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

MANUEL BURGOS, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

DESTINY HOSPICE CARE, INC., a
California Corporation; and DOES 1
through 20, inclusive;

Defendants.

Case No.: CIVSB2308809
*[Assigned to Hon. Jessica Morgan, Dept S26, for
all purposes]*

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

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

Hearing

Date: June 10, 2024

Time: 8:30 a.m.

Dept.: S26

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 10, 2024, 8:30 a.m., or as soon thereafter as the
3 matter may be heard by the Honorable Jessica Morgan in Department S26 of the San Bernardino
4 County Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff
5 Manuel Burgos, individually and on behalf of all others similarly situated, will and hereby does
6 move the Court for entry of an Order preliminarily approving the Parties' Class Action and
7 Private Attorneys General Act ("PAGA") settlement, including:

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

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

23 Dated: May 16, 2024

LAUBY, MANKIN & LAUBY LLP

24
25 BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Manuel Burgos seeks preliminary approval of a \$450,000 class action settlement
4 on behalf of approximately 350 current and former nonexempt employees employed by
5 Defendants Destiny Hospice Care, Inc., and its owners Udokpo and Joy Ekpo (“Defendants”) in
6 California at any time from May 1, 2019, through April 15, 2024 (the “Class Period”).

7 Under the terms of the Settlement Agreement,¹ Defendants will not oppose Plaintiff
8 Counsel’s application for a reasonable award of attorneys’ fees not to exceed \$150,000 (1/3 of
9 the Settlement Amount), litigation expenses not to exceed \$25,000, Settlement Administrator
10 Costs of \$9,000, PAGA penalties of \$30,000 (with 75% to the LWDA and 25% to the Aggrieved
11 Employees on a pro rata basis), and a Service Payment of \$10,000 to Plaintiff Manuel Burgos
12 (“Class Representative”). (S.A. ¶ 49, *et seq.*)

13 After all Court-approved deductions from the Settlement Amount, it is estimated that
14 \$226,000 will be available to pay the Class Members, as follows:

15

<i>Settlement Amount</i>	\$ 450,000.00
Attorneys’ Fees (1/3)	\$ 150,000.00
Litigation Costs (not to exceed)	\$ 25,000.00
Administrator Costs	\$ 9,000.00
PAGA Penalties	\$ 30,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 226,000.00

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21 Assuming 350 Class Members, the average payment will be approximately \$645.71
22 (\$226,000 / 350). However, the actual payments will be calculated on a pro-rata basis according
23 to the number of Weeks Worked by each Class Member during the Class Period. In addition,
24 approximately 200 Aggrieved Employees will receive a share of the \$7,500 PAGA Penalties
25 (25% of the \$30,000 allocation), calculated pro-rata based on Pay Periods Worked during the
26 PAGA Period. (S.A. ¶ 49(h)).

27
28

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

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

8 **II. BACKGROUND**

9 **A. THE CLASS**

10 The Class is defined as follows:

11 All current and former nonexempt employees employed by
12 Defendants in California at any time during the Class Period (May
1, 2019, through April 15, 2024). (S.A. ¶¶ 6, 10).

13 **B. PROCEDURAL HISTORY**

14 Plaintiff submitted a letter to the Labor and Workforce Development Agency ("LWDA")
15 for civil penalties under the Private Attorneys General Act of 2004 ("PAGA"), and
16 simultaneously sent a letter to Defendants requesting the production of personnel and
17 timekeeping records to further evaluate his wage and hour claims. (Mankin Decl. ¶ 13).

18 On May 1, 2023, Plaintiff filed this class action, alleging that Defendants violated various
19 sections of the Labor Code. Then, on July 3, 2023, Plaintiff filed a First Amended Complaint
20 adding PAGA causes of action. (Mankin Decl. ¶ 14).

21 Defendants retained counsel and immediately began to defend the case. Plaintiff
22 propounded a full set of written discovery, seeking information relevant to class certification,
23 including class contact information. Defendants provided responses, but Plaintiff's counsel
24 contended the responses were insufficient, and a meet and confer process commenced.
25 However, after discussions among counsel, the Parties agreed to attend private mediation prior to
26 further discovery and motion practice. (Mankin Decl. ¶ 15).

27 In preparation for mediation, the Parties informally exchanged documents and
28 information that allowed both sides to calculate the potential damages and evaluate potential risk,

1 including policies and procedures pertaining to the claims, statistics relating to the number of
2 current and former employees, number of shifts, pay periods worked and other things, and a
3 sampling of payroll and timekeeping records for Class Members. This information, which
4 included more than 2,000 pages of documents and more than 88,000 rows of excel data, enabled
5 both parties to take a deep dive into the claims. Additionally, during this process, Plaintiff and
6 his counsel analyzed, researched, and investigated the potential issues, including matters related
7 to the calculation of damages, trial, and appellate issues and risks. (Mankin Decl. ¶ 16).

8 On February 6, 2024, Plaintiff and Defendants participated in mediation with Kevin
9 Barnes, Esq. a well-respected employment mediator. After a full-day mediation, the matter
10 resolved after a mediator's proposal, and the Parties entered into the Settlement Agreement. The
11 Parties now seek the Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 17).

12 **C. BRIEF OVERVIEW OF CLAIMS AND DEFENSES**

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

17 For instance, Plaintiff alleged Defendants failed to pay proper wages due to several
18 distinct wage violations. First, Plaintiff alleged that Defendants utilized a practice that
19 "rounded" the Class Members' timekeeping and paid in quarter-hour increments, and further
20 alleged that this practice illegally underpaid the Class because it did not pay all wages owed.
21 *Camp v. Home Depot U.S.A. Inc.*, (2022) 84 Cal.App.5th 638, 660. Second, Plaintiff alleged that
22 Defendants paid the Class on an hourly basis plus additional earned compensation but failed to
23 include this compensation in the regular rate calculations and overtime pay. Third, Plaintiff
24 alleged that Defendants failed to pay for all compensable hours due to the failure to accurately
25 record all hours worked. As a result, Plaintiff argued these violations resulted in unpaid
26 minimum wages and overtime, as well as waiting time penalties under Labor Code § 203 and
27 other derivative penalties. However, Defendants opposed each of these unpaid wage claims on
28 the merits and as to the propriety of class certification. (Mankin Decl. ¶ 19).

1 Plaintiff also alleged that Class Members were denied compliant meal and rest breaks.
2 However, Defendants argued that Class Members were subject to the “personal attendant”
3 exemption of IWC Wage Order 15, mooted the claims. Defendants also argued they provided
4 and made all mandated breaks available to the Class, and any employee who did not take a break
5 did so of their own volition. Thus, Defendants argued these claims were without merit because,
6 for each violation, a fact-finder would have to determine why a break was noncompliant, because
7 if it was by the employee’s choice, no liability attaches to Defendants. (Mankin Decl. ¶ 20).

8 Finally, Plaintiff alleged a variety of other claims (all of which Defendants disputed),
9 such as the failure to timely pay wages each period (under Labor Code § 204), failure to timely
10 pay all wages upon separation of employment (Labor Code §§ 201 – 203), and failure to provide
11 accurate itemized wage statements (Labor Code § 226). (Mankin Decl. ¶ 21).

12 Despite the disputed nature of the claims, the Parties concluded that further litigation of
13 the Action would be protracted and expensive, and that it is desirable that the Action be fully and
14 finally settled to limit further risk, expense, and protracted litigation. (Mankin Decl. ¶ 22).

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

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

17 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

18 The \$450,000 Settlement Amount² is non-reversionary and will be paid out to Class
19 Members without the need to submit a claim form or take any affirmative action. It includes (1)
20 Plaintiff’s attorneys’ fees and costs, as approved by the Court; (2) a service award of \$10,000 to
21 Plaintiff, subject to approval by the Court; (3) Administration Costs, not to exceed \$9,000; (4) a
22 \$30,000 PAGA award, 75% of which is to be paid to the LWDA pursuant to California Labor
23 Code § 2699(i) and 25% to the Aggrieved Employees; and (5) the aggregate of all Individual
24 Settlement Amounts of the Participating Class Members. (S.A. ¶ 49 and subparts). Defendants
25 will separately pay their share of employer payroll taxes and withholdings. (S.A. ¶ 49(a)).
26

27 ² The Settlement Amount is subject to increase if the “Escalator Clause” is triggered. S.A. ¶¶ 17,
28 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(g)).

1 **B. NOTICE PROCEDURES**

2 The proposed Notice will be provided to the Class showing the estimated amounts that
3 each Class Member will receive, the number of Work Weeks credited as a Class Member, and (if
4 applicable) the number of Pay Periods credited as an Aggrieved Employee (*See* Exhibit B to
5 Mankin Decl.). Within 14 calendar days after entry by the Court of its Order of Preliminary
6 Approval, Defendants shall provide the Administrator with the “Class Data” consisting of Class
7 Member names, addresses, Social Security Numbers, Weeks Worked and Pay Periods Worked
8 during the Class/PAGA Period(s). (S.A. ¶¶ 9, 63).

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

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

15 **C. EXCLUSION AND OBJECTION PROCEDURES**

16 Class Members who do not timely Opt-Out of the Settlement will be deemed to
17 participate in the Settlement and shall become a Participating Class Member without having to
18 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
19 must complete and submit a Request for Exclusion to the Administrator no later than 30 days
20 after being mailed by the Administrator (“Response Deadline”). (S.A. ¶¶ 23, 70(a)). Any Opt-
21 Out request not postmarked by the Response Deadline will be invalid, unless a Notice was
22 remailed in which case the Class Member’s exclusion or objection must be returned by the later
23 of the original Notice Response Deadline or 15 calendar days after remailing. (S.A. ¶¶ 66).

24 The Class Notice shall inform Class Members of their right to object to the Settlement.
25 Any Participating Class Member who wishes to object to the Settlement must submit the
26 Objection form to the Administrator no later than the Response Deadline. (S.A. ¶ 70(c)).

27 ///

28 ///

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

2 The amount of each Class Member's Individual Class Payment is tied to the number of
3 Weeks Worked by each Class Member for Defendants during the Class Period. Therefore,
4 Individual Class Payments will be calculated by: (a) dividing the Net Settlement Amount by the
5 total number of Weeks Worked by all Participating Class Members during the Class Period, and
6 (b) multiplying the result by each Participating Class Members' Weeks Worked. (S.A. ¶ 49(c)).
7 Additionally, each "Aggrieved Employee" will receive an Individual PAGA Payment, calculated
8 by dividing and distributing the \$7,500 on a pro-rata Pay Period basis. (S.A. ¶ 49(h)).

9 The Class Notice will inform Class Members of the number of Weeks Worked and Pay
10 Periods during the relevant periods and the estimated Individual Class and PAGA Payments.
11 Class Members may dispute their Weeks Worked or Pay Periods by timely submitting evidence
12 to the Settlement Administrator. (S.A. ¶ 68).

13 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

14 Pursuant to the terms of the Settlement Agreement, Defendants are required to fund the
15 Settlement Amount, plus Defendants' share of payroll taxes owed on the Individual Class
16 Payments, within 15 days of the Effective Date. (S.A. ¶ 71). Within 10 days after receiving the
17 funds, the Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 72).

18 Class Members will have 180 days to cash the 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 twenty percent (20%) of the Individual Class Payments will be
23 allocated as wages subject to withholding of all applicable local, state and federal taxes and the
24 remaining eighty percent (80%) will be allocated for interest and penalties (pursuant to, *e.g.*,
25 California Labor Code §§ 203, 210, 226, 2699 etc.) from which no taxes will be withheld. (S.A.
26 ¶ 49(d)). The Individual PAGA Payments will be classified entirely as civil penalties and shall
27 be reported as required on an IRS Form 1099. (S.A. ¶ 49(h)).

28 ///

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

2 In exchange for these payments, the Settlement Agreement at ¶ 33 defines the “Released
3 Class Claims” as follows:

4 all claims alleged in the Complaint or which could have been alleged
5 based solely upon the facts in the Complaint, including but not limited
6 to: (a) failure to pay minimum wages, (b) failure to pay overtime wages,
7 (c) failure to provide meal periods, (d) failure to provide rest breaks, (e)
8 failure to reimburse business expenses, (f) failure to timely pay wages
 upon separation of employment, (g) failure to provide accurate itemized
 wage statements, and (h) unfair and unlawful competition.

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

14 **H. AGGRIEVED EMPLOYEES’ RELEASE OF CLAIMS**

15 The Settlement Agreement at ¶ 34 defines the “Released PAGA Claims” as follows:

16 all PAGA claims that Plaintiff alleged against the Released Parties, on
17 behalf of the Aggrieved Employees and the State of California, based
18 on the facts stated in the Complaint and in the relevant LWDA notice
19 letters, including all PAGA claims seeking civil penalties premised
20 upon: (a) failure to pay minimum wages, (b) failure to pay overtime
21 wages, (c) failure to provide meal periods, (d) failure to provide rest
22 breaks, (e) failure to reimburse business expenses, (f) failure to timely
23 pay wages each period, (g) failure to timely pay wages upon separation
 of employment, (h) failure to provide accurate itemized wage
 statements, 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.

24 Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement,
25 that individual will still be subject to the Released PAGA Claims and will receive a pro-rata share
26 of PAGA Penalties. (S.A. ¶ 54).

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1 **IV. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR**
2 **PURPOSES OF SETTLEMENT**

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

15 **A. ASCERTAINABILITY AND NUMEROSITY**

16 In determining whether a class is ascertainable, the court considers “(1) the class
17 definition, (2) the size of the class, and (3) the means available for identifying the class
18 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
19 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
20 class is ascertainable if the class members can be objectively identified and given notice of the
21 litigation without unreasonable time or expense). Here, according to Defendants’ records, there
22 are approximately 350 Class Members that are easily identifiable and fall within the defined
23 Class. Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

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

25 *I. Commonality*

26 To justify certification, the class proponent must show that questions of law or fact
27 common to the class predominate over the questions affecting the individual members. *Arenas v.*
28 *El Torito Rests., Inc.* (2010) 183 Cal.App.4th 723, 732. Here, Plaintiff contends that the Class

1 was subjected to common policies and practices relating to payment of wages, meal/rest breaks,
2 and so on. While the Parties dispute whether a class would be appropriate if the litigation were to
3 continue, they agree to class certification for the purposes of this settlement only.

4 2. Typicality

5 Typicality “focuses on whether there exists a relationship between the Plaintiff’s claims
6 and the claims alleged on behalf of the class.” *See* Herbert B. Newberg & Alba Conte, *Newberg*
7 *on Class Actions* (“*Newberg*”) § 3:13 (4th ed. 2002). Here, typicality is satisfied because
8 Plaintiff was employed by Defendants during the Class Period and alleges that he experienced
9 the same wage and hour violations as the rest of the Class, based on Defendants’ uniform
10 policies. (Burgos Decl. ¶¶ 4). Thus, although Defendants dispute whether Plaintiff’s claims are
11 typical of the Class for the purposes of any continued litigation of the Action, they agree that, for
12 the purposes of this settlement only, Plaintiff asserts claims regarding Defendants’ pay policies,
13 meal and rest break practices, wage statements, and the provisions governing the timely and
14 complete payment of wages, which are at the core of the lawsuit.

15 3. Adequacy of Representation

16 The proposed class representative must establish that he or she will adequately represent
17 the proposed class. *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546.
18 Specifically, Plaintiff is adequate to represent the class because he understood his duties as a
19 Class Representative, has been willing to undergo the risks of litigation, and has no conflict of
20 interest. (Burgos Decl. ¶¶ 2-5).

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

25 4. Superiority

26 Certification of the Class for settlement purposes is superior here because there will be a
27 global resolution of all claims at once, which fosters judicial economy. Class certification for
28 settlement purposes is also vastly superior to litigation of numerous individual claims because

1 most of the claims are too small to litigate outside of the class context.

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

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

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

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

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

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 Defendants
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 prior to mediation. *See Munoz v. BCI Coca-Cola Bottling*
18 *Co.* (2010) 186 Cal.App.4th 399, 410 (approving settlement where "considerable information
19 [exists] from which to assess the strength of the class claims" and litigation risks).

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

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

25 However, *Kullar* does not require review of the outer reaches of possible exposure
26 without considering actual risks of certification, decertification, dispositive motions, and trial,
27 rather only a record which allows "an understanding of the amount that is in controversy and the
28 realistic range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at 408-9. Thus, a

1 settlement is not judged against what might have been recovered had a plaintiff prevailed at trial,
2 nor does the settlement have to provide 100% of the damages sought to be fair and reasonable.
3 *Wershba*, 91 Cal.App.4th at 250 (“Compromise is inherent and necessary in [settlement] ... even
4 if the relief afforded by the proposed settlement is substantially narrower than it would be if the
5 suits were to be successfully litigated, this is no bar to a class settlement because the public
6 interest may indeed be served by a voluntary settlement in which each side gives ground in the
7 interest of avoiding litigation.”)

8 Here, Defendants raised significant legal and factual defenses that weigh in favor of the
9 reasonableness of the proposed Settlement. In addition to disputing the merits of Plaintiff’s
10 claims, Defendants strongly disputed that Plaintiff could obtain class certification, arguing a lack
11 of commonality of the legal claims and injuries. Defendants further argued that they complied
12 with the applicable law and that any purported deviations therefrom were individualized in
13 nature, thereby limiting Plaintiff’s ability to certify the class. While Plaintiff asserts that this is a
14 suitable case for certification, he realizes that there is always a significant risk associated with
15 class certification proceedings, which could limit the claims that he could pursue on a class basis.

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

20 Based upon data obtained through formal and informal discovery, Plaintiff’s counsel
21 estimated the following through mediation: (1) 330 Class Members, (2) 200 *former* Class
22 Members for purposes of Labor Code § 203, (3) 20,000 workweeks, (4) 88,000 shifts worked,
23 and (4) approximately 4,725 wage statements during the PAGA Period. (Mankin Decl. ¶ 24).

24 From these numbers, and by applying violations rates derived from analysis of extensive
25 documents and data from Defendants, Plaintiff calculated that, assuming all claims were entirely
26 successful at trial, the maximum class damages and penalties would be approximately \$5
27 million. (Mankin Decl. ¶ 29). Then, by applying risks at class certification and on the merits,
28 and when considering other factors (such as evidentiary burdens of proof), Plaintiff calculated

1 the risk-adjusted award at trial for the class claims to be approximately \$1.5 million. (*Id.*). The
2 full analysis of the maximum and risk-adjusted values is contained in the Mankin Decl. at ¶¶ 24-
3 30 (and, for the sake of brevity, that information is not duplicated in this Motion).

4 And while the PAGA penalties had a potential maximum value in the seven figures, this
5 also fails to incorporate the risks above and, further, fails to acknowledge that courts have wide
6 latitude to reduce the civil penalties “based on the facts and circumstances of a particular case”
7 and if “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
8 confiscatory.” Labor Code § 2699(e)(2). Moreover, Defendants argued against the merits of the
9 underlying claims and particularly that the “willfulness” standard and/or “good faith” defenses
10 mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendants also
11 argued it is improper to stack civil penalty claims on top of underlying statutory claims.

12 Thus, the reasonableness of the settlement is apparent from the fact that the Settlement is
13 sizeable percentage of the risk-adjusted class damages and penalties. And, for that reason and
14 others discussed in this Motion, the Parties submit that this settlement is fair and reasonable.

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

16 The view of attorneys conducting the litigation is entitled to significant weight deciding
17 whether to approve a settlement. *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D.
18 15, 18; *Kullar*, 168 Cal.App.4th at 128 (court must consider “the experience and view of
19 counsel”). Here, Plaintiff’s Counsel are highly experienced in Class/PAGA litigation, having
20 repeatedly been named “Super Lawyer” in employment litigation (a distinction awarded to only
21 5% of litigators), having achieved large settlements and verdicts, including one of the largest
22 PAGA awards in California’s history, collecting over \$250 million for its clients, having tried
23 class and PAGA cases against Fortune 100 companies, among other things. (Mankin Decl. ¶¶ 2-
24 6; Carlson Decl. ¶¶ 3-9). Plaintiff’s counsel, operating at arm’s length, weighed the strengths and
25 risks of this case, and are of the view that this is a fair and reasonable settlement considering the
26 nature of the claims, realistic risk adjusted value, the complexities of the case, state of the law,
27 and uncertainties of class certification and litigation.

28 ///

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

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

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

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

20 The Notice satisfies the requirements of Rule of Court 3.766 and affords Class Members
21 with all due process protections required by the U.S. Constitution. Moreover, the contents of the
22 Notice comply with Cal. R. Ct. 3.766(d), because the Notice includes, without limitation (1) a
23 detailed explanation of the case, including the basic contentions or denials of the parties; (2) a
24 statement that the court will exclude the member from the class if the member so requests by a
25 specified date; (3) a procedure for the member to follow in requesting exclusion from the class;
26 (4) a statement that the judgment, whether favorable or not, will bind all members who do not
27 request exclusion; and (5) a statement that any member who does not request exclusion may, if
28 the member so desires, enter an appearance through counsel. The 30-day deadline to opt-out or

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

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

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

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

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

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

I. THE REQUESTED SERVICE AWARD REQUEST IS FAIR AND APPROPRIATE

The Settlement Agreement provides an incentive award payment of \$10,000 to the Class Representative, which is reasonable given the large recovery Class Members will receive on average, as well as the time and effort he devoted to this case. His efforts included providing

1 factual background for the litigation; providing documents and information about Defendants’
2 compensation plan; participating in phone calls to discuss litigation and settlement strategy;
3 making himself available throughout the litigation to assist with analyzing the claims and
4 defenses; helping Class Counsel prepare for the mediation; and reviewing the settlement
5 documents. The Class Representative also assumed significant risk in bringing this litigation—
6 namely, had he lost, he could have been ordered to pay Defendants’ costs.³

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

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

19 Subject to the Court’s approval, the parties agreed to Phoenix Settlement Administrators
20 serving as the Settlement Administrator. Phoenix is experienced in administering class action
21 settlements and has provided a flat-fee proposal to administer this settlement for \$9,000.

22 (Mankin Decl. ¶ 42; Exhibit 3 to Mankin Decl. [Phoenix’s bid]).

23 ///

24 ///

25
26 ³ In addition to the wage and hour claims at issue in this Settlement, Plaintiff also, separately
27 alleged claims of discrimination under the Fair Employment and Housing Act against Destiny
28 Hospice, where he remains employed on an unpaid disability leave of absence. To resolve these
claims, as well as secure his mutual separation from the Company upon the effective date of the
Final Approval, Plaintiff and Defendants have entered into a separate individual settlement
agreement. That Agreement does not release any claims at issues in this settlement.

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 10, 2024	Preliminary Approval (PA) hearing
July 5, 2024	<u>24 days after PA (+1 for July 4)</u> : Deadline for Administrator to complete first mailing of the Notice to all Class Members.
August 4, 2024	<u>30 days after mailing Notice</u> : Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
16 court days before Final Approval hearing	Deadline for Plaintiff to file and serve Motion for Final Approval and application for award of fees, costs and service payments.
9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiff's Motion for Final Approval, or filing response to an objection.
5 court days before final approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval
TBD – October 8, 2024	<u>Approx. 120 days after PA</u> : 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 16, 2024

LAUBY, MANKIN & LAUBY LLP

BY:



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

[illegible]

On May 16, 2024, I caused to be served the foregoing document(s) described as follows:

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

[] 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.

-18-

SERVICE LIST

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