

Brian J. Mankin, Esq. [CSB No. 216228]
brian@lmlfirm.com
Kristina Bui Carlson, Esq. [CSB No. 294924]
kristina@lmlfirm.com
LAUBY, MANKIN & LAUBY LLP
5198 Arlington Avenue, PMB 513
Riverside, CA 92504
Tel: (951) 320-1444 | Fax: (951) 320-1445

Attorneys for Plaintiffs, on a representative basis and on behalf of all others similarly situated

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

ARMANDO FLORES and WILLIAM
STOREY, individually, on a representative
basis, and on behalf of all others similarly
situated;

Plaintiffs,

v.

SUNRISE RESPIRATORY CARE, INC.,
a California Corporation; SUNRISE
RESPIRATORY MANAGEMENT
GROUP, LLC, a California Limited
Liability Company, MICHAEL EILBERT,
OSCAR MUNOZ and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2127592
*[Assigned to Hon. Judge Joseph T. Ortiz, Dept.
S17, for all purposes]*

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

Hearing

Date: February 14, 2023

Time: 1:30 p.m.

Dept.: S17

Complaint filed: September 27, 2021

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on February 14, 2023 at 1:30 p.m. or as soon thereafter as
3 the matter may be heard by the Honorable Joseph Ortiz in Department S17 of the San Bernardino
4 County Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiffs
5 Armando Flores and William Storey, individually and on behalf of all others similarly situated,
6 will and hereby do move the Court for entry of an Order preliminarily approving the Parties'
7 class action settlement, including:

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

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

23
24 Dated: January 6, 2023

LAUBY, MANKIN & LAUBY LLP

25
26 BY:



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

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	2
A.	THE SETTLEMENT CLASS	2
B.	PROCEDURAL HISTORY	2
III.	SUMMARY OF THE PROPOSED SETTLEMENT	4
A.	SETTLEMENT CONSIDERATION AND ALLOCATION	4
B.	NOTICE PROCEDURES	5
C.	EXCLUSION AND OBJECTION PROCEDURES	5
D.	SETTLEMENT ALLOCATION FORMULA FOR SETTLEMENT SHARES	6
E.	TIMING OF SETTLEMENT DISBURSEMENTS	6
F.	TAX TREATMENT	7
G.	PARTICIPATING CLASS MEMBERS' RELEASE OF CLAIMS	7
H.	AGGRIEVED EMPLOYEES' RELEASE OF CLAIMS	8
IV.	PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE FOR PURPOSES OF SETTLEMENT	8
A.	ASCERTAINABILITY AND NUMEROSITY	9
B.	WELL-DEFINED COMMUNITY OF INTEREST	9
V.	THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, WHICH IS FAIR, ADEQUATE, AND REASONABLE	10
A.	CLASS ACTION SETTLEMENTS ARE SUBJECT TO JUDICIAL REVIEW AND APPROVAL UNDER THE CALIFORNIA RULES OF COURT	10
B.	THE SETTLEMENT IS THE RESULT OF SERIOUS, INFORMED, NON-COLLUSIVE NEGOTIATIONS	12
C.	THE EXTENT OF THE INVESTIGATION WAS MORE THAN SUFFICIENT TO PERMIT PRELIMINARY APPROVAL OF THE SETTLEMENT	12
D.	THE SETTLEMENT IS A REASONABLE COMPROMISE OF CLAIMS	13
E.	PLAINTIFFS' COUNSEL IS EXPERIENCED IN WAGE-AND-HOUR LITIGATION	17
F.	THE CLASS NOTICE CONFORMS TO ALL APPLICABLE STATUTES AND RULES	17
G.	THE NON-REVERSIONARY "CHECKS CASHED" DISTRIBUTION ENSURES MAXIMAL RECOVERY FOR CLASS MEMBERS	19
H.	THE ATTORNEY'S FEES AND COSTS ALLOCATION IS FAIR	19
I.	THE REQUESTED SERVICE AWARD REQUEST IS FAIR AND APPROPRIATE	20
VI.	THE COURT SHOULD APPOINT PHOENIX AS SETTLEMENT ADMINISTRATOR	21
VII.	TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING	21
VIII.	CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Amchem Prods., Inc. v. Windsor</i> (1997) 521 U.S. 591	9
<i>Archibald v. Cinerama Hotels</i> , (1976) 15 Cal.3d 853	18
<i>Arenas v. El Torito Rests., Inc.</i> (2010) 183 Cal.App.4th 723	9
<i>Barboza v. West Coast Digital GSM, Inc.</i> (2009) 179 Cal.App.4th 540	10
<i>Bond v. Ferguson Enterprises, Inc.</i> (E.D. Cal. 2011) 2011 WL 2648879.....	20
<i>Bush v. Superior Court</i> (1992) 10 Cal.App.4th 1374	10
<i>Cho v. Seagate Tech. Holdings, Inc.</i> (2009) 177 Cal.App.4th 734.....	11
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	8, 11, 12
<i>Ellis v. Naval Air Rework Facility</i> (N.D. Cal. 1980) 87 F.R.D. 15	17
<i>Glass v. UBS Fin. Servs.</i> (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 8476	20
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	13, 17
<i>Laffitte v. Robert Half Int’l Inc.</i> (2016) 1 Cal.5th. 480	19
<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.</i> (9th Cir. 2001) 244 F.3d 1152	10
<i>Louie v. Kaiser Found. Health Plan, Inc.</i> (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 78314.....	20
<i>Martin v. FedEx Ground Package System, Inc.</i> (N.D. Cal. Dec. 31, 2008) 2008 WL 5478576 ..	19
<i>Medraza v. Honda of N. Hollywood</i> (2008) 166 Cal.App.4th 89	9
<i>Officers for Justice v. Civil Service Com.</i> (9th Cir. 1982) 688 F.2d 615	8, 11
<i>Reyes v. San Diego County Board of Supervisors</i> (1987) 196 Cal.App.3d 1263	9
<i>Romero v. Producers Dairy Foods, Inc.</i> (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841	19
<i>Ross v. US Bank National Association</i> (N.D. Cal. 2010) 2010 WL 3833922	20
<i>Singer v. Becton Dickinson and Co.</i> (S.D. Cal. June 1, 2010) 2010 WL 2196104	19
<i>Stuart v. RadioShack Corp.</i> (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645.....	19
<i>Vasquez v. Coast Valley Roofing, Inc.</i> (E.D. Cal. 2010) 266 F.R.D. 4150.....	20
<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224.....	11, 13
<i>West v. Circle K Stores, Inc.</i> (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 76558.....	20

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Flores and Storey seek preliminary approval of a \$385,300.00 wage-and-hour
4 class action settlement on behalf of approximately 220 current and former non-exempt
5 employees employed by Defendants Sunrise Respiratory Care, Inc., Michael Eilbert, Oscar
6 Munoz, and Sunrise Respiratory Management Group, LLC (“Defendants”) in California at any
7 time from September 27, 2017, through the Preliminary Approval Date (the “Class Period”).

8 Under the terms of the Settlement Agreement,¹ Defendants will not oppose Plaintiffs
9 Counsel’s application for a reasonable award of attorney’s fees not to exceed \$128,433.33 (1/3 of
10 the Gross Settlement Amount), litigation expenses not to exceed \$20,000, Settlement
11 Administrator Costs of \$8,000.00, PAGA penalties of \$40,000 (with 75% to the LWDA and 25%
12 to the Aggrieved Employees on a pro rata basis), and Service Payments of \$7,500 to Plaintiff
13 Armando Flores and \$3,000 to Plaintiff William Storey (collectively “Class Representatives”).
14 (S.A. ¶ 48.)

15 After all Court-approved deductions from the Gross Settlement Amount², it is estimated
16 that \$188,066.67 will be available to pay the Class Members, as follows:

17

<i>Gross Settlement Amount</i>	\$ 385,300.00
Attorneys’ Fees (1/3)	\$ 128,433.33
Litigation Costs (not to exceed)	\$ 20,000.00
Administrator Costs	\$ 8,000.00
PAGA Penalties	\$ 40,000.00
Class Representatives Service Awards	\$ 10,500.00
Credit to Defendants for Prior Individual Settlements	\$ 10,300.00
<i>Net Settlement Amount</i>	\$ 188,066.67

22

23 Assuming 220 Class Members, the average payment to each Class Member will be
24 approximately \$854.85 (\$188,066.67 / 220). However, the actual payment will be calculated on
25

26
27 ¹ The Class Action and PAGA Settlement Agreement and Release of Claims (the “Settlement Agreement” or
“S.A.”) is attached as Exhibit 1 to the Declaration of Brian Mankin (“Mankin Decl.”).

28 ² The “Gross Settlement Amount” includes a credit of \$10,300 for prior individual settlement payments that
Defendants paid to certain Class Members during the litigation. Individual Settlement Payments will be reduced by
any payment received by a Class Member from the Prior Payment (but in no instance shall the offset from the Prior
Payment cause an Individual Settlement Payment to drop below \$50).

1 a pro-rata basis according to the number of Weeks Worked by each Class Member during the
2 Class Period, with each Work Week having a value of approximately \$17.10 (\$188,066.67 /
3 11,000 estimated Work Weeks). In addition, approximately 195 Aggrieved Employees will
4 receive a share of the \$10,000 PAGA Penalties (25% of the total \$40,000 allocation), calculated
5 pro-rata based on Weeks Worked during the PAGA Period. (S.A. ¶ 48(h)).

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

14 **II. BACKGROUND**

15 **A. THE SETTLEMENT CLASS**

16 The Class is defined as follows:

17 All current and former non-exempt employees employed by
18 Defendant Sunrise Respiratory Care, Inc. in California at any time
19 during the Class Period (which is September 27, 2017, through the
Preliminary Approval Date). (S.A. ¶ 38).

20 **B. PROCEDURAL HISTORY**

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

25 On September 27, 2021, Plaintiff Flores filed a complaint alleging class action causes of
26 action against Defendant for (1) failure to pay minimum wages; (2) failure to pay overtime
27 wages; (3) failure to provide meal periods; (4) failure to provide rest breaks; (5) failure to timely
28 pay final wages; (6) failure to provide accurate itemized wage statements; and (7) unfair and

1 unlawful competition. On November 29, 2021, Plaintiff Flores filed a first amended complaint
2 adding PAGA claims (the operative first amended complaint shall be referred to as the
3 “Complaint”). Plaintiff Flores will file a second amended complaint to add plaintiff and class
4 representative, William Storey, to the pending action after receiving leave from the Court. (S.A.
5 ¶ 41).

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

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

17 On June 1, 2022, Plaintiffs and Defendants participated in mediation before David
18 Phillips, Esq., a well-respected wage-and-hour mediator. The matter did not resolve at
19 mediation. (Mankin Decl. ¶ 15).

20 Immediately thereafter, Plaintiff Flores filed three Doe amendments to add Oscar Munoz,
21 Michael Eilbert, and Sunrise Respiratory Management Group, LLC as defendants to the action.
22 On June 2, 2022, Plaintiff Flores also propounded his first set of written discovery, which
23 consisted of Form Interrogatories, Special Interrogatories, Requests for Production, and Requests
24 for Admissions, to Defendant Sunrise Respiratory, Inc. Plaintiffs’ counsel concurrently
25 forwarded a draft *Belaire-West* notice to defense counsel for comments and revisions. After
26 receiving Sunrise Respiratory Care, Inc.’s initial responses to the first set of written discovery,
27 Plaintiffs’ counsel and defense counsel initiated a prolonged meet and confer process as
28 Plaintiffs’ counsel alleged the responses were noncompliant and insufficient. Additionally,

1 defense counsel had failed to provide any revisions or comments to the proposed *Belaire* notice.
2 (Mankin Decl. ¶ 16).

3 On or about June 10, 2022, Plaintiff William Storey formally retained Plaintiffs' counsel
4 and agreed to serve as a Class Representative in this matter. Prior to that date, Plaintiff William
5 Storey was assisting Plaintiffs' counsel in preparation for mediation. (Mankin Decl. ¶ 17).

6 On or about September 24, 2022, Plaintiff Flores was informed that Defendant Sunrise
7 Respiratory Care, Inc. was making individual settlements with putative Class Members. As a
8 result, Plaintiffs' counsel applied *ex parte* to the Court to request the immediate production of the
9 Class contact information. At the *ex parte* hearing on October 6, 2022, the Honorable David
10 Cohn issued an oral protective order and ordered defense counsel to provide the Class contact list
11 directly to Plaintiffs' counsel no later than one week from the hearing. (Mankin Decl. ¶ 18).

12 Since the original mediation date, the mediator continued to work with the Parties to
13 settle the matter and ultimately Mr. Phillips issued a mediator's proposal calling for a global
14 settlement of the case and giving Defendants credit for the Prior Payment issued to certain Class
15 Members. Both Parties accepted the proposal on about October 10, 2022, and now seek the
16 Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 19).

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

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

19 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

20 The \$385,300 Settlement Amount is non-reversionary and will be paid out to Class
21 Members without the need to submit a claim form or take any affirmative action. It includes (1)
22 Plaintiffs' attorneys' fees and costs, as approved by the Court; (2) a service award of \$7,500 to
23 Plaintiff Flores and \$3,000 to Plaintiff Storey, subject to approval by the Court; (3) settlement
24 administrator expenses, not to exceed \$8,000; (4) a \$40,000 PAGA award, 75 percent of which is
25 to be paid to the LWDA pursuant to California Labor Code § 2699(i) and 25 percent to the
26 Aggrieved Employees; and (5) the aggregate of all Individual Settlement Amounts of the
27 Participating Class Members as well as an offset for the Prior Payments. Defendants will
28 separately pay its share of employer payroll taxes and withholdings. (S.A. ¶ 48).

1 **B. NOTICE PROCEDURES**

2 The proposed Class Notice will be provided to the Class Members showing the estimated
3 amount that each Class Member will receive, the number of Work Weeks credited as a Class
4 Member and the number of Pay Periods Worked as an Aggrieved Employee. Within 10 calendar
5 days after entry by the Court of its Order of Preliminary Approval, Defendant shall provide the
6 Settlement Administrator with a list containing Class Member names, addresses, phone numbers,
7 Social Security Numbers, Weeks Worked during the Class Period and Pay Periods Worked
8 during the PAGA Period (the “Class Data”). (S.A. ¶¶ 5, 64).

9 Within 10 calendar days of receipt of the Class Data, the Settlement Administrator shall
10 calculate the numbers for each Class Member, populate the Class Notice, and send each Class
11 Member the Class Notice via first-class, United States mail. (S.A. ¶ 65).

12 In the event that any Class Notice mailed to a Class Member is returned as having been
13 undelivered by the U.S. Postal Service, the Settlement Administrator shall perform a skip trace
14 search and seek an address correction for such Class Member(s), and a second Class Notice will
15 be sent to any new or different address obtained. (S.A. ¶ 66).

16 **C. EXCLUSION AND OBJECTION PROCEDURES**

17 Class Members who do not timely Opt-Out of the Settlement will be deemed to
18 participate in the Settlement and shall become a Participating Class Member without having to
19 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
20 must submit a written request to the Settlement Administrator no later than 30 days after being
21 mailed by the Settlement Administrator (“Notice Response Deadline”). (S.A. ¶¶ 19). Any Opt-
22 Out request that is not postmarked by the Response Deadline will be invalid, unless a Notice was
23 remailed in which case the Class Member’s exclusion or objection must be returned by the later
24 of the original Notice Response Deadline or 15 calendar days after the remailing of the notice.
25 (S.A. ¶ 66).

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

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

2 The amount of each Settlement Class Member's Individual Class Payment is tied to the
3 number of Weeks Worked by each Class Member for Defendant during the Class Period.
4 Individual Class Payments are calculated by (a) dividing the Net Settlement Amount by the total
5 number Weeks Worked by all Participating Class Members during the Class Period, and (b)
6 multiplying the result by each Participating Class Member's Weeks Worked. (S.A. ¶ 48(c)).

7 Additionally, each "Aggrieved Employee" will receive a share of the PAGA Penalties
8 based on a pro-rata basis. Thus, the \$10,000 PAGA Penalties allocated to the Aggrieved
9 Employees will be divided and paid on a Week Worked basis. (S.A. ¶ 48(h)).

10 The Class Notice will inform Class Members of the estimated share and the number of
11 Weeks Worked during the Class Period, as well as number of Pay Periods Worked during the
12 PAGA Period. Class Members may dispute Weeks and/or Pay Periods Worked if they feel they
13 worked more in the Class or PAGA Periods than Defendant's records show by timely submitting
14 evidence to the Settlement Administrator. (S.A. ¶ 67).

15 As noted, assuming 220 Class Members, the average payment to each Class Member will
16 be approximately \$854.85 (\$188,066.67 / 220). However, the actual payment will be calculated
17 on a pro-rata basis according to the number of Weeks Worked by each Class Member during the
18 Class Period, with each Work Week having a value of approximately \$17.10 (\$188,066.67 /
19 11,000 estimated Work Weeks). In addition, approximately 195 Aggrieved Employees will
20 receive a share of the \$10,000 PAGA Penalties allocation based on Weeks Worked by each
21 Aggrieved Employee during the PAGA Period. (Mankin Decl. ¶ 8).

22 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

23 Defendants are required to deposit the Settlement Amount, along with the employers'
24 share of payroll taxes owed, with the Settlement Administrator, within 15 calendar days after the
25 "Effective Date" and these funds will be used to pay: (1) the class attorney fees and expenses, as
26 approved by the Court; (2) the service award, as approved by the Court; (3) administrative
27 expenses, as approved by the Court; (4) the PAGA Penalties; and (5) the aggregate of all
28 Individual Settlement Amounts of Participating Class Members. Within 10 calendar days after

1 receiving the funds, the Settlement Administrator shall issue payments to cover all court-
2 approved payments. (S.A. ¶ 71).

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

6 **F. TAX TREATMENT**

7 The Parties agree that one-third of the Individual Settlement Payments will be allocated
8 as wages subject to withholding of all applicable local, state and federal taxes and the remaining
9 two-thirds will be allocated for interest and penalties (pursuant to, *e.g.*, California Labor Code
10 sections 203, 210, 226, etc.) from which no taxes will be withheld. (S.A. ¶ 48(d)). Additionally,
11 the PAGA Penalties payable to the Aggrieved Employees will be classified entirely as civil
12 penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶¶ 48(h)). These
13 allocations are in line with the claim valuations in the *Kullar* analysis discussed below (*i.e.*, the
14 penalty claims [§§ 203 and 226] comprise the majority of risk-adjusted value). Defendants will
15 separately pay its share of employer payroll taxes on the sum allocated to wages. (S.A. ¶ 48(a)).

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

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

19 “the claims stated in the Complaint and those based solely upon the
20 facts in the Complaint, including: (a) failure to pay minimum wages,
21 (b) failure to pay overtime wages, (c) failure to provide meal
22 periods, (d) failure to provide rest breaks, (e) failure to failure to
23 timely pay wages each period and upon separation of employment,
24 (f) failure to provide accurate itemized wage statements, (g) unfair
25 and unlawful competition, and (h) all other claims for statutory
26 penalties based on the facts or claims alleged in the operative
27 complaint and/or any and all PAGA Notices sent to the LWDA by
28 Plaintiffs Armando Flores and/or William Storey; as well as any
claims that were or could have been pled based on the same or
similar facts. Any claims for injunctive relief, declaratory relief,
restitution, statutory penalties, fraudulent business practices or
punitive damages alleged or which could have been alleged under
the facts, allegations and/or claims pleaded in the Action are also
released. The time period governing the Released Class Claims
shall be the Class Period.”

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

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

7 The Settlement Agreement at ¶ 23 also defines the "PAGA Released Claims" as follows:

8 "the PAGA claims that Plaintiff alleged against the Released Parties,
9 on behalf of the Aggrieved Employees and the State of California,
10 based on the facts stated in the Complaint and in the relevant LWDA
11 notice letter or that could have been asserted based on those facts,
12 including all PAGA claims seeking civil penalties premised upon:
13 (a) failure to pay minimum wages, (b) failure to pay overtime wages,
14 (c) failure to provide meal periods, (d) failure to provide rest breaks,
15 (e) failure to failure to timely pay wages each period and upon
16 separation of employment, (f) failure to provide accurate itemized
wage statements, and (g) all other claims for civil penalties
recoverable under the Private Attorneys General Act, Labor Code
§§ 2698 *et seq.* based on the facts or claims alleged in the operative
complaint, and any PAGA Notices submitted by Armando Flores or
William Storey."

17 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
18 that individual will still be subject to the PAGA Released Claims to the fullest extent permitted
19 by law and will receive a pro-rata share of PAGA Penalties. (S.A. ¶¶ 53 and 69(a)).

20 **IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS**
21 **APPROPRIATE FOR 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, Plaintiffs request 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 Defendants’ records, there
13 are approximately 225 Class Members that are easily identifiable and fall within the defined
14 Class. Thus, Plaintiffs’ 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, Plaintiffs contend 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 Plaintiffs’ 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 Plaintiffs’ 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 Plaintiffs assert claims regarding

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

3. Adequacy of Representation

The proposed class representative must establish that he or she will adequately represent the proposed class. See *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546. Specifically, Plaintiffs are adequate to represent the class because they were employed by Defendant during the Class Period, experienced the same wage and hour practices as the rest of the Class, understood their duties as a Class Representative, have been willing to undergo the risks of litigation, and have 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, Plaintiffs are represented by Class Counsel with extensive experience in wage and hour class actions. (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;

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:

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

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

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

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

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

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

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

25 Plaintiffs thoroughly investigated and evaluated the factual and legal strengths and
26 weaknesses of this case before reaching the settlement. As described above, the settlement was
27 reached after extensive investigation and research, thorough calculations and risk evaluation, and
28 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 Of particular relevance to the reasonableness of the proposed Settlement is the fact that
14 significant legal and factual grounds for defending this action exist. First, in addition to
15 disputing the merits of Plaintiffs’ claims, Defendants strongly disputed that Plaintiffs could
16 obtain class certification, arguing a lack of commonality of the legal claims and injuries.
17 Defendant further argued that it complied with the applicable law and that any purported
18 deviations therefrom were individualized in nature, thereby limiting Plaintiffs’ ability to certify
19 the class. While Plaintiffs assert that this is a suitable case for certification, they realize that there
20 is always a significant risk associated with class certification proceedings, which could
21 significantly limit the claims that she could pursue on a class basis.

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

26 Based upon detailed data obtained through informal discovery and information
27 exchanges, Plaintiffs’ counsel estimated the following data points through the date of mediation:
28 (1) 173 class members, (2) 86 class members that separated from employment during the 3-year

lookback for Labor Code § 203, (3) 9,679 workweeks, (4) 46,724 shifts worked, and (4) approximately 2,610 wage statements during the PAGA Period. (Mankin Decl. ¶ 21).

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

As to the unpaid wage claims, Plaintiffs alleged two distinct theories of liability. First, Plaintiffs alleged that Defendants utilized an auto-deduct policy that deducted 30 minutes per day for meal breaks, without regard if the Class Member took a lunch break, resulting in a systematic underpayment to the Class. Second, Plaintiffs alleged that Defendants failed to pay proper overtime when Defendants failed to factor in on-call pay received by Class Members into the regular rate of pay. In total, Plaintiffs' counsel estimated the maximum value of these unpaid wages to be \$900,203. (Mankin Decl. ¶ 23).

However, Defendants vehemently opposed these unpaid wage claims on the merits and as to the propriety of class certification. For example, as to the auto-deduct claim, Defendants argued that that policy was only applicable to a small subgroup of Class Members. Moreover, in addition to its other defenses on the merits, Defendants argued that Plaintiffs would be unable to meet its evidentiary burden at summary judgment and/or trial because Plaintiffs and the Class would be unable to introduce evidence as to the amount of unpaid wages (since the claims are not apparent from the timekeeping records alone), thus defeating liability. Furthermore, Defendants argue a lack of commonality due to the fact that there are a number of varying job positions and duties of non-exempt employees. (Mankin Decl. ¶ 24).

Due to these defenses and arguments, Plaintiffs assigned a 30% risk for the auto-deduct claim and 20% risk for the regular rate of pay claim at the class certification stage. And, due to the defenses as to the merits, Plaintiff assigned the following merits-based risk to each claim: 40% risk on the auto-deduct claim and a 30% risk on the regular rate claim. In sum, Plaintiffs' counsel calculated the risk-adjusted value of the unpaid wage claims as \$385,085. (Mankin Decl. ¶ 25).

///

1 Plaintiffs also alleged meal and rest break claims against Defendants. Given the total
2 number of shifts at issue (an estimate of 44,747), and when incorporating violation rates from
3 expert review of the timekeeping records and other evidence, Plaintiffs' counsel estimated a 10%
4 violation rate for meal breaks and a 25% violation rate for rest breaks, leading to 4,475 alleged
5 meal violations and 11,187 alleged rest break violations. This established a maximum potential
6 value for these claims of \$323,701 (15,706 violations multiplied by the average hourly rate of
7 \$20.61 as the applicable premium rate under § 226.7). (Mankin Decl. ¶ 26).

8 However, Defendants raised numerous arguments in response to this claim, including that
9 it maintained fully compliant written policies and specifically authorized the Class Members to
10 take meal and rest breaks, meaning that no one had a reason or cause to miss a break or take a
11 short/late break. Therefore, Defendants asserted that a fact-finder would have to determine for
12 each Class Member whether a break was missed and why, and why a break was noncompliant or
13 nonexistent, because if it was by the employee's choice, no liability attaches to Defendant.
14 These defenses are factored into Plaintiffs' analysis in two ways. First, these issues raise
15 questions regarding whether the meal and rest break claims could be certified, and second these
16 defenses also go toward the merits given the evidentiary question of proving the number of meal
17 and rest violations. As such, Plaintiffs placed a 50% risk on the meal break claim, and a 75%
18 risk on the rest break claim, resulting in a risk-adjusted value for the combined meal and rest
19 break claims at \$242,775.75. (Mankin Decl. ¶ 27).

20 Finally, Plaintiffs alleged claims for waiting time penalties and wage statement
21 violations. But these claims were entirely derivative of the claims above, meaning that they only
22 had merit if the claims for unpaid wages or meal/rest breaks were successful. The maximum
23 values for these claims were as follows: (1) \$451,977 for waiting time penalties [86 former
24 employees x \$20.61 per hour x 8.50 hours per day x 30 days], and (2) \$253,350 for wage
25 statement violations [2,610 wage statements at the \$50/\$100 formula under § 226(e)]. (Mankin
26 Decl. ¶ 28).

27 But Defendants raised a variety of defenses to these derivative claims that impacted the
28 valuation. Namely, as to the wage statement violations, Defendants argued that its wage

statements did not violate Labor Code § 226 and, even if there was a “technical” violation, that Plaintiffs would be unable to prove the required “knowing and intentional” and “injury” elements. Based on these facts and defenses, Plaintiffs placed a nominal 20% risk at class certification (mirroring the claims on which the wage statement claim was based) and estimated another 20% risk the merits, leading to a risk-adjusted value of \$162,144 for the wage statement claims. (Mankin Decl. ¶ 29).

Then, as to the waiting time penalty claim, Plaintiffs’ valuation had to account for the fact that this claim was derivative of the unpaid wage and meal/rest break claims (*e.g.*, the unpaid wage premiums) and, if those claims failed at certification or on the merits, there would be no waiting time penalties owed, so the same risks for those claims applied to this claim. Furthermore, even if the unpaid wage and/or meal/rest claims succeeded at certification and on the merits, Plaintiff would have to prove that the violations (if any existed) were “willful” under the meaning of Labor Code § 203. And, here, Defendants argued that there could not be a finding of a “willful” violation since they had compliant written policies and any deviations therefrom were inadvertent and unintentional. As a result of this analysis, Plaintiffs’ counsel applied a 30% risk at class certification and a 30% risk on the merits, leading to a risk-adjusted value of \$221,469. (Mankin Decl. ¶ 30).

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

•	Unpaid Wage Claims	\$	385,085
•	Meal and Rest Break Claims	\$	242,775
•	Wage Statement Claims	\$	162,144
•	Waiting Time Penalty Claims	\$	<u>221,469</u>
•	Total Risk Adjusted Penalties and Damages	\$	1,011,473

The reasonableness of the settlement is apparent from the fact that the proposed settlement is 38% of the risk-adjusted class damages and penalties. And while the PAGA penalties had a maximum value in the low seven figures, this fails to acknowledge that courts have wide latitude to reduce the civil penalties “based on the facts and circumstances of a

particular case” and if “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(e)(2). Moreover, Defendants 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. Defendants also argued it is improper to stack civil penalty claims on top of underlying statutory claims. For these reasons, the Parties submit that this settlement is fair and reasonable.

E. PLAINTIFFS’ COUNSEL IS EXPERIENCED IN WAGE-AND-HOUR LITIGATION

The view of the attorneys actively conducting the litigation is entitled to significant weight in deciding whether to approve the settlement. *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”).

Plaintiffs’ 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). Plaintiff’s counsel, operating at arm’s length, weighed the strengths and risks of this case, and are of the view that this is a fair and reasonable settlement considering the nature of the claims, realistic risk adjusted value, the complexities of the case, state of the law, and uncertainties of class certification and litigation.

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

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

///

///

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

10 The Court has wide discretion in approving the means of providing notice, so long as the
11 class representative "provide(s) meaningful notice in a form that should have a reasonable
12 chance of reaching a substantial percentage of class members." *Archibald v. Cinerama Hotels*,
13 (1976) 15 Cal.3d 853, 861. Here, the parties' notice plan is that notice of the Settlement will be
14 disseminated directly to the class members by first class mail by the settlement administrator,
15 since Defendant has the last known addresses of all class members and the Settlement
16 Administrator will perform a skip trace and update those addresses for any class notices that are
17 returned and re-send the notice.

18 The Class Notice satisfies the requirements of Rule of Court 3.766 and affords Settlement
19 Class Members with all due process protections required by the U.S. Constitution. Moreover,
20 the contents of the Class Notice comply with Cal. R. Ct. 3.766(d), because the Notice includes,
21 without limitation (1) a detailed explanation of the case, including the basic contentions or
22 denials of the parties; (2) a statement that the court will exclude the member from the class if the
23 member so requests by a specified date; (3) a procedure for the member to follow in requesting
24 exclusion from the class; (4) a statement that the judgment, whether favorable or not, will bind
25 all members who do not request exclusion; and (5) a statement that any member who does not
26 request exclusion may, if the member so desires, enter an appearance through counsel. The 30-
27 day deadline to opt-out or object is also reasonable, as it provides Class Members sufficient time
28 to do so and, if they so choose, to seek independent legal advice in the interim. If a Class

Member does not opt-out, he or she will automatically be sent a settlement check.

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

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

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

Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement of up to \$20,000 in litigation costs, along with \$128,433.33 in attorneys’ fees (one-third of the Settlement Amount). See, e.g., *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480 (approving 1/3 fee in the amount of \$6.33 million at a 2.13 lodestar multiplier, and holding that when class action litigation establishes a monetary fund for the benefit of the class members, the trial court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created); *Stuart v. RadioShack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645 (approving fee 1/3 of the total maximum settlement amount of \$4.5 million since 1/3 was “well within the range of percentages which courts have upheld as reasonable in other class action 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.”); *Martin v. FedEx Ground Package System, Inc.* (N.D. Cal. Dec. 31, 2008) 2008 WL 5478576, at *8 (approving fees of 1/3 of common fund).

Once the Court grants preliminary approval of the Settlement Agreement and Class Notice is disseminated, Plaintiffs’ counsel will submit a comprehensive request for attorneys’

1 fees and costs with its final approval motion.

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

3 The Settlement Agreement provides an incentive award payment of \$7,500 to Armando
4 Flores as a Class Representative and \$3,000 to William Storey as a Class Representative, which
5 is reasonable given the large recovery Class Members will receive on average, as well as the
6 time and effort they devoted to this case. Their efforts included providing factual background for
7 the Class and PAGA complaint; providing documents and information about Defendants’
8 compensation plan; participating in phone calls to discuss litigation and settlement strategy;
9 making themselves available throughout the litigation to assist with analyzing the claims and
10 defenses; helping Class Counsel prepare for the mediation; and reviewing the settlement
11 documents. The Class Representatives also assumed significant risk in bringing this litigation—
12 namely, had they lost, they could have been ordered to pay Defendants’ costs.

13 The requested service award falls within the range of incentive payments typically
14 awarded to Class Representatives in similar class actions. See, e.g., *Bond v. Ferguson*
15 *Enterprises, Inc.* (E.D. Cal. 2011) 2011 WL 2648879 (approving \$11,250 service awards in
16 trucker meal break class action); *Ross v. US Bank National Association* (N.D. Cal. 2010) 2010
17 WL 3833922, at *2 (approving \$20,000 enhancement award in California wage-and-hour class
18 action settlement); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 4150, 493
19 (approving service awards of \$15,000 from a \$300,000 settlement fund in a wage/hour class
20 action); *West v. Circle K Stores, Inc.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 76558, at *28
21 (finding service awards “of \$ 15,000 each to be reasonable.”); *Glass v. UBS Fin. Servs.* (N.D.
22 Cal. 2007) 2007 U.S. Dist. LEXIS 8476, at *52 (finding “requested payment of \$25,000 to each
23 of the named Plaintiff is appropriate” in wage and hour settlement); *Louie v. Kaiser Found.*
24 *Health Plan, Inc.* (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 78314, at *18 (approving “\$25,000
25 incentive award for each Class Representative” in wage an hour settlement).

26 ///

27 ///

28 ///

VI. THE COURT SHOULD APPOINT PHOENIX AS SETTLEMENT ADMINISTRATOR

Subject to the Court's approval, the Parties stipulated to Phoenix serving as the Settlement Administrator. Phoenix is experienced in administering class action settlements and has provided a flat-fee proposal to administer this settlement for \$8,000. (Mankin Decl. ¶ 43; Exhibit 4 to Mankin Decl. [Phoenix's bid]).

VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING

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

February 14, 2023	Preliminary Approval (PA) hearing
March 10, 2023 (24 days after PA)	Deadline for Settlement Administrator to complete first mailing of the Notice Packet to all Settlement Class Members.
April 10, 2023 (30 days after mailing Class Notice)	Deadline for Settlement Class Members to submit Requests for Exclusion and Objections to the settlement.
16 court days before Final Approval hearing	Deadline for Plaintiffs to file and serve Motion for Final Approval and application for award of attorneys' fees, costs and service payments.
9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiffs' Motion for Final Approval, or filing any response to an objection to the settlement.
5 court days before final approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval
TBD (Approximately June 14, 2023 - 120 days after Preliminary Approval)	Final Approval Hearing.

///

///

///

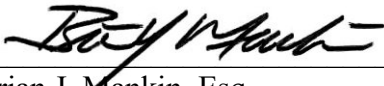
///

1 **VIII. CONCLUSION**

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

4 Dated: January 6, 2023

LAUBY, MANKIN & LAUBY LLP

5
6 BY: 
7 Brian J. Mankin, Esq.
8 Attorneys for Plaintiffs and the Proposed
9 Class
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 January 6, 2023, I caused to be served the foregoing document(s) described as follows:

PLAINTIFFS' 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.

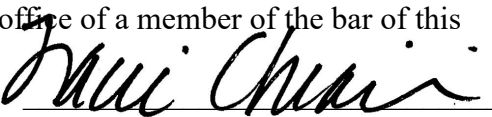
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 January 6, 2023, Riverside, California.

☐ **Federal** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


Tracie Chiarito, Declarant

SERVICE LIST

Spencer Hamer, Esq.

Spencer.Hamer@klgates.com

Ashley Song, Esq.

Ashley.Song@klgates.com

K&L GATES LLP

1 Park Plaza, 12th Floor

Irvine, CA 92614

949-253-0900

949-253-0902 – fax

Penny Chen Fox, Esq.

Penny.Fox@klgates.com

K&L GATES LLP

10100 Monica Blvd., 8th Floor

Los Angeles, CA 90067

310-553-5000

310-553-5001-fax

Attorneys for Defendant Sunrise Respiratory Care, Inc.