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

CARLOS FLORES, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

NIKKISO AMERICA, INC., a Delaware
Corporation; ACD, LLC, a California
Limited Liability Company; CRYOGENIC
INDUSTRIES, INC., a Delaware
Corporation; CRYOGENIC INDUSTRIES
SERVICE COMPANIES, LLC, a
California Limited Liability Company;
CRYOQUIP, LLC, a California Limited
Liability Company; COSMODYNE, LLC,
a California Limited Liability Company;
and DOES 1 through 20, inclusive;

Defendants.

Case No.: CVRI2204626
*[Assigned to Hon. Harold Hopp, Dept 1, for all
purposes]*

**PLAINTIFF'S UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION AND PAGA
SETTLEMENT**

*Filed Concurrently with Declarations in
Support Thereof and [Proposed] Order*

Hearing

Date: June 18, 2024

Time: 8:30 a.m.

Dept.: 1

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 18, 2024, 8:30 a.m., or as soon thereafter as the
3 matter may be heard by the Honorable Harold Hopp in Department 1 of the Riverside County
4 Superior Court, located at 4050 Main Street, Riverside, CA 92501, Plaintiff Carlos Flores,
5 individually and on behalf of all others similarly situated, will and hereby does move the Court
6 for entry of an Order preliminarily approving the Parties' Class Action and Private Attorneys
7 General Act ("PAGA") settlement, 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 and PAGA settlement as fair, adequate,
12 and 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 and Plaintiff's counsel (Brian Mankin and Peter Carlson); the
19 Declaration of Defendant's Counsel Ros Lockwood ; the Declaration of Defendant's
20 Representative Jessica Phillips; the Declaration of Michael Moore on behalf of Phoenix
21 Settlement Administrators; the Class and PAGA Settlement Agreement and Release of Claims
22 (the "Settlement Agreement"); the proposed Order granting Preliminary Approval of the
23 Settlement; all other records, pleadings, and papers filed in this action; and upon such other
24 evidence or argument as may be presented to the Court at the hearing of this motion.

25 Dated: May 24, 2024

LAUBY, MANKIN & LAUBY LLP

26
27 BY:

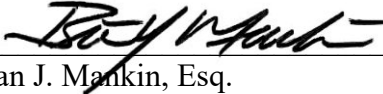

28 Brian J. Mankin, Esq.
Attorneys for Plaintiff and the Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Carlos Flores seeks preliminary approval of a \$460,000 class action settlement
4 on behalf of approximately 315 Class Members employed in California during the period of
5 October 25, 2018 to January 16, 2024 by Defendants Nikkiso America, Inc., ACD, LLC,
6 Cryogenic Industries, Inc., Cryogenic Industries Service Companies, LLC, Cryoquip, LLC,
7 Cosmodyne, LLC, and Integrated Cryogenic Solutions, LLC.

8 Under the terms of the Settlement Agreement,¹ Defendants will not oppose Plaintiff
9 Counsel's application for a reasonable award of attorneys' fees not to exceed \$153,333.33 (1/3 of
10 the Settlement Amount), litigation expenses not to exceed \$25,000, Settlement Administrator
11 Costs of \$9,000, PAGA penalties of \$30,000 (with 75% to the LWDA and 25% to the Aggrieved
12 Employees on a pro rata basis). (S.A. ¶ 54, *et seq.*) Plaintiff Carlos Flores (or "Class
13 Representative") is not seeking a Service Payment in light of a separate individual settlement
14 arising out of discrimination, retaliation and wrongful termination claims.

15 After all Court-approved deductions from the Settlement Amount, it is estimated that
16 \$242,666.67 will be available to pay the Class Members, as follows:

17

<i>Settlement Amount</i>	\$ 460,000.00
Attorneys' Fees (1/3)	\$ 153,333.33
Litigation Costs (not to exceed)	\$ 25,000.00
Administrator Costs	\$ 9,000.00
PAGA Penalties	\$ 30,000.00
Class Representative Service Award	\$ 0
<i>Net Settlement Amount</i>	\$ 242,666.67

22

23 Assuming 315 Class Members, the average payment will be approximately \$770.37
24 (\$242,666.67 / 315). However, the actual payments will be calculated on a pro-rata basis
25 according to the number of Weeks Worked by each Class Member during the Class Period. (*See*
26 *Mankin Decl.* ¶¶ 53 [description of high/low payments]). In addition, approximately 190
27

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

Aggrieved Employees will receive a share of the \$7,500 PAGA Penalties (25% of the \$30,000 allocation), calculated pro-rata based on Weeks Worked during the PAGA Period. (S.A. ¶ 49(h)).

Because the settlement is fair, reasonable, and 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 Settlement Administrators as the Administrator, and scheduling a hearing for final approval.

II. BACKGROUND

A. THE CLASS

Plaintiff brought the claims herein against several business entities based on the allegation that all companies were liable for the acts of the others under California law as "joint employers" and/or an "integrated enterprise." However, during litigation, Defendants and their counsel provided information showing that the joint claims against all entities under the "corporate umbrella" of Nikkiso America must end on December 31, 2019, because, after that date, Defendants completely separated each entity from one another, both in policies and practices. (Mankin Decl. ¶ 9). Thus, the Parties mediated and settled claims on behalf of two distinct classes of employees, the ACD Class and Cryogenic Class, which are further defined as follows:

ACD Class: All current and former nonexempt (hourly paid) employees employed by Defendant ACD, LLC (which also does business in California as ACD and Nikkiso ACD) in California during the ACD Class Period of January 1, 2020, through January 16, 2024. (S.A. ¶¶ 2-4).

Cryogenic Class: All current and former nonexempt (hourly paid) employees employed by Defendants Nikkiso America, Inc., ACD, LLC, Cryogenic Industries, Inc., Cryogenic Industries Service Companies, LLC, Cryoquip, LLC, Cosmodyne, LLC, and Integrated Cryogenic Solutions, LLC in California during the Cryogenic Class Period of October 25, 2018, through December 31, 2019. (S.A. ¶¶ 2-4).

1 **B. PROCEDURAL HISTORY**

2 On October 24, 2022, Plaintiff submitted a letter to the Labor and Workforce
3 Development Agency (“LWDA”) for civil penalties under the Private Attorneys General Act of
4 2004 (“PAGA”), and simultaneously sent a letter to Defendants requesting production of
5 personnel and timekeeping records to evaluate his wage and hour claims. (Mankin Decl. ¶ 13).

6 On October 25, 2022, Plaintiff Carlos Flores filed the instant class action against
7 Defendant Nikkiso America, which he also amended on about November 22, 2022, to add all
8 Defendants to the Action. Then after the 65-day exhaustion period without the LWDA asserting
9 jurisdiction over the PAGA claims, Plaintiff filed the operative second amended Complaint,
10 alleging class and representative action claims, including: (1) failure to pay minimum wages, (2)
11 failure to pay overtime wages, (3) failure to provide meal periods, (4) failure to provide rest
12 breaks, (5) failure to reimburse business expenses, (6) failure to timely pay wages upon
13 separation of employment, (7) failure to provide accurate itemized wage statements, (8) unfair
14 and unlawful competition, and (9) related PAGA claims. Defendants filed their Answer to the
15 Second Amended Complaint on about March 7, 2023. (Mankin Decl. ¶ 14).

16 Defendants retained counsel and immediately began to defend the case. In turn, Plaintiff
17 served written discovery on Defendants. Then, after discussions among counsel, the Parties
18 agreed to attend private mediation. (Mankin Decl. ¶ 15).

19 In preparation for mediation, the Parties informally exchanged documents and
20 information that allowed both sides to calculate the potential damages and evaluate potential risk,
21 including policies and procedures pertaining to the claims, statistics relating to the number of
22 current and former employees, number of shifts, weeks worked and other things, and a sampling
23 of payroll and timekeeping records for Class Members. This information enabled both parties to
24 take a deep dive into the claims. Additionally, during this process, Plaintiff and his counsel
25 analyzed, researched, and investigated the potential issues, including matters related to the
26 calculation of damages, trial, and appellate issues and risks. (Mankin Decl. ¶ 16).

27 On January 16, 2024, the Parties participated in a full-day mediation with Eve Wagner, a
28 highly-respected wage-and-hour mediator. At the conclusion of mediation and extensive arms-

length negotiations, Ms. Wagner issued a mediator's proposal which the Parties accepted and entered into a Memorandum of Understanding. The Parties later entered into the Settlement Agreement submitted herewith, and now seek the Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 17).

C. BRIEF OVERVIEW OF CLAIMS AND DEFENSES

Plaintiff alleged numerous wage and hour violations on behalf of the Class Members. However, Defendants vigorously contested and denied Plaintiff's material allegations on the merits and as to the propriety of a class action or PAGA representative action. Still, Plaintiff believed there were several strong claims. (Mankin Decl. ¶ 18).

For instance, Plaintiff alleged Defendants failed to pay proper wages due to several distinct wage violations. First, Plaintiff alleged that Defendants paid the Class on an hourly basis plus additional earned compensation but failed to include this compensation in the regular rate calculations and overtime pay. Second, Plaintiff alleged that Defendants failed to pay for all compensable hours due to a policy that "auto-deducted" 30 minutes from the shifts of Class Members when no meal period was recorded, without inquiry into whether a meal occurred or cut short. As a result, Plaintiff argued these violations resulted in unpaid minimum wages and overtime, as well as waiting time penalties under Labor Code § 203 and other derivative penalties. However, Defendants opposed each of these unpaid wage claims on the merits and as to the propriety of class certification. (Mankin Decl. ¶ 19).

Plaintiff also alleged that he and the Class Members were often denied compliant meal and rest breaks due to the nature of the work. However, Defendants argued that they provided and made all mandated meal and rest breaks available to the Class, and any employee who did not take a break did so entirely of their own volition. Thus, Defendant argued that these claims were without merit because, for each violation, a fact-finder would have to determine why a break was noncompliant, because if it was by the employee's choice, no liability attaches to Defendant. (Mankin Decl. ¶ 20).

Moreover, Plaintiff alleged other claims, such as the failure to reimburse business expenses (based on the allegation that Class Members were required to purchase and provide

1 their own tools to carry out tasks, without reimbursement). But Defendants disputed all such
2 claims on the merits and as to the propriety of class certification. (Mankin Decl. ¶ 21).

3 Despite the disputed nature of the claims, the Parties concluded that further litigation of
4 the Action would be protracted and expensive, and that it is desirable that the Action be fully and
5 finally settled to limit further risk, expense, and protracted litigation.

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

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

8 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

9 The \$460,000 Settlement Amount² is non-reversionary and will be paid out to Class
10 Members without the need to submit a claim form or take any affirmative action. It includes (1)
11 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) Administration Costs, not to
12 exceed \$9,000; (3) a \$30,000 PAGA award, 75% of which is to be paid to the LWDA pursuant
13 to California Labor Code § 2699(i) and 25% to the Aggrieved Employees; and (4) the aggregate
14 of all Individual Class Payments to the Participating Class Members. (S.A. ¶ 54 and subparts).
15 Defendants will separately pay their share of employer payroll taxes and withholdings. (S.A. ¶
16 54(a)).

17 **B. NOTICE PROCEDURES**

18 Here, the Parties will provide notice of this settlement in strict compliance with Court's
19 Class Action Case Management Order #1, issued on October 26, 2022 (the "CMO"). Thus, as
20 required by CMO ¶ G, the Parties will send each Class Member a Class Notice, a Request for
21 Exclusion Form, an Objection Form, and a Dispute Form. (S.A. ¶ 70), which are attached to the
22 Mankin Decl. as Exhibits B, C, D, and E, respectively.

23 Notably, the proposed Notice complies with CMO ¶ G(5) because it informs each Class
24 Member of the estimated recovery, the number of Weeks Works that each Class Members is
25 credited with, and the applicable average payments, minimum, and high payments. And the
26

27 ² The Settlement Amount is subject to increase if the "Escalator Clause" is triggered. S.A. ¶¶ 21,
28 54(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. ¶ 54(g)).

1 Notice Packet will be provided in both English and Spanish to ensure that each Class Member
2 can read and understand the contents.

3 Within 14 calendar days after entry of the Preliminary Approval Order, Defendants shall
4 provide the Settlement Administrator with the “Class Data” consisting of Class Member names,
5 addresses, Social Security Numbers, and Weeks Worked during the applicable periods. (S.A. ¶¶
6 10, 68). Within 10 calendar days of receipt of the Class Data, the Settlement Administrator shall
7 calculate the numbers for each Class Member, populate the Notice, and send each Class Member
8 the Notice Packet via first-class, United States mail. (S.A. ¶ 70).

9 If a Notice is returned as undelivered by the U.S. Postal Service, the Settlement
10 Administrator shall perform a skip trace and seek an address correction for the Class Member(s),
11 and a second Notice will be sent to any new or different address obtained. (S.A. ¶ 71).

12 **C. EXCLUSION AND OBJECTION PROCEDURES**

13 Class Members who do not timely Opt-Out of the Settlement will be deemed to
14 participate in the Settlement and shall become a Participating Class Member without having to
15 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
16 must submit a written request to the Administrator no later than 45 days after being mailed by
17 the Settlement Administrator (“Response Deadline”). (S.A. ¶ 40, 75(a)). Any Opt-Out request
18 that is not postmarked by the Response Deadline will be invalid, unless a Notice was remailed in
19 which case the Class Member’s exclusion or objection must be returned by the later of the
20 original Response Deadline or 15 calendar days after the remailing of the notice. (S.A. ¶¶ 71).

21 The Class Notice shall inform Class Members of their right to object to the Settlement.
22 Any Participating Class Member who wishes to object to the Settlement must complete the
23 Objection Form in the Notice Packet. To be valid, any Objection Form must be mailed to the
24 Settlement Administrator and postmarked on or before the Response Deadline. (S.A. ¶ 75(c)).

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

26 The amount of each Class Member’s Individual Class Payment is tied to the number of
27 Weeks Worked by each Class Member in the Cryogenic Class and/or ACD Class. Therefore,
28 Individual Class Payments will be calculated by: (a) dividing the Net Settlement Amount by the

1 total number of Weeks Worked by all Participating Class Members during the Combined Class
2 Period, and (b) multiplying the result by each Participating Class Members' Weeks Worked.
3 (S.A. ¶ 54(c)). Additionally, each "Aggrieved Employee" will receive an Individual PAGA
4 Payment, calculated by dividing and distributing the \$7,500 on a pro-rata Weeks Worked basis.
5 (S.A. ¶ 54(h)).

6 The Class Notice will inform Class Members of the number of Weeks Worked during the
7 relevant periods and the estimated Individual Class and PAGA Payments. Class Members may
8 dispute their Weeks Worked by timely submitting evidence to the Settlement Administrator.
9 (S.A. ¶ 73).

10 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

11 Pursuant to the terms of the Settlement Agreement, Defendants are required to fund the
12 Settlement Amount, plus Defendants share of payroll taxes owed on the Individual Class
13 Payments, within 15 days of the Effective Date. (S.A. ¶ 76). Within 10 days after receiving the
14 funds, the Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 77).
15 However, disbursement of the Class Counsel's Attorney's Fees and Cost, Service Payment to the
16 Class Representative, Settlement Administration Costs shall not precede disbursement of the
17 Individual Class Payments and the PAGA Penalties. (*Id.*)

18 Class Members will have 180 days to cash the settlement check. (S.A. ¶ 78). If a Class
19 Member fails to cash a check by the deadline, the Administrator shall issue unclaimed funds to
20 the California State Controller in the name of the Class Member/Aggrieved Employee. (*Id.*).

21 As required by CMO ¶ G(3)(c)(i), Plaintiff's Counsel explains the reasoning for this method of
22 distribution at Mankin Decl. ¶¶ 58-63.

23 **F. TAX TREATMENT**

24 The Parties agree that one-third (33.333%) of the Individual Class Payments will be
25 allocated as wages subject to withholding of all applicable local, state and federal taxes and the
26 remaining two-thirds (66.667%) will be allocated for interest and penalties (pursuant to, *e.g.*,
27 California Labor Code §§ 203, 210, 226, 2699 etc.) from which no taxes will be withheld. (S.A.
28 ¶ 54(d)). The Individual PAGA Payments will be classified entirely as civil penalties and shall

1 be reported as required on an IRS Form 1099. (S.A. ¶ 54(h)).

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

3 In exchange for these payments, and in strict compliance with CMO ¶ G(3)(e), the
4 Settlement Agreement at ¶ 36 defines the “Released Class Claims” as follows:

5 all claims stated in the operative Complaint and those based solely upon the
6 facts in the Complaint, including: (1) failure to pay minimum wages, (2)
7 failure to pay overtime wages, (3) failure to provide meal periods, (4) failure
8 to provide rest breaks, (5) failure to reimburse business expenses, (6) failure
to timely pay final wages, (7) failure to provide accurate itemized wage
statements, and (8) unfair and unlawful competition.

9 Additionally, as required by CMO ¶ G(3)(e)(iii), the time period governing the Released
10 Class Claims is the same as the Class Period. And, pursuant to CMO ¶ G(3)(e)(i), the “Released
11 Parties” are limited to the named Defendants “together with their officers, directors, employees,
12 and agents.” (S.A. ¶ 38).

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

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

19 The Settlement Agreement at ¶ 37 also complies with CMO ¶¶ G(3)(e)(iv) and G(9)(d) as
20 it defines the “Released PAGA Claims” as follows:

21 all PAGA claims that Plaintiff alleged against the Released Parties
22 based on the facts stated in the relevant LWDA notice letter and only
23 to the extent that they are alleged in the operative Complaint,
including all PAGA claims seeking civil penalties premised upon:
24 (1) failure to pay minimum wages, (2) failure to pay overtime wages,
(3) failure to provide meal periods, (4) failure to provide rest breaks,
25 (5) failure to reimburse business expenses, (6) failure to timely pay
wages each period, (7) failure to timely pay wages upon separation
26 of employment, (8) failure to provide accurate itemized wage
statements, and (9) all other claims for civil penalties recoverable
27 under the Private Attorneys General Act, Labor Code §§ 2698 et
28 seq. based on the facts or claims alleged in the LWDA notice letters
and Complaint.

1 The CMO, at ¶¶ G(3)(e)(iv) and G(9)(d)(i), also requires that the “release of claims for
2 PAGA penalties shall bind only the named plaintiff and the State of California.” The Settlement
3 Agreement strictly complies with this requirement. (See S.A. ¶ 58 [“Plaintiff – in his individual
4 capacity and on behalf of the State of California and LWDA – shall completely release and
5 discharge the Released Parties from the Released PAGA Claims for the PAGA Period”]).

6 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
7 that individual will still be subject to the Released PAGA Claims and will receive a pro-rata share
8 of PAGA Penalties. (S.A. ¶ 59; CMO ¶ G(9)(c)).

9 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR**
10 **PURPOSES OF SETTLEMENT**

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

23 **A. ASCERTAINABILITY AND NUMEROSITY**

24 In determining whether a class is ascertainable, the court considers “(1) the class
25 definition, (2) the size of the class, and (3) the means available for identifying the class
26 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
27 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
28 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 Defendants’ records, there
2 are approximately 315 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, meal/rest breaks,
10 and so on. While the Parties dispute whether a class would be appropriate if the litigation were to
11 continue, they agree to class certification for the purposes of this settlement only.

12 *2. Typicality*

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

20 *3. Adequacy of Representation*

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

27 Adequacy may be established by the fact that counsel are experienced practitioners. *See*
28 *Local Joint Exec. Bd. v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F.3d 1152, 1162. Here,

1 Plaintiff is represented by Class Counsel with extensive experience in wage and hour class
2 actions like this matter. (Mankin Decl. ¶¶ 2-6; Carlson Decl. ¶¶ 3-9).

3 4. Superiority

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

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

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

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

20 The decision to approve or reject a proposed settlement lies within the Court’s sound
21 discretion. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35. And the
22 Court’s ultimate duty is to determine whether the settlement is fair, adequate, and reasonable.
23 *Dunk*, 48 Cal.App.4th at 1801 (setting forth the “fair, adequate, and reasonable” standard).

24 Thus, at the preliminary approval stage, the Court need only determine that the settlement
25 falls within the “range of possible judicial approval,” so that notice to the class and the
26 scheduling of the fairness hearing are worthwhile. *See Newberg* § 11:25. Indeed, the Court
27 should grant preliminary approval if there are no “grounds to doubt its fairness or other obvious
28 deficiencies . . . and [the settlement] appears to fall within the range of possible approval.”

1 *Manual For Complex Litigation* (Third) § 30.41 (1995); see *Dunk*, 48 Cal.App.4th at 1802. A
2 “presumption of fairness exists where: (1) the settlement is reached through arm’s-length
3 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
4 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
5 is small.” *Dunk, supra* (citing *Newberg* § 11:41). As shown below, the settlement falls well
6 within the range of approval because there are no grounds to doubt its fairness.

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

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

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

20 Plaintiff thoroughly investigated and evaluated the factual and legal strengths and
21 weaknesses of this case before reaching the settlement. As described above, the settlement was
22 reached after extensive investigation and research, thorough calculations and risk evaluation, and
23 a substantial exchange of information prior to mediation. See *Munoz v. BCI Coca-Cola Bottling*
24 *Co.* (2010) 186 Cal.App.4th 399, 410 (approving settlement where “considerable information
25 [exists] from which to assess the strength of the class claims” and litigation risks).

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

27 To evaluate a settlement, the parties must provide the trial court with “basic information
28 about the nature and magnitude of the claims in question and the basis for concluding that the

1 consideration being paid for the release of those claims represents a reasonable compromise.”

2 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.

3 However, *Kullar* does not require review of the outer reaches of possible exposure
4 without considering actual risks of certification, decertification, dispositive motions, and trial,
5 rather only a record which allows “an understanding of the amount that is in controversy and the
6 realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 408-9. Thus, a
7 settlement is not judged against what might have been recovered had a plaintiff prevailed at trial,
8 nor does the settlement have to provide 100% of the damages sought to be fair and reasonable.
9 *Wershba*, 91 Cal.App.4th at 250 (“Compromise is inherent and necessary in [settlement] ... even
10 if the relief afforded by the proposed settlement is substantially narrower than it would be if the
11 suits were to be successfully litigated, this is no bar to a class settlement because the public
12 interest may indeed be served by a voluntary settlement in which each side gives ground in the
13 interest of avoiding litigation.”)

14 Here, Defendants raised significant legal and factual defenses that weigh in favor of the
15 reasonableness of the proposed Settlement. Furthermore, in addition to disputing the merits of
16 Plaintiff’s claims, Defendants strongly disputed that Plaintiff could obtain class certification,
17 arguing a lack of commonality of the legal claims and injuries. Defendants further argued that
18 they complied with the applicable law and that any purported deviations therefrom were
19 individualized in nature, thereby limiting Plaintiff’s ability to certify the class.

20 While Plaintiff asserts that this is a suitable case for certification, he realizes that there is
21 always a significant risk associated with class certification proceedings, which could limit the
22 claims that he could pursue on a class basis.

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

27 Based upon data obtained through formal and informal discovery, Plaintiff’s counsel
28 estimated the following through mediation: (1) 315 Class Members, (2) 130 *former* Class

Members for purposes of Labor Code § 203, (3) 24,378 workweeks, (4) 120,053 shifts worked, (5) \$25.25 average hourly rate of pay, and (6) approximately 10,782 wage statements during the PAGA Period. (Mankin Decl. ¶ 26).

From these numbers, and by applying violations rates derived from analysis of extensive documents and data from Defendant, Plaintiff calculated the following maximum amounts assuming all claims were entirely successful at trial: class damages and penalties of \$6,090,754, and PAGA penalties of \$4,861,193. (Mankin Decl. ¶ 51). Then, by applying risks at class certification and on the merits, and when considering other factors (such as evidentiary burdens of proof), Plaintiff calculated the risk-adjusted award at trial for the class claims to be \$1,852,840 and for PAGA as \$412,000. (Mankin Decl. ¶ 51). As required by CMO ¶ G(3)(a)(i and ii), the full analysis of the maximum and risk-adjusted values is contained in the Mankin Decl. at ¶¶ 24-51 (and, for the sake of brevity, that information is not duplicated in this Motion).

Thus, the reasonableness of the settlement is apparent from the fact that the proposed settlement is sizeable percent of the risk-adjusted class damages. And, for that reason and the others discussed in this Motion, the Parties submit that this settlement is fair and reasonable.

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

The view of attorneys conducting the litigation is entitled to significant weight deciding whether to approve a settlement. *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18; *Kullar*, 168 Cal.App.4th at 128 (court must consider “the experience and view of counsel”). Here, Plaintiff’s Counsel are highly experienced in Class/PAGA litigation, having repeatedly been named “Super Lawyer” in employment litigation (a distinction awarded to only 5% of litigators), having achieved large settlements and verdicts, including one of the largest PAGA awards in California’s history, collecting over \$250 million for its clients, having tried class and PAGA cases against Fortune 100 companies, among other things. (Mankin Decl. ¶¶ 2-6; Carlson Decl. ¶¶ 3-9). Plaintiff’s counsel, operating at arm’s length, weighed the strengths and risks of this case, and are of the view that this is a fair and reasonable settlement considering the nature of the claims, realistic risk adjusted value, the complexities of the case, state of the law, and uncertainties of class certification and litigation.

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

2 The proposed Notice should be approved, as it fully informs the Class Members of the
3 nature of the lawsuit and each Class Member's rights under terms of the Settlement Agreement
4 and applicable law. The way the Class Notice shall be disseminated ensures that all or nearly all
5 of the Class Members shall be properly notified of the proposed settlement.

6 The proposed Notice and proposed plan for the Administrator to mail the Notice to the
7 last known address of all class members complies with all the requirements of Cal. Rule of Court
8 3.769(f) and 3.766(b). The proposed Notice includes: (1) the material terms of the settlement; (2)
9 the proposed attorneys' fees, litigation expenses, and the costs of administration; (3) details
10 about the final fairness hearing and how class members may elect to exclude themselves or make
11 an objection; (4) how class members can obtain additional information; and (5) each Class
12 Members' Individual Class and PAGA Payments. *See* Class Notice (Exhibit B to Mankin Decl.).

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

20 The Notice satisfies the requirements of Rule of Court 3.766 and affords Class Members
21 with all due process protections required by the U.S. Constitution. Moreover, the contents of the
22 Notice comply with Cal. R. Ct. 3.766(d), because the Notice includes, without limitation (1) a
23 detailed explanation of the case, including the basic contentions or denials of the parties; (2) a
24 statement that the court will exclude the member from the class if the member so requests by a
25 specified date; (3) a procedure for the member to follow in requesting exclusion from the class;
26 (4) a statement that the judgment, whether favorable or not, will bind all members who do not
27 request exclusion; and (5) a statement that any member who does not request exclusion may, if
28 the member so desires, enter an appearance through counsel. The 45-day deadline to opt-out or

object is also reasonable, as it provides Class Members sufficient time to do so and, if they so choose, to seek independent legal advice in the interim. If a Class Member does not opt-out, he or she will automatically be sent a settlement check.

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

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

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

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

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

I. A SERVICE AWARD IS NOT REQUESTED

Plaintiff is not seeking a service award, as Plaintiff entered into a separate individual settlement agreement arising out of claims for discrimination, harassment, and wrongful termination.

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

2 Subject to the Court's approval, the parties agreed to Phoenix Settlement Administrators
3 serving as the Settlement Administrator. Phoenix is experienced in administering class action
4 settlements and has provided a flat-fee proposal to administer this settlement for \$9,000.
5 (Mankin Decl. ¶ 79; Decl. of Michael Moore of Phoenix and exhibits).

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

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

12 June 18, 2024	Preliminary Approval (PA) hearing
13 July 12, 2024	<u>24 days after PA</u> : Deadline for Administrator to complete first 14 mailing of the Notice Packet to all Class Members.
15 August 26, 2024	<u>45 days after mailing Notice</u> : Deadline for Class Members to 16 submit Requests for Exclusion, Disputes and Objections to the settlement.
17 16 court days before Final Approval hearing	Deadline for Plaintiff to file and serve Motion for Final Approval and application for award of fees, costs and service payments.
18 9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiff's Motion for Final Approval, or filing response to an objection.
19 5 court days before final 20 approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval
21 TBD – October 28, 2024	<u>Approx. 130 days after PA</u> : Final Approval Hearing

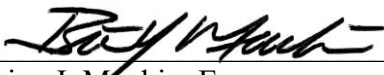
22 **VIII. CONCLUSION**

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

25 Dated: May 24, 2024

LAUBY, MANKIN & LAUBY LLP

27 BY:


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

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

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

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

On May 24, 2024, I caused to be served the foregoing document(s) described as follows:

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT

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

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

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

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

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

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

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

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 24, 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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