

Brian J. Mankin, Esq. [CSB No. 216228]
brian@lmlfirm.com
Misty M. Lauby, Esq. [CSB No. 243009]
misty@lmlfirm.com
LAUBY, MANKIN & LAUBY LLP
5198 Arlington Ave, 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 RIVERSIDE

DARREL NORTHRUP, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

GUYOU CONSTRUCTION, INC., a
California Corporation; MARCUS A.
GUYOU, an individual; and DOES 1 through
20, inclusive;

Defendants.

Case No.: CVRI2105858
*[Assigned to Hon. Harold Hopp, Dept 1, for
all purposes]*

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATIONS IN
SUPPORT THEREOF; [PROPOSED]
ORDER**

Hearing

Date: August 7, 2023
Time: 8:30 a.m.
Dept. 1

Reservation #: 919659104630

Complaint filed: December 29, 2021

1 TO THE HONORABLE COURT AND TO ALL PARTIES AND COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on August 7, 2023, at 8:30 a.m., or as soon thereafter as
3 this matter may be heard by the Honorable Harold Hopp in Department 1 of the Riverside
4 County Superior Court located at 4050 Main Street, Riverside, CA 92501, Plaintiff Darrel
5 Northrup will move pursuant to California Rules of Court 3.769(d) and (e), for an order: (1)
6 granting preliminary certification to the settlement class for settlement purposes only; (2)
7 granting preliminary approval of the proposed settlement including appointment of Plaintiff's
8 counsel as Class Counsel; (3) authorizing the parties to provide the proposed notice to the class;
9 and (4) setting a final approval or fairness hearing. A proposed order to this effect is filed
10 concurrently herewith.

11 This motion is unopposed by Defendants Guyou Construction, Inc. and Marcus Gayou
12 and **they have agreed to waive the additional two days notice for service by email.** The
13 parties seek the Court's preliminary approval of the settlement in order to begin the process
14 towards obtaining final approval of the proposed settlement through a final fairness hearing to
15 occur approximately 120 days after preliminary approval. At that time, the Court will again have
16 the opportunity to fully consider the proposed settlement before entering a final order.

17 This Motion is based upon this Notice, the attached Memorandum of Points and
18 Authorities, the Class Action Settlement Agreement and Release of Claims and the proposed
19 Order submitted herewith, the declarations of Plaintiff's counsel (Brian Mankin and Misty
20 Lauby), Class Representative (Darrel Northrup), Defense counsel (Kathryn Lee Colgan), and the
21 Settlement Administrator (Mike Moore of Phoenix Settlement Administrators), all other papers
22 on file in this action, and on such other materials or arguments of counsel that the Court may
23 receive at or before the hearing on this Motion.

24 Dated: July 14, 2023

LAUBY, MANKIN & LAUBY LLP

25
26 BY:



27 Brian J. Mankin, Esq.
28 Attorneys for Plaintiff

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	2
	A. The Class.....	2
	B. Procedural History	2
	C. Brief Summary of the Claims and Defenses	4
III.	SUMMARY OF THE PROPOSED SETTLEMENT	5
	A. Settlement Consideration and Allocation	5
	B. Notice Procedures	6
	1. The Notice to the Class Complies with CRC Rule 3.766(d)	6
	2. The Manner of Giving Notice Complies with CRC Rule 3.766(e)	7
	3. No Claims Process	7
	4. Exclusions and Objections.....	8
	C. Settlement Allocation Formula for Settlement Shares.....	8
	D. Timing of Settlement Disbursements.....	9
	E. Tax Treatment.....	9
	F. Participating Class Members' Release of Claims	9
	G. Aggrieved Employees' Release of Claims	10
IV.	PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE.....	11
	A. Numerosity and Ascertainability	12
	B. Well-Defined Community of Interest	12
V.	THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT	13
	A. Class Action Settlements are Subject to Judicial Review and Approval.....	13
	B. The Settlement Resulted from Serious, Informed, Non-Collusive Negotiations..	15
	C. The Extent of the Investigation was More than Sufficient	15
	E. The Class Notice Conforms to All Applicable Statutes and Rules.....	16
VI.	THE SETTLEMENT VALUATION IS FAIR AND REASONABLE IN LIGHT OF THE RISKS AND DEFENSES	17
	A. Reasonable Estimate of Likely Recovery at Trial	18
	B. Support for Assessment of PAGA Penalties.....	22
VII.	THE ALLOCATION FOR ATTORNEYS' FEES, COSTS, SERVICE AWARDS, AND ADMINISTRATION COSTS IS FAIR.....	23
	A. The Proposed Attorneys' Fees are Disclosed to the Class and are Reasonable and Warrant Preliminary Approval	23
	B. The Class Representative's Requested Enhancement is Reasonable	24
	C. The Appointment of the Settlement Administrator	25
VIII.	TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING.....	25
IX.	CONCLUSION.....	26

TABLE OF AUTHORITIES

Statutes

<i>Archibald v. Cinerama Hotels</i> , (1976) 15 Cal.3d 853	17
<i>Arenas v. El Torito Rests., Inc.</i> (2010) 183 Cal.App.4th 723	12
<i>Barboza v. West Coast Digital GSM, Inc.</i> (2009) 179 Cal.App.4th 540	13
<i>Bell v. Farmers Insurance Exchange</i> (2004) 115 Cal.App.4th 715.....	25
<i>Bush v. Superior Court</i> (1992) 10 Cal.App.4 th 1374	13
<i>Cartt v. Super. Ct.</i> (1975) 50 Cal.App.3d 970	7
<i>Cho v. Seagate Tech. Holdings, Inc.</i> (2009) 177 Cal.App.4 th 734.....	14
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	11, 14, 15
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4 th 116.....	16, 18
<i>Laffitte v. Robert Half Int'l Inc.</i> (2016) 1 Cal.5th 480	24
<i>Medrazo v. Honda of N. Hollywood</i> (2008) 166 Cal.App.4th 89	12
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> (2010) 186 Cal.App.4 th 399.....	18
<i>Washington Mut. Bank v. Superior Court</i> (2001) 24 Cal.4th 906	12
<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4 th 224.....	14, 18, 24

Statutes

<i>Amchem Prods., Inc. v. Windsor</i> (1997) 521 U.S. 591	7, 11
<i>Ellis v. Naval Air Rework Facility</i> (N.D. Cal. 1980) 87 F.R.D. 15	15
<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.</i> (9th Cir. 2001) 244 F.3d 1152	13
<i>Officers for Justice v. Civil Service Com.</i> (9th Cir. 19150) 688 F.2d 615	11, 14

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

I. INTRODUCTION

Plaintiff Darrel Northrup, individually and on behalf of all others similarly situated, seeks preliminary approval of a \$300,000 wage-and-hour class action and representative PAGA settlement (the “Settlement Amount”) between the Class Members and Defendants Guyou Construction, Inc. and Marcus Gayou (collectively, “Guyou” or “Defendant”).

Through this settlement, Plaintiff seeks to represent the Class comprised of all current and former non-exempt (i.e., hourly paid) employees employed by Defendant Guyou Construction, Inc., under the job titles of inspection technician, installation foreman, installation technician, or operation & maintenance/service technician in California during the Class Period of December 29, 2017, through January 26, 2023.

Under the terms of the Class Action Settlement Agreement and Release of Claims (“Settlement Agreement” or “S.A.”), Defendant will not oppose Plaintiff’s counsel’s application for a reasonable award of attorney’s fees not to exceed one-third of the Settlement Amount (\$100,000.00), litigation expenses not to exceed \$20,000, Settlement Administrator costs of \$7,000, PAGA penalties of \$30,000 (with 75% to the LWDA and 25% to the “Aggrieved Employees” as an Individual PAGA Payment), and a Service Payment not to exceed \$7,500.

After all these deductions from the Settlement Amount, it is estimated that \$135,500 will be available to pay the Individual Class Payments to the Class Members who do not opt-out of the settlement, as follows:

	Total Amount
<i>Gross Settlement Amount</i>	\$ 300,0000
Attorneys' Fees (1/3)	\$ 100,000
Litigation Costs	\$ 20,000
Administrator Costs	\$ 7,000
PAGA Penalties	\$ 30,000
Class Representative Service Awards	\$ 7,500
<i>Net Settlement Amount</i>	\$ 135,500

The settlement is non-reversionary and Class Members will not be required to submit claim forms to receive payment, but each Class Member will receive the Class Notice containing

1 information about his/her share, the opportunity to dispute the number of weeks worked by the
2 Class Member, and the opportunity to opt-out or object to the settlement. All Class Members
3 who do not affirmatively opt-out will receive a settlement check upon the Court granting final
4 approval.

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

13 **II. BACKGROUND**

14 **A. The Class**

15 The Class is defined above and in the Settlement Agreement at ¶ 4. (*See* Exhibit A to the
16 Declaration of Brian J. Mankin ("Mankin Decl."). There are an estimated 231 individuals that
17 fall within the defined Class (the "Class Members").

18 **B. Procedural History**

19 On December 10, 2021, Plaintiff submitted a letter to the California Labor Workforce
20 Development Agency (the "LWDA") for civil penalties under the Private Attorney General Act
21 of 2004 (the "PAGA") and concurrently sent a letter to Defendant requesting the production of
22 his personnel and timekeeping records in order to further evaluate the wage and hour claims.
23 The LWDA declined to assert jurisdiction over the PAGA claims. (Mankin Decl., ¶ 13).

24 On December 29, 2021, Plaintiff filed a putative class action complaint in the Court,
25 alleging Class Claims and representative PAGA Claims, including: (1) failure to pay minimum
26 wages, (2) failure to pay overtime wages, (3) failure to provide meal periods, (4) failure to
27 provide rest breaks, (5) failure to timely pay wages each period, (6) failure to timely pay final
28 wages, (7) failure to provide accurate itemized wage statements, (8) unfair and unlawful

1 competition, and (9) related claims under PAGA. (Mankin Decl., ¶ 14).

2 Defendant retained counsel and fully denied the allegations. Defendant argued that the
3 claims were subject to binding arbitration and, on July 8, 2022, Defendant filed a motion to
4 compel arbitration and dismiss all class and PAGA claims. Defendant further disagreed with
5 Plaintiff's version of the facts and claims and noted in the Joint CMC Statement that Defendant
6 "adequately compensated all employees for hours worked, including overtime. All employees
7 were afforded appropriate breaks as is required by law. In the event of a missed meal or rest
8 break, all employees were paid appropriate meal premiums. At no time did Defendant fail to pay
9 all wages owed, either during or at the termination of employment. All employees received
10 accurate itemized wage statements at the conclusion of pay periods." Plaintiff advised that it
11 intended to oppose the motion to compel arbitration, and further pointed out that the arbitration
12 agreement provided that the Parties must "agree to first mediate and may then submit to binding
13 arbitration." As a result, Defendant agreed to withdraw its motion to compel arbitration, and in
14 exchange, the Parties agreed to attend mediation in order to avoid significant costs and fees
15 associated with a motions and/or a class certification hearing. (Mankin Decl., ¶ 15).

16 In preparation for mediation, the Parties agreed to an informal discovery process where
17 information was exchanged relating to the applicable policies and procedures, payroll and time
18 keeping records, size of the class, and potential value of the case. The exchange included
19 Defendant's policies and procedures relating to the claims at issues, a sampling of timekeeping
20 and payroll records, information relating to the size of the class. The robust exchange allowed
21 Plaintiff and his expert to take a deep dive into the claims by evaluating nearly 19,000 individual
22 shifts and over 4,400 pay periods. As such, Plaintiff and his counsel were essentially given a
23 roadmap to analyze, research, and investigate the potential claims of all similarly situated
24 employees. Moreover, due to Defendant's claims of financial hardship, Defendant informally
25 provided extensive financial records to support its claims. The parties engaged in significant
26 discussions regarding the financial condition of the company including telephone exchanges
27 between counsel, Plaintiff's financial consultant, and Defendant's officers. Ultimately,
28 Plaintiff's counsel received a report from its own consultant indicating there are indeed severe

1 financial problems and that a reduction in settlement value was substantiated. (Mankin Decl., ¶
2 16).

3 The mediation took place on January 26, 2023 with Jeff Winikow, a well-respected
4 mediator. At the conclusion of mediation, Mr. Winikow issued a mediator's proposal that called
5 for a class-wide settlement for \$300,000. Thereafter, the Parties memorialized the terms of the
6 settlement in a long-form Settlement Agreement. (Mankin Decl., ¶ 17).

7 **C. Brief Summary of the Claims and Defenses**

8 Plaintiff alleged numerous wage and hour violations on behalf of the Class. However,
9 Defendant vigorously contested and denied each of Plaintiff's material allegations on the merits
10 and as to the propriety of a class action or PAGA representative action, as discussed herein.
11 (Mankin Decl., ¶ 18).

12 First, Plaintiff alleged that he was not provided proper minimum and overtime wages due to
13 Defendants' failure to accurately record and compensate for all hours worked due to Defendants'
14 routine practice of altering clock-in, clock-out, and meal period timekeeping records resulting in
15 unpaid off-the-clock work leading to unpaid minimum, regular, and overtime wages. Moreover,
16 Plaintiff was expected to travel to various worksites throughout Southern California often resulting in
17 unreasonable unpaid, off-the-clock travel time. (Mankin Decl., ¶ 19).

18 Second, Plaintiff also earned additional compensation in the form of nondiscretionary
19 bonuses based upon the number of inspections the crew passed. However, on the occasions when
20 Plaintiff worked in excess of 8 and/or 12 hours per day and/or 40 hours per week and received
21 additional earned compensation during the pay period, Defendants failed to properly include these
22 amounts in the calculations for the regular rate of pay. Therefore, Defendants failed to pay proper
23 overtime. (Mankin Decl., ¶ 20).

24 Third, during his employment with Defendant, Plaintiff alleged that he was denied compliant
25 meal and rest periods. The sampling of timekeeping records produced by Defendant in preparation
26 for mediation confirms systemic violations. For instance, Defendants' records reveal that Class
27 members were denied compliant meal periods on a significant percentage of total shifts worked due
28 to a variety of reasons, including no first meals for shifts of six hours or more, short/interrupted/late

meal periods and no second meal periods. Importantly, Defendants’ liability for these meal violations does not require any individualized inquiry; instead, Defendants’ objective records, which show the missed, late, and short meals, will establish Defendants’ certain liability for each violation. (Mankin Decl., ¶ 21).

Fourth, Plaintiff received inaccurate and incomplete wage statements that failed to accurately state all necessary items required under Labor Code § 226. (Mankin Decl., ¶ 22).

Finally, due to its failure to pay all wages, Plaintiff alleged that Defendants also failed to comply with the mandates of Labor Code § 204 regarding the timing of the payment of wages each period and failed to comply with the mandates of Labor Code §§ 201 – 203 regarding payment of final wages upon separation of employment triggering the full 30-day waiting time penalty for each former employee. (Mankin Decl., ¶ 23).

Plaintiffs also alleged various PAGA claims arising out of the claimed violations mentioned above. However, Defendant argued that these types of “derivative” claims have no merit.

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

III. SUMMARY OF THE PROPOSED SETTLEMENT

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

A. Settlement Consideration and Allocation

The \$300,000 Settlement Amount is non-reversionary and will be paid out to Class Members without the need to submit a claim form or take any affirmative action. It includes (1) Plaintiff’s attorneys’ fees and costs, as approved by the Court; (2) a service award of \$7,500 to Plaintiff, subject to approval by the Court; (3) Settlement Administrator costs of \$7,000; (4) a \$30,000 PAGA award, 75 percent of which is to be paid to the LWDA pursuant to California Labor Code § 2699(i) and 25 percent to the Aggrieved Employees; and (5) the aggregate Individual Class Payments for Participating Class Members.

///

///

1 After all Court-approved deductions from the Settlement Amount, it is estimated that that
2 \$135,500 will be available to pay the Individual Class Payments of the Class Members. The
3 allocation per Class Member is discussed below in Section III(C).

4 **B. Notice Procedures**

5 **1. *The Notice to the Class Complies with CRC Rule 3.766(d)***

6 In reviewing proposed class notices, courts have held that the method and the content of
7 the notice should be designed to fairly apprise class members of the terms of the proposed
8 settlement and the options available to them.

9 Here, in accordance with California Rules of Court, rules 3.766(d) and 3.769(f), the Class
10 Notice (Exhibit “B” to the Mankin Declaration) provides the Class Members with (1) a brief
11 explanation of the case; (2) an explanation of each Class Member’s right to opt out of the
12 settlement class; (3) an explanation of the process (and relevant deadlines) through which a Class
13 Member could opt out of the settlement class; (4) notice about the binding nature of the
14 Judgment for Class Members who do not opt out; (5) an explanation of each Class Member’s
15 right to appear through counsel; (6) an explanation of each Class Member’s right to appear at the
16 fairness hearing and express views of the settlement, i.e., object or otherwise respond; and (7) an
17 explanation of each Class Member’s right to participate in the settlement and receive payment
18 accordingly. Furthermore, the Notice advises the Class Members that, in granting preliminary
19 approval, “the Court has determined only that there is sufficient evidence to suggest that the
20 proposed settlement might be fair, adequate, and reasonable, and that any final determination of
21 those issues will be made at the final fairness hearing.” (See Class Notice § 2).

22 The terms of the Notice also comply with this Court’s CMO by informing each Class
23 Member of his/her estimated recovery, the number of Weeks Works that each Class Members is
24 credited with receiving, and the applicable average payments, minimum, and high payments.

25 The Notice also discloses where the Class Members can obtain additional information
26 about the Settlement (i.e., at the Court’s physical location, online portal, or by contacting the
27 administrator or Class Counsel).

28 ///

1 The Court's CMO also inquires as to the likely age, education, experience and English-
2 language facility of the class members. According to Defendant, the typical Class Member is
3 above the age of 18 and speaks, understands, and writes in English. As such, the Class Notice
4 will be only provided in English. (S.A. ¶ 65).

5 **2. The Manner of Giving Notice Complies with CRC Rule 3.766(e)**

6 An appropriate notice is one that has a reasonable chance of reaching a substantial
7 percentage of the class members. *Cartt v. Super. Ct.* (1975) 50 Cal.App.3d 970, 974. The
8 settlement calls for the Settlement Administrator to update the list of addresses provided by the
9 employer by using a verification check through the US Postal National Change of Address
10 directory to the last known address of the Settlement Class Members. The Notice Packet will be
11 sent by the Settlement Administrator via first class mail to the last known address of each Class
12 Member. *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 618-620 (individual mailings to
13 each Class Member's last known address is a sufficient form of notice).

14 Here, within 14 days after Preliminary Approval Order is entered, Defendant shall
15 provide the Settlement Administrator with a list of Class Members containing names, addresses;
16 telephone numbers; Social Security Numbers; and the total number of Weeks Worked worked
17 during the Class Period and PAGA Period by each Class Member (the "Class Data"). (S.A. ¶¶ 5,
18 63). Within 10 days of receipt of the Class Data, the Settlement Administrator shall populate the
19 Class Notice for each, and send each Class Member the Class Notice and related forms via first-
20 class, United States mail. (S.A. ¶ 65).

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

25 **3. No Claims Process**

26 As explained above and in the Notice, Class Members are automatically included in the
27 Settlement and will receive payment upon the court granting final approval without being
28 required to take any affirmative action. (S.A. ¶ 25). The Notice provides Class Members with

1 sufficient information to decide whether to opt-out, object, dispute credited Weeks Worked or do
2 nothing.

3 **4. Exclusions and Objections**

4 Class Members who do not timely Opt-Out of the Settlement will be deemed to
5 participate in the Settlement and shall become a Participating Class Member without having to
6 submit a claim form or take any other action. In order to Opt-Out of the Settlement, the Class
7 Member must submit return the Request for Exclusion Form to the Settlement Administrator no
8 later than 45 days after being mailed by the Settlement Administrator (“Response Deadline”).
9 (S.A. ¶¶ 36, 70). However, Aggrieved Employees cannot opt out of the PAGA Claims, and thus,
10 will received their share of PAGA Penalties regardless of whether they opt out of the Class
11 Claims.

12 The Class Notice shall inform the Class Members of their right to object to the
13 Settlement. Any Class Member who wishes to object to the Settlement must complete and return
14 the Objection Form to the Settlement Administrator no later than the Response Deadline. (S.A. ¶
15 70(c)).

16 **C. Settlement Allocation Formula for Settlement Shares**

17 Individual Class Payments will be calculated and apportioned from the Net Settlement
18 Amount based on the number of Weeks Worked by each Class Member during the Class Period.
19 (S.A. ¶¶ 49(c)). Likewise, each “Aggrieved Employee” will receive a share of the \$7,500 in
20 PAGA Penalties allocated to the Aggrieved Employees on a pro-rata basis according to the
21 number of weeks worked during the PAGA Period. (S.A. ¶¶ 49(h)). Aggrieved Employees may
22 not opt-out of the PAGA Penalties. (S.A. ¶¶ 70(a)).

23 The Class Notice will inform Class Members of the estimated share and the number of
24 Weeks Worked during the Class Period and PAGA Period. Class Members may dispute their
25 weeks worked if they feel they worked more than Defendant’s records show by timely
26 submitting the Dispute Form and evidence to the Settlement Administrator. (S.A. ¶ 67).

27 Defendant advises that 231 Class Members collectively worked 8,359 Workweeks
28 through the end of the Class Period. Based on this information, it is estimated that: (1) the

1 average payment will be \$586.58, (2) the value per work week will be \$16.21, (3) the high class
2 payment will be approximately \$4,295.65 (based on an estimated 265 weeks in the Class Period),
3 and (4) the low payment will be approximately \$64.84 (based on an estimated 4 weeks worked).¹
4 (Mankin Decl., ¶ 45).

5 Moreover, the Aggrieved Employees will share in the \$7,500 PAGA award on a pro rata
6 basis.

7 **D. Timing of Settlement Disbursements**

8 Defendant shall deposit the Settlement Amount with the Settlement Administrator within
9 15 days after the Effective Date to pay: (1) the class attorney fees and expenses, as approved by
10 the Court; (2) the service award, as approved by the Court; (3) administrative costs, as approved
11 by the Court; (4) the PAGA award; and (5) the aggregate of all Individual Class Payments of
12 participating Class Members. Within 10 days thereafter, the Settlement Administrator shall issue
13 payments to cover all court-approved payments. (S.A. ¶¶ 71-72).

14 **E. Tax Treatment (CMO ¶ G(3)(j))**

15 The Individual Class Payments to Participating Class Members will be allocated as one-
16 third (33.33%) to wages subject to standard withholdings and two-thirds (66.67%) for interest
17 and statutory penalties (pursuant to, e.g., California Labor Code sections 203, 210, 226) from
18 which no taxes will be withheld. The Settlement Administrator will issue to each Participating
19 Class Member an Internal Revenue Service Form W-2 and comparable state forms with respect
20 to the wage allocation and a Form 1099 with respect to the penalties and interest allocations.
21 (S.A. ¶ 47(d)). Individual PAGA Payments to Aggrieved Employees will be treated as civil
22 penalties and paid on a Form 1099.

23 **F. Participating Class Members' Release of Claims**

24 In exchange for the payments above, the Participating Class Members will release the
25 claims and parties as required by CMO ¶ G(3)(e). Specifically, the Settlement Agreement at ¶
26 30 defines the "Released Claims" as follows:
27
28

¹ These are estimated figures. The final/actual figures will be calculated by the Settlement Administrator and inserted into the Class Notice.

1 “Released Class Claims” or “Class Claims” by the Participating Class
2 Members upon Final Approval of the Settlement will include all claims
3 stated in the operative Complaint and those based solely upon the facts in
4 the Complaint, including: (a) failure to pay minimum wages, (b) failure to
5 pay overtime wages, (c) failure to provide meal periods, (d) failure to
6 provide rest breaks, (e) failure to failure to timely pay wages upon
7 separation of employment, (f) failure to provide accurate itemized wage
8 statements, (g) unfair and unlawful competition, and (h) all other claims
9 for statutory penalties based on the facts or claims alleged in the operative
10 complaint.

11 This definition “Released Claims” complies with CMO ¶ G(3)(e)(ii) and, because the
12 Settlement Agreement at ¶ 30 specifies that “the time period governing the Released Claims [...] shall be the same as the Class Period,” it also complies with CMO ¶ G(3)(e)(iii).

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

23 The Settlement Agreement at ¶ 32 also defines the “Released Parties” as “Defendants,
24 and their officers, directors, and agents.” This definition with the CMO ¶ G(3)(e)(i).

25 Based on the foregoing, Plaintiff submits that the Release complies with all aspects of
26 CMO ¶ G(3)(e).

27 **G. Release of PAGA Claims**

28 The Settlement Agreement at ¶ 31 specifically complies with the CMO ¶ G(3)(e)(iv) by
limiting the release of PAGA claims to only Plaintiff and the LWDA (i.e., the Aggrieved
Employees are not releases PAGA claim), and moreover, the PAGA release is only as to the
claims stated in the operative Complaint and LWDA Notice letter, as follows:

1 “PAGA Released Claims” means any and all PAGA claims that Plaintiff
2 alleged against the Released Parties, **on behalf of himself and the State of**
3 **California**, based on the facts stated **in the operative Complaint in the**
4 **Action and in the LWDA notice letter**, including all PAGA claims seeking
5 civil penalties that premised upon (a) failure to pay minimum wages, (b)
6 failure to pay overtime wages, (c) failure to provide meal periods, (d) failure
7 to provide rest breaks, (e) failure to failure to timely pay wages each period
and upon separation of employment, (f) failure to provide accurate itemized
wage statements, and (g) all other claims for civil penalties recoverable under
the Private Attorneys General Act, Labor Code §§ 2698 *et seq.* based on the
facts or claims alleged in the operative complaint. The time period governing
the Released PAGA Claims shall be any time during the PAGA Period.

8 Additionally, the Settlement Agreement at ¶ 53 provides further clarification showing
9 compliance with the CMO:

10 Upon entry of the Final Approval Order and Defendants’ funding of the
11 Settlement Amount, Plaintiff – in his individual capacity and on behalf of the
12 State of California and LWDA – shall completely release and discharge the
Released Parties from the Released PAGA Claims for the PAGA Period.

13 Finally, even if an Aggrieved Employee requests exclusion from the Class settlement,
14 that individual will still receive a pro-rata share of PAGA Penalties. (S.A. at ¶ 70(a)).

15 **IV. PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE**

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

1 need not inquire whether the case, if tried, would present intractable management problems . . .
2 for the proposal is that there be no trial.”).

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

5 **A. Numerosity and Ascertainability**

6 Numerosity is met if a proposed class is so large that joinder of all members would be
7 impracticable. See Cal. Code Civ. Proc. § 3150. A proposed settlement class is ascertainable if
8 the class members can be objectively identified and given notice of the litigation without
9 unreasonable time or expense. See *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th
10 89, 101. Here, according to Defendant’s records, there are approximately 231 Class Members.
11 This figure satisfies the numerosity requirement.

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

13 *1. Commonality*

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

21 *2. Typicality*

22 Typicality “focuses on whether there exists a relationship between the Plaintiff’s claims
23 and the claims alleged on behalf of the class.” See Herbert B. Newberg & Alba Conte, *Newberg*
24 *on Class Actions* (“*Newberg*”) § 3:13 (4th ed. 2002). Again, the Parties dispute whether
25 Plaintiff’s claims are typical of the Class for any continued litigation of the Action, but agree for
26 the purposes of this settlement only, that Plaintiff asserts the claims as those alleged on behalf of
27 the class, all of which are at the core of the lawsuit.

28 ///

1 3. Adequacy of Representation

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

8 Adequacy may be established by the fact that counsel are experienced practitioners. See
9 *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001)
10 244 F.3d 1152, 1162. Here, Plaintiff is represented by Class Counsel with extensive experience
11 in wage and hour class actions like the instant matter. (Mankin Decl., ¶¶ 2-6).

12 4. Superiority

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

17 **V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**

18 **A. Class Action Settlements are Subject to Judicial Review and Approval**

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

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

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

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

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

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

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

24 At the preliminary approval stage, the Court need only determine that the settlement falls
25 within the “range of possible judicial approval,” so that notice to the class and the scheduling of
26 the fairness hearing are worthwhile. See *Newberg* § 11:25. Indeed, the Court should grant
27 preliminary approval if there are no “grounds to doubt its fairness or other obvious deficiencies .
28 . . and [the settlement] appears to fall within the range of possible approval.” *Manual For*

1 *Complex Litigation* (Third) § 30.41 (1995); see *Dunk*, 48 Cal.App.4th at 1802. A “presumption
2 of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2)
3 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)
4 counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Dunk*,
5 *supra* (citing *Newberg* § 11:41). As shown below, the settlement falls well within the range of
6 approval because there are no grounds to doubt its fairness.

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

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

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

18 Plaintiff and his counsel thoroughly investigated and evaluated the factual and legal
19 strengths and weaknesses of this case before reaching the settlement. As described above, the
20 settlement was reached after extensive investigation and research, thorough calculations and risk
21 evaluation, and a substantial pre-mediation exchange of information, data, and documents.
22 (Mankin Decl., ¶¶ 12-24).

23 **D. Plaintiff’s counsel is Experienced in Similar Wage-and-Hour Litigation**

24 The view of the attorneys actively conducting the litigation is entitled to significant
25 weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework Facility* (N.D.
26 Cal. 1980) 87 F.R.D. 15, 18, *aff’d* (9th Cir. 1981) 661 F.2d 939; *Kullar v. Foot Locker Retail, Inc.*
27 (2008) 168 Cal.App.4th 116, 128 (court must take into account “the experience and view of
28 counsel”) (internal quotation and citation omitted).

1 Plaintiff's counsel is highly experienced in Class/PAGA litigation, having achieved large
2 settlements and verdicts, including one of the largest PAGA awards in California's history,
3 collecting over \$250 million for its clients. (Mankin Decl., ¶¶ 2-6). Plaintiff's counsel,
4 operating at arm's length, weighed the strengths and risks of this case, and are of the view that
5 this is a fair and reasonable settlement in light of the nature of the claims, realistic risk adjusted
6 value of damages, complexities of the case, state of the law, and uncertainties of class
7 certification and litigation. (*Id.*, ¶¶ 55-59).

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

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

14 The proposed Class Notice and proposed plan for the Settlement Administrator to mail
15 the Class Notice to the last known address of all class members complies with all the
16 requirements of California Rule of Court 3.79(f) and 3.766(b). The contents of the proposed
17 Class Notice include (1) the material terms of the settlement; (2) the estimated settlement share;
18 (3) the proposed attorneys' fees, litigation expenses, and the costs of administration; (4) details
19 about the final fairness hearing and how class members may elect to exclude themselves or make
20 an objection; and (5) how class members can obtain additional information.²

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

28

² See Class Notice, Exhibit B to Mankin Decl.

1 Administrator will perform a skip trace and update those addresses for any class notices that are
2 returned and re-send the notice.

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

16 **VI. THE SETTLEMENT VALUATION IS FAIR AND REASONABLE IN LIGHT OF**
17 **THE RISKS AND DEFENSES**

18 To evaluate a settlement, the parties must provide “basic information about the nature and
19 magnitude of the claims in question and the basis for concluding that the consideration being
20 paid for the release of those claims represents a reasonable compromise.” *Kullar, supra*, 168
21 Cal.App.4th at 133.

22 To that end and as required by the Court’s CMO, the Mankin Declaration provides the
23 Court with the maximum potential damages and penalties at trial (CMO ¶ G(3)(a)(ii)) and Class
24 Counsel’s reasonable (i.e., risk-adjusted) expectation of trial award as to damages and penalties
25 (CMO ¶ G(3)(a)(iii)). (See Mankin Decl. ¶¶ 27-44), which is the method requested by the Court
26 at CMO ¶ G(3)(a).

27 As shown in the moving papers, this Settlement is fair, reasonable, and merits approval in
28 light of the reasonable estimate of the total damages and penalties if successful at trial.

1 **A. Maximum Potential Recovery and Reasonable Estimate of Likely Recovery**
2 **at Trial**

3 When evaluating a settlement, the most important consideration is “an understanding of
4 the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz v.*
5 *BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399. And because the
6 amount in controversy (*i.e.*, the maximum theoretical value if all claims succeeded at trial) fails
7 to account for the many risks of continued litigation, settlement should be analyzed based on a
8 reasonable estimate of the likely recovery at trial. *Wershba, supra*, 91 Cal.App.4th at 250
9 (“Compromise is inherent and necessary in the settlement process ... even if the relief afforded
10 by the proposed settlement is substantially narrower than it would be if the suits were to be
11 successfully litigated, this is no bar to a class settlement because the public interest may indeed
12 be served by a voluntary settlement in which each side gives ground in the interest of avoiding
13 litigation”).

14 Therefore, to permit the necessary analysis, the Mankin Declaration, filed concurrently
15 herewith, provides full detail regarding the claims, the maximum theoretical value, as well as the
16 risks and defenses that were considered when determining the risk-adjusted values. For the sake
17 of brevity, this full detail is included in the Mankin Declaration; the sections below provide the
18 maximum theoretical value and the reasonable estimate of likely recovery at trial for each claim.

19 **Failure to Pay Wages**

20 Plaintiff alleges that Defendant employed policies and practices that required employees
21 to work off the clock without compensation. Minimum wage claims include allegations that
22 Defendant had an illegal practice of adjusting timeclock entries to deduct minutes of time with
23 no explanation. Moreover, Plaintiff claims that he and Class Members were required to clock
24 out for lunch even though they were still performing work, they were prevented from leaving the
25 jobsite during lunch due to work duties, and when lunch was taken the hours were rounded and
26 not accurately recorded resulting in uncompensated compensable time. Plaintiff estimated that
27 the maximum potential value of this claims was \$283,490.46 in unpaid wages. This is based on
28 an estimated 10,448.75 affected shifts (25% of 8,359 WW x 5 days per week for 41,798

1 estimated shifts) with deductions of approximately 2 minutes per shift at a rate of \$1.98 [\$58.75
2 (\$23.50 avg. rate of pay x 1.5 (OT rate) + \$23.5 liquidated damages under LC 1194.2)/60 x 2)
3 for a total of \$20,668.53. The meal deduction claim is based on 18,809 shifts (45% of 41,798
4 total shifts) with 30 minutes meal autodeduct multiplied by the average rate of pay of \$23.50 (30
5 minutes = \$11.75) for a maximum value on that claim of \$221,006.93. Together, the maximum
6 value of the minimum wage claims is \$241,695.46. Moreover, Plaintiff alleges that Defendant
7 failed to pay overtime rate due to its failure to include non-discretionary bonuses in the regular
8 rate calculation for overtime. Here, Plaintiff estimates that there was an overtime underpayment
9 of approximately \$10 on 50% of 8,359 workweeks for a maximum value of \$41,795. While
10 Plaintiff initially made wage claims related to unpaid time spent commuting to and from jobsites,
11 further investigation revealed that employees were only required to clock out before returning
12 home if the jobsite was under 60 miles from the corporate office. As a result, this time was likely
13 noncompensable commute time for which does not add value to the wage claims.

14 At mediation, Defendant argued the estimated number of times that the deductions of
15 time occurred was too high and was actually much lower, and that employees were not required
16 to work off-the-clock during lunch periods and that these claims could not be certified due to the
17 individualized nature of the proof. As a result, Plaintiff assigned a 50% class certification
18 discount and a 50% merits discount to these claims for a risk adjusted valuation of \$60,424. The
19 same risk adjustment was made to overtime claims due to the fact that the Defendant argued that
20 \$10 was far too high per shift and that fewer than 50% of workweeks were affected resulting in a
21 risk adjusted value of \$10,449. The total risk adjusted value for all wage claims is \$70,873.

22 Plaintiff also pursued PAGA claims based on the same theory of liability and calculated a
23 risk adjusted total is for minimum wage penalties is \$545,900 (5,459 total PAGA Pay periods x
24 \$100 = \$545,900). Since the same merits risks applied to the PAGA claims and because the
25 Court has the right to make discretionary reductions of PAGA claims, Plaintiff applied a 75%
26 risk reduction to the minimum wage PAGA claims for a total of \$136,475 (\$545,900– 75% =
27 \$136,475). Since overtime claims applied to only 50% of pay periods, the maximum overtime
28 penalties is \$272,950 with a 75% risk adjusted value of \$68,237.50 (\$272,950 x .25). (Mankin

Decl. ¶¶ 28-30).

Meal and Rest Break Claims

Plaintiff also alleged meal and rest break claims against Defendant. Plaintiff estimated a maximum value based on 36,364 unique meal period violations (87% violation rate on 41,798 shifts) amounting to a maximum value of \$854,560 in class damages for meal periods (36,364 x \$23.50 avg. rate of pay). Plaintiff also alleged rest break claims with a maximum value of \$471,445.25 assuming a 50% violation rate on 20,061.5 (50% of 40,123 shifts over 3.5 hours) total shifts multiplied by the average rate of pay of \$23.50.

However, these calculations do not account for various risks and defenses. For instance, Defendant strongly disputed that Plaintiff could obtain class certification, arguing a lack of commonality of the legal claims and injuries. Defendant further argued that it complied with the applicable law and that any purported deviations therefrom were individualized in nature, thereby limiting Plaintiff's ability to certify the class. While Plaintiff asserts that this is a suitable case for certification, we realize that there is always a significant risk associated with class certification proceedings, which could significantly limit the claims that we could pursue on a class basis. Moreover, Defendant provided certain authorities suggesting that Plaintiff's main argument regarding rest periods, namely that employees were forbidden from leaving the premises during breaks, was not viable.

Considering the many risks and defenses to these claims, Plaintiff placed a 50% class certification risk and 50% merits risk for a risk-adjusted value of \$213,640 for meal period claims. Adjusting for risk at 50% for class certification and 50% for merits, Plaintiffs assigned an adjusted value of \$117,861 to the rest claims.

Additionally, based on the same risk factors in addition to potential risk associated with merits based defenses, stacking of PAGA penalties and discretionary reductions, Plaintiff assigned a 75% risk adjustment to both meal and rest claims and assigned the risk-adjusted value of the related PAGA claims. Maximum penalties for meal periods were estimated to be \$436,720 (80% of 5459 PAGA pay periods x \$100) minus 75% for a total risk adjusted value of \$109,180. The maximum penalty for rest periods was estimated to be \$272,950 (50% of 5459

1 PAGA pay periods x \$100) minus 75% for a total risk adjusted value of \$68,237.50. (Mankin
2 Decl. ¶¶ 31-34).

3 **Failure to Timely Pay Wages Upon Separation of Employment and Each Period**

4 Additionally, Plaintiff alleged that Defendant failed to timely pay all wages owed to the
5 Class Members upon separation of employment. Based on this theory of liability, Plaintiff
6 calculated the maximum waiting time penalties to be \$1,167,480 based on 207 former employees
7 x \$188 per day (8 hours x \$23.5 avg. rate of pay) x 30. Defendant argued that it would defeat
8 Plaintiff's unpaid wage claims and, because the waiting time penalty claims were derivative of
9 the unpaid wages, Plaintiff's Labor Code § 203 would fail. Therefore, Plaintiff assigned a 50%
10 class certification risk adjustment and a 50% merits adjustment for a total risk adjusted value of
11 \$291,870.

12 Plaintiff assigned the same 75% adjustment for merits and discretionary deductions to the
13 total PAGA penalty value of \$12,400 (124 former employees during PAGA period x 100) for a
14 risk adjusted penalty value of \$3,100. Additionally, Plaintiff made PAGA claims related to
15 Defendants failure to pay wages timely each pay period with a maximum value of \$545,900
16 (5459 PAGA pay periods x \$100) with a 75% risk reduction for an adjusted value of \$148,725.
17 (Mankin Decl. ¶¶ 35-36).

18 **Wage Statement Claims**

19 Plaintiff also alleged claims that Defendant failed to provide accurate itemized wage
20 statements in compliance with Labor Code § 226 making it impossible for Plaintiffs and
21 employees to determine whether they were paid correctly. At mediation, Defendant denied that
22 the wage statements provided were improper.

23 Plaintiff calculated the maximum potential value of this claim as \$534,800 by
24 multiplying one paystub per class member during the wage statement period (222) by \$50, then
25 multiplying the remainder of the 5,237 paystubs by \$100. Plaintiff assigned a risk adjustment of
26 5% that the class would not be certified and 30% as to the merits, with a risk-adjusted value of
27 \$355,642.

28 ///

1 Additionally, Plaintiff calculated the 75% risk-adjusted value of the PAGA penalties to
2 be \$136,475 (5459 PAGA pay periods x \$100 = \$545,900 reduced by 75%). (Mankin Decl. ¶¶
3 37-39).

4 In sum, the total maximum value of the class damages is \$3,028,285. when factoring in
5 the defenses and risks of ongoing litigation, Plaintiffs estimate the risk-adjusted class recovery as
6 follows:

7	• Unpaid Wages	\$	70,873
8	• Meal Periods	\$	213,640
9	• Rest Breaks	\$	117,861
10	• 203	\$	291,870
11	• Wage Statements	\$	<u>355,642</u>
12	Total	\$	979,013

13 While the proposed Settlement is approximately 30.6% of the risk-adjusted class
14 damages, as noted above, Plaintiff also had to take into account the dire financial condition of the
15 company. Due to these concerns and potential for the Defendant to file bankruptcy, Plaintiff
16 believes that the settlement was the best possible outcome for the Class. For these reasons, the
17 Partis submit that the agreed-upon Settlement is fair and reasonable. (Mankin Decl. ¶ 40-41).

18 **B. Support for Assessment of PAGA Penalties**

19 While the PAGA civil penalty would have a maximum value in the low seven figures,
20 this figure fails to acknowledge that courts have wide latitude to reduce the amount of civil
21 penalties “based on the facts and circumstances of a particular case” and if “to do otherwise
22 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
23 2699(e)(2). Moreover, Defendant argued against the merits of the underlying claims and
24 particularly that the “willfulness” standard and/or “good faith” defenses mitigated the civil
25 penalty claims and rendered any such penalties as uncertain. Defendant also argued that it is
26 improper to stack civil penalty claims on top of the underlying claim.

27 Plaintiff calculated the maximum penalty for the 5459 PAGA pay periods at \$2,681,720
28 as follows:

• Wages	\$	818,850
• Meal Periods	\$	436,720
• Rest Breaks	\$	272,950
• Wage Statements	\$	545,900
• 204	\$	545,900
• 203 (124 former employees x \$100))	\$	<u>12,400</u>
Total	\$	2,681,720

(Mankin Decl. ¶ 42).

Plaintiff applied a 75% risk adjustment to each PAGA claim to account for the various defenses and potential judicial reduction for an adjusted value of \$670,430. (Mankin Decl. ¶ 43).

The proposed Settlement allocates \$30,000 of the gross settlement amount to PAGA claims, of which 75% (or \$22,500) will be paid to the California LWDA and 25% (or \$10,000) will be allocated to the Aggrieved Employees as payment of the settlement. The Mankin Declaration provides all information required under CMO ¶ G(3) and G(9) regarding valuation of the PAGA claims, along with information as to why this allocation is fair. (Mankin Decl. ¶¶ 30, 34, 36, 39, 42-44, and 49-54).

VII. THE ALLOCATION FOR ATTORNEYS’ FEES, COSTS, SERVICE AWARDS, AND ADMINISTRATION COSTS IS FAIR

A. The Proposed Attorneys’ Fees are Disclosed to the Class and are Reasonable and Warrant Preliminary Approval

Under the terms of the Settlement Agreement, Class Counsel is collectively requesting attorneys’ fees equal to one-third of the (1/3) Settlement Amount (\$100,000.00).

The requested fees of one-third of the Settlement Amount is consistent with California law. See, *e.g. Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480 (the percentage of the fund method survives in California class action cases) (“*Laffitte*”). There has been a significant amount of work performed by Class Counsel before this Court, before the mediator, and “behind the scenes.” Class Counsel conducted extensive research, investigation, and analysis of each potential cause of action and claim for damages in Plaintiff’s case. After filing the Complaint,

1 Class Counsel also conducted informal discovery prior to mediation in order to evaluate the
2 claims on a class-wide basis.

3 Class Counsel's investigation and preparation for settlement negotiations included review
4 and analysis of payroll/time records and written policies and procedures. Even after the parties
5 reached a settlement in principle, it took considerable work to fully realize and prepare the
6 Settlement Agreement and to prepare all of the supporting documentation.

7 "In general, questions whether a settlement was fair and reasonable, whether certification
8 of the class was proper, and whether the attorney fee award was proper are matters addressed to
9 the trial court's broad discretion." *Wershba, supra*, 91 Cal.App.4th at 234-235. The custom
10 and practice in class actions is to award approximately *one-third* of a common fund as a fee
11 award. *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 (awarding one-third of the
12 common fund is consistent with, and in the range of, awards in other class action lawsuits.) This
13 practice was recently affirmed by the California Supreme Court in *Laffitte, supra*.

14 The proposed attorneys' fees are disclosed to the Settlement Class Members in the
15 proposed Notice. Preliminarily, the fees are reasonable, and costs are reasonably capped at
16 \$20,000, subject to proof at time of final approval. Defendant does not oppose these requests.

17 For purposes of this Motion for preliminary approval of the Settlement, the requested fees
18 and costs fall well within the range of reasonableness.

19 **B. The Class Representative's Requested Enhancement is Reasonable**

20 A service payment to a class representative in class action settlements is intended to
21 recognize his level of risk, the time expended, and the efforts undertaken on behalf of the class.
22 Courts routinely approve incentive awards to compensate named plaintiffs for the services they
23 provide and the risks they incurred during the course of the class action litigation. See, e.g., *Bell*
24 *v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726 (upholding "service
25 payments" to named Plaintiff for their efforts in bringing class action).

26 In this case, the parties agreed to a service award to the Plaintiff in the amount of \$7,500.
27 The proposed incentive award is reasonable given the time and effort that Plaintiff devoted to
28 this case, including providing factual background for the pleadings; reviewing the litigation

documents; providing information and documents about Defendant's policies and practices; participating in phone calls to discuss litigation and settlement strategy; making himself available throughout the litigation to assist with analyzing the claims and defenses; helping Class Counsel prepare for the mediation; making himself available for a full-day mediation, and reviewing the settlement documents. Plaintiff agreed to participate in this case with no guarantee of personal benefit.

The Class Representative also assumed significant risk in bringing this litigation—namely, had he lost, he could have been ordered to pay Defendant's costs. Moreover, Plaintiff elected to pursue the class action claims on behalf of other employees while foregoing any potential separate individual claims. As part of the negotiations, the parties ultimately reached a settlement of the class claims but the requested service award is also reasonable and appropriate given that Plaintiff agreed to put the interests of the class ahead of their interests and performed work on behalf of the class while entering into a general release as part of these settlements. (Mankin Decl. ¶¶ 60-61).

Accordingly, the service award to Plaintiff is justified and warranted as part of the overall settlement.

C. The Appointment of the Settlement Administrator

After Plaintiff's counsel sought bids from five separate administrators, the Parties mutually agreed to retain Phoenix Settlement Administrators as the Settlement Administrator based on it providing the lowest bid. Phoenix is experienced in administering class action settlements and has submitted a fixed flat fee proposal to administer the settlement for \$7,000. (See Declaration of Mike Moore of Phoenix Settlement Administrators ¶ 17.)

VIII. 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 request that the Court schedule a hearing for final approval of the settlement approximately 120 days after the Preliminary Approval

Hearing Date, in accordance with the following schedule:

<i>Date PA Order is Entered</i>	Preliminary Approval (PA) is Granted
<i>24 days after PA</i>	Deadline for Settlement Administrator to complete first mailing of the Notice Packet to all Settlement Class Members.
<i>45 days after mailing Class Notice</i>	Deadline for Settlement Class Members to submit Requests for Exclusion and Objections to the settlement.
<i>16 court days before Final Approval hearing</i>	Deadline for Plaintiff to file and serve Motion for Final Approval of Settlement and application for award of attorneys' fees, costs and service payments.
<i>9 court days before Final Approval hearing</i>	Deadline for filing of any written opposition to Plaintiff's Motion for Final Approval of Settlement, or filing any response to an objection to the settlement.
<i>5 court days before final approval hearing</i>	Deadline for filing of any written reply to opposition Motion for Final Approval of Settlement.
<i>TBD (Approximately 120 days after Preliminary Approval is granted)</i>	Final Approval Hearing.

IX. CONCLUSION

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

Dated: July 14, 2023

LAUBY, MANKIN & LAUBY LLP

BY:



Brian J. Mankin, Esq.
Attorneys for Plaintiff

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

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES; 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.

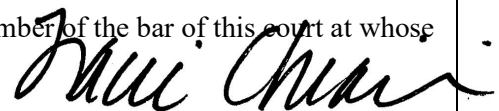
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service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

Kathryn C. Lee, Esq.
Emily Meeson, Esq.
TYSON & MENDES, LLP
5661 La Jolla Blvd.
La Jolla, CA 92037
858-459-4400
858-459-3864-fax
klee@tysonmendes.com
emeeson@tysonmendes.com
Attorneys for Defendants GUYOU CONSTRUCTION, INC. and MARCUS A. GAYOU