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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

RICHARD TOBIN, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

RYDER TRUCK RENTAL, INC., a
Florida corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 5:20-cv-01569-JGB-SHK

**PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT;
AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

Date: April 12, 2021
Time: 9:00 A.M.
Location: Courtroom 1
3470 Twelfth Street
Riverside, CA 92501

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that at 9:00 a.m., on April 12, 2021, or as soon
3 thereafter as the matter can be heard in Courtroom 1 of the United States District
4 Court, Central District of California, located at 3470 Twelfth Street, Riverside,
5 California 92501, before the Honorable Jesus G. Bernal, Plaintiff Richard Tobin
6 (“Plaintiff”) will and hereby does move this Court for an Order preliminarily
7 approving the proposed class action settlement. Specifically, Plaintiff respectfully
8 requests that the Court order as follows:

- 9 1. Grant preliminary approval of the proposed class action settlement;
10 2. Grant conditional certification of the proposed settlement class;
11 3. Authorize the mailing of the proposed notice to the class of the
12 settlement; and
13 4. Schedule a “fairness hearing,” i.e., a hearing on the final approval of
14 the settlement.

15 Plaintiff makes this unopposed motion on the grounds that the proposed
16 settlement is within the range of possible final approval, and notice should,
17 therefore, be provided to the class. This Motion is based upon this Notice of
18 Motion and Motion for Preliminary Approval of Class Action Settlement, the
19 attached Memorandum of Points and Authorities in Support, the Declarations of
20 Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, William L. Marder, and
21 Richard Tobin, the accompanying Class Action Settlement Agreement, any oral
22 argument of counsel, the complete files and records in the above-captioned matter,
23 and such additional matters as the Court may consider.

24 DATED: March 12, 2021

DIVERSITY LAW GROUP

25 By: /s/ Nicholas Rosenthal

26 Larry W. Lee

27 Kristen M. Agnew

Nicholas Rosenthal

28 Attorneys for Plaintiff and the Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF AGREEMENT**

3 Plaintiff Richard Tobin (“Plaintiff” or “Named Plaintiff”) seeks preliminary
4 approval of the Class Action Settlement Agreement (“Settlement Agreement”) that
5 has been reached in the above-captioned matter with Defendant Ryder Truck
6 Rental, Inc. (“Defendant”) (Defendant and Plaintiff collectively referred to as the
7 “Parties”).

8 **A. Factual Allegations**

9 On June 1, 2020, Plaintiff filed a complaint for violation of California Labor
10 Code §§ 226(a) and 2698, *et seq.*, the Private Attorneys General Act (“PAGA”), in
11 the Superior Court of California, County of Riverside (“Complaint” or “Action”).
12 The Action was later removed to this Court.

13 Plaintiff’s Complaint brought the Action on behalf of himself, other
14 allegedly aggrieved employees and as a proxy for the State of California, and the
15 following individuals:

16 All current and former non-exempt employees of
17 Defendant in the State of California who were paid
18 “Premium” and/or “ONCALPAY” wages at any time
 between April 6, 2019, through the present.

19 The Action asserts claims for statutory damages, civil penalties under the PAGA,
20 attorneys’ fees, and costs. Prior to filing this Action, Plaintiff sent notice of alleged
21 Labor Code violations to the Labor and Workforce Development Agency
22 (“LWDA”) pursuant to Labor Code § 2699.3.

23 Plaintiff alleges that Defendant violated Labor Code § 226(a) and PAGA
24 because the wage statements issued do not identify the applicable hourly rates of
25 pay and number of hours worked when “Premium” and/or “ONCALPAY” wages
26 were paid. Instead, the wage statements only identified the gross amount of wages
27 earned for “Premium” and “ONCALPAY” wages.

28 Defendant contends that its wage statements comply with the requirements

1 of Labor Code § 226 and that Plaintiff suffered no injury as a result of any alleged
2 noncompliance. Defendant further contends that Plaintiff’s state law claims are
3 pre-empted by the Labor Management Relations Act (“LMRA”) and that, at most,
4 Plaintiff may represent only those who were covered by the same collective
5 bargaining agreement as Plaintiff.

6 **B. Procedural Background**

7 **1. Summary of the Litigation**

8 On June 1, 2020, Plaintiff filed a putative class and representative action
9 complaint in the Superior Court of California, County of Riverside, asserting
10 claims against Defendant for alleged violation of the California Labor Code for
11 failure to provide accurate itemized wage statements. (Declaration of Nicholas
12 Rosenthal (“Rosenthal Decl.”) ¶ 2.) Specifically, Plaintiff alleged that whenever
13 “Premium” and/or “ONCALPAY” wages were paid, the corresponding wage
14 statements failed to show the applicable hourly rates of pay and number of hours
15 worked, in violation of Labor Code § 226(a). (Rosenthal Decl. ¶ 2.) The complaint
16 is the operative Complaint (“Complaint”). (*Id.*)

17 On August 7, 2020, Defendant filed a Notice of Removal of Civil Action to
18 Federal Court in the United States District Court, Central District of California,
19 alleging that the United States District Courts have original jurisdiction over
20 actions under 28 U.S.C. § 1332(a) and 29 U.S.C. § 141, *et seq.*, LMRA. (*Id.* ¶ 3.)

21 The Parties subsequently agreed to private mediation with Steve Rottman,
22 Esq. on November 23, 2020. (*Id.* ¶ 4.) Following the exchange of information and
23 arm’s-length negotiations, the Parties were able to reach an agreement in principle
24 and entered into a memorandum of understanding. (*Id.*)

25 **2. Summary of Investigation and Discovery**

26 The Parties have served their Initial Disclosures and engaged in a meet and
27 confer process regarding the data necessary to perform a damage analysis and
28 engage in a meaningful mediation. (*Id.* ¶ 10.) In connection with the mediation,

1 Defendant provided certain class payroll data for Plaintiff to review and analyze.
2 (*Id.* ¶ 10.)

3 **C. Summary of the Current Settlement**

4 The Parties have reached a class-wide resolution of the claims alleged in this
5 lawsuit as reflected in the Settlement Agreement on behalf of a Class of employees
6 defined as:

7 All current and former non-exempt employees of
8 Defendant in California who were paid premium pay
9 and/or on-call pay and received an itemized wage
10 statement that did not include either hours and/or rate
associated therewith, at any time during the Class Period.
11 (Settlement Agreement ¶ 4.)

12 The terms of the settlement provide that Defendant shall pay a Gross
13 Settlement Amount of Four Hundred Fifty Thousand Dollars (\$450,000.00).
14 (Settlement Agreement ¶ 2.) Plaintiff currently estimates that after deduction for
15 Settlement Administration Costs, attorneys' fees and costs, PAGA penalties, and
16 Plaintiff's representative enhancement, the Net Settlement Amount of
17 approximately \$231,000.00 will be distributed between approximately 358 Class
18 Members based on the number of wage statements containing payment of
19 "Premium" and/or "ONCALPAY" wages without a corresponding listing of hours
20 and/or rate information that were received by Participating Class Members during
21 the Class Period, as reflected by Defendant's payroll data. (Rosenthal Decl. ¶ 13.)

22 Any funds remaining uncashed after 180 days shall be distributed to the
23 California State Controller's Office, to be held in the names of the individual
24 Participating Class Members whose checks were not cashed. (Settlement
25 Agreement ¶ 63.) The entire Net Settlement Amount will be paid to Participating
26 Class Members, and no funds will revert back to Defendant. (*Id.*)

27 **D. The Settlement is Fair, Reasonable, and Adequate**

28 Based on their own respective independent investigations and evaluations,

1 the Parties and their respective counsel are of the opinion that settlement for the
2 consideration and on the terms set forth in their Settlement Agreement is fair,
3 reasonable, and adequate and is in the best interests of the Class and the Defendant
4 in light of all known facts and circumstances and the expenses and risks inherent in
5 litigation. (Rosenthal Decl. ¶ 16; Declaration of Larry W. Lee (“Lee Decl.”) ¶ 2;
6 Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 3; Declaration of William L.
7 Marder (“Marder Decl.”) ¶ 3.)

8 Defendant denies any liability or wrongdoing of any kind associated with the
9 claims alleged by Plaintiff. Defendant agrees to conditional certification of the
10 Settlement Class for the purpose of settlement only. (Settlement Agreement ¶¶ 35,
11 39, 43.) If this case continued and proceeded to trial, Defendant would assert that
12 Plaintiff would not be able to prevail on the claims.

13 Based on the approximately 358 Class Members, each Class Member will
14 receive a raw average of approximately \$645.25 after deduction for attorneys’ fees,
15 class representative enhancement award, payment of penalties to the LWDA,
16 settlement administration costs, and litigation costs. (Rosenthal Decl. ¶ 14.) Each
17 individual Class Member’s settlement amount may be more or less than this raw
18 average, depending on each respective Class Member’s number of wage statements
19 containing payment of “Premium” and/or “ONCALPAY” wages without the
20 corresponding hours and rate information received during the Class Period and the
21 number of opt-outs received.

22 **II. LEGAL ANALYSIS**

23 **A. The Class at Issue and the Settlement Fund**

24 Defendant has agreed to collect information regarding the identity of the
25 members of the Settlement Class. The Parties have further agreed and stipulated
26 that the Settlement Class be certified on a provisional, non-mandatory basis for the
27 purposes of this settlement only. As set forth in the Settlement Agreement, the
28 Settlement Class includes:

1 All current and former non-exempt employees of
2 Defendant in California who were paid premium pay
3 and/or on-call pay and received an itemized wage
4 statement that did not include either hours and/or rate
associated therewith, at any time during the Class Period.

5 (Settlement Agreement ¶ 4.) The Class Period is defined as “March 30, 2019
6 through October 14, 2020.” (*Id.* ¶ 6.)

7 **B. Two-Step Approval Process**

8 Any settlement of class litigation must be reviewed and approved by the
9 Court. This is done in two steps: (1) an early (preliminary) review by the court, and
10 (2) a final review and approval by the court after notice has been distributed to the
11 class members for their comment or objections. The *Manual for Complex*
12 *Litigation, Fourth* states:

13 Review of a proposed class action settlement generally
14 involves two hearings. First, counsel submit the
15 proposed terms of settlement and the judge makes a
16 preliminary fairness evaluation. In some cases, this
17 initial evaluation can be made on the basis of information
18 already known, supplemented as necessary by briefs,
19 motions, or informal presentations by parties. If the case
20 is presented for both class certification and settlement
21 approval, the certification hearing and preliminary
22 fairness evaluation can usually be combined. The judge
23 should make a preliminary determination that the
24 proposed class satisfies the criteria set out in Rule 23(a)
25 and at least one of the subsections of Rule 23(b). If there
is a need for subclasses, the judge must define them and
appoint counsel to represent them. The judge must make
a preliminary determination on the fairness,
reasonableness, and adequacy of the settlement terms and
must direct the preparation of notice of the certification,
proposed settlement, and date of the final fairness
hearing.

26 *Manual for Complex Litigation, Fourth* (“MCL”) § 21.632 (Fed. Jud. Ctr., 4th ed.
27 2004).

28 Thus, the preliminary approval by the trial court is simply a conditional

1 finding that the settlement appears to be within the range of acceptable settlements.

2 As Professor Newberg comments:

3 The strength of the findings made by a judge at a
4 preliminary hearing or conference concerning a tentative
5 settlement proposal may vary. The court may find that
6 the settlement proposal contains some merit, is within the
7 range of reasonableness required for a settlement offer, or
 is presumptively valid subject only to any objections that
 may be raised at a final hearing.

8 Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed.
9 2010). Accordingly, a court should grant preliminary approval of a class action
10 settlement where it is within the “range of reasonableness.” Here, the Parties have
11 reached such an agreement that is fair, reasonable, and adequate, and have
12 submitted it to the Court in connection with this filing.

13 **C. The Standard for Preliminary Approval**

14 As a matter of public policy, settlement is a strongly-favored method for
15 resolving disputes. *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d
16 437, 443 (9th Cir. 1989). This is especially true in complex class actions such as
17 this case. *Officers for Justice v. Civil Serv. Comm’n of City & County of San*
18 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

19 Preliminary approval does not require the Court to make a final
20 determination that the settlement is fair, reasonable, and adequate. Rather, that
21 decision is made only at the final approval stage, after notice of the settlement has
22 been given to the class members and they have had an opportunity to voice their
23 views of the settlement or to exclude themselves from the settlement. 5 James Wm.
24 Moore et al., *Moore’s Federal Practice* § 23.165 (3d ed. 2010). In considering the
25 settlement, the Court need not reach any ultimate conclusions on the issues of fact
26 and law which underlie the merits of the dispute and need not engage in a trial on
27 the merits. *Officers for Justice*, 688 F.2d at 625. Preliminary approval is merely the
28 prerequisite to giving notice so that “the proposed settlement...may be submitted to

1 members of the prospective class for their acceptance or rejection.” *Philadelphia*
2 *Hous. Auth. v. Am. Radiator & Standard. Sanitary Corp.*, 323 F.Supp. 364, 372
3 (E.D. Pa. 1970).

4 “The judge should raise questions at the preliminary hearing and perhaps
5 seek an independent review if there are reservations about the settlement, such as
6 unduly preferential treatment of class representatives or segments of the class,
7 inadequate compensation or harms to the classes, the need for subclasses, or
8 excessive compensation for attorneys.” MCL § 21.633.

9 Here, the proposed settlement does not pose such issues. Parties are
10 represented by highly-competent counsel. As discussed above and in the
11 declarations submitted herewith, the Parties engaged in a substantial investigation
12 related to the claims and defenses alleged in this case. Further, the proposed
13 settlement was reached after Plaintiff obtained class data from which Plaintiff’s
14 counsel was able to calculate potential exposure so that Plaintiff’s counsel could
15 engage in informed negotiations. Moreover, the Parties utilized the assistance of
16 Steve Rottman, a renowned class action mediator, and after substantial arm’s-
17 length negotiations between the Parties, the Parties were able to resolve this matter.

18 As detailed herein, the proposed settlement satisfies the standard for
19 preliminary approval as it is well within the range of possible approval and there
20 are no grounds to doubt its fairness. The Parties’ attorneys have extensive
21 experience in employment law, particularly wage and hour litigation, and reached
22 settlement only after mediation and extensive arm’s-length negotiations subsequent
23 to the mediation.

24 **D. The Proposed Settlement Class Satisfies the Elements for Class**
25 **Certification**

26 The Parties also may, at the preliminary approval stage, request that the
27 court provisionally approve certification of the class—conditional upon final
28 approval of the settlement. Settlements are highly favored, particularly in class

actions. *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989); *Officers for Justice*, 688 F.2d at 625; *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997). Plaintiff requests such provisional approval at the preliminary approval hearing:

The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may be set out in conditional orders granting tentative approval to the various items submitted to the court. Three basic rulings are often conditionally entered at this preliminary hearing. These conditional rulings may approve a temporary settlement class, the proposed settlement, and the class counsel's application for fees and expenses.

4 *Newberg on Class Actions* § 11.26.

Pursuant to the Settlement Agreement, the Settlement Class is defined as

All current and former non-exempt employees of Defendant in California who were paid premium pay and/or on-call pay and received an itemized wage statement that did not include either hours and/or rate associated therewith, at any time during the Class Period.

(Settlement Agreement ¶ 4.)

The proposed settlement class meets all the requirements for class certification as follows:

1. Numerosity

The numerosity requirement is satisfied if the proposed class is “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Impracticable does not mean impossible, only that it would be difficult or inconvenient to join all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). The Parties estimate that as of the Date of Preliminary Approval the Class will consist of approximately 358 individuals. (Rosenthal Decl. ¶ 12.) Accordingly, here the Class is numerous and clearly satisfies the numerosity prong.

1 **2. Ascertainability**

2 As stated, above, Defendant has already ascertained the Class Members
3 through Defendant’s payroll records. (Rosenthal Decl. ¶ 12.)

4 **3. Typicality**

5 Typicality under Rule 23(a)(3) is satisfied if the representative plaintiff’s
6 claims share a common element with the class: i.e., those claims arise from the
7 same course of conduct that gave rise to the claims of other settlement class
8 members. *In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec.*
9 *Litig.*, 122 F.R.D. 251, 256 (C.D. Cal. 1988).

10 Here, Plaintiff submits that his claims are typical of those of other Class
11 Members because he alleges that he suffered injury from the same specific actions
12 that he alleges harmed other members of the Class. Specifically Plaintiff alleges
13 that whenever he received wage statements that included wages identified as
14 “Premium” and “ONCALPAY,” the wage statements only identified a gross
15 amount paid, rather than the applicable rates of pay and number of hours worked at
16 each rate. (Declaration of Richard Tobin (“Tobin Decl.”) ¶ 3.) It is Plaintiff’s
17 position that his claims are typical of the Class as a whole because they arise from
18 the same factual basis and are based on the same legal theory as those applicable to
19 the Class Members. (Tobin Decl. ¶ 6; Rosenthal Decl. ¶ 7.)

20 **4. Commonality**

21 Commonality relates to whether there are “questions of law or fact common
22 to the class.” Fed. R. Civ. P. 23(a)(2). Commonality is satisfied if there is one issue
23 common to class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th
24 Cir. 1998). Here, Plaintiff contends the common issues include, among other
25 things, whether Defendant failed to provide accurate itemized wage statements.
26 (Rosenthal Decl. ¶ 5.) Many courts have certified Labor Code Section 226(a) class
27 actions, including in *Stafford v. Brink’s, Inc.*, C.D. Cal. Case No. CV-14-01352-
28 MWF (PLAx) and *Magadia v. Wal-Mart*, 2018 WL 339139 (N.D. Cal. Jan. 9,

2018). *See also McKenzie v. Fed. Express Corp.*, 275 F.R.D. 290, 299 (C.D. Cal. 2011); *see also Ortega v. J.B. Hunt Transp., Inc.*, 258 F.R.D. 361, 374 (C.D. Cal. 2009); *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 521 (C.D. Cal. 2011).

5. Adequacy

Adequacy under Rule 23(a)(4) is satisfied if the named plaintiffs have no disabling conflicts of interest with other members of the class and Class Counsel are competent and well qualified to undertake the litigation. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Plaintiff submits that no conflict exists between Plaintiff and the Class because Plaintiff allegedly suffered the same alleged violations as all Class Members and has the incentive to fairly represent all Class Members' claims. (Tobin Decl. ¶ 6; Rosenthal Decl. ¶ 6.) Despite the settlement, Plaintiff remains willing to vigorously prosecute this action to the benefit of the Class.

Furthermore, Plaintiff is represented by attorneys who have extensive experience in complex wage and hour litigation as is detailed in each of their declarations supported herewith. (Rosenthal Decl. ¶¶ 17-20; Lee Decl. ¶¶ 6-11; Agnew Decl. ¶¶ 6-13; Marder Decl. ¶¶ 4-9.)

6. Common Questions of Law and Fact Predominate

Plaintiff contends that common questions of law or fact predominate over individual questions pursuant to Rule 23(b)(3). These issues of fact and law raised in this action are common to all members of the classes and predominate in this case. Here, Plaintiff contends that Defendant failed to provide employees with accurate itemized wage statements. As set forth above, courts have granted certification of such claims. Based on discovery, Plaintiff believes and asserts that Defendant committed these violations as to Plaintiff in the same manner as to all Class Members. (Rosenthal Decl. ¶ 8.)

7. Superiority of Class Action

Plaintiff submits that the requirement that a class action is superior to other

1 methods of adjudication under Rule 23(b)(3) is also met. Courts have recognized
2 that the class action device is superior to other available methods for the fair and
3 efficient adjudication of controversies involving large number of employees in
4 wage and hour disputes. *See, e.g. Hanlon*, 150 F.3d at 1022. Without class-wide
5 relief in this action, the Class Members would be forced to litigate numerous cases
6 on a piecemeal basis.

7 **E. The Settlement is Fair and Reasonable and Not the Result of**
8 **Fraud or Collusion**

9 **1. The Settlement May be Presumed Fair and Reasonable**

10 There is a presumption that a proposed settlement is fair and reasonable
11 when it is the result of arm's-length negotiations. *Williams v. Vukovich*, 720 F.2d
12 909, 922-23 (6th Cir. 1983) ("The court should defer to the judgment of
13 experienced counsel who has competently evaluated the strength of his proofs.");
14 *In re Excess Value Ins. Coverage Litig.*, No. M-21-84 (RMB), 2004 WL 1724980,
15 at *10 (S.D.N.Y. July 30, 2004) ("Where 'the Court finds that the Settlement is the
16 product of arm's length negotiations conducted by experienced counsel
17 knowledgeable in complex class litigation, the Settlement will enjoy a presumption
18 of fairness.'") (Citations omitted); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204
19 F.R.D. 359, 380 (N.D. Ohio 2001) ("When a settlement is the result of extensive
20 negotiations by experienced counsel, the Court should presume it is fair.").

21 Additionally, Courts presume the absence of fraud or collusion in the
22 negotiation of settlement unless evidence to the contrary is offered. *See Priddy v.*
23 *Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental*
24 *Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken*
25 *Antitrust Litig.*, 560 F.Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute
26 their judgment for that of the proponents, particularly where, as here, settlement
27 has been reached with the participation of experienced counsel familiar with the
28 litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528

1 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F.Supp. 1087, 1093-1094 (D.D.C. 1990);
2 *Steinberg v. Carey*, 470 F.Supp. 471, 478 (S.D.N.Y. 1979); *Sommers v. Abraham*
3 *Lincoln Federal Sav. & Loan Ass’n*, 79 F.R.D. 571, 576 (E.D. Pa. 1978).

4 While the recommendations of counsel proposing the settlement are not
5 conclusive, the Court can properly take them into account, particularly where, as
6 here, they have already been involved in extensive litigation, extensive informal
7 investigation and formal written discovery, and expert discovery, appear to be
8 competent, and have experience with this type of litigation. 4 *Newberg on Class*
9 *Actions* § 11.47; *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (“So long as the
10 integrity of the arm’s length negotiation process is preserved, however, a strong
11 initial presumption of fairness attaches to the proposed settlement...and ‘great
12 weight’ is accorded to the recommendations of counsel, who are most closely
13 acquainted with the facts of the underlying litigation.”) (citations omitted). Here,
14 this settlement was reached after discovery and investigation, production of class
15 data, and a full day of mediation. Therefore, a presumption of fairness exists.

16 **a. Experience of Class Counsel**

17 Here, counsel for Parties have a great deal of experience in wage and hour
18 class action litigation. Plaintiff’s counsel has been approved as class counsel in a
19 number of other wage/hour class actions. (Rosenthal Decl. ¶¶ 17-20; Lee Decl. ¶¶
20 6-11; Agnew Decl. ¶¶ 6-13; Marder Decl. ¶¶ 4-9.) Moreover, Plaintiff’s counsel
21 conducted an extensive investigation and discovery of the factual allegations
22 involved in this case prior to filing suit and throughout the course of litigation.
23 Thus, based upon such experience and knowledge of the current case, Plaintiff’s
24 counsel believe that the current Settlement is fair, reasonable, and adequate.
25 (Rosenthal Decl. ¶ 16; Lee Decl. ¶ 2; Agnew Decl. ¶ 3; Marder Decl. ¶ 3.)

26 **b. Investigation and Discovery Prior to Settlement**

27 As mentioned, Class Counsel conducted significant investigation and
28 discovery in furtherance of the prosecution of this action. This investigation and

1 discovery included, among other things: (a) exchanging initial disclosures; (b)
2 inspection and analysis of wage statements including revised wage statements that
3 were rolled out by Defendant after the Action was initiated; and (c) conducting an
4 exposure analysis. (Rosenthal Decl. ¶ 11.)

5 Here, there were 8,260 wage statements reflecting payment for “Premium”
6 and/or “ONCALPAY” wages without corresponding hour and rate information
7 issued to 358 Class Members. (Rosenthal Decl. ¶ 12.)

8 In the present case, the gross settlement of \$450,000 is for approximately
9 8,260 wage statements. This amounts to approximately \$54.58 per wage statement
10 at issue. To put this figure in perspective, the penalty for violation of Labor Code §
11 226(a) is \$50 for the first violation and \$100 for each subsequent violation,
12 meaning that total potential damages for violation of §226(a) amount to \$808,100
13 (\$50 x 358 + \$100 x 7,902). Thus, this settlement is for slightly more than 55% of
14 the total value of the §226 penalties at issue. It is true that Plaintiff also alleged a
15 claim for violation of PAGA, however those penalties are entirely at the discretion
16 of the Court. Even assuming the Court would potentially award full PAGA
17 penalties, this settlement still represents over 15% of total penalties under §226 and
18 PAGA combined.

19 An “apples to apples” comparison with a similar case shows that the
20 Settlement is reasonable. The settlement in *McKenzie v. Federal Express Corp.*,
21 2012 US Dist Lexis 103666 (C.D. Cal. July 2, 2012), which involved a gross
22 settlement amount of \$8,250,000 for 484,928 wage statements, amounted to
23 approximately \$17.00 per wage statement. Not only did the *McKenzie* case involve
24 the same exaction violations as alleged in the current case, the District Court found
25 that the *McKenzie* settlement to be fair, reasonable, and adequate. *Id.* at *6. The
26 instant settlement is more than triple the amount of the *McKenzie* settlement on a
27 per wage statement basis. This is further evidence that the current settlement is
28 indeed, fair, reasonable, and adequate.

1 **2. The Settlement is Fair, Reasonable, and Adequate**

2 The settlement for each participating Class Member is fair, reasonable, and
3 adequate, given the inherent risk of going forward with trial, the risk of appeals,
4 the risks in an area where the law is unsettled, and the costs of pursuing such
5 litigation.

6 **a. Risks of Proceeding with Trial and Any Appeals**

7 To assess the fairness, adequacy, and reasonableness of a class action
8 settlement, the Court must weigh the immediacy and certainty of substantial
9 settlement proceeds against the risks inherent in continued litigation. *In re General*
10 *Motors Corp.*, 55 F.3d 768, 806 (3d Cir. 1995) (“[P]resent value of the damages
11 plaintiffs would likely recover if successful, appropriately discounted for the risk
12 of not prevailing, should be compared with the amount of the proposed
13 settlement.”); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel*
14 *Corp.*, 485 F.Supp. 610, 616-17 (N.D. Cal. 1979); MCL § 21.62 at 316.

15 Here, the Settlement affords fair relief to the Class, while avoiding
16 significant legal and factual battles, especially at trial, that otherwise may have
17 prevented the Class from obtaining any recovery at all. Although Plaintiff’s
18 attorneys believe the claims are meritorious, they are experienced and realistic, and
19 understand that the outcome of a trial, and the outcome of any appeals that would
20 inevitably follow if the class prevailed at trial, are inherently uncertain in terms of
21 both outcome and duration.

22 In light of the risks and uncertainties in connection with proceeding with
23 trial, Plaintiff asserts that this settlement is fair, adequate and reasonable.

24 **b. The Settlement is Within the Range of Reasonableness**

25 The standard of review for class settlements is whether the settlement is
26 within a range of reasonableness. As Professor Newberg comments:

27 Recognizing that there may always be a difference of
28 opinion as to the appropriate value of settlement, the
courts have refused to substitute their judgment for that

1 of the proponents. Instead the courts have reviewed
2 settlements with the intent of determining whether they
are within a range of reasonableness....

3 *4 Newberg on Class Actions* §11.45.

4 Here, the settlement fund is non-reversionary, such that 100 percent of the
5 Net Settlement Amount will be available for distribution to Settlement Class
6 Members who do not opt-out. Moreover, the settlement does not require claim
7 forms. Rather, Class Members who do not opt-out will automatically receive a
8 check. (Rosenthal Decl. ¶ 14.) Assuming that every Class Member elects to
9 participate in the settlement, each Class Member will receive his or her pro rata
10 share, with each person receiving on average an approximate amount of \$645.25.
11 Further, the settlement fund will be paid out entirely in cash (as opposed to a
12 voucher, coupon, etc.).

13 In addition, as set forth in the Settlement Agreement, the release for
14 Settlement Class Members is limited to only the claims alleged in the operative
15 complaint. Specifically, the Settlement Agreement defines “Released Claims” as
16 follows:

17 [A]ll claims, rights, demands, liabilities, causes of action,
18 and theories of liability of every nature and description,
19 whether known or unknown, that were or could have
20 been alleged against any of the Released Parties arising
21 out of, in connection with, or based on the facts alleged
22 in the operative Complaint and/or the PAGA Letter. This
23 includes, but may not be limited to, claims for failure to
24 provide accurate itemized wage statements, penalties
25 (including but not limited to civil and statutory penalties),
26 damages, interest, costs, or attorneys’ fees, and violations
27 of any other local, state, or federal law, whether for
28 economic damages, non-economic damages, penalties,
liquidated or punitive damages, restitution, tort, contract,
equitable relief, injunctive or declaratory relief, to the
extent necessary to effect a full and complete release of
the Class Released Claims, including, but not limited to,
all claims under any common laws, contract, California
Labor Code Sections 96-98.2, *et seq.*, 218.5, 226, and
any related provisions, the California Private Attorneys

General Act, Labor Code Sections 2698, *et seq.*,
California Code of Civ. Proc. Section 1021.5, and/or the
California Business & Professions Code Sections 17200,
et seq.

(Settlement Agreement ¶ 75.)

For these reasons, and for the reasons set forth above relating to the total liability and the risks of prevailing on the theories of liability alleged, Plaintiff believes that the current Settlement is fair, reasonable, and adequate.

c. The Complexity, Expense, and Likely Duration of Continued Litigation Against the Settling Defendant Favors Approval

Another factor considered by courts in approving a settlement is the complexity, expense, and likely duration of the litigation. *Officers of Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at 157. In applying this factor, the Court must weigh the benefits of the settlement against the expense and delay involved in achieving an equivalent or more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433-34 (5th Cir. 1971).

The Settlement Agreement provides to all Class Members fair relief in a prompt and efficient manner. Were the Parties to engage in continued litigation of this matter and proceed to trial, Plaintiff may risk losing class certification and at trial on liability for one or more of the claims based on the reasons explained above. Moreover, following a decision at trial, there is also the possibility of appeal. Given the realities of litigation, this process places ultimate relief several years away. The idea of balancing a fair recovery now, with settlement dollars being paid out now, as opposed to battling at trial and a lengthy appeal process, is a significant factor to be considered. *DIRECTV*, 221 F.R.D. at 526-27 (“Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.”).

The settlement in this case is therefore consistent with the “overriding public

1 interest in settling and quieting litigation” that is “particularly true in class action
2 suits.” *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); 4
3 *Newberg on Class Actions* § 11.41.

4 **d. Non-Admission of Liability by Defendant**

5 Finally, Defendant denies any liability or wrongdoing of any kind associated
6 with the claims alleged in this lawsuit. Defendant further denies that, apart from
7 settlement, certification is appropriate as to Plaintiff’s claims. Defendant
8 maintains that it has complied at all times with California wage and hour laws.
9 Because of such denial, if this case is not resolved, there is a high likelihood that
10 the case will continue even after trial and into the process of appeal.

11 **F. The Notice to be Given is the Best Practicable**

12 “For any class certified under Rule 23(b)(3), the court must direct to class
13 members the best notice practicable under the circumstances, including individual
14 notice to all members who can be identified through reasonable effort.” Fed. R.
15 Civ. P. 23(c)(2)(B). “The court must direct notice in a reasonable manner to all
16 class members who would be bound by a proposed settlement, voluntary dismissal
17 or compromise.” Fed. R. Civ. P. 23(e)(B).

18 Here, the terms of the Settlement Agreement provide for a notice
19 distribution plan that is designed to achieve the best notice that is practicable under
20 the circumstances. The Settlement Administrator is to mail via first-class U.S. mail
21 a copy of the Court-approved Notice of Class Settlement to all Class Members.
22 (Settlement Agreement ¶ 46.) The Settlement Administrator shall forward any
23 returned mail to the forwarding address listed or perform a reasonable search for an
24 updated address for any mail that is returned without a forwarding address. (*Id.*)
25 The Notice of Class Settlement provides Class Members with the information
26 needed to make an informed decision. It provides a brief summary of the proposed
27 settlement and information about the lawsuit, a summary of the allocations under
28 the Settlement and the amount that the Settlement Class Member is estimated to

1 receive, the Settlement Class Member's rights and claims that are included in the
2 release, the Settlement Class Member's options including procedures on how to
3 object and opt-out of the settlement, Class Counsel contact information for any
4 questions, information regarding the final approval hearing and how to appear,
5 procedures on how to obtain more information, and contact information for Class
6 Counsel and case website to be established by the Settlement Administrator. It also
7 explains that those who do not opt out will be bound by the settlement.

8 **G. Attorney's Fees, Costs, and Class Representative Enhancement**

9 Pursuant to the terms of the Settlement Agreement, and without opposition
10 from Defendant, Plaintiff will also be entitled to request an enhancement up to a
11 maximum of \$10,000.00. (Settlement Agreement ¶ 68.) This amount is to
12 compensate Plaintiff for his efforts and work in prosecuting this case, participating
13 in discovery, meeting and communicating with his counsel, reviewing the
14 pleadings and documents in this case, and for executing a general release of all his
15 claims, including under California Civil Code § 1542. (Tobin Decl. ¶¶ 4,7.)

16 Similarly, Class Counsel will seek an award of attorneys' fees of not more
17 than one-third of the Gross Settlement Amount, or \$150,000.00. (Settlement
18 Agreement ¶ 69; Rosenthal Decl. ¶ 20.)

19 Finally, Plaintiff and Class Counsel will seek the reimbursement of costs,
20 which mainly includes filing fees and mediation costs. Plaintiff's counsel will seek
21 such costs up to \$12,500.00. (*Id.* ¶ 20.)

22 **H. Settlement Administrator**

23 The Parties have selected Simpluris, Inc. as the Settlement Administrator.
24 (Settlement Agreement ¶ 31.) Plaintiff's counsel obtained bids from multiple
25 settlement administrators and Simpluris provided the lowest bid. (Rosenthal Decl. ¶
26 21.) Further, notice by U.S. mail along with the skip trace for undeliverable mail
27 has been approved by numerous courts and, therefore, the Parties agreed to notice
28 by U.S. mail. (*Id.*)

Moreover, the anticipated costs for the settlement administration are \$9,000.00. (Settlement Agreement ¶ 65.) Plaintiff and his counsel believe that this amount is reasonable in relation to the value of the settlement, as the administration costs account for only 2% of the Gross Settlement Amount. (Rosenthal Decl. ¶ 22.) The settlement administration costs will be deducted from the Gross Settlement Amount.

I. CAFA Notice

The Settlement Administrator will provide CAFA Notice pursuant to 28 U.S.C. § 1715. (Settlement Agreement ¶ 64.)

III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court (1) grant preliminary approval for the proposed class action settlement; (2) authorize the mailing of the proposed notice to the Class of the settlement; and (3) schedule a “fairness hearing,” i.e. a hearing on the final approval of the settlement.

DATED: March 12, 2021

DIVERSITY LAW GROUP

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