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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

PAUL ZAVALA, individually, and on behalf of other members of the general public similarly situated, Plaintiff, v. DONAGHY SALES, LLC., a California company; and DOES 1 through 100, inclusive, Defendants.	Case No.: BCV-20-102005-DRL Honorable David R. Lampe Department 11 **<u>CLASS ACTION</u>** **PLAINTIFF'S NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION, APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING DATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** [Declaration of Proposed Class Counsel (Douglas Han) and [Proposed] Order filed concurrently herewith] Hearing Date: February 8, 2021 Hearing Time: 8:30 a.m. Hearing Place: Dept. 11 Filed: August 27, 2020 Trial: None Set

PLEASE TAKE NOTICE that on February 8, 2021, and at 8:30 a.m., or as soon as the matter may be heard before the Honorable David R. Lampe in Department 11 of the Kern County Superior Court, located at 1415 Truxtun Avenue, Bakersfield, California 93301, Plaintiff Paul Zavala, ("Plaintiff") will and hereby move for an order:

- Granting Preliminary Approval of the proposed class action settlement described herein and as set forth in the parties' Class Legal Action Settlement Agreement ("Settlement," "Agreement," or "Settlement Agreement"), attached as **"EXHIBIT 1"** to the Declaration of Douglas Han, including, and not limited to, the means of allocation and distribution of funds, and the allocations for penalties under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, Class Representative Service Payment, and the Administration Costs;
- Conditionally certifying the proposed Class for settlement purposes only;
- Appointing Plaintiff as the Class Representative;
- Appointing Justice Law Corporation as Class Counsel;
- Approving the proposed Notice of Proposed Settlement of Class Legal Action ("Class Notice") attached as "Exhibit A" to the Settlement Agreement;
- Directing the mailing of the proposed Class Notice (hereinafter collectively referred to as the "Class Notice Packet") to the proposed Class;
- Approving the proposed deadlines for the notice and Settlement Administration process;
- Approving Simpluris, Inc. as the Settlement Administrator; and
- Scheduling a hearing to consider whether to grant Final Approval of the Settlement, at which time the Court will also consider whether to grant Final Approval of the requests for Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, Class Representative Service Payment, and approval of the allocation for PAGA penalties and the Administration Costs.

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This motion is based upon the following memorandum of points and authorities; the Declaration of proposed Class Counsel (Douglas Han); and the [Proposed] Order lodged together with this motion, as well as the pleadings and other records on file with the Court in this matter, and such documentary evidence and oral argument as may be presented at the hearing on this motion.

Dated: January 5, 2021

JUSTICE LAW CORPORATION

By: ______________________

Douglas Han
Attorneys for Plaintiff

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I. INTRODUCTION

This motion seeks preliminary approval of a non-reversionary $2,000,000 proposed wage and hour class action settlement by Plaintiff Paul Zavala ("Plaintiff") on behalf of himself and all individuals who were California residents who worked for Defendant Donaghy Sales, LLC. ("Donaghy Sales" or "Defendant") in California as a truck driver at any time between September 12, 2012 through December 31, 2020. At the time of this filing, Defendant estimates that there are approximately two hundred and fifty (250) individuals that would be included in this Settlement.

It is requested this Court grant Preliminary Approval, as, when analyzing the strengths and vulnerabilities of the class claims along-side Defendant's potential liability exposure, this proposed settlement of $2,000,000 – **with an average settlement share amount estimated at $4,718**[1] – is well within the "ballpark" of reasonableness.

As the following sections show, Class Counsel is convinced that the proposed Settlement is in the best interests of the Class based on the negotiations and detailed knowledge of the issues present in this action. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant, particularly the uncertainty of class certification, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in arriving at the proposed Settlement.

II. BACKGROUND

Donaghy Sales is a beverage distribution company operating in and around Fresno County. This case involves and all individuals who were California residents who worked for Defendant Donaghy Sales, LLC. ("Donaghy Sales" or "Defendant") in California as a truck driver at any time between September 12, 2012, to May 20, 2020. Plaintiff alleges that at all times during the class period, Donaghy Sales' truck drivers work and/or worked on an hourly basis. (Declaration of Douglas Han "Han Dec." ¶ 8).

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[1] $1,179,500 (Net Settlement Amount) / 250 (Class Members) = $4,718

On September 12, 2016, Plaintiff Paul Zavala filed a class action complaint in Fresno County Superior Court against Donaghy Sales alleging wage and hour violations on behalf of all current and former truck drivers who worked for Donaghy Sales in the four years preceding the complaint. The complaint alleged causes of action for collection of due and unpaid wages, waiting time penalties, and unfair business practices. (Han Dec. ¶ 9).

On February 10, 2017, Class Member Richard Zepeda provided notice to the Labor Workforce Development Agency notice to bring a lawsuit seeking civil penalties. He also filed a Private Attorneys General Act ("PAGA") action on May 3, 2017, in the Superior Court for the County of Fresno on behalf of himself and other current and former aggrieved employees and was represented by Class Counsel. (Han Dec. ¶ 10).

After several years of investigation and formal discovery, Plaintiff filed a Motion for Class Certification to certify the class of truck drivers. While the motion was pending the Parties agreed to mediate this matter. (Han Dec. ¶ 11).

The Parties agreed to attend a mediation of Plaintiff's claims on February 11, 2020. At the conclusion of the mediation, the Parties were unable to reach an agreement on a settlement. However, with the mediator's involvement and further negotiations, the Parties accepted a mediator's proposal resolving all of the claims of the Class Action. (Han Dec. ¶ 12).

As part of the settlement negotiations, the Parties agreed to seek approval in Kern County Superior Court. (Han Dec. ¶ 13).

Defendant denies the allegations of the class action in their entirety, denies any liability or wrongdoing of any kind associated with the claims alleged in this action, and further denies that, for any purpose other than settling this action, this matter is appropriate for class treatment. Defendant further contends that it has complied at all times with all applicable California laws, the California Labor Code, the applicable California Wage Order(s), and the Unfair Competition Law. Defendant finally contends that, if this matter were to be litigated further, it would have strong defenses to class certification and on the merits. (Han Dec. ¶ 14).

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III. INVESTIGATION/ LITIGATION HISTORY

a. Discovery, Investigation, and the Parties' Staunchly Conflicting Positions

After filing Plaintiff's complaint, both Parties engaged in discovery. Plaintiff propounded one (1) set of form interrogatories, one (1) set of special interrogatories, one (1) set of request for admissions, and one (1) set of requests for production on Defendant. Defendant responded to this discovery. After which, the Parties met and conferred regarding this discovery. (Han Dec. ¶ 15). Plaintiff was forced to file several motions to compel discovery to obtain substantive responses. (*Id.*) Plaintiff also noticed and took the deposition of two PMQ witnesses Jason Shoulet and Lisa Cortez Valdez and produced Plaintiff Paul Zavala for his deposition. (*Id.*)

As the result of discovery conducted by Plaintiff, Defendant produced a large volume of documents including employee handbooks, compensation practices, meal and rest period policies, Plaintiff's personnel files, payroll records, and time records. (Han Dec. ¶ 16). Plaintiff also engaged in a *Belaire* opt-out process and obtained the putative class contact information. (*Id.*)

Plaintiff also was in constant communication with many current and former truck drivers of Defendant. These employees apprised Plaintiff of their experiences working for Defendant and provided Plaintiff with relevant documents, including their personnel files and documents they had obtained through their employment. (Han Dec. ¶ 17).

Based upon Defendant's discovery responses, depositions, and document production, as well as interviews Plaintiff's counsel had with truck drivers, Plaintiff contends – and Defendant denies – that Defendant did not provide lawful meal and rest periods. Plaintiff asserts that Defendant's policy automatically deduced meal periods. Moreover, Plaintiff contends that they were rarely afforded timely, uninterrupted rest and meal breaks while working. Plaintiff contends that Defendant failed to pay premium wage compensation owed to truck drivers for the non-compliant meal and rest periods. (Han Dec. ¶ 18). Defendant denies these allegations.

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In addition, Plaintiff contends – and Defendant denies – that Defendant did not compensate employees for all time worked. Plaintiff asserts that employees were not compensated for time working off-the-clock when working through their meal breaks during their delivery routes, and the meal breaks were automatically deducted. (Han Dec. ¶ 19).

Defendant denies Plaintiff's contentions in their entirety. Among other things, Defendant denies Plaintiff's rest and meal break contentions, because it provided rest and meal periods within compliant times and that truck drivers were given discretion as to when to take their rest and meal periods. Defendant contends that its rest and meal period policies complied with California law, and those truck drivers were allowed to use their rest period and meal period time for their own purposes. Defendant contends that whether truck drivers took meal and rest periods during compliant time frames and were relieved of all duties are questions that could only be resolved by resorting to individualized inquiries to each truck driver and, therefore, class certification would not be appropriate. (Han Dec. ¶ 20). Moreover, Defendant contends that it had a policy to obtain meal break certification where each truck driver would certify that they took their meal breaks, thus absolving it of any liability for automatically deducting meal breaks. (Han Dec. ¶ 21).

Per the above, the Parties took staunchly conflicting positions concerning Defendant's policies and procedures and their effect on truck drivers.

b. The Parties Attended Mediation Which Led to the Settlement Agreement

The Parties agreed to go to mediation with experienced wage and hour mediator, Lynn Frank, Esq. The mediation took place on February 11, 2020. The parties were able to reach an agreement on the basic terms of a settlement that led to an eventual settlement the terms of which were memorialized in an enforceable "Memorandum Of Settlement" dated February 27, 2020. (Han Dec. ¶ 22; Ex. 1). The parties drafted a long-form "Class Legal Action Settlement Agreement" (referred to herein as the "Settlement Agreement" or "Settlement") that the Parties seek preliminary approval of in the instant motion. (Han Dec. ¶ 22; Ex. 2).

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c. Terms of the Proposed Settlement

i. Deductions from the Settlement

The Parties have agreed (subject to and contingent upon the Court's approval) that this action be settled and compromised for the non-reversionary total sum of $2,000,000 ("Gross Settlement Amount" or "GSA") which includes, subject to Court approval: (a) Class Counsel Fees Payment of up to $700,000 (35% of the GSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement and securing Court approval; (b) Class Counsel Litigation Expenses Payment for actual litigation costs not to exceed $30,000;[2] (c) Class Representative Service Payment to the named Class Representative in a sum not to exceed $10,000 to Plaintiff in consideration for a general release of claims, for initiating and prosecuting the class action complaint, serving as a Class Representative, work performed, and risks undertaken for the payment of attorneys' fees and costs in the event they had been unsuccessful in their matters; (d) Administration Costs and expenses to Simpluris, Inc. ("Simpluris"), estimated at approximately $5,500 but not to exceed $30,000; and (e) LWDA payment of $75,000 (which is 75% of $100,000 allocated to Plaintiff's claims under PAGA). (Han Dec. ¶ 23).

ii. Calculation of the Settlement Payments to Class Members

After all Court-approved deductions from the GSA, it is estimated that $1,179,500 ("Net Settlement Amount" or "NSA"), less all applicable employee taxes on the wage portion of the Settlement Share, will be distributed to Class Members – **with an average settlement share estimated at $4,718.** Subject to the terms and conditions of the Settlement, the Settlement Administrator will calculate and issue Settlement Shares based on the following formula:

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[2] The actual amount of litigation costs will be provided to the Court in conjunction with Plaintiff's motion for final approval. At that time, Plaintiff will ask the Court to approve the amount of these costs. If Plaintiff's actual costs exceed $30,000 Plaintiff will only seek reimbursement in the amount of $30,000. If Plaintiff's actual costs are lower than $30,000, Plaintiff will seek reimbursement of their actual litigation costs and the difference shall become part of the Net Settlement Amount and be available for distribution to Participating Class Members. (Han Dec. ¶ 24).

> Each Participating Class Member will receive a proportionate share of the Net Settlement Amount that will be calculated by (a) dividing the Net Settlement Amount by the total number of work weeks for all Participating Class Members that occurred during the Class Period and (b) multiplying the result by each individual Participating Class Member's work weeks that occurred during the Class Period. For purposes of this calculation, work weeks are defined as two work weeks per payroll period that occurred during the Class Period, based on the payroll periods included in Defendant's records. If a Participating Class Member worked any time during a payroll period, then he or she will be credited for two weeks for the payroll period.

The precise number of compensable weeks worked per Class Member will not be known until Defendant has tabulated them, following preliminary approval. Under no circumstances will any portion of the $2,000,000 settlement revert to Defendant. (Han Dec. ¶ 25).

iii. Notice to the Class

Within fourteen (14) calendar days after entry of the preliminary approval order, Defendant shall deliver to the Settlement Administrator an electronic database for purposes of mailing Class Notices to Participating Class members ("Class Data"). Within fourteen (14) calendar days after receiving the Class Data, Simpluris shall mail copies of the Class Notice Packets to all Class Members via regular First-Class U.S. Mail. The Notice advises the Class of their rights to participate in the settlement and how to and when to object or request exclusion from the settlement. Class Members are not required to submit a claim form to receive payment. (Han Dec. ¶ 26). The proposed Class Notice is attached as Exhibits A to the Settlement Agreement, which is Exhibit 1 to the Declaration of Douglas Han.

iv. Distribution of Funds

Upon the Effective Date, Defendant shall transfer the Gross Settlement Amount of Two Million Nine Hundred Thousand Dollars ($2,000,000) by wiring the funds into a Qualified Settlement Fund ("QSF") set up and controlled by Simpluris. (Han Dec. ¶ 27).

Simpluris shall pay the Settlement Shares, Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, PAGA Payment, and Administration Costs within thirty (30) calendar days after the Effective Date. (Han Dec. ¶ 28).

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Any checks issued to Participating Class Members shall remain valid and negotiable for one hundred and eighty (180) days from the date of their issuance. If a check is returned to the Settlement Administrator, the Settlement Administrator will make all reasonable efforts to re-mail it to the Participating Class Member at his or her correct address. If Participating Class Member's Settlement Share check is not cashed within 120 days after its last mailing to the Participating Class Member's the Settlement Administrator will send the Participating Class Member a letter informing him or her that unless the check is cashed in the next 60 days, it will expire and become non-negotiable, and offer to replace the check if it was lost or misplaced but not cashed. If the check remains uncashed by the expiration of the 60 day period after this notice, the funds from such uncashed checks will be paid to the California State Controller Unpaid Wage Fund in the name of the Participating Class Member and the Participating Class Member will remain bound by the Settlement. (Han Dec. ¶ 29).

v. Release of Claims

In exchange for a Settlement Payment, Class Members are informed that, by accepting the payment, they are releasing in exchange for the consideration provided for by this Agreement are all alleged claims in the Legal Action and claims that could have been pled arising out of the same operative facts, as well as claims for meal and rest breaks, wage statement violations, and off the clock work, that each Participating Class Member had, now has, or may hereafter claim to have against Defendant, its predecessors, successors, assigns, heirs, executors, administrators, personal representatives, officers, directors, shareholders, employees, agents, attorneys, accountants (collectively "Released Parties") that were alleged in the Legal Action which occurred during the Class Period ("Released Class Claims"). (Han Dec. ¶ 30).

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IV. ARGUMENT

a. Class Action Settlements Are Subject to Court Review

Rule 3.769 requires court approval for class action settlements.[3] "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (California Rules of Court, Rule 3.769(g). Rule 3.769 further requires a noticed motion for preliminary approval of class settlements:

> (a) A settlement or compromise of an entire class action, or a cause of action in a class action, or as to a party, requires the approval of the court after hearing.
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> (c) Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion.

Courts act within their discretion in approving settlements that are fair, not collusive, and take into account "all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions." *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n* (1981) 452 U.S. 905.

b. Conditional Certification of the Class is Appropriate.

For settlement purposes only, the requisites for establishing conditional class certification are met. Code of Civil Procedure Section 382 "authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326. California courts certify class actions where the plaintiff identifies "both [1] an ascertainable class and [2] a well-defined community of interest among class members." *Id.*

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[3]The California Supreme Court also has authorized California's trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

Here, the proposed Class is ascertainable and numerous as to make it impracticable to join all class members, and there are common questions of law and fact that predominate over any questions affecting any individual Class Member. Plaintiff's claims are typical of the claims of the Class Members, and Class Counsel will fairly and adequately protect the interests of the Class. Further, prosecution of separate actions by individual Class Members would create the risk of inconsistent or varying adjudications, and a class action is superior to other available means for the fair and efficient adjudication of the case. (Han Dec. ¶ 31). As discussed below, this case is amenable to class certification.

c. The Settlement Is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement under Code of Civil Procedure § 382, the Court must find that a proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is presumed fair under the following circumstances: (1) the parties reached a settlement after arms-length negotiations; (2) investigation and discovery were 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 v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these elements are present here, and the Court's grant of preliminary approval is therefore requested.

i. The proposed Class Is Ascertainable and Sufficiently Numerous

"Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 914. "A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828. The proposed class must also be sufficiently numerous. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

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This action involves approximately two hundred and fifty (250) Class Members. This Class is sufficiently numerous. *See Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal. App. 4th 1524, 1531 n.5 (finding that a proposed class of "as many as 190 current and former employees" is sufficiently numerous). Further, all Class Members can and will be identified by Defendant to the Settlement Administrator through a review of Defendant's employment records concerning truck drivers who worked for Defendant in the State of California during the Class Period. (Han Dec. ¶ 32).

ii. The Class Members Share a Well-Defined Community of Interest

The community of interest requirement "embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Sav-On*, *supra*, 34 Cal.4th at p. 326. "[T]he community of interest requirement for certification *does not mandate that class members have uniform or identical claims*." *Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 692 (emphasis in original). Rather, courts focus on the Defendant's internal policies and "pattern and practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate." *Id*. (citing *Sav-On*, *supra*, 34 Cal.4th at 333).

The "common issues" requirement "involves analysis of whether the proponent's 'theory of recovery' is likely to prove compatible with class treatment." *Capitol People*, *supra*, 155 Cal.App.4th at p. 690 (emphasis added) (citing *Sav-On*, *supra*, 34 Cal.4th at p. 327). Furthermore, the commonality inquiry centers on the "reasonableness" of the Defendant's labor policies as applied to the potential class. *Ghazaryan*, *supra*, 169 Cal.App.4th at p. 1534.

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Here, Plaintiff asserts that common issues of fact and law predominate as to each of the claims alleged by Plaintiff. All truck drivers who worked for Defendant during the Class Period were subject to the same or similar employment practices, policies, and procedures. (Han Dec. ¶¶ 18-19). All of their claims surround Defendant's common practice and scheme of failing to account for all hours properly worked by truck drivers and failing to pay them, *inter alia*, for overtime work, and non-compliant meal and rest periods, and associated waiting time penalties. (*Id*.). Notably, Plaintiff alleges, and Defendant denies that Plaintiff was not compensated for working off-the-clock due to the automatic meal deduction practice. Plaintiff contends, and Defendant denies that Defendant failed to provide rest periods according to law. (*Id*.). Plaintiff also argues that Defendant never paid a premium wage for meal or rest break violations, evidencing a uniform policy not to pay premium wages. (*Id*. ¶ 41) As a result, all of the Class Members, including Plaintiff, were uniformly not paid for all of the hours they worked for Defendant during the Class Period. Based on these facts, Plaintiff concludes that the proposed Class is readily certifiable in this case. Accordingly, the Court should provisionally certify the Class for settlement purposes only.

d. The Settlement Was Reached as a Result of Arm's-Length Negotiations

The Settlement was reached as a result of arms-length negotiations. Though cordial and professional, the settlement negotiations have been, at all times, adversarial and non-collusive in nature. At the mediation, Counsel for the Parties conducted extensive arm's length settlement negotiations until an agreement was ultimately reached by all parties. The terms of the Settlement are memorialized in the Settlement Agreement. (Han Dec. ¶ 33, Ex. 2).

Plaintiff believes in the merits of their case, but also recognizes the inherent risks of litigation and understands the benefit of the Class receiving settlement funds immediately as opposed to risking continued litigation, the merits of the case before and after trial, damages awarded, and an appeal that can take years to litigate. (Han Dec. ¶ 34).

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e. The Settlement Is the Result of Thorough Investigation and Discovery

The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before reaching the proposed settlement, and engaged in sufficient investigation, research and discovery to support the settlement. The settlement was only possible following discovery and evaluation of Defendant's policies and practices, as well as the data produced for the putative class, which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. This litigation has reached the stage where "the Parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the Settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

f. Counsel for Both Parties Are Experienced in Similar Litigation

Both Plaintiff's counsel and Defendant's counsel are particularly experienced in wage and hour employment law and class actions. Plaintiff's counsel has significant experience in litigating unpaid wages, non-compliant meal period, and non-compliant rest period class actions. (Han Dec. ¶¶ 4-7).

Plaintiff's counsel has prosecuted numerous cases on behalf of employees for California Labor Code violations and thus are experienced and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses. This experience instructed Plaintiff's counsel on the risks and uncertainties of further litigation and guided their determination to endorse the proposed settlement.[4] (Han Dec. ¶ 4-7).

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[4] The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Notice of Proposed Settlement of Class Legal Action has been provided to the Class and they have had an opportunity to respond. This information will be provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

g. The Proposed Settlement is a Reasonable Compromise of Claims

An understanding of the amount in controversy is an important factor in whether the settlement "of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Id.*

In weighing the strength of the Plaintiff's case, *Kullar* instructs that the court is not to "decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys." *Kullar, supra,* 168 Cal.App.4th at 133. Finally, *Kullar* does not require an explicit statement of the maximum amount the plaintiffs class could recover if it prevailed on all its claims, provided there is a record which allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at 409. Put differently, "as the court does when it approves a settlement as in good faith under *Code of Civil Procedure* § 877.6, the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness." *Kullar*, *supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.

As the following subsections show, the Parties' investigation and discovery revealed plenty of reasons to discount claims and agree to this settlement.

i. The Settlement Is Fair and Reasonable

The proposed settlement was only possible following significant discovery and evaluation of Defendants' relevant policies and practices, as well as the discovery they produced for the putative Class as referenced in Section III above, which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. (Han Dec. ¶ 35).

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This discovery and investigation resulted in Plaintiff's central theories of liability, which are predicated on Plaintiff's claims that Defendant employed uniform policies of not providing compliant meal and rest periods and not compensating employees for off-the-clock work (automatic deduction for meals). (Han Dec. ¶ 36).

Defendant vehemently denies Plaintiff's theories of liability and contends, as stated above, that all meal and rest periods were provided in compliance with California law, that all wages were properly paid to class members, and that it provided wage statements in compliance with Labor Code § 226. Defendant argues that if litigation were to continue, it feels confident that it would prevail. (Han Dec. ¶ 37).

Although Plaintiff believes the case is suitable for certification on the claimed basis that there are company-wide policies that Plaintiff contends violate California law and uniformly affect the putative class members; uncertainties with respect to certification are always present. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court's sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims.[5] (Han Dec. ¶ 38).

Although remaining confident in the strengths of his claims, all of these factors led Plaintiff to discount the following calculations of potential damage claims.

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[5] (*See, e.g.*, *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*, 148 Cal. App. 4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson's Inc*. (2006) 141 Cal. App. 4th 1422 (affirming denial of certification).

ii. The Settlement Amount of $2,000,000 is Reasonable

In addition to being able to discover the strengths and vulnerabilities associated with Plaintiff's claims, in preparing for mediation, Defendant provided Plaintiff with a sampling of time and pay records and information regarding the estimated number of workweeks worked by putative class members and the average hourly rate for class members. (Han Dec. ¶ 39). Based on this information, Plaintiff calculated that there were approximately 39,101 workweeks worked by putative class members. Plaintiff was also able to determine that the average hourly rate for class members was $12.88. (*Id.*)

Specifically, Plaintiff claims – and Defendant denies – that Defendant's employees were not compensated for working through their meal breaks, for which Defendant automatically deducted 30 minutes per shift regardless of whether a meal break was taken. Based on a reasonable estimate that Class Members were able to prove that they worked approximately 30-minutes of off-the-clock work each shift, a reasonable estimate of damages at trial would be $629,526.10 for minimum wage exposure (39,101 workweeks x 1.25 hour calculated using a rate of $12.88) or if using the overtime rate as certain shifts exceeded 8 hours per day or 40 hours per week would be $944,289.15 (39,101 workweeks x 1.25 hour calculated using a rate of $19.32). (Han Dec. ¶ 40).

Additionally, Plaintiff claims – and Defendant denies – that Defendant's employees are not provided with compliant meal periods and rest breaks. Plaintiff contends that due to the nature of the job – delivery drivers – with pressure to meet delivery windows and deadlines, prevented employees from taking timely, full, and uninterrupted meal and rest breaks. Plaintiff argues that the fact that Defendant never paid a premium wage for a meal or rest break violation evidences a uniform policy not to pay premiums. Accordingly, Plaintiff argues that a combination of either one meal period violation or rest period violation, employees are entitled to a meal or rest period premiums of at least once per shift. Plaintiff calculates Defendant's maximum potential exposure for the meal and rest period claim to be approximately $2,518,104.40 (39,101 weeks x $12.88/average hourly rate x 5 meal or rest break violations per week). (Han Dec. ¶ 41).

Further, Plaintiff claim – and Defendant denies – that Defendant failed to accurately record hours worked by putative class members making it likely that Defendant issued wage statements in violation of *California Labor Code* section 226(a) in that the wage statements would also fail to state the accurate number of hours worked. Plaintiff calculates Defendant's maximum potential exposure as to this claim to be approximately $772,000 ($4,000 penalty per employee x 193 employees (based in 65 average pay periods). (Han Dec. ¶ 42).

If Plaintiff is able to prove their failure to pay all wages owed, they are then entitled to waiting time penalties in the amount of 30 days' worth of wages. Plaintiff calculates Defendant's maximum potential exposure as to this claim to be approximately $293,664 (8 hours x $12.88/average hourly rate x approximately 95 former truck drivers x 30). (Han Dec. ¶ 43).

The provisions of the Labor Code potentially triggering PAGA penalties in this case include but are not limited to Labor Code sections 204, 226(a), 226.7, 510, 512(a), 1174(d), 1194, 1197, 1197.1, and 1198. Defendant asserted that, regardless of the results of the underlying causes of action, PAGA penalties are not mandatory but permissive and discretionary. Defendant maintained that, in addition to its strong arguments against the underlying claims, it had a strong argument that it would be unjust to award maximum PAGA penalties given the current unsettled state of law. (Han Dec., ¶ 44.)

Class Counsel calculated penalties under this cause of action by multiplying the number of active Class Members (because of the shortened statutory period for this claim), by the civil penalties that each could be awarded for the Labor Code sections enumerated under Labor Code section 2699.5 that were applicable in this case. Class Counsel then applied discounts in light of the countervailing arguments with regard to the other causes of action, as well as the Court's power to award "a lesser amount than the maximum civil liability." Lab. Code § 2699(e)(2). (Han Dec., ¶ 45.)

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Given the state of the law and the range of PAGA penalties requested and actually awarded in California courts, it is difficult to determine a reasonable value and actual exposure for PAGA penalties. However, if PAGA penalties are granted on any one of the violations alleged in Plaintiff's operative complaint, the total penalties exposure for the eligible pay periods could be approximately $0 to $2,489,700 ($12,900 x 193). Plaintiff calculated Defendant's PAGA exposure using a 100% violation rate based on the average number of pay periods during the one-year statutory period. If this amount were to be multiplied by the alleged violations under the PAGA cause of action, the civil penalties could be $0 to $14,938,200. (Han Dec., ¶ 46.)

Plaintiff also recognized the risk that any PAGA award could be significantly reduced. Many of the causes of action brought were duplicative of the statutory claims such as violations of California Labor Code section 226(e), 226.7, 510, 512(a), 1194 and 1198. Of these violations, section 226(e) is a derivative claim. For the meal and rest period violations, they did not occur every single pay period. Thus, the maximum penalties for each pay period are not justified. It was indeed arguable whether the Court would award the maximum penalties under the law. Thus, allocating $100,000 to PAGA civil penalties was reasonable. Where PAGA penalties are negotiated in good faith and "there is no indication that [the] amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.,* Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009); *see, e.g., Nordstrom Com. Cases,* 186 Cal. App. 4th 576, 579 (20 10) ("[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims."). (Han Dec., ¶ 47.)

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Defendant argues that if litigation continues, it will show that truck drivers were provided with compliant meal and rest periods. Defendant argues that meal periods were provided in lawful timeframes and that employees signed certifications confirming that they were able to take their meal and rest breaks. Defendant argues that in order to determine when meal periods were taken each shift and whether work was being conducted during meal periods, an individual inquiry of each employee regarding how long their shift was and when they took a meal period, which would show that individualized issues predominate. Defendant argues it pays for all time worked as recorded by employees. Likewise, Defendant argues that its rest period policies conform to California law and that class members are provided with rest periods in compliant time frames. As no records of rest periods exist, Plaintiff would have to ask each class member when they took a rest period during any given shift, and individual issues would also predominate as to this claim. Defendant contends that under *Brinker*, it is not required to police its employees to ensure they take meal and rest breaks. If these breaks were not taken, Defendant argues this was due to the employee's decision not to take it. Defendant also argues that meal and rest period violations are preempted by the Federal Motor Carrier Safety Administrations rule exempting drivers from California meal and rest break violations. (Han Dec., ¶ 48.)

Accordingly, taking into consideration Defendant's defenses, its supporting evidence, and its position that the action is not suitable for class treatment, the settlement amount of $2,000,000 – **with an average settlement share amount estimated at $4,718** – is a reasonable and fair settlement.

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h. Discount Analysis Justifies the Settlement

Excluding the civil penalties, which could be completely discretionary, for the reasons stated the total estimated realistic potential exposure, assuming certification and prevailing at trial, would be approximately $1,394,361.64 on the low end to $1,534,005.01 on the high end. (Han Dec., ¶ 49.)

Category	**Potential Exposure**	**Certification Risk**	**Merits Risk**	**Realistic Exposure**
Meal/Rest Premiums	$2,518,104.40	50%	50%	$629,526.10
Overtime/Minimum Wage: Off-the-Clock	$629,526.10 to $944,289.15	10%	50%	$285,286.74 to $424,930.11
Waiting Time Penalty	$293,664.00	10%	50%	$132,148.80
Paystub Penalty	$772,000.00	10%	50%	$347,400.00
MAXIMUM TOTAL EXPOSURE	**$4,213,294.50 to $4,528,057.55**			**$1,394,361.64 to $1,534.005.01**

Plaintiff applies a 50% percent certification risk discount for meal and rest period exposure. Due to facially valid meal and rest break policies, Class Counsel believes that the certification on this claim is difficult. Also, a further discount of 50% is justified due to merits risk. Defendant has meal and rest break certifications which Class Members acknowledge that meal and rest breaks were taken. Defendant also may submit evidence and testimony that meal breaks were provided and that Class Members chose to take non-compliant breaks. (Han Dec., ¶ 50.)

Concerning overtime/minimum wage off-the-clock claims, certifying these claims is reasonably certain due to the uniform theory of automatic deduction. Nevertheless, Plaintiff applies a 10% certification risk discount as this matter is filed in a conservative jurisdiction, which may not certify the claims. However, if and once certified, there is a 50% chance that the Class may not be able to prove up the full extent of damages claimed. Plaintiff's Labor Code 203 claims are based in-part of derivative claims from the off-the-clock theory and automatic deduction theory. There is always a certification risk even if Class Counsel believes that certification is certain but applies the same level of risk as to the off-the-clock theory. Likewise, due to the off-the-clock theory, the same discount analysis applies to the wage statement claim. (Han Dec., ¶ 51.)

Based on this analysis, the realistic recovery for this case is $1,394,361.64 to $1,534,005.01. *Id*. The Gross Settlement Amount of $2,000,000 is approximately 44% of the maximum potential exposure and almost 130% of the highest realistic exposure at trial, which is in the ball-park of reasonableness. (Han Dec., ¶ 52.) This is an excellent settlement.

The only question at preliminary approval is whether the settlement is within the range of possible approval. *In re Tableware Antitrust Litig*., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F. 2d 448, 455, *see also Linney v. Ceullar Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234,1242 ("[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.").

i. Notice to Class Members Complies with California Rule of Court 3.769(f)

California Rule of Court, No. 3.769(f), provides:

> If the court has certified the action as a class action, notice of the final approval hearing must be given to class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.

The proposed Notice meets all of these requirements. The proposed Notice advises the Class of their rights to participate in the Settlement, how to and when to object to or request exclusion from the Settlement, and the date, time, and location of the final approval hearing. See Han Dec. Ex. A to Ex 2.

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V. CONCLUSION

Plaintiff respectfully submits that the proposed settlement is in the best interests of the class, as it is fair, adequate, and reasonable, and one that should ultimately be granted final approval. Under the applicable class action criteria and guidelines, the proposed settlement should be preliminarily approved by the Court, the class should be conditionally certified for purposes of settlement only, and the Notice of Proposed Settlement of Class Legal Action should be approved.

Dated: January 5, 2021

JUSTICE LAW CORPORATION

By: D. Han

Douglas Han
Attorneys for Plaintiff

PROOF OF SERVICE
1013A(3) CCP

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 751 N. Fair Oaks Avenue, Suite 101, Pasadena, CA 91103 and my electronic service address is arivera@justicelawcorp.com

On January 5, 2021, I served the foregoing document described as

PLAINTIFF'S NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION, APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING DATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

for the following case:	**Zavala v. Donaghy Sales, LLC**
LWDA/Court Case No.:	**LWDA Case No.: CM 771370-20** **Court Case No.: BCV-20-102005** **Kern County Superior Court**

on interested parties in this action by electronically submitting as follows:

State of California
Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, California 95814

[X] BY ELECTRONIC SUBMISSION
Pursuant to California Senate Bill No. 836, I caused the documents described above to be electronically submitted by and through the procedure stated on the website of the State of California Labor and Workforce Development Agency.

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

Executed on January 5, 2021, at Pasadena, California.

Allana Rivera