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

DUSTIN REISCHMAN, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

MERCHANTS METALS LLC, a
Delaware Limited Liability Company; and
DOES 1 through 20, inclusive;

Defendants.

Case No.: CVRI2301910
*[Assigned to Hon. Harold Hopp, Dept 1, for all
purposes]*

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

Hearing

Date: December 2, 2024

Time: 8:30 a.m.

Dept.: 1

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 7, 2024, 8:30 a.m., or as soon thereafter as the
3 matter may be heard by the Honorable Harold Hopp in Department 1 of the Riverside County
4 Superior Court, located at 4050 Main Street, Riverside, CA 92501, Plaintiff Dustin Reischman,
5 individually and on behalf of all others similarly situated, will and hereby does move the Court
6 for entry of an Order preliminarily approving the Parties' Class Action and Private Attorneys
7 General Act ("PAGA") settlement, including:

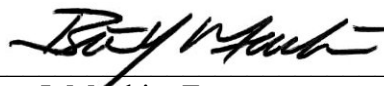
- 8 1. Certifying the class for purposes of settlement only;
- 9 2. Preliminarily appointing Plaintiff as class representative for settlement purposes;
- 10 3. Appointing Plaintiff's counsel as class counsel for purposes of settlement only;
- 11 4. Preliminarily approving the class action and PAGA settlement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

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

25 Dated: November 5, 2024

LAUBY, MANKIN & LAUBY LLP

26
27 BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Dustin Reischman seeks preliminary approval of a \$295,000 class action
4 settlement on behalf of approximately 80 nonexempt (hourly paid) employees employed by
5 Defendant Merchants Metals LLC (“Defendant”) in California during the “Class Period” of April
6 13, 2019, through June 2, 2024 (the “Class Members”).

7 Under the terms of the Settlement Agreement,¹ Defendant will not oppose Plaintiff
8 Counsel’s application for a reasonable award of attorneys’ fees not to exceed \$98,333.33 (1/3 of
9 the Settlement Amount), litigation expenses not to exceed \$25,000, Settlement Administrator
10 Costs of \$6,500, PAGA penalties of \$25,000 (with 75% to the LWDA and 25% to the Aggrieved
11 Employees on a pro rata basis), and a \$10,000 Service Award to Plaintiff Dustin Reischman as
12 the Class Representative. (S.A. ¶ 49, *et seq.*) After all Court-approved deductions, it is estimated
13 that \$130,166.67 will be available to pay the Class Members, as follows:

14

<i>Settlement Amount</i>	\$ 295,000.00
Attorneys’ Fees (1/3)	\$ 98,333.33
Litigation Costs (not to exceed)	\$ 25,000.00
Administrator Costs	\$ 6,500.00
PAGA Penalties	\$ 25,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 130,166.67

15
16
17
18

19 Assuming 80 Class Members, the average payment will be approximately \$1,627.08
20 (\$130,166.67 / 80).² However, the actual payments will be calculated on a pro-rata basis
21 according to the number of Weeks Worked by each Class Member during the Class Period. (*See*
22 Mankin Decl. ¶¶ 50 [description of high/low payments]). In addition, approximately 45
23 Aggrieved Employees will receive a share of the \$6,250 PAGA Penalties (25% of the \$25,000
24 allocation), calculated pro-rata based on Weeks Worked during the PAGA Period. (S.A. ¶ 49(h)).

25
26 ¹ The Class and PAGA Settlement Agreement and Release of Claims (the “Settlement
Agreement” or “S.A.”) is attached as Exhibit A to the Decl. of Brian Mankin (“Mankin Decl.”).

27 ² During litigation, Defendant engaged in a *Pick-Up Stix* campaign through which it obtained
28 releases from Class Members. Since this was done in response to this litigation and the claims
herein, the Parties agreed that Defendant is entitled to a credit of \$44,420 for “Prior Payments”
made during the *Pick-Up Stix* campaign; Class Members’ shares will be offset by such credits.

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 (hourly paid) employees employed
12 by Defendant in California during the Class Period (which is April 13,
2019, through June 2, 2024). (S.A. ¶¶ 4, 8).

13 **B. PROCEDURAL HISTORY**

14 On April 13, 2023, Plaintiff submitted a letter to the Labor and Workforce Development
15 Agency ("LWDA") for civil penalties under the Private Attorneys General Act of 2004
16 ("PAGA"), and simultaneously sent a letter to Defendant requesting production of personnel and
17 timekeeping records to evaluate his wage and hour claims. (Mankin Decl. ¶ 13).

18 Plaintiff then filed the instant class action on April 13, 2023, alleging that Defendant
19 violated various sections of the Labor Code. After the 65-day exhaustion period elapsed without
20 the LWDA asserting jurisdiction over the PAGA claims, Plaintiff filed his first amended
21 complaint on June 28, 2023. Defendant filed its Answer to the FAC on about August 15, 2023.
22 (Mankin Decl. ¶ 14).

23 Defendant retained counsel and immediately began to defend the case. Plaintiff then
24 propounded formal discovery seeking the contact information for all Class Members, as
25 permitted by this Court's CMO. However, Defendant's counsel advised that Defendant had
26 contacted and obtained *Pick-Up Stix* settlements from a significant portion of the putative class –
27 as such, Defendant argued that the discovery was improper. Plaintiff's counsel disagreed and
28 sought the Court's permission to lift the stay on discovery so that counsel could further

1 investigate the claims and enforceability of the *Pick-Up Stix* releases. (Mankin Decl. ¶ 15).

2 Ultimately, after discussions among counsel, the Parties agreed to attend mediation with
3 the explicit agreement that the mediation would be on a class/PAGA basis, covering all Class
4 Members regardless of whether they signed a release – and Plaintiff would credit amounts paid
5 in the *Pick-Up Stix* campaign toward the settlement amount. (Mankin Decl. ¶ 16).

6 In preparation for mediation, the Parties informally exchanged documents and
7 information that allowed both sides to calculate the potential damages and evaluate potential risk,
8 including policies and procedures pertaining to the claims, statistics relating to the number of
9 current and former employees, number of shifts, weeks worked and other things, and a sampling
10 of payroll and timekeeping records for Class Members. This information included over 55,000
11 rows of excel data, and covered over 70% of Class Members and more than 44.8% of all
12 workweeks; this enabled both parties to take a deep dive into the claims. Additionally, during
13 this process, Plaintiff and his counsel analyzed, researched, and investigated the potential issues,
14 including matters related to the calculation of damages, trial, and appellate issues and risks. As
15 part of this process, Plaintiff’s counsel discovered an additional claim that was not previously
16 alleged – the failure to pay vested vacation under Labor Code § 227.3. (Mankin Decl. ¶ 17).

17 On April 3, 2024, the Parties participated in a full-day mediation with Todd Smith, a
18 highly-respected wage-and-hour mediator. At the conclusion of mediation and extensive arms-
19 length negotiations, Mr. Smith issued a mediator’s proposal which the Parties accepted and
20 entered into a Memorandum of Understanding. As part of the settlement, the Parties agreed to
21 permit Plaintiff to file a second amended complaint to add a claim for failure to pay vested
22 vacation under Labor Code § 227.3; Plaintiff’s second amended complaint was filed on or about
23 November 5, 2024. The Parties then entered into the Settlement Agreement submitted herewith,
24 and now seek the Court’s preliminary approval of the Settlement. (Mankin Decl. ¶ 18).

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

26 Plaintiff alleged numerous wage and hour violations on behalf of the Class Members.
27 However, Defendant vigorously contested and denied Plaintiff’s material allegations on the
28 merits and as to the propriety of a class action or PAGA representative action. Still, Plaintiff

1 believed there were several strong claims. (Mankin Decl. ¶ 19).

2 For instance, Plaintiff alleged that Defendant paid the Class on an hourly basis plus
3 additional earned compensation but failed to include this compensation in the regular rate
4 calculations, leading to a failure to pay all required overtime, sick and vacation pay, and meal
5 premiums. However, Defendant opposed this regular rate claim, arguing that the bonus and
6 commission payments were properly excluded from the regular rate, and therefore these claims
7 would lose on the merits and as to the propriety of class certification. (Mankin Decl. ¶ 20).

8 Plaintiff also alleged that he and the Class Members were often denied compliant meal
9 and rest breaks due to the nature of the work. However, Defendant argued that it provided and
10 made all mandated meal and rest breaks available to the Class, and any employee who did not
11 take a break did so entirely of their own volition. Thus, Defendant argued that these claims were
12 without merit because, for each violation, a fact-finder would have to determine why a break was
13 noncompliant, because if it was by the employee's choice, no liability attaches to Defendant.
14 (Mankin Decl. ¶ 21).

15 Finally, Plaintiff alleged a variety of other claims (all of which Defendant disputed), such
16 as the failure to timely pay wages each period and upon separation of employment and failure to
17 provide accurate itemized wage statements. (Mankin Decl. ¶ 22).

18 Despite the disputed nature of the claims, the Parties concluded that further litigation of
19 the Action would be protracted and expensive, and that it is desirable that the Action be fully and
20 finally settled to limit further risk, expense, and protracted litigation. (Mankin Decl. ¶ 23).

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

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

23 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

24 The \$295,000 Settlement Amount³ is non-reversionary and will be paid out to Class
25 Members without the need to submit a claim form or take any affirmative action. It includes (1)
26

27 ³ The Settlement Amount includes a credit of \$44,420 for "Prior Payments" made by Defendant.
28 The Settlement Amount is also subject to increase if the "Escalator Clause" is triggered. S.A. ¶¶
15, 37. If this clause is triggered, other figures will also shift upward along with the Settlement

1 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) Administration Costs, not to
2 exceed \$6,500; (3) a \$25,000 PAGA award, 75% of which paid to the LWDA and 25% to the
3 Aggrieved Employees; and (4) the aggregate of all Individual Class Payments to the
4 Participating Class Members. (S.A. ¶ 49 and subparts). Defendant will separately pay its share
5 of employer payroll taxes and withholdings. (S.A. ¶ 49(a)).

6 **B. NOTICE PROCEDURES**

7 Here, the Parties will provide notice of this settlement in strict compliance with Court's
8 Class Action Case Management Order #1, issued on January 9, 2023 (the "CMO"). Thus, as
9 required by CMO ¶ G, the Parties will send each Class Member a Class Notice, a Request for
10 Exclusion Form, an Objection Form, and a Dispute Form. (S.A. ¶¶ 21, 65), which are attached to
11 the Mankin Decl. as Exhibits B, C, D, and E, respectively.

12 Notably, the proposed Notice complies with CMO ¶ G(5) because it informs each Class
13 Member of the estimated recovery, the number of Weeks Works that each Class Members is
14 credited with, and the applicable average payments, minimum, and high payments. The Notice
15 Packet will be provided in English because Defendant's Representative testified that Class
16 Members can read and comprehend English.

17 Within 14 calendar days after entry of the Preliminary Approval Order, Defendant shall
18 provide the Settlement Administrator with the "Class Data" consisting of Class Member names,
19 addresses, Social Security Numbers, Weeks Worked during the applicable periods, and any Prior
20 Payments received. (S.A. ¶¶ 7, 63). Within 10 calendar days of receipt of the Class Data, the
21 Settlement Administrator shall calculate the numbers for each Class Member, populate the
22 Notice, and send each Class Member the Notice Packet via first-class, United States mail. (S.A. ¶
23 65).

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

27
28 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 **C. EXCLUSION AND OBJECTION PROCEDURES**

2 Class Members who do not timely Opt-Out of the Settlement will be deemed to
3 participate in the Settlement and shall become a Participating Class Member without having to
4 submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member
5 must submit a written request to the Administrator no later than 45 days after being mailed by
6 the Settlement Administrator (“Response Deadline”). (S.A. ¶¶ 35, 70(a)). Any Opt-Out request
7 that is not postmarked by the Response Deadline will be invalid, unless a Notice was remailed in
8 which case the Class Member’s exclusion or objection must be returned by the later of the
9 original Response Deadline or 15 calendar days after the remailing of the notice. (S.A. ¶ 70(a)).

10 The Class Notice shall inform Class Members of their right to object to the Settlement.
11 Any Participating Class Member who wishes to object to the Settlement must complete the
12 Objection Form in the Notice Packet. To be valid, any Objection Form must be mailed to the
13 Settlement Administrator and postmarked on or before the Response Deadline. (S.A. ¶ 70(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 Weeks Worked by each Class Member for Defendant during the Class Period. However, there is
17 an additional factor that requires explanation.

18 As noted previously, Defendant obtained *Pick-Up Stix* settlements from certain Class
19 Members, and the Parties agreed that these payments (the “Prior Payments” totaling \$44,420 [see
20 S.A. ¶ 29]) shall be credited toward the Settlement Amount.

21 Therefore, Individual Class Payments will be calculated by: (a) dividing the Net
22 Settlement Amount (prior to applying a credit for Prior Payments) by the total number of Weeks
23 Worked by all Participating Class Members during the Class Period, (b) multiplying the result by
24 each Participating Class Members’ Weeks Worked, then (c) if applicable, reducing the
25 Individual Class Payment by any Prior Payment received by the Class Member (but in no
26 instance shall the offset from the Prior Payment cause an Individual Class Payment to drop
27 below \$50.00). (S.A. ¶ 49(c)). Additionally, each “Aggrieved Employee” will receive an
28 Individual PAGA Payment, calculated by dividing and distributing the \$6,250 on a pro-rata

Weeks Worked basis. (S.A. ¶ 49(h)).

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

E. TIMING OF SETTLEMENT DISBURSEMENTS

Pursuant to the terms of the Settlement Agreement, Defendant is required to fund the Settlement Amount, plus Defendant's share of payroll taxes owed on the Individual Class Payments, but less the credit of \$44,420 for Prior Payments, within 15 days of the Effective Date. (S.A. ¶ 71). Within 10 days after receiving the funds, the Settlement Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 72).

Class Members will have 180 days to cash the settlement check. (S.A. ¶ 73). If a Class Member fails to cash a check by the deadline, the Administrator shall issue unclaimed funds to the California State Controller in the name of the Class Member/Aggrieved Employee. (*Id.*). As required by CMO ¶ G(3)(c)(i), Plaintiff's Counsel explains the reasoning for this method of distribution at Mankin Decl. ¶¶ 55-60.

F. TAX TREATMENT

The Parties agree that one-third (33.33%) of the Individual Class Payments will be allocated as wages subject to withholding of all applicable local, state and federal taxes and the remaining two-thirds (66.67%) will be allocated for interest and penalties (pursuant to, *e.g.*, California Labor Code §§ 203, 210, 226, 2699 etc.) from which no taxes will be withheld. (S.A. ¶ 49(d)). The Individual PAGA Payments will be classified entirely as civil penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶ 49(h)).

G. PARTICIPATING CLASS MEMBERS' RELEASE OF CLAIMS

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

all claims stated in the Complaint and those based solely upon the facts in the Complaint, including: (1) failure to pay minimum wages, (2) failure to pay overtime wages, (3) failure to pay vested vacation, (4) failure to provide meal periods, (5) failure to provide rest breaks,

(6) failure to timely pay final wages, (7) failure to provide accurate itemized wage statements, and (8) unfair and unlawful competition.

Additionally, as required by CMO ¶ G(3)(e)(iii), “[t]he time period governing the Released Class Claims is the same as the Class Period.” (S.A. ¶ 31). And, pursuant to CMO ¶ G(3)(e)(i), the “Released Parties” are limited to the named Defendant “together with its officers, directors, employees, and agents.” (S.A. ¶ 33).

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

all PAGA claims that Plaintiff alleged against the Released Parties, based on the facts stated in the relevant LWDA notice letters and only to the extent that they are alleged in the Complaint, including all PAGA claims seeking civil penalties premised upon: (1) failure to pay minimum wages, (2) failure to pay overtime wages, (3) failure to pay vested vacation, (4) failure to provide meal periods, (5) failure to provide rest breaks, (6) failure to timely pay wages each period, (7) failure to timely pay wages upon separation of employment, (8) failure to provide accurate itemized wage statements, and (9) 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 LWDA notice letters and Complaint.

The CMO, at ¶¶ G(3)(e)(iv) and G(9)(d)(i), also requires that the “release of claims for PAGA penalties shall bind only the named plaintiff and the State of California.” The Settlement Agreement strictly complies with this requirement. (*See* S.A. ¶ 53 [“Plaintiff – in his individual capacity and on behalf of the State of California and LWDA – shall completely release and discharge the Released Parties from the Released PAGA Claims for the PAGA Period”]).

Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement, that individual will still be subject to the Released PAGA Claims and will receive a pro-rata share of PAGA Penalties. (S.A. ¶ 54; CMO ¶ G(9)(c)).

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

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

A. ASCERTAINABILITY AND NUMEROSITY

In determining whether a class is ascertainable, the court considers “(1) the class definition, (2) the size of the class, and (3) the means available for identifying the class members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement class is ascertainable if the class members can be objectively identified and given notice of the litigation without unreasonable time or expense). Here, according to Defendant’s records, there are approximately 80 Class Members that are easily identifiable and fall within the defined 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, meal and rest break practices, wage statements, and the provisions
16 governing the 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. *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546.
20 Specifically, Plaintiff is adequate to represent the class because he was employed by Defendant
21 during the Class Period, experienced the same wage and hour practices as the rest of the Class,
22 understood his duties as a Class Representative, has been willing to undergo the risks of
23 litigation, and has no conflict of interest. (Reischman Decl. ¶¶ 2-5).

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

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. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35. And the
20 Court's ultimate duty is to determine whether the settlement is fair, adequate, and reasonable.
21 *Dunk*, 48 Cal.App.4th at 1801 (setting forth the "fair, adequate, and reasonable" standard).

22 Thus, at the preliminary approval stage, the Court need only determine that the settlement
23 falls within the "range of possible judicial approval," so that notice to the class and the
24 scheduling of the fairness hearing are worthwhile. *See Newberg* § 11:25. Indeed, the Court
25 should grant preliminary approval if there are no "grounds to doubt its fairness or other obvious
26 deficiencies . . . and [the settlement] appears to fall within the range of possible approval."
27 *Manual For Complex Litigation* (Third) § 30.41 (1995); *see Dunk*, 48 Cal.App.4th at 1802. A
28 "presumption of fairness exists where: (1) the settlement is reached through arm's-length

1 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
2 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
3 is small.” *Dunk, supra* (citing *Newberg* § 11:41). As shown below, the settlement falls well
4 within the range of approval because there are no grounds to doubt its fairness.

5 **B. THE SETTLEMENT IS THE RESULT OF SERIOUS, INFORMED, NON-COLLUSIVE**
6 **NEGOTIATIONS**

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

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

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

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

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

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

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

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

24 Based upon data obtained through formal and informal discovery, Plaintiff’s counsel
25 estimated the following through mediation: (1) 80 Class Members, (2) 35 *former* Class Members
26 for purposes of Labor Code § 203, (3) 8,000 workweeks, (4) 36,000 shifts worked, (5) \$25.43
27 average hourly rate of pay, and (6) approximately 2,000 wage statements during the PAGA
28 Period. (Mankin Decl. ¶ 27).

1 From these numbers, and by applying violations rates derived from analysis of extensive
2 documents and data from Defendant, Plaintiff calculated the following maximum amounts
3 assuming all claims were entirely successful at trial: class damages and penalties of \$1,588,356,
4 and PAGA penalties of \$815,800. (Mankin Decl. ¶ 48). Then, by applying risks at class
5 certification and on the merits, and when considering other factors (such as evidentiary burdens
6 of proof), Plaintiff calculated the risk-adjusted award at trial for the class claims to be \$454,745
7 and for PAGA as \$102,000. (Mankin Decl. ¶ 48). As required by CMO ¶ G(3)(a)(i and ii), the
8 full analysis of the maximum and risk-adjusted values is contained in the Mankin Decl. at ¶¶ 27-
9 48 (and, for the sake of brevity, that information is not duplicated in this Motion).

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

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

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

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

27 The proposed Notice should be approved, as it fully informs the Class Members of the
28 nature of the lawsuit and each Class Member’s rights under terms of the Settlement Agreement

1 and applicable law. The way the Class Notice shall be disseminated ensures that all or nearly all
2 of the Class Members shall be properly notified of the proposed settlement.

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

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

17 The Notice satisfies the requirements of Rule of Court 3.766 and affords Class Members
18 with all due process protections required by the U.S. Constitution. Moreover, the contents of the
19 Notice comply with Cal. R. Ct. 3.766(d), because the Notice includes, without limitation (1) a
20 detailed explanation of the case, including the basic contentions or denials of the parties; (2) a
21 statement that the court will exclude the member from the class if the member so requests by a
22 specified date; (3) a procedure for the member to follow in requesting exclusion from the class;
23 (4) a statement that the judgment, whether favorable or not, will bind all members who do not
24 request exclusion; and (5) a statement that any member who does not request exclusion may, if
25 the member so desires, enter an appearance through counsel. The 45-day deadline to opt-out or
26 object is also reasonable, as it provides Class Members sufficient time to do so and, if they so
27 choose, to seek independent legal advice in the interim. If a Class Member does not opt-out, he
28 or she will automatically be sent a settlement check.

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

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

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

11 Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement
12 of up to \$25,000 in litigation costs, along with attorneys’ fees equal to one-third of the
13 Settlement Amount. See, *e.g.*, *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th. 480 (approving
14 1/3 fee in the amount of \$6.33 million at a 2.13 lodestar multiplier, and holding that when class
15 action litigation establishes a monetary fund for the benefit of the class members, the trial court
16 may determine the amount of a reasonable fee by choosing an appropriate percentage of the
17 fund created); *Stuart v. RadioShack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645
18 (approving fee 1/3 from settlement amount of \$4.5 million since 1/3 was “well within the range
19 of percentages which courts have upheld as reasonable in other class action lawsuits”).

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

22 **I. A SERVICE AWARD IS NOT REQUESTED**

23 The Settlement Agreement provides an incentive award payment of \$10,000 to the Class
24 Representative, which is reasonable given the recovery Class Members will receive on average,
25 as well as the time and effort he devoted to this case. His efforts included providing factual
26 background for the litigation; providing documents and information about Defendant’s
27 compensation plan; participating in phone calls to discuss litigation and settlement strategy;
28 making himself available throughout the litigation to assist with analyzing the claims and

1 defenses; helping Class Counsel prepare for the mediation; and reviewing the settlement
2 documents. The Class Representative also assumed significant risk in bringing this litigation—
3 namely, had he lost, he could have been ordered to pay Defendant’s costs.

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

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

16 Subject to the Court’s approval, the parties agreed to Phoenix Settlement Administrators
17 serving as the Settlement Administrator. Phoenix is experienced in administering class action
18 settlements and has provided a flat-fee proposal to administer this settlement for \$9,000.
19 (Mankin Decl. ¶ 76; Decl. of Michael Moore of Phoenix and exhibits).

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

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

26 ///

27 ///

28 ///

December 2, 2024	Preliminary Approval (PA) hearing
December 26, 2024	<u>24 days after PA</u> : Deadline for Administrator to complete first mailing of the Notice Packet to all Class Members.
February 10, 2024	<u>45 days after mailing Notice</u> : Deadline for Class Members to submit Requests for Exclusion, Disputes 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	<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: November 5, 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 November 5, 2024, I caused to be served the foregoing document(s) described as follows:

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; 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 November 5, 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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