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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

JUAN CARLOS BAUTISTA and JAIME CERVANTES, individually, on a representative basis, and on behalf of all others similarly situated;

Plaintiff,

vs.

SERVICEFIRST RESTORATION, INC., a California Corporation; and DOES 1 through 20, inclusive;

Defendants.

Case No.: CIVSB2302978
[Assigned to Hon. Joseph Ortiz, Dept S17, for all purposes]

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

Hearing
Date: August 5, 2024
Time: 8:30 a.m.
Dept.: S17

Complaint filed: May 12, 2023

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 5, 2024, 8:30 a.m., or as soon thereafter as the matter may be heard by the Honorable Joseph Ortiz in Department S17 of the San Bernardino County Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiffs Juan Carlos Bautista and Jaime Cervantes, individually and on behalf of all others similarly situated, will and hereby do move the Court for entry of an Order preliminarily approving the Parties' Class Action and Private Attorneys General Act ("PAGA") settlement, including:

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

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

Dated: July 10, 2024 LAUBY, MANKIN & LAUBY LLP

BY: ______________________

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Juan Carlos Bautista and Jaime Cervantes seek preliminary approval of a $500,000 class action settlement on behalf of approximately 110 Class Members[1] that worked for Defendant ServiceFirst Restoration, Inc. ("ServiceFirst" or "Defendant") in California at any time from May 12, 2019, through January 31, 2024 (the "Class Period").

Under the terms of the Settlement Agreement, Defendant will not oppose Plaintiffs' Counsel's application for a reasonable award of attorneys' fees not to exceed $166,666.67 (1/3 of the Settlement Amount), litigation expenses not to exceed $20,000, Settlement Administrator Costs of $8,000, PAGA penalties of $30,000 (with 75% to the LWDA and 25% to the Aggrieved Employees on a pro rata basis), and a Service Payment of $10,000 to each Plaintiff (the "Class Representatives"). (S.A. ¶ 52, *et seq*.)

After all Court-approved deductions from the Settlement Amount, it is estimated that $255,333.33 will be available to pay the Class Members, as follows:

Settlement Amount	**$ 500,000.00**
Attorneys' Fees (1/3)	$ 166,666.67
Litigation Costs (not to exceed)	$ 20,000.00
Administrator Costs	$ 8,000.00
PAGA Penalties	$ 30,000.00
Class Representatives Service Awards	$ 20,000.00
Net Settlement Amount	**$ 255,333.33**

The Settlement allocates payment to Class Members as follows: (1) 75% of the Net Settlement Amount shall be allocated to the Independent Contractors, who sustained additional damages over the Hourly Employees and thus will each receive a $5,000 payment plus a pro-rata share of the remaining amount based on Weeks Worked during the Class Period, and (2) 25% of

[1] The "Settlement Agreement" or "S.A." (attached as Exhibit 1 to the Mankin Decl.), defines the following relevant terms: (1) "Class Members" include "all Independent Contractors and Hourly Employees" [S.A. ¶ 4]; (2) "Hourly Employees" is defined as "all nonexempt employees employed by Defendant in California during the Class Period" [S.A. ¶ 16]; (3) "Independent Contractors" means "the sixteen (16) individuals that performed contracting field/service work for Defendant in California and who Defendant classified as independent contractors during the Class Period" [S.A. ¶ 17; for privacy, the 16 names will be sent solely to the Administrator].

the Net Settlement Amount shall be allocated to the Hourly Employees, distributed on a pro-rata basis according to Weeks Worked during the Class Period. (S.A. ¶ 52(c)). In addition, approximately 50 Aggrieved Employees will receive a share of the $7,500 PAGA Penalties (25% of the $30,000 allocation), calculated pro-rata based on Weeks Worked during the PAGA Period. (S.A. ¶ 52(h)).

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

II. BACKGROUND

A. THE CLASS

The Class is defined as follows:

> All Independent Contractors and Hourly Employees during the Class Period (May 12, 2019, through January 31, 2024). (S.A. ¶¶ 4, 8).

B. PROCEDURAL HISTORY

Plaintiff Bautista submitted a letter to the Labor and Workforce Development Agency ("LWDA") for civil penalties under the Private Attorneys General Act of 2004 ("PAGA"), and simultaneously sent a letter to Defendant requesting the production of personnel and timekeeping records to further evaluate his wage and hour claims. On May 12, 2023, Plaintiff Bautista filed this action, alleging Defendant violated various sections of the Labor Code. On June 27, 2023, Defendant filed its Answer to the complaint. (Mankin Decl. ¶ 13).

Thereafter, Plaintiff Cervantes retained Class Counsel and sought to be added to this Action. In that regard, on June 1, 2023, Plaintiffs submitted an Amended LWDA Notice to the LWDA and by certified mail to Defendant, setting forth the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the violations. On October 6, 2023, Plaintiffs filed the operative First Amended Complaint which added Plaintiff

Cervantes as a class representative and causes of action under PAGA. (Mankin Decl. ¶ 14).

Defendant retained counsel and immediately began to defend the case. However, after early discussions among counsel, the Parties agreed to attend private mediation prior to discovery and motion practice. (Mankin Decl. ¶ 15).

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

On December 13, 2023, Plaintiffs and Defendant participated in mediation with Glenn Lerman, Esq. a well-respected employment mediator. At the conclusion of mediation and extensive arms-length negotiations, the Parties reached a global settlement, which is reflected in the Settlement Agreement and for which the Parties now seek the Court's preliminary approval. (Mankin Decl. ¶ 17).

C. BRIEF OVERVIEW OF CLAIMS AND DEFENSES

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

For instance, Plaintiffs alleged that they and the Class Members were, at all times, denied compliant meal and rest breaks. However, Defendant argued that it provided and made all mandated breaks available to the Class, and any employee who did not take a break did so of their own volition. Thus, Defendant argued these claims were without merit because, for each violation, a fact-finder would have to determine why a break was noncompliant, because if it was by the employee's choice, no liability attaches to Defendant. (Mankin Decl. ¶ 19).

Plaintiffs also alleged that Defendant required the Class Members – primarily the Independent Contractors – to incur substantial costs and expenses to perform their tasks, without any reimbursement. But Defendant denied that this occurred and claimed that it reimbursed the Class Members for all reasonable and necessary expenses incurred. (Mankin Decl. ¶ 20).

Plaintiffs further alleged that Defendant failed to pay proper wages due to the failure to accurately record and compensate for all hours worked. As a result, Plaintiffs argued these violations resulted in unpaid minimum and overtime wages, as well as waiting time penalties and other derivative penalties. However, Defendant opposed each of these unpaid wage claims on the merits and as to the propriety of class certification. (Mankin Decl. ¶ 21).

Finally, Plaintiffs alleged a variety of other claims (all of which Defendant disputed), such as willful misclassification of the Independent Contractors (Labor Code § 226.8), the failure to timely pay wages each period (under Labor Code § 204), failure to timely pay all wages upon separation of employment (Labor Code §§ 201 – 203), and failure to provide accurate itemized wage statements (Labor Code § 226). (Mankin Decl. ¶ 22).

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

III. SUMMARY OF THE PROPOSED SETTLEMENT

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

A. SETTLEMENT CONSIDERATION AND ALLOCATION

The $500,000 Settlement Amount is non-reversionary and will be paid out to Class Members without the need to submit a claim form or take any affirmative action. It includes (1) Plaintiffs' attorneys' fees and costs, as approved by the Court; (2) a service award of $10,000 to each Plaintiff, subject to approval by the Court; (3) Administration Costs, not to exceed $8,000; (4) a $30,000 PAGA award, 75% of which is to be paid to the LWDA pursuant to California Labor Code § 2699(i) and 25% to the Aggrieved Employees; and (5) the aggregate of all Individual Settlement Amounts of the Participating Class Members. (S.A. ¶ 52). Defendant will separately pay its share of employer payroll taxes and withholdings. (S.A. ¶ 52(a)).

B. Notice Procedures

The proposed Notice will be provided to the Class showing the estimated amounts that each Class Member will receive, the number of Work Weeks credited as a Class Member and (if applicable) as an Aggrieved Employee (*See* Exhibit 2 to Mankin Decl.). Within 14 calendar days after entry by the Court of its Order of Preliminary Approval, Defendant shall provide the Administrator with the "Class Data" consisting of Class Member names, addresses, Social Security Numbers, and Weeks Worked during the Class/PAGA Period(s). (S.A. ¶¶ 7, 66).

Within 10 calendar days of receipt of the Class Data, the Administrator shall calculate the numbers for each Class Member, populate the Notice, and send each Class Member the Notice via first-class, United States mail. (S.A. ¶ 67).

If a Notice is returned as undelivered by the U.S. Postal Service, the Administrator shall perform a skip trace search and seek an address correction for the Class Member(s), and a second Notice will be sent to any new or different address obtained. (S.A. ¶ 68).

C. Exclusion and Objection Procedures

Class Members who do not timely Opt-Out of the Settlement will be deemed to participate in the Settlement and shall become a Participating Class Member without having to submit a claim form or take any other action. To Opt-Out of the Settlement, the Class Member must complete and submit a Request for Exclusion to the Administrator no later than 30 days after being mailed by the Administrator ("Response Deadline"). (S.A. ¶¶ 35, 72(a)). Any Opt-Out request not postmarked by the Response Deadline will be invalid, unless a Notice was remailed in which case the Class Member's exclusion or objection must be returned by the later of the original Notice Response Deadline or 15 calendar days after remailing. (S.A. ¶¶ 68).

The Class Notice shall inform Class Members of their right to object to the Settlement. Any Participating Class Member who wishes to object to the Settlement must submit the Objection form to the Administrator no later than the Response Deadline. (S.A. ¶ 72(c)).

D. Settlement Allocation Formula for Settlement Shares

The amount of each Class Member's Individual Class Payment is based upon the allocation described in ¶ 52(c) of the Settlement Agreement:

- 75% of the Net Settlement Amount shall be allocated and paid to the Independent Contractors, who will each receive a payment of $5,000 plus a pro-rata share of the remaining amount based on Weeks Worked during the Class Period, and
- 25% of the Net Settlement Amount shall be allocated and paid to the Hourly Employees, and these amounts shall be paid on a pro-rata basis according to Weeks Worked during the Class Period.

This allocation was negotiated and agreed upon by the Parties because the Independent Contractors were subjected to several unique claims with higher valuation (*i.e.*, independent contractor misclassification, alleged substantial unreimbursed expenses, among others). (Mankin Decl. ¶ 10).

Additionally, each "Aggrieved Employee" will receive an Individual PAGA Payment, calculated by dividing and distributing the $7,500 on a pro-rata Work Week basis. (S.A. ¶ 52(h)).

The Class Notice will inform Class Members of their Weeks Worked during the relevant periods, whether the individual is an Independent Contractor or Hourly Employee and estimated Individual Class and PAGA Payments. Class Members may dispute their Weeks Worked or Pay Periods by timely submitting evidence to the Settlement Administrator. (S.A. ¶ 68).

E. <u>Timing of Settlement Disbursements</u>

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, by the later of December 1, 2024, or 15 days after the Effective Date. (S.A. ¶ 73). Within 10 days after receiving the funds, the Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 74).

Class Members will have 180 days to cash the settlement check. (S.A. ¶ 75). 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.*).

F. <u>Tax Treatment</u>

The Parties agree that the tax treatment for Individual Class Payments are as follows (see ¶ 52(d) of the S.A.):

- Independent Contractors: Because the Independent Contractors performed contract services for Defendant as independent contractors, rather than as employees, and because Defendant fully disputes the allegations alleged herein, the Parties agree that the settlement funds paid to Independent Contractors will be allocated and paid as contract compensation, interest, and penalties from which no state or federal taxes will be withheld or deducted, and

- As to Hourly Employees: twenty percent (20%) of the Individual Class Payments will be allocated as wages subject to withholding of all applicable local, state and federal taxes and the remaining eighty percent (80%) 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.

The Individual PAGA Payments will be classified entirely as civil penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶ 52(h)).

G. PARTICIPATING CLASS MEMBERS' RELEASE OF CLAIMS

In exchange for these payments, the Settlement Agreement at ¶ 30 defines the "Released Class Claims" as follows:

> all claims stated in the Complaint and those that could reasonably have been alleged based upon the facts in the Complaint, including: (1) failure to pay minimum wages, (2) failure to pay overtime wages, (3) failure to pay for rest periods and nonproductive time, (4) failure to provide meal periods, (5) failure to provide rest breaks, (6) failure to reimburse business expenses, (7) failure to timely pay final wages, (8) failure to provide accurate itemized wage statements, and (9) unfair and unlawful competition.

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.

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H. AGGRIEVED EMPLOYEES' RELEASE OF CLAIMS

The Settlement Agreement at ¶ 31 defines the "Released PAGA Claims" as follows:

> all PAGA claims seeking civil penalties premised upon: (1) misclassification, (2) failure to pay minimum wages, (3) failure to pay overtime wages, (4) failure to pay for rest and recovery periods and nonproductive time under Labor Code § 226.2, (5) failure to provide meal periods, (6) failure to provide rest breaks, (7) failure to reimburse business expenses, (8) failure to timely pay wages each period, (9) failure to timely pay wages upon separation of employment, (10) failure to provide accurate itemized wage statements, and (11) 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.

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. ¶ 57).

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, Plaintiffs requests that this Court provisionally certify the Class, as defined above, under Code of Civil Procedure § 382.

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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; *Medrazo 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 110 Class Members that are easily identifiable and fall within the defined Class. Thus, Plaintiffs' proposed Class meets the ascertainability and numerosity requirements.

B. WELL-DEFINED COMMUNITY OF INTEREST

1. Commonality

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

2. Typicality

Typicality "focuses on whether there exists a relationship between the Plaintiff's claims and the claims alleged on behalf of the class." *See* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") § 3:13 (4th ed. 2002). Here, typicality is satisfied because Plaintiffs worked for Defendant during the Class Period and allege that they experienced the same wage and hour violations as the rest of the Class, based on Defendant's uniform policies. Thus, although Defendant disputes whether Plaintiffs' claims are typical of the Class for the purposes of any continued litigation of the Action, they agree that, for the purposes of this settlement only, Plaintiffs assert claims regarding Defendant's pay policies, meal and rest break practices, wage statements, and the provisions governing the timely and complete payment of wages, which are at the core of the lawsuit.

3. *Adequacy of Representation*

The proposed class representative must establish that he or she will adequately represent the proposed class. *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546. Specifically, Plaintiffs are adequate to represent the class because they understood their duties as the Class Representatives, have been willing to undergo the risks of litigation, and have no conflict of interest. (Bautista Decl. ¶¶ 2-5; Cervantes Decl. ¶¶ 2-5).

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

4. *Superiority*

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

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

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

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

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

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

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

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

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

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

D. THE SETTLEMENT IS A REASONABLE COMPROMISE OF CLAIMS

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

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

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

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

Based upon data obtained through formal and informal discovery, Plaintiffs' counsel estimated the following through mediation: (1) 97 Class Members, (2) 70 *former* Class Members for purposes of Labor Code § 203, (3) 9,520 workweeks, (4) 42,840 shifts worked, and (4) approximately 2,200 wage statements during the PAGA Period. (Mankin Decl. ¶ 25).

From these numbers, and by applying violations rates derived from analysis of extensive documents and data from Defendant, Plaintiffs calculated that, assuming all claims were entirely successful at trial, the maximum class damages and penalties would be approximately $3.5 million. (Mankin Decl. ¶ 31). Then, by applying risks at class certification and on the merits, and when considering other factors (such as evidentiary burdens of proof), Plaintiffs calculated the risk-adjusted award at trial for the class claims to be approximately $1.4 million. (*Id.*). The full analysis of the maximum and risk-adjusted values is contained in the Mankin Decl. at ¶¶ 25-31 (and, for the sake of brevity, that information is not duplicated in this Motion).

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

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

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

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

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

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

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

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

The Notice satisfies the requirements of Rule of Court 3.766 and affords Class Members with all due process protections required by the U.S. Constitution. Moreover, the contents of the Notice complies with Cal. R. Ct. 3.766(d), because the Notice includes, without limitation (1) a detailed explanation of the case, including the basic contentions or denials of the parties; (2) a statement that the court will exclude the member from the class if the member so requests by a specified date; (3) a procedure for the member to follow in requesting exclusion from the class; (4) a statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and (5) a statement that any member who does not request exclusion may, if 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 themself. Moreover, the Settlement Amount is non-reversionary, which means that no settlement funds will revert to Defendant; 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. <u>The Attorney's Fees and Costs Allocation is Fair</u>

Under the terms of the Settlement Agreement, Class Counsel is seeking reimbursement of up to $20,000 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, Plaintiffs' counsel will submit a comprehensive request for attorneys' fees and costs with final approval.

I. <u>The Requested Service Award is Fair and Appropriate</u>

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

The requested service award falls within the range of incentive payments typically awarded to Class Representatives in similar class actions. *See*, *e.g.*, *Bond v. Ferguson Enterprises, Inc*. (E.D. Cal. 2011) 2011 WL 2648879 (approving $11,250 service awards in class action); *Ross v. US Bank National Association* (N.D. Cal. 2010) 2010 WL 3833922, at *2 (approving $20,000 enhancement award in California wage-and-hour class settlement); *Vasquez v. Coast Valley Roofing, Inc*. (E.D. Cal. 2010) 266 F.R.D. 415, 493 (approving service awards of

$15,000 from a $300,000 settlement fund in a wage/hour class action); *West v. Circle K Stores, Inc*. (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 76558, at *28 (finding service awards "of $ 15,000 each to be reasonable."); *Glass v. UBS Fin. Servs*. (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 8476, at *52 (finding "requested payment of $25,000 to each of the named Plaintiff is appropriate" in wage and hour settlement).

VI. THE COURT SHOULD APPOINT PHOENIX AS ADMINISTRATOR

Subject to the Court's approval, the parties agreed to Phoenix Settlement Administrators serving as the Settlement Administrator. Phoenix is experienced in administering class action settlements and has provided a flat-fee proposal to administer this settlement for $8,000. (Mankin Decl. ¶ 44; Exhibit 3 to Mankin Decl. [Phoenix's bid])

VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING

The last step in the approval process is the formal hearing, whereby proponents of the Settlement may explain and describe its terms and conditions and offer argument in support of approval, and Class Members or their counsel may be heard in support of or in opposition to the settlement. Subject to the Court's approval, the Parties propose that the Court schedule a hearing for final approval approximately 110 days after the Preliminary Approval Date, as follows:

August 5, 2024	Preliminary Approval (PA) hearing
August 29, 2024	*24 days after PA*: Deadline for Administrator to complete first mailing of the Notice to all Class Members.
September 28, 2024	*30 days after mailing Notice*: Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
16 court days before Final Approval hearing	Deadline for Plaintiffs 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 Plaintiffs' 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 – November 25, 2024	*Approx. 120 days after PA*: Final Approval Hearing

VIII. CONCLUSION

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

Dated: July 10, 2024

LAUBY, MANKIN & LAUBY LLP

BY: ______________________

Brian J. Mankin, Esq.
Attorneys for Plaintiffs 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 July 10, 2024, I caused to be served the foregoing document(s) described as follows:

PLAINTIFFS' 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.

[X] **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.

[X] **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 10, 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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