

Brian J. Mankin, Esq. [CSB No. 216228]
brian@lmlfirm.com
Kristina Bui Carlson, Esq. [CSB No. 294924]
kristina@lmlfirm.com
LAUBY, MANKIN & LAUBY LLP
5198 Arlington Avenue, PMB 513
Riverside, CA 92504
Tel: (951) 320-1444 | Fax: (951) 320-1445

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

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

RICHARD HARPER, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

HAMNER TOWING, INC., a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB 2127523
*[Assigned to Hon. Judge David Cohn, Dept S26,
for all purposes]*

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

Hearing

Date: March 9, 2023

Time: 10:00 a.m.

Dept.: S26

Complaint filed: October 4, 2021

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 9, 2023, at 10:00 a.m., or as soon thereafter as
the matter may be heard by the Honorable David Cohn in Department S26 of the San Bernardino
County Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff
Richard Harper, individually and on behalf of all others similarly situated, will and hereby does
move the Court for entry of an Order preliminarily approving the Parties' class action settlement,
including:

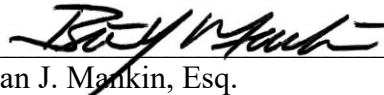
1. Certifying the class for purposes of settlement only;
2. Preliminarily appointing Plaintiff as the class representative for settlement purposes;
3. Appointing Plaintiff's counsel as class counsel for purposes of settlement only;
4. Preliminarily approving the class action settlement as fair, adequate,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

This motion is based upon this Memorandum of Points and Authorities in Support thereof; the Declaration of Plaintiff's counsel (Brian Mankin and Kristina Bui Carlson); the Class Action and PAGA Settlement Agreement and Release of Claims (the "Settlement Agreement"); the proposed Order granting Preliminary Approval of the Settlement; all other records, pleadings, and papers filed in this action; and upon such other evidence or argument as may be presented to the Court at the hearing of this motion.

Dated: February 14, 2023

LAUBY, MANKIN & LAUBY LLP

BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Richard Harper seeks preliminary approval of a \$290,000.00 wage-and-hour
4 class and representative action settlement on behalf of approximately 135 current and former
5 non-exempt employees employed by Defendant Hamner Towing, Inc. (“Defendant”) in
6 California at any time from October 4, 2017, through March 9, 2023 (the “Class Period”).

7 Under the terms of the Settlement Agreement,¹ Defendant will not oppose Plaintiff
8 Counsel’s application for a reasonable award of attorney’s fees not to exceed \$96,666.67 (1/3 of
9 the Gross Settlement Amount), litigation expenses not to exceed \$20,000, Settlement
10 Administrator Costs of \$6,500.00, PAGA penalties of \$30,000 (with 75% to the LWDA and 25%
11 to the Aggrieved Employees on a pro rata basis), and Service Payment of \$5,000 to Plaintiff
12 (also referred to as the “Class Representative”). (S.A. ¶ 48.)

13 After all Court-approved deductions from the Gross Settlement Amount, it is estimated
14 that \$131,833.33 will be available to pay the Class Members, as follows:

15

<i>Gross Settlement Amount</i>	\$ 290,000.00
Attorneys’ Fees (1/3)	\$ 96,666.67
Litigation Costs (not to exceed)	\$ 20,000.00
Administrator Costs	\$ 6,500.00
PAGA Penalties	\$ 30,000.00
Class Representative Service Award	\$ 5,000.00
<i>Net Settlement Amount</i>	\$ 131,833.33

16
17
18
19

20 Assuming 135 Class Members, the average payment to each Class Member will be
21 approximately \$976.54 (\$131,833.33 / 135). However, the actual payment will be calculated on
22 a pro-rata basis according to the number of Weeks Worked by each Class Member during the
23 Class Period, with each Work Week having a value of approximately \$12.68 (\$131,833.33 /
24 10,400 estimated Work Weeks). In addition, approximately 135 Aggrieved Employees will
25 receive a share of the \$7,500 PAGA Penalties (25% of the total \$30,000 allocation), calculated
26 pro-rata based on Weeks Worked during the PAGA Period. (S.A. ¶ 48(h)).

27
28

¹ The Class Action and PAGA Settlement Agreement and Release of Claims (the “Settlement Agreement” or
“S.A.”) is attached as Exhibit 1 to the Declaration of Brian Mankin (“Mankin Decl.”).

1 Because the settlement is fair and reasonable and was negotiated at arm's length by
2 experienced counsel and an experienced mediator following a sufficient exchange of information
3 and documents prior to mediation, it should be preliminarily approved. Plaintiff respectfully
4 request that the Court enter an order preliminarily approving the settlement, conditionally
5 certifying the Class under Code of Civil Procedure § 382 for settlement purposes, approving the
6 proposed Class Notice, appointing Plaintiff's counsel as class counsel, appointing Phoenix Class
7 Action Administrators as the Settlement Administrator, and scheduling a hearing for final
8 approval of the Settlement.

9 **II. BACKGROUND**

10 **A. THE SETTLEMENT CLASS**

11 The Class is defined as follows:

12 All current and former non-exempt employees employed by
13 Defendant in California at any time during the Class Period (which
14 is October 4, 2017, through March 9, 2023). (S.A. ¶¶ 6, 38).

15 **B. PROCEDURAL HISTORY**

16 On October 1, 2021, Plaintiff submitted a letter to the Labor Workforce Development
17 Agency (the "LWDA") for civil penalties under the Private Attorney General Act of 2004 (the
18 "PAGA"), and simultaneously sent a letter to Defendant requesting the production of personnel
19 and timekeeping records in order to further evaluate his wage and hour claims. (Mankin Decl. ¶
20 11).

21 On October 4, 2021, Plaintiff filed a complaint alleging class action causes of action and
22 corresponding PAGA claims against Defendant for (1) failure to pay minimum wages; (2) failure
23 to pay overtime wages; (3) failure to provide meal periods; (4) failure to provide rest breaks; (5)
24 failure to reimburse business expenses; (6) failure to timely pay final wages; (7) failure to
25 provide accurate itemized wage statements; and (8) unfair and unlawful competition. On
26 December 6, 2021, Plaintiff filed a first amended complaint to add related claims under PAGA
27 (the "Complaint"). (Mankin Decl. ¶ 12).

28 ///

1 Defendant retained counsel and immediately began to defend the case. Plaintiff
2 propounded written discovery and Defendant provided responses. However, Plaintiff alleged that
3 Defendant's discovery responses were non-compliant or incomplete. The Parties began to meet
4 and confer over the discovery issues. Shortly thereafter discussions among counsel, the Parties
5 agreed to attend private mediation. (Mankin Decl. ¶ 13).

6 In preparation for the mediation, the Parties informally exchanged documents and
7 information that allowed both sides to calculate the potential damages and evaluate potential risk,
8 including policies and procedures pertaining to each claim alleged, and statistics relating to the
9 number of current and former employees, number of shifts, pay periods worked and other things.
10 Defendant also provided their written policies and practices and a robust sampling of payroll and
11 timekeeping records for Class Members. This information enabled both parties to take a deep
12 dive into the claims. Additionally, during this process, Plaintiff and their counsel analyzed,
13 researched, and investigated the potential issues, including matters related to the calculation of
14 damages, trial, and appellate issues and risks. (Mankin Decl. ¶ 14).

15 On October 11, 2022, Plaintiff and Defendant participated in mediation before Hon.
16 Nancy Wieben Stock (Ret.), a well-respected wage-and-hour mediator. The mediation was
17 successful, and the Parties reached a global settlement that resolved all claims brought by
18 Plaintiff. Now the Parties seek the Court's preliminary approval of the Settlement. (Mankin
19 Decl. ¶ 15).

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

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

22 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

23 The \$290,000 Settlement Amount is non-reversionary and will be paid out to Class
24 Members without the need to submit a claim form or take any affirmative action. It includes (1)
25 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service award of \$5,000 to
26 Plaintiff, subject to approval by the Court; (3) settlement administrator expenses, not to exceed
27 \$6,500; and (4) a \$30,000 PAGA award, 75 percent of which is to be paid to the LWDA
28 pursuant to California Labor Code § 2699(i) and 25 percent to the Aggrieved Employees.

1 Defendant will separately pay its share of employer payroll taxes and withholdings. (S.A. ¶ 48).

2 **B. NOTICE PROCEDURES**

3 The proposed Class Notice will be provided to the Class Members showing the estimated
4 amount that each Class Member will receive, the number of Work Weeks credited as a Class
5 Member and the number of Weeks Worked as an Aggrieved Employee. Within 10 calendar days
6 after entry by the Court of its Order of Preliminary Approval, Defendant shall provide the
7 Settlement Administrator with a list containing Class Member names, addresses, phone numbers,
8 Social Security Numbers, Weeks Worked during the Class Period and Weeks Worked during the
9 PAGA Period (the “Class Data”). (S.A. ¶¶ 5, 64).

10 Within 10 calendar days of receipt of the Class Data, the Settlement Administrator shall
11 calculate the numbers for each Class Member, populate the Class Notice, and send each Class
12 Member the Class Notice via first-class, United States mail. (S.A. ¶ 65).

13 In the event that any Class Notice mailed to a Class Member is returned as having been
14 undelivered by the U.S. Postal Service, the Settlement Administrator shall perform a skip trace
15 search and seek an address correction for such Class Member(s), and a second Class Notice will
16 be sent to any new or different address obtained. (S.A. ¶ 66).

17 **C. EXCLUSION AND OBJECTION PROCEDURES**

18 Class Members who do not timely Opt-Out of the Settlement will be deemed to
19 participate in the Settlement and shall become a Participating Class Member without having to
20 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
21 must submit a written request to the Settlement Administrator no later than 30 days after being
22 mailed by the Settlement Administrator (“Notice Response Deadline”). (S.A. ¶ 20). Any Opt-
23 Out request that is not postmarked by the Response Deadline will be invalid, unless a Notice was
24 remailed in which case the Class Member’s exclusion or objection must be returned by the later
25 of the original Notice Response Deadline or 15 calendar days after the remailing of the notice.
26 (S.A. ¶ 69).

27 The Class Notice shall inform Class Members of their right to object to the Settlement.
28 Any Participating Class Member who wishes to object to the Settlement may submit a written

objection to the Settlement Administrator no later than the Response Deadline. (S.A. ¶ 69(c)).

D. SETTLEMENT ALLOCATION FORMULA FOR SETTLEMENT SHARES

The amount of each Settlement Class Member's Individual Class Payment is tied to the number of Weeks Worked by each Class Member for Defendant during the Class Period. Individual Class Payments are calculated by (a) dividing the Net Settlement Amount by the total number Weeks Worked by all Participating Class Members during the Class Period, and (b) multiplying the result by each Participating Class Member's Weeks Worked. (S.A. ¶ 48(g)(i)).

Additionally, each "Aggrieved Employee" will receive a share of the PAGA Penalties based on a pro-rata basis. Thus, the \$10,000 PAGA Penalties allocated to the Aggrieved Employees will be divided and paid on a Weeks Worked basis. (S.A. ¶ 48(h)).

The Class Notice will inform Class Members of the estimated share and the number of Weeks Worked during the Class Period, as well as number of Weeks Worked during the PAGA Period. Class Members may dispute Weeks Worked if they feel they worked more in the Class or PAGA Periods than Defendant's records show by timely submitting evidence to the Settlement Administrator. (S.A. ¶ 67).

As noted, assuming 135 Class Members, the average payment to each Class Member will be approximately \$976.54 (\$131,833.33 / 135). However, the actual payment will be calculated on a pro-rata basis according to the number of Weeks Worked by each Class Member during the Class Period, with each Work Week having a value of approximately \$12.68 (\$131,833.33 / 10,400 estimated Work Weeks). In addition, approximately 135 Aggrieved Employees will receive a share of the \$7,500 PAGA Penalties (25% of the total \$30,000 allocation), allocation based on Weeks Worked by each Aggrieved Employee during the PAGA Period. (Mankin Decl. ¶ 8).

E. TIMING OF SETTLEMENT DISBURSEMENTS

Defendant is required to deposit the Settlement Amount, along with the employers' share of payroll taxes owed, with the Settlement Administrator, within 15 calendar days after the "Effective Date" and these funds will be used to pay: (1) the class attorney fees and expenses, as approved by the Court; (2) the service award, as approved by the Court; (3) administrative

1 expenses, as approved by the Court; (4) the PAGA Penalties; and (5) the aggregate of all
2 Individual Settlement Amounts of Participating Class Members. Within 10 calendar days after
3 receiving the funds, the Settlement Administrator shall issue payments to cover all court-
4 approved payments. (S.A. ¶ 70).

5 Class Members will have 180 days to cash the settlement check. (S.A. ¶ 72). If a Class
6 Member fails to cash a check by the deadline, the Settlement Administrator shall issue unclaimed
7 funds to the California State Controller's Office in the name of the Class Member and/or
8 Aggrieved Employee (S.A. ¶ 72).

9 **F. TAX TREATMENT**

10 The Parties agree that 25 percent of the Individual Settlement Payments will be allocated
11 as wages subject to withholding of all applicable local, state and federal taxes and the remaining
12 75 percent will be allocated for interest and penalties (pursuant to, *e.g.*, California Labor Code
13 sections 203, 210, 226, etc.) from which no taxes will be withheld. (S.A. ¶ 48(d)). Additionally,
14 the PAGA Penalties payable to the Aggrieved Employees will be classified entirely as civil
15 penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶¶ 48(h)). These
16 allocations are in line with the claim valuations in the *Kullar* analysis discussed below (*i.e.*, the
17 penalty claims [§§ 203 and 226] comprise the majority of risk-adjusted value). Defendant will
18 separately pay its share of employer payroll taxes on the sum allocated to wages. (S.A. ¶ 48(a)).

19 **G. PARTICIPATING CLASS MEMBERS' RELEASE OF CLAIMS**

20 In exchange for these payments, the Settlement Agreement at ¶ 30 provides that the
21 Participating Class Members will release the Released Parties of:

22 "the claims stated in the operative complaint and those arising out
23 of or related to the facts pled in the Complaint, including: (a) failure
24 to pay minimum wages, (b) failure to pay overtime wages, (c) failure
25 to provide meal periods, (d) failure to provide rest breaks, (e) failure
26 to reimburse business expenses, (f) failure to timely pay wages, (g)
27 failure to timely pay wages upon separation of employment, (h)
28 failure to provide accurate itemized wage statements, (i) unfair and
unlawful competition, and (j) all other claims that reasonably could
have arisen out of the allegations made and based on the facts
alleged in the Complaint."

///

1 It is understood and agreed that the Settlement Agreement will not release any person,
2 party or entity from claims, if any, by Class Members for any other claims, including claims for
3 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
4 unemployment insurance, disability, social security, workers' compensation, or claims based on
5 facts occurring outside the Class Period.

6 **H. AGGRIEVED EMPLOYEES' RELEASE OF CLAIMS**

7 The Settlement Agreement at ¶ 24 also defines the "PAGA Released Claims" as follows:

8 "the PAGA claims that Plaintiff alleged against the Released Parties,
9 on behalf of the Aggrieved Employees and the State of California,
10 based on the facts stated in the Complaint and in the relevant LWDA
11 notice letters or claims arising out of or related to facts pled in the
12 operative Complaint and relevant LWDA notice letters, including
13 all PAGA claims seeking civil penalties premised upon: (a) failure
14 to pay minimum wages, (b) failure to pay overtime wages, (c) failure
15 to provide meal periods, (d) failure to provide rest breaks, (e) failure
16 to reimburse business expenses, (f) failure to timely pay wages each
17 period, (g) failure to time pay wages upon separation of
18 employment, and (h) failure to provide accurate itemized wage
19 statements, and (i) all other claims for civil penalties recoverable
20 under the Private Attorneys General Act, Labor Code §§ 2698 et
21 seq. based on the facts or claims alleged in the LWDA Notice and
22 the Complaint."

23 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
24 that individual will still be subject to the PAGA Released Claims to the fullest extent permitted
25 by law and will receive a pro-rata share of PAGA Penalties. (S.A. ¶¶ 54 and 69(a)).

26 **IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS**
27 **APPROPRIATE FOR PURPOSES OF SETTLEMENT**

28 California Rule of Court 3.769(d) provides that the Court may make an order approving
certification of a provisional settlement class at the preliminary approval stage. It is well-
established that trial courts should use a "lesser standard of scrutiny" for determining the
propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor*
Co. (1996) 48 Cal.App.4th 1794, 1807 at n.19; *Officers for Justice v. Civil Service Com.* (9th Cir.
1982) 688 F.2d 615, 633 ("[C]ertification issues raised by class action litigation that is resolved

1 short of a decision on the merits must be viewed in a different light.”); *Amchem Prods., Inc. v.*
2 *Windsor* (1997) 521 U.S. 591, 620 (“Confronted with a request for settlement-only class
3 certification, a district court need not inquire whether the case, if tried, would present intractable
4 management problems . . . for the proposal is that there be no trial.”). As discussed below, for the
5 purposes of this settlement only, Plaintiff request that this Court provisionally certify the Class,
6 as defined above, under Code of Civil Procedure § 382.

7 **A. ASCERTAINABILITY AND NUMEROSITY**

8 In determining whether a class is ascertainable, the court considers “(1) the class
9 definition, (2) the size of the class, and (3) the means available for identifying the class
10 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
11 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
12 class is ascertainable if the class members can be objectively identified and given notice of the
13 litigation without unreasonable time or expense). Here, according to Defendant’s records, there
14 are approximately 122 Class Members that are easily identifiable and fall within the defined
15 Class. Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

16 **B. WELL-DEFINED COMMUNITY OF INTEREST**

17 **1. Commonality**

18 To justify certification, the class proponent must show that questions of law or fact
19 common to the class predominate over the questions affecting the individual members. *Arenas v.*
20 *El Torito Rests., Inc.* (2010) 183 Cal.App.4th 723, 732. Here, Plaintiff contends that the Class
21 was subjected to common policies and practices relating to payment of wages, meal/rest breaks,
22 and so on. While the Parties dispute whether a class would be appropriate if the litigation were to
23 continue, they agree to class certification for the purposes of this settlement only.

24 **2. Typicality**

25 Typicality “focuses on whether there exists a relationship between the Plaintiff’s claims
26 and the claims alleged on behalf of the class.” See Herbert B. Newberg & Alba Conte, *Newberg*
27 *on Class Actions* (“Newberg”) § 3:13 (4th ed. 2002). Again, the Parties dispute whether
28 Plaintiff’s claims are typical of the Class for the purposes of any continued litigation of the

1 Action, but agree for the purposes of this settlement only, that Plaintiff asserts claims regarding
2 Defendant's pay policies, meal and rest break practices, wage statements, and the provisions
3 governing the timely and complete payment of wages, which are at the core of the lawsuit.

4 3. Adequacy of Representation

5 The proposed class representative must establish that he or she will adequately represent
6 the proposed class. See *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540,
7 546. Specifically, Plaintiff is adequate to represent the class because he was employed by
8 Defendant during the Class Period, experienced the same wage and hour practices as the rest of
9 the Class, understood their duties as a Class Representative, have been willing to undergo the
10 risks of litigation, and have no conflict of interest.

11 Adequacy may be established by the fact that counsel are experienced practitioners. See
12 *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001)
13 244 F.3d 1152, 1162. Here, Plaintiff is represented by Class Counsel with extensive experience
14 in wage and hour class actions. (Mankin Decl. ¶¶ 2-6; Carlson Decl. ¶¶ 3-6).

15 4. Superiority

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

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

22 **A. CLASS ACTION SETTLEMENTS ARE SUBJECT TO JUDICIAL REVIEW AND**
23 **APPROVAL UNDER THE CALIFORNIA RULES OF COURT**

24 The law favors settlements. *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374. This is
25 particularly true in class actions where substantial resources can be conserved by avoiding the
26 time, cost, and rigors of formal litigation. However, a class action may not be dismissed,
27 compromised, or settled without the Court's approval. Cal. R. Ct. 3.769(a). The California Rules
28 of Court set forth the procedures for court approval of a class action settlement: (1) the Court

1 preliminarily approves the settlement; (2) class members receive notice as directed by the Court;
2 and (3) the Court conducts a final approval hearing to inquire into the fairness of the proposed
3 settlement. *See* Cal. R. Ct. 3.769(c), (e-g).

4 The decision to approve or reject a proposed settlement lies within the Court’s sound
5 discretion. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35.

6 Nevertheless, in considering a potential settlement for approval, a court is not to turn the
7 approval hearing “into a trial or rehearsal for trial on the merits . . . [or] to reach any ultimate
8 conclusions on the contested issues of fact and law which underlie the merits of the dispute.”
9 *Officers for Justice*, 688 F.2d at 625.

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

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

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

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

1 quotation marks omitted).

2 At the preliminary approval stage, the Court need only determine that the settlement falls
3 within the “range of possible judicial approval,” so that notice to the class and the scheduling of
4 the fairness hearing are worthwhile. *See Newberg* § 11:25. Indeed, the Court should grant
5 preliminary approval if there are no “grounds to doubt its fairness or other obvious deficiencies .
6 . . and [the settlement] appears to fall within the range of possible approval.” *Manual For*
7 *Complex Litigation* (Third) § 30.41 (1995); see *Dunk*, 48 Cal.App.4th at 1802. A “presumption
8 of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2)
9 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)
10 counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Dunk*,
11 *supra* (citing *Newberg* § 11:41). As shown below, the settlement falls well within the range of
12 approval because there are no grounds to doubt its fairness.

13 **B. THE SETTLEMENT IS THE RESULT OF SERIOUS, INFORMED, NON-COLLUSIVE**
14 **NEGOTIATIONS**

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

24 **C. THE EXTENT OF THE INVESTIGATION WAS MORE THAN SUFFICIENT TO PERMIT**
25 **PRELIMINARY APPROVAL OF THE SETTLEMENT**

26 Plaintiff thoroughly investigated and evaluated the factual and legal strengths and
27 weaknesses of this case before reaching the settlement. As described above, the settlement was
28 reached after extensive investigation and research, thorough calculations and risk evaluation, and

1 a substantial exchange of information relating to the Class Members prior to mediation.

2 **D. THE SETTLEMENT IS A REASONABLE COMPROMISE OF CLAIMS**

3 To evaluate a settlement, the parties must provide the trial court with “basic information
4 about the nature and magnitude of the claims in question and the basis for concluding that the
5 consideration being paid for the release of those claims represents a reasonable compromise.”
6 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.

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

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

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

27 Based upon detailed data obtained through informal discovery and information
28 exchanges, Plaintiff’s counsel estimated the following data points through September 23, 2022

1 (the date of Defendant's Response to Plaintiff's Pre-Mediation Requests for Data and
2 Information): (1) 135 class members, (2) 69 class members that separated from employment
3 during the 3-year lookback for Labor Code § 203, (3) 10,400 workweeks, (4) 52,000 shifts
4 worked, and (5) approximately 2,080 wage statements during the PAGA Period. (Mankin Decl. ¶
5 17).

6 Here, there were three categories of claims alleged by Plaintiff: (1) unpaid wage claims
7 under various theories, (2) meal and rest break violations, and (3) derivative claims for waiting
8 time and wage statement penalties due to the other alleged violations. (Mankin Decl. ¶ 18).

9 As to the unpaid wage claims, Plaintiff alleged Defendant failed to pay proper overtime
10 when Class Members worked more than 8 hours in a day. Furthermore, when Defendant paid
11 overtime, it failed to factor in non-discretionary compensation (*e.g.*, bonuses and commissions)
12 received by Class Members into calculating the regular rate of pay. In total, Plaintiff's counsel
13 estimated the maximum value of these unpaid wages to be \$156,000. (Mankin Decl. ¶ 19).

14 However, Defendants vehemently opposed these unpaid wage claims on the merits and as
15 to the propriety of class certification. For example, Defendants argued that the majority of
16 employees worked out on the field alone, completed their own timesheets, approved their own
17 timesheets, and when employees reported overtime, it was paid. Moreover, in addition to its
18 other defenses on the merits, Defendants argued that Plaintiffs would be unable to meet its
19 evidentiary burden at summary judgment and/or trial because Plaintiffs and the Class would be
20 unable to introduce evidence as to the amount of unpaid wages (since the claims are not apparent
21 from the timekeeping records alone), thus defeating liability. Furthermore, Defendants argue a
22 lack of commonality due to the fact that there are a number of varying job positions and duties of
23 non-exempt employees. (Mankin Decl. ¶ 20).

24 Due to these defenses and arguments, Plaintiff assigned a 30% risk for the unpaid
25 overtime claim at the class certification stage. And, due to the defenses as to the merits, Plaintiff
26 assigned the following merits-based risk to each claim: a 20% risk on the unpaid overtime claim.
27 In sum, Plaintiff's counsel calculated the risk-adjusted value of the unpaid wage claims as
28 \$87,360. (Mankin Decl. ¶ 21).

1 Plaintiff also alleged meal and rest break claims against Defendant. Given the total
2 number of shifts at issue (an estimate of 52,000), and when incorporating violation rates from
3 review of the timekeeping records and other evidence, Plaintiff's counsel estimated a 75%
4 violation rate for meal breaks and a 30% violation rate for rest breaks, leading to 39,000 alleged
5 meal violations and 15,600 alleged rest break violations. This established a maximum potential
6 value for these claims of \$723,450 (54,600 violations multiplied by the average hourly rate of
7 \$13.25 as the applicable premium rate under § 226.7). (Mankin Decl. ¶ 22).

8 However, Defendant raised numerous arguments in response to this claim, including that
9 it maintained fully compliant written policies and specifically authorized the Class Members to
10 take meal and rest breaks, meaning that no one had a reason or cause to miss a break or take a
11 short/late break. Therefore, Defendant asserted that a fact-finder would have to determine for
12 each Class Member whether a break was missed and why, and why a break was noncompliant or
13 nonexistent, because if it was by the employee's choice, no liability attaches to Defendant.
14 These defenses are factored into Plaintiff's analysis in two ways. First, these issues raise
15 questions regarding whether the meal and rest break claims could be certified, and second these
16 defenses also go toward the merits given the evidentiary question of proving the number of meal
17 and rest violations. As such, Plaintiff placed a 30% risk on the meal break claim, and a 30% risk
18 on the rest break claim, resulting in a risk-adjusted value for the combined meal and rest break
19 claims at \$405,132. (Mankin Decl. ¶ 23).

20 Finally, Plaintiff alleged claims for waiting time penalties and wage statement violations.
21 But these claims were entirely derivative of the claims above, meaning that they only had merit
22 if the claims for unpaid wages or meal/rest breaks were successful. The maximum values for
23 these claims were as follows: (1) \$274,275 for waiting time penalties [69 former employees x
24 \$13.25 per hour x 10 hours per day x 30 days], and (2) \$198,000 for wage statement violations
25 [2,080 wage statements at the \$50/\$100 formula under § 226(e)]. (Mankin Decl. ¶ 24).

26 But Defendant raised a variety of defenses to these derivative claims that impacted the
27 valuation. Namely, as to the wage statement violations, Defendant argued that its wage
28 statements did not violate Labor Code § 226 and, even if there was a "technical" violation, that

Plaintiff would be unable to prove the required “knowing and intentional” and “injury” elements. Based on these facts and defenses, Plaintiff placed a 20% risk at class certification (mirroring the claims on which the wage statement claim was based) and estimated another 20% risk the merits, leading to a risk-adjusted value of \$126,720 for the wage statement claims. (Mankin Decl. ¶ 25).

Then, as to the waiting time penalty claim, Plaintiff’s valuation had to account for the fact that this claim was derivative of the unpaid wage and meal/rest break claims (*e.g.*, the unpaid wage premiums) and, if those claims failed at certification or on the merits, there would be no waiting time penalties owed, so the same risks for those claims applied to this claim. Furthermore, even if the unpaid wage and/or meal/rest claims succeeded at certification and on the merits, Plaintiff would have to prove that the violations (if any existed) were “willful” under the meaning of Labor Code § 203. And, here, Defendant argued that there could not be a finding of a “willful” violation since they had compliant written policies and any deviations therefrom were inadvertent and unintentional. As a result of this analysis, Plaintiff’s counsel applied a 20% risk at class certification and a 20% risk on the merits, leading to a risk-adjusted value of \$175,536. (Mankin Decl. ¶ 26).

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

•	Unpaid Wage Claims	\$	87,360
•	Meal and Rest Break Claims	\$	405,132
•	Wage Statement Claims	\$	26,720
•	Waiting Time Penalty Claims	\$	<u>175,536</u>
•	Total Risk Adjusted Penalties and Damages	\$	794,748

The reasonableness of the settlement is apparent from the fact that the proposed settlement is 36.49% of the risk-adjusted class damages and penalties. And while the PAGA penalties had a maximum value in the low seven figures, this fails to acknowledge that courts have wide latitude to reduce the civil penalties “based on the facts and circumstances of a particular case” and if “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(e)(2). Moreover, Defendant argued against the

merits of the underlying claims and particularly that the “willfulness” standard and/or “good faith” defenses mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendant also argued it is improper to stack civil penalty claims on top of underlying statutory claims. For these reasons, the Parties submit that this settlement is fair and reasonable.

E. PLAINTIFF’S COUNSEL IS EXPERIENCED IN WAGE-AND-HOUR LITIGATION

The view of the attorneys actively conducting the litigation is entitled to significant weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18; *Kullar*, 168 Cal.App.4th at 128 (court must take into account “the experience and view of counsel”).

Plaintiff’s Counsel is also highly experienced in Class/PAGA litigation, having repeatedly been named “Super Lawyer” in employment litigation (a distinction awarded to only 5% of litigators), having achieved large settlements and verdicts, including one of the largest PAGA awards in California’s history, collecting over \$250 million for its clients, having tried class and PAGA cases against Fortune 100 companies, among other things. (Mankin Decl. ¶¶ 2-6). Plaintiff’s counsel, operating at arm’s length, weighed the strengths and risks of this case, and are of the view that this is a fair and reasonable settlement considering the nature of the claims, realistic risk adjusted value, the complexities of the case, state of the law, and uncertainties of class certification and litigation.

F. THE CLASS NOTICE CONFORMS TO ALL APPLICABLE STATUTES AND RULES

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

The proposed Class Notice and proposed plan for the Settlement Administrator to mail the Class Notice to the last known address of all class members complies with all the requirements of California Rule of Court 3.769(f) and 3.766(b). The contents of the proposed Class Notice includes (1) the material terms of the settlement; (2) the proposed attorneys’ fees,

1 litigation expenses, and the costs of administration; (3) details about the final fairness hearing
2 and how class members may elect to exclude themselves or make an objection; and (4) how class
3 members can obtain additional information. *See* Class Notice, which is attached as Exhibit 2 to
4 the Mankin Declaration). In addition, it will inform Class Members of their estimated settlement
5 share.

6 The Court has wide discretion in approving the means of providing notice, so long as the
7 class representative “provide(s) meaningful notice in a form that should have a reasonable
8 chance of reaching a substantial percentage of class members.” *Archibald v. Cinerama Hotels*,
9 (1976) 15 Cal.3d 853, 861. Here, the parties’ notice plan is that notice of the Settlement will be
10 disseminated directly to the class members by first class mail by the settlement administrator,
11 since Defendant has the last known addresses of all class members and the Settlement
12 Administrator will perform a skip trace and update those addresses for any class notices that are
13 returned and re-send the notice.

14 The Class Notice satisfies the requirements of Rule of Court 3.766 and affords Settlement
15 Class Members with all due process protections required by the U.S. Constitution. Moreover,
16 the contents of the Class Notice comply with Cal. R. Ct. 3.766(d), because the Notice includes,
17 without limitation (1) a detailed explanation of the case, including the basic contentions or
18 denials of the parties; (2) a statement that the court will exclude the member from the class if the
19 member so requests by a specified date; (3) a procedure for the member to follow in requesting
20 exclusion from the class; (4) a statement that the judgment, whether favorable or not, will bind
21 all members who do not request exclusion; and (5) a statement that any member who does not
22 request exclusion may, if the member so desires, enter an appearance through counsel. The 30-
23 day deadline to opt-out or object is also reasonable, as it provides Class Members sufficient time
24 to do so and, if they so choose, to seek independent legal advice in the interim. If a Class
25 Member does not opt-out, he or she will automatically be sent a settlement check.

26 ///

27 ///

28 ///

1 **G. THE NON-REVERSIONARY “CHECKS CASHED” DISTRIBUTION ENSURES**
2 **MAXIMAL RECOVERY FOR CLASS MEMBERS**

3 The fact that each member who does not opt out of the Settlement shall be mailed a check
4 ensures that every Class Member will be paid unless he or she affirmatively acts to exclude
5 himself or herself. Moreover, the Settlement Amount is non-reversionary, which means that no
6 settlement funds will revert to Defendant; instead, if any checks are uncashed by the deadline,
7 the funds will be transferred to the State Controller’s Office subject to approval of the Court.
8 Such terms are favored by Courts and demonstrate that there was no collusion between counsel
9 for the parties and that the Settlement is fair and favorable to the Class Members.

10 **H. THE ATTORNEY’S FEES AND COSTS ALLOCATION IS FAIR**

11 Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement
12 of up to \$20,000 in litigation costs, along with \$133,333.33 in attorneys’ fees (one-third of the
13 Settlement Amount). See, *e.g.*, *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480
14 (approving 1/3 fee in the amount of \$6.33 million at a 2.13 lodestar multiplier, and holding that
15 when class action litigation establishes a monetary fund for the benefit of the class members,
16 the trial court may determine the amount of a reasonable fee by choosing an appropriate
17 percentage of the fund created); *Stuart v. RadioShack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL
18 3155645 (approving fee 1/3 of the total maximum settlement amount of \$4.5 million since 1/3
19 was “well within the range of percentages which courts have upheld as reasonable in other class
20 action lawsuits”); *Singer v. Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) 2010 WL
21 2196104, at *8 (approving fee award of 33.33% of the common fund); *Romero v. Producers*
22 *Dairy Foods, Inc.* (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841, at *4 (awarding fees of 1/3 of
23 common fund, noting: “[f]ee awards in class actions average around one-third of the
24 recovery.”); *Martin v. FedEx Ground Package System, Inc.* (N.D. Cal. Dec. 31, 2008) 2008 WL
25 5478576, at *8 (approving fees of 1/3 of common fund).

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

1 **I. THE REQUESTED SERVICE AWARD REQUEST IS FAIR AND APPROPRIATE**

2 The Settlement Agreement provides an incentive award payment of \$5,000 to Plaintiff as
3 a Class Representative, which is reasonable given the large recovery Class Members will receive
4 on average, as well as the time and effort they devoted to this case. Plaintiff's efforts included
5 providing factual background for the Class and PAGA complaint; providing documents and
6 information about Defendant's compensation plan; participating in phone calls to discuss
7 litigation and settlement strategy; making themselves available throughout the litigation to assist
8 with analyzing the claims and defenses; helping Class Counsel prepare for the mediation; and
9 reviewing the settlement documents. The Class Representative also assumed significant risk in
10 bringing this litigation—namely, had he lost, he could have been ordered to pay Defendant's
11 costs.

12 The requested service award falls within the range of incentive payments typically
13 awarded to a Class Representative in similar class actions. See, e.g., *Bond v. Ferguson*
14 *Enterprises, Inc.* (E.D. Cal. 2011) 2011 WL 2648879 (approving \$11,250 service awards in
15 trucker meal break class action); *Ross v. US Bank National Association* (N.D. Cal. 2010) 2010
16 WL 3833922, at *2 (approving \$20,000 enhancement award in California wage-and-hour class
17 action settlement); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 4150, 493
18 (approving service awards of \$15,000 from a \$300,000 settlement fund in a wage/hour class
19 action); *West v. Circle K Stores, Inc.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 76558, at *28
20 (finding service awards "of \$ 15,000 each to be reasonable."); *Glass v. UBS Fin. Servs.* (N.D.
21 Cal. 2007) 2007 U.S. Dist. LEXIS 8476, at *52 (finding "requested payment of \$25,000 to each
22 of the named Plaintiff is appropriate" in wage and hour settlement); *Louie v. Kaiser Found.*
23 *Health Plan, Inc.* (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 78314, at *18 (approving "\$25,000
24 incentive award for each Class Representative" in wage an hour settlement).

25 **VI. THE COURT SHOULD APPOINT PHOENIX AS SETTLEMENT**
26 **ADMINISTRATOR**

27 Subject to the Court's approval, the Parties stipulated to Phoenix serving as the
28 Settlement Administrator. Phoenix is experienced in administering class action settlements and

has provided a flat-fee proposal to administer this settlement for \$6,500. (Mankin Decl. ¶ 39; Exhibit 4 to Mankin Decl. [Phoenix's bid]).

VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING

The last step in the approval process is the formal hearing, whereby proponents of the settlement may explain and describe its terms and conditions and offer argument in support of approval, and Class Members or their counsel may be heard in support of or in opposition to the settlement. Subject to the Court's approval, the Parties propose that the Court schedule a hearing for final approval approximately 120 days after the Preliminary Approval Date, as follows:

March 9, 2023	Preliminary Approval (PA) hearing
April 3, 2023 (24 days after PA)	Deadline for Settlement Administrator to complete first mailing of the Notice Packet to all Settlement Class Members.
May 3, 2023 (30 days after mailing Class Notice)	Deadline for Settlement Class Members to submit Requests for Exclusion and Objections to the settlement.
16 court days before Final Approval hearing	Deadline for Plaintiff to file and serve Motion for Final Approval 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, 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
TBD (Approximately July 7, 2023 - 120 days after Preliminary Approval)	Final Approval Hearing.

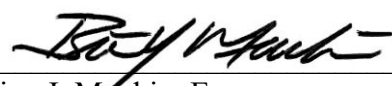
VIII. CONCLUSION

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

Dated: February 14, 2023

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 5198 Arlington Avenue, PMB 513, Riverside, California 92504.

On February 14, 2023, I caused to be served the foregoing document(s) described as follows:

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; DECLARATIONS 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.

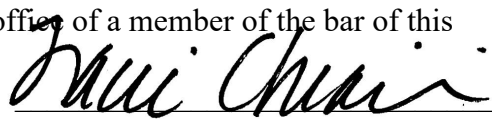
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 February 14, 2023, 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

SERVICE LIST

Semarnpreet Kaur, Esq.
Kevin M. Erwin, Esq.
JACKSON LEWIS P.C.
200 Spectrum Center Drive, #500
Irvine, CA 92618
949-885-1360
949-885-1380-fax
semarnpreet.kaur@jacksonlewis.com
kevin.erwin@jacksonlewis.com
Attorneys for Defendant HAMNER TOWING, INC.