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

EDUARDO RIVERA, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

PATRIOT PAVING, INC., a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2210619
*[Assigned to Hon. Judge David Cohn, Dept S26,
for all purposes]*

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

Hearing

Date: July 14, 2023

Time: 9:00 a.m.

Dept.: S26

Complaint filed: May 27, 2022

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 14, 2023 at 9:00 a.m., or as soon thereafter as the
3 matter may be heard by the Honorable David Cohn in Department S26 of the San Bernardino
4 County Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff
5 Eduardo Rivera, individually and on behalf of all others similarly situated, will and hereby does
6 move the Court for entry of an Order preliminarily approving the Parties' class action settlement,
7 including:

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

17 This motion is based upon this Memorandum of Points and Authorities in Support
18 thereof; the Declaration of Plaintiff's counsel (Brian Mankin, Peter Carlson, and Kirk Hanson);
19 the 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: June 21, 2023

LAUBY, MANKIN & LAUBY LLP

25
26 BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Rivera seeks preliminary approval of a \$299,000 wage-and-hour class action
4 settlement on behalf of approximately 72 current and former non-exempt employees employed
5 by Defendant Patriot Paving, Inc. (“Patriot”) in California at any time from May 27, 2018,
6 through April 10, 2023 (the “Class Period”).

7 Under the terms of the Settlement Agreement,¹ Defendants will not oppose Plaintiff
8 Counsel’s application for a reasonable award of attorney’s fees not to exceed \$99,666.66 (1/3 of
9 the Gross Settlement Amount), litigation expenses not to exceed \$20,000, Settlement
10 Administrator Costs of \$6,000, PAGA penalties of \$10,000 (with 75% to the LWDA and 25% to
11 the Aggrieved Employees on a pro rata basis), and a Service Payment of \$7,500 to Plaintiff
12 Eduardo Rivera (“Class Representative”). (S.A. ¶ 47, *et seq.*)

13 After all Court-approved deductions from the Settlement Amount, it is estimated that
14 \$155,833.34 will be available to pay the Class Members, as follows:

15

<i>Gross Settlement Amount</i>	\$ 299,000.00
Attorneys’ Fees (1/3)	\$ 99,666.66
Litigation Costs (not to exceed)	\$ 20,000.00
Administrator Costs	\$ 6,000.00
PAGA Penalties	\$ 10,000.00
Class Representative Service Award	\$ 7,500.00
<i>Net Settlement Amount</i>	\$ 155,833.34

16
17
18
19

20 Assuming 72 Class Members, the average payment to each Class Member will be
21 approximately \$2,164.35 (\$155,833.34 / 72). However, the actual payment will be calculated on
22 a pro-rata basis according to the number of Weeks Worked by each Class Member during the
23 Class Period, with each Work Week having a value of approximately \$24.90 (\$155,833.34 /
24 6,259 estimated Work Weeks). In addition, approximately 50 Aggrieved Employees will receive
25 a share of the \$2,500 PAGA Penalties (25% of the total \$10,000 allocation), calculated pro-rata
26 based on Weeks Worked during the PAGA Period. (S.A. ¶ 47(h)).

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

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

8 **II. BACKGROUND**

9 **A. THE CLASS**

The Class is defined as follows:

10 All current and former nonexempt employees employed by
11 Defendant in California at any time during the Class Period (which
12 is May 27, 2018, through April 10, 2023). (S.A. ¶¶ 6, 10).

13 **B. PROCEDURAL HISTORY**

14 Plaintiff submitted a letter to the Labor Workforce Development Agency (the "LWDA")
15 for civil penalties under the Private Attorney General Act of 2004 (the "PAGA"), and
16 simultaneously sent a letter to Patriot requesting the production of personnel and timekeeping
17 records in order to further evaluate his wage and hour claims. (Mankin Decl. ¶ 12).

18 On May 27, 2022, Plaintiff filed a class and PAGA complaint against Patriot, alleging:
19 (1) failure to pay minimum wages, (2) failure to pay overtime, (3) failure to provide meal
20 periods, (4) failure to provide rest breaks, (5) failure to reimburse business expenses, (6) failure
21 to timely pay final wages, (7) failure to provide accurate itemized wage statements, (8) unfair
22 and unlawful competition pursuant to California Bus. and Prof. Code §§ 17200 *et seq.*, and (9)-
23 (16) related PAGA claims (S.A. ¶ 40).

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

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

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

6 On April 10, 2023, Plaintiff and Patriot participated in mediation before Gail Glick, Esq.
7 a well-respected employment mediator. The matter resolved at mediation and the Parties entered
8 into the Settlement Agreement submitted herewith. The Parties now seek the Court's preliminary
9 approval of the Settlement. (Mankin Decl. ¶ 16).

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

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

12 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

13 The \$299,000 Settlement Amount² is non-reversionary and will be paid out to Class
14 Members without the need to submit a claim form or take any affirmative action. It includes (1)
15 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service award of \$7,500 to
16 Plaintiff, subject to approval by the Court; (3) Administration Costs, not to exceed \$6,000; (4) a
17 \$10,000 PAGA award, 75% of which is to be paid to the LWDA pursuant to California Labor
18 Code § 2699(i) and 25% to the Aggrieved Employees; and (5) the aggregate of all Individual
19 Settlement Amounts of the Participating Class Members. (S.A. ¶ 47 and subparts). Defendant
20 will separately pay its share of employer payroll taxes and withholdings. (S.A. ¶ 47(a)).

21 **B. NOTICE PROCEDURES**

22 The proposed Notice will be provided to the Class showing the estimated amounts that
23 each Class Member will receive, the number of Work Weeks credited as a Class Member and/or
24 Aggrieved Employee (*See* Exhibit 2 to Mankin Decl.). Within 14 calendar days after entry by
25 the Court of its Order of Preliminary Approval, Defendant shall provide the Administrator with
26

27 ² The Settlement Amount is subject to increase if the "Escalator Clause" is triggered. S.A. ¶¶ 17,
28 47(a). If this clause is triggered, other figures will also shift upward along with the Settlement
Amount, such as attorneys' fees (but this is still constrained to 1/3 of the Settlement Amount)
along with increased Administration Costs (*see* S.A. ¶ 47(g)).

1 the “Class Data” consisting of Class Member names, addresses, phone numbers, Social Security
2 Numbers, and Weeks Worked during the Class/PAGA Period(s) (S.A. ¶¶ 9, 61).

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

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

9 **C. EXCLUSION AND OBJECTION PROCEDURES**

10 Class Members who do not timely Opt-Out of the Settlement will be deemed to
11 participate in the Settlement and shall become a Participating Class Member without having to
12 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
13 must submit a written request to the Administrator no later than 30 days after being mailed by
14 the Administrator (“Response Deadline”). (S.A. ¶¶ 24). Any Opt-Out request that is not
15 postmarked by the Response Deadline will be invalid, unless a Notice was remailed in which
16 case the Class Member’s exclusion or objection must be returned by the later of the original
17 Notice Response Deadline or 15 calendar days after the remailing of the notice. (S.A. ¶¶ 64, 68).

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

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

22 The amount of each Class Member’s Individual Class Payment is tied to the number of
23 Weeks Worked by each Class Member for Patriot during the Class Period. Individual Class
24 Payments are calculated by (a) dividing the Net Settlement Amount by the total number Weeks
25 Worked by all Participating Class Members during the Class Period, and (b) multiplying the
26 result by each Participating Class Member’s Weeks Worked. (S.A. ¶ 47(c)). Additionally, each
27 “Aggrieved Employee” will receive an Individual PAGA Payment calculated in the same way ;
28 thus, the \$7,500 PAGA Penalties will be paid pro rata on a Weeks Worked basis. (S.A. ¶ 47(h)).

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

5 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

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

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

13 **F. TAX TREATMENT**

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

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

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

24 all claims alleged in the Complaint or which could have been alleged based
25 solely upon the facts in the Complaint, including: (a) failure to pay
26 minimum wages, (b) failure to pay overtime wages, (c) failure to provide
27 meal periods and failure to pay premiums at the regular rate, (d) failure to
28 provide rest breaks and failure to pay premiums at the regular rate, (e)
failure to reimburse business expenses, (f) failure to timely pay wages upon
separation of employment, (g) failure to provide accurate itemized wage
statements, (h) unfair and unlawful competition, and (i) all other claims for
statutory penalties based on the facts or claims alleged in the Complaint

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

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

7 The Settlement Agreement at ¶ 34 also defines the "Released PAGA Claims" as follows:

8 all PAGA claims that Plaintiff alleged against the Released Parties, on
9 behalf of the Aggrieved Employees and the State of California, based on
10 the facts stated in the Complaint or which could have been stated based
11 solely upon the facts in the Complaint and in the relevant LWDA notice
12 letters, including all PAGA claims seeking civil penalties premised upon:
13 (a) failure to pay minimum wages, (b) failure to pay overtime wages, (c)
14 failure to provide meal periods and failure to pay premiums at the regular
15 rate, (d) failure to provide rest breaks and failure to pay premiums at the
16 regular rate, (e) failure to reimburse business expenses, (f) failure to timely
17 pay wages each period and upon separation of employment, (g) failure to
18 provide accurate itemized wage statements, and (h) all other claims for civil
19 penalties recoverable under the Private Attorneys General Act, Labor Code
20 §§ 2698 et seq. based on the facts or claims alleged in the Complaint.

21 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
22 that individual will still be subject to the Released PAGA Claims to the fullest extent permitted by
23 law and will receive a pro-rata share of PAGA Penalties.

24 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR**
25 **PURPOSES OF SETTLEMENT**

26 California Rule of Court 3.769(d) provides that the Court may make an order approving
27 certification of a provisional settlement class at the preliminary approval stage. It is well-
28 established that trial courts should use a "lesser standard of scrutiny" for determining the propriety
of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor Co.* (1996) 48
Cal.App.4th 1794, 1807 at n.19; *Officers for Justice v. Civil Service Com.* (9th Cir. 1982) 688 F.2d
615, 633 ("[C]ertification issues raised by class action litigation that is resolved short of a decision
on the merits must be viewed in a different light."); *Amchem Prods., Inc. v. Windsor* (1997) 521

1 U.S. 591, 620 (“Confronted with a request for settlement-only class certification, a district court
2 need not inquire whether the case, if tried, would present intractable management problems . . . for
3 the proposal is that there be no trial.”). As discussed below, for the purposes of this settlement
4 only, Plaintiff requests that this Court provisionally certify the Class, as defined above, under Code
5 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 Patriot’s records, there are
13 approximately 72 Class Members that are easily identifiable and fall within the defined Class.
14 Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

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

16 *1. Commonality*

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

23 *2. Typicality*

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

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

3 3. Adequacy of Representation

4 The proposed class representative must establish that he or she will adequately represent
5 the proposed class. See *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540,
6 546. Specifically, Plaintiff is adequate to represent the class because he was employed by Patriot
7 during the Class Period, experienced the same wage and hour practices as the rest of the Class,
8 understood his duties as a Class Representative, has been willing to undergo the risks of
9 litigation, and has no conflict of interest. (Rivera Decl. ¶¶ 2-4).

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

14 4. Superiority

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

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

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

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

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

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

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

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

28 ///

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

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

25 Based upon data obtained through informal discovery, Plaintiff’s counsel estimated the
26 following data through mediation: (1) 72 Class Members, (2) 58 *former* Class Members for
27 purposes of Labor Code § 203, (3) 6,259 workweeks, (4) 31,295 shifts worked, and (4)
28 approximately 2,400 biweekly wage statements during the PAGA Period. (Mankin Decl. ¶ 18).

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

4 As to the unpaid wage claims, Plaintiff alleged two primary theories of liability. First,
5 Plaintiff alleged that Patriot failed to pay all required wages due to a practice which paid the
6 Class on an hourly basis plus additional earned compensation, yet Patriot did not include the
7 additional earned compensation in the regular rate for purposes of calculating overtime wages.
8 Second, Class Members were frequently required to work on private jobs and public works
9 projects during the same workweek. However, during workweeks where Class Members worked
10 on both private and public works projects and worked overtime, Patriot paid overtime based on
11 the “rate-in-effect” method, whereas Plaintiff contends that California law required the company
12 to calculate and pay overtime based on the “weighted average.” In total, Plaintiff’s counsel
13 estimated the maximum value of these unpaid wages to be \$50,000. But Patriot vehemently
14 opposed these unpaid wage claims on the merits and as to the propriety of class certification.
15 Due to the defenses and arguments raised, Plaintiff assigned a 20% risk for each respective
16 unpaid wage claim at the class certification stage and an additional 20% risk on the merits. In
17 sum, Plaintiff’s counsel calculated the risk-adjusted value of the unpaid wage claims as \$32,000.
18 (Mankin Decl. ¶ 20).

19 Plaintiff also alleged meal and rest break claims against Defendant. Given the total
20 number of shifts at issue (an estimate of 31,295), and when incorporating violation rates from
21 expert review of the timekeeping records and other evidence, Plaintiff’s counsel estimated a 75%
22 violation rate for meal breaks and a 75% violation rate for rest breaks, leading to 23,471 alleged
23 meal violations and 23,471 alleged rest break violations. This established a maximum potential
24 value for these claims of \$1,408,260 (46,942 violations multiplied by the average hourly rate of
25 \$30 as the applicable premium rate under § 226.7). (Mankin Decl. ¶ 21).

26 However, Patriot raised numerous arguments in response to this claim, including that it
27 maintained fully compliant policies and specifically authorized the Class Members to take meal
28 and rest breaks, meaning that no one had a reason or cause to miss a break or take a short/late

1 break. Therefore, Defendant asserted that a fact-finder would have to determine for each Class
2 Member whether a break was missed and why, and why a break was noncompliant or
3 nonexistent, because if it was by the employee's choice, no liability attaches to Defendant.
4 These defenses are factored into Plaintiff's analysis in two ways. First, these issues raise
5 questions regarding whether the meal and rest break claims could be certified, and Plaintiff
6 placed a 30% risk at the class certification stage for meal periods and a 40% risk for rest breaks.
7 Second, these defenses also go toward the merits given the evidentiary question of proving the
8 number of meal and rest violations. As such, Plaintiff placed a 30% risk on the merits for meal
9 breaks, and an additional 40% risk on the merits for rest breaks, setting the risk-adjusted value
10 for the combined meal and rest break claims at \$598,511. (Mankin Decl. ¶ 22).

11 Finally, Plaintiff alleged claims for waiting time penalties and wage statement violations.
12 But these claims were entirely derivative of the claims above, meaning that they only had merit
13 if the claims for unpaid wages or meal/rest breaks were successful. The maximum values for
14 these claims were as follows: (1) \$417,600 for waiting time penalties [58 former employees x
15 \$30 per hour x 8 hours per day x 30 days], and (2) \$237,500 for wage statement violations [2,400
16 wage statements at the \$50/\$100 formula under § 226(e)]. (Mankin Decl. ¶ 23).

17 But Patriot raised a variety of defenses to these derivative claims that impacted the
18 valuation. Namely, Patriot argued that the wage statements did not violate Labor Code § 226
19 and, even if there was a "technical" violation, Plaintiff would be unable to prove the required
20 "knowing and intentional" and "injury" elements. Based on these facts and defenses, Plaintiff
21 placed a nominal 20% risk at class certification (mirroring the claims on which the wage
22 statement claim was based) and estimated another 30% risk the merits, leading to a risk-adjusted
23 value of \$133,000 for the wage statement claims. (Mankin Decl. ¶ 24).

24 Then, as to the waiting time penalty claim, Plaintiff's valuation had to account for the
25 fact that this claim was derivative of the unpaid wage and meal/rest break claims and, if those
26 claims failed at certification or on the merits, there would be no waiting time penalties owed, so
27 the same risks for those claims applied to this claim. Furthermore, even if the unpaid wage
28 and/or meal/rest claims succeeded at certification and on the merits, Plaintiff would have to

1 prove that the violations (if any existed) were “willful” under the meaning of Labor Code § 203.
2 And, here, Defendant argued there was no “willful” violation since they had compliant policies
3 and any deviations therefrom were inadvertent and unintentional. As a result of this analysis,
4 Plaintiff’s counsel applied a 30% risk at class certification and a 40% risk on the merits, leading
5 to a risk-adjusted value of \$175,392. (Mankin Decl. ¶ 25).

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

8	• Unpaid Wage Claims	\$ 32,000
9	• Meal and Rest Break Claims	\$ 598,511
10	• Wage Statement Claims	\$ 133,000
11	• Waiting Time Penalty Claims	<u>\$ 175,392</u>
12	• Total Risk Adjusted Penalties and Damages	\$ 938,903

13 The reasonableness of the settlement is apparent from the fact that the proposed
14 settlement is 31.85% of the risk-adjusted class damages and penalties. And while the PAGA
15 penalties had a maximum value in the six figures, this fails to acknowledge that courts have wide
16 latitude to reduce the civil penalties “based on the facts and circumstances of a particular case”
17 and if “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
18 confiscatory.” Labor Code § 2699(e)(2). Moreover, Patriot argued against the merits of the
19 underlying claims and particularly that the “willfulness” standard and/or “good faith” defenses
20 mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendant also
21 argued it is improper to stack civil penalty claims on top of underlying statutory claims. For
22 these reasons, the Parties submit that this settlement is fair and reasonable.

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

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

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1 Plaintiff's Counsel is also highly experienced in Class/PAGA litigation, having
2 repeatedly been named "Super Lawyer" in employment litigation (a distinction awarded to only
3 5% of litigators), having achieved large settlements and verdicts, including one of the largest
4 PAGA awards in California's history, collecting over \$250 million for its clients, having tried
5 class and PAGA cases against Fortune 100 companies, among other things. (Mankin Decl. ¶¶ 2-
6 6; Carlson Decl. ¶¶ 2-9; Hanson Decl.). Plaintiff's counsel, operating at arm's length, weighed
7 the strengths and risks of this case, and are of the view that this is a fair and reasonable
8 settlement considering the nature of the claims, realistic risk adjusted value, the complexities of
9 the case, state of the law, and uncertainties of class certification and litigation.

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

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

16 The proposed Notice and proposed plan for the Administrator to mail the Notice to the
17 last known address of all class members complies with all the requirements of Cal. Rule of Court
18 3.769(f) and 3.766(b). The proposed Notice includes: (1) the material terms of the settlement; (2)
19 the proposed attorneys' fees, litigation expenses, and the costs of administration; (3) details
20 about the final fairness hearing and how class members may elect to exclude themselves or make
21 an objection; (4) how class members can obtain additional information; and (5) each Class
22 Members' Individual Class PAGA Payments. *See* Class Notice (Exhibit 2 to Mankin Decl.).

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

1 trace and update those addresses for any class notices that are returned and re-send the notice.

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

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

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

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

24 Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement
25 of up to \$20,000 in litigation costs, along with attorneys’ fees equal to one-third of the
26 Settlement Amount. See, *e.g.*, *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480 (approving
27 1/3 fee in the amount of \$6.33 million at a 2.13 lodestar multiplier, and holding that when class
28 action litigation establishes a monetary fund for the benefit of the class members, the trial court

1 may determine the amount of a reasonable fee by choosing an appropriate percentage of the
2 fund created); *Stuart v. RadioShack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645
3 (approving fee 1/3 of the total maximum settlement amount of \$4.5 million since 1/3 was “well
4 within the range of percentages which courts have upheld as reasonable in other class action
5 lawsuits”); *Singer v. Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) 2010 WL 2196104, at
6 *8 (approving fee award of 33.33% of the common fund).

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

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

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

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

appropriate” in wage and hour settlement)

VI. THE COURT SHOULD APPOINT PHOENIX AS ADMINISTRATOR

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

VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING

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

July 14, 2023	Preliminary Approval (PA) hearing
August 7, 2023	<i>24 days after PA</i> : Deadline for Administrator to complete first mailing of the Notice Packet to all Class Members.
September 6, 2023	<i>30 days after mailing Notice</i> : Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
16 court days before Final Approval hearing	Deadline for Plaintiff to file and serve Motion for Final Approval and application for award of fees, costs and service payments.
9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiff’s Motion for Final Approval, or filing response to an objection.
5 court days before final approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval
TBD - November 1, 2023	<i>Approx. 110 days after PA</i> : Final Approval Hearing

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1 **VIII. CONCLUSION**

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

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5 Dated: June 21, 2023

LAUBY, MANKIN & LAUBY LLP

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7 BY:



8 Brian J. Mankin, Esq.
9 Attorneys for Plaintiff and the Class
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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, CA 92504.

On June 21, 2023, I caused to be served the foregoing document(s) described as follows:

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

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

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

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

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

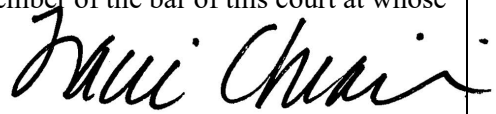
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service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

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

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

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 21, 2023, Riverside, California.

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



Tracie Chiarito, Declarant

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