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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 LUIS LOPEZ YANEZ, KAYASONE
14 MUONGKHOT and JULIO RUBIO on
15 behalf of themselves and all others
16 similarly situated,

17 Plaintiffs,

18 v.

19 HL WELDING, INC.,
20

21 Defendant.
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CASE NO. 3:20-CV-01789 BEN MDD

**NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION, FLSA COLLECTIVE
ACTION AND PRIVATE
ATTORNEYS' GENERAL ACT
SETTLEMENT**

Hearing Date: July 12, 2021
Time: 10:30 a.m.
Location: Courtroom 5A, 5th Fl.
Judge: Hon. Roger T. Benitez

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PLEASE TAKE NOTICE that on July 12, 2021 at 10:30 a.m., or as soon thereafter as the matter may be heard, before the Hon. Roger T. Benitez, United States District Court for the Southern District of California, located at 221 West Broadway, San Diego, California in Courtroom 5A, 5th Floor, Plaintiffs Luis Lopez Yanez, Kayasone Muongkhhot and Julio Rubio (“Plaintiffs”) will and hereby do respectfully move this Court for preliminary approval of the proposed Collective, Class action and Private Attorney General Act settlement.

Plaintiffs request that this Court enter an Order (1) conditionally certifying the Rule 23 settlement class; (2) granting preliminary approval to the proposed Class and Collective Action Settlement; (3) appointing Plaintiffs as class representatives of the Class and as representative Plaintiffs for the collective action; (4) appointing Plaintiffs' attorneys as Class Counsel; (5) appointing Simpluris, Inc. ("Simpluris") as Settlement Administrator; (6) approving the form, content, and method of distribution of the Notice of Class Settlement and Estimated Share Form; (7) scheduling a hearing regarding final approval of the proposed Settlement, Class Counsel's request for attorneys' fees and costs, and Service Awards to the Named Plaintiffs.

This motion is made on the ground that proposed settlement is the product of arm's length negotiations by qualified class counsel with the assistance of an experienced and renowned neutral mediator. Its terms are fair, reasonable and adequate in light of the risks the Plaintiffs and Class Members face in connection with continuing to litigate liability, and proof of damages. Defendant does not oppose this motion.

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities; the Declaration of David Pogrel and Exhibits thereto; the Proposed Order; the Court’s record of this action; all matters of which the Court may take notice, and any other such evidence, briefing, or argument

1 that may be presented to the court at or before the time of hearing.

2 DATED: June 4, 2021

Respectfully submitted,

3 **LEONARD CARDER, LLP**

4
5 By: /s/ David Pogrel
David Pogrel

6 *Attorneys for Plaintiffs and the Putative Class*
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL**

3 **I. INTRODUCTION**

4 Plaintiffs Luis Lopez Yanez, Kayasone Muongkhot and Julio Rubio
5 (“Plaintiffs” or “Class Representatives”), seek preliminary approval of an \$858,000
6 class, collective and Private Attorneys General Act (“PAGA”) representative action
7 settlement on behalf of approximately 600 current and former Tradespeople for HL
8 Welding, Inc. (“HL Welding” or “Defendant”). This proposed settlement is intended
9 to resolve this action and also a related action currently pending in the Superior
10 Court of San Diego entitled *Muongkhot, et. al. v. HL Welding, Inc.*, (San Diego Sup.
11 Ct., Case No. 37-2019-00054150-CU-OE-CTL) (“*Muongkhot* Action”). The
12 settlement resolves California and federal Fair Labor Standards Act (FLSA)
13 overtime and related claims.

14 The gravamen of Plaintiffs’ Complaint in this action and the *Muongkhot*
15 Action is that HL Welding has used a pay scheme to deprive Tradespeople of wages
16 by paying a “per diem” in addition to hourly wages, but not including the *per diem*
17 rate in its calculation of overtime pay. As a result, HL Welding has not paid overtime
18 using the proper “regular rate of pay” required by the FLSA and California law.
19 Plaintiffs further allege derivative claims that HL Welding failed to provide accurate
20 wage statements, and that certain Tradespeople they are due waiting time and PAGA
21 penalties. The settlement provides substantial relief and there will be no submission
22 of claims required of any workers to participate in the settlement.

23 The proposed settlement is the product of arm’s length negotiations by
24 experienced counsel with a neutral and well-regarded mediator. It is fair, reasonable
25 and adequate in light of the risks the Plaintiffs and Tradespeople face in connection
26 with continued litigation over class membership, liability, arbitration agreement
27 disputes, proof of damages, and other defenses asserted by Defendant. Accordingly,
28 Plaintiffs request that the Court (1) conditionally certify the Rule 23 settlement class;

(2) grant preliminary approval to the proposed class and collective action settlement; (3) appoint Plaintiffs as representatives of the Class; (4) appoint Plaintiffs' attorneys as Class Counsel; (5) appoint Simpluris, Inc. ("Simpluris") as Settlement Administrator; (6) approve the form, content, and method of distribution of the Notice of Class and PAGA Settlement and Estimated Share Form; and (7) schedule a hearing regarding final approval of the proposed Settlement, Class Counsel's request for attorneys' fees and costs, and service awards to the Plaintiffs.

II. BACKGROUND

A. Plaintiffs' Factual Allegations

HL Welding is a staffing agency that provides workers to maritime construction contractors for work building marine vessels. HL Welding's primary operations are in San Diego, but it has also employed Tradespeople on shipyard projects in Alabama, Florida, Mississippi, Pennsylvania, Virginia, and Washington. The Tradespeople who most commonly perform work for HL Welding are Welders, Ship Fitters, Pipefitters, Sheet Metal workers, Electricians, Machinists, Riggers and Tackers. Plaintiffs all worked for HL Welding on projects in San Diego.¹

HL Welding has had a common policy of compensating Tradespeople with a *per diem* rate, in addition to their hourly rate of pay, throughout the liability period. Prior to February 29, 2016, HL Welding paid the *per diem* hour-for-hour based on total hours worked. Each Tradesperson received a base hourly wage of \$14 to \$20 per hour, plus a *per diem* of \$18 per hour. Effective February 29, 2016, HL Welding implemented a new pay plan that adjusted the *per diem* to a pro-rated daily payment. The new *per diem* was initially set at \$144/day, equivalent to the \$18 hourly *per diem* rate under the prior policy (\$18/hour x 8 hours/day = \$144/day). Tradespeople who worked over six hours per day received the full \$144. Those working less than six hours were subject to a pro-rata reduction based on an eight-

¹ Angel Lopez Yanez worked as Pipefitter and Sheet Metal worker, Kayasone Muongkhot was a Ship Fitter, and Julio Rubio was a Welder.

1 hour day. HL Welding later increased the *per diem* amount from \$144/ per day to
2 \$150/ per day.

3 HL Welding has never considered the *per diem* payment in calculating the
4 “regular rate of pay,” and thus has not paid overtime premiums on this portion of any
5 Tradespersons’ wages. HL Welding justifies its non-payment of overtime by
6 claiming that the *per diem* was paid as a non-taxed “reimbursement” for travel
7 expenses paid to employees who reside outside the local work area.

8 **B. Procedural Background**

9 On October 10, 2019, Plaintiff Muongkhot filed a class action complaint
10 against HL Welding in San Diego Superior Court (“*Muongkhot* Action”). See
11 Declaration of David Pogrel in Support of Plaintiffs’ Motion for Preliminary
12 Approval (“Pogrel Decl.”), ¶¶ 15-16. The initial complaint was filed on behalf of a
13 putative class of Welders, Ship Fitters, and other similarly situated employees
14 employed in California on or after October 10, 2015. As the statute of limitations had
15 run on several potential claims because of when Muongkhot left his employment at
16 HL Welding, his initial case was limited to a claim for violations of California’s
17 Unfair Competition Law – Business and Professions Code 17200, *et. seq. Id.* On
18 February 10, 2020, Plaintiff Julio Rubio retained Plaintiffs’ counsel with the
19 intention of being a Plaintiff in the *Muongkhot* Action. Pogrel Decl., ¶ 18.

20 On February 12, 2020, following Defendant’s answer in the *Muongkhot*
21 Action and service of Plaintiff Muongkhot’s initial discovery, Defendant’s counsel
22 first contacted Plaintiffs’ counsel to propose mediation. Pogrel Decl., ¶ 19. At that
23 time Defendant’s counsel further revealed that many members of the putative class
24 had signed arbitration agreements with HL Welding that included a class action
25 waiver which, in the view of Defendant, precluded their participation in any class
26 action as either a plaintiff or class member. *Id.*

27 In late February 2020, Defendant produced a signed arbitration agreement for
28 Mr. Rubio that Plaintiffs’ counsel determined would likely preclude him from

1 serving as a class representative, but he could serve as a representative plaintiff for a
2 claim under PAGA. Pogrel Decl., ¶ 20. On February 13, 2020, Plaintiffs' counsel
3 initiated the 65-day administrative exhaustion process with the California Labor and
4 Workforce Development Agency (LWDA) that was required before Mr. Rubio could
5 join the *Muongkhot* Action as a PAGA representative plaintiff. *Id.*

6 During the March to June 2020 period, the Parties continued to explore
7 mediation and negotiate informal discovery, as Plaintiffs' counsel provided repeated
8 extensions on Defendant's formal discovery responses and initial document
9 production. Pogrel Decl., ¶ 22. The negotiations over informal discovery included
10 Plaintiff seeking the contact information for the putative class, in addition to the
11 documents and other information counsel believed was relevant to become informed
12 about HL Welding's potential defenses in the *Muongkhot* Action. *Id.* Plaintiff also
13 sought class wide data to determine the scope of Defendant's potential exposure and
14 information about the arbitration agreements Defendant claimed to have executed
15 with a number of putative class members. *Id.* Also in June 2020, Plaintiffs' counsel
16 proposed that HL Welding agree to the terms of a tolling agreement that would pause
17 any statutes of limitation on any overtime claims for class members and enable the
18 parties to discuss settlement without additional litigation. Pogrel Decl., ¶ 23.

19 In June 2020, Following several months of negotiation about the parameters of
20 a mediation, Defendant's counsel informed Plaintiffs' counsel that Defendant would
21 only consider mediation of claims by Tradespeople who the company claimed had
22 not signed arbitration agreements. Pogrel Decl., ¶ 24. Defendant also refused at that
23 time to sign the tolling agreement that Plaintiffs had proposed and agreed to provide
24 only limited information for negotiations. *Id.* As a result, on June 19, 2020 Plaintiffs
25 decided to forgo mediation and continue the litigation. *Id.*

26 Litigation of the *Muongkhot* Action during the April to July 2020 period was
27 complicated extensively by COVID-19. Pogrel Decl., ¶ 22. These complications
28 included COVID-19 outbreaks among Defendant's employees and significant other

1 economic impacts that limited Defendant's engagement in the litigation. Plaintiffs'
2 counsel continued its investigation during this period and was retained by a number
3 of additional employees seeking to join the *Muongkhot* Action. *Id.*

4 In July 2020, Plaintiffs sought a stipulation in the *Muongkhot* Action to add
5 additional plaintiffs and provide an expanded class definition to include all class
6 positions in addition to Welders and Shipfitters. Pogrel Decl., ¶ 25. Defendant
7 declined to stipulate, thus requiring that Plaintiffs file a Motion for Leave to Amend.
8 Due to the court's calendar, Plaintiffs' motion could not be heard until October 23,
9 2020. *Id.*

10 On September 11, 2021, Plaintiff Yanez filed the instant action. Pogrel Decl.,
11 ¶ 26. While the allegations here are almost identical to the *Muongkhot* Action,
12 Plaintiff and counsel viewed this additional case as necessary for three reasons. First,
13 Defendant had refused to sign a tolling agreement that could have precluded the need
14 to file the additional litigation for additional putative class members. *Id.* Second, the
15 new case expanded the class definition, necessary in the event that the court in the
16 *Muongkhot* Action denied Plaintiffs' motion for leave that would not be decided for
17 at least six more weeks. *Id.* Third, this action expanded the claims to include
18 employees outside California, asserting a collective action under the FLSA. *Id.*

19 On October 21, 2020, the court in the *Muongkhot* Action issued a tentative
20 ruling granting Plaintiffs' Motion for Leave to Amend. Pogrel Decl., ¶ 28. Following
21 this ruling, Defendant again proposed that the parties engage in mediation, now with
22 further expanded parameters to cover employees with claims under PAGA
23 (including those who signed arbitration agreements) and non-California employees
24 with FLSA claims who did not sign arbitration agreements. *Id.*

25 During October and November 2020, the Parties further negotiated the
26 parameters for mediation and also the discussed the means by which Plaintiffs'
27 counsel could access class member contact information and data required for
28 mediation. Pogrel Decl., ¶ 29. The parties reached agreement on the parameters in

1 early December 2020, including the selection of experienced employment law
2 mediator Scott Markus. *Id.* Due to scheduling conflicts, the mediation was scheduled
3 for March 24, 2021. *Id.*

4 The parameters for mediation included that negotiations would focus on three
5 groups of employees: (1) a California subclass who did not sign arbitration
6 agreements and worked on or after October 15, 2019 (“California subclass”); (2) an
7 FLSA collective who did not sign arbitration agreements and worked on or after
8 September 15, 2017 (“FLSA subclass”); and (3) a PAGA representative group who
9 have worked on or after February 13, 2019, irrespective of whether or not they
10 signed an arbitration agreement (“PAGA Recipients”). Categories (2) and (3), above,
11 are in addition to the employees for whom Defendant agreed to negotiate a potential
12 settlement in June 2020. Pogrel Decl., ¶ 30.²

13 The Parties and counsel prepared for and participated in a full day of video
14 mediation on March 24, 2021. At the end of the mediation session, the Parties agreed
15 upon a settlement in concept, after the mediator issued a mediator’s proposal, and
16 signed a Memorandum of Understanding. Pogrel Decl., ¶ 33. Further negotiations
17 followed regarding the terms of the long-form settlement agreement and notice
18 documents. These negotiations, and all disputed issues, were resolved on June 3,
19 2021 and resulted in a signed settlement agreement. *Id.*

20 **III. PROPOSED SETTLEMENT**

21 The details of the settlement are set forth in the Joint Stipulation Settlement of
22 Class Action and Collective Action Settlement and Release Agreement and Release
23 (“Settlement Agreement”). See Pogrel Decl., Exh. 1. A summary is set forth below:
24
25

26 ² To facilitate mediation, Defendant also agreed to the terms of a tolling agreement
27 that meant Plaintiffs did not need to file any amended complaints in either this action
28 or the *Muongkhot* Action, and that Plaintiff Yanez also did not need to file his
motion for collective action notice. Pogrel Decl., ¶ 31.

1 **A. Settlement Class and Subclass Definitions**

2 HL Welding agrees, for settlement purposes only, to certification of the
3 following class and two subclasses:

4 “Settlement Class” and “Settlement Class Members” shall mean all
5 current and former employees of HL Welding who were employed as
6 Welders, Ship Fitters, Pipefitters, Sheet Metal workers, Electricians,
7 Machinists, Riggers and Tackers at any time from October 1, 2015 and June
8 30, 2021 and who have not signed arbitration agreement with
9 class/collective action waiver with HL Welding and who fall within one of
10 the following two subclasses:

11 California Subclass: All current and former employees of
12 HL Welding who were employed as Welders, Ship Fitters,
13 Pipefitters, Sheet Metal workers, Electricians, Machinists,
14 Riggers and Tackers by Defendant in California at any
15 time between October 1, 2015 and June 30, 2021 (the
16 “California Subclass Period”) and who have not signed
17 arbitration agreement with class/collective action waiver
18 with HL Welding.

19 FLSA Subclass: All current and former employees of HL
20 Welding who were employed as Welders, Ship Fitters,
21 Pipefitters, Sheet Metal workers, Electricians, Machinists,
22 Riggers and Tackers by Defendant in states other than
23 California at any time between September 15, 2017 and
24 June 30, 2021 (the “FLSA Subclass Period”) and who
25 have not signed arbitration agreement with
26 class/collective action waiver with HL Welding.

27 The proposed class and subclass definitions are different from the definitions
28 in the operative complaint in the following respects: the revised definitions (1)

1 finalize the Class Period end date of June 30, 2021, (2) create two subclasses, and (3)
2 clarify that only Tradespeople who did not sign arbitration agreements are included
3 in the class settlement and subject to the class release. That is, any Tradesperson who
4 signed an arbitration agreement retains his/her right to bring an individual arbitration
5 for the overtime and related claims at issue in this litigation.

6 Separately, a third group of employees – the PAGA Recipients – is entitled to
7 collect from the PAGA allocation of the settlement, with a correspondingly narrow
8 release of claims. The PAGA Recipients are defined as follows:

9 “PAGA Recipient(s)” means all means all current and former
10 employees of Defendant who were employed as Welders, Ship Fitters,
11 Pipefitters, Sheet Metal workers, Electricians, Machinists, Riggers and
12 Tackers by Defendant in California at any time between February 13, 2019
13 and June 30, 2021 (the “PAGA Period”).

14 Based on HL Welding records, reflected in Exhibits C – E to the Settlement
15 Agreement, there are 75³ individuals in the California Subclass, 24 in the FLSA
16 Subclass and 514 in the PAGA Recipients. Settlement Agreement ¶ 4, Exhs. C - E.

17 **B. Settlement Terms Plan of Distribution**

18 A summary of the settlement terms is as follows:

- 19 1. Settlement Fund: Defendant to create a non-reversionary \$858,000
20 Gross Settlement Amount. In addition, HL Welding will separately pay
21 for the “employer’s share” of employment taxes (FICA, FUTA, SDI) on
22 any payments classified as W-2 income or wages, over and above the
23 Gross Settlement Amount.
- 24 2. Class Representative Service Payments: Plaintiffs request that \$15,000
25 from the Gross Settlement Amount be set aside for class representative
26 service awards for Plaintiffs, with each Plaintiff allocated \$5,000 for his
27

28 ³ 74 listed in Exhibit A, plus Plaintiff Julio Rubio.

1 service to the class. These amounts are to compensate Plaintiffs for (1)
2 the risks they have incurred on behalf of the Settlement Class in this
3 Action, (2) the time and effort they have spent, including assisting in the
4 investigation and consulting with counsel regarding all aspects of the
5 litigation and settlement, and (3) the releases they are providing
6 pursuant to the Settlement Agreement, which are broader than those of
7 other Class Members.

8 At the final approval hearing, Plaintiffs' counsel will move the
9 Court for service awards totaling \$15,000. Counsel will provide
10 evidence and support for the requested service awards at the time they
11 submit their fee application. Settlement Agreement, ¶¶ 57-58.

- 12 3. Class Counsel's Fees and Expenses – Plaintiffs request that the Court
13 preliminarily approve their attorneys' fees in the amount of one-third
14 (33-1/3%) of the Gross Settlement Amount, or \$286,000, plus litigation
15 expenses up to a maximum of ten thousand dollars (\$10,000). Counsel
16 will provide evidence and support for the requested fees and expenses at
17 the time they submit their fee application. Settlement Agreement, ¶ 62.
- 18 4. PAGA Penalty Payments– The parties have designated \$100,000 of the
19 Gross Settlement Amount to resolve claims under PAGA. Thus, under
20 Labor Code Section 2699(i), 75 percent, or \$75,000 of the penalty
21 payment will be paid to the California Labor and Workforce
22 Development Agency. The remaining \$25,000 of the PAGA Payment
23 will be distributed to the 514 PAGA Recipients. Plaintiffs will provide a
24 copy of the Settlement Agreement to the LWDA at the time the
25 Agreement is submitted to the Court for approval per Cal. Labor Code
26 §2699(l)(2). Agreement, ¶¶ 63-64.
- 27 5. Net Settlement Fund – The Net Settlement Fund – the amount that will
28 remain of the Settlement after deduction of amounts for awards of

attorneys' fees and costs, notice and settlement administration expenses, Named Plaintiffs' service awards, and PAGA payment – will total approximately \$435,000.⁴ This amount will be distributed to Class Members on a pro-rata basis (based on workweeks in the applicable statutory periods) following Defendant's second of three fund deposits, as described in paragraphs 8 and 9, below.

6. No Claims Made Procedure: Settlement Class Members will not be required to file claims in order to receive their share of the Net Settlement Fund. They will however have the opportunity to correct any errors in HL Welding's records to their number of weeks worked as Tradespeople in California. Agreement, ¶ 87.
7. Settlement Administration – The Settlement Administrator will be Simpluris, Inc. The Settlement Administrator will, among other things, independently review the Defendant's records as to the workweeks of the Settlement Class Members and pay periods by PAGA Recipients and calculate the amounts due to Settlement Class Members and PAGA Recipients; send to the Class Members and PAGA Recipients the Class Action and PAGA Notice and the Estimated Share Form; take appropriate steps to trace and locate missing individuals; respond to inquiries; receive and independently review and resolve any challenges and associated documentation; draw and distribute checks to Settlement Class Members, PAGA Recipients, and the LWDA; administer the Settlement Fund; prepare and file any necessary tax reporting for the Settlement Fund; and report to the Court on the notice/opt out process and payment of the Settlement Fund. All disputes relating to the Settlement Administrator's performance of its duties shall be referred to

⁴ Pogrel Decl., ¶ 40.

the Court, if necessary, which will have continuing jurisdiction over the terms and conditions of the Settlement Agreement until all payments and obligations contemplated by the Settlement Agreement have been fully carried out. Agreement, ¶¶ 77-79.

8. Transfer and Deposit of Settlement Funds: Defendants shall transfer the settlement funds to the Settlement Administrator in three installment payments as follows:

a. Defendant shall make a first payment/installment of \$286,000, plus fifty percent (50%) of any amounts required for Defendants' share of employer-side payroll taxes, no later than 10 calendar days after the date on which the Court grants final approval of the settlement;

b. Defendant shall make a second payment/installment of \$286,000, plus fifty percent (50%) of any amounts required for Defendants' share of employer-side payroll taxes, no later than 50 calendar days after the date on which the Court grants final approval of the settlement; and

c. Defendant shall make a third payment/installment of \$286,000, intended to cover attorney's fees' (if approved), no later than 300 calendar days after the date on which the Court grants final approval of the settlement. Agreement, ¶ 69.

9. Timing of Distribution of Settlement Funds: The Settlement Agreement includes the following schedule for distribution of the settlement funds, if the Court grants Plaintiffs' requests for Plaintiff service awards and Counsel's fees and costs:

a. Within 150 days after final approval (following deposit 2, above), payments to be distributed to the Settlement Class Members, PAGA Recipients, California LWDA, Settlement Administrator,

1 Plaintiffs (service awards) and Class Counsel (expenses only);
2 and

3 b. Within 300 days after final approval (following deposit 3, above),
4 payment to be distributed to Class Counsel for attorneys' fees.

5 Agreement, ¶ 70.

6 10. Tax Treatment of Settlement Payments: Individual Payment Amounts
7 to Class Members will be allocated as follows: 26% will be allocated to
8 wages, subject to tax withholdings; 34% allocated to interest; and 40%
9 allocated to penalties. No taxes will be held for penalty or interest
10 allocations. The Settlement Administrator shall issue a Form 1099-INT
11 for the interest allocation, a Form 1099-MISC for the penalty allocation,
12 and a Form W-2 for the wage allocation. Agreement, ¶ 71.

13 11. Class Notice and Notice Procedure – A Notice of Class Action and
14 PAGA Settlement (“Notice”) in substantially the form attached as
15 Exhibit A to the parties’ Settlement Agreement, and as approved by the
16 Court, shall be sent by the Settlement Administrator to the Class
17 Members by First Class U.S. Mail. Accompanying the Notice will be an
18 Estimated Share Form in substantially the form attached as Exhibit B to
19 the Settlement Agreement, and as approved by the Court. The Notice
20 and Estimated Share Form are collectively referred to herein as the
21 “Notice Packet.” Any returned Notice Packets from this mailing with
22 forwarding addresses will be used by the Settlement Administrator to
23 forward the Notice Packet to the Settlement Class Members. If there is
24 no forwarding address, the Settlement Administrator will do a “skip
25 trace” search for a new address and re-mail the Notice Packet within
26 five (5) calendar days. Settlement Agreement, ¶¶ 80-84.

27 12. Scope of Release – Class Members – The release for the Settlement
28 Class Members corresponds to the operative claims in the Complaint,

1 releasing claims asserted, or that could have been asserted based on the
2 alleged facts, arising from and related to Defendant's alleged failure to
3 properly pay overtime compensation, provide accurate wage statements,
4 and pay all wages due upon termination. The Settlement Class Member
5 release also includes related claims brought pursuant to Cal. Business
6 and Professions Code sections 17200 *et seq.* Settlement Agreement, ¶¶
7 100-101.

8 13. Scope of Release – PAGA Recipients – The scope of the release for the
9 PAGA Recipients for the proposed Settlement is significantly narrower.
10 That is, the PAGA Recipients release only all claims, demands, rights,
11 obligations, liabilities, actions, and causes of action for PAGA penalties
12 under the provisions of law alleged to have been violated in the Action
13 or which could have been alleged based on the facts in the First
14 Amended Complaint during the PAGA Period. The release by PAGA
15 Recipients is not a general releases and shall not extend beyond claims
16 under the PAGA. Settlement Agreement, ¶ 102.

17 **IV. ARGUMENT**

18 Federal Rule of Civil Procedure 23 requires Court approval for the proposed
19 settlement, voluntary dismissal or compromise of a certified class or a class proposed
20 to be certified for purposes of settlement. Fed. R. Civ. P. Rule 23(e). The Court's
21 "role in evaluating a proposed settlement is 'limited to the extent necessary to reach
22 a reasoned judgment that the agreement is not the product of fraud or overreaching
23 by, or collusion between, the negotiating parties, and that the settlement, taken as a
24 whole is fair, reasonable and adequate to all concerned.'" *Boyd v. Avanquest N. Am.,*
25 *Inc.*, No. 12-cv-04391-WHO, 2015 WL 4396137 *2 (N.D. Cal. July 17, 2015).

26 **A. Conditional Certification of the Rule 23 Class is Appropriate**

27 In order to review the sufficiency of the settlement, the Court must first
28 determine that the proposed class satisfies the criteria set out in Federal Rules of

Civil Procedure Rule 23(a), specifically that: (1) the class is so numerous that joinder would be impracticable; (2) there are questions of law or fact common to the class; (3) the named plaintiffs' claims are typical of the claims of the proposed class; and (4) the named plaintiffs and their counsel will adequately and fairly represented the interests of the class. *See* Manual for Complex Litigation §21.632 (4th ed. 2004); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-20 (9th Cir. 1998). Additionally, the action must be maintainable under Fed. R. Civ. P. 23(b) (1), (2), or (3). *Hanlon v. Chrysler Corp.*, 150 F.3d at 1022. Based on these standards, as further discussed below, the Court should certify the proposed Class for settlement purposes.⁵

1. The Settlement Class Satisfies the Requirements of Rule 23(a)

The proposed Settlement Class satisfies all the requirements of Rule 23(a).

First, the Settlement Class is sufficiently numerous that it makes joinder impracticable. Fed. R. Civ. P. 23(a)(1). Courts have generally found a class of at least 40 members meets the numerosity requirement. *See, e.g., EEOC v. Kovacevich "5" Farms*, No. CV-F-06-165 OWW/TAG, 2007 WL 1174444, at *21 (E.D. Cal. Apr. 19, 2007). Here, the proposed Class has approximately 100 Tradespeople in the two subclasses, and readily meets this standard.

Second, commonality is satisfied because there "are questions of law and fact common" to the proposed Class. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) ("Commonality only requires a single significant question of law or fact."); *Smith v. Cardinal Logistics*, No. 07-2104 SC, 2008 WL 4156364 (N.D. Cal. Sept. 5, 2008) (common issues predominate on questions of whether delivery drivers misclassified as independent contractors). Here, there are several common liability issues, namely, whether: (1) class members have been subject to

⁵ The group of PAGA Recipients does not require certification for settlement purposes. *Arias v. Super. Ct.*, 46 Cal. 4th 969, 980-88 (2009) (affirming lower court's holding that "plaintiff need not satisfy class action requirements" to assert a PAGA claim).

1 the same “per diem” payment plan; (2) class members are entitled to the overtime
2 protections of the California Labor Code and FLSA; (3) HL Welding has violated its
3 legal obligations under various provisions of the California Labor Code and FLSA;
4 and (4) HL Welding’s actions constitute violations of the Unfair Competition Law.

5 Third, the typicality requirement of Rule 23(a)(3) is satisfied because
6 Plaintiffs’ claims are typical of the claims asserted on behalf of the Class. Typicality
7 is established if representative claims are “reasonably co-extensive with those of
8 absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at
9 1020. Plaintiffs’ claims arise out of the same factual and legal circumstances as the
10 claims of other Class Members: like all Class Members, Plaintiffs were subject to
11 HL Welding’s “per diem” compensation and have been underpaid according to the
12 California and federal overtime laws and did not receive accurate wage statements.
13 In addition, Class Members no longer providing services to HL Welding, like
14 Plaintiffs, are entitled to waiting time penalties and other penalties.

15 Fourth, Plaintiffs have fairly and adequately protected the interests of the class
16 and will continue to do so. Fed. R. Civ. P. 23(a)(4). The adequacy requirement is met
17 where the named plaintiffs and their counsel do not have conflicts of interest with
18 other class members, and will vigorously prosecute the interests of the class. *Hanlon*,
19 150 F.3d at 1020; *Soc. Sers. Union, Local 535 v. County of Santa Clara*, 609 F.2d
20 944, 946-47 (9th Cir. 1979). Here, Plaintiffs share an interest to prosecute the claims
21 on behalf of themselves and the Class, have vigorously prosecuted the claims to date,
22 and have no conflicts of interest with Settlement Class Members.

23 In addition, Plaintiffs are represented by experienced counsel. In appointing
24 class counsel, the court must consider: (i) the work counsel has done in identifying or
25 investigating potential claims in the action; (ii) counsel’s experience in handling
26 class actions, other complex litigation and the type of claims asserted in the action;
27 (iii) counsel’s knowledge of the applicable law; and (4) the resources that counsel
28 will commit to its representation. Fed. R. Civ. P. 23(g).

1 Plaintiffs’ counsel has actively identified, investigated and prosecuted the
2 claims that are the subject of this Settlement; they have decades of extensive
3 experience in class action litigation, including wage-and-hour claims of the type
4 asserted here, have been appointed class counsel in numerous other cases; and have
5 demonstrated that they have the ability and resources to vigorously pursue the claims
6 asserted in this litigation. Pogrel Decl. ¶¶ 6-35. For these reasons, Plaintiffs’ counsel
7 and the Plaintiffs meet the adequacy requirement of Rule 23 (a)(4), and Plaintiffs’
8 counsel should be appointed as Class Counsel pursuant to Rule 23(g).

9 **2. The Settlement Class Meets the Requirements of Rule 23(b)(3)**

10 The Settlement Class satisfies the requirements of Rule 23(b)(3), because
11 common questions “predominate over any questions affecting only individual
12 members,” and class resolution is “superior to other available methods for the fair
13 and efficient adjudication of the controversy.”

14 First, the Settlement Class satisfies the predominance requirement, which
15 examines whether the proposed class is “sufficiently cohesive to warrant
16 adjudication by representation.” *Hanlon*, 150 F.3d at 1022. “When common
17 questions present a significant aspect of the case and they can be resolved for all
18 members of the class in a single adjudication, there is clear justification for handling
19 the dispute on a representative rather than on an individual basis.” *Id.* Here, as
20 discussed above, common issues predominate because Plaintiffs’ claims turn on a
21 common liability issue suited to class-wide adjudication.

22 Second, Rule 23 (b)(3) is satisfied because resolution of the issues in this case
23 on a class-wide basis is “superior to other available methods for the fair and efficient
24 adjudication of the controversy.” *Id.* at 1023. The alternative to a single class action -
25 - numerous individual actions -- would be inefficient and unfair. *See, e.g., Custom*
26 *Led, LLC v. eBay, Inc.*, No. 12-CV-00350-JST, 2013 WL 4552789, at *5 (N.D. Cal.
27 Aug. 27, 2013) (superiority established because a “class action would achieve the
28 resolution of the putative class members’ claims at a lower cost and would reduce

1 the likelihood of inconsistent determinations”); *Hanlon*, 150 F.3d at 1023 (“many
2 claims [that] could not be successfully asserted individually. . . would not only
3 unnecessarily burden the judiciary, but would prove uneconomic for potential
4 plaintiffs.”).

5 **B. Preliminary Approval is Appropriate Because the Settlement is Fair,**
6 **Reasonable and Adequate**

7 Once the Settlement Class has been conditionally certified, the Court can
8 determine whether the proposed class action settlement warrants preliminary
9 approval by determining the fairness, reasonableness and adequacy of the settlement
10 terms, and, if so, direct that notice be sent to proposed class members, reserving
11 closer scrutiny for the final approval hearing. *See Harris v. Vector Mktg. Corp.*, No.
12 C-08-5198 EMC, 2011 WL 1627973, at *7 (N.D. Cal. Apr. 29, 2011).

13 Courts should grant preliminary approval of a settlement if it “appears to be
14 the product of serious, informed, non-collusive negotiations, has no obvious
15 deficiencies, does not improperly grant preferential treatment to class representatives
16 or segments of the class, and falls within the range of possible approval.” *See In re*
17 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Courts
18 should also apply their discretion in light of the judicial policy favoring settlement of
19 complex class action litigation. *See, e.g., Officers for Justice v. Civil Serv. Comm’n*
20 *of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (“[I]t must not be
21 overlooked that voluntary conciliation and settlement are the preferred means of
22 dispute resolution. This is especially true in complex class action litigation . . .”).
23 As discussed below, application of the relevant factors to this case supports
24 preliminary approval.

25 **1. Settlement is the Product of Informed, Non-Collusive Negotiation**

26 Adequate discovery and the use of an experienced mediator tend to support the
27 conclusion that settlement negotiations were informed and non-collusive. *See*
28

1 *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL
2 5878390, at *6 (N.D. Cal. Nov. 21, 2012); *Satchell v. Fed. Express Corp.*, No. C03-
3 2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007).

4 This Settlement Agreement was the result of thorough negotiations by
5 experienced counsel familiar with the applicable law, class action litigation, and the
6 facts of this case. The parties engaged in written and documentary discovery, in
7 addition to substantial informal discovery and data exchange prior to mediation.
8 Pogrel Decl., ¶¶ 19, 22-23, 27, 31-32. Plaintiffs' counsel was also retained by
9 additional clients and interviewed a number of other affected employees. Pogrel
10 Decl., ¶ 22.

11 The settlement was reached only after a mediator's proposal was issued at the
12 conclusion of a full day of mediation. Pogrel Decl., ¶ 33. Prior to the mediation, HL
13 Welding provided a large volume of damages data and Plaintiffs' counsel conducted
14 thorough review and analysis of the data and estimate potential damages incurred by
15 the Settlement Class. Pogrel Decl., ¶¶ 36-37. HL Welding provided additional
16 updated following the mediation, which data and Plaintiffs' counsel further analyzed
17 to refine their calculation of estimated potential damages. Pogrel Decl., ¶¶ 36-38.

18 **2. The Settlement Falls Within the Range of Possible Approval**

19 In deciding whether the proposed settlement is adequate and falls within the
20 range of possible approval, "courts primarily consider plaintiffs' expected recovery
21 balanced against the value of the settlement offer," taking into account the risks of
22 continuing litigation. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080.
23 Courts should recognize that "the agreement reached normally embodies
24 compromise; in exchange for the saving of cost and elimination of risk, the Parties
25 each gave up something they might have won had they proceeded with litigation."
26 *Officers for Justice*, 688 F.2d at 624 (internal quotations and citation omitted). Here,
27 the Settlement is fair, adequate, and well within the range of possible approval.
28

1 **a. The Relative Strength of Plaintiffs' Case and the Risk of Further**
2 **Litigation Support Preliminary Approval**

3 While Plaintiffs believe they have strong claims for liability, and that they
4 would prevail on many if not all of their claims, Defendant has several legal and
5 factual grounds to challenge certification, the merits, and damages in this action. The
6 compromise is based on the degree of risk, expense, complexity, and certainty of
7 delay involved in further litigation.

8 Here, although the Parties have already engaged in discovery, substantial
9 additional litigation would still be necessary to bring this case to a final resolution,
10 including requiring Plaintiffs to obtain class certification, establish class-wide
11 liability, and prove up various complex issues regarding damages. Such efforts
12 would likely take several years, and necessitate expert witness testimony, as well as
13 other costs, risks and potential delays. Appellate risks could further delay and
14 jeopardize recovery. By contrast, the Settlement ensures timely relief and substantial
15 recovery of the wages that Plaintiffs contend are owed to the Settlement Class.

16 Class Certification: HL Welding would have opposed Plaintiffs' motion to
17 conditionally certify the FLSA collective action and Plaintiffs' motion to certify the
18 Rule 23 class. In its opposition, HL Welding would likely argue that individual
19 issues would predominate should this case proceed to trial. Specifically, HL Welding
20 would assert that class certification is not appropriate because its defense that its *per*
21 *diem* pay policy is lawful travel reimbursement can only be determined through an
22 individualized fact-intensive inquiry. That is, it would argue that the class lacked
23 commonality for many reasons, including: (1) the job position and skills of the
24 employees are different; (2) different HL Welding locations have different policies;
25 (3) employees' residences and their relation to individual worksites vary greatly; (4)
26 some Tradespeople signed arbitration agreements; and (5) some putative Class
27 Members did not work any overtime. HL Welding would make these arguments,
28 among others, to support its opposition to conditional and class certification.

1 While Plaintiffs disagree with Defendant's position and believe that the claims
2 would have been successfully tried on a class-wide basis through representative
3 testimony from Class Members, HL Welding managers' and employees' testimony,
4 statistical sampling and expert testimony, and company documents, they recognize
5 that such procedures raise difficult management and proof issues. Accordingly, there
6 is a risk that the Court may have denied class certification or, if it initially certified
7 the class, later decertified it if the trial procedures became unmanageable.

8 Arbitration: In support of its opposition to plaintiff motion for certification,
9 HL Welding would rely in part on the fact that it has executed arbitration agreements
10 with many of the putative class members. There remains a risk that some, or all, of
11 the claims of certain putative Class Members could be forced into arbitration.

12 Liability on Overtime Claims: Plaintiffs also recognize that there is a risk on
13 the merits of their claims, as there would likely be disputes over several legal and
14 factual issues. For instance, HL Welding contends that its overtime pay practices
15 were at all times lawful and that *per diem* payments did not qualify as compensation
16 on which overtime is due.

17 Damage Issues: Even if Plaintiffs are able to establish liability, there are a
18 number of issues that could impact their ability to establish damages on a class-wide
19 basis. For instance, HL Welding would argue that Plaintiffs and Class Members
20 greatly exaggerate the number of overtime hours worked. Establishing the value of
21 this claim on a class-wide basis at different worksites throughout the United States
22 would present issues of proof as well. Thus, there is a risk that any damage award
23 obtained for the Tradespeople would only be a fraction of the potential exposure
24 calculated by counsel.

25 **b. The Benefit Conferred by the Settlement Balances in Favor of**
26 **Approval**

27 "[I]t is well-settled law that a cash settlement amounting to only a fraction of
28 the potential recovery does not per se render the settlement inadequate or unfair.

1 Rather, the fairness and the adequacy of the settlement should be assessed relative to
2 risks of pursuing the litigation to judgment.” *Villegas*, 2012 WL 5878390, at *6
3 (internal quotations and citations omitted).

4 The Settlement will result in payment of an outstanding award to Settlement
5 Class Members, particularly in light of the litigation risks. The Settlement affords
6 essentially full relief to Tradespeople who likely would never have filed individual
7 claims. That is, the \$435,000 Net Settlement Fund represents more than 100% of
8 Plaintiffs’ counsel’s best estimate of the maximum verdict value of the Class’
9 potential recovery of all overtime wages, interest and liquidated damages, assuming
10 all factual and legal disputes would be resolved in Plaintiffs’ favor and they would
11 obtain the full value of their claimed damages. Pogrel Decl., ¶ 45. The settlement
12 will result in a payment of approximately \$144 for each week worked by the
13 Settlement Class Members, with an additional \$49, on average, to PAGA Recipients.
14 Pogrel Decl., ¶¶ 42-43. Estimated payments to the Settlement Class Members will
15 average \$4,400, with the highest awards ranging between \$14,000 and \$37,300.
16 Pogrel Decl., ¶ 42.

17 **3. Extent of Investigation and Discovery Completed Supports** 18 **Preliminary Approval**

19 Plaintiffs’ counsel conducted sufficient investigation and discovery. The
20 parties exchanged written and documentary discovery, while Plaintiffs’ counsel also
21 interviewed many putative class members and prepared a thorough analysis of
22 voluminous damages data. Pogrel Decl., ¶¶ 19, 22-23, 27, 31-32. The factual
23 investigation, discovery and litigation conducted in this matter, enabled Plaintiffs’
24 counsel to have a sound understanding of the merits of their positions and to evaluate
25 the worth of the claims of the Settlement Class. Based on the evidence and counsel’s
26 experience, Plaintiffs and their counsel were able to make an informed determination
27 that the settlement is in the best interests of the Class. Pogrel Decl., ¶¶ 45-47.
28

1 **4. Experience and Views of Counsel Support Preliminary Approval**

2 “Parties represented by competent counsel are better position than courts to
3 produce a settlement that fairly reflects each party’s expected outcome in litigation.”
4 *Larsen v. Trader Joe’s Co.*, No. 11-cv-05188-WHO, 2014 WL 3404531, at *5 (N.D.
5 Cal. July 11, 2014). In determining whether proposed settlements are fair,
6 reasonable, and adequate, courts are entitled to give consideration to the opinions of
7 competent counsel familiar with the case. *Id.* Here, Plaintiffs and the Settlement
8 Class are represented by competent and experienced counsel, with decades of
9 experience with wage and hour class actions, including cases in the delivery service
10 industry. Pogrel Decl., ¶¶ 6-13. Counsel recommends the proposed settlement as fair,
11 adequate and reasonable to the class members and in their best interests. Pogrel
12 Decl., ¶ 5. Defendant does not oppose the motion.

13 **5. The Scope of the Release Provision in the Settlement Agreement is**
14 **Appropriate**

15 In return for the settlement award, Plaintiffs and Settlement Class Members
16 will release claims in this Action. The releases are separated into three groups --
17 releases for claims by Settlement Class Members, releases by PAGA Recipients, and
18 releases by Plaintiffs/Class Representatives. Settlement Agreement, ¶¶ 100-103.

19 The releases for the Settlement Class Members are limited to claims that were
20 asserted in the operative complaint, or if not asserted which could have been
21 asserted. Such language is standard and is limited by language tying the release to
22 the facts alleged in the complaint and related to, or arising from, the failure to pay
23 overtime under California law and the FLSA. Settlement Agreement, ¶¶ 100-101.

24 The release PAGA Recipients for PAGA Recipients is significantly narrower.
25 The PAGA Recipients release only all claims, demands, rights, obligations,
26 liabilities, actions, and causes of action for PAGA penalties under the provisions of
27 law which could have been alleged based on the facts in the operative complaint
28 during the PAGA Period. The release by PAGA Recipients is not a general release

and shall not extend beyond claims under the PAGA. Settlement Agreement, ¶ 102.

Named Plaintiffs/ Class Representatives will provide a general release, including a California Civil Code § 1542 waiver of unknown claims. Settlement Agreement, ¶ 103.

6. Timeline

The preliminary schedule for implementation of this settlement is as follows:⁶

DESCRIPTION	EVENT
5 days after preliminary approval of settlement	Defendants to provide Settlement Administrator and Plaintiffs' Counsel a final spreadsheet, which lists each Class Member's first and last name, last known address and phone number, Social Security number or ITIN, the dates of employment and total workweeks. The version of the spreadsheet provided to Plaintiffs' counsel will include only the last four digits of each Class Member's Social Security number in lieu of the full number.
25 days after preliminary approval of settlement	Plaintiffs to file Motion for Approval of Attorney's Fees and Costs, and Plaintiff Service Awards.
30 days after preliminary approval of settlement	Mailing by first class mail of Class Action Settlement Notice and Estimated Settlement Share Form (collectively "Notice Packet") by Settlement Administrator.
No later than 25 days after mailing of Notice Packet	Settlement Administrator to conduct trace/search efforts and send a follow up mailing to Settlement Class Members whose Notice Packet was returned as undeliverable or whose listed address is found to be inaccurate or outdated.

⁶ Settlement Agreement, ¶ 104.

45 days after mailing of Notice Packet	Last day for Settlement Class Members to opt out, challenge dates of employment, or submit written objections (the “Objection/Exclusion Deadline”).
10 days after the Objection/Exclusion Deadline	Settlement Administrator to provide counsel with opt outs and challenges received from Settlement Class Members, and also prepare a declaration for Plaintiffs’ counsel and Defendant’s counsel review and approval certifying the completion and results of the class notice and related processes.
30 days before final approval hearing	Last day for filing and service of papers in support of final settlement approval. Including declaration from Settlement Administrator.
Date to be set by Court at Preliminary Approval hearing	Hearing for Final Approval
Date Court Grants Final Approval of the Settlement ⁷	Settlement Effective Date
Within five (5) days of the Settlement Effective Date	Settlement Administrator to make the final calculation of payments from the Net Settlement Fund to be distributed to the Settlement Class Members and provide all Counsel with a report listing the amount of all payments to be made to each Settlement Class Member from the Net Settlement Fund. Plaintiffs to file a Dismissal of the <i>Muongkhot</i> Action.
Within Ten (10) days of the Settlement Effective Date	Defendant shall deposit the money to fund \$286,000 of the GSA and one-half of the employer side taxes with the Settlement Administrator (“Deposit 1”)
Within One Hundred and Fifty (150) days of the Settlement Effective Date	Defendant shall deposit the money to fund a further \$286,000 of the GSA and one-half of the employer side taxes with the Settlement Administrator (“Deposit 2”)

⁷ Assumes no objections to the Settlement.

Within five (5) business days of Deposit 2, above	Settlement Administrator to distribute and pay from the Settlement Fund each of the following: (1) Settlement share checks to all Settlement Class Members and PAGA Recipients; (2) awarded attorney reimbursed litigation expenses to Plaintiffs' counsel; (3) check for the class representatives' service awards; (4) PAGA Penalties to California LWDA, and (5) administration costs paid to the Settlement Administrator.
120 days after distribution of checks to Eligible Settlement Class Members	Expiration / void date for checks distributed to Eligible Settlement Class Members.
Within Three Hundred (300) days of the Settlement Effective Date	Defendant shall deposit the money to fund the balance of the GSA - a further \$286,000 ("Deposit 3")
Within five (5) business days of Deposit 3, above	Settlement Administrator to distribute and pay from the Settlement Fund all awarded attorneys' fees to Plaintiffs' counsel.
Within 10 days of final payment of attorney's fees	Class Counsel to submit final Settlement Administrator's report regarding status of payments, and request for distribution of any residual to Court-approved <i>cy pres</i> beneficiary.
Date to be set by Court at Preliminary Approval	Final Accounting Hearing to be held. Plaintiffs' Counsel will request Court approval of disposition of residual funds from Reserve Fund, including, but not limited to payment to <i>cy pres</i> beneficiary, and will submit a declaration in support of their request from the settlement administrator.
Within sixty (60) days of Deposit 3	Settlement Administrator to pay any residual funds in the settlement fund to or the <i>cy pres</i> beneficiary.

1 2 3	10 days after payment of residual funds to <i>cy pres</i> beneficiary	Class Counsel to file and serve final Settlement Administrator's report regarding all payments and the <i>cy pres</i> distribution, if any.
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7. The Proposed Class Notice is the Best Notice Practicable

Under Rule 23(e), “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed.R.Civ.P. 23 (e)(1)(B)(2). The notice provided to members of a class certified under Rule 23(b)(3) must be “the best notice that is practicable.” Fed.R.Civ. P. 23(c)(2)(B). The notice itself must be clear, concise and state:

(i) The nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

The proposed Notice Packet and notice plan satisfy the requirements of Rule 23(c). In addition to including all the categories contemplated in Fed. R. Civ. P. 23(c)(2)(B), the notice contains (1) contact information for class counsel; (2) information on each Settlement Class Member's credited workweeks and corresponding Individual Settlement Payment; (3) instructions on how to dispute credited workweeks; and (4) details for the final approval hearing. Settlement Agreement, Exhs. A and B.

The proposed Notice procedure provides Settlement Class Members with the best notice possible. The parties have agreed, subject to Court approval, that within 21 days after an order granting preliminary approval the Settlement Administrator will mail notice via first class mail and email to the last-known addresses of the

1 class members as provided by Defendant. The Settlement Administrator will use
2 people-finder software, or equivalent, and skip-trace searches to attempt to locate
3 addresses for undeliverable mail. This method meets the requirements of due
4 process. *Ohayon v. Hertz Corp.*, No. 5:11-cv-01662 EJD, 2012 WL 4936058, at *5-
5 6 (N.D. Cal. Oct. 16, 2012) (Reasonable diligence to obtain addresses for returned
6 mailings met the Rule 23 notice standards).

7 **V. CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully request that the Court: (1)
9 conditionally certify for settlement purposes the Settlement Class and Subclasses; (2)
10 grant preliminary approval of the proposed Settlement; (3) appoint Leonard Carder,
11 LLP as Settlement Class Counsel, (4) appoint Plaintiffs as Class Representatives; (5)
12 appoint Simpluris, Inc. as Settlement Administrator; (6) approve the content and
13 method of distribution of the Notice of Class Settlement and Estimated Share form;
14 and (7) and schedule a hearing regarding final approval of the proposed Settlement,
15 Class Counsels' request for attorneys' fees and costs, and Plaintiffs' service awards.

16 Dated: June 4, 2021

LEONARD CARDER, LLP

17
18 By: /s/ David Pogrel
19 David Pogrel, Esq.

20 *Attorneys for Plaintiffs and the Putative Class*
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