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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA**

EDGAR DIAZ and JOE TRIGO, individually
and on behalf of all others similarly situated,

Plaintiffs,

vs.

TAK COMMUNICATIONS CA, INC.; TAK
COMMUNICATIONS, INC.; and DOES 1-25,
inclusive,

Defendants.

Case No: RG20064706

CLASS ACTION

*Assigned for All Purposes to Judge Winifred
Smith, Dept. 21*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
AND COLLECTIVE ACTION
SETTLEMENT, CERTIFICATION OF
SETTLEMENT CLASS, APPROVAL OF
NOTICE OF SETTLEMENT, AND
SETTING OF HEARING FOR FINAL
APPROVAL**

Date: December 11, 2020
Time: 10:00 a.m.
Reservation Number: R-2220979
Date Action Filed: June 12, 2020

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1 **I. INTRODUCTION**

2 Plaintiffs Edgar Diaz and Joe Trigo, on behalf of themselves and all others similarly
3 situated (“Plaintiffs”), seek preliminary approval of the settlement of this wage and hour class,
4 collective, and representative action against Defendants TAK Communications CA, Inc. and TAK
5 Communications, Inc. (“TAK”).

6 Through early intensive mediation and arm’s-length negotiations by the Parties with the
7 assistance of a respected wage and hour mediator, the Parties have resolved the claims of
8 approximately 685 current and former non-exempt hourly employees who install cable television,
9 phone, security, and internet services (“Class and Collective Members” or “Technicians”) for a
10 total non-reversionary Gross Settlement Amount of \$1,200,000.00, of which approximately
11 \$706,250.01 will be available for distribution to Settlement Class and Collective Members. These
12 terms are memorialized in the proposed Class Action Settlement Agreement and Release
13 (“Settlement”).¹

14 Plaintiffs seek preliminary approval of the Settlement as to the Class of approximately 679
15 California Technicians. Plaintiffs also seek approval of the Settlement as to claims of the
16 approximately 86 Opt-In Plaintiffs, all of whom would have otherwise been compelled to
17 individual arbitrations, and approximately 679 of whom worked in California and are part of the
18 California class. Finally, the Settlement resolves claims brought under the California Private
19 Attorneys General Act (“PAGA”), California Labor Code § 2699.

20 The proposed Settlement provides an excellent benefit to the Class and Collective and an
21 efficient outcome in the face of expanding litigation. The proposed Settlement satisfies all of the
22 criteria for preliminary settlement approval under California law and falls well within the range of
23 reasonableness. The Parties are resolving numerous claims that almost certainly never would have
24 been prosecuted as individual actions, and in so doing provide substantial benefit to the members
25 of the Class and Collective. Accordingly, Plaintiffs request that the Court (1) grant preliminary
26 approval of the proposed Settlement; (2) appoint Heffler Claims Group (“Heffler”) as Settlement
27 Administrator for the proposed Settlement and approve the estimated costs of settlement
28 administration (estimated at \$27,500.00); (3) appoint Schneider Wallace Cottrell Konecky LLP

1 ¹ A true and correct copy of the Settlement is attached as **Exhibit 1** to the Declaration of Carolyn
2 Hunt Cottrell in Support of Plaintiffs’ Motion for Preliminary Approval of Class and Collective
3 Action Settlement, Certification of Settlement Class, Approval of Notice of Settlement, and
4 Setting of Hearing for Final Approval (“Cottrell Decl.”).

1 and Berger Montague, PC² as Class Counsel for the Settlement Class and Collective (“Class
2 Counsel”); (5) appoint Plaintiffs Edgar Diaz and Joe Trigo as Representatives of the Settlement
3 Class and Collective; (6) provisionally certify the Settlement Class and Collective; (7)
4 preliminarily approve a service award of \$10,000.00 each to Plaintiffs Edgar Diaz and Joe Trigo
5 for their efforts on behalf of the Class; (8) preliminarily approve an award of \$35,000.00 for
6 penalties under California Private Attorneys General Act (“PAGA”), Labor Code § 2699; (9)
7 preliminarily approve an award of attorneys’ fees to Class Counsel in the amount of 33.33% of
8 the Gross Settlement Amount (\$399,999.99), plus reimbursement of Class Counsel’s out-of-
9 pocket expenses, not to exceed \$20,000.00; (10) approve the Notice of Class Action Settlement;³
10 and (11) approve the proposed implementation schedule, set forth in the Notice of Motion, for
11 relevant dates and deadlines regarding the administration and approval of the Settlement.

12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 **A. The Original Pleadings.**

14 Plaintiffs Edgar Diaz and Joe Trigo filed an initial action, *Diaz, et al. v. TAK*
15 *Communications CA, Inc., et al.* (hereinafter, “*Diaz-Federal*”), in California District Court,
16 Eastern District of California, Case No. 2:20-at-00481, against TAK on May 18, 2020, asserting
17 claims as a collective action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*
18 (“FLSA”) and a class action pursuant to California Labor laws. (Cottrell Decl. at ¶ 21.)⁴

19 On June 12, 2020, Plaintiff Diaz filed a separate action against TAK in this Court, to assert
20 claims for penalties under PAGA. (*Id.* at ¶ 22.) TAK filed its Answer on July 27, 2020, denying
21 Plaintiff’s allegations. (*Id.*)

22 TAK is a contractor for cable and equipment installations on behalf of cable operators
23 throughout the United States. (*Id.* at ¶ 9.) Plaintiffs allege that TAK employs Technicians to carry
24 out installation services, and classifies them as non-exempt employees. (*Id.*) Technicians perform
25 these services throughout the United States, including in California. (*Id.*) Plaintiffs allege that

26 ² Concurrently with this motion, Sarah Schalman-Bergen of Berger Montague PC is applying for
27 *pro hac* admission to this court.

28 ³ Hereinafter, “Notice,” a true and correct copy attached as **Exhibit A** to the Settlement.

⁴ The Parties subsequently agreed to a Tolling and Dismissal Agreement (“Tolling Agreement”) on June 26, 2020, whereby Plaintiffs agreed to dismiss their Class and Collective action without prejudice in federal court, and TAK agreed that no statute of limitations on any claim would run against Plaintiffs while the agreement is in effect (except those claims that are already barred by any applicable statute of limitations). (*Id.* at ¶¶ 23-25.)

1 TAK Technicians work long hours, typically upwards of ten hours per day, five to seven days per
2 week, and experience wage and hour violations under the FLSA and California labor law. (*Id.* at
3 ¶¶ 11-12.) Plaintiffs allege that Technicians are routinely denied meal and rest periods, do not
4 receive adequate compensation, and are not reimbursed for necessary business expenses. (*Id.* at ¶¶
5 13-15, 17, 19.) Plaintiffs further allege derivative violations for failure to provide accurate,
6 itemized wage statements, failure to maintain proper records, and failure to pay all amounts owed
7 following voluntary or involuntary termination. (*Id.* at ¶¶ 16, 18.) TAK denies all of Plaintiffs’
allegations. (*Id.* at ¶ 20.)

8 **B. Pre-Mediation Efforts.**

9 Following the filing of the state and federal actions, TAK informed Plaintiffs of the
10 existence of arbitration agreements purportedly executed by all named plaintiffs and opt-in
11 plaintiffs. (*Id.* at ¶ 23.) The Parties subsequently agreed to attend mediation early on in these
12 actions. (*Id.*) The Parties engaged in extensive informal discovery leading up to mediation. (*Id.* at
13 ¶¶ 26-28.) Plaintiffs’ counsel completed extensive outreach with Class and Collective Members,
14 including approximately 40 in-depth interviews, covering topics including dates and locations of
15 work, hours of work, off-the-clock work, meal and rest breaks, and reimbursement of work-
16 related expenses. (*Id.* at ¶ 26.) Through the outreach process, Plaintiffs obtained additional
17 documents from Technicians and garnered substantial factual background regarding the alleged
violations outlined in the state and federal complaints, which Plaintiffs’ counsel utilized to build
their case and to assess TAK’s potential exposure. (*Id.* at ¶ 27.)

18 TAK also produced documents and information on an informal basis to facilitate
19 mediation. (*Id.* at ¶ 28.) TAK produced job descriptions, employee handbooks detailing
20 Defendant’s company policies, schedules, billing rates and associated piece-rates, training
21 materials, time data analysis reports, and timekeeping and payroll records for 50% of the
22 proposed Class, as well as other information necessary for a damages analysis. (*Id.*) TAK also
23 provided class-wide figures, including the total number of Technicians, average hourly rates, and
24 additional data points to enable Plaintiffs’ counsel to evaluate damages on a Class and Collective
25 basis. (*Id.*) Plaintiffs’ counsel completed an exhaustive review of such documents, and used the
information and data from them to prepare for mediation. (*Id.*)

26 **C. Settlement.**

27 On August 4, 2020, the Parties conducted a full day mediation session, which was remotely
28 held before well-respected and highly-skilled employment law mediator Frances “Tripper”

1 Ortman. (*Id.* at ¶ 30.) In preparation for the mediation, Plaintiffs performed a detailed damages
2 analysis with the assistance of Class Counsel’s in-house data analyst, and the Parties met and
3 conferred on several occasions to make sure they were prepared to engage in good faith, arms’
4 length settlement negotiations. (*Id.* at ¶ 29.) The Parties reached a settlement in principle at the
5 mediation and executed a confidential memorandum of understanding of the substantive terms of
6 the settlement that day. (*Id.* at ¶ 30.) The Parties fully executed the long-form settlement
agreement on October 6, 2020, submitted for approval herewith. (*Id.* at ¶ 31; *see* Settlement.)

7 **III. TERMS OF THE SETTLEMENT**

8 **A. Monetary Terms.**

9 The Settlement provides for a non-reversionary Gross Settlement Amount of
10 \$1,200,000.00. (*Id.* at ¶ 33.) TAK agrees to pay the employer’s share of payroll taxes separately.
11 (*Id.*) With the Motion for Final Approval, Class Counsel will seek fees of no more than thirty-
12 three and one-third (33 1/3) percent of the Gross Settlement Amount, or \$399,999.99, and actual
13 costs not to exceed \$20,000.00. (*Id.* at ¶ 34.) The Settlement also sets aside \$27,500.00 for the
14 actual costs of settlement administration; \$10,000.00 each to Plaintiffs Diaz and Trigo for their
service to the Class, and \$35,000.00 for PAGA penalties. (*Id.*)

15 TAK will fund the Gross Settlement Amount within ten (10) business days after the
16 Effective Date. (*Id.* at ¶ 35.) The payment will be used to pay 100% of the Settlement Awards to
17 Participating Individuals, the Service Awards, the PAGA payment, and the Class Counsel Fees
18 and Costs Payment. (*Id.*) If ten percent (10%) or more of the Class Members opt out of the
19 Settlement, Defendants may, at their election, rescind the Settlement and all actions taken in
furtherance of it will be null and void. (*Id.* at ¶ 36.)

20 **B. Settlement Awards for Eligible Class and Collective Members.**

21 The estimated Net Settlement Amount available to Participating Class Members totals
22 \$697,500.01 and Net PAGA Amount of \$8,750.00 (for a total of \$706,250.01). (Cottrell Decl. at ¶
23 39.) The Net Settlement Amount is to be allocated among and paid to Participating Individuals
24 (i.e., those Class Members who do not opt out of the Settlement, and the Opt-in Plaintiffs who
25 have filed an opt in consent form) proportionally based on the number of shifts that they worked
for TAK as a percentage of the total shifts worked by all Participating Individuals.⁵ (*Id.*)

27 ⁵ Separately, Participating Individuals who are also Aggrieved Employees will also receive a pro
28 rata share of the Net PAGA Amount of \$8,750.00. (Cottrell Decl. at ¶ 34, n. 1.)

1 Participating Individuals are not required to submit an opt-in form or claim form in order to
2 receive payment under the Settlement. (*Id.* at ¶ 40.)

3 **C. Settlement Administration.**

4 The Parties selected Heffler, a national class action settlement administrator, as the
5 Settlement Administrator. (*Id.* at ¶ 56.) Heffler will satisfy due process requirements in notifying
6 Class and Collective Members of the settlement and distributing Settlement awards according to
7 the Settlement. (*Id.* at ¶¶ 55-67; *see infra*, Section VII.) If the Settlement is finally approved,
8 Heffler will administer payments to the Participating Individuals, including calculation of payroll
9 taxes and preparation of tax reporting documents. (Cottrell Decl. at ¶¶ 55-67.)

10 **IV. CLASS-ACTION SETTLEMENT APPROVAL PROCEDURE**

11 A class action may not be dismissed, compromised, or settled without the approval of the
12 court.⁶ California Rule of Court 3.769 describes three distinct steps for approval of class action
13 settlements by California courts: (1) preliminary approval of the proposed settlement after
14 submission of a written motion for preliminary approval, the proposed class action settlement, and
15 the proposed Class Notice; (2) mailing of notice of the settlement to all affected Members of the
16 Settlement Class; and (3) a final settlement approval hearing at which Members of the Settlement
17 Class may be heard regarding the settlement, and at which evidence and argument concerning the
18 fairness, adequacy, and reasonableness of the settlement is presented.⁷

19 With this Motion, the Parties request that the Court take the first step and grant preliminary
20 approval. The Settlement proposed herein is based on arm's-length negotiations that were guided
21 by Class Counsel's investigation and the evaluation of informal discovery. (Cottrell Decl. at ¶¶
22 68-69.) The negotiations included extensive communications between Class Counsel and counsel
23 for TAK and a mediation conference supervised by an experienced and respected mediator. (*Id.*)
24 The proposed Settlement provides substantial monetary recovery for the Settlement Class, and it
25 satisfies all of the required due process protections. (*Id.* at ¶¶ 70-86.) Thus, the proposed
26
27
28

24 ⁶ See California Civil Code § 1781(f); California Rule of Court 3.769; *see also* Federal Rule of
25 Civil Procedure 23(e). The California Supreme Court has authorized and urged California's trial
26 courts to use Federal Rule of Civil Procedure Rule 23 and federal case law for guidance in
27 considering class action issues. (*Green v. Obledo* (1981) 29 Cal.3d 126, 145-46.)

28 ⁷ This procedure is similar to the procedure and criteria for approval of class actions under federal
law and is also endorsed by the nation's leading class action commentator, Professor Herbert
Newberg. (*See Newberg on Class Actions*, § 11:24 (4th Ed. 2002); *Manual for Complex
Litigation*, §21:63 (4th Ed. 2006).)

1 Settlement is fair, reasonable, and adequate, and Plaintiffs therefore request that this Court grant
2 preliminary approval.

3 **A. Preliminary Approval of the Settlement is Appropriate.**

4 The decision to approve or reject a proposed settlement is committed to a court's broad
5 discretion. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35.) To grant
6 preliminary approval of a class action settlement, courts need find only that the settlement falls
7 within the range of possible final approval, also described as "the range of reasonableness." (*See*,
8 *e.g.*, *North County Contractor's Assn., Inc. v. Touchstone Ins. Svcs.* (1994) 27 Cal.App.4th 1085,
9 1089-90; *see also Newberg on Class Actions* at §11:25.)

10 To make this determination, courts must consider several relevant factors, including "the
11 strength of [the] plaintiffs' case, the risk, expense, complexity and likely duration of further
12 litigation, the risk of maintaining class action status through trial, the amount offered in
13 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
14 experience and views of counsel." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)
15 "The list of factors is not exclusive and the court is free to engage in a balancing and weighing of
16 the factors depending on the circumstances of each case." (*Wershba*, 91 Cal.App.4th at 245.)

17 **1. The terms of the proposed Settlement are fair, reasonable, and**
18 **adequate.**

19 Courts make an initial evaluation of the fairness, reasonableness, and adequacy of the
20 proposed settlement on the basis of information already known, supplemented as necessary by
21 briefs, motions, or information presented by the settling parties. (*See Manual for Complex*
22 *Litigation* at § 21:632.) Courts must ensure that "the agreement is not the product of fraud or
23 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
24 whole, is fair, reasonable and adequate to all concerned." (*Hanlon v. Chrysler Corp.* (9th Cir.
25 1998) 150 F.3d 1011, 1027.) A presumption of fairness exists where: (1) the settlement is reached
26 through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel
27 and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the
28 percentage of objectors is small. (*Dunk*, 48 Cal.App.4th at 1802.) The first three of these
conditions are satisfied here, and Plaintiffs expect that the fourth condition will also be satisfied.
(*See Cottrell Decl.* at ¶¶ 29-31, 26-28, 5-8.)

A preliminary review of the Settlement reveals the fairness of its terms. (*Id.* at ¶ 68.) The
estimated Net Settlement Amount of \$697,500.01 and Net PAGA Amount of \$8,750.00 (for a

total of \$706,250.01), derived from a Gross Settlement Amount of \$1,200,000.00, will result in fair and just relief to all Participating Individuals. (*Id.* at ¶ 70.) This Net Settlement Amount alone provides an estimated average recovery of \$1,031.02 per Participating Individual, assuming full participation of all Class and Collective Members in the Settlement. (*Id.* at ¶¶ 71-72.) Considering the difficulty and risks presented by continuing this litigation, the result far exceeds the reasonable standard when considering the recovery covers less than one and a half years of work (from May 22, 2019 to November 4, 2020) for each Participating Individual. (*Id.* at ¶ 72.)

2. The Settlement was reached after extensive investigation, discovery, and analysis of the class claims.

California courts recognize that “a presumption of fairness exists where . . . [a] settlement is reached through arm’s-length bargaining.” (*Wershba*, 91 Cal.App.4th at 245.) Preliminary approval is warranted where the Court is provided sufficient information regarding the discovery process and the facts developed (*see Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 129-31), so that the Court may form “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” (*Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 801.)

The Settlement was agreed upon following an extensive review of the facts and law in this case. (*Id.*; *Kullar*, 68 Cal.App.4th at 129-31.) To facilitate settlement negotiations, Class Counsel investigated the applicable law and the facts in this case and extensively analyzed the potential damages that might be recovered following the exchange of documents and information with TAK. (Cottrell Decl. at ¶¶ 78-79.) TAK provided informal discovery including a 50% sampling of the timekeeping and payroll records of the Class, as well as TAK’s general policies, and other information necessary for a damages analysis. (*Id.*) Class Counsel was also able to perform outreach with approximately 40 Technicians to complete in-depth intakes. (*Id.*) Plaintiffs used this information to perform a careful and extensive analysis of the effects of TAK’s compensation policies and practices on Class Members’ pay. (*Id.*)

3. Litigation of this action not only would delay recovery, but would be expensive, time-consuming, and would involve substantial risk.

Absent this settlement, it is estimated that Class Counsel’s fees and costs would far exceed \$1,000,000.00 to pursue these claims on behalf of Class Members. (*Id.* at ¶ 80.) Litigating the class claims in this action would require substantial additional discovery including the depositions of Technicians and experts, as well as the consideration, preparation, and presentation of voluminous documentary evidence and the preparation and analysis of expert reports. (*Id.*)

1 In contrast, the Settlement will yield a prompt, certain, and substantial recovery for
2 Participating Individuals. (*Id.* at ¶ 81.) Such a result will benefit the parties and the court system.
3 (*Id.*) The proposed \$1,200,000.00 Settlement achieves a just and beneficial result. (*Id.*) In light of
4 the challenges that Plaintiffs would likely face, discussed below, the proposed Settlement is
extremely reasonable. (*Id.*)

5 **4. TAK would continue to contest liability on all issues.**

6 The reasonableness of the Settlement is further underscored by the fact that Defendants
7 have legal and factual grounds available to defend this action. (*Id.* at ¶¶ 82-85.) Defendants take
8 the position that this case is not suitable for class treatment, that they fully complied with their
9 obligations under the Labor Code, and that Plaintiffs and the putative Class Members are not
10 entitled to damages, penalties, or other relief sought. (*Id.*) These defenses must be accounted for
in considering the reasonableness of the Settlement.

11 **5. Additional risks Plaintiffs considered.**

12 Plaintiffs would face other significant risks if the litigation were to proceed to trial,
13 including defeating arbitration agreements that purport to require them to proceed individually in
14 arbitration. If arbitration is not compelled, a Motion for Class Certification requiring
15 investigation and outreach efforts by Class Counsel to obtain supporting evidence would be
16 vigorously contested by Defendants. (*Id.* at ¶ 83.) Plaintiffs would then need to establish class-
17 wide liability, and prove up various issues regarding damages and penalties. (*Id.*) Such efforts
18 would likely take many more months, if not years, and would necessitate expert witness testimony
and significant additional litigation. (*Id.*)

19 Additionally, Plaintiffs' derivative claims regarding waiting time penalties, accurate
20 records, and wage statements rise and fall with Plaintiffs' other wage payment claims. (*Id.* at ¶
21 84.) For example, Plaintiffs would recover nothing under Labor Code § 203 if they were unable
22 to prove the underlying claims or defeat a "good faith" dispute defense. (*See* Cal. Code Regs. Tit.
23 8, § 13520.) While Plaintiffs believe that they would prevail on these issues and others, Plaintiffs
24 recognize the risk that a fact finder may find for Defendants on one or more of these issues and
may find damages to be significantly less than what Plaintiffs claim. (*Id.*)

25 Defendants, represented by experienced employment lawyers, raised the above arguments,
26 and more, in mediation and would have done so in continued litigation. (*Id.* at ¶ 85.) Despite
27 Plaintiffs' confidence in their ability to prove their claims on a Class-wide basis, any one of the
28

1 above defenses, if decided in favor of Defendants, could have reduced or even eliminated any
2 potential damages award. (*Id.*)

3 **6. Class Counsel are experienced class action litigators.**

4 Class Counsel are experienced and respected class action litigators, including cases
5 involving technicians for other similar cable companies. (*See id.* at ¶¶ 5-8; Declaration of Sarah
6 Schalman-Bergen (“Schalman-Bergen Decl.”) at ¶¶ 1-10, Ex. A.) Based on Class Counsel’s
7 knowledge and expertise in this area of law, Class Counsel believes this Settlement will provide a
substantial benefit to the Class Members. (Cottrell Decl. at ¶ 86; Schalman-Bergen Decl. ¶ 9.)

8 **7. The proposed Settlement is well within the range of reasonableness.**

9 This is a recovery that easily falls within the range of reasonableness. (*Kullar*, 168 Cal.
10 App. 4th at 133 [citing *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488,
11 499–500] “the court must at least satisfy itself that the class settlement is within the “ballpark” of
12 reasonableness”].) The Settlement calls for Net Settlement Amount of approximately \$697,500.01
13 for all Class Members.⁸ This amount will be available to the approximately 685 Participating
14 Individuals, which includes the Class and Collective Members, exclusive of attorneys’ fees and
15 costs, administrative costs and other expenses, and the service awards. (Cottrell Decl. at ¶ 71.)
This amount provides an estimated average recovery of \$1,031.02 per Participating Individual
assuming one hundred percent (100%) participation in the Settlement. (*Id.* at ¶ 72.)

16 The Settlement represents 36.4% of TAK’s total potential exposure. (*Id.* at ¶ 76.) For
17 purposes of estimating damages, Class Counsel ran a damages analysis with the following
18 assumptions based on its outreach and discovery analysis that Plaintiffs and the putative Class
19 fully prevail on all causes of action and can prove thirty minutes of unpaid overtime per shift, and
20 can prove two missed meal and rest periods per week for each Class Member for all shifts worked
21 (less the number of penalties that TAK’s alleged that they paid to each Class Member over the
22 Class Period).⁹ (*See id.* at ¶ 73-79.) Class Counsel determined, TAK’s exposure for the California
Class was approximately \$3.3 million. (*Id.* at ¶ 75.)

23 A recovery of 36.4% of the total exposure easily falls within the range of reasonableness.
24 (*See Soto et al v. O.C. Communications, et al.*, No. 17-cv-00251 (N.D. Cal. Oct. 23, 2019) (ECF
25

26 ⁸ Cottrell Decl. at ¶ 70. Separately, Participating Individuals who are also Aggrieved Employees
27 will also receive a *pro rata* share of the Net PAGA Amount of \$8,750.00. *Id.* at ¶ 45.

28 ⁹ *See* Schalman-Bergen Decl. at ¶¶ 11-29 for a comprehensive discussion of Plaintiffs’ damages
analysis.

No. 305) (granting final approval in a wage and hour and hour settlement involving cable installers represented by Class Counsel here where the Gross Settlement amount (inclusive of fees and costs) represented approximately 17.2% of defendant's total potential exposure); *In Re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 [“It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.”] [citation omitted]; Cottrell Decl. at ¶ 76.)

B. The Service Awards To The Plaintiffs Are Reasonable And Should Be Preliminarily Approved.

Courts award service payments to advance public policy by encouraging individuals to come forward and perform their civic duty in protecting the rights of the class, as well as to compensate class representatives for their time, effort, inconvenience, and for any expense or risk incurred. (*In Re California Indirect Purchases* (1998) 1998 WL 1031494, *11; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412.)

The unopposed payment to Plaintiff Diaz and Plaintiff Trigo in the amount of \$10,000.00 each is reasonable in light of the efforts they made and the risks they took in filing and prosecuting this action to obtain this \$1,200,000.00 Settlement. (Cottrell Decl. at ¶¶ 102, 106.) Plaintiffs have committed their time to this case and assumed significant risk to obtain the result. (*Id.* at ¶ 104.) Throughout this litigation, Plaintiffs worked with Class Counsel and assisted in the development of the case. (*Id.* at ¶ 105.) They produced documents which Class Counsel relied upon in mediation, answered Class Counsel's questions in developing its position for mediation, assisted with the facilitation of class outreach, took part in the Settlement decision, agreed to a broader release, and remained apprised of the case at all times during litigation. (*Id.*) As a result of Plaintiffs' efforts and their willingness to step forward, the Participating Class Members will receive significant recoveries if the Settlement is approved. (*Id.* at ¶ 103.)

C. The Proposed Payment Of Attorneys' Fees And Costs Is Reasonable And Should Be Preliminarily Approved.

Plaintiffs seek reasonable attorneys' fees and expenses from the \$1,200,000.00 Gross Settlement Amount. (*Id.* at ¶ 107.) Under the terms of the Settlement, Class Counsel may seek an award of up to thirty-three and one-third (33 1/3) percent of the Gross Settlement Amount, or \$399,999.99. (*Id.* at ¶ 34.) The requested attorneys' fees are a reasonable “multiplier” of Class Counsel's lodestar amount. (*Id.* at ¶¶ 109-113.) This amount would only increase with preparation and attendance at the preliminary and final approval hearings, further correspondence with Class Members, and Settlement administration and oversight. (*Id.* at ¶ 108.)

1 In this case, there was no guarantee of compensation or reimbursement. (*Id.* at ¶ 109.)
2 Rather, Class Counsel have undertaken all the risks of this litigation on a completely contingent
3 basis. (*Id.*) The inherent risk of proving liability and damages on a Class-wide basis and TAK's
4 representation by skillful counsel confront Class Counsel with the prospect of recovering nothing
5 or close to nothing for their commitment to and investment in the case. (*Id.*) Nevertheless,
6 Plaintiffs and Class Counsel have committed themselves to developing and pressing Plaintiffs'
7 legal claims to enforce the employees' rights and maximize the Class recovery. (*Id.* at ¶ 110.)
8 This commitment and the risks involved are precisely the reasons for multipliers in contingency
9 fee cases.¹⁰ As Class Members will receive a significant payment if the Settlement is approved,
10 Class Counsel seek a reasonable fee award for their efforts and the risk they have assumed. (*Id.*)

11 Class Counsel's requested fee is well within the range customarily approved by California
12 and federal courts in comparable class actions. (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43,
13 66, fn. 11 [recognizing one-third as the average fee award in class actions] *Laffitte v. Robert Half*
14 *Int'l Inc.* (2014) 180 Cal. Rptr.3d 136, 149, *as modified* (Nov. 21, 2014) ["...the trial court's use
15 of a percentage of 33 1/3 percent of the common fund is consistent with, and in the range of,
16 awards in other class action lawsuits."]; *Ochoa v. Haralambos Beverage Co.* (Los Angeles Super.
17 Ct., Feb. 1, 2007) No. BC319588 [approving 33.3% fee award with no mention of lodestar
18 crosscheck]; *Big Lots Overtime Cases* (San Bernardino Super. Ct., JCC Proceeding No. 4283,
19 Feb. 4, 2004) [approving award of attorneys' fees of 33% of the recovery]; *Ojito v. Robertson's*
20 *Ready Mix Concrete, Inc.*, (Super. Ct., Riverside County, Jan. 16, 2007) No. RIC420994
21 [approving 30% fee award with no mention of lodestar crosscheck]).

22 Furthermore, reasonable litigation expenses are ordinarily included in an award of
23 attorneys' fees pursuant to California wage and hour law. Class Counsel's litigation costs to date
24 total \$14,926.25. (*Id.* at ¶ 114; Schalman-Bergen Decl. at ¶ 32.) All of the expenses were
25 reasonable, were necessary to the prosecution of this action, and are customarily billed to fee-
26 paying clients. (Cottrell Decl. at ¶ 114; Schalman-Bergen Decl. at ¶ 32.) Class Counsel also
27 requests reimbursement for these expenses, to be capped at \$20,000.00. (Cottrell Decl. at ¶ 114-
28 115; Schalman-Bergen Decl. at ¶¶ 30-36.)

26 ¹⁰ See Posner, *Economic Analysis of the Law*, 534, 567 (4th ed. 1992) ("A contingent fee must be
27 higher than a fee for the same legal services paid as they are performed... because the risk of
28 default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher
than that of conventional loans").

1 **V. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS FOR**
2 **SETTLEMENT PURPOSES.**

3 This Court should certify the proposed Settlement Class pursuant to California Code of
4 Civil Procedure § 382. California has a strong public policy in favor of broad enforcement of
5 wage and hour laws for the benefit of workers and in favor of using the class action device. (*Sav-*
6 *on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) The party seeking
7 certification has the burden to establish the existence of both an ascertainable class and a well-
8 defined community of interest among class members. (*Id.* at 326 [citations omitted].) The
9 ‘community of interest’ requirement embodies three factors: (1) predominant common questions
10 of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class
11 representatives who can adequately represent the class.” (*Id.*)

12 The benefits and efficiencies of this proposed Settlement, when compared to continued
13 litigation of this case on either a class basis or through multiple individual suits (or in hundreds of
14 individual arbitrations), justifies certification of the proposed Settlement Class. (Cottrell Decl. at ¶
15 87.) The Settlement specifically proposes a California Class, defined as current and former hourly,
16 non-exempt employees who worked as Technicians for TAK in the state of California between
17 May 22, 2019 and August 4, 2020. (*Id.* at ¶ 88.) Applying the standards outlined herein, the Court
18 should certify the proposed Settlement Class.

19 **A. Plaintiffs Satisfy the Ascertainability and Numerosity Requirements for**
20 **Settlement Purposes.**

21 In determining whether a class is “ascertainable,” courts “examine the class definition, the
22 size of the class, and the means of identifying the class members.” (*Reyes v. Board of Supervisors*,
23 (1987) 196 Cal.App.3d 1263, 1274-75.) Plaintiffs defined the Settlement Class according to
24 objective criteria. The Class Members are easily identifiable and can be easily located. (Cottrell
25 Decl. at ¶ 89.) Plaintiffs satisfy the numerosity element as well with 697 Class Members. (*Rose v.*
26 *City of Hayward*, (1981) 126 Cal.App.3d 926, 934; *Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

27 **B. Common Questions Of Law And Fact Predominate In This Action for**
28 **Settlement Purposes.**

“[T]he focus in a certification dispute is on what type of questions – common or individual
– are likely to arise in the action[.]” (*Sav-on*, 34 Cal.4th at 327.) The California Supreme Court
has expressly held that predominance does not require that all questions of law and fact be
uniform for all members of the class. (*Id.* at 338.) Here, TAK’s class-wide policies and
procedures raise common issues of law and fact that are applicable to the claims of Plaintiffs and
Class Members for settlement purposes. (Cottrell Decl. at ¶ 90.) Where, as in this case, uniform

1 policies and procedures apply on a class-wide basis, “the legal question to be resolved is not an
2 individual one. To the contrary, the common legal question remains the overall impact of
3 [Defendant’s] policies on its [employees]” (*Jaimez v. Daiohs USA, Inc.* (2010) 181
4 Cal.App.4th 1286, 1299.) Plaintiffs allege that TAK has uniform timekeeping, payroll,
5 compensation, meal and rest period, overtime, and business expense reimbursement policies and
6 practices applicable to all non-exempt hourly employees. (Cottrell Decl. at ¶ 90.)

7 Common factual issues that apply to the Class Members, such as Defendants’ alleged
8 failures to pay for all hours worked, allegedly uniformly packed schedules that prevented Class
9 Members from receiving uninterrupted meal and rest breaks, Class Members required usage of
10 TAK’s proprietary timekeeping system, and TAK’s alleged requirement that Class Members be
11 on-duty during breaks would provide key evidence of unpaid wages, denied meal and rest breaks,
12 and unreimbursed business expenses. (*Id.*) These standardized policies and procedures are
13 dictated by TAK and apply to all of the Class Members. (*Id.*)

14 **C. The Typicality Requirement is Satisfied for Settlement Purposes.**

15 Plaintiffs also must establish that they are typical members of the Class they seek to
16 represent. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 874.) A representative plaintiff’s
17 claims are “typical” if they arise from the same event, practice, or course of conduct that gives
18 rise to the claims of the other class members and if their claims are based on the same legal
19 theory. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47.) The typicality requirement is not
20 onerous and does not require the claims to be identical. (*Id.*)

21 Here, the Named Plaintiffs, like other Class Members, were subject to the policies and
22 practices that form the basis of the claims asserted in this case. (Cottrell Decl. at ¶ 91.) Plaintiffs
23 claim they were denied meal and rest breaks, compensation for all hours worked, and
24 reimbursement for necessarily incurred business expenses. (*Id.*) Like Plaintiffs, the Class
25 Members were subjected to the same allegedly illegal policies and practices to which Plaintiffs
26 were subjected and the Class claims are based on the same legal theory as Plaintiffs’ individual
27 claims. (*Id.*) Accordingly, the Named Plaintiffs are members of the Class they seek to represent,
28 and their claims are “typical” of those asserted by other Settlement Class Members. (*Id.*)

D. The Adequacy Requirement is Satisfied for Settlement Purposes.

A plaintiff is an adequate class representative if his or her claims are not inconsistent with
or antagonistic to the claims of the class members. (*See Johnson v. GlaxoSmithKline, Inc.* (2008)
166 Cal.App.4th 1497, 1509.) In the instant case, there is no conflict between Plaintiffs and the

1 proposed Class. (Cottrell Decl. at ¶ 92.) Plaintiffs’ claims are in line with those of the Class, and
2 Plaintiffs have prosecuted this case with the interests of the Class in mind. (*Id.*) Furthermore,
3 Plaintiffs have selected counsel with extensive experience in class action and employment
4 litigation, including wage and hour class actions, and who do not have any conflict with the Class.
5 (*Id.*; Schalman-Bergen Decl. at ¶ 6.) For the foregoing reasons, Plaintiffs are adequate class
6 representatives, and Schneider Wallace Cottrell Konecky LLP and Berger Montague PC are
appropriate Class Counsel. (Cottrell Decl. at ¶ 93; Schalman-Bergen Decl. at ¶¶ 6-10.)

7 **VI. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT**
8 **COLLECTIVE FOR SETTLEMENT PURPOSES.**

9 In the FLSA context, court approval is required for FLSA collective settlements. Most
10 courts in the Ninth Circuit first consider whether the named plaintiffs are “similarly situated” to
11 the putative collective members within the meaning of 29 U.S.C. § 216(b), and then evaluate the
12 settlement under the standard established by the Eleventh Circuit (*see Lynn’s Food Stores, Inc. v.*
13 *United States* (11th Cir. 1982) 679 F.2d 1350, 1355), which requires the settlement to constitute
14 “a fair and reasonable resolution of a bona fide dispute over FLSA provisions.” (*Otey*, 2015 WL
15 6091741, at *4.) “If a settlement in an employee FLSA suit does reflect a reasonable compromise
16 over issues...that are actually in dispute,” the court may “approve the settlement in order to
17 promote the policy of encouraging settlement of litigation.” (*Lynn’s Food Stores*, 679 F.2d at
18 1354; *Otey*, 2015 WL 6091741, at *4.)

19 Plaintiffs made substantial factual allegations showing Technicians across the country are
20 all similarly situated because they are subject to a common practice or policy in violation of the
21 FLSA, which are supported by the overwhelming number of Technicians who have already
22 opted-in to this action.¹¹ *See supra*, Sections V.B-C. Defendants maintain various common
23 policies and practices as to what work they compensate and what work they do not compensate,
24 and apply these policies and practices to the Technicians. (*Id.*) This is all that is needed to show
25 that the Technicians were similarly situated under the FLSA. *See* 29 U.S.C. § 216(b).¹²

26 ¹¹ During the course of the litigation, 86 Technicians have submitted opt-in consent forms that
27 have been filed as an exhibit to Plaintiffs’ First Amended Complaint. (Cottrell Decl. at ¶ 98.)

28 ¹² *Lewis v. Wells Fargo & Co.* (N.D. Cal. 2009) 669 F.Supp.2d 1124, 1127 (“ ‘[a]ll that need be
shown by the plaintiff is that some identifiable factual or legal nexus binds together the various
claims of the class members in a way that hearing the claims together promotes judicial efficiency
and comports with the broad remedial policies underlying the FLSA.’ ”) (citations omitted).

1 TAK has further stipulated as part of the Settlement that the Collective Members are
2 similarly situated to Plaintiffs. (*See id.* at ¶ 101; Settlement at ¶ 12.) The Court should find that
3 Plaintiff and the Collective Members are similarly situated. The Court should also find that the
4 Settlement is “a fair and reasonable resolution” for the same reasons discussed *supra*, in Section
IV.A.7. (*See Lynn's Food Stores*, 679 F.2d at 1354-55.)

5 **VII. THE PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS.**

6 “Adequate notice is critical to court approval of a class settlement under Rule 23(e).”
7 (*Hanlon*, 150 F.3d at 1025.) A class action settlement notice “is satisfactory if it ‘generally
8 describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to
9 investigate and to come forward and be heard.’” (*Churchill Village LLC v. General Electric* (9th
Cir. 2004) 361 F.3d 566, 575.)

10 Here, all Class and Collective Members will be identified, and the Notice will be mailed
11 and emailed directly to each individual at their last known addresses and email addresses provided
12 by TAK. (Cottrell Decl. at ¶¶ 117-118.) Prior to the mailing, Heffler will check the addresses
13 provided by TAK through the National Change of Address System, if necessary. (*Id.* at ¶ 123.) If
14 a Notice is returned as undeliverable, Heffler will perform a skip trace and resend the notice. (*Id.*)

15 The proposed Notice is clear and straightforward, and provides information on the case, the
16 meaning and nature of the proposed Settlement, its terms and provisions, the rights of the Class
17 Members to participate, opt out, and object, the monetary awards that the Settlement will provide
18 to Participating Individuals, the Class release, the date, time, and location of the Final Approval
19 hearing, and the identity and contact information for Class Counsel. (*Id.* at ¶¶ 119-122.) The
20 proposed Class Notice also fulfills the requirement of neutrality in class notices. (*See Newberg on*
21 *Class Actions* at §§ 8:21; *Manual for Complex Litig.* at §§ 21:311 and 21:312.) Based on the
22 foregoing, the Class Notice complies with the standards of fairness, completeness, and neutrality
required of a settlement class notice disseminated under authority of the Court.

23 **VIII. THE PROPOSED IMPLEMENTATION SCHEDULE**

24 Plaintiffs respectfully request the Court approve the proposed implementation schedule for
25 approval of the Settlement set forth in Plaintiffs’ Notice of Motion and proposed order.

26 **IX. CONCLUSION**

27 For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion
28 for Preliminary Approval and enter an Order consistent with the Proposed Order submitted
herewith.

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Dated: November 17, 2020

Respectfully submitted,

SCHNEIDER WALLACE
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