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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GENNINE MERRITT, individually, on a representative basis, and on behalf of all others similarly situated;

Plaintiff,

vs.

DMA CLAIMS, INC., a California Corporation; DMA CLAIMS MANAGEMENT, INC., an Illinois Corporation; VENBROOK GROUP, LLC, a Delaware Limited Liability Company; VENBROOK INSURANCE SERVICES, LLC, a California Limited Liability Company; and DOES 1 through 20, inclusive;

Defendants.

Case No.: 21STCV31200
[Assigned to Hon. Judge Stuart M. Rice, Dept 1, for all purposes]

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

Hearing

Date: December 12, 2022
Time: 10:00 a.m.
Dept.: 1

Complaint filed: August 24, 2021

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 12, 2022, at 10:00 a.m. or as soon thereafter as the matter may be heard by the Honorable Stuart M. Rice in Department 1 of the Los Angeles County Superior Court, located at 312 North Spring Street, Los Angeles, CA 90012, Plaintiff Gennine Merritt, individually and on behalf of all others similarly situated, will and hereby does move the Court for entry of an Order preliminarily approving the Parties' class action settlement, including:

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

This motion is based upon this Memorandum of Points and Authorities in Support thereof; the Declaration of Plaintiff's counsel (Brian Mankin, Peter Carlson, and Mehrdad Bokhour) in support thereof; the Declaration of Plaintiff Gennine Merritt, the Class Action and PAGA Settlement Agreement (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: November 16, 2022

LAUBY, MANKIN & LAUBY LLP

BY: 

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Gennine Merritt seeks preliminary approval of a $750,000 wage-and-hour class action settlement on behalf of approximately 185 putative class members employed by Defendants DMA Claims, Inc., DMA Claims Management, Inc., Venbrook Group, LLC, and Venbrook Insurance Services, LLC in California at any time between August 23, 2017, and September 29, 2022 (the "Class Period").

Under the terms of the Settlement Agreement,[1] Defendants will not oppose Plaintiff Counsel's application for a reasonable award of attorney's fees not to exceed $250,000 (1/3 of the Gross Settlement Amount), litigation expenses not to exceed $20,000, Settlement Administrator Costs of $6,000, PAGA penalties of $75,000 (with 75% to the LWDA and 25% to the Aggrieved Employees on a pro rata basis), and a Service Payment of $10,000 to Plaintiff Gennine Merritt ("Class Representative"). (S.A. ¶ 3.2 et seq.)

After all Court-approved deductions from the Settlement Amount, it is estimated that $389,000.00 will be available to pay the Class Members, as follows:

Gross Settlement Amount	**$ 750,000.00**
Attorneys' Fees (1/3)	$ 250,000.00
Litigation Costs (not to exceed)	$ 20,000.00
Administrator Costs (not to exceed)	$ 6,000.00
PAGA Penalties	$ 75,000.00
Class Representative Service Award	$ 10,000.00
Net Settlement Amount	**$ 389,000.00**

Assuming 185 Class Members, the average payment to each class member will be approximately $2,102.70 ($389,000 / 185). Of course, the actual payment will be calculated on a pro-rata basis according to the number of Pay Periods Worked, with each Pay Period having a value of approximately $35.69 ($389,000 / 10,900 total Pay Period Worked). In addition, approximately 82 Aggrieved Employees will receive a share of the $18,750 PAGA Penalties

[1] The Class Action and PAGA Settlement Agreement (the "Settlement Agreement" or "S.A.") is attached as Exhibit 2 to the Declaration of Brian Mankin ("Mankin Decl.") and is based on the new model long-form agreement created by the Los Angeles County Superior Court. To facilitate the Court's review of the S.A., a redlined version is attached as Exhibit 3 to the Mankin Decl. to compare the S.A. to the model agreement.

(25% of the total $75,000 PAGA allocation), calculated pro-rata based on approximately 3,465 Pay Periods Weeks Worked during the PAGA Period. (Settlement Agreement ¶ 4.1; Mankin Decl. ¶ 9).

Because the settlement is fair and reasonable and was 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. Plaintiff respectfully requests 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 Plaintiff's counsel as class counsel, appointing Phoenix Class Action Administrators as the Settlement Administrator, and scheduling a hearing for final approval of the Settlement.

II. BACKGROUND

A. THE SETTLEMENT CLASS

The Class is defined as follows:

> All current and former nonexempt employees (i.e., meaning they are eligible to receive overtime pay) of Defendants DMA, including all former employees of Defendant DMA who were employed by Defendant Venbrook, who worked in California at any time during the Class Period. (S.A. ¶ 1.6).[2]

B. PROCEDURAL HISTORY

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

On August 23, 2021, Plaintiff filed a class and representative PAGA action complaint in the Court alleging claims for: (1) failure to pay minimum wages, (2) failure to pay overtime wages, (3) failure to provide meal periods, (4) failure to provide rest breaks, (5) failure to

[2] The following defined terms are used in this class definition: "DMA" means, collectively, Defendants DMA Claims, Inc. and DMA Claims Management, Inc. [S.A. ¶ 1.20]; "Venbrook" means, collectively, Defendants Venbrook Group, LLC and Venbrook Insurance Services, LLC [S.A. ¶ 1.49]; "Class Period" means the period from August 23, 2017 to September 29, 2022 [S.A. ¶ 1.13].

reimburse business expenses, (6) failure to timely pay final wages, (7) failure to provide accurate itemized wage statements, (8) unfair and unlawful competition pursuant to Business and Professions Code §17200 *et seq*., and (9) related claims under PAGA. (Mankin Decl. ¶ 14).

Defendants retained counsel and immediately began to defend the case, including alleging that Plaintiff executed an arbitration agreement that prevented her from bringing the class and PAGA claims alleged in the complaint. Plaintiff challenged the agreement, arguing that it was not binding or enforceable. Then, after early discussions among counsel, the Parties agreed to attend private mediation with Jeffrey Krivis on June 29, 2022. (Mankin Decl. ¶ 15).

In preparation for the 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 each claim alleged, and statistics relating to the number of current and former employees, number of shifts, pay periods worked and other things. Defendants also provided their written policies and practices and a robust 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, Plaintiff and her counsel analyzed, researched, and investigated the potential issues, including matters related to the calculation of damages, trial, and appellate issues and risks. Plaintiff also retained an expert (Jarrett Gorlick of Berger Consulting Group) to perform a statistical analysis of the claims and violations (Mankin Decl. ¶ 16).

On June 29, 2022, Plaintiff and Defendants participated in mediation before Jeffrey Krivis, a highly regarded and experienced wage-and-hour class action mediator. The matter did not resolve at mediation, but the Parties continued negotiations and Mr. Krivis ultimately issued a mediator's proposal which was accepted by the Parties on July 19, 2022. (Mankin Decl. ¶ 17). The Parties now seek the Court's preliminary approval of the Settlement.

C. SUMMARY OF THE CLAIMS AND DEFENSES

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

One of the primary claims in this action is for unpaid wages, and this theory of liability falls into two categories. *First*, Plaintiff alleged that she and the Class Members were routinely denied compensation for all hours worked (minimum wage and overtime) due to Defendants' policies that actively discouraged recording all hours worked at the threat of discipline. *Second*, Plaintiff alleged that the Class Members were not paid all wages owed due to Defendants' hybrid hourly/piece-rate pay policy. For instance, for certain clients, the Class Members were paid a flat amount for certain tasks (a "task rate"), regardless of time spent. However, Defendants vehemently denied these allegations and opposed these claims on the merits and as to the propriety of class certification. (Mankin Decl. ¶ 19).

Plaintiff also argued that the Class Members were often denied compliant meal and rest breaks due to the nature of the work. However, Defendants argued that it provided and made available meal and rest breaks to all employees, and any employee who did not take a meal or rest break did so entirely of his or her own volition. In this regard, Defendants produced its written policies and practices, which it argued show full compliance with the law. As such, Defendants argued that these claims were without merit because, for each violation, a fact-finder would have to determine why a break was noncompliant/nonexistent, because if it was by the employee's choice, no liability attaches to the Defendants. (Mankin Decl. ¶ 20).

Additionally, Plaintiff brought claims for wage statement violations (Labor Code § 226) based on the claim that Defendants' wage statements failed to include several required pieces of information, such as total hours worked and the overtime rate of pay. However, Defendants argued that it *did* provide this information, including on a separate form provided with the wage statements, thus complying with Labor Code § 226. (Mankin Decl. ¶ 21).

Plaintiff also alleged various other Class and PAGA claims, such as the failure to reimburse business expenses, failure to timely pay all wages owed upon termination, and other claims related to the alleged violations mentioned above. However, Defendants argued that these other claims, as well as the "derivative" claims, have no merit. (Mankin Decl. ¶ 22).

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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.

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 $750,000 Settlement Amount is non-reversionary and will be paid out to Class Members without the need to submit a claim form or take any affirmative action. It includes (1) Plaintiff's attorneys' fees not to exceed one third of the Settlement Amount and costs not to exceed $20,000, as approved by the Court; (2) a service award of $10,000 to Plaintiff, subject to approval by the Court; (3) settlement administrator expenses, not to exceed $6,000; (4) a $75,000 PAGA award, 75 percent of which is to be paid to the LWDA pursuant to California Labor Code § 2699(i) and 25 percent to the Aggrieved Employees; and (5) the aggregate of all Individual Settlement Amounts of the Participating Class Members. (S.A. ¶ 3.2 and subparts). Defendants will separately pay their share of employer payroll taxes and withholdings. (S.A. ¶ 3.1).

B. NOTICE PROCEDURES

The proposed Class Notice (based on the model provided by the Court) will be provided to the Class Members showing the estimated amount that each Class Member will receive and the credited number of Pay Periods Worked (Exhibit A to the S.A.). Within 30 days after entry by the Court of its Order of Preliminary Approval, Defendants shall provide the Settlement Administrator with a list of Class Members containing names, addresses, telephone numbers, Social Security Numbers, and the total Pay Periods Worked in the Class and PAGA Periods (the "Class Data"). (S.A. ¶¶ 1.9 and 4.2).

Within 10 days of receipt of the Class Data, the Settlement Administrator shall calculate the number of Pay Periods Worked for each Class Member, populate the Class Notice for each, and send each Class Member the Class Notice via first-class, United States mail. (S.A. ¶ 8.4.2).

In the event that any Class Notice mailed to a Class Member is returned as having been undelivered by the U.S. Postal Service, the Settlement Administrator shall perform a skip trace

search and seek an address correction for such Class Member(s), and a second Class 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 written request to the Settlement Administrator no later than 45 days after being mailed by the Settlement Administrator ("Response Deadline"). (S.A. ¶¶ 1.47). Any Opt-Out request that is not postmarked by the Response Deadline will be invalid. (S.A. ¶ 8.5.1).

The Class Notice shall inform the Class Members of their right to object to the Settlement. Any Class Member who wishes to object to the Settlement may submit a written objection to the Settlement Administrator no later than the Response Deadline or, in the alternative, may appear in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval Hearing. (S.A. ¶ 8.7.2).

D. SETTLEMENT ALLOCATION FORMULA FOR SETTLEMENT SHARES

The amount of each Settlement Class Member's Individual Class Payment is tied to the number of Pay Periods Worked by each Settlement Class Member for Defendants during the Class Period. Individual Class Payments are calculated by (a) dividing the Net Settlement Amount by the total number of Pay Periods Worked by all Participating Class Members during the Class Period, and (b) multiplying the result by each Participating Class Member's Pay Periods Worked. (S.A. ¶ 3.2.4).

Additionally, each "Aggrieved Employee" will receive a share of the PAGA Penalties based on a pro-rata basis. Thus, the $18,750 PAGA Penalties allocated to the Aggrieved Employees will be divided and paid on a Pay Periods Worked basis. (S.A. ¶ 3.2.5).

The Class Notice will inform Class Members of the estimated share and the number of Pay Periods he/she worked during the Class Period. Class Members may dispute their Pay Periods Worked if they feel they worked more in the Class or PAGA Periods than Defendants' records show by timely submitting evidence to the Settlement Administrator. (S.A. ¶ 8.6).

As noted, assuming a class size of 185, the average payment will be approximately $2,102.70 ($389,000 / 185). And assuming an estimated 10,900 Pay Periods Worked, each Pay Period Worked will have a value of approximately $35.69 on average ($389,000 / 10,900). In addition, approximately 82 Aggrieved Employees will receive a share of the $18,750 PAGA Penalties (25% of the total $75,000 PAGA allocation), calculated pro-rata based on approximately 3,465 Pay Periods Weeks Worked during the PAGA Period.

E. TIMING OF SETTLEMENT DISBURSEMENTS

Defendants are required to deposit the Settlement Amount, along with the employers' share of payroll taxes owed, with the Settlement Administrator, within 14 calendar days after the "Effective Date" and these funds will be used to pay: (1) the class attorney fees and expenses, as approved by the Court; (2) the service awards, as approved by the Court; (3) administrative expenses, as approved by the Court; (4) the PAGA award; and (5) the aggregate of all Individual Settlement Amounts of participating Class Members. Within 10 days after receiving the funds, the Settlement Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ 4.4).

Class Members will have 180 days to cash the settlement check. (S.A. ¶ 4.4.1). If a Class Member fails to cash a check by the deadline, the Settlement Administrator shall issue unclaimed funds to the California State Controller in the name of the Class Member. (S.A. ¶ 4.4.3).

F. TAX TREATMENT

The Parties agree that twenty percent (20%) will be allocated as wages subject to withholding of all applicable local, state and federal taxes; and eighty percent (80%) will be allocated for interest and penalties (pursuant to, e.g., California Labor Code sections 203, 210, 226, etc.) from which no taxes will be withheld. (S.A. ¶ 3.2.4.1). Additionally, the PAGA Penalties payable to the Aggrieved Employees will be classified entirely as civil penalties and shall be reported as required on an IRS Form 1099. (S.A. ¶¶ 3.2.5.1 and 3.2.5.2).

Defendants will separately pay its share of employer payroll taxes on the sum allocated to wages. (S.A. ¶¶ 3.1).

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G. PARTICIPATING CLASS MEMBERS' RELEASE OF CLAIMS

In exchange for these payments, the Settlement Agreement at ¶ 6.2 provides that the Participating Class Members will release the Released Parties of:

> all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint, including claims for failure to provide meal and rest breaks, failure to pay for meal and rest break premiums pay in lieu thereof and at the correct rates paid for same, pay overtime wages and the correct rates paid for same, pay minimum or regular wages for all hours worked, pay timely wages during employment, pay all earned and accrued wages to discharged/separated employees, furnish accurate itemized wage statements, maintain required payroll records, and indemnify employees for business expenses, and based on violations of Labor Code sections 200-204, 208, 210, 218.6, 221-223, 226, 226.2, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2802, or Industrial Welfare Commission Order #4, or Business and Professions Code section 17200, et seq., which are premised on the same allegations, and Cal. Code Regs., tit. 8, section 11090 (the "Released Class Claims"). The operative release period for the Released Class Claims is the Class Period.

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. (S.A. ¶ 6.2).

H. AGGRIEVED EMPLOYEES' RELEASE OF CLAIMS

The Settlement Agreement at ¶ 6.3 also defines the "PAGA Released Claims" as follows:

> all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and the PAGA Notice, including violations premised on violation of Labor Code sections 200-204, 208, 210, 218.6, 221-223, 226, 226.2, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, and 2802, and IWC Wage Order #4, and Cal. Code Regs., tit. 8, section 11090 (the "Released PAGA Claims"). The operative release period for the Released PAGA Claims is the PAGA Period.

Moreover, even if an Aggrieved Employee requests exclusion from the Class settlement, that individual will still be subject to the PAGA Released Claims to the fullest extent permitted by law and will receive a pro-rata share of PAGA Penalties. (S.A. ¶ 8.5.4).

IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT 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; *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 Defendants' records, there are approximately 185 Class Members that are easily identifiable and fall within the defined Class. Thus, Plaintiff's proposed Class meets the ascertainability and numerosity requirements.

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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, Plaintiff contends 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). Again, the Parties dispute whether Plaintiff's claims are typical of the Class for the purposes of any continued litigation of the Action, but agree for the purposes of this settlement only, that Plaintiff asserts claims regarding Defendants' 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. See *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546. Specifically, Plaintiff is adequate to represent the class because s
he was employed by Defendants during the Class Period, experienced the same wage and hour practices as the rest of the Class, understood her duties as a Class Representative, has been willing to undergo the risks of litigation, and has no conflict of interest.

Adequacy may be established by the fact that counsel are experienced practitioners. See *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F.3d 1152, 1162. Here, Plaintiff is represented by Class Counsel with extensive experience in wage and hour class actions like the instant matter. (Mankin Decl. ¶¶ 2-6; Bokhour Decl. ¶¶ 15-20; 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. See *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35. Nevertheless, in considering a potential settlement for approval, a court is not to turn the approval hearing "into a trial or rehearsal for trial on the merits . . . [or] to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." *Officers for Justice,* 688 F.2d at 625.

The Court's ultimate duty is to determine whether the settlement is fair, adequate, and reasonable. See *Dunk,* 48 Cal.App.4th at 1801 (setting forth the "fair, adequate, and reasonable" standard) (citing *Officers for Justice*, *supra*); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal.App.4th 734, 742-43 (a trial court must approve a class action settlement agreement, but only after determining that it is "'fair, adequate and reasonable,'" considering factors such as the

"'risk, expense, [and] complexity'" of continued litigation) (citations omitted). The Court enjoys broad discretion in making its fairness determination, and should consider factors including, but not limited to:

> [T]he strength of Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel . . . and the reaction of the class members to the proposed settlement.

Dunk, supra (detailing non-exhaustive list of factors for court's consideration at final approval).

The above factors are not exclusive "and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." *Wershba*, 91 Cal.App.4th at 245. However, in doing so, the Court must give "[due] regard to what is otherwise a private consensual agreement between the parties." *Id.* The inquiry must be limited "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Id.* (citation and internal quotation marks omitted).

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.

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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 Plaintiff and her 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 Defendants prevailed on any of the defenses, the employees may not have received any monetary recovery.

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

Plaintiff 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 relating to the Class Members prior to mediation.

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, 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.")

Of particular relevance to the reasonableness of the proposed Settlement is the fact that significant legal and factual grounds for defending this action exist. First, in addition to disputing the merits of Plaintiff's claims, Defendants strongly disputed that Plaintiff could obtain class certification, arguing a lack of commonality of the legal claims and injuries. Defendants further argued that it complied with the applicable law and that any purported deviations therefrom were individualized in nature, thereby limiting Plaintiff's ability to certify the class. While Plaintiff asserts that this is a suitable case for certification, she realizes that there is always a significant risk associated with class certification proceedings, which could significantly limit the claims that she could pursue on a class basis.

In light of 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 detailed data obtained through informal discovery and information exchanges, Plaintiff's counsel estimated the following data points through the date of mediation: (1) 179 class members, (2) 19,387 workweeks, (3) 96,935 shifts worked, and (4) approximately 3,242 wage statements during the PAGA Period. (Mankin Decl. ¶ 23).

Plaintiff contended that her strongest claim was for unpaid wages, arising from two distinct violations. When combining the two claims (off-the-clock and the piece-rate policy), and after investigating the alleged frequency of violations, Plaintiff's counsel estimated that there were an alleged 25,854 unpaid hours during the Class Period at an applicable rate of pay of $56.28.[3] Thus, the maximum potential value for the unpaid wage claims was $1,455,063. However, Defendants vehemently opposed these unpaid wage claims on multiple fronts. For example, Defendants argued that it had policies to pay employees for all hours worked and other policies requiring employees to accurately record their own hours worked. Thus, Defendants

[3] Since these unpaid hours were alleged to occur *after* 8 hours in a day, this blended rate is the overtime rate plus liquidated damages (for unpaid minimum wages) under Labor Code § 1194.2.

argued that there was no "off-the-clock" time and, even if there were, it had no actual or constructive notice of the same and would not be liable. Additionally, Defendants claimed that its hybrid hourly/task-rate pay policy still paid for all hours worked, as the policy based a base wage for all hours worked, and that the "task-rate" payments were merely treated as a production bonus added to the base hourly pay. Moreover, Defendants alleged that, due to these defenses, Plaintiff's claims are the prototypical example of "individualized issues" for which certification would not be proper. Thus, Plaintiff placed a 30% risk on these claims at the class certification stage. Moreover, in addition to its other defenses on the merits, Defendants argued that Plaintiff would be unable to meet its evidentiary burden at summary judgment and/or trial because Plaintiff and the Class would be unable to identify when these alleged wage violations occurred (since the claims are not apparent from the timekeeping records), thus defeating liability. For this reason, Plaintiff's counsel assigned another 40% risk on the merits. When factoring in these risks and defenses, Plaintiff calculated the risk-adjusted value of the unpaid wage claims to be $611,126. (Mankin Decl. ¶ 24).

Plaintiff also alleged meal and rest break claims against Defendants. Given the total number of shifts at issue, and when incorporating violation rates from the timekeeping records and other evidence, Plaintiff's counsel estimated 63,786 alleged meal violations and 48,468 alleged rest break violations, leading to a maximum potential value of $2,865,723. However, Defendants raised numerous arguments in response to this claim, including that policies specifically authorized the Class Members to take a meal and rest breaks, timesheets specifically showed that breaks occurred, and that many employees worked in the field without supervision and had ample opportunity to take compliant breaks. Therefore, Defendants asserted that a fact-finder would have to determine for each Class Member whether a break was recorded on each employees timesheet or if it was missed and why, and why a break was noncompliant or nonexistent, because if it was by the employee's choice, no liability attaches to Defendants. This defense is factored into Plaintiffs' analysis in two ways. First, these issues raise questions regarding whether the meal and rest break claims could be certified, and Plaintiffs placed a 50% risk at the class certification stage. Second, these defenses also go toward the merits given the

evidentiary question of proving the number of meal and rest violations. As such, Plaintiff placed a 40% risk on the merits, setting the risk-adjusted value for the meal and rest break claims at $716,431. (Mankin Decl. ¶ 25).

Furthermore, Plaintiff alleged that Defendants failed to timely pay all wages owed to the Class Members upon separation of employment since the Class Members. The maximum potential value of this claim was $535,813 based on 87 *former* employees being entitled to the full waiting time penalty of 30 days of pay. But this maximum value failed to account for many risks and defenses. For instance, this claim was entirely derivative of the unpaid wage and meal/rest break claims (*e.g.*, the unpaid wage premiums). If those claims fails at certification or on the merits, there would be no waiting time penalties owed, so the same risks for those claims applied to this claim. Furthermore, even if the unpaid wage and/or meal/rest claims succeeded at certification and on the merits, Plaintiffs would have to prove that the violations (if any existed) were "willful" under the meaning of Labor Code § 203. And, here, Defendants argued that there could not be a finding of a "willful" violation since they had compliant written policies and any deviations therefrom were inadvertent and unintentional. As a result of this analysis, Plaintiff's counsel applied a 30% risk at class certification and a 50% risk on the merits, leading to a risk-adjusted value of $187,535. (Mankin Decl. ¶ 26).

Plaintiff further alleged that Defendants failed to reimburse the Class for expenses incurred to carry out their duties, including the cost to acquire and maintain a smart phone and related monthly plan to communicate with Defendant. Plaintiff also alleged that there were various home office expenses that she and the Class were not reimbursed for but which were necessary to carry out their duties for Defendants. Based on these claims, Plaintiff's counsel estimated that Class Members incurred $25 in unreimbursed expenses per workweek, and there were 12,927 workweeks at issue for this claim. Thus, the maximum potential value of the unreimbursed expense claim was $323,175. However, Defendants argued that this claim had no merit because its policy did not require or even encourage the Class to use personal cellular phones or incur other expenses to carry out their duties for the company. As such, Defendants argued that this claim was not suited for class certification given that it would require

individualized assessments of whether a Class Member incur expenses, why they did so, whether each expense was "necessary," and how frequently it happened. Plaintiff adopted a 50% risk at the class certification due to these defenses. Additionally, based on the same defenses, Plaintiff believed that there was a 50% risk of defeat on the merits. Therefore, Plaintiffs estimated the risk-adjusted value of this claim at $80,794. (Mankin Decl. ¶ 27).

Finally, Plaintiff alleged that Defendants failed to provide accurate itemized wage statements due to failing to accurate statement several items required by Labor Code § 226(a). The maximum potential value for this claim, calculated using the statutory framework of § 226(e) [$50 for first violation and $100 for every violation thereafter), was $320,200 based on 3,242 allegedly violative wage statements. But Defendants raised strong defenses to this claim, including that, with each wage statement, it provided an additional document further detailing the Class Member's pay, rates of pay, and other items, all in compliance with § 226. Defendants further argued that: (a) these violations, if any, did not result in any "injury" under § 226(e), (b) the violations, if any, were not "knowing and intentional" and could not support the assessment of penalties, and (c) "derivative" wage statement claims are without merit. Based on these defenses, Plaintiff assigned a 20% risk at class certification and an additional 30% on the merits, leading to a risk-adjusted value of $179,312. (Mankin Decl. ¶ 28).

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

• Unpaid Wage Claims	$	611,126
• Meal and Rest Break Claims	$	716,431
• Waiting Time Penalty Claims	$	187,535
• Unreimbursed Expense Claims	$	80,794
• Wage Statement Claims	$	179,312
• **Total Risk Adjusted Penalties and Damages**	**$**	**1,775,198**

The reasonableness of the settlement is apparent from the fact that the proposed settlement is 42% of the risk-adjusted class damages and penalties. And while the PAGA penalties had a maximum value in the high six figures, this fails to acknowledge that courts have

wide latitude to reduce the civil penalties "based on the facts and circumstances of a particular case" and if "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Labor Code § 2699(e)(2). Moreover, Defendants argued against the merits of the underlying claims and particularly that the "willfulness" standard and/or "good faith" defenses mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendants also argued that it is improper to stack civil penalty claims on top of the underlying statutory claim. For these reasons, the Parties submit that the agreed-upon settlement is fair and reasonable.

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

The view of the attorneys actively conducting the litigation is entitled to significant weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18; *Kullar,* 168 Cal.App.4th at 128 (court must take into account "the experience and view of counsel").

Plaintiff's Counsel is also 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; Bokhour Decl. ¶¶ 15-20). Plaintiff's 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.

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

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

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The proposed Class Notice and proposed plan for the Settlement Administrator to mail the Class Notice to the last known address of all class members complies with all the requirements of California Rule of Court 3.769(f) and 3.766(b). The contents of the proposed Class 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; and (4) how class members can obtain additional information. *See* Class Notice (Exhibit B to Mankin Decl.). In addition, it will inform Class Members of their estimated settlement share.

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 parties' notice plan is that notice of the Settlement will be disseminated directly to the class members by first class mail by the settlement administrator, since Defendants have the last known addresses of all class members and the Settlement Administrator will perform a skip trace and update those addresses for any class notices that are returned and re-send the notice.

The Class Notice satisfies the requirements of Rule of Court 3.766 and afford Settlement Class Members with all due process protections required by the United States Constitution. Moreover, the contents of the Class Notice are in compliance 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 45-day deadline for Class Members to exclude themselves is reasonable, as it provides Class Members with 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, then 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 he or she affirmatively acts to exclude himself or herself. Moreover, the Settlement Amount is non-reversionary, which means that no settlement funds will revert to Defendants; instead, if any checks are uncashed by the deadline, the funds will be transferred to the State Controller's Office subject to approval of the Court. Such terms are favored by Courts and demonstrate that there was no collusion between counsel for the parties and that the Settlement is fair and favorable to the Class Members.

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

Under the terms of the Settlement Agreement, Class Counsel is requesting $250,000 in attorneys' fees, which is 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, 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); see also *Stuart v. RadioShack Corp*. (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645 (approving fee award of 1/3 of the total maximum settlement amount of $4.5 million) (the court noted that the fee award of 1/3 of the total settlement was "well within the range of percentages which courts have upheld as reasonable in other class action lawsuits"); *Singer v. Becton Dickinson and Co*. (S.D. Cal. June 1, 2010) 2010 WL 2196104, at *8 (approving fee award of 33.33% of the common fund); *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal. Nov. 14, 2007), 2007 WL 3492841, at *4 (awarding fees of 1/3 of common fund in a wage and hour class action, noting: "[f]ee awards in class actions average around one-third of the recovery."); *Martin v. FedEx Ground Package System, Inc*. (N.D. Cal. Dec. 31, 2008) 2008 WL 5478576, at *8 (approving fees of 1/3 of common fund).

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Additionally, Plaintiff is seeking up to $20,000 in litigation costs, pursuant to the Settlement Agreement.

Once the Court grants preliminary approval of the Settlement Agreement and Class Notice is disseminated and completed, Plaintiff's counsel will submit a request for attorneys' fees and costs with its final approval motion.

I. THE REQUESTED SERVICE AWARD REQUEST IS FAIR AND APPROPRIATE

The Settlement Agreement provides an incentive award payment of $10,000 to the Class Representative, which is reasonable given the large recovery Class Members will receive on average, as well as the time and effort she devoted to this case. Her efforts included providing factual background for the Class and PAGA complaint; providing documents and information about Defendants' compensation plan; participating in phone calls to discuss litigation and settlement strategy; making herself 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 she lost, she could have been ordered to pay Defendants' costs. Additionally, Plaintiff gave up an opportunity to pursue claims for discrimination and retaliation, and instead agreed to forego those claims in exchange for the service award and full release of claims.

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 award to each of the two class representatives in a trucker meal break class action; *Ross v. US Bank National Association* (N.D. Cal. 2010) 2010 WL 3833922, at *2 (approving $20,000 enhancement award to Class Representative in California wage-and-hour class action settlement); *Vasquez v. Coast Valley Roofing, Inc*. (E.D. Cal. 2010) 266 F.R.D. 4150, 493 (approving service awards in the amount of $15,000 each 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 ("the court finds Plaintiff's enhancement payments 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); *Louie v. Kaiser Found. Health Plan, Inc*. (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 78314, at *18 (approving "$25,000 incentive award for each Class Representative" in wage an hour settlement).

VI. THE COURT SHOULD APPOINT PHOENIX AS SETTLEMENT ADMINISTRATOR

Subject to the Court's approval, the parties stipulated to Phoenix 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 $6,000. Additionally, Phoenix has agreed to undertake the rules and responsibilities set forth in the new model agreement. (See Decl. of Mike Moore). No party or counsel has any financial interest or ties to the proposed class administrator. (See Mankin Decl. ¶ 7; Ohl Decl. ¶ 4; Theriault Decl. ¶ 2).

VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING

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

December 12, 2022	Preliminary Approval (PA) hearing
January 23, 2023 *(40 days after PA)*	Deadline for Settlement Administrator to complete first mailing of the Notice Packet to all Settlement Class Members.
March 9, 2022 (*45 days after mailing Class Notice*)	Deadline for Settlement 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 of Settlement and application for award of attorneys' fees, costs and service payments.

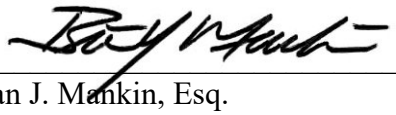
9 court days before Final Approval hearing	Deadline for filing of any written opposition to Plaintiff's Motion for Final Approval of Settlement, or filing any response to an objection to the settlement.
5 court days before final approval hearing	Deadline for filing of any written reply to opposition Motion for Final Approval of Settlement.
TBD (Approximately April 12, 2023 - 120 days after Preliminary Approval is granted)	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 16, 2022

LAUBY, MANKIN & LAUBY LLP

BY: 

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

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE:

I, Tracie Chiarito, declare I am a citizen of the United States of America and am employed in Riverside, California; I am over the age of 18 years and am not a party to the within action; my business address is 5198 Arlington Avenue, PMB 513, Riverside, California 92504. On November 16, 2022, I served the within **PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; DECLARATIONS IN SUPPORT THEREOF; [PROPOSED] ORDER** in said action by electronic filing service Case Home Page website to the parties on the service list maintained on the Case Home Page website for this case pursuant to the Court Order establishing the case website and authorizing service of documents.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 16, 2022, at Riverside, California.

Tracie Chiarito, Declarant

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