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and on behalf of the general public.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

MIGUEL HERNANDEZ, on behalf of
himself, all others similarly situated, and
on behalf of the general public

Plaintiff,

v.

MJ INDUSTRIES, INC.; MJ TANK
LINES, INC.; and DOES 1-100,

Defendants.

Case No. 37-2017-00003218-CU-OE-CTL

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT, ATTORNEYS' FEES,
COSTS, CLASS REPRESENTATIVE
GENERAL RELEASE PAYMENT, AND
ENTERING OF FINAL JUDGMENT**

Date: January 15, 2021
Time: 8:30 a.m.
Dept: C-74
Judge: Hon. Ronald L. Styn

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1 **I. INTRODUCTION**

2 This motion seeks final approval of a non-reversionary \$150,000 proposed wage and hour
3 class action settlement by Plaintiff Miguel Hernandez (hereinafter “Plaintiff”) on behalf of himself
4 and all persons currently or formerly employed by Defendant MJ Industries, Inc. dba MJ Tank
5 Lines (hereinafter “Defendant”) (hereinafter, Plaintiff and Defendant are collectively referred to
6 as the “Parties”) as drivers in California at any time between January 25, 2013 through July 24,
7 2020 (“Class Period”). The proposed settlement is projected to pay an average estimated payment
8 of \$331.72 per Class Member, with a high payment of \$1,435.54.¹ **The Settlement and all its**
9 **terms received resounding support from Class Members as there were no objections and**
10 **only four requests for exclusion.²**

11 This case required 444 hours of attorney time from Class Counsel and sought relief for 188
12 drivers. This litigation involved investigations with Class Members throughout California, formal
13 discovery, the production of documents by Defendant, the informal exchange of information prior
14 to mediation, a full day of mediation, and extensive post mediation settlement negotiations.

15 Plaintiff moves for final approval of attorneys’ fees in the amount of \$50,000, which
16 represents thirty-three and one-third percent (33 1/3%) of the Gross Settlement Amount (“GSA”).
17 As will be demonstrated herein, Plaintiff’s attorney fee request is supported using the percentage
18 fee method and the lodestar method. Second, Plaintiff moves for final approval of litigation costs
19 in the amount of \$15,000.00³ incurred in litigating this matter. Third, Plaintiff moves for final
20 approval of the Class Representative general release payment in the amount of \$10,000 to
21 compensate the Class Representative for a general release of his claims against Defendant, and for
22 the time they spent on and the risks absorbed in undertaking this case. Plaintiff played a vital role
23 in representing the other drivers in this case and spearheading the lawsuits to seek monetary relief
24 for them. Fourth, Plaintiff moves for final approval of payment of \$6,249.00 to the Settlement
25 Administrator, Simpluris, Inc. (“Simpluris”) for the costs and fees of administering settlement.

26 _____
27 ¹ Declaration of Mary Butler Regarding Notice and Settlement Administration (“Butler Dec.”) ¶ 12.

28 ² Butler Dec. ¶ 13-14. The four (4) requests for exclusion represent less than 2.5% of the class members; therefore,
nearly 98% of the class members will receive a settlement payment

³ Class Counsel’s total out of pocket expenses were \$31,580.45. Under the settlement agreement, Class Counsel
agreed to seek an amount up to but not exceeding \$15,000.

1 Fifth, Plaintiff moves for final approval of payment to the Labor and Workforce Development
2 Agency (“LWDA”) under the Private Attorneys’ General Act (“PAGA”) in the amount of \$3,750
3 (75% of \$5,000 allocated to PAGA penalties).

4 The requested amounts of attorneys’ fees, litigation costs, general release payment,
5 settlement administration costs, and PAGA payment were fully disclosed to the Class Members
6 when the Class Notice was mailed to them on August 13, 2020.⁴ **Most importantly, the**
7 **Settlement and all its terms received universal support from Class Members as there no were**
8 **objections or disputes, and only four requests for exclusion.**⁵ The Court is therefore respectfully
9 requested to honor the Class Members’ endorsement of the settlement and grant final approval of
10 the settlement, attorneys’ fees, litigation costs, general release payments, costs of settlement
11 administration, and payment to the LWDA pursuant to PAGA in the amounts as preliminarily
12 approved by this Court, as fully disclosed to the Class Members, and as requested herein.

13 II. BACKGROUND, INVESTIGATION, DISCOVERY

14 MJ is in the business of transporting hazardous materials, specifically fuel, oil, etc., for its
15 customers. MJ serves its customers in Central and Southern California out of the 5 terminals it
16 operates located in Southern California. In order to carry out its business, MJ hires truck drivers,
17 like Plaintiff, to operate the trucks and transport the materials.

18 Plaintiff filed a putative class action complaint in the San Diego County Superior Court
19 against Defendant on January 25, 2017. Plaintiff’s original Complaint alleged the following causes
20 of action: 1) failure to pay all straight time wages; 2) failure to pay overtime; 3) failure to provide
21 meal periods; 4) failure to authorize and permit rest periods; 5) knowing and intentional failure to
22 comply with itemized employee wage statement provisions; 6) failure to pay all wages due at the
23 time of termination; and 7) violation of the Unfair Competition Law. On July 5, 2017, Defendant
24 answered the complaint generally denying all claims. Plaintiff’s First Amended Complaint was
25 filed on June 17, 2020 alleging violations of the Private Attorneys General Act of 2004 (“PAGA”).
26 Declaration of David Mara, Esq. (“Mara Dec.”) ¶ 9.

27
28 ⁴ Butler Dec. ¶ 5, 8.

⁵ Butler Dec. ¶¶ 13-15.

1 As the following shows, the instant wage and hour class action was only capable of being
2 settled after the Parties engaged in considerable investigation and discovery into the nature,
3 strength, and value of the class claims.

4 **a. Discovery and Motions**

5 After filing, the Parties engaged in extensive discovery. Plaintiff's discovery requests,
6 coupled with the Parties extensive meet and confer efforts, led to Defendant producing over ten
7 thousand pages of documents. These documents included, but were not limited to, Defendant's
8 meal and rest period policies, employee handbooks, time records and wage records for class
9 members, and additional relevant policies. Additionally, Defendant provided Plaintiff with data
10 that enabled him to fully evaluate class-wide claims and potential exposure. Plaintiff also
11 performed an independent analysis of the case and interviewed numerous class members about
12 their experiences working for Defendant. Mara Dec. ¶ 10.

13 On May 3, 2019, Plaintiff filed his Motion for Class Certification. Defendant opposed this
14 motion. The Court held a hearing on Plaintiff's motion on July 12, 2019, and the Court issued an
15 order granting Plaintiff's Motion for Class Certification only as to Plaintiff's meal period and rest
16 period claims. On or around November 6, 2019, Defendant filed its Motion for Summary
17 Judgment arguing that the certified class claims were preempted by the Federal Motor Carrier
18 Safety Administration's ("FMCSA") hours of service regulations and the Pipeline and Hazardous
19 Materials Safety Administration's ("PHMSA") administrative determination that California's
20 meal period rules are preempted. The Parties reached the instant settlement prior to having the
21 motion heard by the Court. Mara Dec. ¶ 11.

22 **b. The Parties' Staunchly Conflicting Positions**

23 The gravamen of Plaintiff's claims is that drivers are always subject to Defendant's control
24 and command, including during meal and rest breaks. Defendant requires class members to remain
25 in constant attendance of their trucks and its contents at all times because Defendant transports
26 hazardous materials. As a result, Defendant failed to provide duty-free meal periods and rest breaks
27 to drivers in violation of *Labor Code* sections 512 and 226.7, *Wage Orders*, *Brinker Restaurant*
28 *Corp. v. Superior Court* (2012) 53 Cal.4th 1004, and *Augustus v. ABM Security Services, Inc.*
(2016) 2 Cal.5th 257, that drivers were entitled to premium payments and unpaid wages for

1 Defendant's failure to provide rest periods and meal periods compliant with California law. This
2 proposed Settlement was only possible following significant discovery and evaluation of
3 Defendant's relevant policies, procedures, and data, which permitted Plaintiff's Counsel to engage
4 in a comprehensive analysis of liability and potential damages to prepare for the mediation, class
5 certification, and summary judgment. Mara Dec. ¶ 12.

6 Defendant vigorously denies Plaintiff's contentions, claiming that all meal and rest breaks
7 were provided in compliance with California law, and any and all wages owed were paid to drivers.
8 Specifically, Defendant contends it imposed compliant meal and rest break policies making meal
9 and rest breaks available to drivers when their trucks did not contain hazardous materials, but
10 drivers' decisions to take those breaks varied individually. Additionally, Defendant asserts that
11 Plaintiff's claims for failure to provide meal and rest periods are completely preempted by federal
12 law, and were confident in the Court granting summary judgment on these issues had a settlement
13 not been reached. Defendant further argues, under *Brinker*, it need not ensure meal and rest breaks
14 are taken but are only obligated to make them available to drivers, which it did. Mara Dec. ¶ 13.

15 **c. The Parties Attended Mediation Which Led to Settlement**

16 The Parties participated in a full day mediation with the Jeffrey Krivis on January 22, 2018.
17 The matter did not settle at mediation, but the Parties continued settlement discussions throughout
18 the course of the litigation. In light of the points raised in Defendant's Motion for Summary
19 Judgment, and appreciating the significant risks on both sides, the Parties reached a settlement in
20 principle. The Parties then met and conferred regarding all the terms of the settlement and finalized
21 their agreement in the Joint Stipulation, of which the Parties seek final approval of their Joint
22 Stipulation in the instant motion. Mara Dec. ¶ 14; Exhibit 5.

23 **III. THE PROPOSED SETTLEMENT AND THE CLASS MEMBERS' RESPONSE**

24 **a. Terms of the Proposed Settlement**

25 The Parties agreed (subject to and contingent upon the Court's approval) that this action
26 be settled and compromised for the non-reversionary total sum of \$150,000 ("Gross Settlement
27 Amount" or "GSA") which includes, subject to Court approval: (a) attorneys' fees of up to \$50,000
28 (33 1/3% of the GSA) to compensate Class Counsel for work already performed and all work
remaining to be performed in documenting the settlement, administering the settlement and

1 securing Court approval; (b) litigation costs of \$ 15,000; (c) Class Representative General Release
2 Payment to the named class representative, Miguel Hernandez, in a sum not to exceed \$10,000 in
3 consideration for a general release of his claims against Defendant and for initiating and
4 prosecuting this Class Action, serving as Class Representative, work performed, and risks
5 undertaken for the payment of Defendant's attorneys' fees and costs in the event he had been
6 unsuccessful in either matter; (d) claims administration fees and expenses to Simpluris, in the
7 amount of \$6,249.00 (originally estimated not to exceed \$7,500), and (e) PAGA payment to the
8 LWDA in the amount of \$3,750 (which represents seventy-five percent (75%) of \$5,000 allocated
9 to PAGA). Mara Dec. ¶ 15.

10 After all Court-approved deductions from the GSA, it is estimated that \$61,036.10, ("Net
11 Settlement Amount" or "NSA"), less all applicable employee taxes, will be distributed to Class
12 Members – with an average estimated payment of \$331.72 per Class Member, and a high payment
13 of \$1,435.54. One hundred percent (100%) of the NSA will be paid to the Class Members, less
14 taxes. Subject to the terms and conditions of the Settlement, the Settlement Administrator will
15 calculate and issue Individual Settlement Payments based on the following formula:

16 **Individual Settlement Share Calculation.** Each Participating Class Member will receive
17 a proportionate share of the Net Settlement Amount that is equal to (i) the number of weeks
18 he or she worked for Defendant in California based on the Class data provided by
19 Defendant, divided by (ii) the total number of weeks worked by all Participating Class
20 Members based on the same Class data, which is then multiplied by the Net Settlement
21 Amount. One day worked in a given week will be credited as a week for purposes of this
22 calculation. Therefore, the value of each Class Member's Individual Settlement Share ties
23 directly to the amount of weeks that he or she worked.

24 *See* Mara Dec., Exhibit 5 at Section III, Paragraph F(1)(a). The precise number of workweeks is
25 derived from Defendant's records. **Under no circumstances will any portion of the \$150,000**
26 **settlement revert to Defendant.** Mara Dec. ¶ 16.

27 **b. Released Claims**

28 In exchange for an Individual Settlement Share, Class Members are informed that, by
accepting the payment, they release the Released Parties⁶ of all known and unknown state law

⁶ **"Released Parties"** means Defendant and its past, present and/or future, direct and/or indirect, officers, directors, members, employees, representatives, administrators, attorneys, agents, parent companies, subsidiaries and affiliated

claims that were alleged or that could have been alleged based on the facts of the complaints filed in the matter. *See* Joint Stipulation and Settlement Agreement at I(CC); Mara Dec. ¶ 17.

c. The Class Members Overwhelmingly Support the Settlement – No Objections, Only Four Opt-Outs, and 100% of the Settlement Payment Will Be Paid to the Class

On July 24, 2020, the Court granted preliminary approval, conditionally certified the Class, appointed Simpluris to act as the Settlement Administrator, approved the notice to be sent to the Class, and directed that the notice be mailed to the Class by First Class U.S. Mail. On or around July 24, 2020, Simpluris received the Court approved text for the Notice from Counsel for Plaintiff. Simpluris prepared a draft of the formatted Notice, which was approved by the Parties' Counsel prior to mailing. Butler Dec. ¶ 5. On August 1, 2020, Simpluris received the class data file from Counsel for Defendant, which contained the name, social security number, last known mailing address, employment dates, and the total number of applicable workweeks worked for each Settlement Class Member. The data file was uploaded to our database and checked for duplicates and other possible discrepancies. The Class List contained 188 individuals. *Id.* at ¶ 6. On August 13, 2020, the Notice was mailed, via U.S First Class Mail, to all 188 individuals contained in the Class List.⁷

Twenty-four (24) Notices were returned to Simpluris by the Post Office. Butler Dec. ¶ 9. Simpluris performed a skip trace on all returned mail with no forwarding addresses to locate new addresses using Accurint, one of the most comprehensive address databases available. *Id.* Twenty (20) Notices were re-mailed as a result of a skip trace or request from the Class Members themselves. *Id.* Four (4) Notices have ultimately been deemed undeliverable. *Id.*

In sum, the settlement was received with overwhelming support from the Class Members. Specifically, there were no objections, only four requests for exclusion, or disputes filed by Class Members. Butler Dec. ¶¶ 13-15. Therefore, nearly 98% of the Class Members will receive a settlement payment. *Id.* at 10.

corporations and entities, consultants, shareholders, joint ventures, predecessors, successors, and/or assigns. *See* Joint Stipulation and Settlement Agreement at I(DD).

⁷ Butler Dec. ¶ 8.

1 **IV. ARGUMENT**

2 **a. The Settlement is Fair, Reasonable, and Adequate and Satisfies the Standard**
3 **for Final Approval**

4 California Rule of Court, Rule 3.769, requires court approval for class action settlements.
5 Cal. R. Ct. 3.769(g). California courts favor settlement. *Stambaugh v. Superior Court* (1976) 62
6 Cal. App. 3d 231, 236, *Potter v. Pacific Coast Lumber Co. of Cal.* (1951) 37 Cal. 2d 592, 602
7 (“[T]he law wisely favors settlements”). Accordingly, the Court must give “[due] regard to what
8 is otherwise a private consensual agreement between the parties.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 245.

9 In deciding whether to approve a class settlement, a court evaluates whether the proposed
10 settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th
11 1794, 1801 (citing *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.* (9th Cir. 1982)
12 688 F.2d 615, 625); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 742 43. A
13 court enjoys broad discretion to make its fairness determination. *Dunk*, 48 Cal. App. 4th at 1801.

14 However, “a presumption of fairness exists where: (1) the settlement is reached through
15 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
16 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
17 objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802; accord *Wershba*, 91 Cal. App. 4th at 245. In
18 addition, a court should consider additional relevant factors, including the strength of the plaintiff’s
19 case compared to the settlement amount; the risk, expenses, complexity, and likely duration of
20 further litigation; and the fair treatment of class members in relation to each other. *Dunk*, 48 Cal.
21 App. 4th at 1802.

22 At the time of preliminary approval, the Court was provided with sufficient information to
23 satisfy three of the four *Dunk* factors, leaving the fourth factor, the number of objectors, unknown
24 until after the Class had an opportunity to respond to the Settlement as explained in the Class
25 Notice.⁸ Subject only to the Class’ reaction to the Settlement, the Court preliminarily presumed
26 the Settlement was fair, adequate and reasonable. Following dissemination of the Class Notice,

27 ⁸ See Memorandum of Points and Authorities in Support of Preliminary Approval, filed on June 17, 2020. In addition
28 to the *Dunk* factors, Class Counsel also detailed the other factors such as the strengths of Plaintiff’s case, risks and
costs of further litigation, as well as the reasonableness of the GSA amount in light of *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116. *Id.*

1 and adequate time provided to the Class to return an objection to the Settlement, no class members
2 objected to the Settlement. Hernandez Dec. ¶ 14. Thus, the proposed settlement is entitled to the
3 presumption that it is fair and in all other respects proper and should be finally approved.

4 **b. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff's**
5 **Case and the Risks and Costs of Further Litigation**

6 This entire case hinges on whether Plaintiff's and class members' claims for failure to
7 provide compliant meal and rest periods under California law are preempted by federal law. A
8 September 21, 2018 opinion by the Pipeline and Hazardous Materials Safety Administration
9 ("PHMSA") found that California's meal and rest period laws do not apply to drivers of motor
10 vehicles that are transporting hazardous materials. PHMSA opined that "California's meal and rest
11 break requirements create an unnecessary delay in the transportation of hazardous materials and
12 are therefore preempted." Further, on December 28, 2018, the Federal Motor Carrier Safety
13 Administration issued a separate opinion determining that the California meal and rest break
14 provisions are more stringent than the Agency's hours of service regulations, that they have no
15 safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety
16 Regulations, that they are incompatible with the Federal hours of service regulations, and that they
17 cause an unreasonable burden on interstate commerce. Thus, California meal and rest break laws,
18 therefore, are preempted under 49 U.S.C. 31141(c). Mara Dec. ¶ 18.

19 Plaintiff argues that these opinions cannot and do not apply retroactively, and Defendant
20 is still liable for violating California law for nearly the entirety of the Class Period prior to the
21 issuance of this opinion. Federal agency decisions and opinions, like the FMCSA and PHMSA
22 opinions, are "subject to the presumption of prospectivity that attends true exercises of legislative
23 authority." *Gutierrez-Brizuela v. Lynch* (10th Cir. 2016) 834 F.3d 1142, 1144. As FMCSA and
24 PHMSA orders are subject to the presumption of prospectivity, there must be express language in
25 the statutory grant of legislative rulemaking authority enabling these administrative agencies to
26 extend their regulations retroactively. Here, the statutes enabling these agencies to issue this
27 legislative regulations, 49 U.S.C. §§ 31141 and 5125, are completely void of any language,
28 evidence, or indication whatsoever that Congress expressly granted these agencies with the power
to promulgate retroactive rules, nor do the FMCSA and PHMSA Orders themselves give any

1 indication that they are to be interpreted retroactively. Hence, because agency orders are presumed
2 prospective unless congress expressly conveys the power to promulgate retroactive rules, and
3 congress never expressly granted the power to issue retroactive preemption determinations, the
4 FMCSA and PHMSA opinions are not retroactive Further, Plaintiff contends that this opinion
5 holds no weight over California Superior Courts, and will ultimately be struck down and/or
6 reversed by the appropriate legislative and judicial bodies. Mara Dec. ¶ 19.

7 Defendant contends that the PHMSA and FMCSA opinions are fully enforceable and
8 extinguishes Plaintiff's and the putative class' claims for meal and rest period violations in their
9 entirety and not only for purported violations after the opinion was issued. Defendant can point to
10 numerous state and federal decisions enforcing the FMCSA opinion and granting summary
11 judgment as to meal and rest period claims for truck drivers subject to the Federal Hours of Service
12 requirements, to which Plaintiff and class members were undisputedly beholden. Specifically, in
13 cases like *Ayala v. U.S Xpress Enterprises, Inc.*, 2019 U.S. Dist. LEXIS 77089, 2019 WL 1986760,
14 at *3 (C.D. Cal. May 2, 2019), courts have applied the FMCSA opinion to enter summary judgment
15 on claims like those made here, finding both that "retroactivity" was not at issue because the courts
16 lack authority to enforce the preempted laws, and that any challenge to the opinion must be brought
17 in United States Courts of Appeal. Indeed, these were the very issues raised in Defendant's Motion
18 for Summary Judgment that was pending prior to the Parties reaching this settlement.

19 Therefore, Plaintiff's arguments, as outlined below, are only relevant if the Court were to
20 find that the PHMSA and FMCSA opinions have no, or only a limited, effect on Plaintiff's case.
21 Because of this, Plaintiff had to take into consideration the possibility that Defendant's position
22 could prevail and had to discount his damage exposure significantly. Mara Dec. ¶ 20.

23 Based upon the discovery and litigation conducted, Plaintiff contends – and Defendant
24 disputes – that class members are always subject to MJ's control and command, including during
25 meal and rest breaks. Plaintiff alleges that MJ has uniform policies which require class members
26 to remain in constant attendance of their trucks and its contents at all times. Because Defendant
27 transports hazardous materials, Plaintiff asserts that under Title 49 of the Code of Federal
28 Regulations, Section 397.5(a) (49 CFR 397.5(a)) drivers are required to attend to their trucks at all

1 times throughout the workday, even on meal and rest periods. As a result, employees are not
2 provided with rest periods in which they are free to use the time for their own purposes. Mara
3 Dec. ¶ 21.

4 Plaintiff argues that the cases *Brinker Restaurant Corp. v. Superior Court* (“*Brinker*”),
5 (2012) 53 Cal.4th 1004, and *Augustus v. ABM Security Services, Inc.* (“*Augustus*”), (2016) 2 Cal.
6 5th 257, provide that employers are required to relinquish any control over how employees spend
7 their break time, and relieve their employees of all duties. Plaintiff contends that when an employer
8 requires drivers to remain in constant attendance of their truck and trailers during meal and rest
9 periods, that is, when an employer prevents drivers from leaving their trucks unattended due to
10 their containment of hazardous materials to maintain the employer’s compliance with 49 CFR
11 397.5(a), the employer has impermissibly imposed a restraint not inherent in the meal and rest
12 period requirements itself, and places drivers on-duty for meal and rest periods. Under California
13 Labor Code § 226.7(a), “[n]o employer shall require any employee to work during any . . . rest
14 period mandated by an applicable order of the Industrial Welfare Commission.” If an employer
15 does not provide a duty-free meal or rest period, i.e., one that is free of employer control, the 226.7
16 premium is triggered. Mara Dec. ¶ 22.

17 As addressed above, Defendant asserts that Plaintiff’s claims for failure to provide meal
18 and rest periods are completely preempted by federal law. Further, Defendant claims that despite
19 this contention, it has, at all times during the Class Period, complied with California law.
20 Defendant contends that drivers have ample time between loads, when the trucks do not contain
21 any hazardous materials, to take duty-free meal and rest periods and are not always required to
22 attend to their trucks throughout the entirety of a shift to comply with 49 CFR 397.5(a). Defendant
23 argues that California law only requires employers to make duty-free meal and rest periods
24 available to employees. Employers are not required to police drivers to take their meal and rest
25 periods. Any choice an employee makes to take a meal or rest period while attending to hazardous
26 materials, rather than the down time in between loads, was solely the choice of each individual
27 driver, not the result of any purported mandate from Defendant.

28 Furthermore, Plaintiff contends that because MJ mandates drivers attend to their trucks and

1 its contents, drivers are not paid wages for all hours worked. Under California law, employees
2 must be paid for all hours worked. Hours worked is defined in Wage Order 9-2001⁹ as “the time
3 during which an employee is subject to the control of an employer, and includes all the time the
4 employee is suffered or permitted to work, whether or not required to do so.” Wage Order 9-2001,
5 Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015). Under this
6 standard, “it is only necessary that the worker be subject to the control of the employer in order to
7 be entitled to compensation.” *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000). Plaintiff
8 asserts that this deprives drivers of wages for all hours worked, specifically during unpaid meal
9 periods). Mara Dec. ¶ 23.

10 Defendant argues that beyond the limited accusations of Plaintiff, there is no evidence that
11 class members performed *any* work-related tasks for which drivers were not compensated.
12 Defendant further contends that there is no evidence of any kind of uniform practice or policy for
13 drivers to perform work off the clock, and, in fact, Defendant has uniform practices and policies
14 *forbidding* class members from working off the clock. Additionally, Defendant contends that it
15 provided drivers with the option to take on-duty meal periods in order to remain in compliance
16 with the attendance requirements of 49 CFR 397.5(a), for which drivers were *fully compensated*
17 for any and all time worked during their meal periods. Defendant points to the time and wage
18 records for driver class members as further evidence that drivers were paid throughout the entirety
19 of their shifts, with no 30-minute deduction for meal periods.

20 Although Plaintiff is confident in the strengths of his claims, Defendant’s counter-
21 arguments raise uncertainties to success on the merits. Perhaps of chief importance are Defendant’s
22 counter-arguments asserted in regard to the FMCSA and PHMSA opinions; if Defendant were
23 successful on its arguments, Plaintiff’s claims for meal and rest breaks, the core claims of this case,
24 would fail entirely. Given the uncertainty of how the Ninth Circuit will rule and the current trial
25 court decisions being made in support of FMCSA’s decisions, a significant discount had to be
26 factored into evaluating class-wide settlement. In light of Defendant’s defenses, supporting
27 evidence, and position that the action is not suitable for class treatment, the settlement amount of

28 _____
⁹ This is the Wage Order that governs the driver class members in this case.

1 \$150,000.00—with an average settlement share estimated at \$331.72, with a high payment of
2 \$1,435.54 —Plaintiff and his counsel believe this is a reasonable and fair settlement. Mara Dec. ¶
3 24.

4 **V. THE COURT SHOULD APPROVE THE REQUESTED FEES AND COSTS**

5 **a. The Requested Fee Award is Fair and Reasonable, Calculated as a Percentage**
6 **of a Common Fund**

7 Class Counsel applies for an award of attorneys’ fees in the sum of \$50,000 (which is 33
8 1/3% of the GSA), and litigation costs of \$15,000. Mara Dec. ¶ 25. California courts have
9 recognized an appropriate method for determining an award of attorneys’ fees is based on a
10 percentage of the total value of benefits to Class Members by the settlement, also known as the
11 “common fund” method. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (*Serrano III*) 34 (“when a
12 number of persons are entitled in common to a specific fund, and an action brought by a plaintiff
13 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
14 or plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh*, 32 Cal.3d 621,
15 627 (1982) (in awarding a fee from the common fund obtained for the benefit of all parties, the
16 trial court acts within its equitable power to prevent the other parties’ unjust enrichment.);
17 *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of
18 the fund method for calculating attorney’s fees more accurately reflects the results achieved for
19 the putative class than the lodestar method and “establishes reasonable expectations on the part of
20 plaintiffs’ attorneys as to their expected recovery; and it encourages early settlement, which avoids
21 protracted litigation.”); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005)
22 (“The percentage-of-recovery method is generally favored in common fund cases because it allows
23 courts to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it
24 for failure.’”).

25 The purpose of the common fund/percentage approach is to “spread litigation costs
26 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
27 burden alone.” *Vincent*, 557 F.2d at 769. In *Quinn v. State of California* (1995) 15 Cal.3d 162,
28 167, the Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund
from which others derive benefits may require those passive beneficiaries to bear a fair share of

the litigation costs.” Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that the common fund doctrine has been applied “consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.” The reasons for applying the common fund doctrine include: “...fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful.” *Id.*

Indeed, the California Supreme Court confirmed in *Laffitte v. Robert Half Int’l, Inc.* that using the percentage method has many advantages:

The recognized advantages of the percentage method - including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts.

Id. at 503 (internal citation omitted).¹⁰ Because there is a defined and traceable benefit to the Class, the Court can base an award of attorneys’ fees using a ‘common fund’ approach.

b. The Requested Attorneys’ Fee and Cost Award is Within the Range of Fees Approved in Comparable Common Fund Cases

Several studies of class action fee awards have found that the median common fund fee award is approximately one-third of the total settlement fund.¹¹ The requested fee falls in the mid-range of percentage class fee awards, which generally range from 20% to 50% of a common fund,

¹⁰ *Laffitte* also held trial courts have discretion to assess reasonableness of fee awards with tools such as the lodestar cross-check, although they need not do so. *Laffitte*, 1 Cal.5th at 506 (“We hold further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee . . . they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee”).

¹¹ See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have shown that “fee awards in class actions average around one-third of the recovery.”); Reagan W. Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel’s Response*, 17 Rev. Litig. 525, 546 ; T. Willging, L. Hooper and R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 90 (1996) (finding that attorneys’ fees in class litigation “were generally in the traditional range of approximately one-third of the total settlement”).

1 and it constitutes fair compensation for undertaking complex, risky, expensive, and time-
2 consuming litigation on a contingent basis and compensates Class Counsel for their efforts, as well
3 as the result achieved for the benefit of the Class. Numerous state and federal courts in California
4 routinely approve fee requests equal to or greater than 33% of the common fund. Indeed, courts
5 have found that an award of 33% of the common fund represents the “benchmark” in California.¹²
6 In short, Plaintiff counsels’ fee request of \$50,000 (33.33% of the GSA) is in line with awards in
7 similar cases in California and nationwide and demonstrates that Plaintiff’s counsels’ fee request
8 is consistent with market rates and is reasonable.

9 **c. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee**

10 Plaintiff counsels’ fee request is reasonable when calculated using the lodestar method.
11 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably
12 spent on the case and the reasonable hourly compensation of the attorney. *Serrano III*, 20 Cal. 3d
13 at 48. The court then may enhance this lodestar figure by a “multiplier” to account for a range of
14 factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of
15 success achieved. *Id.* at 49; *see also Ketchum v. Moses*, 24 Cal.4th 1122, 1132-36 (2001); *Thayer*
16 *v. Wells Fargo Bank*, 92 Cal.App.4th 819, 834 (2001), “[t]here is no...rule limiting the factors
17 that may justify an exercise of judicial discretion to [adjust the] lodestar”. Courts “routinely
18 enhance[] the lodestar to reflect the risk of non-payment in common fund cases.” *Vizcaino v.*
19 *Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051; *Graham v. DaimlerChrysler Corp.* (2004)
20 34 Cal.4th 553, 579 (“One of the most common fee enhancers [...] is for contingency risk.”) Such
21 an enhancement “mirrors the established practice in the private legal market of rewarding
22 attorneys’ fees for taking the risk of nonpayment by paying them a premium over their normal
23 hourly rates for winning contingency cases.” *Vizcaino, supra*, 220 F.3d at 1051; *Ketchum*, 24
24 Cal.4th at 1132-33. A risk multiplier also serves to bring the financial incentives for enforcing
25 important rights “into line with incentives [attorneys] have to undertake claims for which they are

26
27 ¹² *Smith v. CRST Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 10-CV-1116- IEG WMC, 2013 WL 163293, *5 (“These
28 percentages compare favorably with both California (33%) and federal (25%) benchmarks.”); *Dennis v. Kellogg Co.*
(S.D. Cal. Nov. 14, 2013) 09-CV-1786-L WMC, 2013 WL 6055326, at *7 (“This percentage compares favorably with
both California (33%) and federal (25%) benchmarks and the requested fee compares well with a lodestar cross-check
as well.”).

1 paid on a fee-for-service basis. *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to
2 enhance or reduce the lodestar, California courts take into account multiple factors, including: the
3 time and labor required; the skill requisite to perform the legal services properly; the preclusion of
4 other employment by the attorney due to the acceptance of the case; the contingent nature of the
5 fee; the amount involved and results obtained; the experience, reputation, and ability of the
6 attorney; and awards in similar cases. *Cates v. Chiang* (2013) 213 Cal.App.4th 791, 822.

7 As of the date of filing this Motion for Final Approval, Plaintiff's counsel has worked a
8 total of 444 hours on this case and calculated the base lodestar at \$239,900 at rates reflecting those
9 currently earned in the marketplace. Mara Decl. ¶¶ 26-28, 30-31, 33-34, 36-37; Exhibit 1. All of
10 the work and tasks performed by Plaintiff's counsel were reasonable and necessary to the
11 prosecution of this case. Mara Decl. ¶¶ 26-28, 30-31, 33-34, 36-37. As Class Counsel's lodestar
12 fee is in excess of their fee request, a multiplier on their lodestar fee is not sought herein. Mara
13 Dec. ¶ 38. In fact, the requested fee results in a so-called "negative multiplier" which suggests the
14 percentage of the fund amount is reasonable and fair. *See Chun-Hoon v. McKee Foods Corp.* (N.D.
15 Cal. 2010) 716 F.Supp.2d 848, 854; *In re Portal Software, Inc. Securities Litigation* (N.D. Cal.
16 2007) 2007 U.S. Dist. LEXIS 88886, 2007 WL 4171201, at *16.

17 **d. Class Counsel's Hourly Rates Are Reasonable**

18 Plaintiff's counsels' hourly rates are between \$400 and \$750 and are in line with rates
19 typically approved in wage and hour class action litigation and which rates have been approved by
20 Courts in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San
21 Diego County Superior Courts.¹³ A reasonable hourly rate is the prevailing rate charged by
22 attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc v. Drexler*
23 (2000) 22 Cal. 4th 1084, 1095. When determining a reasonable hourly rate, courts may consider
24 factors such as skill and experience, the nature of the work performed, the relevant area of expertise
25 and the attorney's customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal.
26 App. 4th 629, 632.

27 ¹³ Mara Dec. ¶¶ 1-8, 26-28, 30-31, 33-34, 36-37; Exhibit 2 Westlaw Court Express's Legal Billing Report, Volume
28 14, Number 3, California Region for December 2012; Exhibit 3, 2014 Declaration of Richard M. Pearl in *Hohnbaum*
v. Brinker Restaurant Corp. SDSC GIC834348; Exhibit 4, 2012 National Law Journal Survey of Hourly Billing Rates
for Partners and Associates.

1 Plaintiff's counsels' skill and experience support their hourly rates. Their practice is limited
2 exclusively to litigation, focusing on the representation of employees in wage and hour and
3 consumer class action matters. Mara Decl. ¶¶ 1-8, 29, 32, 35. As prominent attorneys in the field
4 of wage and hour class action litigation, Plaintiff's counsel continually monitors the prevailing
5 market rates charged by both defense and plaintiff law firms and set the billing rates of their
6 attorneys and paralegals to be consistent with the prevailing market rates in the private sector for
7 attorneys and staff of comparable skill, qualifications and experience. Other wage and hour
8 attorneys working as class counsel before California courts charge comparable if not higher rates.¹⁴
9 Therefore, as they are in line with those of the relevant community, Class Counsels' hourly rates
10 are reasonable.

11 **e. Class Counsels' Total Hours are Reasonable**

12 In determining a lodestar fee, reasonable hours include, in addition to time spent during
13 litigation, the time spent before the action was filed, including time spent interviewing clients,
14 investigating the facts and the law, and preparing the initial pleadings. *See New York Gaslight*
15 *Club, Inc. v. Carey* (1980) 447 U.S. 54, 62. The fee award should include fees incurred to establish
16 and defend the attorneys' fee claim. *Serrano v. Priest* (1982) 32 Cal.3d 621, 639.

17 To date, Plaintiff's Counsel has expended a total of 444 hours litigating this case. The work
18 performed to achieve a settlement that will provide valuable consideration to the Class, averaging
19 an estimated payment of \$331.72¹⁵, is summarized by Class Counsel in the declarations submitted
20 herewith. Mara Dec. ¶¶ 26-28, 30-31, 33-34, 36-37; Exhibit 1. Counsel's many tasks, in summary
21 form, included the following: pre-filing investigation and legal research; communicating with the
22 class representatives; interviewing and meeting with putative Class Members; research and
23 investigation of California's ever evolving wage and hour laws; investigation into Defendant's
24 pay-structures and policies for its hourly employees; drafting and filing pleadings; numerous
25 interoffice discussions; review documents and discovery responses produced by Defendant;

26
27 ¹⁴ Mara Dec. ¶¶ 28, 31, 34, 37; Exhibit 2 Westlaw Court Express's Legal Billing Report, Volume 14, Number 3,
28 California Region for December 2012; Exhibit 3, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker*
Restaurant Corp. SDSC GIC834348; Exhibit 4, 2012 National Law Journal Survey of Hourly Billing Rates for
Partners and Associates.

¹⁵ See Butler Dec. ¶ 12.

1 numerous conferences with Defendant; review Defendant's discovery responses; analyze records
2 produced by Defendant relating to its policies, pay-structures, driver logs, and timekeeping and
3 payroll; prepare for and depose Defendant's PMQ witnesses; prepare for and defend Plaintiff's
4 deposition; draft mediation brief and damage exposure models; attend mediation; draft motion for
5 class certification; prepare for and argue at class certification hearing; review Defendant's motion
6 for summary judgment; draft settlement agreement and class notice; draft motion for preliminary
7 approval; draft declarations in support of preliminary approval; prepare for and appear at
8 preliminary approval hearing; review weekly reports from the settlement administrator; draft
9 motion for final approval; draft declarations in support of final approval. All tasks and work
10 performed were reasonable and necessary to the prosecution of this case. The work performed was
11 justified in light of the result achieved. Mara Dec. ¶¶ 26-28, 30-31, 33-34, 36-37.

12 **f. Costs of Litigation**

13 Class Counsel seeks reimbursement of the litigation costs and expenses of \$15,000. These
14 costs were all reasonable and necessary to the prosecution of this case and the results achieved and
15 are fair, and reasonable. Mara Dec. ¶ 40, Exhibit 1.

16 **VI. THE CLASS REPRESENTATIVE ENHANCEMENT AWARD/GENERAL
17 RELEASE PAYMENT IS REASONABLE**

18 Class Counsel seeks approval of a service award to named Plaintiff/Class Representative,
19 Miguel Hernandez, of \$10,000. The requested service award is reasonable in light of the general
20 releases of all claims Plaintiff agreed to, greater than the release given by Class Members, the
21 benefits Plaintiff conferred upon the entire Class, resulting in payments to all Class Members, the
22 time spent assisting counsel with the investigation and prosecution of these claims, commitment
23 to responding to anticipated discovery and to his anticipated deposition, sitting for a full day
24 deposition, and consenting to the proposed Settlement. Mara Dec. ¶ 41.

25 Courts routinely approve service payments, or incentive awards, to compensate a named
26 plaintiff for the services he or she provides and the risks he or she incurs during class litigation.
27 *See In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393; *see also Bell v.*
28 *Farmers Ins. Exch.* (2004) 11 Cal.App.4th 715, 725-26 (upholding services payments to class
representatives); *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th

399, 412 (upholding incentive awards to plaintiffs that, when added to their individual recoveries, amounted to more than twice as much as the average payment to class members). Courts have regularly and routinely granted approval of settlements containing such enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003).¹⁶ In Class Counsel’s experience, the typical enhancement award in wage and hour class action settlements ranges from \$5,000 to \$75,000. Very commonly there is more than one class representative who receives an award in the above range. Mara Decl. ¶ 42.

The requested enhancement is appropriate and reasonable and unopposed by Defendant. This payment is made, in part, in exchange for Mr. Hernandez providing Defendant with a general release of his claims. This general release is far greater than the release signed by class members. In addition, in to support of his enhancement request, Mr. Hernandez submitted a declaration detailing the efforts he expended on behalf of the class in order to advance this case to its successful conclusion. *See generally* Declaration of Miguel Hernandez. There is no question that this case would not have reached the same result but for Mr. Stone’s involvement and input at all stages of the litigation.

As representative for the absent class members, Mr. Hernandez risked a potential judgment taken against himself for attorneys’ fees and costs if this matter had not been successfully concluded. *See Early v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000) (losing party is liable for the prevailing party’s costs); California Labor Code § 218.5 (prevailing party is entitled to attorneys’ fees). Mr. Hernandez risked having a cost bill entered against him leaving him ultimately liable for potentially hundreds of thousands of dollars in the unexpected possibility that Plaintiff’s counsel did not meet their obligation to cover those costs.

Unfortunately, there have been several judgments entered against class representatives, e.g. *Koehl v. Verio, Inc.* 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for the

¹⁶ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (“present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril, a substantial enhancement award is justified”); *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) (“We also think there is something to be said for rewarding those drivers who protect and help to bring rights to a group of employees who have been the victims of discrimination.”).

1 Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, 2007 U.S.
2 Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost on summary
3 judgment, after the case was certified, the named Plaintiff was assessed costs in the sum of
4 \$56,788.). The risk of payment of Defendant's costs, in itself alone, is a sufficient basis for an
5 award of the requested enhancement sum. Few individuals are willing to take this risk, and it is
6 clear that the appointed Class Representative here championed a cause on behalf of others with
7 potentially huge monetary risks.

8 Additionally, it is common knowledge that the modern-day work force is quite mobile,
9 with employees holding several jobs in a career during their lifetime. It is also true that prospective
10 employers in this computer, high-tech age "Google" and/or do extensive background checks and
11 have access to Court databases to see if applicants have ever filed a lawsuit or have ever been sued.
12 Here, Mr. Hernandez litigated against Defendant for a substantial sum of money by his courage to
13 step forward to vindicate not only his own rights but also, those of the similarly situated
14 individuals, all of whom will now receive substantial payments due to the initiation of this action.
15 This matter took place in an industry where everyone knows everyone. Such conduct will not be
16 lost on a prospective employer who has to choose between an applicant who has never sued an
17 employer and one who has done so. The requested enhancement far from compensates Mr.
18 Hernandez for opportunities he may lose in the future because of the exercise of a Constitutional
19 right to petition the courts for redress of a grievance.

20 The enhancement request is modest for the work performed, risks undertaken for payment
21 of fees and costs if this case had not been successfully concluded, stigma on future employment
22 opportunities, and the benefits all members of the class as well as all current and future class
23 members will enjoy as a result of Mr. Hernandez's efforts. Thus, the Court should approve the
24 request.

25 **VII. THE ADMINISTRATION COSTS ARE REASONABLE**

26 The Parties agreed to hire Simpluris as the Administrator, and the Court approved this
27 choice. The Administrator was responsible for formatting, printing and mailing the Notice. It was
28 also responsible for updating addresses and re-mailing Notices returned as undeliverable,

1 responding to Class Member inquiries, answering questions from Counsel for the Parties, and
2 providing a declaration to document its duties and responsibilities under the settlement. Plaintiff
3 now requests that the Court finally approve the \$6,249.00 (estimated not to exceed \$7,500) fee to
4 Simpluris for services rendered and to be rendered. Butler Dec. ¶ 16.

5 Following the grant of final approval, the Administrator's duties will continue in order to
6 calculate and mail the Individual Settlement Payment checks to Class Members, perform tax
7 reporting obligations, disburse other payments as ordered by the Court, and perform such other
8 duties as set forth in the Settlement Agreement. Simpluris' fee of \$6,249.00 for services rendered
9 and to be rendered is fair and reasonable and should be granted.

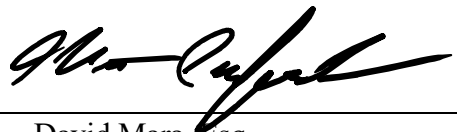
10 **VIII. CONCLUSION**

11 Based on the foregoing, Class Counsel respectfully requests the Court grant final approval
12 of the Class Action Settlement, award Class Counsel's attorneys' fees in the sum of \$50,000 and
13 litigation costs of \$15,000, award to the named Plaintiff an enhancement general release payment
14 in the sum of \$10,000, award to Simpluris, Inc. \$6,249.00 for settlement administration services,
15 and approve of a payment to the LWDA in the amount of \$3,750.

16 Respectfully submitted,

17 Dated: December 8, 2020

MARA LAW FIRM, PC

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19

20 David Mara, Esq.
21 Matthew Crawford, Esq.
22 Attorneys for Plaintiff
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