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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF STANISLAUS

NICHOLAS TOSTA, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

FORMULATION TECHNOLOGY
INCORPORATED, a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CV-22-000189
*[Assigned to Hon. Judge Sonny S. Sandhu, Dept
24, for all purposes]*

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

Hearing

Date: June 7, 2023

Time: 8:30 a.m.

Dept.: 24

Complaint filed: January 14, 2022

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 7, 2023 at 8:30 a.m., or as soon thereafter as the
3 matter may be heard by the Honorable Sonny Sandhu in Department 24 of the Stanislaus County
4 Superior Court, located at 801 10th Street, 4th Floor, Modesto, CA 95354, Plaintiff Nicholas
5 Tosta, individually and on behalf of all others similarly situated, will and hereby does move the
6 Court for entry of an Order preliminarily approving the Parties' class action settlement,
7 including:

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

23
24 Dated: May 15, 2023

LAUBY, MANKIN & LAUBY LLP

25
26 BY:



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

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	2
A.	THE CLASS.....	2
B.	PROCEDURAL HISTORY	2
III.	SUMMARY OF THE PROPOSED SETTLEMENT	3
A.	SETTLEMENT CONSIDERATION AND ALLOCATION	3
B.	NOTICE PROCEDURES	3
C.	EXCLUSION AND OBJECTION PROCEDURES	4
D.	SETTLEMENT ALLOCATION FORMULA FOR SETTLEMENT SHARES	4
E.	TIMING OF SETTLEMENT DISBURSEMENTS.....	5
F.	TAX TREATMENT	5
G.	PARTICIPATING CLASS MEMBERS’ RELEASE OF CLAIMS	5
H.	AGGRIEVED EMPLOYEES’ RELEASE OF CLAIMS.....	6
IV.	PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR PURPOSES OF SETTLEMENT	6
A.	ASCERTAINABILITY AND NUMEROSITY	7
B.	WELL-DEFINED COMMUNITY OF INTEREST	7
V.	THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, WHICH IS FAIR, ADEQUATE, AND REASONABLE	8
A.	CLASS ACTION SETTLEMENTS ARE SUBJECT TO JUDICIAL REVIEW AND APPROVAL UNDER THE CALIFORNIA RULES OF COURT.....	8
B.	THE SETTLEMENT IS THE RESULT OF SERIOUS, INFORMED, NON-COLLUSIVE NEGOTIATIONS.....	10
C.	THE EXTENT OF THE INVESTIGATION WAS MORE THAN SUFFICIENT TO PERMIT PRELIMINARY APPROVAL OF THE SETTLEMENT	10
D.	THE SETTLEMENT IS A REASONABLE COMPROMISE OF CLAIMS	11
E.	PLAINTIFF’S COUNSEL IS EXPERIENCED IN WAGE-AND-HOUR LITIGATION	14
F.	THE CLASS NOTICE CONFORMS TO ALL APPLICABLE STATUTES AND RULES.....	15
G.	THE NON-REVERSIONARY “CHECKS CASHED” DISTRIBUTION ENSURES MAXIMAL RECOVERY FOR CLASS MEMBERS.....	16
H.	THE ATTORNEY’S FEES AND COSTS ALLOCATION IS FAIR	16
I.	THE REQUESTED SERVICE AWARD REQUEST IS FAIR AND APPROPRIATE	17
VI.	THE COURT SHOULD APPOINT PHOENIX AS ADMINISTRATOR	18
VII.	TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING.....	18
VIII.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

<i>Amchem Prods., Inc. v. Windsor</i> (1997) 521 U.S. 591	7
<i>Archibald v. Cinerama Hotels</i> , (1976) 15 Cal.3d 853	17
<i>Arenas v. El Torito Rests., Inc.</i> (2010) 183 Cal.App.4th 723	8
<i>Barboza v. West Coast Digital GSM, Inc.</i> (2009) 179 Cal.App.4th 540	8
<i>Bond v. Ferguson Enterprises, Inc.</i> (E.D. Cal. 2011) 2011 WL 2648879.....	19
<i>Bush v. Superior Court</i> (1992) 10 Cal.App.4th 1374	9
<i>Cho v. Seagate Tech. Holdings, Inc.</i> (2009) 177 Cal.App.4th 734.....	10
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	7, 10, 11
<i>Ellis v. Naval Air Rework Facility</i> (N.D. Cal. 1980) 87 F.R.D. 15	16
<i>Glass v. UBS Fin. Servs.</i> (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 8476	19
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	11, 16
<i>Laffitte v. Robert Half Int’l Inc.</i> (2016) 1 Cal.5th. 480	18
<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.</i> (9th Cir. 2001)	
244 F.3d 1152	9
<i>Louie v. Kaiser Found. Health Plan, Inc.</i> (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 78314.....	19
<i>Martin v. FedEx Ground Package System, Inc.</i> (N.D. Cal. Dec. 31, 2008) 2008 WL 5478576 ..	18
<i>Medraza v. Honda of N. Hollywood</i> (2008) 166 Cal.App.4th 89	8
<i>Officers for Justice v. Civil Service Com.</i> (9th Cir. 1982) 688 F.2d 615	7, 10
<i>Reyes v. San Diego County Board of Supervisors</i> (1987) 196 Cal.App.3d 1263	8
<i>Romero v. Producers Dairy Foods, Inc.</i> (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841	18
<i>Ross v. US Bank National Association</i> (N.D. Cal. 2010) 2010 WL 3833922	19
<i>Singer v. Becton Dickinson and Co.</i> (S.D. Cal. June 1, 2010) 2010 WL 2196104	18
<i>Stuart v. RadioShack Corp.</i> (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645.....	18
<i>Vasquez v. Coast Valley Roofing, Inc.</i> (E.D. Cal. 2010) 266 F.R.D. 4150.....	19
<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224.....	9, 10, 12
<i>West v. Circle K Stores, Inc.</i> (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 76558.....	19

Statutes

Code of Civil Procedure § 382.....	2, 7
Labor Code § 2699(i).....	3

Rules

California Rules of Court, Rule 3.769	9
---	---

Treatises

Herbert B. Newberg & Alba Conte, <i>Newberg on Class Actions</i> (“ <i>Newberg</i> ”) § 3:13 (4th ed. 2002)	8, 10
<i>Manual For Complex Litigation</i> (Third) § 30.41 (1995).....	11

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Nicholas Tosta seeks preliminary approval of a \$300,000 wage-and-hour class action settlement on behalf of approximately 120 current and former non-exempt employees employed by Defendant Formulation Technology Incorporated (“Defendant” or “FTI”) in California at any time from January 14, 2018, through February 15, 2023 (the “Class Period”).

Under the terms of the Settlement Agreement,¹ Defendant will not oppose Plaintiff Counsel’s application for a reasonable award of attorney’s fees not to exceed 1/3 of the Settlement Amount, litigation expenses not to exceed \$20,000, Administrator Costs of \$6,000.00, PAGA penalties of \$30,000 (with 75% to the LWDA and 25% to the Aggrieved Employees on a pro rata basis), and a Service Payment of \$10,000 to Plaintiff Nicholas Tosta (“Class Representative”). (S.A. ¶ 47, *et seq.*)

After all Court-approved deductions from the Settlement Amount, it is estimated that \$139,000 will be available to pay the Class Members, as follows:

<i>Settlement Amount</i>	\$ 300,000.00
Attorneys’ Fees (1/3)	\$ 100,000.00
Litigation Costs (not to exceed)	\$ 15,000.00
Administrator Costs	\$ 6,000.00
PAGA Penalties	\$ 30,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 139,000.00

Assuming 120 Class Members, the average payment to each Class Member will be approximately \$1,158 (\$139,000 / 120). However, the actual payment will be calculated on a pro-rata basis according to the number of Weeks Worked by each Class Member during the Class Period, with each Work Week having a value of approximately \$11.58 (\$132,000 / 12,000 estimated Work Weeks). In addition, approximately 85 Aggrieved Employees will receive a share of the \$7,500 PAGA Penalties (25% of the total \$30,000 allocation), calculated pro-rata based on Weeks Worked during the PAGA Period. (S.A. ¶ 47(h)).

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. Plaintiff respectfully requests
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 Plaintiff's 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 non-exempt (hourly paid) employees
12 employed by Defendant in California at any time during the Class
13 Period (which is January 14, 2018, through February 15, 2023).
(S.A. ¶¶ 6, 10).

14 **B. PROCEDURAL HISTORY**

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

19 On January 14, 2022, Plaintiff filed a class and PAGA complaint against FTI, alleging:
20 (1) failure to pay minimum wages, (2) failure to pay overtime, (3) failure to provide meal
21 periods, (4) failure to provide rest breaks, (5) failure to timely pay final wages, (6) failure to
22 provide accurate itemized wage statements, (7) unfair and unlawful competition pursuant to
23 California Bus. and Prof. Code §§ 17200 *et seq.*, and (8)-(14) related PAGA claims (S.A. ¶ 40).

24 FTI retained counsel and immediately began to defend the case. Then, after early
25 discussions among counsel, the Parties agreed to attend private mediation. (Mankin Decl. ¶ 14).

26 In preparation for the mediation, the Parties informally exchanged documents and
27 information that allowed both sides to calculate the potential damages and evaluate potential risk,
28 including policies and procedures pertaining to each claim alleged, and statistics relating to the

number of current and former employees, number of shifts, pay periods worked and other things. FTI also provided their written policies and practices and a robust sampling of payroll and timekeeping records for Class Members. This information enabled both parties to take a deep dive into the claims. Additionally, during this process, Plaintiff and his counsel analyzed, researched, and investigated the potential issues, including matters related to the calculation of damages, trial, and appellate issues and risks. (Mankin Decl. ¶ 15).

On February 15, 2023, Plaintiff and FTI participated in mediation before Glenn Lerman, Esq. a well-respected employment mediator. The matter resolved at mediation and the Parties entered into the Settlement Agreement submitted herewith. The Parties now seek the Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 16).

III. SUMMARY OF THE PROPOSED SETTLEMENT

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

A. SETTLEMENT CONSIDERATION AND ALLOCATION

The \$300,000 Settlement Amount² is non-reversionary and will be paid out to Class Members without the need to submit a claim form or take any affirmative action. It includes (1) Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service award of \$10,000 to Plaintiff, subject to approval by the Court; (3) Administration Costs, not to exceed \$6,000; (4) a \$30,000 PAGA award, 75% of which is to be paid to the LWDA pursuant to California Labor Code § 2699(i) and 25% to the Aggrieved Employees; and (5) the aggregate of all Individual Settlement Amounts of the Participating Class Members. (S.A. ¶ 49 and subparts). Defendants will separately pay their share of employer payroll taxes and withholdings. (S.A. ¶ 47(a)).

B. NOTICE PROCEDURES

The proposed Notice will be provided to the Class showing the estimated amounts that each Class Member will receive, the number of Work Weeks credited as a Class Member and/or Aggrieved Employee (*See* Exhibit B to Mankin Decl.). Within 14 calendar days after entry by

² The \$300,000 Settlement Amount is subject to increase if the "Escalator Clause" is triggered. S.A. ¶¶ 16, 47(a). If this clause is triggered, other figures will also shift upward along with the 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 the Court of its Order of Preliminary Approval, Defendant shall provide the Administrator with
2 the “Class Data” consisting of Class Member names, addresses, phone numbers, Social Security
3 Numbers, and Weeks Worked during the Class/PAGA Period(s) (S.A. ¶¶ 9, 61).

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

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

10 **C. EXCLUSION AND OBJECTION PROCEDURES**

11 Class Members who do not timely Opt-Out of the Settlement will be deemed to
12 participate in the Settlement and shall become a Participating Class Member without having to
13 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
14 must submit a written request to the Administrator no later than 45 days after being mailed by
15 the Administrator (“Response Deadline”). (S.A. ¶¶ 24). Any Opt-Out request that is not
16 postmarked by the Response Deadline will be invalid, unless a Notice was remailed in which
17 case the Class Member’s exclusion or objection must be returned by the later of the original
18 Notice Response Deadline or 15 calendar days after the remailing of the notice. (S.A. ¶¶ 64, 68).

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

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

23 The amount of each Class Member’s Individual Class Payment is tied to the number of
24 Weeks Worked by each Class Member for FTI during the Class Period. Individual Class
25 Payments are calculated by (a) dividing the Net Settlement Amount by the total number Weeks
26 Worked by all Participating Class Members during the Class Period, and (b) multiplying the
27 result by each Participating Class Member’s Weeks Worked. (S.A. ¶ 47(c)).

28 ///

1 Additionally, each “Aggrieved Employee” will receive an Individual PAGA Payment
2 calculated in the same way; thus, the \$7,500 PAGA Penalties allocated to the Aggrieved
3 Employees will be divided and paid on a Weeks Worked basis. (S.A. ¶ 47(h)).

4 The Class Notice will inform Class Members of the estimated share and the number of
5 Weeks Worked during the Class and/or PAGA Period(s). Class Members may dispute Weeks
6 Worked if they feel they worked more in the Class or PAGA Periods than FTI’s records show by
7 timely submitting evidence to the Administrator. (S.A. ¶ 66).

8 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

9 Pursuant to the terms of the Settlement Agreement, Defendant is required to fund the
10 Settlement Amount, plus Defendant’s share of payroll taxes owed on the Individual Class
11 Payments, within 15 days of the Effective Date. (S.A. ¶ 69). Within 10 days after receiving the
12 funds, the Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 70).

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

16 **F. TAX TREATMENT**

17 The Parties agree that 20% of the Individual Class Payments will be allocated as wages
18 subject to withholding of all applicable local, state and federal taxes and the remaining 80% will
19 be allocated for interest and penalties (pursuant to, *e.g.*, California Labor Code §§ 203, 210, 226,
20 2699 etc.) from which no taxes will be withheld. (S.A. ¶ 47(d)). The Individual PAGA
21 Payments will be classified entirely as civil penalties and shall be reported as required on an IRS
22 Form 1099. (S.A. ¶ 47(h)). Defendants will separately pay the share of employer payroll taxes
23 on the sum allocated to wages. (S.A. ¶ 47(a)).

24 **G. PARTICIPATING CLASS MEMBERS’ RELEASE OF CLAIMS**

25 In exchange for these payments, the Settlement Agreement at ¶ 33 provides that the
26 Participating Class Members will release the Released Parties of:

27 all claims stated in the operative Complaint and those based solely upon the
28 facts in the Complaint, including: (a) failure to pay minimum wages, (b)
 failure to pay overtime wages, (c) failure to provide meal periods, (d) failure
 to provide rest breaks, (e) failure to failure to timely pay wages upon

1 separation of employment, (f) failure to provide accurate itemized wage
2 statements, (g) unfair and unlawful competition, and (j) all other claims for
statutory penalties based on the facts or claims alleged in the Complaint.

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

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

9 The Settlement Agreement at ¶ 32 also defines the "Released PAGA Claims" as follows:

10 all PAGA claims that Plaintiff alleged against the Released Parties,
11 on behalf of himself and the State of California, based on the facts
12 stated in the Complaint in the Action and in the LWDA notice letter,
13 including all PAGA claims seeking civil penalties that premised
14 upon (a) failure to pay minimum wages, (b) failure to pay overtime
15 wages, (c) failure to provide meal periods, (d) failure to provide rest
16 breaks, (e) failure to failure to timely pay wages each period and
upon separation of employment, (f) failure to provide accurate
itemized wage statements, and (g) all other claims for civil penalties
recoverable under the Private Attorneys General Act, Labor Code
§§ 2698 *et seq.* based on the facts or claims alleged in the Complaint

17 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
18 that individual will still be subject to the Released PAGA Claims to the fullest extent permitted
19 by law and will receive a pro-rata share of PAGA Penalties. (S.A. ¶ 52).

20 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR** 21 **PURPOSES OF SETTLEMENT**

22 California Rule of Court 3.769(d) provides that the Court may make an order approving
23 certification of a provisional settlement class at the preliminary approval stage. It is well-
24 established that trial courts should use a "lesser standard of scrutiny" for determining the
25 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor*
26 *Co.* (1996) 48 Cal.App.4th 1794, 1807 at n.19; *Officers for Justice v. Civil Service Com.* (9th Cir.
27 1982) 688 F.2d 615, 633 ("[C]ertification issues raised by class action litigation that is resolved
28 short of a decision on the merits must be viewed in a different light."); *Amchem Prods., Inc. v.*

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

6 **A. ASCERTAINABILITY AND NUMEROSITY**

7 In determining whether a class is ascertainable, the court considers “(1) the class
8 definition, (2) the size of the class, and (3) the means available for identifying the class
9 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
10 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
11 class is ascertainable if the class members can be objectively identified and given notice of the
12 litigation without unreasonable time or expense). Here, according to FTI’s records, there are
13 approximately 120 Class Members that are easily identifiable and fall within the defined Class.
14 Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

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

16 *1. Commonality*

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

23 *2. Typicality*

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

1 Defendant's pay policies, meal and rest break practices, wage statements, and the provisions
2 governing the timely and complete payment of wages, which are at the core of the lawsuit.

3 3. Adequacy of Representation

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

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

14 4. Superiority

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

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

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

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

1 and (3) the Court conducts a final approval hearing to inquire into the fairness of the proposed
2 settlement. *See* Cal. R. Ct. 3.769(c), (e-g).

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

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

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

28 ///

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

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

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

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

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

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

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

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

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

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

25 Based upon data obtained through informal discovery, Plaintiff’s counsel estimated the
26 following data through mediation: (1) 120 Class Members, (2) 63 *former* Class Members for
27 purposes of Labor Code § 203, (3) 12,000 workweeks, (4) 57,500 shifts worked, and (4)
28 approximately 2,500 biweekly wage statements during the PAGA Period. (Mankin Decl. ¶ 18).

1 Here, there were three categories of claims alleged by Plaintiff: (1) unpaid wage claims
2 under various theories, (2) meal and rest break violations, and (3) derivative claims for waiting
3 time and wage statement penalties due to the other alleged violations. (Mankin Decl. ¶ 19).

4 As to the unpaid wage claims, Plaintiff alleged three theories of liability. First, Plaintiff
5 alleged that FTI failed to pay all required minimum and overtime wages due to a practice that
6 required Class Members to complete pre-shift temperature checks and screenings prior to
7 clocking in. Second, Plaintiff claimed that Defendant, at times, paid bonuses to Class Members
8 yet failed to include that additional compensation in the regular rate for purposes of calculating
9 overtime wages. Third, Plaintiff argued that Defendant utilized a rounding policy that was not
10 neutral in application, thus violating California law. In total, Plaintiff's counsel estimated the
11 maximum value of these unpaid wages to be \$48,000. But FTI vehemently opposed these unpaid
12 wage claims on the merits and as to the propriety of class certification. Due to the defenses and
13 arguments raised, Plaintiff assigned a 20% risk for each respective unpaid wage claim at the
14 class certification stage and an additional 20% risk on the merits. In sum, Plaintiff's counsel
15 calculated the risk-adjusted value of the unpaid wage claims as \$30,720. (Mankin Decl. ¶ 20).

16 Plaintiff also alleged meal and rest break claims against Defendant. Given the total
17 number of shifts at issue (an estimate of 57,500), and when incorporating violation rates from
18 expert review of the timekeeping records and other evidence, Plaintiff's counsel estimated a
19 35.5% violation rate for meal breaks and a 50% violation rate for rest breaks, leading to 20,413
20 alleged meal violations and 28,750 alleged rest break violations. This established a maximum
21 potential value for these claims of \$663,700 (49,163 violations multiplied by the average hourly
22 rate of \$13.50 as the applicable premium rate under § 226.7). (Mankin Decl. ¶ 21).

23 However, FTI raised numerous arguments in response to this claim, including that it
24 maintained fully compliant written policies and specifically authorized the Class Members to
25 take meal and rest breaks, meaning that no one had a reason or cause to miss a break or take a
26 short/late break. Therefore, Defendant asserted that a fact-finder would have to determine for
27 each Class Member whether a break was missed and why, and why a break was noncompliant or
28 nonexistent, because if it was by the employee's choice, no liability attaches to Defendant.

1 These defenses are factored into Plaintiff's analysis in two ways. First, these issues raise
2 questions regarding whether the meal and rest break claims could be certified, and Plaintiff
3 placed a 20% risk at the class certification stage for meal periods and a 40% risk for rest breaks.
4 Second, these defenses also go toward the merits given the evidentiary question of proving the
5 number of meal and rest violations. As such, Plaintiff placed a 20% risk on the merits for meal
6 breaks, and an additional 40% risk on the merits for rest breaks, setting the risk-adjusted value
7 for the combined meal and rest break claims at \$316,093. (Mankin Decl. ¶ 22).

8 Finally, Plaintiff alleged claims for waiting time penalties and wage statement violations.
9 But these claims were entirely derivative of the claims above, meaning that they only had merit
10 if the claims for unpaid wages or meal/rest breaks were successful. The maximum values for
11 these claims were as follows: (1) \$214,326 for waiting time penalties [63 former employees x
12 \$13.50 per hour x 8.4 hours per day x 30 days], and (2) \$245,750 for wage statement violations
13 [2,500 wage statements at the \$50/\$100 formula under § 226(e)]. (Mankin Decl. ¶ 23).

14 But FTI raised a variety of defenses to these derivative claims that impacted the
15 valuation. Namely, FTI argued that the wage statements did not violate Labor Code § 226 and,
16 even if there was a "technical" violation, Plaintiff would be unable to prove the required
17 "knowing and intentional" and "injury" elements. Based on these facts and defenses, Plaintiff
18 placed a nominal 20% risk at class certification (mirroring the claims on which the wage
19 statement claim was based) and estimated another 30% risk the merits, leading to a risk-adjusted
20 value of \$137,620 for the wage statement claims. (Mankin Decl. ¶ 24).

21 Then, as to the waiting time penalty claim, Plaintiff's valuation had to account for the
22 fact that this claim was derivative of the unpaid wage and meal/rest break claims and, if those
23 claims failed at certification or on the merits, there would be no waiting time penalties owed, so
24 the same risks for those claims applied to this claim. Furthermore, even if the unpaid wage
25 and/or meal/rest claims succeeded at certification and on the merits, Plaintiff would have to
26 prove that the violations (if any existed) were "willful" under the meaning of Labor Code § 203.
27 And, here, Defendant argued there was no "willful" violation since they had compliant written
28 policies and any deviations therefrom were inadvertent and unintentional. As a result of this

analysis, Plaintiff's counsel applied a 30% risk at class certification and a 40% risk on the merits, leading to a risk-adjusted value of \$90,016. (Mankin Decl. ¶ 25).

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

•	Unpaid Wage Claims	\$	30,720
•	Meal and Rest Break Claims	\$	316,093
•	Wage Statement Claims	\$	137,620
•	Waiting Time Penalty Claims	\$	<u>90,016</u>
•	Total Risk Adjusted Penalties and Damages	\$	574,449

The reasonableness of the settlement is apparent from the fact that the proposed settlement is 52.2% of the risk-adjusted class damages and penalties. 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, FTI 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

1 class and PAGA cases against Fortune 100 companies, among other things. (Mankin Decl. ¶¶ 2-
2 6; Carlson Decl. ¶¶ 2-9). Plaintiff's counsel, operating at arm's length, weighed the strengths
3 and risks of this case, and are of the view that this is a fair and reasonable settlement considering
4 the nature of the claims, realistic risk adjusted value, the complexities of the case, state of the
5 law, and uncertainties of class certification and litigation.

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

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

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

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

27 The Notice satisfies the requirements of Rule of Court 3.766 and affords Class Members
28 with all due process protections required by the U.S. Constitution. Moreover, the contents of the

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

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

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

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

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

1 within the range of percentages which courts have upheld as reasonable in other class action
2 lawsuits”); *Singer v. Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) 2010 WL 2196104, at
3 *8 (approving fee award of 33.33% of the common fund); *Romero v. Producers Dairy Foods,*
4 *Inc.* (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841, at *4 (awarding fees of 1/3 of common
5 fund, noting: “[f]ee awards in class actions average around one-third of the recovery.”).

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

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

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

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

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

2 Subject to the Court's approval, the parties stipulated to Phoenix Class Action
3 Administration Solutions serving as the Administrator. Phoenix is experienced in administering
4 class action settlements and has provided a flat-fee proposal to administer this settlement for
5 \$6,000. (Mankin Decl. ¶ 38; Exhibit D to Mankin Decl. [Administrator's bid]).

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

7 The last step in the approval process is the formal hearing, whereby proponents of the
8 Settlement may explain and describe its terms and conditions and offer argument in support of
9 approval, and Class Members or their counsel may be heard in support of or in opposition to the
10 settlement. Subject to the Court's approval, the Parties propose that the Court schedule a hearing
11 for final approval approximately 130 days after the Preliminary Approval Date, as follows:

12 June 7, 2023	Preliminary Approval (PA) hearing
13 July 5, 2023 14 <i>24 days after PA</i>	Deadline for Administrator to complete first mailing of the Notice Packet to all Class Members.
15 August 19, 2023 16 <i>45 days after mailing Notice</i>	Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
17 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.
18 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.
19 5 court days before final 20 approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval
21 TBD - Approx. October 16, 22 2023 <i>130 days after PA</i>	Final Approval Hearing.

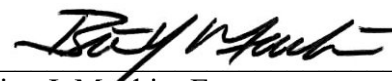
23 **VIII. CONCLUSION**

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

26 Dated: May 15, 2023

LAUBY, MANKIN & LAUBY LLP

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 16, 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.

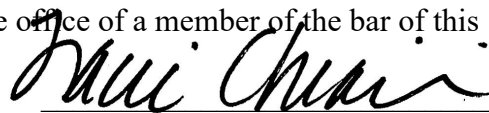
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 16, 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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