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

Coordination Proceeding Special Title
(Rule 3.550)

AMERICAN TIRE WAGE AND HOUR
CASES

*Rafael Martinez, et al. v. American Tire
Distributors, Inc., et al.*
Case No.: CIVSB2133396
(San Bernardino Superior Court – 12-8-21)

*Germaine Tanner Sr., et al. v. American
Tire Distributors, Inc., et al.*
Case No.: 22CECG00735
(Fresno County Superior Court – 03-8-22)

Case No.: JCCP 5239
[Assigned to the Hon. Judge David Cohn, Dept.
S26, for all purposes]

**PLAINTIFFS' UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

*Filed Concurrently with [Proposed] Order
and Declarations of Brian Mankin, Esq., Peter
Carlson, Esq., Daniel Gaines, Esq., and
Plaintiffs Rafael Martinez and Germaine
Tanner*

Hearing
Date: April 25, 2023
Time: 10:00 a.m.
Dept.: S26

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on April 25, 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, Plaintiffs
5 Rafael Martinez and Germaine Tanner, Sr., individually and on behalf of all others similarly
6 situated, will and hereby do move the Court for entry of an Order preliminarily approving the
7 Parties' class action settlement, including:

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

24
25 Dated: April 3, 2023

LAUBY, MANKIN & LAUBY LLP
GAINES & GAINES, APLC

26
27
28 BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Rafael Martinez and Germaine Tanner (“Plaintiffs”) seek preliminary approval
4 of a \$2,195,000 wage-and-hour class action settlement on behalf of approximately 950 current
5 and former non-exempt employees employed by Defendant American Tire Distributors, Inc.
6 (“Defendant” or “ATD”) in California at any time from June 16, 2019, through February 6, 2023
7 (the “Class Period”).

8 Under the terms of the Settlement Agreement,¹ Defendant will not oppose Plaintiffs’
9 Counsel’s application for a reasonable award of attorney’s fees not to exceed 1/3 of the
10 Settlement Amount, litigation expenses not to exceed \$25,000, Administrator Costs of
11 \$13,000.00, PAGA penalties of \$150,000 (with 75% to the LWDA and 25% to the Aggrieved
12 Employees on a pro rata basis), and Service Payments of \$10,000 to each Plaintiff (the “Class
13 Representatives”). (S.A. ¶ 48, *et seq.*)

14 After all Court-approved deductions from the Settlement Amount, it is estimated that
15 \$1,255,333.34 will be available to pay the Class Members, as follows:

16

<i>Settlement Amount</i>	\$ 2,195,000.00
Attorneys’ Fees (1/3)	\$ 731,666.66
Litigation Costs (not to exceed)	\$ 25,000.00
Administrator Costs	\$ 13,000.00
PAGA Penalties	\$ 150,000.00
Class Representative Service Awards	\$ 20,000.00
<i>Net Settlement Amount</i>	\$ 1,255,333.34

20

21 Assuming 950 Class Members, the average payment to each Class Member will be
22 approximately \$1,321.40. However, the actual payment will be calculated on a pro-rata basis
23 according to the number of Weeks Worked by each Class Member during the Class Period, with
24 each Work Week having a value of approximately \$13.72. Also, approximately 775 Aggrieved
25 Employees will share in the \$37,500 PAGA Penalties (25% of \$150,000), calculated pro-rata
26 based on Weeks Worked during the PAGA Period. (Mankin Decl. ¶ 9; S.A. ¶ 48(h)).
27

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

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

8 **II. BACKGROUND**

9 **A. THE CLASS**

10 The Class is defined as follows:

11 All current and former nonexempt employees employed by
12 Defendant in California at any time during the Class Period (which
13 is June 16, 2019, through February 6, 2023). (S.A. ¶¶ 6, 10).

14 **B. PROCEDURAL HISTORY**

15 *As to the Martinez Action*

16 On December 8, 2021, Plaintiff Martinez filed his putative class action against Defendant
17 and, on February 8, 2022, he filed his operative First Amended Complaint, alleging class and
18 PAGA claims, including: (a) failure to pay minimum wages, (b) failure to pay overtime wages,
19 (c) failure to provide meal periods, (d) failure to provide rest breaks, (e) failure to failure to
20 timely pay wages each period and upon separation of employment, (h) failure to provide accurate
21 itemized wage statements, and (i) unfair and unlawful competition. (S.A. ¶ 40).

22 ATD retained counsel and immediately began to defend the case. On March 3, 2022,
23 Defendant removed the *Martinez Action* to the U.S. District Court for the Central District of
24 California under purported diversity jurisdiction). Plaintiff contended that the removal was
25 improper, and the parties commenced a meet and confer which resulted in Defendant agreeing to
26 remand the action back to San Bernardino County Superior Court. (Mankin Decl. ¶ 14).

27 After remand, Plaintiff propounded a full set of written discovery on ATD, including
28 special and form interrogatories, requests for production, and requests for admission. (*Id.*).

1 *As to the Tanner Action*

2 On March 8, 2022, Plaintiff Tanner filed his putative class action in Fresno County
3 Superior Court against Defendant. Then, on April 4, 2022, Plaintiff Tanner filed his operative
4 First Amended Complaint, alleging class and PAGA claims, including: (a) failure to pay all
5 minimum and overtime wages, (b) failure to provide rest periods, (c) failure to provide meal
6 periods, (d) failure to provide accurate itemized wage statements, (e) claims for injunctive relief
7 and restitution under the UCL, and (f) claims under PAGA. (S.A. ¶ 41).

8 *The Coordination Proceedings*

9 On or around May 11, 2022, counsel for Plaintiff Tanner filed a petition to coordinate the
10 *Tanner* Action with the *Martinez* Action. On August 12, 2022, this Court granted Plaintiff
11 Tanner's petition for coordination and both cases are now assigned to this department. (Mankin
12 Decl. ¶ 15). After the coordination proceedings, counsel for Plaintiffs Martinez and Tanner met
13 and conferred and agreed to prosecute the claims under a Joint Prosecution Agreement. (*Id.*).

14 *Mediation*

15 After coordination, the parties discussed how to proceed and, ultimately, agreed to attend
16 private mediation. (Mankin Decl. ¶ 16).

17 In preparation for the mediation, the Parties informally exchanged documents and
18 information that allowed both sides to calculate the potential damages and evaluate potential risk,
19 including policies and procedures pertaining to each claim alleged, and statistics relating to the
20 number of current and former employees, number of shifts, pay periods worked and other things.
21 ATD also provided their written policies and practices and a robust sampling of payroll and
22 timekeeping records for approximately 25% of all Class Members. This information enabled
23 both parties to take a deep dive into the claims. Additionally, during this process, Plaintiffs and
24 their counsel analyzed, researched, and investigated the potential issues, including matters
25 related to the calculation of damages, trial, and appellate issues and risks. (Mankin Decl. ¶ 17).

26 On March 2, 2023, the parties participated in mediation with Marc Feder, a well-
27 respected employment mediator, and the matter resolved via mediator's proposal. The Parties
28 now seek the Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 18).

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

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

3 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

4 The \$2,195,000 Settlement Amount² is non-reversionary and will be paid out to Class
5 Members without the need to submit a claim form or take any affirmative action. It includes (1)
6 Plaintiffs' attorneys' fees and costs, as approved by the Court; (2) a service award of \$10,000 to
7 each Plaintiff, subject to approval by the Court; (3) Administration Costs, not to exceed \$13,000;
8 (4) a \$150,000 PAGA award, 75% of which is to be paid to the LWDA pursuant to California
9 Labor Code § 2699(i) and 25% to the Aggrieved Employees; and (5) the aggregate of all
10 Individual Settlement Amounts of the Participating Class Members. (S.A. ¶ 48). Defendant will
11 separately pay its share of employer payroll taxes and withholdings. (S.A. ¶ 48(a)).

12 **B. NOTICE PROCEDURES**

13 The proposed Notice will be provided to the Class showing the estimated amounts that
14 each Class Member will receive, the number of Work Weeks credited as a Class Member and/or
15 Aggrieved Employee (*See* Exhibit B to Mankin Decl.). Within 21 calendar days after entry by
16 the Court of its Order of Preliminary Approval, Defendant shall provide the Administrator with
17 the "Class Data" consisting of Class Member names, addresses, phone numbers, Social Security
18 Numbers, and Weeks Worked during the Class/PAGA Period(s) (S.A. ¶¶ 9, 62).

19 Within 10 calendar days of receipt of the Class Data, the Administrator shall calculate the
20 numbers for each Class Member, populate the Notice, and send each Class Member the Notice
21 via first-class, United States mail. (S.A. ¶ 64).

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

25 ///

26
27 ² The \$2,195,000 Settlement Amount is subject to increase if the "Escalator Clause" is triggered.
28 S.A. ¶¶ 17, 48(a). If this clause is triggered, the Settlement Amount and other figures will shift
upward, such as attorneys' fees (but this is still constrained to 1/3 of the Settlement Amount)
along with increased Administration Costs (*see* S.A. ¶ 48(g)).

1 **C. EXCLUSION AND OBJECTION PROCEDURES**

2 Class Members who do not timely Opt-Out of the Settlement will be deemed to
3 participate in the Settlement and shall become a Participating Class Member without having to
4 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
5 must submit a written request to the Administrator no later than 45 days after being mailed by
6 the Administrator (“Response Deadline”). (S.A. ¶ 36). Any Opt-Out request that is not
7 postmarked by the Response Deadline will be invalid, unless a Notice was remailed in which
8 case the Class Member’s exclusion or objection must be returned by the later of the original
9 Notice Response Deadline or 15 calendar days after the remailing of the notice. (S.A. ¶¶ 65, 69).

10 The Class Notice shall inform Class Members of their right to object to the Settlement.
11 Any Participating Class Member who wishes to object to the Settlement may submit a written
12 objection to the Administrator no later than the Response Deadline. (S.A. ¶ 69(c)).

13 **D. SETTLEMENT ALLOCATION FORMULA FOR SETTLEMENT SHARES**

14 The amount of each Class Member’s Individual Class Payment is tied to the number of
15 Weeks Worked by each Class Member for ATD during the Class Period. Individual Class
16 Payments are calculated by (a) dividing the Net Settlement Amount by the total number Weeks
17 Worked by all Participating Class Members during the Class Period, and (b) multiplying the
18 result by each Participating Class Member’s Weeks Worked. (S.A. ¶ 48(c)).

19 Additionally, each “Aggrieved Employee” will receive an Individual PAGA Payment
20 calculated in the same way; thus, the \$37,500 PAGA Penalties allocated to the Aggrieved
21 Employees will be divided and paid on a Weeks Worked basis. (S.A. ¶ 48(h)).

22 The Class Notice will inform Class Members of the estimated share and the number of
23 Weeks Worked during the Class and/or PAGA Period(s). Class Members may dispute Weeks
24 Worked if they feel they worked more in the Class or PAGA Periods than ATD’s records show
25 by timely submitting evidence to the Administrator. (S.A. ¶ 67).

26 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

27 Pursuant to the terms of the Settlement Agreement, Defendant is required to fund the
28 Settlement Amount, plus Defendant’s share of payroll taxes owed on the Individual Class

1 Payments, within 10 days of the Effective Date. (S.A. ¶ 70). Within 10 days after receiving the
2 funds, the Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 71).

3 Class Members will have 180 days to cash the settlement check. (S.A. ¶ 72). If a Class
4 Member fails to cash a check by the deadline, the Administrator shall issue unclaimed funds to
5 the California State Controller in the name of the Class Member/Aggrieved Employee (*Id.*).

6 **F. TAX TREATMENT**

7 The Parties agree that 10% of the Individual Class Payments will be allocated as wages
8 subject to withholding of all applicable local, state and federal taxes and the remaining 90% will
9 be allocated for interest and penalties (pursuant to, *e.g.*, California Labor Code §§ 203, 210, 226,
10 2699 etc.) from which no taxes will be withheld. (S.A. ¶ 48(d)). The Individual PAGA
11 Payments will be classified entirely as civil penalties and shall be reported as required on an IRS
12 Form 1099. (S.A. ¶ 48(h)). Defendant will separately pay the share of employer payroll taxes on
13 the sum allocated to wages. (S.A. ¶ 48(a)).

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

15 In exchange for these payments, the Settlement Agreement at ¶ 32 provides that the
16 Participating Class Members will release the Released Parties of:

17 all claims alleged or those that could have been alleged in the Complaint,
18 which arose during the Class Period, and based solely upon the facts in the
19 Complaint, including: (a) failure to pay minimum wages, (b) failure to pay
20 overtime wages, (c) failure to provide meal periods, (d) failure to provide
21 rest breaks, (e) failure to failure to timely pay wages upon separation of
22 employment, (f) failure to provide accurate itemized wage statements, (g)
23 unfair and unlawful competition, and (h) all other claims for statutory
24 penalties based on the facts or claims alleged in the Complaint.³

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

³ Pursuant to S.A. ¶ 12, "Complaint" refers collectively to: (a) the operative FAC in the *Martinez* Action, and (b) the operative FAC in the *Tanner* Action.

1 **H. AGGRIEVED EMPLOYEES’ RELEASE OF CLAIMS**

2 The Settlement Agreement at ¶ 33 also defines the “Released PAGA Claims” as follows:

3 all PAGA claims that Plaintiffs alleged against the Released Parties,
4 on behalf of themselves and the State of California, based on the
5 facts stated in the Complaint and in the LWDA notice letters,
6 including all PAGA claims seeking civil penalties premised upon
7 (a) failure to pay minimum wages, (b) failure to pay overtime wages,
8 (c) failure to provide meal periods, (d) failure to provide rest breaks,
9 (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 PAGA based on the facts or claims alleged in the
 Complaint.

10 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
11 that individual will still be subject to the Released PAGA Claims to the fullest extent permitted
12 by law and will receive a pro-rata share of PAGA Penalties. (S.A. ¶ 53).

13 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR**
14 **PURPOSES OF SETTLEMENT**

15 Rule of Court 3.769(d) provides that the Court may make an order approving certification
16 of a provisional settlement class at the preliminary approval stage. It is well-established that trial
17 courts should use a “lesser standard of scrutiny” for determining the propriety of certifying a
18 settlement, as opposed to litigation, class. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794,
19 1807 at n.19; *Officers for Justice v. Civil Service Com.* (9th Cir. 1982) 688 F.2d 615, 633
20 (“[C]ertification issues raised by class action litigation that is resolved short of a decision on the
21 merits must be viewed in a different light”); *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S.
22 591, 620 (“Confronted with a request for settlement-only class certification, a district court need
23 not inquire whether the case, if tried, would present intractable management problems . . . for the
24 proposal is that there be no trial.”). Thus for purposes of this Settlement, Plaintiffs request that
25 this Court provisionally certify the Class, as defined above, under Code of Civil Procedure § 382.

26 **A. ASCERTAINABILITY AND NUMEROSITY**

27 In determining whether a class is ascertainable, the court considers “(1) the class
28 definition, (2) the size of the class, and (3) the means available for identifying the class

1 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
2 1271; *Medrazo v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
3 class is ascertainable if the class members can be objectively identified and given notice of the
4 litigation without unreasonable time or expense). Here, according to ATD’s records, there are
5 approximately 950 Class Members that are easily identifiable and fall within the defined Class.
6 Thus, Plaintiffs’ proposed Class meets the ascertainability and numerosity requirements.

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

8 *1. Commonality*

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

15 *2. Typicality*

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

23 *3. Adequacy of Representation*

24 The proposed class representative must establish that he or she will adequately represent
25 the proposed class. See *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540,
26 546. Specifically, Plaintiffs are adequate to represent the class because they were employed by
27 ATD during the Class Period, experienced the same wage and hour practices as the rest of the
28 Class, understood their duties as a Class Representative, and have been willing to undergo the

1 risks of litigation, and has no conflict of interest. (*See, generally*, Declarations of Plaintiffs
2 Rafael Martinez and Germaine Tanner, Sr.).

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

8 4. Superiority

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

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

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

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

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

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

3 The Court’s ultimate duty is to determine whether the settlement is fair, adequate, and
4 reasonable. *Dunk*, 48 Cal.App.4th at 1801 (setting forth the “fair, adequate, and reasonable”
5 standard) (citing *Officers for Justice*, *supra*); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177
6 Cal.App.4th 734, 742-43 (a trial court must approve a class action settlement agreement, but only
7 after determining that it is “fair, adequate and reasonable,” considering factors such as the
8 “risk, expense, [and] complexity” of continued litigation) (citations omitted). The Court enjoys
9 broad discretion in making its fairness determination, and should consider factors including, but
10 not limited to: “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration
11 of further litigation, the risk of maintaining class action status through trial, the amount offered
12 in settlement, the extent of discovery completed and the stage of the proceedings, the experience
13 and views of counsel . . . and the reaction of the class members to the proposed settlement. *Dunk*,
14 *supra* (detailing non-exhaustive list of factors for court’s consideration at final approval).

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

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

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

5 **B. THE SETTLEMENT IS THE RESULT OF SERIOUS, INFORMED, NON-COLLUSIVE**
6 **NEGOTIATIONS**

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

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

18 Plaintiffs’ counsel thoroughly investigated and evaluated the factual and legal strengths
19 and weaknesses of this case before reaching the settlement. As described above, the settlement
20 was reached after extensive investigation and research, thorough calculations and risk evaluation,
21 and a substantial exchange of information relating to the Class Members prior to mediation.

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

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

27 However, a settlement is not judged against what might have been recovered had a
28 plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought

1 to be fair and reasonable. *Wershba*, 91 Cal.App.4th at 250 (“Compromise is inherent and
2 necessary in [settlement] ... even if the relief afforded by the proposed settlement is substantially
3 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
4 settlement because the public interest may indeed be served by a voluntary settlement in which
5 each side gives ground in the interest of avoiding litigation.”)

6 Here, Defendant raised significant legal and factual defenses that weigh in favor of the
7 reasonableness of the proposed Settlement. First, in addition to disputing the merits of Plaintiffs’
8 claims, ATD strongly disputed that Plaintiffs could obtain class certification, arguing a lack of
9 commonality of the legal claims and injuries. ATD further argued that it complied with the
10 applicable law and that any purported deviations therefrom were individualized in nature,
11 thereby limiting Plaintiffs’ ability to certify the class. While Plaintiffs assert that this is a suitable
12 case for certification, they realize that there is always a significant risk associated with class
13 certification proceedings, which could limit the claims that he could pursue on a class basis.

14 Considering the uncertainties of protracted litigation, this negotiated settlement reflects
15 the best practicable recovery for the Class. While the total Settlement Amount is, of course, a
16 compromise figure, the potential risks and opportunities of both parties were effectively weighed
17 and considered by the parties, resulting in a fair and equitable settlement.

18 Based upon data obtained through informal discovery, Plaintiffs’ counsel estimated the
19 following data through mediation: (1) 950 Class Members, (2) 400 *former* Class Members for
20 purposes of Labor Code § 203, (3) 91,477 workweeks, (4) 424,000 shifts worked, and (4)
21 approximately 27,600 biweekly wage statements during the PAGA Period. (Mankin Decl. ¶ 20).

22 Here, there were three categories of claims alleged by Plaintiffs: (1) unpaid wage claims
23 under various theories, (2) meal and rest break violations, and (3) derivative claims for waiting
24 time and wage statement penalties due to the other alleged violations. (Mankin Decl. ¶ 21).

25 As to the unpaid wage claims, Plaintiffs alleged two theories of liability. First, Plaintiffs
26 alleged that ATD failed to pay all required overtime wages due to a practice that of rounded
27 employee *rates of pay* (not hours worked) down rather than up when the rate ended with a “5” in
28 the third decimal (*e.g.*, Plaintiff Martinez was paid \$20.29 per hour and the one-half overtime

1 premium had to be paid at \$10.145 [without rounding] or \$10.15 [with rounding], but Defendant
2 only paid the one-half overtime premium at \$10.14). Second, Plaintiffs claimed that Defendant,
3 at times, paid bonuses to Class Members yet failed to include that additional compensation in the
4 regular rate for purposes of calculating overtime wages. The maximum value of these claims was
5 small (only \$50,000), but the real value was in Labor Code § 203 waiting time penalties
6 (discussed below). ATD vehemently opposed these unpaid wage claims on the merits and as to
7 the propriety of class certification. Due to the defenses and arguments raised, Plaintiffs assigned
8 a 20% risk for each respective unpaid wage claim at the class certification stage and an
9 additional 20% risk on the merits. In sum, Plaintiffs' counsel calculated the risk-adjusted value
10 of the unpaid wage claims as \$32,000. (Mankin Decl. ¶ 22).

11 Plaintiffs also alleged meal and rest break claims against Defendant. After expert review
12 of the timekeeping records, Plaintiffs' counsel estimated a 46.8% violation rate for meal breaks
13 and a 40.5% violation rate for rest breaks. Given the total number of shifts at issue (an estimate
14 of 424,000), this led to 198,432 alleged meal violations and 171,720 alleged rest break
15 violations. This established a maximum potential value for these claims of \$8,261,792 (370,152
16 violations multiplied by the average hourly rate of \$22.32 per § 226.7). (Mankin Decl. ¶ 23).

17 However, ATD raised numerous arguments in response to this claim, including that it
18 maintained fully compliant written policies and specifically authorized the Class Members to
19 take meal and rest breaks, meaning that no one had a reason or cause to miss a break or take a
20 short/late break. Therefore, Defendant asserted that a fact-finder would have to determine for
21 each Class Member whether a break was missed and why, and why a break was noncompliant or
22 nonexistent, because if it was by the employee's choice, no liability attaches to Defendant.
23 These defenses are factored into Plaintiffs' analysis in two ways. First, these issues raise
24 questions regarding whether the meal and rest break claims could be certified, and Plaintiffs
25 placed a 30% risk at the class certification stage for meal periods and a 40% risk for rest breaks.
26 Second, these defenses also go toward the merits given the evidentiary question of proving the
27 number of meal and rest violations. As such, Plaintiffs placed a 30% risk on the merits for meal
28 breaks, and an additional 40% risk on the merits for rest breaks, setting the risk-adjusted value

1 for the combined meal and rest break claims at \$3,550,014. (Mankin Decl. ¶ 24).

2 Finally, Plaintiffs alleged claims for waiting time penalties and wage statement
3 violations. But these claims were entirely derivative of the claims above, meaning that they only
4 had merit if the claims for unpaid wages or meal/rest breaks were successful. The maximum
5 values for these claims were as follows: (1) \$2,142,720 [400 former employees x \$22.32 per
6 hour x 8 hours per day x 30 days], and (2) \$2,721,250 for wage statement violations [27,600
7 wage statements at the \$50/\$100 formula under § 226(e)]. (Mankin Decl. ¶ 25).

8 But ATD raised a variety of defenses to these derivative claims that impacted the
9 valuation. Namely, ATD argued that the wage statements did not violate Labor Code § 226 and,
10 even if there was a “technical” violation, Plaintiffs would be unable to prove the required
11 “knowing and intentional” and “injury” elements. Based on these facts and defenses, Plaintiffs
12 placed a nominal 20% risk at class certification (mirroring the claims on which the wage
13 statement claim was based) and estimated another 40% risk on the merits, leading to a risk-
14 adjusted value of \$1,306,200 for the wage statement claims. (Mankin Decl. ¶ 26).

15 Then, as to the waiting time penalty claim, Plaintiffs’ valuation had to account for the
16 fact that this claim was derivative of the unpaid wage and meal/rest break claims and, if those
17 claims failed at certification or on the merits, there would be no waiting time penalties owed, so
18 the same risks for those claims applied to this claim. Furthermore, even if the unpaid wage
19 and/or meal/rest claims succeeded at certification and on the merits, Plaintiffs would have to
20 prove that the violations (if any existed) were “willful” under the meaning of Labor Code § 203.
21 And, here, Defendant argued there was no “willful” violation since they had compliant written
22 policies and any deviations therefrom were inadvertent and unintentional. As a result of this
23 analysis, Plaintiffs’ counsel applied a 30% risk at class certification and a 40% risk on the merits,
24 leading to a risk-adjusted value of \$899,942. (Mankin Decl. ¶ 27).

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

27 ///

28 ///

•	Unpaid Wage Claims	\$	32,000
•	Meal and Rest Break Claims	\$	3,550,014
•	Wage Statement Claims	\$	1,306,200
•	Waiting Time Penalty Claims	\$	<u>899.942</u>
•	Total Risk Adjusted Penalties and Damages	\$	5,788,156

The reasonableness of the settlement is apparent from the fact that the proposed settlement is 37.92% of the risk-adjusted class damages and penalties. And while the PAGA penalties had a maximum value in the 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, ATD argued against the merits of the underlying claims and particularly that the “willfulness” standard and/or “good faith” defenses mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendant also argued it is improper to stack civil penalty claims on top of underlying statutory claims. For these reasons, the Parties submit that this settlement is fair and reasonable.

E. PLAINTIFFS’ 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. *Kullar*, 168 Cal.App.4th at 128 (court must take into account “the experience and view of counsel”).

Plaintiffs’ Counsel are 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. ¶¶ 2-9; Gaines Decl. ¶¶ 3-6). Plaintiffs’ 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.

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

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

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

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 Administrator, since ATD
20 has the last known addresses of all class members and the Administrator will perform a skip
21 trace and update those addresses for any class notices that are returned and re-send the notice.

22 The Notice satisfies the requirements of Rule of Court 3.766 and affords Class Members
23 with all due process protections required by the U.S. Constitution. Moreover, the contents of the
24 Notice comply with Cal. R. Ct. 3.766(d), because the Notice includes, without limitation (1) a
25 detailed explanation of the case, including the basic contentions or denials of the parties; (2) a
26 statement that the court will exclude the member from the class if the member so requests by a
27 specified date; (3) a procedure for the member to follow in requesting exclusion from the class;
28 (4) a statement that the judgment, whether favorable or not, will bind all members who do not

1 request exclusion; and (5) a statement that any member who does not request exclusion may, if
2 the member so desires, enter an appearance through counsel. The 45-day deadline to opt-out or
3 object is also reasonable, as it provides Class Members sufficient time to do so and, if they so
4 choose, to seek independent legal advice in the interim. If a Class Member does not opt-out, he
5 or she will automatically be sent a settlement check.

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

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

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

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

1 Once the Court grants preliminary approval and Notice is disseminated, Plaintiffs’
2 counsel will submit a comprehensive request for attorneys’ fees and costs with final approval.

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

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

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

24 **VI. THE COURT SHOULD APPOINT PHOENIX AS ADMINISTRATOR**

25 Subject to the Court’s approval, the parties stipulated to Phoenix Class Action
26 Administration Solutions serving as the Administrator. Phoenix is experienced in administering
27 class action settlements and has provided a flat-fee proposal to administer this settlement for
28 \$13,000. (Mankin Decl. ¶ 40; Exhibit D to Mankin Decl. [Administrator’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 25, 2023	Preliminary Approval (PA) hearing
May 26, 2023 <i>31 days after PA</i>	Deadline for Administrator to complete first mailing of the Notice Packet to all Class Members.
July 10, 2023 <i>45 days after mailing Notice</i>	Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
16 court days before Final Approval hearing	Deadline for Plaintiffs to file and serve Motion for Final Approval and application for award of fees, costs and service payments.
9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiffs' Motion for Final Approval, or filing response to an objection.
5 court days before final approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval
TBD - Approx. August 14, 2023 (<i>110 days after PA</i>)	Final Approval Hearing.

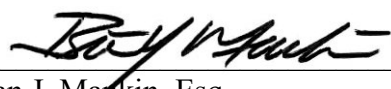
VIII. CONCLUSION

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

Dated: April 3, 2023

LAUBY, MANKIN & LAUBY LLP
GAINES & GAINES, APLC

BY:



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

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

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 5198 Arlington Avenue, PMB 513, Riverside, California 92504.

On April 3, 2023, I caused to be served the foregoing document(s) described as follows:

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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 April 3, 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

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