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6 Attorneys for Arturo Gonzalez,
on behalf of himself, all others similarly situated,
7 and on behalf of the general public

8
9 **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF CALIFORNIA

10 ARTURO GONZALEZ on behalf of himself,
11 all others similarly situated, and on behalf of
the general public,

12 Plaintiffs,

13 v.
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15 NCI GROUP, INC., dba NCI BUILDING
SYSTEMS; and DOES 1-100,

16 Defendants.
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Case No. 1:18-cv-00948-AWI-SKO

Assigned to the Hon. Anthony W. Ishii

**DECLARATION OF DAVID MARA, ESQ.
IN SUPPORT OF PLAINTIFF'S
RENEWED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: February 28, 2022
Time: 1:30 p.m.
Judge: Hon. Anthony W. Ishii
Courtroom: 2

Complaint Filed: June 6, 2018
Removed: July 12, 2018
Trial Date: None Set

1 I, DAVID MARA, declare as follows:

- 2 1. I am President of Mara Law Firm, PC and counsel of record for Plaintiff and the putative
3 class in this matter. I am duly admitted to practice before all the courts of the state of
4 California. The following facts are within my personal knowledge and, if called to testify, I
5 could and would competently testify thereto.
- 6 2. I have been practicing law in California since 2004.
- 7 3. I extensively handle employment cases which involve violations of the California Labor
8 Code and Industrial Welfare Commission Wage Orders, such as wage and hour class
9 actions and cases alleging violations of the Private Attorneys General Act of 2004
10 (“PAGA”).
- 11 4. I was co-class counsel in *Hohnbaum v. Brinker Restaurant Corp.*, San Diego Superior
12 Court, Case No. GIC834348, which was the underlying case in the California Supreme
13 Court’s landmark decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53
14 Cal.4th 1004, in which the California Supreme Court delineated the scope of employer
15 obligations to provide, and employee rights to receive, meal and rest periods under
16 California law.
- 17 5. I wrote an Amicus brief on behalf of Consumer Attorneys of California (“CAOC”) in the
18 recent decision by the California Supreme Court in *Augustus v. ABM Security Services,*
19 *Inc.* (2016) 2 Cal.5th 257 (rest breaks must be duty-free and time spent being on call
20 during rest breaks is not considered duty-free).
- 21 6. My firm also wrote an Amicus brief on behalf of CAOC in the recent decision by the
22 California Supreme Court in *Williams v. Superior Court* (2017) 3 Cal. 5th 531 (PAGA and
23 wage and hour class action).
- 24 7. My firm has been granted class certification in both state and federal courts.
- 25 8. I am also Plaintiff’s counsel in a host of other class actions involving violations of
26 California’s wage and hour laws, many of which involve the transportation industry. For
27 example, I have been and am involved as counsel for plaintiffs in the following sampling
28 of class action cases involving wage and hour violations under California law: *Davis v.*

1 *Apria Healthcare Group* (Case No. 37-2015-00007743); *Norona v. B&G Delivery System,*
2 *Inc.* (Case No. RG1577005); *Perez v. City of San Diego* (Case No. 37-2014-00016621);
3 *Cuellar-Ramirez v. US Foods, Inc.* (Case No. RG15770766); *Peron v. The Vons*
4 *Companies, Inc.* (Case No. 15-cv-01567-L-JMA); *Hilderbrand v. LinkUs Enterprises, LLC*
5 (Case No. DR150155); *Belton v. Pacific Pulmonary Services* (Case No. CGC-15-547564);
6 *Medina v. Central Cal Transportation, Inc.* (Case No. RG15770011); *Eure v. Dotson v.*
7 *Asbury Environmental Services* (Case No. RG16842620); *Spikes v. Bear Trucking, Inc.*
8 (Case No. 16CECG02389); *Reynoso v. Benjamin's Transfer, Inc.* (Case No. FCS048845);
9 *Montes v. Coram Specialty Infusion Services, Inc.* (Case No. 37-2016-00028950-CU-OE-
10 CTL); *Rodriguez v. Delta Sierra Beverage, LLC* (Case No. 34-2017-00206727); *Clavel v.*
11 *La Jolla Beach & Tennis Club, Inc.* (Case No. 37-2017-00004802-CU-OE-CTL); *Martin v.*
12 *Sysco Central California, Inc.* (Case No. 9000052).

13 9. Mara Law Firm, PC devotes a significant portion of its practice specifically to wage and
14 hour class actions. A majority of the cases I handle are wage and hour class actions and
15 actions filed pursuant to the Private Attorneys General Act of 2004 ("PAGA"). Ms. Vecchi
16 solely handles wage and hour class actions and PAGA actions. Mara Law Firm, PC, has
17 been appointed class counsel in numerous federal and state class actions. Mara Law Firm,
18 PC, and its lawyers have handled over three hundred and fifty (350) class action and
19 PAGA lawsuits. Mara Law Firm, PC, and its lawyers have successfully settled over one
20 hundred (100) cases over a period of approximately fifteen (15) years, resulting in the
21 recovery of millions of dollars for class members.

22 10. Mara Law Firm, PC, is well versed in wage and hour class action law. Specifically, Mara
23 Law Firm, PC, has obtained class certification and has been certified as class counsel in the
24 following cases: *Mario Norona v. B&G Delivery System, Inc.* (Sacramento County
25 Superior Court, Case No. 34-2015-00186826-CU-OE-GDS); *Jerald Schroeder v. YRC,*
26 *Inc.; YRC Worldwide, Inc.* (Central District of California, Case No. 12-cv-01374-TJH);
27 *John Martin v. Sysco Corporation; Sysco Central California, Inc.* (Eastern District of
28 California, Case No. 1:16-cv-00990-DAD-SAB); *William Smith v. Werner Enterprises,*

1 *Inc. d/b/a C.L. Werner, Inc.* (District of Nebraska, Case No. 8:15-cv-287); *Thomas Perez v.*
2 *City of San Diego* (San Diego County Superior Court, Case No. 37-2014-00016621-CU-
3 OE-CTL); *Miguel Hernandez v. MJ Industries, Inc.*; *MJ Tank Lines, Inc.* (San Diego
4 County Superior Court, Case No. 37-2017-00003218); and *Eric Mendez v. M&N*
5 *Consulting, Inc. dba A-Line Messenger Service* (San Bernardino County Superior Court,
6 Case No. CIVDS1923624). In addition, my firm currently has a motion for class
7 certification pending in the case *Patrick Kuhns v. Matheson Trucking, Inc.* (Alameda
8 County Superior Court, Case No. RG18907542).

9 11. In addition, Mara Law Firm, PC, filed and briefed class certification motions before the
10 following cases were settled: *Alton Davis v. Apria Healthcare Group, Inc.* (San Diego
11 County Superior Court, Case No. 37-2014-00004724); *Rick Frieri v. Sysco Corporation*;
12 *Sysco San Diego, Inc.* (Southern District of California, Case No. 16-cv-1432-JLS-NLS);
13 *Alberto Solano and Damon Randall v. Professional Auto Transport, Inc.* (San Bernardino
14 County Superior Court, Case No. CIVDS1619020); *Richard Terry v. Hoovestol, Inc.*
15 (Northern District of California, Case No. 3:16-cv-05183-JST); *Kristina McConville v.*
16 *Renzenberger, Inc.* (Central District of California, Case No. 2:17-cv-02972-FMO-JC); and
17 *Terrance Bailey v. Blue Apron, LLC; Blue Apron, Inc.* (Northern District of California,
18 Case No. 3:18-cv-07000-VC).

19 12. I have litigated over three hundred and fifty (350) class action and PAGA lawsuits. I have
20 been litigating wage and hour class action lawsuits for approximately fifteen (15) years. I
21 graduated from California Western School of Law and was admitted to practice law in
22 California in May 2004. I primarily handle wage and hour class actions and PAGA actions.
23 I am the president of Mara Law Firm, PC and was a partner of The Turley & Mara Law
24 Firm, APLC. I supervise and oversee the class action department of the firm which
25 consists of five (5) associate attorneys.

26 13. I was co-class counsel in *Hohnbaum v. Brinker Restaurant Corp.* (San Diego County
27 Superior Court, Case No. GIC834348) which was the underlying case in the California
28 Supreme Court's landmark decision in *Brinker Restaurant Corp. v. Superior Court* (2012)

1 53 Cal.4th 1004, in which the California Supreme Court delineated the scope of employer
2 obligations to provide, and employee rights to receive, meal and rest periods under
3 California law. I also wrote the Amicus Curiae brief on behalf of CAOC in the decision by
4 the California Supreme Court in *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th
5 257 (rest breaks must be duty-free and time spent being on call during rest breaks is not
6 considered duty-free). I also wrote the Amicus Curiae brief on behalf of CAOC in the
7 matter currently pending before the California Supreme Court, *Frlekin v. Apple, Inc.* (Cal.
8 S. Ct. No. S243805).

9 14. I oversee all aspects of the class action and PAGA action cases Mara Law Firm, PC,
10 handles. I also write a wide range of motions and argue at a wide range of hearings. I
11 review and edit motions written by the associates at Mara Law Firm, PC; develop
12 strategies with associates at Mara Law Firm, PC, in how to best litigate each case; review
13 and edit discovery that is sent out to employers; review and edit clients' discovery
14 responses; draft and revise complaints; draft and revise retainers sent to clients;
15 communicate with clients; communicate with class members; communicate with defense
16 counsel; communicate with co-counsel; review documents produced by employers;
17 conduct investigations into potential cases; research and stay up to date in relevant law;
18 attend mediations; draft, review, and revise settlement agreements; and oversee all day to
19 day matters in cases.

20 15. I have been named as class counsel in the following certified cases as a result of the court
21 granting a motion for class certification: *Mario Norona v. B&G Delivery System, Inc.*
22 (Sacramento County Superior Court, Case No. 34-2015-00186826-CU-OE-GDS); *Jerald*
23 *Schroeder v. YRC, Inc.; YRC Worldwide, Inc.* (Central District of California, Case No. 12-
24 cv-01374-TJH); *John Martin v. Sysco Corporation; Sysco Central California, Inc.* (Eastern
25 District of California, Case No. 1:16-cv-00990-DAD-SAB); *William Smith v. Werner*
26 *Enterprises, Inc. d/b/a C.L. Werner, Inc.* (District of Nebraska, Case No. 8:15-cv-287); and
27 *Thomas Perez v. City of San Diego* (San Diego County Superior Court, Case No. 37-2014-
28 00016621-CU-OE-CTL).

1 16. In 2017, I was co-first chair in a maritime/employment related trial in federal court that
2 lasted one week. In 2012, I was second chair in a product liability trial in state court that
3 lasted just over a month. In 2008 and 2010, I was heavily involved in a wrongful death,
4 product liability trial that involved multiple firms and lasted approximately two and a half
5 months.

6 17. Jill Vecchi is an associate at Mara Law Firm, PC. She solely handles wage and hour class
7 actions and PAGA actions. Ms. Vecchi graduated from Santa Clara University School of
8 Law and was admitted to practice law in California in December 2014 and received her
9 undergraduate degree from University of California, Riverside in 2010. Ms. Vecchi has
10 been litigating wage and hour class actions for over six (6) years and has handled over one
11 hundred (100) class action and PAGA lawsuits. Ms. Vecchi received her training in wage
12 and hour class action and PAGA lawsuits while at Mara Law Firm, PC. Ms. Vecchi has
13 been at the Mara Law Firm, PC, for over six (6) years and oversees other associates at
14 Mara Law, PC.

15 18. Ms. Vecchi oversees all aspects of the cases assigned to her and litigates these cases with
16 the assistance of two other associates. Ms. Vecchi oversees these associate's work. Ms.
17 Vecchi routinely writes and opposes motions and argues at hearings. Ms. Vecchi edits
18 motions written by other associates; drafts and revises discovery propounded on
19 employers; communicates with clients; communicates with class members; communicates
20 with co-counsel; communicates with defense counsel; drafts and revises notices to the
21 Labor and Workforce Development Agency pursuant to the Private Attorneys General Act
22 of 2004; creates exhibits for use in cases; reviews documents produced by employers;
23 deposes employer witnesses; defends client depositions; attends mediations; drafts,
24 reviews, and revises settlement agreements; drafts, reviews, and revises settlement
25 approval motions; argues at hearings on settlement motions; and oversees all day to day
26 work in her cases.

27 19. Ms. Vecchi has been named as class counsel in the following certified cases as a result of
28 the court granting a motion for class certification: *Mario Norona v. B&G Delivery System*,

1 *Inc.* (Sacramento County Superior Court, Case No. 34-2015-00186826-CU-OE-GDS);
2 *Jerald Schroeder v. YRC, Inc.; YRC Worldwide, Inc.* (Central District of California, Case
3 No. 12-cv-01374-TJH); and *John Martin v. Sysco Corporation; Sysco Central California,*
4 *Inc.* (Eastern District of California, Case No. 1:16-cv-00990-DAD-SAB).

5 20. In 2015, Ms. Vecchi was second chair on a personal injury jury trial involving a slip and
6 fall case.

7 21. The proposed settlement is the product of serious, informed, non-collusive negotiations,
8 has no obvious defects, does not improperly grant preferential treatment to the class
9 representative or segments of the class and falls within the range of fair and reasonable
10 settlements. I believe that this non-reversionary settlement is in the best interests of the
11 class as fair, reasonable, and adequate. Therefore, I recommend approval of the settlement.

12 22. NCI manufactures and markets metal building systems and components for the
13 nonresidential construction industry. To carry out its business, NCI employs warehouse
14 workers. This lawsuit alleges that NCI violated various California wage and hour laws
15 applicable to NCI's warehouse workers.

16 23. Plaintiff filed this matter in Merced County Superior Court on June 6, 2018. NCI filed an
17 Answer on July 12, 2018 and removed this matter on July 12, 2018.

18 24. Plaintiff propounded special interrogatories and demands for production of documents to
19 which NCI responded. NCI produced hundreds of documents including employee
20 handbooks and policy manuals, earning statements, personnel files, break logs, job
21 descriptions and work tasks. NCI also produced tens of thousands of lines of time
22 records—the majority of which were produced in a raw electronic format which had to be
23 analyzed and interpreted. NCI also propounded written discovery to which Plaintiff
24 responded.

25 25. The Parties attended a mediation on November 19, 2019 and engaged in extensive arm's-
26 length negotiations mediated by retired Superior Court Judge and well-respected mediator,
27 Honorable Joan A. Lewis (Ret). As a result of meditation, the Parties signed a Term Sheet
28 Settlement Agreement and negotiated and finalized a Stipulation Regarding Settlement of

1 Class and Representative Action. On February 3, 2020, Plaintiff filed a motion for
2 preliminary approval. (ECF Dkt. No. 18). The Court issued an Order on Plaintiff's Motion
3 for Preliminary Approval of Class Action Settlement (ECF Dkt. No. 21) on August 6,
4 2020. Thereafter, the Parties revised the terms of the settlement and entered into an
5 Amended Stipulation Regarding Settlement of Class and Representative Action, which is
6 now before the Court for preliminary approval. The Parties Amended Stipulation
7 Regarding Settlement of Class and Representative Action is attached hereto as **Exhibit A**.

8 26. Though the fee agreement provides that Class Counsel would pay such costs in the event
9 his case was not won, Mr. Gonzalez could nevertheless have had a cost bill entered against
10 him if he were unsuccessful, leaving him liable for potentially hundreds of thousands of
11 dollars in the unexpected possibility that Class Counsel did not meet their obligation to
12 cover those costs.

13 27. The Settlement allots an amount not to exceed \$15,000 to administer this Settlement,
14 which falls within the range of estimates Class Counsel has received in the past for
15 settlements of similar size and circumstances. The Settlement Administration Costs will be
16 paid out of the MSA. If Rust's actual expenses or the amount awarded is less than the
17 amount allotted in the Settlement, the difference shall become part of the NSA and be
18 available for distribution to Settlement Class Members.

19 28. Based on Plaintiff's analysis of time records produced by NCI it was revealed that
20 overtime was worked by Class Members in approximately 90% of shifts.

21 29. Nothing in the record indicates that any class member has a particular individual interest in
22 controlling the prosecution or defense of separate actions. All class members' harm arises
23 out of the same unlawful policies challenged in this lawsuit. There are also no other known
24 actions pending raising the same issues against NCI.

25 30. The factors noted above are commonly considered at preliminary approval. The factors
26 here, in their respective levels of applicability, favor approval of the Settlement. Mr.
27 Gonzalez submits—and NCI disputes—that this case was factually and legally strong. This
28 matter was settled after substantial discovery, which included written discovery that

1 resulted in hundreds of pages of documents and thousands of lines of data. Thus, at the
2 point the Settlement was initially agreed to, no one was in a better position than Plaintiff's
3 Counsel to understand the strengths and potential limitations of Mr. Gonzalez's case and
4 thus evaluate the reasonableness of the amount offered in settlement.

5 31. Mr. Gonzalez contends that NCI's failure to provide compliant meal and rest periods and
6 pay all wages owed are the predominant claims in the lawsuit.

7 32. Plaintiff recognizes that none of his class-wide claims would result in a guaranteed win.
8 Plaintiff's core claims here are for meal and rest break violations and unpaid wages, which
9 faced significant challenges that had to be considered in negotiating class-wide settlement.

10 33. Plaintiff contends NCI requires Class Members to wear protective gear during their shifts.
11 Plaintiff contends NCI requires employees to use part of their break time to don and doff
12 their personal protective gear and to be back at their workstations within the time provided
13 for the break (30 minutes for meal periods, and 15 minutes for rest breaks). Further, each
14 of NCI's employee handbooks state, "employees are expected to be punctual in starting
15 and ending their breaks and may be disciplined for tardiness in returning to work upon the
16 conclusion of their breaks." Based on these policies, Plaintiff contends that NCI's meal and
17 rest period policies are unlawful because they fail to provide employees with a full 30
18 minutes of duty-free time for meal breaks and a full net 10 minutes of rest during a rest
19 period, given that employees must use part of their break time to don and doff protective
20 gear and travel to and from the break area.

21 34. Plaintiff estimates that NCI's *maximum* exposure under Plaintiff's meal and rest break
22 claims would be \$4,513,860 (173,610 shifts x \$13.00 per hour x 2 violations per shift (one
23 meal and one rest)), representing two violations per shift (one for a meal period violation
24 and one for a rest break violation) per employee.

25 35. As stated above, Plaintiff argues that NCI's policies require Class Members to perform
26 work at the beginning of their meal periods after clocking out to doff protective gear and to
27 don protective gear at the end of their meal period before clocking in. If the factfinder
28 agreed with Plaintiff, Class Members would be entitled to wages for the time spent

1 donning/doffing protective gear while on unpaid meal periods. Plaintiff calculated the
2 unpaid wage exposure at 5 minutes per shift during the Class Period. NCI's *maximum*
3 exposure under Plaintiff's unpaid wages theory of liability would be \$270,831.60 (173,610
4 shifts x \$19.50 per hour (overtime rate of \$13 x 1.5) x 0.08 hours (*i.e.* 5 minutes) =
5 \$270,831.60) (calculated as overtime wages). As Class Members almost always worked
6 shifts that included overtime, Class Members would be entitled to their overtime rate for
7 these wages.

8 36. The wages Plaintiff claims are owed are the same unpaid wages that are the subject of the
9 unpaid straight time and overtime claims. Thus, the only additional issue that would need
10 to be resolved would be whether NCI's failure to pay all wages was "willful" within the
11 meaning of the statute. If the factfinder agrees with Plaintiff's theories of liability, Section
12 203 penalties will be proven in the single-stroke post-certification determination of
13 whether NCI willfully failed to these wages at termination. Plaintiff calculated these
14 penalties as equal to thirty (30) days' worth of wages for all 122 former employees. Thus,
15 NCI's *maximum* potential exposure would be \$404,430.

16 37. \$13 per hour x 8.5 hours = \$110.50 x 30 days = \$3,315; 122 former employees x \$3,315
17 (30 days' worth of wages) = \$404,430.

18 38. Plaintiff's theory of liability for wage statement violations derives from his unpaid wages
19 claim. In other words, if Plaintiff prevails on his theory of liability for unpaid wages, then
20 Plaintiff contends Class Members are entitled to penalties under Cal. Lab. Code § 226(e)
21 for failure to include gross wages earned, total hours worked by the employee, and net
22 wages earned, pursuant to Cal. Lab. Code § 226(a)(1)-(2) and (5). The statute of
23 limitations for Plaintiff's inaccurate wage statement cause of action is only one (1) year.
24 As such, Plaintiff calculates NCI's *maximum* potential exposure under this cause of action
25 as \$608,000.

26 39. Approximately 152 employees employed within the statute of limitations x \$4,000
27 (maximum damages per employee under California Labor Code § 226).

28 40. This claim is subject to the same potential defenses NCI is likely to raise in defense of the

1 above substantive claims. Plaintiff considers these defenses in evaluating the overall
2 strength of the wage statement claim.

3 41. If NCI prevails on its defense regarding stacking, then penalties would be assessed at 1
4 violation per pay period for all warehouse workers (152 x \$100 x 1 violation x 52 pay
5 periods = \$790,400).

6 42. Should the Court agree with any of NCI's defenses, there is a potential that the individual
7 class members would take nothing on their claims, and any associated PAGA penalties
8 would be extinguished, as penalties can only be awarded if the Court agrees with the
9 underlying allegations. Even if NCI's liability is established, the Court is empowered to
10 reduce any PAGA penalties. The likelihood of a penalty reduction is higher in this case
11 than others, as the Court may determine that NCI believed in good faith that it did not
12 intrude into employees' break time. In addition, denial of walking time and time donning
13 and doffing gear may not be considered as egregious as other meal period and rest breaks
14 violations where absolutely zero break time is afforded. Further, if Plaintiff is successful
15 on the merits, PAGA penalties would be duplicative of the recovery from the underlying
16 violations. Therefore, Plaintiff recognizes and reasonably believes the Court could
17 significantly reduce any PAGA penalties if NCI was found liable for the underlying Labor
18 Code violations.

19 43. In performing his exposure analysis, Plaintiff considered the realistic potential of
20 recovering under the each of his theories. Based on the above strengths and challenges,
21 Plaintiff and his experienced counsel calculated the potential value of the putative class's
22 claims, and determined that the gross settlement amount of \$600,000 is a fair and
23 reasonable settlement value.

24 I hereby declare under penalty of perjury under the laws of the United States of America
25 that the foregoing is true and correct.

26 Dated: January 28, 2022

By: David Mara
David Mara, Esq.