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

CLARENCE PHILLIPS, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

HARDY WINDOW COMPANY, a
California Corporation; and DOES 1
through 20, inclusive;

Defendants.

Case No.: CIVSB2312048

*[Assigned to Hon. Jessica Morgan, Dept S26, for
all purposes]*

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

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

Hearing

Date: August 1, 2024

Time: 8:30 a.m.

Dept.: S26

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 1, 2024, at 8:30 a.m., or as soon thereafter as
3 the matter may be heard by the Honorable Jessica Morgan in Department S26 of the San
4 Bernardino County Superior Court, located at 247 West Third Street, San Bernardino, CA
5 92415, Plaintiff Clarence Phillips, individually and on behalf of all others similarly situated, will
6 and hereby does move the Court for entry of an Order preliminarily approving the Parties' Class
7 Action and Private Attorneys General Act ("PAGA") settlement, including:

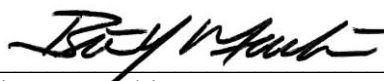
- 8 1. Certifying the class for purposes of settlement only;
- 9 2. Preliminarily appointing Plaintiff as class representative for settlement purposes
10 only;
- 11 3. Appointing Plaintiff's counsel as class counsel for purposes of settlement only;
- 12 4. Preliminarily approving the class action and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

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

24 Dated: July 9, 2024

LAUBY, MANKIN & LAUBY LLP

25
26 BY:



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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Clarence Phillips seeks preliminary approval of a \$662,500 class action
4 settlement on behalf of approximately 450 current and former nonexempt employees who were
5 employed by Defendant Hardy Window Company (“Defendant” or “Hardy”) in California at any
6 time from December 10, 2019, through Preliminary Approval (the “Class Period”).

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 \$220,833.33 (1/3 of
9 the Gross Settlement Amount), litigation expenses not to exceed \$25,000, an Administration
10 Expenses Payment of \$9,500, PAGA penalties of \$40,000 (with 75% to the LWDA and 25% to
11 the Aggrieved Employees on a pro rata basis), and a Service Payment of \$10,000 to Plaintiff
12 Clarence Phillips (“Class Representative”). (S.A. ¶ 3.1 – 3.2.6)

13 After all Court-approved deductions from the Gross Settlement Amount, it is estimated
14 that \$357,166.67 will be available to pay the Class Members, as follows:

15

<i>Gross Settlement Amount</i>	\$ 662,500.00
Attorneys’ Fees (1/3)	\$ 220,833.33
Litigation Costs (not to exceed)	\$ 25,000.00
Administrator Costs	\$ 9,500.00
PAGA Penalties	\$ 40,000.00
Class Representative Service Payment	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 357,166.67

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21 Assuming 450 Class Members, the average payment will be approximately \$793.70
22 (\$357,166.67 / 450). However, the actual payments will be calculated on a pro-rata basis
23 according to the number of Weeks Worked by each Class Member during the Class Period, with
24 an estimated net value of \$13.48 per workweek. In addition, approximately 280 Aggrieved
25 Employees will receive a share of the \$10,000 PAGA Penalties (25% of the \$40,000 allocation),
26 calculated pro-rata based on Weeks Worked during the PAGA Period. (S.A. ¶ 3.2.6).

27
28

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

1 Because the settlement is fair, reasonable, and negotiated at arm's length by experienced
2 counsel and an experienced mediator following a sufficient exchange of information and
3 documents prior to mediation, it should be preliminarily approved. Plaintiff respectfully requests
4 that the Court enter an order preliminarily approving the settlement, conditionally certifying the
5 Class under Code of Civil Procedure § 382 for settlement purposes only, 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**

The Class is defined as follows:

10 All current and former nonexempt employees who were employed
11 by Hardy Window Company in California at any time during the
12 Class Period (December 10, 2019, through Preliminary Approval).
(S.A. ¶¶ 1.7, 1.14, 1.40).

13 **B. PROCEDURAL HISTORY**

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

18 Then, on May 5, 2023, Plaintiff filed this class action, alleging that Defendant violated
19 various sections of the Labor Code. After the LWDA declined to assert jurisdiction over the
20 PAGA claims, Plaintiff filed the operative First Amended Complaint on July 10, 2023, which
21 added PAGA claims to the action. (Mankin Decl. ¶ 14).

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

25 In preparation for mediation, the Parties informally exchanged documents and
26 information that allowed both sides to calculate the potential damages and evaluate potential risk,
27 including policies and procedures pertaining to the claims, statistics relating to the number of
28 current and former employees, number of shifts, pay periods worked and other things, and a

1 sampling of payroll and timekeeping records for Class Members. This information, which
2 included more than 5,000 pages of documents and substantial excel data for a sampling of
3 employees, enabled both parties to take a deep dive into the claims. Additionally, during this
4 process, Plaintiff and his counsel analyzed, researched, and investigated the potential issues,
5 including matters related to the calculation of damages, trial, and appellate issues and risks.
6 (Mankin Decl. ¶ 16).

7 On March 14, 2024, Plaintiff and Defendant participated in mediation with Kelly Knight,
8 Esq. a well-respected employment mediator. After a full-day mediation, the matter resolved
9 after a mediator's proposal, and the Parties entered into the Settlement Agreement. The Parties
10 now seek the Court's preliminary approval of the Settlement. (Mankin Decl. ¶ 17).

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

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

16 For instance, Plaintiff alleged Defendant failed to pay proper wages due to several
17 distinct wage violations. First, Plaintiff alleged that Defendant utilized a practice that "rounded"
18 the Class Members' timekeeping and paid in quarter-hour increments, and further alleged that
19 this practice illegally underpaid the Class because it did not pay all wages owed. *Camp v. Home*
20 *Depot U.S.A. Inc.*, (2022) 84 Cal.App.5th 638, 660. Second, Plaintiff also alleged that Defendant
21 paid the Class at a base hourly rate, along with a lower hourly rate for "drive time." And Plaintiff
22 alleged that this lower "drive time" rate violated California law because it was less than several
23 of the local minimum wage rates established by cities and counties where the Class performed
24 their work. Third, Plaintiff argued that Defendant failed to pay all overtime owed because of a
25 failure to calculate and pay overtime at the correct "weighted average" on occasions that Class
26 Members earned two or more rates of pay in a workweek. Plaintiff thus argued these violations
27 resulted in unpaid minimum wages and overtime, waiting time penalties under Labor Code §
28 203, and other derivative penalties. However, Defendant opposed each of these unpaid wage

1 claims on the merits and as to the propriety of class certification. (Mankin Decl. ¶ 19).

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

8 Finally, Plaintiff alleged a variety of other claims (all of which Defendant disputed), such
9 as the failure to reimburse expenses, failure to timely pay wages each period and upon separation
10 of employment, and failure to provide accurate itemized wage statement. (Mankin Decl. ¶ 21).

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

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

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

16 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

17 The \$662,500 Gross Settlement Amount² is non-reversionary and will be paid to Class
18 Members without the need to submit a claim form or take any affirmative action. It includes (1)
19 Plaintiff's attorneys' fees and costs, as approved by the Court; (2) a service payment of \$10,000
20 to Plaintiff, subject to approval by the Court; (3) an Administration Expenses Payment of \$9,500;
21 (4) a \$40,000 PAGA award, 75% paid to the LWDA and 25% to the Aggrieved Employees; and
22 (5) the aggregate of all Individual Class Payments of the Participating Class Members. (S.A. ¶¶

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24
25 ² The Gross Settlement Amount is subject to increase if the "Escalator Clause" is triggered,
26 resulting in an "Adjusted Gross Settlement Amount." (S.A. ¶¶ 1.2, 9). If this clause is triggered,
27 other figures will also shift upward, such as attorneys' fees (but this is still constrained to 1/3 of
28 the Adjusted Gross Settlement Amount). In the alternative, Defendant may adjust the end date of
the Class Period so that the release covers no more than 30,475 workweeks. If Defendant
chooses this option, the end date of the PAGA Period shall be adjusted to match the end date of
the Class Period, but under no circumstance shall the Class Period and/or PAGA Period be
adjusted prior to the date of mediation (March 14, 2024).

3.1 – 3.2.5). Defendant will separately pay its share of employer payroll taxes and withholdings. (S.A. ¶¶ 1.26 and 3.1).

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 as an Aggrieved Employee (*See* Exhibit 2 to Mankin Decl.). Within 21 calendar days after Preliminary Approval, Defendant shall provide the Administrator with the “Class Data” consisting of Class Member names, last-known mailing addresses, Social Security Numbers, Weeks Worked during the Class and PAGA period(s). (S.A. ¶¶ 1.10, 4.2).

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. ¶ 8.4.2).

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. ¶ 8.4.3).

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 submit a Request for Exclusion to the Administrator no later than 45 days after being mailed by the Administrator (“Response Deadline”). (S.A. ¶¶ 1.46, 8.5.1). 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 14 calendar days after remailing. (S.A. ¶¶ 8.5.1, 8.5.3).

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 provide their objection no later than the Response Deadline. (S.A. ¶ 8.7.2).

///

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

2 The amount of each Class Member's Individual Class Payment is tied to the number of
3 Weeks Worked by each Class Member for Defendant during the Class Period. Therefore,
4 Individual Class Payments will be calculated by: (a) dividing the Net Settlement Amount by the
5 total number of Weeks Worked by all Participating Class Members during the Class Period, and
6 (b) multiplying the result by each Participating Class Members' Weeks Worked. (S.A. ¶ 3.2.4).
7 Additionally, each "Aggrieved Employee" will receive an Individual PAGA Payment, calculated
8 by dividing and distributing the \$10,000 on a pro-rata Workweek basis. (S.A. ¶ 3.2.6).

9 The Class Notice will inform Class Members of the number of Weeks Worked during the
10 relevant periods and the estimated Individual Class and PAGA Payments. Class Members may
11 dispute their Weeks Worked by timely submitting evidence to the Administrator. (S.A. ¶ 8.6).

12 **E. TIMING OF SETTLEMENT DISBURSEMENTS**

13 Pursuant to the terms of the Settlement Agreement, Defendant is required to fund the
14 Settlement Amount, plus Defendant's share of payroll taxes owed on the Individual Class
15 Payments, within 30 days of the Effective Date. (S.A. ¶ 4.3). Within 10 days after receiving the
16 funds, the Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 4.4).

17 Class Members will have 180 days to cash the settlement check. (S.A. ¶ 4.4). If a Class
18 Member fails to cash a check by the deadline, the Administrator shall issue unclaimed funds to
19 the California State Controller in the name of the Class Member/Aggrieved Employee. (S.A. ¶
20 4.4.3).

21 **F. TAX TREATMENT**

22 The Parties agree that fifteen percent (15%) of the Individual Class Payments will be
23 allocated as wages subject to withholding of all applicable local, state and federal taxes and the
24 remaining eighty-five percent (85%) will be allocated for interest and penalties (pursuant to, *e.g.*,
25 California Labor Code §§ 203, 210, 226, 2699, etc.) from which no taxes will be withheld. (S.A.
26 ¶ 3.2.4.1). The Individual PAGA Payments will be classified entirely as civil penalties and shall
27 be reported as required on an IRS Form 1099.

28 ///

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

2 In exchange for these payments, the Settlement Agreement at ¶ 6.2 defines the “Released
3 Class Claims” as follows:

4 all claims that were alleged in the Complaint, or that reasonably
5 could have been alleged based upon the facts stated in the
6 Complaint, including, but not limited to,: (1) failure to pay minimum
7 wages, (2) failure to pay overtime wages, (3) failure to provide meal
8 periods, (4) failure to provide rest breaks, (5) failure to reimburse
9 business expenses, (6) failure to timely pay final wages, (7) failure
10 to provide accurate itemized wage statements, and (8) unfair and
11 unlawful competition.

12 It is understood and agreed, with the exception of Plaintiff, who has agreed to a waiver of
13 rights under California Civil Code section 1542, that the Settlement Agreement will not release
14 any person, party or entity from claims, if any, by Class Members for any other claims, including
15 claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing
16 Act, unemployment insurance, disability, social security, workers’ compensation, or claims based
17 on facts occurring outside the Class Period.

18 **H. AGGRIEVED EMPLOYEES' RELEASE OF CLAIMS**

19 The Settlement Agreement at ¶ 6.3 defines the “Released PAGA Claims” as follows:

20 all claims for civil penalties under the Private Attorneys General
21 Act, Labor Code § 2698 et seq., that Plaintiff alleged against the
22 Released Parties, on behalf of Aggrieved Employees and State of
23 California, based on the facts stated in the Complaint and in
24 Plaintiff’s PAGA Notice to the LWDA, including all PAGA claims
25 seeking civil penalties premised upon: (1) failure to pay minimum
26 wages, (2) failure to pay overtime wages, (3) failure to provide meal
27 periods, (4) failure to provide rest breaks, (5) failure to reimburse
28 business expenses, (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 letter 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. ¶ 8.5.4).

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

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

15 **A. ASCERTAINABILITY AND NUMEROSITY**

16 In determining whether a class is ascertainable, the court considers “(1) the class
17 definition, (2) the size of the class, and (3) the means available for identifying the class
18 members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263,
19 1271; *Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 101 (proposed settlement
20 class is ascertainable if the class members can be objectively identified and given notice of the
21 litigation without unreasonable time or expense). Here, according to Defendant’s records, there
22 are approximately 450 Class Members that are easily identifiable and fall within the defined
23 Class. Thus, Plaintiff’s proposed Class meets the ascertainability and numerosity requirements.

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

25 *I. Commonality*

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

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

4 2. Typicality

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

14 3. Adequacy of Representation

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

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

24 4. Superiority

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

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

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

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

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

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

28 ///

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

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

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

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

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

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

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

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

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

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

20 Based upon data obtained through formal and informal discovery, Plaintiff’s counsel
21 estimated the following through mediation: (1) 420 Class Members, (2) 250 *former* Class
22 Members for purposes of Labor Code § 203, (3) 26,500 workweeks, (4) 119,250 shifts worked,
23 and (4) approximately 12,250 wage statements during the PAGA Period. (Mankin Decl. ¶ 24).

24 From these numbers, and by applying violations rates derived from analysis of extensive
25 documents and data from Defendant, Plaintiff calculated that, assuming all claims were entirely
26 successful at trial, the maximum class damages and penalties would be approximately
27 \$5,000,000. (Mankin Decl. ¶ 30). However, this figure failed to incorporate or acknowledge
28 many risks at class certification and on the merits, defenses, and other issues (such as violation

1 rates and evidentiary burdens of proof); when taking those into account, Plaintiff calculated the
2 risk-adjusted award at trial for the class claims to be \$1,500,000. (*Id.*). The full analysis of the
3 maximum and risk-adjusted values is contained in the Mankin Decl. at ¶¶ 24-30 (and, for the
4 sake of brevity, that information is not duplicated in this Motion).

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

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

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

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

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

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

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

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

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

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

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

The fact that each member who does not opt out of the Settlement shall be mailed a check ensures that every Class Member will be paid unless they affirmatively act to exclude themselves. Moreover, the Settlement Amount is non-reversionary, which means that no settlement funds will revert to 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. THE ATTORNEY’S FEES AND COSTS ALLOCATION IS FAIR

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

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

I. THE REQUESTED SERVICE AWARD REQUEST IS FAIR AND APPROPRIATE

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

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

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

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

19 Subject to the Court's approval, the parties agreed to Phoenix Settlement Administrators
20 serving as the Administrator. Phoenix is experienced in administering class action settlements
21 and has provided a flat-fee proposal to administer this settlement for \$9,500. (Mankin Decl. ¶
22 43; and Exhibit 4 [Phoenix's bid]).

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

24 The last step in the approval process is the formal hearing, whereby proponents of the
25 Settlement may explain and describe its terms and conditions and offer argument in support of
26 approval, and Class Members or their counsel may be heard in support of or in opposition to the
27 settlement. Subject to the Court's approval, the Parties propose that the Court schedule a hearing
28 for final approval approximately 130 days after Preliminary Approval, as follows:

August 1, 2024	Preliminary Approval (PA) hearing
September 3, 2024	<i>31 days after PA (+2 for weekend and holiday):</i> Deadline for Administrator to complete first mailing of the Notice
October 18, 2024	<i>45 days after mailing Notice:</i> Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
16 court days before Final Approval hearing	Deadline for Plaintiff to file and serve Motion for Final Approval and application for award of fees, costs and service payments.
9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiff's Motion for Final Approval, or filing response to an objection.
5 court days before final approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval
TBD	Final Approval Hearing

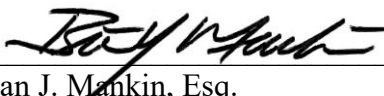
VIII. CONCLUSION

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

Dated: July 9, 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 July 9, 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

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 July 9, 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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