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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

MARCO JIMENEZ, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

PINA ENTERPRISES, INC., a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2301756
*[Assigned to Hon. Jessica Morgan, Dept S26, for
all purposes]*

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

Hearing

Date: June 26, 2024

Time: 8:30 a.m.

Dept.: S26

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 26, 2024, at 8:30 a.m., or as soon thereafter as the
matter may be heard by the Honorable Jessica Morgan in Department S26 of San Bernardino
County Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff,
Marco Jimenez, individually and on behalf of all others similarly situated, will and hereby does
move the Court for entry of an Order preliminarily approving the Parties' class action settlement,
including:

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

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

Dated: May 31, 2024

LAUBY, MANKIN & LAUBY LLP

BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Marco Jimenez (“Plaintiff”) seeks preliminary approval of a \$220,000 wage-
4 and-hour class action settlement on behalf of approximately 122 current and former California
5 nonexempt employees that performed services for Defendant Pina Enterprises, Inc. (“Defendant”
6 or “Pina Enterprises”) and its owners Jose Raul Pina and Monica Pina (collectively, the
7 “Defendants”) and in California at any time from February 9, 2019, through the earlier of March
8 8, 2024 (which is 30 days from mediation) or when the Class Members collectively worked
9 6,220 Work Weeks. (Plaintiff and Defendant are collectively referred to as the “Parties”).

10 Under the terms of the Settlement Agreement,¹ Defendants will not oppose Plaintiff
11 Counsel’s application for a reasonable award of attorney’s fees not to exceed 1/3 of the
12 Settlement Amount, litigation expenses estimated to be \$17,500, Administrator Costs of \$8,500,
13 PAGA penalties of \$20,000 (with 75% to the LWDA and 25% to the Aggrieved Employees on a
14 pro rata basis), and a Service Payment of \$10,000 to Plaintiff (“Class Representative”). (S.A. ¶
15 48, *et seq.*)

16 After all Court-approved deductions from the Settlement Amount, it is estimated that
17 \$90,666.67 will be available to pay the Class Members, as follows:

18

<i>Settlement Amount</i>	\$ 220,000.00
Attorneys’ Fees (1/3)	\$ 73,333.33
Litigation Costs (estimated)	\$ 17,500.00
Administrator Costs	\$ 8,500.00
PAGA Penalties	\$ 20,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 90,666.67

22

23 Assuming 122 Class Members, the average payment to each Class Member will be
24 approximately \$743.17 (\$90,666.67 / 122). However, the actual payment will be calculated on a
25 pro-rata basis according to the number of Weeks Worked by each Class Member during the
26 Class Period, with each Work Week having a value of approximately \$14.57 (\$90,666.67 / 6,220
27

28 ¹ The Class Action 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.”).

1 estimated Work Weeks). In addition, the Aggrieved Employees will receive a share of the
2 \$5,000 PAGA Penalties (25% of the total \$20,000 allocation), calculated pro-rata based on Work
3 Weeks worked during the period of February 9, 2022, through the earlier of March 8, 2024, or
4 when the Class Members collectively worked 6,220 Work Weeks (the “PAGA Period”). (S.A. ¶
5 48(h)).

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

14 **II. BACKGROUND**

15 **A. THE CLASS AND AGGRIEVED EMPLOYEES**

16 The Class is defined as follows:

17 All current and former non-exempt employees employed by
18 Defendant Pina Enterprises, Inc. in California at any time during the
19 Class Period (which is February 9, 2019, through the earlier of
20 March 8, 2024, or when the Class Members collectively worked
21 6,220 Work Weeks). (S.A. ¶¶ 6, 10).

22 The Aggrieved Employees are defined as follows:

23 Current and former non-exempt employees employed by Defendant
24 Pina Enterprises, Inc. in California at any time during the PAGA
25 Period (which is February 9, 2022, through the earlier of March 8,
26 2024, or when the Class Members collectively worked 6,220 Work
27 Weeks). (S.A. ¶¶ 4, 25).

28 **B. PROCEDURAL HISTORY**

On February 8, 2023, Plaintiff Marco Jimenez 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 Defendants requesting the production of

1 personnel and timekeeping records to further evaluate his wage and hour claims. (Mankin Decl.
2 ¶ 11).

3 On February 9, 2023, Plaintiff filed a putative class action complaint against Defendant
4 Pina Enterprises, Inc., in San Bernardino County Superior Court. After the LWDA declined to
5 assert jurisdiction over the PAGA claims, Plaintiff filed the operative First Amended Complaint,
6 alleging putative class and representative PAGA claims, including: (a) failure to pay minimum
7 wages, (b) failure to pay overtime wages, (c) failure to provide meal periods, (d) failure to
8 provide rest breaks, (e) failure to reimburse business expenses, (f) failure to pay all wages due
9 and owing each pay period and upon separation of employment, including but not limited to
10 minimum, regular, and overtime wages, wage premiums, vacation wages, among others (g)
11 failure to provide accurate itemized wage statements, (h) unfair and unlawful competition, and
12 (i) related claims under PAGA. Plaintiff later filed DOE amendments as to Defendants Jose
13 Raul Pina and Monica Pina. (Mankin Decl. ¶ 12).

14 Defendants retained counsel and immediately began to defend the case. After some
15 initial written discovery and early depositions, there were discussions among counsel, and the
16 Parties agreed to attend private mediation. (Mankin Decl. ¶ 13).

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

26 On February 7, 2024, Plaintiff and Defendants participated in mediation before Todd
27 Smith, Esq., a well-respected wage-and-hour mediator. At the conclusion of mediation and after
28 extensive arms-length negotiations, the Parties reached a global settlement and entered into the

Settlement Agreement submitted herewith. The Parties now seek the Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 15).

III. SUMMARY OF THE PROPOSED SETTLEMENT

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

A. SETTLEMENT CONSIDERATION AND ALLOCATION

The \$220,000 Settlement Amount is non-reversionary and will be paid out to Class Members without the need to submit a claim form or take any affirmative action. It includes (1) Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service award of \$10,000 to Plaintiff, subject to approval by the Court; (3) Administration Costs, not to exceed \$8,500; (4) a \$20,000 PAGA award, 75% of which is to be paid to the LWDA pursuant to California Labor Code § 2699(i) and 25% to the Aggrieved Employees; and (5) the aggregate of all Individual Settlement Amounts of the Participating Class Members. (S.A. ¶ 48 and subparts). Defendant will separately pay their share of employer payroll taxes and withholdings. (S.A. ¶ 48(a)).

B. NOTICE PROCEDURES

The proposed Notice will be provided to the Class showing the estimated amounts that each Class Member will receive, the number of Work Weeks credited as a Class Member and/or Aggrieved Employee (*See* Exhibit B to Mankin Decl.). Within 14 calendar days after entry by the Court of its Order of Preliminary Approval, Defendant shall provide the Administrator with the "Class Data" consisting of Class Member names, addresses, phone numbers, Social Security Numbers, and Weeks Worked during the Class/PAGA Period(s) (S.A. ¶¶ 9, 62).

Within 10 calendar days of receipt of the Class Data, the Administrator shall calculate the numbers for each Class Member, populate the Notice, and send each Class Member the Notice via first-class, United States mail. (S.A. ¶ 64).

If a Notice is returned as undelivered by the U.S. Postal Service, the Administrator shall perform a skip trace search and seek an address correction for the Class Member(s), and a second Notice will be sent to any new or different address obtained. (S.A. ¶ 65).

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1 **C. EXCLUSION AND OBJECTION PROCEDURES**

2 Class Members who do not timely request to be excluded from the Settlement will be
3 deemed to participate in the Settlement and shall become a Participating Class Member without
4 having to submit a claim form or take any other action. To request to be excluded from the
5 Settlement, the Class Member must submit a written Request for Exclusion to the Administrator
6 no later than 30 days after being mailed the Class Notice by the Administrator (“Response
7 Deadline”). (S.A. ¶¶ 22, 69). Any Request for Exclusion that is not postmarked by the
8 Response Deadline will be invalid, unless a Notice was remailed in which case the Class
9 Member’s Request for Exclusion must be returned by the later of the original Notice Response
10 Deadline or 14 calendar days after the remailing of the notice. (S.A. ¶ 65).

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

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

15 The amount of each Class Member’s Individual Class Payment is tied to the number of
16 Work Weeks worked by each Class Member for Defendants during the Class Period. Individual
17 Class Payments are calculated by (a) dividing the Net Settlement Amount by the total number of
18 Work Weeks worked by all Participating Class Members during the Class Period, and (b)
19 multiplying the result by each Participating Class Member’s number of Work Weeks worked
20 (S.A. ¶ 48(c)).

21 Additionally, each “Aggrieved Employee” will receive an Individual PAGA Payment
22 calculated in the same way; thus, the \$5,000 PAGA Penalties allocated to the Aggrieved
23 Employees will be divided and paid on a Work Weeks basis. (S.A. ¶ 48(h)).

24 The Class Notice will inform Class Members of their estimated share and the number of
25 Work Weeks they worked during the Class and/or PAGA Period(s). Class Members may dispute
26 Work Weeks if they feel they worked more in the Class or PAGA Periods than Defendants’
27 records show by timely submitting evidence to the Administrator. (S.A. ¶ 67).

28 ///

1 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

2 Defendants are required to deposit the Settlement Amount, along with the employers’
3 share of payroll taxes owed, with the Settlement Administrator, based on the following payment
4 plan:

- 5 a. Within 30 days after the Effective Date, Defendants shall fund \$146,666.67,
6 which shall be distributed in a manner that compensates Plaintiff, the Participating
7 Class Members, the Aggrieved Employees, the LWDA, Class Counsel [for fees
8 and costs], and the Settlement Administrator for two-thirds of the Court-awarded
9 amounts [\$146,666.67 is two-thirds of the Settlement Amount];
- 10 b. By the later of December 1, 2025, or 10 days after the Effective Date, Defendants
11 shall fund \$73,333.33, representing the remaining balance of the Settlement
12 Amount, and which will be distributed in a manner that compensates Plaintiff, the
13 Participating Class Members, the Aggrieved Employees, the LWDA, Class
14 Counsel [for fees and costs], and the Settlement Administrator for all remaining
15 Court-awarded amounts. (S.A. ¶ 70)

16 Within 10 calendar days after receiving each payment described above, the Settlement
17 Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 72).

18 Class Members will have 180 days to cash each settlement check. (S.A. ¶ 73). 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 **F. TAX TREATMENT**

22 The Parties agree that 20% of the Individual Settlement Payments will be allocated as
23 wages subject to withholding of all applicable local, state and federal taxes and the remaining
24 80% will be allocated for interest and penalties (pursuant to, *e.g.*, California Labor Code sections
25 203, 210, 226, etc.) from which no taxes will be withheld. (S.A. ¶ 48(d)). Additionally, the
26 PAGA Penalties payable to the Aggrieved Employees will be classified entirely as civil penalties
27 and shall be reported as required on an IRS Form 1099. (S.A. ¶ 48(h)). These allocations are in
28 line with the claim valuations in the *Kullar* analysis discussed below (*i.e.*, the penalty claims [§§

203 and 226] comprise the majority of risk-adjusted value). Defendants will separately pay its share of employer payroll taxes on the sum allocated to wages. (S.A. ¶ 48(a)).

G. PARTICIPATING CLASS MEMBERS' RELEASE OF CLAIMS

In exchange for these payments, the Settlement Agreement at ¶ 31 defines the Released Class Claims and provides that the Participating Class Members will release the Released Parties of:

the claims stated in the Complaint and those claims that reasonably could have been brought based upon the facts in the Complaint, including but not limited to: (a) failure to pay minimum wages, (b) failure to pay overtime wages, (c) failure to provide meal periods, (d) failure to provide rest breaks, (e) failure to reimburse business expenses, (f) failure to pay all wages due and owing each pay period and upon separation of employment, including but not limited to minimum, regular, 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.

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. AGGRIEVED EMPLOYEES' RELEASE OF CLAIMS

The Settlement Agreement at ¶ 32 also defines the "Released PAGA Claims" as follows:

all PAGA claims that Plaintiff 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 minimum wages, (b) failure to pay for overtime wages, (c) failure to provide meal periods, (d) failure to provide rest breaks, (e) failure to reimburse business expenses, (f) failure to pay all wages due and owing each pay period and upon separation of employment, including but not limited to minimum, regular, 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

1 alleged in the Complaint. The time period governing the Released PAGA
2 Claims shall be any time during the PAGA Period.

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

6 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR**
7 **PURPOSES OF SETTLEMENT**

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

20 **A. ASCERTAINABILITY AND NUMEROSITY**

21 In determining whether a class is ascertainable, the court considers “(1) the class
22 definition, (2) the size of the class, and (3) the means available for identifying the class
23 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
24 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
25 class is ascertainable if the class members can be objectively identified and given notice of the
26 litigation without unreasonable time or expense). Here, according to Defendants’ records, there
27 are approximately 122 Class Members that are easily identifiable and fall within the defined
28 Class. Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

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, Plaintiff contends 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, Plaintiff is adequate to represent the class because he was employed by
21 Defendants during the Class Period, experienced the same wage and hour practices as the rest of
22 the Class, understood his duties as a Class Representative, has been willing to undergo the risks
23 of litigation, and has 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, Plaintiff is represented by Class Counsel with extensive experience
27 in wage and hour class actions like this matter. (Mankin Decl. ¶¶ 2-6; Carlson Decl. ¶¶ 3-6).

28 ///

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 Plaintiff and his 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 Plaintiff 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

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

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

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

14 Based upon data obtained through informal discovery, Plaintiff’s counsel estimated the
15 following data *through mediation*: (1) 122 Class Members, (2) approximately 88 *former* Class
16 Members for purposes of Labor Code § 203, (3) 6,100 Work Weeks, and (4) approximately
17 3,506 wage statements during the PAGA Period. (Mankin Decl. ¶ 17).

18 Here, there were three categories of claims alleged by Plaintiff: (1) unpaid wage claims
19 under various theories, (2) meal and rest break violations, and (3) derivative claims for waiting
20 time and wage statement penalties due to the other alleged violations. (Mankin Decl. ¶ 18).

21 As to the unpaid wage claims, Plaintiff alleged two distinct theories of liability. First,
22 Plaintiff alleged that Defendants failed to pay proper overtime when Class Members worked
23 more than 8 hours in a day. Furthermore, on occasions when Defendants paid overtime, it failed
24 to factor in non-discretionary compensation (*e.g.*, bonuses and commissions) received by Class
25 Members into calculating the regular rate of pay. Second, Plaintiff alleged that Defendants
26 required Plaintiff and the Class Members to perform off-the-clock work for Defendants, such as
27 paperwork, restocking vehicles, etc., yet Defendant failed to compensate Class Members for all
28 hours worked. In total, Plaintiff’s counsel estimated the maximum value of these unpaid wages

1 to be \$424,594. (Mankin Decl. ¶ 19).

2 However, Defendants vehemently opposed these unpaid wage claims on the merits and as
3 to the propriety of class certification. For example, Defendants argued that the majority of
4 employees worked out on the field alone, that off-the-clock work was strictly prohibited, that
5 employees completed their own timesheets, approved their own timesheets, and when employees
6 reported overtime, it was paid. Moreover, in addition to its other defenses on the merits,
7 Defendants argued that Plaintiff would be unable to meet its evidentiary burden at summary
8 judgment and/or trial because Plaintiff and the Class would be unable to introduce evidence as to
9 the amount of unpaid wages (since the claims are not apparent from the timekeeping records
10 alone), thus defeating liability. Furthermore, Defendants argue a lack of commonality due to the
11 fact that there are a number of varying job positions of non-exempt employees. (Mankin Decl. ¶
12 20).

13 Due to these defenses and arguments, Plaintiff assigned a 30% risk for the minimum
14 wage claim and 30% risk for the unpaid overtime claim at the class certification stage. And, due
15 to the defenses as to the merits, Plaintiff assigned the following merits-based risk to each claim:
16 30% risk on the minimum wage claim and a 30% risk on the unpaid overtime claim. In sum,
17 Plaintiff's counsel calculated the risk-adjusted value of the unpaid wage claims as \$208,051.
18 (Mankin Decl. ¶ 21).

19 Plaintiff also alleged meal and rest break claims against Defendants. Given the total
20 number of shifts at issue (an estimate of 30,500), and when incorporating violation rates from
21 expert review of the timekeeping records and other evidence, Plaintiff's counsel estimated a 35%
22 violation rate for meal breaks and a 50% violation rate for rest breaks, leading to 10,675 alleged
23 meal violations and 15,250 alleged rest break violations. This established a maximum potential
24 value for these claims of \$421,282 (25,925 violations multiplied by the average hourly rate of
25 \$16.25 as the applicable premium rate under § 226.7). (Mankin Decl. ¶ 22).

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

1 short/late break. Therefore, Defendants asserted that a factfinder would have to determine for
2 each Class Member whether a break was missed and why, and why a break was noncompliant or
3 nonexistent, because if it was by the employee's choice, no liability attaches to Defendant.
4 These defenses are factored into Plaintiff's analysis in two ways. First, these issues raise
5 questions regarding whether the meal and rest break claims could be certified, and second these
6 defenses also go toward the merits given the evidentiary question of proving the number of meal
7 and rest violations. As such, Plaintiff placed a 40% risk on the meal break claim, and a 30% risk
8 on the rest break claim, resulting in a risk-adjusted value for the combined meal and rest break
9 claims at \$183,877. (Mankin Decl. ¶ 23).

10 Finally, Plaintiff alleged claims for waiting time penalties and wage statement violations.
11 But these claims were entirely derivative of the claims above, meaning that they only had merit
12 if the claims for unpaid wages or meal/rest breaks were successful. The maximum values for
13 these claims were as follows: (1) \$381,810 for waiting time penalties [88 former employees x
14 \$16.25 per hour x 8.90 hours per day x 30 days], and (2) \$344,500 for wage statement violations
15 [3,506 wage statements at the \$50/\$100 formula under § 226(e)]. (Mankin Decl. ¶ 24).

16 But Defendant raised a variety of defenses to these derivative claims that impacted the
17 valuation. Namely, as to the wage statement violations, Defendant argued that its wage
18 statements did not violate Labor Code § 226 and, even if there was a "technical" violation, that
19 Plaintiff would be unable to prove the required "knowing and intentional" and "injury" elements.
20 Based on these facts and defenses, Plaintiff placed a 30% risk at class certification (mirroring the
21 claims on which the wage statement claim was based) and estimated another 30% risk on the
22 merits, leading to a risk-adjusted value of \$168,805 for the wage statement claims. (Mankin
23 Decl. ¶ 25).

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

the merits, Plaintiff would have to prove that the violations (if any existed) were “willful” under the meaning of Labor Code § 203. And, here, Defendant argued that there could not be a finding of a “willful” violation since they had compliant written policies and any deviations therefrom were inadvertent and unintentional. As a result of this analysis, Plaintiff’s counsel applied a 30% risk at class certification and a 30% risk on the merits, leading to a risk-adjusted value of \$187,087. (Mankin Decl. ¶ 26).

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

•	Unpaid Wage Claims	\$	208,051
•	Meal and Rest Break Claims	\$	183,877
•	Wage Statement Claims	\$	68,805
•	Waiting Time Penalty Claims	\$	<u>187,087</u>
•	Total Risk Adjusted Penalties and Damages	\$	747,820

The reasonableness of the settlement is apparent from the fact that the proposed settlement is 29.4% of the risk-adjusted class damages and penalties. And while the PAGA penalties had a maximum value in the low seven figures, this fails to acknowledge that courts have wide latitude to reduce the civil penalties “based on the facts and circumstances of a particular case” and if “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(e)(2). Moreover, Defendants argued against the merits of the underlying claims and particularly that the “willfulness” standard and/or “good faith” defenses mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendants also argued it is improper to stack civil penalty claims on top of underlying statutory claims. Finally, Defendants argued financial concerns that further necessitated additional discounts. For these reasons, the Parties submit that this settlement is fair and reasonable.

E. PLAINTIFF’S 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

1 experience and view of counsel”).

2 Plaintiff’s Counsel is also highly experienced in Class/PAGA litigation, having been
3 named by the LA Times as one “Southern California Leading Lawyers” in the May 2023 issue of
4 Consumer Attorney’s of Southern California (a recognition given to 17 employment/labor law
5 attorneys in 2023), being repeatedly been named “Super Lawyer” in employment litigation (a
6 distinction awarded to only 5% of litigators), having achieved large settlements and verdicts,
7 including one of the largest PAGA awards in California’s history, collecting over \$250 million
8 for its clients, having tried class and PAGA cases against Fortune 100 companies, among other
9 things. (Mankin Decl. ¶¶ 2-6; Carlson Decl. ¶¶ 3-6). Plaintiff’s counsel, operating at arm’s
10 length, weighed the strengths and risks of this case, and are of the view that this is a fair and
11 reasonable settlement considering the nature of the claims, realistic risk adjusted value, the
12 complexities of the case, state of the law, and uncertainties of class certification and litigation.

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

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

19 The proposed Notice and proposed plan for the Administrator to mail the Notice to the
20 last known address of all class members complies with all the requirements of Cal. Rule of Court
21 3.769(f) and 3.766(b). The contents of the proposed Notice includes (1) the material terms of the
22 settlement; (2) the proposed attorneys’ fees, litigation expenses, and the costs of administration;
23 (3) details about the final fairness hearing and how class members may elect to exclude
24 themselves or make an objection; and (4) how class members can obtain additional information.
25 See Class Notice (Exhibit B to Mankin Decl.). In addition, it will inform Class Members of their
26 estimated Individual Class Payment and Individual PAGA Payment.

27 The Court has wide discretion in approving the means of providing notice, so long as the
28 class representative “provide(s) meaningful notice in a form that should have a reasonable

1 chance of reaching a substantial percentage of class members.” *Archibald v. Cinerama Hotels*,
2 (1976) 15 Cal.3d 853, 861. Here, the parties’ notice plan is that notice of the Settlement will be
3 disseminated directly to the class members by first class mail by the Administrator, since
4 Defendants have the last known addresses of all Class Members and the Administrator will
5 perform a skip trace and update those addresses for any class notices that are returned and re-
6 send the notice.

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

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

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

28 ///

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

2 Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement
3 of an estimated \$17,500 in litigation costs, along with attorneys’ fees equal to one-third of the
4 Settlement Amount. See, e.g., *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480 (approving
5 1/3 fee in the amount of \$6.33 million at a 2.13 lodestar multiplier, and holding that when class
6 action litigation establishes a monetary fund for the benefit of the class members, the trial court
7 may determine the amount of a reasonable fee by choosing an appropriate percentage of the
8 fund created); *Stuart v. RadioShack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645
9 (approving fee 1/3 of the total maximum settlement amount of \$4.5 million since 1/3 was “well
10 within the range of percentages which courts have upheld as reasonable in other class action
11 lawsuits”); *Singer v. Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) 2010 WL 2196104, at
12 *8 (approving fee award of 33.33% of the common fund); *Romero v. Producers Dairy Foods,*
13 *Inc.* (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841, at *4 (awarding fees of 1/3 of common
14 fund, noting: “[f]ee awards in class actions average around one-third of the recovery.”).

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

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

18 The Settlement Agreement provides an incentive award payment of \$10,000 to the Class
19 Representative, which is reasonable given the recovery Class Members will receive on average,
20 as well as the time and effort he devoted to this case. Their efforts included providing factual
21 background for the Class and PAGA complaint; providing documents and information about
22 Defendants’ compensation plan; participating in phone calls to discuss litigation and settlement
23 strategy; making themselves available throughout the litigation to assist with analyzing the
24 claims and defenses; helping Class Counsel prepare for the mediation; and reviewing the
25 settlement documents. The Class Representative also assumed significant risk in bringing this
26 litigation—namely, had he lost, he could have been ordered to pay Defendants’ costs.

27 The requested service award falls within the range of incentive payments typically
28 awarded to Class Representatives in similar class actions. See, e.g., *Bond v. Ferguson*

Enterprises, Inc. (E.D. Cal. 2011) 2011 WL 2648879 (approving \$11,250 service awards in trucker meal break class action); *Ross v. US Bank National Association* (N.D. Cal. 2010) 2010 WL 3833922, at *2 (approving \$20,000 enhancement award in California wage-and-hour class action settlement); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 415, 493 (approving service awards of \$15,000 from a \$300,000 settlement fund in a wage/hour class action); *West v. Circle K Stores, Inc.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 76558, at *28 (finding service awards “of \$ 15,000 each to be reasonable.”); *Glass v. UBS Fin. Servs.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 8476, at *52 (finding “requested payment of \$25,000 to each of the named Plaintiff is appropriate” in wage and hour settlement).

VI. THE COURT SHOULD APPOINT PHOENIX AS ADMINISTRATOR

The parties selected Phoenix Settlement Administrators (“Phoenix”) as the Administrator. Phoenix has provided a flat-fee proposal to administer this settlement for \$8,500. (Mankin Decl. ¶ 39; Exhibit D to Mankin Decl. [Administrator’s bid]).

VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING

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

June 26, 2024	Preliminary Approval (PA) hearing
July 22, 2024 24 days after PA	Deadline for Administrator to complete first mailing of the Notice to all Class Members.
August 21, 2024 30 days after mailing Notice	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

December 19, 2024
Approx. 120 days after PA

Final Approval Hearing.

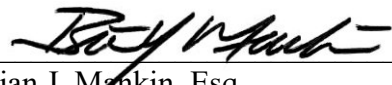
VIII. CONCLUSION

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

Dated: May 31, 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 May 31, 2024, I caused to be served the foregoing document(s) described as follows:

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

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

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

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

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

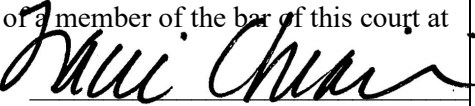
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service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

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

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

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 31, 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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