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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

KENNETH PEFFER and REGINA
VILLEGAS, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

DILLARD-LEWIS, INC., a North Carolina
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2223428
*[Assigned to Hon. Christian Towns, Dept S26,
for all purposes]*

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

Hearing

Date: February 3, 2025

Time: 8:30 a.m.

Dept.: S26

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 3, 2025, at 8:30 a.m., or as soon thereafter as
the matter may be heard by the Honorable Christian Towns in Department S26 of San
Bernardino County Superior Court, located at 247 West Third Street, San Bernardino, CA
92415, Plaintiffs Kenneth Pepper and Regina Villegas, individually and on behalf of all others
similarly situated, will and hereby do move the Court for entry of an Order preliminarily
approving the Parties' class action settlement, including:

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

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

Dated: October 14, 2024

LAUBY, MANKIN & LAUBY LLP

BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Kenneth Pepper and Regina Villegas (“Plaintiffs”) seek preliminary approval of
4 a \$550,000 wage-and-hour class action settlement on behalf of approximately 148 current and
5 former California nonexempt employees that performed services for Defendant Dillard-Lewis,
6 Inc. (“Defendant” or “Dillard-Lewis”) and in California at any time from October 13, 2018,
7 through June 3, 2024 (the “Class Period”). (Plaintiffs and Defendant are collectively referred to
8 as the “Parties”).

9 Under the terms of the Settlement Agreement,¹ Defendant will not oppose Plaintiffs
10 Counsel’s application for a reasonable award of attorney’s fees not to exceed 1/3 of the
11 Settlement Amount, litigation expenses not to exceed \$20,000, Administrator Costs of \$6,000,
12 \$40,000 paid to settle claims for potential PAGA penalties (with 75% of that amount paid to the
13 LWDA and 25% paid to the Aggrieved Employees on a pro rata basis), and a Service Payment of
14 \$10,000 to each Plaintiff (“Class Representatives”). (S.A. ¶ 49, *et seq.*)

15 After all Court-approved deductions from the Settlement Amount, it is estimated that
16 \$280,666.67 will be available to pay the Class Members, as follows:

17

<i>Settlement Amount</i>	\$ 550,000.00
Attorneys’ Fees (1/3)	\$ 183,333.33
Litigation Costs (not to exceed)	\$ 20,000.00
Administrator Costs	\$ 6,000.00
PAGA Settlement	\$ 40,000.00
Class Representative Service Awards	\$ 20,000.00
<i>Net Settlement Amount</i>	\$ 280,666.67

21

22 Assuming 148 Class Members, the average payment to each Class Member will be
23 approximately \$1,896.40 (\$280,666.67 / 148). However, the actual payment will be calculated
24 on a pro-rata basis according to the number of Weeks Worked by each Class Member during the
25 Class Period, with each Work Week having a value of approximately \$26.30 (\$280,666.67 /
26 10,673 estimated Work Weeks). In addition, the Aggrieved Employees will receive a share of
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 Decl. of Brian Mankin (“Mankin Decl.”).

the \$10,000 PAGA Penalties (25% of the total \$40,000 allocation), calculated pro-rata based on Work Weeks worked during the period of October 13, 2021, through June 3, 2024 (the “PAGA Period”). (S.A. ¶ 49(h)).

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

II. BACKGROUND

A. THE CLASS AND AGGRIEVED EMPLOYEES

The Class is defined as follows:

All current and former non-exempt employees employed by Defendant in California at any time during the Class Period (which is October 13, 2018, through June 3, 2024). (S.A. ¶¶ 6, 10).

The Aggrieved Employees are defined as follows:

All current and former non-exempt employees employed by Defendant in California at any time during the PAGA Period (which is October 13, 2021, through June 3, 2024). (S.A. ¶¶ 4, 26).

B. PROCEDURAL HISTORY

On October 12, 2022, Plaintiff Pepper submitted a letter to the Labor Workforce Development Agency (the “LWDA”) for civil penalties under the Private Attorney General Act of 2004 (“PAGA”), and simultaneously sent a letter to Defendant requesting the production of personnel and timekeeping records to further evaluate his wage and hour claims. (Mankin Decl. ¶ 11).

On October 13, 2022, Plaintiff Pepper filed a putative class action in the San Bernardino County Superior Court. Shortly thereafter, in October 2022, another employee (Regina Villegas) retained Plaintiff’s counsel to obtain her employment records from Defendant and evaluate her

1 potential claims. (Mankin Decl. ¶ 12). After the LWDA declined to assert jurisdiction over the
2 PAGA Claims, on March 1, 2023, Plaintiff Pepper filed a first amended complaint that added
3 representative PAGA Claims and Plaintiff Villegas as a class representative and plaintiff. The
4 first amended complaint alleges the following: (a) failure to pay minimum wages, (b) failure to
5 pay overtime wages, (c) failure to provide meal periods, (d) failure to provide rest breaks, (e)
6 failure to reimburse business expenses, (f) failure to timely pay final wages, (g) failure to provide
7 accurate itemized wage statements; (h) unfair and unlawful competition, and (i) related PAGA
8 claims. (Mankin Decl. ¶ 13).

9 Defendant then retained counsel and immediately began to defend the case. After early
10 discussions, the Parties agreed to attend private mediation. (Mankin Decl. ¶ 14).

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

20 On April 4, 2024, Plaintiffs and Defendant participated in mediation before Hon.
21 Jonathan Cannon (Ret.), a well-respected wage-and-hour mediator. The matter resolved at
22 mediation, and the Parties entered into the Settlement Agreement submitted herewith. The
23 Parties now seek the Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 16).

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

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

26 ///

27 // /

28 ///

1 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

2 The \$550,000 Settlement Amount² is non-reversionary and will be paid out to Class
3 Members without the need to submit a claim form or take any affirmative action. It includes (1)
4 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service award of \$10,000 to
5 each Plaintiff, subject to approval by the Court; (3) Administration Costs, not to exceed \$6,000;
6 (4) a \$40,000 PAGA allotment, 75% of which is to be paid to the LWDA pursuant to California
7 Labor Code § 2699(i) and 25% to the Aggrieved Employees; and (5) the aggregate of all
8 Individual Settlement Amounts of the Participating Class Members. (S.A. ¶ 49 and subparts).
9 Defendant will separately pay its share of employer payroll taxes and withholdings. (S.A. ¶¶ 39,
10 49(a)).

11 **B. NOTICE PROCEDURES**

12 The proposed Notice will be provided to the Class showing the estimated amounts that
13 each Class Member will receive, the number of Work Weeks credited as a Class Member and/or
14 Aggrieved Employee (*See* Exhibit 2 to Mankin Decl.). Within 14 calendar days after entry by
15 the Court of its Order of Preliminary Approval, Defendant shall provide the Administrator with
16 the "Class Data" consisting of Class Member names, addresses, phone numbers, Social Security
17 Numbers, and Weeks Worked during the Class/PAGA Period(s) (S.A. ¶¶ 9, 63).

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

21 If a Notice is returned as undelivered by the U.S. Postal Service, the Administrator shall
22 perform a skip trace search and seek an address correction for the Class Member(s), and a second
23 Notice will be sent to any new or different address obtained. (S.A. ¶ 66).

24 ///

25 ///

26
27 ² The \$550,000 Settlement Amount is subject to increase if the "Escalator Clause" is triggered.
28 S.A. ¶¶ 17, 39, 49(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. ¶ 49(f)).

1 **C. EXCLUSION AND OBJECTION PROCEDURES**

2 Class Members who do not timely Opt-Out of the Settlement will be deemed to
3 participate in the Settlement and shall become a Participating Class Member without having to
4 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
5 must submit a written request to the Administrator no later than 30 days after being mailed by
6 the Administrator (“Response Deadline”). (S.A. ¶ 23). Any Opt-Out request that is not
7 postmarked by the Response Deadline will be invalid, unless a Notice was remailed in which
8 case the Class Member’s exclusion or objection must be returned by the later of the original
9 Notice Response Deadline or 14 calendar days after the remailing of the notice. (S.A. ¶¶ 66, 70).

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

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

14 The amount of each Class Member’s Individual Class Payment is tied to the number of
15 Work Weeks worked by each Class Member for Defendant during the Class Period. Individual
16 Class Payments are calculated by (a) dividing the Net Settlement Amount by the total number
17 Work Weeks worked by all Participating Class Members during the Class Period, and (b)
18 multiplying the result by each Participating Class Member’s Work Weeks worked (S.A. ¶ 49(c)).

19 Additionally, each “Aggrieved Employee” will receive an Individual PAGA Payment
20 calculated in the same way; thus, the \$10,000 PAGA Penalties allocated to the Aggrieved
21 Employees will be divided and paid on a Work Weeks basis. (S.A. ¶ 49(h)).

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

26 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

27 Defendant is required to deposit the Settlement Amount, along with the employers’ share
28 of payroll taxes owed, with the Settlement Administrator, within 15 calendar days after the

1 “Effective Date” and these funds will be used to pay: (1) the class attorney fees and expenses, as
2 approved by the Court; (2) the service award, as approved by the Court; (3) administrative
3 expenses, as approved by the Court; (4) the amount allocated to settle potential PAGA penalties;
4 and (5) the aggregate of all Individual Settlement Amounts of Participating Class Members.
5 (S.A. ¶ 72). Within 10 calendar days after receiving the funds, the Settlement Administrator shall
6 issue payments to cover all court-approved payments. (S.A. ¶ 74).

7 Class Members will have 180 days to cash the settlement check. (S.A. ¶ 75). If a Class
8 Member fails to cash a check by the deadline, the Administrator shall issue unclaimed funds to
9 the California State Controller in the name of the Class Member/Aggrieved Employee (*Id.*).

10 **F. TAX TREATMENT**

11 The Parties agree that 20% of the Individual Settlement Payments will be allocated as
12 wages subject to withholding of all applicable local, state and federal taxes; and 80% will be
13 allocated for all other non-wage claims (pursuant to, e.g., Labor Code section 2802), statutory
14 penalties (pursuant to, e.g., California Labor Code sections 203, 210, 226), and interest from
15 which no taxes will be withheld. (S.A. ¶ 49(d)). Additionally, the amount allocated to settle
16 potential claims for PAGA penalties payable to the Aggrieved Employees will be classified
17 entirely as civil penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶ 49(h)).
18 These allocations are in line with the claim valuations in the *Kullar* analysis discussed below
19 (*i.e.*, the penalty claims [§§ 203 and 226] comprise the majority of risk-adjusted value).
20 Defendant will separately pay its share of employer payroll taxes on the sum allocated to wages.
21 (S.A. ¶ 49(a)).

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

23 In exchange for these payments, the Settlement Agreement at ¶ 32 defines the Released
24 Class Claims and provides that the Participating Class Members will release the Released Parties
25 of:

26 the claims stated in the Complaint and those claims that reasonably could have
27 been brought based upon the facts in the Complaint, including but not limited to:
28 (a) failure to pay straight or minimum wages, (b) failure to pay overtime or
doubletime wages, (c) failure to provide meal periods or premium payments in
lieu thereof, (d) failure to provide rest breaks or premium payments in lieu

thereof, (e) failure to reimburse business expenses, (f) failure to timely pay all wages due and owing each pay period and upon separation of employment, including but not limited to straight, minimum, regular, doubletime and overtime wages, wage premiums, vacation wages, among others, (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 and those claims that reasonably could have been brought upon the facts of the Complaint. The Released Class Claims include claims pursuant to California Labor Code sections 200, 201, 202, 203, 204, 208, 210, 218.6, 221, 222, 223, 226, 226.3, 226.7, 246, 510, 512, 558, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and 2802; the applicable IWC Wage Order; Cal. Code of Regs., tit. 8, section 11090; Business and Professions Code section 17200, et seq.; and Code of Civil Procedure section 1021.5. The time period governing the Released Class Claims shall be the Class Period.

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

H. RELEASE OF PAGA CLAIMS BY STATE AND AGGRIEVED EMPLOYEES

The Settlement Agreement at ¶ 33 also defines the "Released PAGA Claims" as follows:

all PAGA claims that Plaintiffs alleged against the Released Parties, on behalf of the Aggrieved Employees and the State of California, based on the facts stated in the Complaint and in the relevant LWDA notice letters, including all PAGA claims seeking civil penalties premised upon: (a) failure to pay straight or minimum wages, (b) failure to pay for overtime or doubletime wages, (c) failure to provide meal periods or premium payments in lieu thereof, (d) failure to provide rest breaks or premium payments in lieu thereof, (e) failure to reimburse business expenses, (f) failure to timely pay all wages due and owing each pay period and upon separation of employment, including but not limited to straight, minimum, regular, doubletime and overtime wages, wage premiums, vacation wages, among others, (g) failure to provide accurate itemized wage statements, (h) failure to maintain employment records, and (i) all other claims for civil penalties recoverable under the Private Attorneys General Act, Labor Code §§ 2698 et seq. based on the facts or claims alleged in the Complaint and those claims that reasonably could have been brought upon the facts of the Complaint. The time period governing the Released PAGA Claims shall be any time during the PAGA Period.

1 Aggrieved Employees cannot exclude themselves from the settlement and release of the
2 PAGA Claims and will receive a pro-rata share of PAGA Penalties even if they exclude
3 themselves from the settlement of the class claims. (S.A. ¶ 64).

4 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR**
5 **PURPOSES OF SETTLEMENT**

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

18 **A. ASCERTAINABILITY AND NUMEROSITY**

19 In determining whether a class is ascertainable, the court considers “(1) the class
20 definition, (2) the size of the class, and (3) the means available for identifying the class
21 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
22 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
23 class is ascertainable if the class members can be objectively identified and given notice of the
24 litigation without unreasonable time or expense). Here, according to Defendant’s records, there
25 are approximately 52 Class Members that are easily identifiable and fall within the defined
26 Class. Thus, Plaintiffs’ proposed Class meets the ascertainability and numerosity requirements.

27 ///

28 ///

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

2 1. Commonality

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

9 2. Typicality

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

17 3. Adequacy of Representation

18 The proposed class representative must establish that he or she will adequately represent
19 the proposed class. *See Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540,
20 546. Specifically, Plaintiffs are adequate to represent the class because they were employed by
21 Defendant during the Class Period, experienced the same wage and hour practices as the rest of
22 the Class, understood their duties as Class Representatives, have been willing to undergo the
23 risks of litigation, and have no conflict of interest.

24 Adequacy may be established by the fact that counsel are experienced practitioners. *See*
25 *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001)
26 244 F.3d 1152, 1162. Here, Plaintiffs are represented by Class Counsel with extensive
27 experience in wage and hour class actions like this matter. (Mankin Decl. ¶¶ 2-6; Carlson Decl.
28 ¶¶ 3-6).

1 4. Superiority

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

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

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

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

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

24 The Court's ultimate duty is to determine whether the settlement is fair, adequate, and
25 reasonable. *See Dunk*, 48 Cal.App.4th at 1801 (setting forth the "fair, adequate, and reasonable"
26 standard) (citing *Officers for Justice, supra*); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177
27 Cal.App.4th 734, 742-43 (a trial court must approve a class action settlement agreement, but only
28 after determining that it is "fair, adequate and reasonable," considering factors such as the

1 “‘risk, expense, [and] complexity’” of continued litigation) (citations omitted). The Court enjoys
2 broad discretion in making its fairness determination, and should consider factors including, but
3 not limited to: “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration
4 of further litigation, the risk of maintaining class action status through trial, the amount offered
5 in settlement, the extent of discovery completed and the stage of the proceedings, the experience
6 and views of counsel . . . and the reaction of the class members to the proposed settlement.”

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

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

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

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

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

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

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

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

19 To evaluate a settlement, the parties must provide the trial court with "basic information
20 about the nature and magnitude of the claims in question and the basis for concluding that the
21 consideration being paid for the release of those claims represents a reasonable compromise."

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

23 However, a settlement is not judged against what might have been recovered had a
24 plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought
25 to be fair and reasonable. *Wershba*, 91 Cal.App.4th at 250 ("Compromise is inherent and
26 necessary in [settlement] ... even if the relief afforded by the proposed settlement is substantially
27 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
28 settlement because the public interest may indeed be served by a voluntary settlement in which

each side gives ground in the interest of avoiding litigation.”)

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

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

Based upon data obtained through informal discovery, Plaintiffs’ counsel estimated the following data *through mediation*: (1) 148 Class Members, (2) approximately 69 *former* Class Members for purposes of Labor Code § 203, (3) 10,673 Work Weeks, and (4) approximately 2,037 wage statements during the PAGA Period.

Here, there were four categories of claims alleged by Plaintiff: (1) unpaid wage claims under various theories, (2) meal and rest break violations, (3) expense reimbursement claims, and (4) claims for waiting time and wage statement penalties due to the other alleged violations.

As to the unpaid wage claims, Plaintiffs alleged that Defendant failed to pay all required minimum and overtime wages due to a practice that required Class Members to complete non-driving tasks (*e.g.*, pre-trip and post-trip inspections, fueling, etc.) without any compensation for these tasks. But Defendant vehemently opposed these unpaid wage claims on the merits and as to the propriety of class certification. Due to the defenses and arguments raised, Plaintiffs assigned a 20% risk for the unpaid wage claim at the class certification stage and an additional 20% risk on the merits. In sum, Plaintiff’s counsel calculated the risk-adjusted value of the unpaid wage claims as \$234,899.

1 Plaintiffs also alleged meal and rest break claims against Defendant. Given the total
2 number of Work Weeks, Plaintiffs' counsel estimated an approximate 75% violation rate for
3 meal breaks and a 100% violation rate for rest breaks, leading to 25,784 alleged meal violations
4 and 34,379 alleged rest break violations. This established a maximum potential value for these
5 claims of \$1,107,004 (60,163 violations multiplied by the average hourly rate of \$18.40 as the
6 applicable premium rate under § 226.7).

7 However, Defendant raised numerous arguments in response to this claim, including that
8 it authorized the Class Members to take meal and rest breaks, meaning that no one had a reason
9 or cause to miss a break or take a short/late break. Furthermore, Defendant argued that the meal
10 and rest break claims may be subject to exemptions for passenger carrying vehicles. Therefore,
11 Defendant asserted that a fact-finder would have to determine for each Class Member whether a
12 break was missed and why, and why a break was noncompliant or nonexistent, because if it was
13 by the employee's choice, no liability attaches to Defendant. These defenses are factored into
14 Plaintiffs' analysis in two ways. First, these issues raise questions regarding whether the meal
15 and rest break claims could be certified, and Plaintiff placed a 30% risk at the class certification
16 stage for meal periods and a 30% risk for rest breaks. Second, these defenses also go toward the
17 merits given the evidentiary question of proving the number of meal and rest violations. As
18 such, Plaintiffs placed a 30% risk on the merits for meal breaks, and an additional 30% risk on
19 the merits for rest breaks, setting the risk-adjusted value for the combined meal and rest break
20 claims at \$542,432.

21 Plaintiffs alleged claims for expense reimbursement based on cell phone use. Defendant
22 argued, however, that this claim had minimal value because Defendant discouraged cell phone
23 use by employees, and provided two-way communication tablets in all vehicles.

24 Plaintiffs alleged claims for waiting time penalties and wage statement violations. The
25 maximum values for these claims were as follows: (1) \$279,719 for waiting time penalties [69
26 former employees x \$135.13 average daily pay x 30 days], and (2) \$200,200 for wage statement
27 violations [2,037 wage statements at the \$50/\$100 formula under § 226(e)].
28

1 But Defendant raised a variety of defenses to these claims that impacted the valuation.
2 Namely, Defendant argued that the wage statements did not violate Labor Code § 226 and, even
3 if there was a “technical” violation, Plaintiff would be unable to prove the required “knowing
4 and intentional” and “injury” elements. Defendant also argued that these claims were derivative
5 claims of the above-mentioned unpaid wage and meal / rest break claims. Based on these facts
6 and defenses, Plaintiffs placed a 30% risk at class certification and estimated another 30% risk
7 the merits, leading to a risk-adjusted value of \$98,098 for the wage statement claims.

8 Then, as to the waiting time penalty claim, Plaintiffs’ valuation had to account for the
9 fact that part of this claim was derivative of the unpaid wage claims and also of the meal and rest
10 break claims, if those claims failed at certification or on the merits, there would be no waiting
11 time penalties owed. Furthermore, even if the unpaid wage and/or meal/rest claims succeeded at
12 certification and on the merits, Plaintiff would have to prove that the violations (if any existed)
13 were “willful” under the meaning of Labor Code § 203. And, here, Defendant argued there was
14 no “willful” violation as they were inadvertent and unintentional. As a result of this analysis,
15 Plaintiff’s counsel applied a 30% risk at class certification and a 30% risk on the merits, leading
16 to a risk-adjusted value of \$137,062.

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

19	• Unpaid Wage Claims	\$ 234,899
20	• Meal and Rest Break Claims	\$ 542,432
21	• Wage Statement Claims	\$ 98,098
22	• Waiting Time Penalty Claims	<u>\$ 137,062</u>
23	• Total Risk Adjusted Penalties and Damages	\$ 1,012,491

24 The reasonableness of the settlement is apparent from the fact that the proposed
25 settlement is 54.3% of the risk-adjusted class damages and penalties. And while the PAGA
26 penalties had a maximum value in the low seven six figures, this fails to acknowledge that courts
27 have wide latitude to reduce the civil penalties “based on the facts and circumstances of a
28 particular case” and if “to do otherwise would result in an award that is unjust, arbitrary and

oppressive, or confiscatory.” Labor Code § 2699(e)(2). Moreover, Defendant argued against the merits of the underlying claims and particularly that the “willfulness” standard and/or “good faith” defenses mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendant also argued it is improper to stack civil penalty claims on top of underlying statutory claims. For these reasons, the Parties submit that this settlement is fair and reasonable.

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

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

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

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

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

The proposed Notice and proposed plan for the Administrator to mail the Notice to the last known address of all class members complies with all the requirements of Cal. Rule of Court 3.769(f) and 3.766(b). The contents of the proposed Notice includes (1) the material terms of the

1 settlement; (2) the proposed attorneys' fees, litigation expenses, and the costs of administration;
2 (3) details about the final fairness hearing and how class members may elect to exclude
3 themselves or make an objection; and (4) how class members can obtain additional information.
4 *See* Class Notice (Exhibit 2 to Mankin Decl.). In addition, it will inform Class Members of their
5 estimated Individual Class Payment and Individual PAGA Payment.

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

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

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

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

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

11 Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement
12 of up to \$20,000 in litigation costs, along with attorneys’ fees equal to one-third of the
13 Settlement Amount. See, *e.g.*, *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480 (approving
14 1/3 fee in the amount of \$6.33 million at a 2.13 lodestar multiplier, and holding that when class
15 action litigation establishes a monetary fund for the benefit of the class members, the trial court
16 may determine the amount of a reasonable fee by choosing an appropriate percentage of the
17 fund created); *Stuart v. RadioShack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645
18 (approving fee 1/3 of the total maximum settlement amount of \$4.5 million since 1/3 was “well
19 within the range of percentages which courts have upheld as reasonable in other class action
20 lawsuits”); *Singer v. Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) 2010 WL 2196104, at
21 *8 (approving fee award of 33.33% of the common fund); *Romero v. Producers Dairy Foods,*
22 *Inc.* (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841, at *4 (awarding fees of 1/3 of common
23 fund, noting: “[f]ee awards in class actions average around one-third of the recovery.”).

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

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

27 The Settlement Agreement provides an incentive award payment of \$10,000 each to the
28 Class Representatives, which is reasonable given the large recovery Class Members will receive

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

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

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

21 The parties agreed to Phoenix Settlement Administrators as the Administrator. Phoenix
22 has provided a flat-fee proposal to administer this settlement for \$6,000. (Mankin Decl. ¶ 28;
23 Exhibit 4 to Mankin Decl. [Administrator's bid]).

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

25 The last step in the approval process is the formal hearing, whereby proponents of the
26 Settlement may explain and describe its terms and conditions and offer argument in support of
27 approval, and Class Members or their counsel may be heard in support of or in opposition to the
28 settlement. Subject to the Court's approval, the Parties propose that the Court schedule a hearing

for final approval approximately 120 days after the Preliminary Approval Date, as follows:

February 3, 2025	Preliminary Approval (PA) hearing
February 27, 2025	Deadline for Administrator to complete first mailing of the Notice to all Class Members.
March 31, 2025	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
June 3, 2025- Approx. 120 days after PA	Final Approval Hearing.

VIII. CONCLUSION

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

Dated: October 14, 2024

LAUBY, MANKIN & LAUBY LLP

BY:



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 October 14, 2024, I caused to be served the foregoing document(s) described as follows:

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

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

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

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

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

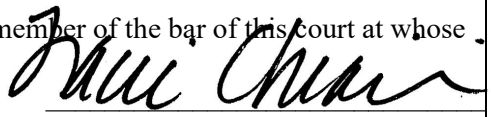
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service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

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

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

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 14, 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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