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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

STEPHANIE CUEVAS, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

TARLANI CORP., a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2202953
*[Assigned to Hon. Judge David Cohn, Dept S26,
for all purposes]*

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

Hearing

Date: June 13, 2023

Time: 10:00 a.m.

Dept.: S26

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 13, 2023, at 10:00 a.m., or as soon thereafter as
the matter may be heard by the Honorable David Cohn in Department S26 of San Bernardino
County Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff
Stephanie Cuevas, individually and on behalf of all others similarly situated, will and hereby
does move the Court for entry of an Order preliminarily approving the Parties' class action
settlement, including:

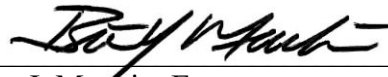
1. Certifying the class for purposes of settlement only;
2. Preliminarily appointing Plaintiff as class representative for settlement purposes;
3. Appointing Plaintiff's counsel as class counsel for purposes of settlement only;
4. Preliminarily approving the class action settlement as fair, adequate,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

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

Dated: May 17, 2023

LAUBY, MANKIN & LAUBY LLP

BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Stephanie Cuevas (“Plaintiff”) seeks preliminary approval of a \$737,500 wage-
4 and-hour class action settlement on behalf of approximately 630 current and former California
5 nonexempt, healthcare field worker and performed services for Defendant Tarlani Corp.
6 (“Defendant” or “Tarlani”) and in California at any time from January 28, 2018, through April
7 23, 2023 (the “Class Period”). (Plaintiff and Defendant are collectively referred to as the
8 “Parties”).

9 Under the terms of the Settlement Agreement,¹ Defendants will not oppose Plaintiff
10 Counsel’s application for a reasonable award of attorney’s fees not to exceed 1/3 of the
11 Settlement Amount, litigation expenses not to exceed \$20,000, Administrator Costs of
12 \$10,000.00, PAGA penalties of \$50,000 (with 75% to the LWDA and 25% to the Aggrieved
13 Employees on a pro rata basis), and a Service Payment of \$7,500 to Plaintiff (“Class
14 Representative”). (S.A. ¶ 47, *et seq.*)

15 After all Court-approved deductions from the Settlement Amount, it is estimated that
16 \$404,166.67 will be available to pay the Class Members, as follows:

17

<i>Settlement Amount</i>	\$ 737,500.00
Attorneys’ Fees (1/3)	\$ 245,833.33
Litigation Costs (not to exceed)	\$ 20,000.00
Administrator Costs	\$ 10,000.00
PAGA Penalties	\$ 50,000.00
Class Representative Service Award	\$ 7,500.00
<i>Net Settlement Amount</i>	\$ 404,166.67

21

22 Assuming 630 Class Members, the average payment to each Class Member will be
23 approximately \$641.53 (\$404,166.67 / 630). However, the actual payment will be calculated on
24 a pro-rata basis according to the number of Patient Visits Completed by each Class Member
25 during the Class Period, with each Patient Visit having a value of approximately \$2.31
26 (\$404,166.67 / 175,000 estimated Patient Visits Completed). In addition, the Aggrieved
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 Employees will receive a share of the \$50,000 PAGA Penalties (25% of the total \$50,000
2 allocation), calculated pro-rata based on Patient Visits Completed during the period of January
3 28, 2021, through April 23, 2023 (the “PAGA Period”). (S.A. ¶ 47(h)).

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

12 **II. BACKGROUND**

13 **A. THE CLASS AND AGGRIEVED EMPLOYEES**

14 The Class is defined as follows:

15 All current and former non-exempt (hourly paid) employees
16 employed by Defendant in California as a healthcare field workers
17 (including but not limited to LVN, RN, and/or Certified Home
18 Health Aide) (excluding office staff) at any time during the Class
Period (which is January 28, 2018, through April 23, 2023). (S.A.
¶¶ 6, 10).

19 The Aggrieved Employees are defined as follows:

20 Current and former non-exempt (hourly paid) employees employed
21 by Defendant in California as a healthcare field worker (including
22 but not limited to LVN, RN, and/or Certified Home Health Aid)
23 (excluding office staff) at any time during the PAGA Period (which
is January 28, 2021, through April 23, 2023). (S.A. ¶¶ 4).

24 **B. PROCEDURAL HISTORY**

25 On January 27, 2022, Plaintiff submitted a letter to the Labor Workforce Development
26 Agency (the “LWDA”) for civil penalties under the Private Attorney General Act of 2004
27 (“PAGA”), and simultaneously sent a letter to Defendants requesting the production of personnel
28 and timekeeping records to further evaluate her wage and hour claims. (Mankin Decl. ¶ 11).

1 On January 28, 2022, Plaintiff filed a class and PAGA complaint against Defendant,
2 alleging: (1) failure to pay minimum wages, (2) failure to pay for rest and recovery periods, (3)
3 failure to provide rest breaks, (4) failure to provide meal periods, (5) failure to reimburse
4 business expenses, (6) failure to timely pay final wages, (7) failure to provide accurate itemized
5 wage statements, (8) unfair and unlawful competition pursuant to California Business and
6 Professions Code §§ 17200 *et seq.* (S.A. ¶ 40).

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

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

18 On February 22, 2023, Plaintiff and Defendant participated in mediation before David
19 Phillips, Esq., a well-respected wage-and-hour mediator. The matter resolved at mediation, and
20 the Parties entered into the Settlement Agreement submitted herewith. The Parties now seek the
21 Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 15).

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

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

24 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

25 The \$737,500 Settlement Amount² is non-reversionary and will be paid out to Class
26 Members without the need to submit a claim form or take any affirmative action. It includes (1)

27 ² The \$737,500 Settlement Amount is subject to increase if the "Escalator Clause" is triggered.
28 S.A. ¶¶ 17, 47(a). If this clause is triggered, other figures will also shift upward along with the

1 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service award of \$7,500 to
2 Plaintiff, subject to approval by the Court; (3) Administration Costs, not to exceed \$10,000; (4) a
3 \$50,000 PAGA award, 75% of which is to be paid to the LWDA pursuant to California Labor
4 Code § 2699(i) and 25% to the Aggrieved Employees; and (5) the aggregate of all Individual
5 Settlement Amounts of the Participating Class Members. (S.A. ¶ 48 and subparts). Defendants
6 will separately pay their share of employer payroll taxes and withholdings. (S.A. ¶ 47(a)).

7 **B. NOTICE PROCEDURES**

8 The proposed Notice will be provided to the Class showing the estimated amounts that
9 each Class Member will receive, the number of Work Weeks credited as a Class Member and/or
10 Aggrieved Employee (*See* Exhibit B to Mankin Decl.). Within 30 calendar days after entry by
11 the Court of its Order of Preliminary Approval, Defendants shall provide the Administrator with
12 the "Class Data" consisting of Class Member names, addresses, phone numbers, Social Security
13 Numbers, and Weeks Worked during the Class/PAGA Period(s) (S.A. ¶¶ 7, 61).

14 Within 10 calendar days of receipt of the Class Data, the Administrator shall calculate the
15 numbers for each Class Member, populate the Notice, and send each Class Member the Notice
16 via first-class, United States mail. (S.A. ¶ 63).

17 If a Notice is returned as undelivered by the U.S. Postal Service, the Administrator shall
18 perform a skip trace search and seek an address correction for the Class Member(s), and a second
19 Notice will be sent to any new or different address obtained. (S.A. ¶ 64).

20 **C. EXCLUSION AND OBJECTION PROCEDURES**

21 Class Members who do not timely Opt-Out of the Settlement will be deemed to
22 participate in the Settlement and shall become a Participating Class Member without having to
23 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
24 must submit a written request to the Administrator no later than 30 days after being mailed by
25 the Administrator ("Response Deadline"). (S.A. ¶¶ 37). Any Opt-Out request that is not
26 postmarked by the Response Deadline will be invalid, unless a Notice was remailed in which
27

28 Settlement Amount, such as attorneys' fees (but this is still constrained to 1/3 of the Settlement
Amount) along with increased Administration Costs (*see* S.A. ¶ 47(g)).

1 case the Class Member’s exclusion or objection must be returned by the later of the original
2 Notice Response Deadline or 15 calendar days after the remailing of the notice. (S.A. ¶¶ 64, 68).

3 The Class Notice shall inform Class Members of their right to object to the Settlement.
4 Any Participating Class Member who wishes to object to the Settlement may submit a written
5 objection to the Administrator no later than the Response Deadline. (S.A. ¶ 68(c)).

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

7 The amount of each Class Member’s Individual Class Payment is tied to the number of
8 Patient Visits Completed by each Class Member for Defendants during the Class Period.
9 Individual Class Payments are calculated by (a) dividing the Net Settlement Amount by the total
10 number Patient Visits Completed by all Participating Class Members during the Class Period,
11 and (b) multiplying the result by each Participating Class Member’s Patient Visits Completed.
12 (S.A. ¶ 47(c)).

13 Additionally, each “Aggrieved Employee” will receive an Individual PAGA Payment
14 calculated in the same way; thus, the \$12,500 PAGA Penalties allocated to the Aggrieved
15 Employees will be divided and paid on a Patient Visits Completed basis. (S.A. ¶ 47(h)).

16 The Class Notice will inform Class Members of the estimated share and the number of
17 Patient Visits Completed during the Class and/or PAGA Period(s). Class Members may dispute
18 Patient Visits Completed if they feel they worked more in the Class or PAGA Periods than
19 Defendant’s records show by timely submitting evidence to the Administrator. (S.A. ¶ 66).

20 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

21 Pursuant to the terms of the Settlement Agreement, Defendant is required to fund the
22 Settlement Amount, plus Defendant’s share of payroll taxes owed on the Individual Class
23 Payments as follows: (a) By the later of December 1, 2023, or 15 days after the Effective Date,
24 Defendant shall fund one-third of the Settlement Amount; (b) By May 1, 2024, Defendant shall
25 another one-third of the Settlement Amount; and (c) Defendant shall fund the remaining one-
26 third balance of the Settlement Amount by September 1, 2024 (S.A. ¶ 69). Within 10 days after
27 receiving the funds, the Administrator shall issue payments to cover all court-approved
28 payments. (S.A. ¶ 70).

1 Class Members will have 180 days to cash the settlement check. (S.A. ¶ 71). If a Class
2 Member fails to cash a check by the deadline, the Administrator shall issue unclaimed funds to
3 the California State Controller in the name of the Class Member/Aggrieved Employee (*Id.*).

4 **F. TAX TREATMENT**

5 The Parties agree that one-third (1/3) of the Individual Settlement Payments will be
6 allocated as wages subject to withholding of all applicable local, state and federal taxes and the
7 remaining two-thirds (2/3) will be allocated for interest and penalties (pursuant to, *e.g.*,
8 California Labor Code sections 203, 210, 226, etc.) from which no taxes will be withheld. (S.A.
9 ¶ 47(d)). Additionally, the PAGA Penalties payable to the Aggrieved Employees will be
10 classified entirely as civil penalties and shall be reported as required on an IRS Form 1099.
11 (S.A. ¶¶ 47(h)). These allocations are in line with the claim valuations in the *Kullar* analysis
12 discussed below (*i.e.*, the penalty claims [§§ 203 and 226] comprise the majority of risk-adjusted
13 value). Defendant will separately pay its share of employer payroll taxes on the sum allocated to
14 wages. (S.A. ¶ 47(a)).

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

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

19 all class claims stated in the operative Complaint and those based upon
20 the facts in the Complaint, including: (a) failure to pay minimum wages,
21 (b) failure to provide and pay for rest and recovery periods, (c) failure to
22 provide meal periods, (d) failure to provide rest breaks, (e) failure to
23 reimburse business expenses, (f) failure to timely pay wages upon
24 separation of employment, (g) failure to provide accurate itemized wage
statements, (h) unfair and unlawful competition, and (i) all other claims
that reasonably could have arisen out of the allegations made and based on
the facts alleged in the operative Complaint.

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

1 facts occurring outside the Class Period.

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

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

4 all PAGA claims that Plaintiff alleged against the Released Parties,
5 on behalf of herself and the State of California, based on the facts
6 stated in the operative Complaint in the Action and in the LWDA
7 notice letter, including all PAGA claims seeking civil penalties that
8 premised upon (a) failure to pay minimum wages, (b) failure to
9 provide and pay for rest and recovery periods, (c) failure to provide
10 meal periods, (d) failure to provide rest breaks, (e) failure to
11 reimburse business expenses, (f) failure to timely pay wages upon
separation of employment, (g) failure to provide accurate itemized
wage statements, (h) failure to maintain employment records, and
(i) all other claims for civil penalties recoverable under PAGA based
on the facts or claims alleged in the operative Complaint.

12 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
13 that individual will still be subject to the Released PAGA Claims to the fullest extent permitted
14 by law and will receive a pro-rata share of PAGA Penalties. (S.A. ¶ 68).

15 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR**
16 **PURPOSES OF SETTLEMENT**

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

1 **A. ASCERTAINABILITY AND NUMEROSITY**

2 In determining whether a class is ascertainable, the court considers “(1) the class
3 definition, (2) the size of the class, and (3) the means available for identifying the class
4 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
5 1271; *Medrazo v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
6 class is ascertainable if the class members can be objectively identified and given notice of the
7 litigation without unreasonable time or expense). Here, according to Defendants’ records, there
8 are approximately 630 Class Members that are easily identifiable and fall within the defined
9 Class. Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

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

11 1. Commonality

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

18 2. Typicality

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

26 3. Adequacy of Representation

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

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

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

4. Superiority

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

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

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

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

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

1 approval hearing “into a trial or rehearsal for trial on the merits . . . [or] to reach any ultimate
2 conclusions on the contested issues of fact and law which underlie the merits of the dispute.”
3 *Officers for Justice*, 688 F.2d at 625.

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

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

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

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

6 **B. THE SETTLEMENT IS THE RESULT OF SERIOUS, INFORMED, NON-COLLUSIVE**
7 **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 Plaintiff and her 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 Defendants
16 prevailed on any of the defenses, the employees may not have received any monetary recovery.

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

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

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

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

28 ///

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

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

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

20 Based upon data obtained through informal discovery, Plaintiff’s counsel estimated the
21 following data through mediation: (1) 630 Class Members, (2) approximately 500 *former* Class
22 Members for purposes of Labor Code § 203, (3) 175,000 patient visits completed, and (4)
23 approximately 6,480 wage statements during the PAGA Period. (Mankin Decl. ¶ 17).

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

27 As to the unpaid wage claims, Plaintiff alleged that Defendant illegally paid Class
28 Members on a piece-rate, “per-visit” basis. Therefore, Plaintiff alleged that Defendant failed to

1 pay all required minimum and overtime wages due to a practice that required Class Members to
2 complete additional tasks (*e.g.*, calling patients after visits, charting and other paperwork, driving
3 to and from patient visits) without any compensation for these tasks. But Defendant vehemently
4 opposed these unpaid wage claims on the merits and as to the propriety of class certification.
5 Due to the defenses and arguments raised, Plaintiff assigned a 30% risk for the unpaid wage
6 claim at the class certification stage and an additional 30% risk on the merits. In sum, Plaintiff's
7 counsel calculated the risk-adjusted value of the unpaid wage claims as \$1,317,179. (Mankin
8 Decl. ¶ 19).

9 Plaintiff also alleged meal and rest break claims against Defendant. Given the total
10 number of patient visits completed and an estimated number of average visits completed per shift
11 (an estimate of 5.57), Plaintiff's counsel estimated an approximate 50% violation rate for meal
12 breaks and a 50% violation rate for rest breaks, leading to 15,720 alleged meal violations and
13 15,720 alleged rest break violations. This established a maximum potential value for these
14 claims of \$1,414,800 (31,440 violations multiplied by the average hourly rate of \$45 as the
15 applicable premium rate under § 226.7). (Mankin Decl. ¶ 20).

16 However, Defendant raised numerous arguments in response to this claim, including that
17 it authorized the Class Members to take meal and rest breaks, meaning that no one had a reason
18 or cause to miss a break or take a short/late break. Therefore, Defendant asserted that a fact-
19 finder would have to determine for each Class Member whether a break was missed and why,
20 and why a break was noncompliant or nonexistent, because if it was by the employee's choice,
21 no liability attaches to Defendant. These defenses are factored into Plaintiff's analysis in two
22 ways. First, these issues raise questions regarding whether the meal and rest break claims could
23 be certified, and Plaintiff placed a 40% risk at the class certification stage for meal periods and a
24 40% risk for rest breaks. Second, these defenses also go toward the merits given the evidentiary
25 question of proving the number of meal and rest violations. As such, Plaintiff placed a 40% risk
26 on the merits for meal breaks, and an additional 40% risk on the merits for rest breaks, setting the
27 risk-adjusted value for the combined meal and rest break claims at \$509,328. (Mankin Decl. ¶
28 21).

1 Plaintiff alleged claims for waiting time penalties and wage statement violations. The
2 maximum values for these claims were as follows: (1) \$5,400,000 for waiting time penalties [500
3 former employees x \$360 average daily pay x 30 days], and (2) \$620,250 for wage statement
4 violations [6,480 wage statements at the \$50/\$100 formula under § 226(e)]. (Mankin Decl. ¶ 22).

5 But Defendant raised a variety of defenses to these claims that impacted the valuation.
6 Namely, Defendants argued that the wage statements did not violate Labor Code § 226 and, even
7 if there was a “technical” violation, Plaintiff would be unable to prove the required “knowing
8 and intentional” and “injury” elements. Defendant also argued that these claims were derivative
9 claims of the above-mentioned unpaid wage and meal / rest break claims. Based on these facts
10 and defenses, Plaintiff placed a 30% risk at class certification and estimated another 30% risk the
11 merits, leading to a risk-adjusted value of \$303,923 for the wage statement claims. (Mankin
12 Decl. ¶ 23).

13 Then, as to the waiting time penalty claim, Plaintiff’s valuation had to account for the
14 fact that part of this claim was derivative of the unpaid wage claims and also of the meal and rest
15 break claims, if those claims failed at certification or on the merits, there would be no waiting
16 time penalties owed. Furthermore, even if the unpaid wage and/or meal/rest claims succeeded at
17 certification and on the merits, Plaintiff would have to prove that the violations (if any existed)
18 were “willful” under the meaning of Labor Code § 203. And, here, Defendant argued there was
19 no “willful” violation as they were inadvertent and unintentional. As a result of this analysis,
20 Plaintiff’s counsel applied a 50% risk at class certification and a 50% risk on the merits, leading
21 to a risk-adjusted value of \$1,350,000. (Mankin Decl. ¶ 24).

22 Finally, Defendant provided financial documents to Plaintiff’s counsel as finances were a
23 concern. Plaintiff’s counsel had an expert review and analyze Defendant’s financial documents.
24 After review, Plaintiff’s counsel further believed an additional discount was warranted due to
25 Defendant’s finances. (Mankin Decl. ¶ 25).

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

28 / / /

•	Unpaid Wage Claims	\$ 1,317,179
•	Meal and Rest Break Claims	\$ 509,328
•	Wage Statement Claims	\$ 303,923
•	Waiting Time Penalty Claims	<u>\$ 1,317,179</u>
•	Total Risk Adjusted Penalties and Damages	\$ 3,480,429

The reasonableness of the settlement is apparent from the fact that the proposed settlement is 21.2% of the risk-adjusted class damages and penalties, while also factoring in Defendant's financial constraints. And while the PAGA penalties had a maximum value in the six figures, this fails to acknowledge that courts have wide latitude to reduce the civil penalties "based on the facts and circumstances of a particular case" and if "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Labor Code § 2699(e)(2). Moreover, Defendant argued against the merits of the underlying claims and particularly that the "willfulness" standard and/or "good faith" defenses mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendant also argued it is improper to stack civil penalty claims on top of underlying statutory claims. For these reasons, the Parties submit that this settlement is fair and reasonable.

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

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

Plaintiff's Counsel is also highly experienced in Class/PAGA litigation, having repeatedly been named "Super Lawyer" in employment litigation (a distinction awarded to only 5% of litigators), having achieved large settlements and verdicts, including one of the largest PAGA awards in California's history, collecting over \$250 million for its clients, having tried class and PAGA cases against Fortune 100 companies, among other things. (Mankin Decl. ¶¶ 2-6; Carlson Decl. ¶¶ 3-6). Plaintiff's counsel, operating at arm's length, weighed the strengths and risks of this case, and are of the view that this is a fair and reasonable settlement considering

1 the nature of the claims, realistic risk adjusted value, the complexities of the case, state of the
2 law, and uncertainties of class certification and litigation.

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

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

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

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

25 The Notice satisfies the requirements of Rule of Court 3.766 and affords Class Members
26 with all due process protections required by the U.S. Constitution. Moreover, the contents of the
27 Notice comply with Cal. R. Ct. 3.766(d), because the Notice includes, without limitation (1) a
28 detailed explanation of the case, including the basic contentions or denials of the parties; (2) a

1 statement that the court will exclude the member from the class if the member so requests by a
2 specified date; (3) a procedure for the member to follow in requesting exclusion from the class;
3 (4) a statement that the judgment, whether favorable or not, will bind all members who do not
4 request exclusion; and (5) a statement that any member who does not request exclusion may, if
5 the member so desires, enter an appearance through counsel. The 45-day deadline to opt-out or
6 object is also reasonable, as it provides Class Members sufficient time to do so and, if they so
7 choose, to seek independent legal advice in the interim. If a Class Member does not opt-out, he
8 or she will automatically be sent a settlement check.

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

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

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

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

*8 (approving fee award of 33.33% of the common fund); *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841, at *4 (awarding fees of 1/3 of common fund, noting: “[f]ee awards in class actions average around one-third of the recovery.”).

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

I. THE REQUESTED SERVICE AWARD REQUEST IS FAIR AND APPROPRIATE

The Settlement Agreement provides an incentive award payment of \$7,500 to the Class Representative, which is reasonable given the large recovery Class Members will receive on average, as well as the time and effort he devoted to this case. Her efforts included providing factual background for the Class and PAGA complaint; providing documents and information about Defendants’ compensation plan; participating in phone calls to discuss litigation and settlement strategy; making herself available throughout the litigation to assist with analyzing the claims and defenses; helping Class Counsel prepare for the mediation; and reviewing the settlement documents. The Class Representative also assumed significant risk in bringing this litigation—namely, had she lost, she could have been ordered to pay Defendants’ costs.

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

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

2 The parties selected to Phoenix Settlement Administrators as the Administrator. Phoenix
3 has provided a flat-fee proposal to administer this settlement for \$10,000. (Mankin Decl. ¶ 38;
4 Exhibit D to Mankin Decl. [Administrator's bid]).

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

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

11 June 13, 2023	Preliminary Approval (PA) hearing
12 July 7, 2023 13 24 days after PA	Deadline for Administrator to complete first mailing of the Notice to all Class Members.
14 August 7, 2023 15 30 days after mailing Notice	Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
16 16 court days before Final Approval hearing	Deadline for Plaintiff to file and serve Motion for Final Approval and application for award of fees, costs and service payments.
17 9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiff's Motion for Final Approval, or filing response to an objection.
18 5 court days before final 19 approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval
20 October 11, 2023 - Approx. 21 120 days after PA	Final Approval Hearing.

22 **VIII. CONCLUSION**

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

25 Dated: May 17, 2023

LAUBY, MANKIN & LAUBY LLP

26
27 BY:


28 Brian J. Mankin, Esq.
Attorneys for Plaintiff and the 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 May 17, 2023, I caused to be served the foregoing document(s) described as follows:

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

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

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

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

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

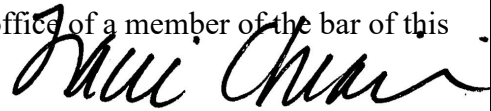
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service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

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

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

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 17, 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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