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

KRISTY ELWELL, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

DIVERSITY WIRELESS PARTNERS
LLC, a California Limited Liability
Company; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2134554

*[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: April 19, 2023

Time: 10:00 a.m.

Dept.: S26

Complaint filed: December 17, 2021

FAC filed: January 31, 2022

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on April 19, 2023 at 10:00 a.m., or as soon thereafter as
3 the matter may be heard by the Honorable David Cohn in Department S26 of the San Bernardino
4 County Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff
5 Kristy Elwell, 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:

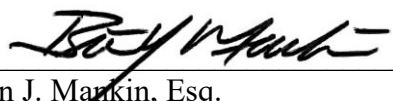
- 8 1. Certifying the class for purposes of settlement only;
- 9 2. Preliminarily appointing Plaintiff as class representative for settlement purposes;
- 10 3. Appointing Plaintiff's counsel as class counsel for purposes of settlement only;
- 11 4. Preliminarily approving the class action settlement 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 and Plaintiff's counsel (Brian Mankin and Peter Carlson); the
19 Class Action and PAGA Settlement Agreement and Release of Claims (the "Settlement
20 Agreement"); the proposed Order granting Preliminary Approval of the Settlement; all other
21 records, pleadings, and papers filed in this action; and upon such other evidence or argument as
22 may be presented to the Court at the hearing of this motion.

23
24 Dated: March 21, 2023

LAUBY, MANKIN & LAUBY LLP

25
26 BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Elwell seeks preliminary approval of a \$250,000 wage-and-hour class action
4 settlement on behalf of approximately 300 current and former non-exempt employees employed
5 by Defendant Diversity Wireless Partners, LLC (“Diversity”) in California at any time from
6 December 17, 2017, through December 31, 2022 (the “Class Period”).

7 Under the terms of the Settlement Agreement,¹ Defendants will not oppose Plaintiff
8 Counsel’s application for a reasonable award of attorney’s fees not to exceed \$83,333.33 (1/3 of
9 the Gross Settlement Amount), litigation expenses not to exceed \$20,000, Settlement
10 Administrator Costs of \$11,000.00, PAGA penalties of \$10,000 (with 75% to the LWDA and
11 25% to the Aggrieved Employees on a pro rata basis), and a Service Payment of \$10,000 to
12 Plaintiff Kristy Elwell (“Class Representative”). (S.A. ¶ 49, *et seq.*)

13 After all Court-approved deductions from the Settlement Amount, it is estimated that
14 \$406,166.67 will be available to pay the Class Members, as follows:

15

<i>Gross Settlement Amount</i>	\$ 250,000.00
Attorneys’ Fees (1/3)	\$ 83,333.33
Litigation Costs (not to exceed)	\$ 20,000.00
Administrator Costs	\$ 11,000.00
PAGA Penalties	\$ 10,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 115,666.67

16
17
18
19

20 Assuming 300 Class Members, the average payment to each Class Member will be
21 approximately \$385.55 (\$115,668.67 / 300). 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 \$16.52 (\$115,666.67 /
24 7,000 estimated Work Weeks). In addition, approximately 240 Aggrieved Employees will
25 receive a share of the \$2,500 PAGA Penalties (25% of the total \$10,000 allocation), calculated
26 pro-rata based on Weeks Worked during the PAGA Period. (S.A. ¶ 49(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 requests 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 nonexempt employees employed by
13 Defendant Diversity Wireless Partners, LLC in California at any
14 time during the Class Period (which is December 17, 2017, through
December 31, 2022). (S.A. ¶ 37).

15 **B. PROCEDURAL HISTORY**

16 On December 17, 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 Diversity requesting the production of personnel
19 and timekeeping records in order to further evaluate her wage and hour claims. (Mankin Decl. ¶
20 11).

21 On December 17, 2021, Plaintiff filed a class action and representative PAGA complaint
22 against Diversity. Then, on January 31, 2022, Plaintiff filed the operative First Amended
23 Complaint against Diversity and Does 1 through 20, alleging class and representative PAGA
24 claims, including: (1) failure to pay minimum wages, (2) failure to pay overtime, (3) failure to
25 provide meal periods, (4) failure to provide rest breaks, (5) failure to pay vested vacation, (6)
26 failure to reimburse for business expenses, (7) failure to timely pay final wages, (8) failure to
27 provide accurate itemized wage statements, (9) unfair and unlawful competition pursuant to
28 California Business and Professions Code §§ 17200 et seq., and (10)-(18) related claims under

1 PAGA. (S.A. ¶ 40).

2 Diversity retained counsel and immediately began to defend the case. Then, after early
3 discussions among counsel, the Parties agreed to attend private mediation. (Mankin Decl. ¶ 13).

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

13 On September 9, 2022, Plaintiff and Diversity participated in mediation before Hon.
14 James Di Cesare (Ret.), a well-respected mediator that recently retired from the Orange County
15 complex bench. (S.A. ¶ 46). The matter did not resolve at mediation and the Parties moved
16 forward with discovery, and Plaintiffs also filed Doe amendments adding the owners of Diversity
17 Wireless (Jon Garcia and Victor Chapron, Sr.) as defendants in this action (collectively,
18 “Defendants”). (S.A. ¶ 42).

19 Despite the unsuccessful mediation, the Parties continued negotiating and, after extensive
20 back-and-forth discussions, settlement was reached on November 11, 2022. (S.A. ¶ 46). The
21 Parties now seek the Court’s preliminary approval of the Settlement.

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

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

24 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

25 The \$250,000 Settlement Amount is non-reversionary and will be paid out to Class
26 Members without the need to submit a claim form or take any affirmative action. It includes (1)
27 Plaintiff’s attorneys’ fees and costs, as approved by the Court; (2) a service award of \$10,000 to
28 Plaintiff, subject to approval by the Court; (3) settlement administrator expenses, not to exceed

1 \$11,000; (4) a \$10,000 PAGA award, 75 percent of which is to be paid to the LWDA pursuant to
2 California Labor Code § 2699(i) and 25 percent to the Aggrieved Employees; and (5) the
3 aggregate of all Individual Settlement Amounts of the Participating Class Members. (S.A. ¶ 49
4 and subparts). Defendants will separately pay their share of employer payroll taxes and
5 withholdings. (S.A. ¶ 49(a)).

6 **B. NOTICE PROCEDURES**

7 The proposed Class Notice will be provided to the Class Members showing the estimated
8 amount that each Class Member will receive, the number of Work Weeks credited as a Class
9 Member and/or Aggrieved Employee (*See* Exhibit 2 to Mankin Decl.). Within 14 calendar days
10 after entry by the Court of its Order of Preliminary Approval, Defendants shall provide the
11 Settlement Administrator with a list containing Class Member names, addresses, phone numbers,
12 Social Security Numbers, and Weeks Worked during the Class and/or PAGA Period(s) (the
13 “Class Data”). (S.A. ¶¶ 5, 67).

14 Within 10 calendar days of receipt of the Class Data, the Settlement Administrator shall
15 calculate the numbers for each Class Member, populate the Class Notice, and send each Class
16 Member the Class Notice via first-class, United States mail. (S.A. ¶ 68).

17 In the event that any Class Notice mailed to a Class Member is returned as having been
18 undelivered by the U.S. Postal Service, the Settlement Administrator shall perform a skip trace
19 search and seek an address correction for such Class Member(s), and a second Class Notice will
20 be sent to any new or different address obtained. (S.A. ¶ 69).

21 **C. EXCLUSION AND OBJECTION PROCEDURES**

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

of the original Notice Response Deadline or 15 calendar days after the remailing of the notice. (S.A. ¶ 69).

The Class Notice shall inform Class Members of their right to object to the Settlement. 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. ¶ 72(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 Diversity 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. ¶ 49(c)).

Additionally, each "Aggrieved Employee" will receive a share of the PAGA Penalties based on a pro-rata basis. Thus, the \$2,500 PAGA Penalties allocated to the Aggrieved Employees will be divided and paid on a Weeks Worked basis. (S.A. ¶ 49(h)).

The Class Notice will inform Class Members of the estimated share and the number of Weeks Worked during the Class and/or PAGA Period(s). Class Members may dispute Weeks Worked if they feel they worked more in the Class or PAGA Periods than Diversity's records show by timely submitting evidence to the Settlement Administrator. (S.A. ¶ 70).

As noted, assuming 300 Class Members, the average payment to each Class Member will be approximately \$385.55 (\$115,668.67 / 300). 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 \$16.52 (\$115,666.67 / 7,000 estimated Work Weeks). In addition, approximately 240 Aggrieved Employees will receive a share of the \$2,500 PAGA Penalties (25% of the total \$10,000 allocation), calculated pro-rata based on Weeks Worked during the PAGA Period. (Mankin Decl. ¶ 8).

E. TIMING OF SETTLEMENT DISBURSEMENTS

Pursuant to the terms of the Settlement Agreement, Defendants are required to fund the Gross Settlement Amount under a three-part payment plan that divides each payment

proportionally between Plaintiff, the Participating Class Members, the Aggrieved Employees, the LWDA, Class Counsel (for fees and costs), and the Settlement Administrator. (S.A. ¶ 73).

Under this payment plan, Defendants are required to fund: (1) \$80,000 by the later of August 1, 2023, or 10 days after the Effective Date, (2) another \$80,000 by the later of February 1, 2024, or 10 days after the Effective Date, and (3) the remaining \$90,000 balance of the Gross Settlement Amount by the later of August 1, 2024, or 10 days after the Effective Date. (S.A. ¶ 73(a)-(c)). The Parties also negotiated an “Acceleration Clause” which causes all remaining balances due and payable immediately if Defendants fail to timely make any installment payments and fail to cure the default. (S.A. ¶ 74).

Within 10 business days after receiving each installment payment, the Settlement Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 75). Class Members and Aggrieved Employees will have 180 days to cash each settlement check. If a check is not cashed within the 180-day period, the check will be voided, and a stop-payment will be issued. If either of the first two installments are not cashed within 180 days, the Settlement Administrator will hold the funds in trust, pending a request by the recipient to have the payments reissued. However, once 180 days has passed after the final check is mailed the Participating Class Members and Aggrieved Employees, the Settlement Administrator shall issue all unclaimed funds (from all installments) to the California State Controller’s Office in the name of the Participating Class Member or Aggrieved Employee. (S.A. ¶ 76).

F. TAX TREATMENT

The Parties agree that 20% of the Individual Settlement Payments will be allocated as wages subject to withholding of all applicable local, state and federal taxes and the remaining 80% will be allocated for interest and penalties (pursuant to, *e.g.*, California Labor Code §§ 203, 210, 226, 2699 etc.) from which no taxes will be withheld. (S.A. ¶ 49(d)). Additionally, the PAGA Penalties payable to the Aggrieved Employees will be classified entirely as civil penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶¶ 49(h)). Defendants will separately pay the share of employer payroll taxes on the sum allocated to wages. (S.A. ¶ 49(a)).

///

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

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

4 all claims stated in the Complaint and those based solely upon the facts in the
5 Complaint, including: (a) failure to pay minimum wages, (b) failure to pay
6 overtime wages, (c) failure to provide meal periods, (d) failure to provide rest
7 breaks, (e) failure to pay vested vacation, (f) failure to reimburse business
8 expenses, (g) failure to timely pay wages upon separation of employment, (h)
9 failure to provide accurate itemized wage statements, (i) unfair and unlawful
10 competition, and (j) all other claims that reasonably could have arisen out of
11 the allegations made and based on the facts alleged in the Complaint.

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 any other claims, including claims for
14 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
15 unemployment insurance, disability, social security, workers' compensation, or claims based on
16 facts occurring outside the Class Period.

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

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

19 the PAGA claims that Plaintiff alleged against the Released Parties, on behalf
20 of the Aggrieved Employees and the State of California, based on the facts
21 stated in the Complaint and in the relevant LWDA notice letter, including all
22 PAGA claims seeking civil penalties premised upon: (a) failure to pay
23 minimum wages, (b) failure to pay overtime wages, (c) failure to provide meal
24 periods, (d) failure to provide rest breaks, (e) failure to pay vested vacation, (f)
25 failure to reimburse business expenses, (g) failure to timely pay wages each
26 period, (h) failure to timely pay wages upon separation of employment, (i)
27 failure to provide accurate itemized wage statements, and (j) all other claims
28 for civil penalties recoverable under PAGA based on the facts or claims alleged
in the Complaint.

 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
that individual will still be subject to the PAGA Released Claims to the fullest extent permitted
by law and will receive a pro-rata share of PAGA Penalties. (S.A. ¶ 72(a)).

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1 **IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS**
2 **APPROPRIATE FOR PURPOSES OF SETTLEMENT**

3 California Rule of Court 3.769(d) provides that the Court may make an order approving
4 certification of a provisional settlement class at the preliminary approval stage. It is well-
5 established that trial courts should use a “lesser standard of scrutiny” for determining the
6 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor*
7 *Co.* (1996) 48 Cal.App.4th 1794, 1807 at n.19; *Officers for Justice v. Civil Service Com.* (9th Cir.
8 1982) 688 F.2d 615, 633 (“[C]ertification issues raised by class action litigation that is resolved
9 short of a decision on the merits must be viewed in a different light.”); *Amchem Prods., Inc. v.*
10 *Windsor* (1997) 521 U.S. 591, 620 (“Confronted with a request for settlement-only class
11 certification, a district court need not inquire whether the case, if tried, would present intractable
12 management problems . . . for the proposal is that there be no trial.”). As discussed below, for the
13 purposes of this settlement only, Plaintiff requests that this Court provisionally certify the Class,
14 as defined above, under Code of Civil Procedure § 382.

15 **A. ASCERTAINABILITY AND NUMEROSITY**

16 In determining whether a class is ascertainable, the court considers “(1) the class
17 definition, (2) the size of the class, and (3) the means available for identifying the class
18 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
19 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
20 class is ascertainable if the class members can be objectively identified and given notice of the
21 litigation without unreasonable time or expense). Here, according to Diversity’s records, there
22 are approximately 300 Class Members that are easily identifiable and fall within the defined
23 Class. Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

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

25 *1. Commonality*

26 To justify certification, the class proponent must show that questions of law or fact
27 common to the class predominate over the questions affecting the individual members. *Arenas v.*
28 *El Torito Rests., Inc.* (2010) 183 Cal.App.4th 723, 732. Here, Plaintiff contends that the Class

1 was subjected to common policies and practices relating to payment of wages, meal/rest breaks,
2 and so on. While the Parties dispute whether a class would be appropriate if the litigation were to
3 continue, they agree to class certification for the purposes of this settlement only.

4 2. Typicality

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

12 3. Adequacy of Representation

13 The proposed class representative must establish that he or she will adequately represent
14 the proposed class. See *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540,
15 546. Specifically, Plaintiff is adequate to represent the class because she was employed by
16 Diversity during the Class Period, experienced the same wage and hour practices as the rest of
17 the Class, understood her duties as a Class Representative, has been willing to undergo the risks
18 of litigation, and has no conflict of interest.

19 Adequacy may be established by the fact that counsel are experienced practitioners. See
20 *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001)
21 244 F.3d 1152, 1162. Here, Plaintiff is represented by Class Counsel with extensive experience
22 in wage and hour class actions like this matter. (Mankin Decl. ¶¶ 2-6; Carlson Decl. ¶¶ 3-9).

23 4. Superiority

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

28 ///

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

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

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

13 The decision to approve or reject a proposed settlement lies within the Court's sound
14 discretion. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35.
15 Nevertheless, in considering a potential settlement for approval, a court is not to turn the
16 approval hearing "into a trial or rehearsal for trial on the merits . . . [or] to reach any ultimate
17 conclusions on the contested issues of fact and law which underlie the merits of the dispute."
18 *Officers for Justice*, 688 F.2d at 625.

19 The Court's ultimate duty is to determine whether the settlement is fair, adequate, and
20 reasonable. *See Dunk*, 48 Cal.App.4th at 1801 (setting forth the "fair, adequate, and reasonable"
21 standard) (citing *Officers for Justice, supra*); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177
22 Cal.App.4th 734, 742-43 (a trial court must approve a class action settlement agreement, but only
23 after determining that it is "'fair, adequate and reasonable,'" considering factors such as the
24 "'risk, expense, [and] complexity'" of continued litigation) (citations omitted). The Court enjoys
25 broad discretion in making its fairness determination, and should consider factors including, but
26 not limited to: "the strength of Plaintiff's case, the risk, expense, complexity and likely duration
27 of further litigation, the risk of maintaining class action status through trial, the amount offered
28 in settlement, the extent of discovery completed and the stage of the proceedings, the experience

1 and views of counsel . . . and the reaction of the class members to the proposed settlement. *Dunk*,
2 *supra* (detailing non-exhaustive list of factors for court’s consideration at final approval).

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

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

21 **B. THE SETTLEMENT IS THE RESULT OF SERIOUS, INFORMED, NON-COLLUSIVE**
22 **NEGOTIATIONS**

23 The settlement was the product of extensive arm’s length negotiations between counsel
24 and was facilitated by an experienced wage-and-hour class action mediator. Though cordial and
25 professional, the settlement negotiations were adversarial and non-collusive in nature. The
26 settlement reached is the product of substantial effort by the parties and their counsel. Although
27 Plaintiff and her counsel believed that there was a possibility of certifying the claims, they
28 recognized the potential risk, expense, and complexity posed by litigation, such as unfavorable

1 decisions on class certification, summary judgment, at trial and/or on the damages awarded,
2 and/or on an appeal that can take several more years to litigate. In addition, if Diversity
3 prevailed on any of the defenses, the employees may not have received any monetary recovery.

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

6 Plaintiff thoroughly investigated and evaluated the factual and legal strengths and
7 weaknesses of this case before reaching the settlement. As described above, the settlement was
8 reached after extensive investigation and research, thorough calculations and risk evaluation, and
9 a substantial exchange of information relating to the Class Members prior to mediation.

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

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

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

22 Of particular relevance to the reasonableness of the proposed Settlement is the fact that
23 significant legal and factual grounds for defending this action exist. First, in addition to
24 disputing the merits of Plaintiff’s claims, Diversity strongly disputed that Plaintiff could obtain
25 class certification, arguing a lack of commonality of the legal claims and injuries. Diversity
26 further argued that it complied with the applicable law and that any purported deviations
27 therefrom were individualized in nature, thereby limiting Plaintiff’s ability to certify the class.
28 While Plaintiff asserts that this is a suitable case for certification, she realizes that there is always

1 a significant risk associated with class certification proceedings, which could significantly limit
2 the claims that she could pursue on a class basis.

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

7 Based upon detailed data obtained through informal discovery and information
8 exchanges, Plaintiff's counsel estimated the following data points through the date of mediation:
9 (1) 247 class members, (2) 166 class members that separated from employment during the 3-year
10 lookback for Labor Code § 203, (3) 6,366 workweeks, (4) 27,986 shifts worked, and (4)
11 approximately 2,980 biweekly wage statements during the PAGA Period. (Mankin Decl. ¶ 17).

12 Here, there were four categories of claims alleged by Plaintiff: (1) unpaid wage claims
13 under various theories, (2) meal and rest break violations, (3) failure to reimburse business
14 expenses, and (4) derivative claims for waiting time and wage statement penalties due to the
15 other alleged violations. (Mankin Decl. ¶ 18).

16 As to the unpaid wage claims, Plaintiff alleged two theories of liability. First, Plaintiff
17 alleged that Diversity failed to pay all overtime due to the failure to include commissions and
18 bonuses in the regular rate and overtime calculations. Second, Plaintiff alleged that Diversity had
19 a policy of paying vested but unused vacation to departing employees at the base hourly rate of
20 pay, rather than the "final rate" required by Labor Code § 227.3. In total, Plaintiff's counsel
21 estimated the maximum value of these unpaid wages to be \$80,260. However, Diversity
22 vehemently opposed these unpaid wage claims on the merits and as to the propriety of class
23 certification. Due to the defenses and arguments raised, Plaintiff assigned a 20% risk for each
24 respective unpaid wage claim at the class certification stage and an additional 20% risk on the
25 merits. In sum, Plaintiff's counsel calculated the risk-adjusted value of the unpaid wage claims as
26 \$51,366. (Mankin Decl. ¶ 19).

27 Plaintiff also alleged meal and rest break claims against Defendant. Given the total
28 number of shifts at issue (an estimate of 27,986), and when incorporating violation rates from

1 expert review of the timekeeping records and other evidence, Plaintiff's counsel estimated a 25%
2 violation rate for meal breaks and a 50% violation rate for rest breaks, leading to 6,997 alleged
3 meal violations and 13,993 alleged rest break violations. This established a maximum potential
4 value for these claims of \$390,834 (20,990 violations multiplied by the average hourly rate of
5 \$18.62 as the applicable premium rate under § 226.7). (Mankin Decl. ¶ 20).

6 However, Diversity raised numerous arguments in response to this claim, including that it
7 maintained fully compliant written policies and specifically authorized the Class Members to
8 take meal and rest breaks, meaning that no one had a reason or cause to miss a break or take a
9 short/late break. Therefore, Diversity asserted that a fact-finder would have to determine for
10 each Class Member whether a break was missed and why, and why a break was noncompliant or
11 nonexistent, because if it was by the employee's choice, no liability attaches to Defendant.
12 These defenses are factored into Plaintiff's analysis in two ways. First, these issues raise
13 questions regarding whether the meal and rest break claims could be certified, and Plaintiffs
14 placed a 20% risk at the class certification stage for meal periods and a 40% risk for rest breaks.
15 Second, these defenses also go toward the merits given the evidentiary question of proving the
16 number of meal and rest violations. As such, Plaintiff placed a 20% risk on the merits for meal
17 breaks, and an additional 40% risk on the merits for rest breaks, setting the risk-adjusted value
18 for the combined meal and rest break claims at \$177,173. (Mankin Decl. ¶ 21).

19 Plaintiff also alleged that Diversity required Class Members to use their personal cellular
20 phone for business purposes, with no reimbursement. Plaintiff calculated the maximum value of
21 this claim as \$127,320 (\$20 per workweek x 6,366 workweeks). But Defendants strongly
22 opposed this claim and denied that any Class Member was required to use a cellular phone for
23 business purposes. Thus, Defendants contended that even if a Class Member did use their own
24 phone, it was not "necessary" and cannot trigger liability under Labor Code § 2802. Based on
25 the defenses to this claim, Plaintiff's counsel assigned a 30% risk at class certification and
26 another 30% on the merits, leading to a risk-adjusted value of \$62,386. (Mankin Decl. ¶ 22).

27 Finally, Plaintiff alleged claims for waiting time penalties and wage statement violations.
28 But these claims were entirely derivative of the claims above, meaning that they only had merit

1 if the claims for unpaid wages or meal/rest breaks were successful. The maximum values for
2 these claims were as follows: (1) \$741,820 for waiting time penalties [166 former employees x
3 \$18.62 per hour x 8 hours per day x 30 days], and (2) \$288,000 for wage statement violations
4 [2,980 wage statements at the \$50/\$100 formula under § 226(e)]. (Mankin Decl. ¶ 23).

5 But Diversity raised a variety of defenses to these derivative claims that impacted the
6 valuation. Namely, as to the wage statement violations, that the wage statements did not violate
7 Labor Code § 226 and, even if there was a “technical” violation, that Plaintiff would be unable to
8 prove the required “knowing and intentional” and “injury” elements. Based on these facts and
9 defenses, Plaintiff placed a nominal 20% risk at class certification (mirroring the claims on
10 which the wage statement claim was based) and estimated another 30% risk the merits, leading
11 to a risk-adjusted value of \$161,280 for the wage statement claims. (Mankin Decl. ¶ 24).

12 Then, as to the waiting time penalty claim, Plaintiffs’ valuation had to account for the
13 fact that this claim was derivative of the unpaid wage and meal/rest break claims (*e.g.*, the
14 unpaid wage premiums) and, if those claims failed at certification or on the merits, there would
15 be no waiting time penalties owed, so the same risks for those claims applied to this claim.
16 Furthermore, even if the unpaid wage and/or meal/rest claims succeeded at certification and on
17 the merits, Plaintiff would have to prove that the violations (if any existed) were “willful” under
18 the meaning of Labor Code § 203. And, here, Defendants argued that there could not be a
19 finding of a “willful” violation since they had compliant written policies and any deviations
20 therefrom were inadvertent and unintentional. As a result of this analysis, Plaintiff’s counsel
21 applied a 30% risk at class certification and a 40% risk on the merits, leading to a risk-adjusted
22 value of \$311,564. (Mankin Decl. ¶ 25).

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

25	• Unpaid Wage Claims	\$	51,366
26	• Meal and Rest Break Claims	\$	177,173
27	• Failure to Reimburse Expenses	\$	62,368
28	• Wage Statement Claims	\$	161,280

- Waiting Time Penalty Claims \$ 311,564
- **Total Risk Adjusted Penalties and Damages** \$ **763,751**

The reasonableness of the settlement is apparent from the fact that the proposed settlement is 32.7% 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, Diversity 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. Diversity 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; Carlson Decl. ¶¶ 3-9). 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.

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

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

7 The proposed Class Notice and proposed plan for the Settlement Administrator to mail
8 the Class Notice to the last known address of all class members complies with all the
9 requirements of California Rule of Court 3.769(f) and 3.766(b). The contents of the proposed
10 Class Notice includes (1) the material terms of the settlement; (2) the proposed attorneys' fees,
11 litigation expenses, and the costs of administration; (3) details about the final fairness hearing
12 and how class members may elect to exclude themselves or make an objection; and (4) how class
13 members can obtain additional information. *See* Class Notice (Exhibit 2 to Mankin Decl.). In
14 addition, it will inform Class Members of their estimated settlement share.

15 The Court has wide discretion in approving the means of providing notice, so long as the
16 class representative "provide(s) meaningful notice in a form that should have a reasonable
17 chance of reaching a substantial percentage of class members." *Archibald v. Cinerama Hotels*,
18 (1976) 15 Cal.3d 853, 861. Here, the parties' notice plan is that notice of the Settlement will be
19 disseminated directly to the class members by first class mail by the settlement administrator,
20 since Diversity has the last known addresses of all class members and the Settlement
21 Administrator will perform a skip trace and update those addresses for any class notices that are
22 returned and re-send the notice.

23 The Class Notice satisfies the requirements of Rule of Court 3.766 and affords Settlement
24 Class Members with all due process protections required by the U.S. Constitution. Moreover,
25 the contents of the Class Notice comply with Cal. R. Ct. 3.766(d), because the Notice includes,
26 without limitation (1) a detailed explanation of the case, including the basic contentions or
27 denials of the parties; (2) a statement that the court will exclude the member from the class if the
28 member so requests by a specified date; (3) a procedure for the member to follow in requesting

1 exclusion from the class; (4) a statement that the judgment, whether favorable or not, will bind
2 all members who do not request exclusion; and (5) a statement that any member who does not
3 request exclusion may, if the member so desires, enter an appearance through counsel. The 30-
4 day deadline to opt-out or object is also reasonable, as it provides Class Members sufficient time
5 to do so and, if they so choose, to seek independent legal advice in the interim. If a Class
6 Member does not opt-out, he or she will automatically be sent a settlement check.

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

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

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

17 Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement
18 of up to \$20,000 in litigation costs, along with \$83,333.33 in attorneys’ fees (one-third of the
19 Settlement Amount). See, e.g., *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480
20 (approving 1/3 fee in the amount of \$6.33 million at a 2.13 lodestar multiplier, and holding that
21 when class action litigation establishes a monetary fund for the benefit of the class members,
22 the trial court may determine the amount of a reasonable fee by choosing an appropriate
23 percentage of the fund created); *Stuart v. RadioShack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL
24 3155645 (approving fee 1/3 of the total maximum settlement amount of \$4.5 million since 1/3
25 was “well within the range of percentages which courts have upheld as reasonable in other class
26 action lawsuits”); *Singer v. Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) 2010 WL
27 2196104, at *8 (approving fee award of 33.33% of the common fund); *Romero v. Producers*
28 *Dairy Foods, Inc.* (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841, at *4 (awarding fees of 1/3 of

1 common fund, noting: “[f]ee awards in class actions average around one-third of the
2 recovery.”); *Martin v. FedEx Ground Package System, Inc.* (N.D. Cal. Dec. 31, 2008) 2008 WL
3 5478576, at *8 (approving fees of 1/3 of common fund).

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

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

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

17 The requested service award falls within the range of incentive payments typically
18 awarded to Class Representatives in similar class actions. See, e.g., *Bond v. Ferguson*
19 *Enterprises, Inc.* (E.D. Cal. 2011) 2011 WL 2648879 (approving \$11,250 service awards in
20 trucker meal break class action); *Ross v. US Bank National Association* (N.D. Cal. 2010) 2010
21 WL 3833922, at *2 (approving \$20,000 enhancement award in California wage-and-hour class
22 action settlement); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 415, 493
23 (approving service awards of \$15,000 from a \$300,000 settlement fund in a wage/hour class
24 action); *West v. Circle K Stores, Inc.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 76558, at *28
25 (finding service awards “of \$ 15,000 each to be reasonable.”); *Glass v. UBS Fin. Servs.* (N.D.
26 Cal. 2007) 2007 U.S. Dist. LEXIS 8476, at *52 (finding “requested payment of \$25,000 to each
27 of the named Plaintiff is appropriate” in wage and hour settlement).

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VI. THE COURT SHOULD APPOINT PHOENIX AS SETTLEMENT ADMINISTRATOR

Subject to the Court's approval, the parties stipulated to Phoenix serving as the Settlement Administrator. Phoenix is experienced in administering class action settlements and has provided a flat-fee proposal to administer this settlement for \$11,000. (Mankin Decl. ¶ 38; 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 110 days after the Preliminary Approval Date, as follows:

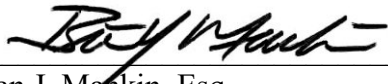
April 19, 2023	Preliminary Approval (PA) hearing
May 15, 2023 (<i>24 days after PA</i>)	Deadline for Settlement Administrator to complete first mailing of the Notice Packet to all Settlement Class Members.
June 14, 2023 (<i>30 days after mailing Class Notice</i>)	Deadline for Settlement Class Members 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 August 7, 2023 - 110 days after Preliminary Approval)	Final Approval Hearing.

1 **VIII. CONCLUSION**

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

4 Dated: March 21, 2023

LAUBY, MANKIN & LAUBY LLP

5
6 BY: 
7 Brian J. Mankin, Esq.
8 Attorneys for Plaintiff and the Proposed
9 Class
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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 March 21, 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.

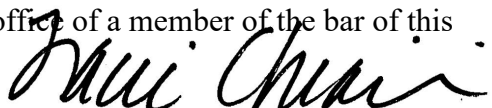
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 March 21, 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

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