summary judgment, at trial and/or on the damages awarded,
13 and/or on an appeal that can take several more years to litigate. In addition, if Defendant
14 prevailed on any of its defenses, the employees may not have received any monetary recovery.

15 **C. The Extent of the Investigation was More than Sufficient**

16 Plaintiff, his counsel, and their retained expert thoroughly investigated and evaluated the
17 factual and legal strengths and weaknesses of this case before reaching the settlement. As
18 described above, the settlement was reached after extensive investigation and research, thorough
19 calculations and risk evaluation, and a substantial exchange of information relating to the Class
20 Members prior to mediation. (Mankin Decl. ¶¶ 13, 15-22).

21 **D. The Settlement is a Reasonable Compromise of Claims**

22 To evaluate a settlement, the parties must provide the trial court with “basic information
23 about the nature and magnitude of the claims in question and the basis for concluding that the
24 consideration being paid for the release of those claims represents a reasonable compromise.”
25 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133. The *Kullar* requirement was
26 further explained in *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
27 Cal.App.4th 399, which held that an explicit statement of the maximum theoretical amount that
28 the class could recover was not necessary:

1 Greenwell misunderstands *Kullar*, apparently interpreting it to require the
2 record in all cases to contain evidence in the form of an explicit statement
3 of the maximum amount the plaintiff class could recover if it prevailed on
4 all its claims – a number which appears nowhere in the record of the case.
5 But *Kullar* does not, as Geenwell claims, require any such explicit
6 statement of value; it requires a record which allows “an understanding of
7 the amount that is in controversy and the realistic range of outcomes of the
8 litigation.”

9 A settlement is not judged against what might have been recovered had a plaintiff
10 prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair
11 and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 246, 250
12 (“Compromise is inherent and necessary in the settlement process ... even if the relief afforded
13 by the proposed settlement is substantially narrower than it would be if the suits were to be
14 successfully litigated, this is no bar to a class settlement because the public interest may indeed
15 be served by a voluntary settlement in which each side gives ground in the interest of avoiding
16 litigation.”)

17 Of particular relevance to the reasonableness of the proposed Settlement is the fact that
18 significant legal and factual grounds for defending this action exist. First, in addition to
19 disputing the merits of Plaintiff’s claims, Defendant strongly disputed that Plaintiff could obtain
20 class certification, arguing a lack of commonality of the legal claims and injuries. Defendant
21 further argued that it complied with the applicable law and that any purported deviations
22 therefrom were individualized in nature, thereby limiting Plaintiff’s ability to certify the class.
23 While Plaintiff assert that this is a suitable case for certification, he realizes that there is always a
24 significant risk associated with class certification proceedings, which could significantly limit the
25 claims that he could pursue on a class basis.

26 In light of the uncertainties of protracted litigation, this negotiated settlement reflects the
27 best practicable recovery for the Class. While the total settlement amount is, of course, a
28 compromise figure, the potential risks and opportunities of both parties were effectively weighed
and considered by the parties, resulting in a fair and equitable settlement.

Based upon detailed data obtained through informal discovery and information
exchanges, Plaintiff’s counsel estimated the following data points through the date of mediation:

1 (1) approximately 140 total Class Members as of the May 20, 2021, mediation (“the pre-
2 mediation period”), (2) approximately 19,237 workweeks in the pre-mediation period (or 9,891
3 pay periods), (3) approximately 98 Aggrieved Employees in the pre-mediation period, and (4)
4 approximately 3,062 pay periods during the pre-mediation PAGA Period. From these metrics,
5 and when factoring in claim certification probabilities and liability probabilities, Class Counsel
6 formulated detailed damages models to value the claims in preparation for mediation and to
7 reach a realistic and reasonable resolution.

8 Plaintiff contends that his strongest claim was for unpaid minimum and overtime wages
9 due to Defendant’s rounding policy. Based on data and information gathered prior to mediation,
10 as well as an analysis of such data by a retained expert, Plaintiff alleges that the Class Members
11 were underpaid by an average of 2.3 minutes per shift, for a total of 3,441.7 hours during the pre-
12 mediation, at an effective rate of pay of \$36.87 per hour (a blended rate, incorporating the base
13 wage, overtime premium, and liquidated damages pursuant to Labor Code § 1194.2). As such,
14 the maximum potential damages for the rounding claim was \$126,895.

15 But this maximum figure ignores Defendant’s multiple defenses to the rounding claim.
16 First, Defendant argued that it would defeat certification on the rounding claim because Class
17 Members routinely clocked in for their shift then engaged in personal activities, such as
18 socializing or making phone calls, which cannot be considered work time. As such, Defendant
19 argued that this constituted precisely the type of individualized inquiry that is not appropriate for
20 certification because the court would have to conduct a person-by-person analysis to determine if
21 the Class Member was under the control of Defendant because, if not, then this does not
22 constitute compensable time. Based on this argument, and others, Plaintiff assigned a 10% risk
23 that the Court would deny class certification on the rounding claims. Additionally, Defendant
24 alleged that, if certification were granted, it would defeat the rounding claim on the merits at
25 summary judgment or at trial because its policies were, at all times, facially neutral in
26 compliance with *See’s I*. Plaintiff assigned an additional 10% discount for risks at the merits
27 stage, resulting in a total risk-adjusted value for the rounding claim of \$102,785.

28 ///

1 Plaintiff also raised an additional unpaid wage claim based on the allegation that
2 Defendant's timekeeping policies automatically deducted 30 minutes from the shift of each Class
3 Member, regardless of whether a meal period was taken. Based on the pre-mediation data, this
4 occurred on 20,346 occasions and, therefore, leads to a claim for 10,173 unpaid hours during the
5 pre-mediation period (at 0.5 hours or 30 minutes per violation). Using the same blended rate
6 above, Plaintiff argued that the maximum potential value of the auto-deduct claim was \$375,079.

7 However, Defendant vehemently opposed this auto-deduct claim and argued that the
8 Class Members did, in fact, take meal periods regardless of what the timekeeping records
9 showed. As such, Defendant argued that it would produce testimony from Class Members
10 confirming that these meal periods occurred. Moreover, Defendant stressed that the need for
11 individualized testimony as to whether these meal periods were taken present the prototypical
12 example of individualized issues for which certification would not be proper. Based on these
13 arguments, Plaintiff placed a 10% risk at the class certification stage and another 25% risk on the
14 merits, leading to a risk-adjusted value of the auto-deduct claim of \$253,178.

15 These unpaid wage claims also gave rise to Plaintiff's claim for waiting time penalties
16 under Labor Code § 203. In this respect, there were 74 Class Members that separated from
17 employment during the relevant period, and those individuals earned an average daily wage of
18 \$168.35. Therefore, the maximum potential waiting time penalties totaled \$373,737. However,
19 Defendant argued that it would defeat the waiting time penalty claim as to Plaintiff's rounding
20 claim because the failure to pay wages, if any, was not willful given Defendant's facially neutral
21 policy. Furthermore, Defendant argued that it would defeat liability as to waiting time penalties
22 arising out of the other unpaid wage claims. Plaintiff applied a 10% risk of defeat at the class
23 certification stage, and an additional 10% risk of defeat at the summary judgment stage or on the
24 merits, resulting in the risk-adjusted value of \$302,737 for the waiting time penalty claims.

25 With regard to Plaintiff's meal and rest break claims, the Class Members worked 91,458
26 shifts during the pre-mediation period. Based on an alleged 72.8% violation rate for the meal
27 period claims, as extrapolated from the pre-mediation sampling, and a 25% violation rate for the
28 rest break claims, the maximum potential damages are \$1,192,473 and \$410,875, respectively.

1 But Defendant strongly opposed these claims based on the argument that these fall
2 directly into the category of impermissible “individualized issues” which cannot meet class
3 certification standards since Defendant had compliant written policies the employees had ample
4 latitude regarding whether, when, and how they took their breaks. Therefore, Defendant asserted
5 that a fact-finder would have to determine for each Class Member whether a break was missed
6 and why, and why a break was noncompliant/nonexistent, because if it was by the employee’s
7 choice, no liability attaches to the defendant. Based on these arguments, Plaintiff believes there
8 is a 25% risk that the Court would deny class certification on these meal period claims and a
9 50% risk as to the rest break claims.

10 Defendant also argued that, even if certification were granted, it would defeat these
11 claims on the merits because Defendant utilized compliant policies and practices and it would
12 present sufficient evidence that the workers were properly provided with all breaks. Moreover,
13 Defendant argued that Plaintiff would be unable to present sufficient evidence establishing the
14 number of meal and rest period violations in order to allow a fact-finder to appropriately
15 determine damages. Plaintiff acknowledged the risks and incorporated a further 25% reduction
16 on the merits for the rest break claim. However, due to the recent decision in *Donohue v. AMN*
17 *Services, LLC* (2021) 11 Cal.5th 58, Plaintiff only applied an additional 10% risk on the meal
18 period claims. Plaintiff therefore calculates the risk-adjusted value of the meal claims to be
19 \$804,919 and the rest break claims to be \$154,078.

20 Finally, Plaintiff estimates the maximum potential penalties for the wage statement
21 claims as \$301,300 (based on approximately 3,062 pre-mediation allegedly violative wage
22 statements issued for the one-year statute of limitations). However, Defendant raised many
23 defenses, including that: (a) these violations, if any, did not result in any “injury” under § 226(e),
24 (b) the violations, if any, were not “knowing and intentional” and could not support the
25 assessment of penalties, and (c) “derivative” wage statement claims are without merit. These
26 defenses all went to the merits, not to defeating class certification. Thus, Plaintiff did not assign a
27 risk at the class certification stage but applied a 30% risk on the merits, resulting in a risk-
28 adjusted value for the wage statement claims of \$210,910.

1 In sum, when factoring in the defenses and risks of ongoing litigation, Plaintiff estimates
2 the risk-adjusted class recovery as follows:

3	• Rounding Claims	\$ 102,785
4	• Auto-Deduct Claims	\$ 253,178
5	• Waiting Time Penalty Claims	\$ 302,737
6	• Meal Period Claims	\$ 804,919
7	• Rest Break Claims	\$ 154,078
8	• Wage Statement Claims	<u>\$ 210,910</u>
9	• Total Risk Adjusted Penalties and Damages	\$ 1,828,607

10 The reasonableness of the settlement is apparent from the fact that the proposed
11 settlement is only a 34% discount from the risk-adjusted class damages and penalties. And while
12 the PAGA civil penalty would have a maximum value in the high six figures, this figure fails to
13 acknowledge that courts have wide latitude to reduce the amount of civil penalties “based on the
14 facts and circumstances of a particular case” and if “to do otherwise would result in an award
15 that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(h). Moreover,
16 Defendant argued against the merits of the underlying claims and particularly that the
17 “willfulness” standard and/or “good faith” defenses mitigated the civil penalty claims and
18 rendered any such penalties as uncertain. Defendant also argued that it is improper to stack civil
19 penalty claims on top of the underlying claim. For these reasons, the Parties submit that the
20 agreed-upon settlement is fair and reasonable.

21 **E. Plaintiff’s Counsel if Experienced in Similar Wage-and-Hour Litigation**

22 The view of the attorneys actively conducting the litigation is entitled to significant
23 weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework Facility* (N.D.
24 Cal. 1980) 87 F.R.D. 15, 18, *aff’d* (9th Cir. 1981) 661 F.2d 939; *Kullar v. Foot Locker Retail,*
25 *Inc.* (2008) 168 Cal.App.4th 116, 128 (court must take into account “the experience and view of
26 counsel”) (internal quotation and citation omitted).

27 Plaintiff’s Counsel is also highly experienced in Class/PAGA litigation, having been
28 named “Super Lawyer” in employment litigation (a distinction awarded to only 5% of litigators),

1 having achieved large settlements and verdicts, including one of the largest PAGA awards in
2 California's history, collecting over \$250 million for its clients, having tried class and PAGA
3 cases against Fortune 100 companies, among other things. (Mankin Decl. ¶¶ 2-6). Plaintiff's
4 counsel, operating at arm's length, weighed the strengths and risks of this case, and are of the
5 view that this is a fair and reasonable settlement in light of the nature of the claims, realistic risk
6 adjusted value of damages, complexities of the case, the state of the law, and uncertainties of
7 class certification and litigation. (*Id.* ¶¶ 20-25).

8 **F. The Class Notice Conforms to All Applicable Statutes and Rules**

9 The proposed Class Notice should be approved, as it fully informs the Class Members of
10 the nature of the lawsuit and each Class Member's rights under terms of the Settlement
11 Agreement and applicable law. The manner in which the Class Notice shall be disseminated, as
12 outlined above, shall ensure that all or nearly all of the Class Members shall be properly notified
13 of the proposed settlement.

14 The proposed Class Notice and proposed plan for the Settlement Administrator to mail
15 the Class Notice to the last known address of all class members complies with all the
16 requirements of California Rule of Court 3.79(f) and 3.766(b). The contents of the proposed
17 Class Notice includes (1) the material terms of the settlement; (2) the proposed attorneys' fees,
18 litigation expenses, and the costs of administration; (3) details about the final fairness hearing
19 and how class members may elect to exclude themselves or make an objection; and (4) how class
20 members can obtain additional information. See Class Notice (Exhibit B to Mankin Decl.). In
21 addition, it will inform Class Members of their estimated settlement share.

22 The Court has wide discretion in approving the means of providing notice, so long as the
23 class representative "provide(s) meaningful notice in a form that should have a reasonable
24 chance of reaching a substantial percentage of class members." *Archibald v. Cinerama Hotels*,
25 (1976) 15 Cal.3d 853, 861. Here, the parties' notice plan is that notice of the Settlement will be
26 disseminated directly to the Class Members by first class mail by the Settlement Administrator
27 since Defendant has the last known addresses of all class members and the Settlement
28 Administrator will perform a skip trace and update those addresses for any class notices that are

1 returned and re-send the notice.

2 The Class Notice satisfies the requirements of Rule of Court 3.766 and afford Settlement
3 Class Members with all due process protections required by the United States Constitution.
4 Moreover, the contents of the Class Notice are in compliance with Cal. R. Ct. 3.766(d), because
5 the Notice includes, without limitation (1) a detailed explanation of the case, including the basic
6 contentions or denials of the parties; (2) a statement that the court will exclude the member from
7 the class if the member so requests by a specified date; (3) a procedure for the member to follow
8 in requesting exclusion from the class; (4) a statement that the judgment, whether favorable or
9 not, will bind all members who do not request exclusion; and (5) a statement that any member
10 who does not request exclusion may, if the member so desires, enter an appearance through
11 counsel. The 45-day deadline for Class Members to exclude themselves is reasonable, as it
12 provides Class Members with sufficient time to do so and, if they so choose, to seek independent
13 legal advice in the interim. If a Class Member does not opt-out, then he or she will automatically
14 be sent a settlement check.

15 **G. The Non-Reversionary “Checks Cashed” Distribution Ensures Maximal**
16 **Recovery for Class Members**

17 The fact that each member who does not opt out of the Settlement shall be mailed a check
18 ensures that every Class Member will be paid unless he or she affirmatively acts to exclude
19 himself or herself. Moreover, the Settlement Amount is non-reversionary, which means that no
20 settlement funds will revert to Defendant; instead, if any checks are not cashed before the
21 objection deadline, the funds will be transferred to the state’s unclaimed property department
22 subject to approval of the Court. Such terms are favored by Courts and demonstrate that there
23 was no collusion between counsel for the parties and that the Settlement is fair and favorable to
24 the Class Members.

25 **H. The Attorney Fee Allocation Under the Settlement Agreement is Fair**

26 Under the terms of the Settlement Agreement, Class Counsel is requesting \$400,000 in
27 attorneys’ fees and costs, which is equal to one-third of the Settlement Amount. *See, e.g.*
28 *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480 (approving 1/3 fee in the amount of \$6.33

1 million at a 2.13 lodestar multiplier, when class action litigation establishes a monetary fund for
2 the benefit of the class members, the trial court may determine the amount of a reasonable fee
3 by choosing an appropriate percentage of the fund created); see also *Stuart v. RadioShack*
4 *Corp.* (N.D. Cal. Aug. 9, 2010) No. C-07-4499 EMC, 2010 WL 3155645 (approving fee award
5 of 1/3 of the total maximum settlement amount of \$4.5 million as “well within the range of
6 percentages which courts have upheld as reasonable in other class action lawsuits”); *Singer v.*
7 *Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) No. 08-cv-1501-IEG (BLM), 2010 WL
8 2196104, at *8 (approving fee award of 33.33% of the common fund); *Romero v. Producers*
9 *Dairy Foods, Inc.* (E.D. Cal. Nov. 14, 2007) No. 1:05cv0484 DLB, 2007 WL 3492841, at *4
10 (awarding fees of 1/3 of common fund in a wage and hour class action, noting: “[f]ee awards in
11 class actions average around one-third of the recovery.”); *Martin v. FedEx Ground Package*
12 *System, Inc.* (N.D. Cal. Dec. 31, 2008) No. C 06-6883 VRW, 2008 WL 5478576, at *8
13 (approving fees of 1/3 of common fund).

14 Once the Court grants preliminary approval of the Settlement Agreement and Class
15 Notice is disseminated, Plaintiff’s counsel will submit a comprehensive request for attorneys’
16 fees and costs with its final approval motion.

17 **I. The Class Representative Service Award is Fair and Appropriate**

18 The Settlement Agreement provides an incentive award payment of \$10,000 to the Class
19 Representative, which is reasonable given large recovery that Class Members will receive on
20 average, as well as the time and effort they devoted to this case. Their efforts included providing
21 factual background for the Class and PAGA complaint; providing documents and information
22 about Defendant’s compensation plan; participating in phone calls to discuss litigation and
23 settlement strategy; making themselves available throughout the litigation to assist with
24 analyzing the claims and defenses; helping Class Counsel prepare for the mediation; and
25 reviewing the settlement documents. The Class Representative also assumed significant risk in
26 bringing this litigation—namely, had he lost, he could have been ordered to pay Defendant’s
27 costs.

28 ///

1 The requested service award falls within the range of incentive payments typically
2 awarded to Class Representatives in similar class actions. *See e.g. Bond v. Ferguson Enterprises,*
3 *Inc.* (E.D. Cal. June 30, 2011) No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879 (approving
4 \$11,250 service award to each of the two class representatives in a trucker meal break class
5 action; *Ross v. US Bank National Association* (N.D. Cal. Sept. 29, 2010) No. C 07-02951 SI,
6 2010 WL 3833922, at *2 (approving \$20,000 enhancement award to Class Representative in
7 California wage-and-hour class action settlement); *Vasquez v. Coast Valley Roofing, Inc.* (E.D.
8 Cal. 2010) 266 F.R.D. 4150, 493 (approving service awards in the amount of \$15,000 each from
9 a \$300,000 settlement fund in a wage/hour class action); *West v. Circle K Stores, Inc.* (E.D. Cal.
10 Oct. 19, 2006) NO. CIV. S-04-0438 WBS GGH, 2006 U.S. Dist. LEXIS 76558, at *28 (“the
11 court finds Plaintiff’s enhancement payments of \$15,000 each to be reasonable.”); *Glass v. UBS*
12 *Fin. Servs.* (N.D. Cal. Jan. 26, 2007) No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *52
13 (finding “requested payment of \$ 25,000 to each of the named Plaintiff is appropriate” in wage
14 and hour settlement); *Louie v. Kaiser Found. Health Plan, Inc.* (S.D. Cal. Oct. 6, 2008) Case No.
15 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (approving “\$25,000 incentive award
16 for each Class Representative” in wage and hour settlement).

17 **VI. THE COURT SHOULD APPOINT ILYM AS SETTLEMENT ADMINISTRATOR**

18 Subject to the Court’s approval, the parties stipulated to ILYM Group serving as the
19 Settlement Administrator. ILYM Group is experienced in administering class action settlements
20 and has provided a flat-fee proposal to administer this settlement for \$6,000. (Mankin Decl. ¶ 31;
21 Exhibit “D”).

22 **VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING**

23 The last step in the approval process is the formal hearing, whereby proponents of the
24 settlement may explain and describe its terms and conditions and offer argument in support of
25 approval, and Class Members or their counsel may be heard in support of or in opposition to the
26 settlement. Subject to the Court’s approval, the Settlement Agreement stipulates that the Court
27 schedule a hearing for final approval of the settlement approximately 130 days after the
28 Preliminary Approval Hearing Date, in accordance with the following schedule:

January 21, 2022	Preliminary Approval (PA) hearing
March 2, 2022 (40 days after PA)	Deadline for Settlement Administrator to complete first mailing of the Notice Packet to all Settlement Class Members.
April 16, 2022 (45 days after mailing Class Notice)	Deadline for Settlement Class Members to mail Requests for Exclusion, Objections to the settlement, as well as dispute his/her Pay Periods credited.
16 court days before Final Approval hearing	Deadline for Plaintiff to file and serve Motion for Final Approval of Settlement and application for award of attorneys' fees, costs and service payments.
9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiff's Motion for Final Approval of Settlement, or filing any response to an objection to the settlement.
5 court days before final approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval of Settlement.
TBD (Approximately June 3, 2022 - 130 days after Preliminary Approval is granted)	Final Approval Hearing.
15 days after Effective Date	Defendant to fund the Gross Settlement Amount

VIII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant the motion for preliminary approval of the settlement.

Dated: October 8, 2021

LAUBY, MANKIN & LAUBY LLP

BY:



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

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 4590 Allstate Drive, Riverside, California 92501.

On October 8, 2021, I caused to be served the foregoing document(s) described as follows:

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; DECLARATION IN SUPPORT THEREOF; [PROPOSED] ORDER

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **By Mail** I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

☐ **By Facsimile** I sent this document via fax to all parties as listed on attached service list, on

☐ **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

☐ **By Certified Mail-Return Receipt Requested** I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California

☐ **By Personal Service** I caused said document(s) to be personally served by hand on the parties listed on the attached service list

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 8, 2021, Riverside, California.

☐ **Federal** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Tracie Chiarito, Declarant

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