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

WILLIAM MITTIE, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

CARRY TRANSIT, LLC, a Delaware
Limited Liability Company; HENIFF
TRANSPORTATION SYSTEMS, LLC, a
Delaware Limited Liability Company; and
DOES 1 through 20, inclusive;

Defendants.

Case No.: 22CV008178
*[Assigned to Hon. Evelio Grillo, Dept. 21, for all
purposes]*

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

Hearing

Date: April 23, 2024

Time: 1:30 p.m.

Dept.: 21

Reservation ID #: 697290104032

Complaint filed: March 9, 2022

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 23, 2024, at 1:30 p.m., or as soon thereafter as the matter may be heard by the Honorable Evelio Grillo in Department 21 of the Alameda County Superior Court, located at 1221 Oak Street, Oakland, CA 94612, Plaintiff William Mittie, individually and on behalf of all others similarly situated, will and hereby does move the Court for entry of an Order preliminarily approving the Parties' class action settlement, including:

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

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

Dated: March 28, 2024

LAUBY, MANKIN & LAUBY LLP

BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Mittie seeks preliminary approval of a \$425,000 (“Gross Settlement Amount” or
4 “GSA”) wage-and-hour class action settlement on behalf of approximately 47 current and former
5 California resident truck drivers who were employed by Defendant Carry Transit, LLC, and who
6 drove in California at any time during the Class Period of March 9, 2018, through January 10,
7 2024.

8 Under the terms of the Settlement Agreement,¹ Defendant will not oppose Plaintiff’s
9 Counsel’s application for a reasonable award of attorney’s fees not to exceed \$141,666.66 (1/3 of
10 the Gross Settlement Amount) - 10% of which will be held in trust by the Settlement
11 Administrator until the completion of the distribution process and the Court approves the final
12 accounting, litigation expenses not to exceed \$20,000, Settlement Administrator Costs of
13 \$5,000.00, PAGA penalties of \$42,500 (with 75% to the LWDA and 25% to the Aggrieved
14 Employees on a pro rata basis), and a Service Payment of \$7,500 to Plaintiff William Mittie
15 (“Class Representative”). (S.A. ¶ 47).

16 After all Court-approved deductions from the Gross Settlement Amount, it is estimated
17 that \$208,333.34 will be available to pay the Class Members, as follows:

18

<i>Gross Settlement Amount</i>	\$ 425,000.00
Attorneys’ Fees (1/3)	\$ 141,666.66
Litigation Expenses (not to exceed)	\$ 20,000.00
Settlement Administrator Costs	\$ 5,000.00
PAGA Penalties	\$ 42,500.00
Class Representative Service Award	\$ 7,500.00
<i>Net Settlement Amount</i>	\$ 208,333.34

22

23 Assuming 47 Class Members, the average payment to each Class Member will be
24 approximately \$4,432.62 (\$208,333.34 / 47). However, the actual payment will be calculated on
25 a pro-rata basis according to the number of Weeks Worked by each Class Member during the
26 Class Period, with each Work Week having a value of approximately \$41.66 (\$208,333.34 /
27

28

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.”).

5,000 estimated Work Weeks). In addition, approximately 45 Aggrieved Employees will receive a share of the \$10,625 PAGA Penalties (25% of the total \$42,500 allocation), calculated pro-rata based on Pay Periods Worked during the PAGA Period. (S.A. ¶ 47(h)).

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

II. BACKGROUND

A. THE SETTLEMENT CLASS

The Class is defined as follows:

All current and former California resident truck drivers who were employed by Defendant Carry Transit, LLC, and who drove in California at any time during the Class Period (which is March 9, 2018, through January 10, 2024). (S.A. ¶ 3).²

B. PROCEDURAL HISTORY

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

On March 9, 2022, Plaintiff filed a complaint alleging class action causes of action against Defendant for (1) failure to pay proper minimum wages, (2) failure to pay for rest and recovery periods under Labor Code § 226.2, (3) failure to reimburse business expenses, (4) failure to pay wages, (5) failure to timely pay final wages, (6) failure to provide accurate

² "Defendant" refers to Carry Transit, LLC, and includes its affiliate, Defendant Heniff Transportation Systems, LLC. [S.A. ¶ 11]; "Class Period" means the period from March 9, 2018, through January 10, 2024 [S.A. ¶ 7].

1 itemized wage statements; and (7) unfair and unlawful competition. Plaintiff later filed a first
2 amended complaint adding PAGA claims (the operative first amended complaint shall be
3 referred to as the “Complaint”). (S.A. ¶ 41; Mankin Decl. ¶ 12).

4 Defendant retained counsel and immediately began to defend the case, arguing that all
5 materials allegations lack merit. Defendant further asserted that Defendant Heniff
6 Transportation Systems, LLC (“Heniff”) is not a proper defendant in this matter, as Plaintiff was
7 employed solely by Carry Transit, LLC, and the two companies have separate DOT numbers that
8 haul different types of products. Then, after early discussions among counsel, the Parties agreed
9 to attend private mediation. (Mankin Decl. ¶ 13).

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

19 On October 10, 2023, Plaintiff and Defendant participated in mediation before Judge
20 Amy Hogue (Ret.), a well-respected retired judge who served on the LA Superior Court complex
21 division, and now works as a wage and hour mediator. The matter resolved at mediation
22 pursuant to a mediator’s proposal which was accepted by both Parties. (Mankin Decl. ¶ 15). The
23 Parties entered into the Settlement Agreement (Exhibit 2 to the Mankin Declaration) and now
24 seek the Court’s preliminary approval of the Settlement.

25 ///

26 ///

27 ///

28 ///

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

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

3 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

4 The \$425,000 Gross Settlement Amount is non-reversionary and will be paid out to Class
5 Members without the need to submit a claim form or take any affirmative action. It includes (1)
6 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service award of \$7,500 to
7 Plaintiff, subject to approval by the Court; (3) settlement administrator expenses, not to exceed
8 \$5,000; (4) a \$42,500 PAGA award, 75 percent of which is to be paid to the LWDA pursuant to
9 California Labor Code § 2699(i) and 25 percent to the Aggrieved Employees; and (5) the
10 aggregate of all Individual Settlement Amounts of the Participating Class Members. (S.A. ¶ 47
11 and subparts). Defendant will separately pay its share of employer payroll taxes and
12 withholdings due on the wage portions of the Individual Settlement Payments, which shall be
13 reported through the Settlement Administrator. (S.A. ¶ 49(a)).

14 **B. NOTICE PROCEDURES**

15 The proposed Class Notice will be provided to the Class Members showing the estimated
16 amount that each Class Member will receive, the number of Work Weeks credited as a Class
17 Member and Aggrieved Employee³. Within 14 calendar days after entry by the Court of its
18 Order of Preliminary Approval, Defendant shall provide the Settlement Administrator with a list
19 containing Class Member names, addresses, phone numbers, Social Security Numbers, Weeks
20 Worked during the Class Period and PAGA Period (the "Class Data"). (S.A. ¶¶ 6, 65).

21 Within 10 calendar days of receipt of the Class Data, the Settlement Administrator shall
22 calculate the numbers for each Class Member, populate the Class Notice, and send each Class
23 Member the Class Notice via first-class, United States mail. (S.A. ¶ 66).

24 In the event that any Class Notice mailed to a Class Member is returned as having been
25 undelivered by the U.S. Postal Service, the Settlement Administrator shall perform a skip trace
26

27 _____
28 ³ The Class Notice is attached as Exhibit 2 to the Mankin Decl.

1 search and seek an address correction for such Class Member(s), and a second Class Notice will
2 be sent to any new or different address obtained. (S.A. ¶ 67).

3 **C. EXCLUSION AND OBJECTION PROCEDURES**

4 Class Members who do not timely Opt-Out of the Settlement will be deemed to
5 participate in the Settlement and shall become a Participating Class Member without having to
6 submit a claim form or take any other action. To Opt-Out of the Settlement, a Class Member
7 must submit a written request to the Settlement Administrator no later than 60 days after being
8 mailed by the Settlement Administrator (“Response Deadline”). (S.A. ¶¶ 35). Any Opt-Out
9 request that is not postmarked by the Response Deadline will be invalid, unless a Notice was
10 remailed in which case the Class Member’s exclusion or objection must be returned by the later
11 of the original Response Deadline or 15 calendar days after the remailing of the notice. (S.A. ¶
12 70).

13 The Class Notice shall inform Class Members of their right to object to the Settlement.
14 Any Participating Class Member who wishes to object to the Settlement may submit a written
15 objection to the Settlement Administrator no later than the Response Deadline. (S.A. ¶ 70(c)).

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

17 The amount of each Class Member’s Individual Class Payment is tied to the number of
18 Weeks Worked by each Class Member for Defendant during the Class Period. Individual Class
19 Payments are calculated by (a) dividing the Net Settlement Amount by the total number Weeks
20 Worked by all Participating Class Members during the Class Period, and (b) multiplying the
21 result by each Participating Class Member’s Weeks Worked. (S.A. ¶ 47(c)).

22 Additionally, each “Aggrieved Employee” will receive a share of the PAGA Penalties
23 based on a pro-rata basis. Thus, the \$10,625 PAGA Penalties allocated to the Aggrieved
24 Employees will be divided and paid on a Weeks Worked basis. (S.A. ¶ 47(h)).

25 The Class Notice will inform Class Members of the estimated share and the number of
26 Weeks Worked during the Class Period and PAGA Period. Class Members may dispute Weeks
27 Worked if they feel they worked more in the Class or PAGA Periods than Defendant’s records
28 show by timely submitting evidence to the Settlement Administrator. (S.A. ¶ 68).

1 As noted, assuming 47 Class Members, the average payment to each Class Member will
2 be approximately \$4,432.62 (\$208,333.34 / 47). However, the actual payment will be calculated
3 on a pro-rata basis according to the number of Weeks Worked by each Class Member during the
4 Class Period, with each Work Week having a value of approximately \$41.66 (\$208,333.34 /
5 5,000 estimated Work Weeks). In addition, approximately 45 Aggrieved Employees will receive
6 a share of the \$10,625 PAGA Penalties allocation based on Weeks Worked during the PAGA
7 Period.

8 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

9 Defendant is required to deposit the Settlement Amount, along with the employers' share
10 of payroll taxes owed, with the Settlement Administrator, within 30 calendar days after the
11 "Effective Date" and these funds will be used to pay: (1) the class attorney fees and expenses, as
12 approved by the Court; (2) the service award, as approved by the Court; (3) administrative
13 expenses, as approved by the Court; (4) the PAGA award; and (5) the aggregate of all Individual
14 Settlement Amounts of Participating Class Members. Within 10 calendar days after receiving the
15 funds, the Settlement Administrator shall issue payments to cover all court-approved payments
16 (except that 10% of the attorneys' fees and costs shall be held back until after the final
17 distribution hearing). (S.A. ¶ 72).

18 Class Members will have 180 days to cash the settlement check. If a Class Member fails
19 to cash a check by the deadline, the Settlement Administrator shall issue unclaimed funds to the
20 following cy pres in accordance with CCP section 384: Bay Area Legal Aid – Working
21 Together for Justine (baylegal.org). (S.A. ¶ 73).

22 **F. TAX TREATMENT**

23 The Parties agree that one-third (1/3) of the Individual Class Payments will be allocated
24 as wages subject to withholding of all applicable local, state and federal taxes and the remaining
25 two-thirds (2/3) will be allocated for interest and penalties (pursuant to, *e.g.*, California Labor
26 Code sections 203, 210, 226, etc.) from which no taxes will be withheld. (S.A. ¶ 47(d)).
27 Additionally, the PAGA Penalties payable to the Aggrieved Employees will be classified entirely
28 as civil penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶ 47(h)). These

1 allocations are in line with the claim valuations in the *Kullar* analysis discussed below (*i.e.*, the
2 penalty claims [§§ 203 and 226] comprise the majority of risk-adjusted value). Defendant will
3 separately pay its share of employer payroll taxes on the wages portions of the Individual
4 Settlement Payments. (S.A. ¶ 47(a)).

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

6 In exchange for these payments, the Settlement Agreement at ¶ 30 provides that the
7 Participating Class Members will release the Released Parties of the Released Class Claims,
8 which is defined as:

9 All claims that were alleged, or reasonably could have been alleged,
10 based on the facts stated in the operative Complaint, including
11 claims for failure to pay minimum or regular wages for all hour
12 worked, failure to pay for nonproductive time, failure to pay for rest
13 and recovery periods, failure to reimburse business expenses, failure
14 to pay timely wages during employment, failure to pay all earned
15 and accrued wages to discharged/separated employees, furnish
16 accurate itemized wage statements, and maintain required payroll
17 records in violation of Labor Code sections 200-204, 208, 210,
18 218.6, 226, 226.2, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194,
1194.2, 1197, 1197.1, 1198, 1198.5, 1199, or Industrial Welfare
Commission Orders 4-2001 and 9-2001, or Business and
Professions Code section 17200, et seq., which are premised on the
same allegations, and Cal. Code Regs., tit. 8, section 11090 (the
"Released Class Claims"). The operative release period for the
Released Class Claims is the Class Period.

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

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

25 The Settlement Agreement at ¶ 31 provides that only Plaintiff and the State of California
26 (not the Aggrieved Employees) shall release the Released PAGA Claims, which is defined as
27 follows:
28

1 The PAGA claims that Plaintiff alleged against the Released Parties,
2 on behalf of himself and the State of California, based on the facts
3 stated in the Complaint and in the relevant LWDA notice letter or
4 that could have been asserted based on those facts, including
5 violations premised on violation of Labor Code sections 200-204,
6 208, 210, 218.6, 221-223, 226, 226.2, 226.3, 226.7, 510, 512, 558,
7 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, IWC
8 Wage Orders 4, including §§ 3(A), 4, 3(A), 11, 12, and Cal. Code
9 Regs., tit. 8, section 11090, and all other claims for civil penalties
10 recoverable under the PAGA based on the facts or claims alleged in
11 the LWDA notice letter and the Complaint.

12
13 **IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS**
14 **APPROPRIATE FOR PURPOSES OF SETTLEMENT**

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

27 **A. ASCERTAINABILITY AND NUMEROSITY**

28 In determining whether a class is ascertainable, the court considers “(1) the class
definition, (2) the size of the class, and (3) the means available for identifying the class
members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
class is ascertainable if the class members can be objectively identified and given notice of the

1 litigation without unreasonable time or expense). Here, according to Defendant’s records, there
2 are approximately 47 Class Members that are easily identifiable and fall within the defined
3 Class. Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

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

5 *1. Commonality*

6 To justify certification, the class proponent must show that questions of law or fact
7 common to the class predominate over the questions affecting the individual members. *Arenas v.*
8 *El Torito Rests., Inc.* (2010) 183 Cal.App.4th 723, 732. Here, Plaintiff contends that the Class
9 was subjected to common policies and practices relating to payment of wages applicable to truck
10 drivers, provisions regarding wage statements, as well as reimbursement of expenses, and so on.
11 While the Parties dispute whether a class would be appropriate if the litigation were to continue,
12 they agree to class certification for the purposes of this settlement only.

13 *2. Typicality*

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

21 *3. Adequacy of Representation*

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

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

4. Superiority

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

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

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

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

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

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

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

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

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

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

D. THE SETTLEMENT IS A REASONABLE COMPROMISE OF CLAIMS

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

However, a settlement is not judged against what might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *Wershba*, 91 Cal.App.4th at 250 (“Compromise is inherent and

1 necessary in [settlement] ... even if the relief afforded by the proposed settlement is substantially
2 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
3 settlement because the public interest may indeed be served by a voluntary settlement in which
4 each side gives ground in the interest of avoiding litigation.”)

5 Of particular relevance to the reasonableness of the proposed Settlement is the fact that
6 significant legal and factual grounds for defending this action exist. First, in addition to
7 disputing the merits of Plaintiff’s claims, Defendant strongly disputed that Plaintiff could obtain
8 class certification, arguing a lack of commonality of the legal claims and injuries. Defendant
9 further argued that it complied with the applicable law and that any purported deviations
10 therefrom were individualized in nature, thereby limiting Plaintiff’s ability to certify the class.
11 While Plaintiff asserts that this is a suitable case for certification, he realizes that there is always
12 a significant risk associated with class certification proceedings, which could significantly limit
13 the claims that she could pursue on a class basis.

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

18 Based upon detailed data obtained through informal discovery and information
19 exchanges, Plaintiff’s counsel estimated the following data points through the date of mediation:
20 (1) 47 class members, (2) 24 class members that separated from employment during the 3-year
21 lookback for Labor Code § 203, (3) approximately 4,063 workweeks, and (4) approximately
22 2,700 workweeks during the PAGA Period. (Mankin Decl. ¶ 17).

23 Here, there were two main categories of claims alleged by Plaintiff: (1) unpaid wage
24 claims under various theories and (2) derivative claims for waiting time and wage statement
25 penalties due to the other alleged violations. (Mankin Decl. ¶ 18).

26 As to the unpaid wage claims, Plaintiff alleged that Defendants paid Class Members on a
27 “percentage of the load” or “per-mile” driven basis. Therefore, Plaintiff alleged that Defendants
28 failed to pay all required minimum and overtime wages due to a practice that required Class

1 Members to complete non-driving tasks (*e.g.*, pre-trip and post-trip inspections, fueling, going
2 through truck scales, detention time) without any compensation for these tasks. But Defendants
3 vehemently opposed these unpaid wage claims on the merits and as to the propriety of class
4 certification. Due to the defenses and arguments raised, Plaintiff assigned a 20% risk for the
5 unpaid wage claim at the class certification stage and an additional 20% risk on the merits. In
6 sum, Plaintiff’s counsel calculated the risk-adjusted value of the unpaid wage claims as
7 \$520,064. (Mankin Decl. ¶ 19).

8 Plaintiff alleged claims for waiting time penalties and wage statement violations. But
9 these claims were entirely derivative of the claims above, meaning that they only had merit if the
10 claims for unpaid wages were successful. The maximum values for these claims were as
11 follows: (1) \$180,000 for waiting time penalties [24 former employees x \$250 average daily pay
12 x 30 days], and (2) \$267,750 for wage statement violations [2,700 wage statements at the
13 \$50/\$100 formula under § 226(e)]. (Mankin Decl. ¶ 20).

14 But Defendants raised a variety of defenses to these derivative claims that impacted the
15 valuation. Namely, Defendants argued that the wage statements did not violate Labor Code §
16 226 and, 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 20% risk the merits, leading to a risk-adjusted
20 value of \$171,360 for the wage statement claims. (Mankin Decl. ¶ 21).

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 claims and, if those claims failed at
23 certification or on the merits, there would be no waiting time penalties owed, so the same risks
24 for those claims applied to this claim. Furthermore, even if the unpaid wage and/or meal/rest
25 claims succeeded at certification and on the merits, Plaintiff would have to prove that the
26 violations (if any existed) were “willful” under the meaning of Labor Code § 203. And, here,
27 Defendant argued there was no “willful” violation as they were inadvertent and unintentional.
28 As a result of this analysis, Plaintiff’s counsel applied a 20% risk at class certification and a 20%

1 risk on the merits, leading to a risk-adjusted value of \$115,200 (Mankin Decl. ¶ 22).

2 Plaintiff also alleged claims for unreimbursed business expenses. Plaintiff alleged that he
3 and the Class Members to obtain and maintain a smart phone with data plan in order
4 communicate with Defendants, yet Defendants did not provide any reimbursement for this
5 expense. The maximum value for this claim was \$81,260. However, Defendants contend that
6 Plaintiff and Class Members had an electronic logging device at the terminals through which the
7 drivers could communicate. Plaintiff assigned a 20% risk for the claim at the class certification
8 stage and an additional 20% risk on the merits. In sum, Plaintiff's counsel calculated the risk-
9 adjusted value of this claim as \$52,006. (Mankin Decl. ¶ 23).

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

12	• Unpaid Wage Claims	\$ 520,064
13	• Reimbursement Claims	\$ 52,006
14	• Wage Statement Claims	\$ 171,360
15	• Waiting Time Penalty Claims	<u>\$ 115,200</u>
16	• Total Risk Adjusted Penalties and Damages	\$ 858,630

17 The reasonableness of the settlement is apparent from the fact that the proposed
18 settlement is 49.5% of the risk-adjusted class damages and penalties. And while the PAGA
19 penalties had a maximum value in the low seven figures, this fails to acknowledge that courts
20 have wide latitude to reduce the civil penalties “based on the facts and circumstances of a
21 particular case” and if “to do otherwise would result in an award that is unjust, arbitrary and
22 oppressive, or confiscatory.” Labor Code § 2699(e)(2). Moreover, Defendant argued against the
23 merits of the underlying claims and particularly that the “willfulness” standard and/or “good
24 faith” defenses mitigated the civil penalty claims and rendered any such penalties as uncertain.
25 Defendant also argued it is improper to stack civil penalty claims on top of underlying statutory
26 claims. For these reasons, the Parties submit that this settlement is fair and reasonable.

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1 **E. PLAINTIFF’S COUNSEL IS EXPERIENCED IN WAGE-AND-HOUR LITIGATION**

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

6 Plaintiff’s Counsel is also highly experienced in Class/PAGA litigation, having been
7 named by the LA Times as one “Southern California Leading Lawyers” in the May 2023 issue of
8 Consumer Attorney’s of Southern California, being named as a “Super Lawyer” in employment
9 litigation (a distinction awarded to only 5% of litigators), having achieved large settlements and
10 verdicts, including one of the largest PAGA awards in California’s history, collecting over \$250
11 million for its clients, having tried class and PAGA cases against Fortune 100 companies, among
12 other things. (Mankin Decl. ¶¶ 2-6). Plaintiff’s counsel, operating at arm’s length, weighed the
13 strengths and risks of this case, and are of the view that this is a fair and reasonable settlement
14 considering the nature of the claims, realistic risk adjusted value, the complexities of the case,
15 state of the law, and uncertainties of class certification and litigation.

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

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

22 The proposed Class Notice and proposed plan for the Settlement Administrator to mail
23 the Class Notice to the last known address of all class members complies with all the
24 requirements of California Rule of Court 3.769(f) and 3.766(b). The contents of the proposed
25 Class Notice includes (1) the material terms of the settlement; (2) the proposed attorneys’ fees,
26 litigation expenses, and the costs of administration; (3) details about the final fairness hearing
27 and how class members may elect to exclude themselves or make an objection; and (4) how class
28 members can obtain additional information. *See* Class Notice (Exhibit 2 to the Mankin

1 Declaration). In addition, it will inform Class Members of their estimated settlement share.

2 The Court has wide discretion in approving the means of providing notice, so long as the
3 class representative “provide(s) meaningful notice in a form that should have a reasonable
4 chance of reaching a substantial percentage of class members.” *Archibald v. Cinerama Hotels*,
5 (1976) 15 Cal.3d 853, 861. Here, the Parties’ notice plan is that notice of the settlement will be
6 disseminated directly to the class members by first class mail by the settlement administrator,
7 since Defendant has the last known addresses of all class members and the Settlement
8 Administrator will perform a skip trace and update those addresses for any class notices that are
9 returned and re-send the notice.

10 The Class Notice satisfies the requirements of California Rule of Court 3.766 and affords
11 Settlement Class Members with all due process protections required by the U.S. Constitution.
12 Moreover, the contents of the Class Notice comply with California Rule of Court 3.766(d),
13 because the Notice includes, without limitation (1) a detailed explanation of the case, including
14 the basic contentions or denials of the parties; (2) a statement that the court will exclude the
15 member from the class if the member so requests by a specified date; (3) a procedure for the
16 member to follow in requesting exclusion from the class; (4) a statement that the judgment,
17 whether favorable or not, will bind all members who do not request exclusion; and (5) a
18 statement that any member who does not request exclusion may, if the member so desires, enter
19 an appearance through counsel. The 60-day deadline to opt-out or object is also reasonable, as it
20 provides Class Members sufficient time to do so and, if they so choose, to seek independent legal
21 advice in the interim. If a Class Member does not opt-out, he or she will automatically be sent a
22 settlement check.

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

25 The fact that each member who does not opt out of the settlement shall be mailed a check
26 ensures that every Class Member will be paid unless he or she affirmatively acts to exclude
27 himself or herself. Moreover, the Settlement Amount is non-reversionary, which means that no
28 settlement funds will revert to Defendant; instead, if any checks are uncashed by the deadline,

1 the funds will be transferred to the following cy pres in accordance with CCP section 384: Bay
2 Area Legal Aid. Neither party nor their counsel have an interest or affiliation with this cy pres
3 entity. (S.A. ¶ 73).

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

5 Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement
6 of up to \$20,000 in litigation costs, along with \$141,666.66 in attorneys’ fees (one-third of the
7 Gross Settlement Amount). In accordance with the Court’s guidelines, 10% of the fee and cost
8 award will be held in trust by the Administrator until the final disbursement hearing.

9 One-third is the benchmark for attorney fee awards in common fund settlements in
10 California state court cases. See, e.g., *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480
11 (approving 1/3 fee in the amount of \$6.33 million at a 2.13 lodestar multiplier, and holding that
12 when class action litigation establishes a monetary fund for the benefit of the class members,
13 the trial court may determine the amount of a reasonable fee by choosing an appropriate
14 percentage of the fund created); *Stuart v. RadioShack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL
15 3155645 (approving fee 1/3 of the total maximum settlement amount of \$4.5 million since 1/3
16 was “well within the range of percentages which courts have upheld as reasonable in other class
17 action lawsuits”); *Singer v. Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) 2010 WL
18 2196104, at *8 (approving fee award of 33.33% of the common fund); *Romero v. Producers*
19 *Dairy Foods, Inc.* (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841, at *4 (awarding fees of 1/3 of
20 common fund, noting: “[f]ee awards in class actions average around one-third of the
21 recovery.”); *Martin v. FedEx Ground Package System, Inc.* (N.D. Cal. Dec. 31, 2008) 2008 WL
22 5478576, at *8 (approving fees of 1/3 of common fund).

23 Once the Court grants preliminary approval of the Settlement Agreement and Class
24 Notice is disseminated, Plaintiff’s counsel will submit a comprehensive request for attorneys’
25 fees and costs with its final approval motion.

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

27 The Settlement Agreement provides an incentive award payment of \$7,500 to the Class
28 Representative, which is reasonable given the large recovery Class Members will receive on

1 average, as well as the time and effort he devoted to this case. His efforts included providing
2 factual background for the Class and PAGA complaint; providing documents and information
3 about Defendant’s compensation plan; participating in phone calls to discuss litigation and
4 settlement strategy; making herself available throughout the litigation to assist with analyzing the
5 claims and defenses; helping Class Counsel prepare for the mediation; and reviewing the
6 settlement documents. The Class Representative also assumed significant risk in bringing this
7 litigation—namely, had he lost, he could have been ordered to pay Defendant’s costs.

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

21 **VI. THE COURT SHOULD APPOINT PHOENIX AS SETTLEMENT**
22 **ADMINISTRATOR**

23 Subject to the Court’s approval, the parties stipulated to Phoenix Settlement
24 Administrators (“Phoenix”) serving as the Settlement Administrator. Phoenix is experienced in
25 administering class action settlements and has provided a flat-fee proposal to administer this
26 settlement for \$5,000. (Mankin Decl. ¶ 36; Exhibit 4 to Mankin Decl. [Phoenix’s bid]).

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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 135 days after the Preliminary Approval Date, as follows:

April 23, 2024	Preliminary Approval (PA) hearing
May 17, 2024 (<i>24 days after PA</i>)	Deadline for Settlement Administrator to complete first mailing of the Notice to all Class Members.
July 16, 2024 (<i>60 days after mailing Class Notice</i>)	Deadline for Settlement Class Members to submit Requests for Exclusion and Objections to the settlement.
16 court days before Final Approval hearing	Deadline for Plaintiff 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 Plaintiff's 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 September 5, 2024 - 135 days after Preliminary Approval)	Final Approval Hearing.

VIII. CONCLUSION

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

Dated: March 28, 2024

LAUBY, MANKIN & LAUBY LLP

BY:



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

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

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

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

On March 29, 2024, 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.

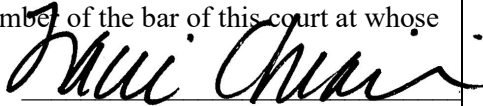
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 March 29, 2024, 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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