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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JAN 26 2021

BY ________ FELIX GARZA, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

SANTIAGO GIOVANNI JOVEL DEL CID, MICHAEL HARRINGTON, AND DERRICK CARBAJAL, as individuals and on behalf of all others similarly situated,

Plaintiffs,

v.

EMPIRE TRANSPORTATION, INC., an unknown entity, and DOES 1 through 50, inclusive,

Defendants.

Case No. CIVDS1806733

[Assigned for all purposes to Hon. David Cohn, Dept. S26]

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

[Filed concurrently with Declaration of Kenneth H. Yoon; Declaration of Monica Escorza; and [Proposed] Order]

Date: March 19, 2021
Time: 10:00 a.m.
Place: Dept. S26

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on March 19, 2021 at 10:00 a.m. or as soon thereafter as the matter may be heard in Department S26 of the above-entitled Court, located at 247 West Third St., San Bernardino, CA 92415, Plaintiffs Santiago Giovanni Jovel Del Cid, Michael Harrington, and Derrick Carbajal ("Plaintiffs") will and do hereby move this Court for an order granting conditional certification of the class and preliminary approval of class action settlement and representative action settlement reached between Plaintiffs and Defendant Empire Transportation, Inc. ("Defendant," collectively the "Parties"), as memorialized in the Joint Stipulation of Settlement and Release (the "Agreement" or "Settlement").

This motion is made pursuant to California Rules of Court, rule 3.769 and California Labor Code section 2699(k)(2) on the grounds that the proposed settlement is within the range of possible final approval, and notice should therefore be provided to the Class. This motion is based upon this notice, the memorandum of points and authorities in support thereof, the Declaration of Kenneth H. Yoon filed concurrently herewith, the Declaration of Monica Escorza filed concurrently herewith, such argument of counsel as may be presented at the hearing on this matter, and all papers and records on file herein.

DATED: January 25, 2021

YOON LAW, APC

Kenneth H. Yoon
Brian G. Lee
Attorneys for Plaintiffs

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SUMMARY OF THE LITIGATION 2

A. Plaintiffs' Allegations and Procedural History 2

B. Investigation and Discovery 2

C. Mediation and Settlement Efforts 3

III. SUMMARY OF SETTLEMENT TERMS 3

A. Summary of the Terms of the Settlement 3

B. Notice to the Class 8

C. Settlement Administration Process 9

IV. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED 9

A. Legal Standard 9

B. The Settlement May be Presumed Fair and Reasonable 10

1. Arms-Length Bargaining 10

2. Investigation and Discovery Prior to Settlement 11

3. Experience of Class Counsel 12

C. The Settlement Meets the Standard of Fair, Reasonable, and Adequate 12

D. The Settlement is Within the Range of Reasonableness in Light of the Estimate of Actual Loss 13

1. Defendant's Financial Condition 15

V. THE COURT SHOULD PRELIMINARILY APPROVE THE REQUESTED ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE ENHANCEMENT PAYMENT 15

A. The Requested Attorneys' Fees and Costs Are Justified 15

B. Plaintiffs' Enhancement Payment is Warranted 15

VI. CLASS CERTIFICATION 17

A. The Class is Sufficiently Numerous 17

B. The Class is Ascertainable 17

C. There Exists a Community of Interests Amongst Class Members 18

1. Common Questions of Law and Fact Predominate 18

2. The Claims of the Class Representative Are Typical of the Claims of the Class 19

3. Class Counsel and the Class Representative are Adequate 19

D. The Class Action Method is the Superior Means of Adjudication 20

VII. CONCLUSION 21

TABLE OF AUTHORITIES

Page

California Cases

Balderas v. Massage Envy Franchising, LLC, 2014 WL 3610945 (N.D. Cal. 2014) 14

Cellphone Termination Fee Cases, 186 Cal. App. 4th 1380 (2010). 16

Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794 (1996) 9, 12

Hernandez v. Vitamin Shoppe Indus., Inc., 174 Cal. App. 4th 1441 (2009) 10

Federal Cases

Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 542 (S.D. Fla. 1988) 14

Cook v. Niedert, 142 F.3d 1004 (7th Cir. 1998) 16

Ingram v. Coca-Cola Co., 200 F.R.D. 685, 694 (N.D. Ga. 2001) 16

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523 (C.D. Cal. 2004) 10

Roberts v. Texaco, Inc. 979 F. Supp. 185 (S.D.N.Y1997) 16

Staton v. Boeing Co., 327 F. 3d 938 (9th Cir. 2003) 16

Sullivan v. DB Investments, Inc., 667 F.3d 273 (3rd Cir. 2011) 14

Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995) 16

Statutes and Rules

Cal. Rules of Court, rule 3.769 .... 1, 9

Other Authority

MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004) 10

Newberg on Class Actions (4th Ed. 2009) 10, 13, 14

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Santiago Giovanni Jovel Del Cid, Michael Harrington, and Derrick Carbajal ("Plaintiffs") seek preliminary approval of the Joint Stipulation of Settlement and Release ("Agreement" or "Settlement") entered into by Plaintiffs and Defendant Empire Transportation, Inc. ("Defendant" and collectively, the "Parties").[1]

By this motion, Plaintiffs seek approval of the Settlement, which fully resolves the class-wide component of the settlement pursuant to California Rules of Court, rule 3.769, and the representative action component pursuant to California Labor Code section 2699(k)(2) alleged in the instant Action. Additionally, the Settlement also allows eligible Class Members to opt-into the FLSA portion of the Settlement. The Gross Settlement Amount is $285,000 without any reversionary interest. Of the Gross Settlement Amount, $28,500 is allocated to penalties under the PAGA claim.

The Class consists of all persons employed in California by Empire Transportation, Inc., in a non-exempt position at any time during the Class Period. There are approximately 1,632 total Class Members.

The Parties reached the Settlement following several months of negotiations following an unsuccessful full-day mediation with mediator Steven Pearl. One of the primary circumstances affecting the settlement amount is the poor financial condition of Defendant. Defendant has provided substantial evidence of its financial condition (that has only worsened in recent times), and has agreed to provide that evidence to the Court or any valid objector subject to the stipulated protective order in this action. (Settlement at ¶ 6.1.1.)

For the reasons set forth below, Defendant's and Plaintiffs' counsel believe that in light of the circumstances of the instant matter, the Settlement reached by the Parties is fair, reasonable and adequate and request the Court to preliminarily approve the Settlement so that the Class may receive the benefits it provides.

[1] All defined terms used herein shall have the same meaning as defined in the Settlement.

II. SUMMARY OF THE LITIGATION

A. Plaintiffs' Allegations and Procedural History

Plaintiff Del Cid first filed the instant class action complaint on March 20, 2018 in San Bernardino County Superior Court. The operative First Amended Complaint alleges the following violations of the Labor Code: (1) failure to provide proper meal and rest periods, and to properly provide premium pay in lieu thereof; (2) failure to pay all minimum wages and overtime wages due; (3) failure to reimburse business expenses; (4) waiting time penalties; (5) improper and/or inaccurate wage statements; (6) unfair business practices, and (7) violation of California Labor Code section 2698 *et seq.* (the Private Attorneys General Act of 2004 ("PAGA").

As stipulated between the Parties in the Settlement, Plaintiffs seek to file a Second Amended Complaint which adds an eighth cause of action under the Fair Labor Standards Act (29 U.S.C. § 201 et seq.) ("FLSA"). Each of the Plaintiffs were employed by Defendant as drivers in Southern California and assert Defendant's policies and practices have systematically violated the above Labor Code provisions and the FLSA. Defendant maintains it fully complied with the law and has made no admission of wrongdoing by virtue of this Settlement.

B. Investigation and Discovery

Each side has apprised the other of their respective factual contentions, legal theories, and defenses, resulting in extensive arms-length negotiations taking place between the Parties. Plaintiff propounded formal written discovery, including Special Interrogatories and Requests for Production. Ahead of mediation on May 20, 2019, Defendant produced hundreds of pages documenting its policies, practices, and procedures, pertinent collective bargaining agreements in effect, and a sampling of time and payroll data for approximately 10% of the putative class, as well as for Plaintiff. At mediation, Defendant also provided private financial documents regarding its financial condition. Plaintiff thoroughly analyzed each of the documents produced and the sampling of data for purposes of estimating the amount of wages owed and the damages exposure alleged by the Class. (Declaration of Kenneth H. Yoon filed concurrently herewith ("Yoon Decl.") ¶¶ 2-4.)

Following the unsuccessful mediation, Plaintiffs filed motions to compel further responses to Special Interrogatories and Requests for Production that were seeking further documents, policies, data, and the contact information for the putative class. On August 27, 2019, the Court granted Plaintiffs' motions in full. Following a *Belaire* opt-out procedure, Plaintiffs' counsel received the contact information for the putative class and personally spoke to numerous putative class members regarding the case. As the Parties re-engaged in settlement discussions, Defendant provided further evidence of Defendant's financial condition in the form of private and confidential documents under the Parties' protective order.

In sum, Plaintiff has obtained sufficient discovery on both liability and damages to apprise the Court of the fairness of the settlement. Based on the information secured, the Settlement is fair, reasonable, and adequate, given the inherent risk of litigation, Defendant's financial condition, the risks and time of any potential appeals, and the costs of pursuing such litigation.

C. **Mediation and Settlement Efforts**

On May 20, 2019, the Parties participated in a full-day mediation before mediator Steven Pearl. Despite their efforts, the Parties were unable to reach an agreement to resolve the matter. Following the resolution of Plaintiffs' discovery motions, the Parties re-engaged in substantive settlement negotiations. Following months of additional informal discovery regarding Defendant's financial condition and discussions regarding the scope of the class, the Parties were able to reach a preliminary agreement fully resolving the class, PAGA, and FLSA claims alleged. In the months following the executed preliminary agreement, while opposing the proposed intervention by a class member that had filed a later-filed case, the Parties negotiated and executed the longform Settlement.

III. SUMMARY OF SETTLEMENT TERMS

A. **Summary of the Terms of the Settlement**

The Settlement provides for $285,000 as the Gross Settlement Amount. (Settlement at ¶ 2.25.) The Gross Settlement Amount is inclusive of the Settlement Administration Costs, attorneys' fees, litigation costs, Class Representatives' Enhancement Payments, and the PAGA Payment. (*Id.*) The Settlement Administrator is Phoenix Class Action Administration Solutions, and settlement administration costs shall not exceed $20,000. (Settlement at ¶ 2.41) There will be no reversion of any of the Gross Settlement Amount to Defendant. (Settlement at ¶ 6.10.5.)

Following deduction of Court approved attorneys' fees and litigation costs, Settlement Administration Costs, the Class Representatives' Enhancement Payments, and the PAGA Payment from the Gross Settlement Amount, the remaining portion constitutes the Net Settlement Amount and will be available to be distributed to Class Members. (Settlement at ¶ 2.26.) There are three potential payments that can be issued to Class members. The Individual Settlement Payment payable to the Class Members, the FLSA Settlement Payment payable to FLSA Settlement Members, and the equitable share of the PAGA Payment payable to PAGA Settlement Members. 90% of the Net Settlement Amount shall be allocated to the Individual Settlement Payments, and 10% of the Net Settlement Amount shall be allocated to the FLSA Settlement Payments to be distributed to FLSA Settlement Class Members. The Settlement provides for a PAGA payment in the amount of $28,500, to be allocated to the claims for statutory penalties made under the Labor Code Private Attorneys General Act of 2004, California Labor Code §§ 2698 *et seq.*, which includes $21,375 being awarded to the California Labor and Workforce Development Agency ("LWDA"), and also includes $7,125 being awarded equitably to the PAGA Settlement Members. (Settlement at ¶ 2.30.)

The Class Period spans from March 20, 2014 and ends through the Preliminary Approval Date. (Settlement at ¶ 2.6.) The FLSA Claim Period spans from March 20, 2015 through the Preliminary Approval Date. (Settlement at ¶ 2.19.) The PAGA Claim Period spans from March 12, 2019 through the Preliminary Approval Date. (Settlement at ¶ 2.29.) With the exception of PAGA Settlement Members, any member of the Settlement Class who requests exclusion from the settlement will not be entitled to any share of the settlement, will not be bound by the settlement, and will not have any right to object, appeal or comment thereon. (Settlement at ¶ 6.4.4.) PAGA Settlement Members who request exclusion from the settlement will still receive their equitable share of the PAGA Settlement Allocation. (*Id*.)

Within thirty (30) calendar days after Preliminary Approval, Defendant shall provide the Settlement Administrator, Phoenix Settlement Administrators, each Class Members' (i) full name, (ii) last known address, (iii) Social Security Number, and (iv) dates of active employment in which they worked for Defendant in California during the Class Period (including in particular: the first date a Class Member first performed work during the Class Period, the date a Class Member stopped performing work during the Class Period, and any subsequent dates in which the Class Member may have re-entered the Class Period by again performing work or re-exited the Class Period by again discontinuing work). (Settlement at ¶ 6.3.1.) Each Class Member's Claim Amounts shall be determined by the Settlement Administrator using the data provided based on the following eligibility and formula requirements.

Each Individual Settlement Payment shall be determined based on the following calculation: the number of workweeks that the Class Member was a member of the Class during the Class Period divided by the total number of workweeks that every Class Member was a member of the Class during the Class Period, then multiplied by the Individual Settlement Allocation. (Settlement at ¶ 6.10.2.)

Each FLSA Settlement Payment shall be determined based on the following calculation: the number of workweeks that the FLSA Settlement Class Member was a member of the FLSA Claim Period divided by the total number of workweeks that every FLSA Settlement Class Member was a member of the FLSA Claim Period, then multiplied by the FLSA Settlement Allocation. (Settlement at ¶ 6.10.3.)

Each PAGA Settlement Member shall receive payment based on their equitable share of the PAGA Settlement Allocation without a claims process. Each PAGA Settlement Member's payment shall be determined based on the following calculation: the number of workweeks that the PAGA Settlement Member was a member of the PAGA Claim Period divided by the total number of workweeks that every PAGA Settlement Member was a member of the PAGA Claim Period, then multiplied by the PAGA Settlement Allocation. PAGA Settlement Members who request exclusion from the settlement will still receive their equitable share of the PAGA Settlement Allocation. (Settlement at ¶ 6.10.4.)

Pertaining to any calculations performed, counted workweeks shall constitute all full or partial weeks within which a Class Member was considered actively employed by Defendant in California. Any partial workweek will be rounded up to the nearest full workweek. Any workweeks worked by a Class Member, when not a member of the Class (for example, while classified as exempt, while on a leave of absence, etc.) are not included as workweeks. There will be no reversion of any of the Gross Settlement Amount or Net Settlement Amount to Defendant. The calculation of a Class Member's workweeks and a determination as to whether a Class Member was actively employed in a particular workweek shall be construed from Defendant's records. (Settlement at ¶ 6.10.5.)

The Notice of Settlement explains to the Class Members all the procedures for settlement and will provide the Class Members information as to how they may object to or request exclusion from the Settlement. (Settlement, Exhibit 1.)

Class Members may request exclusion from the Settlement if they so choose. (Settlement at ¶ 6.4.4.) In the event 5% or more Class Members file proper and timely requests for exclusion, Defendant shall have the right to revoke and terminate the Settlement. (Settlement at ¶ 6.4.7.)

The release is narrowly tailored to the causes of action alleged in the operative complaint. Class Members who do not request exclusion from the Settlement will only release the Releasees from the Released Class Claims that arose during the Class Period. (Settlement at ¶ 2.37.)

The Releasees are "Empire Transportation, Inc., and all its present and former parent companies, subsidiaries, divisions, concepts, related or affiliated companies, shareholders, officers, directors, employees, agents, attorneys, insurers, successors and assigns, and any individual or entity, which could be liable for any of the Released Class Claims, Released FLSA Claims, and Released PAGA Claims, and Defendant's counsel of record in the Action." (Settlement at ¶ 2.40.)

The Released Class Claims are defined as "all claims under state or local law, whether statutory, common law or administrative law, pled or that could have been pled based on the factual assertions in the Complaint, including but not limited to: (1) failure to provide meal periods and rest breaks in violation of California Labor Code §§ 226 and 512; (2) failure to pay overtime and minimum wages in violation of California Labor Code §§ 510 and 1194; (3) failure to reimburse business expenses in violation of California Labor Code § 2802; (4) waiting time penalties in violation of California Labor Code § 203; (5) failure to maintain accurate itemized wage statements in violation of California Labor Code § 226; (6) unfair and unlawful business practices in violation of California Business and Professions Code § 17200, *et seq.*; including, but not limited to, injunctive relief; punitive damages; liquidated damages, penalties of any nature; interest; fees including but not limited to California Code of Civil Procedure § 1021.5; costs; and all other claims and allegations made or which could have been made in the Action during the Class Period. Notwithstanding the above, the

Released Class Claims exclude all claims for civil penalties, including any claims, causes of action, or legal theories of relief pled, or that could have been pled, based on the factual assertions in the Complaint and PAGA Notice to the LWDA arising under the California Private Attorneys General Act (California Labor Code §§ 2698, *et seq*.) ('PAGA')." (Settlement at ¶ 2.37.)

FLSA Settlement Members that decide to opt-in by submitting the FLSA Claim Form will only release the Released FLSA Claims. (Settlement at ¶ 2.38.) The Released FLSA Claims are defined as "any claims, causes of action, or legal theories of relief pled, or that could have been pled, based on the factual assertions in the Complaint arising under the Fair Labor Standards Act (29 U.S.C. § 201 et seq,) during the FLSA Claim Period. Released FLSA Claims will be released by eligible FLSA Settlement Class Members *only if* they consent to join as a party plaintiff by submitting a valid FLSA Claim Form." (*Id*.)

Only Class Members that worked during the PAGA Claim Period will be releasing the Released PAGA Claims. (Settlement at ¶ 2.39.) The Released PAGA Claims are defined as "any claims, causes of action, or legal theories of relief pled, or that could have been pled, based on the factual assertions in the Complaint and PAGA Notice to the LWDA arising under the California Private Attorneys General Act (California Labor Code §§ 2698, et seq.) ("PAGA") during the PAGA Claim Period. All eligible PAGA Settlement Members cannot exclude themselves from releasing the Released PAGA Claims and cannot opt-out of receiving their share of the PAGA Settlement Allocation." (*Id*.)

The Settlement provides for an award of attorneys' fees to Class Counsel in an amount not to exceed 35% of the Gross Settlement Amount, or $99,750, and an award of actual litigation costs advanced by Class Counsel (presently estimated not to exceed $15,000, and which figure will be inserted into the Class Notice), subject to Court approval. (Settlement at ¶ 6.6.) The Settlement also allows Plaintiffs to request Enhancement Payments subject to Court approval for $6,000 to Plaintiff Santiago Giovanni Jovel Del Cid, $1,500 to Plaintiff Michael Harrington, and $1,000 to Plaintiff Derrick Carbajal, in addition to their respective Claim Amounts as Qualified Claimants, in recognition of their efforts in coming forward as Class Representatives. (Settlement at ¶ 2.14.)

With respect to the foregoing, the Settlement requires Plaintiffs and their counsel to apply for an award of attorneys' fees, costs, and Enhancement Payments by application to the Court. The purpose of the application is to provide the Court with sufficient information justifying the requested attorneys' fees, costs, and Enhancement Payments. Plaintiffs' counsel will include in declarations, the time spent during litigation, including through appeal and the settlement process, answering questions of Class Members received in response to the Notice of Settlement, or otherwise addressing issues that arise during the claim process. Plaintiffs will provide in advance of the final approval hearing supporting declarations of the work performed and risks incurred in undertaking this litigation.

B. <u>Notice to the Class</u>

The Settlement provides that the agreed-upon Settlement Administrator, Phoenix Settlement Administrators, will perform a national change of address ("NCOA") search, to confirm the validity of each Class Members' addresses. (Settlement at ¶ 6.3.2.)

If Class Notices are returned as undeliverable, within five calendar days of receipt of a returned Notice Packet, the Settlement Administrator will make reasonable efforts to obtain a valid mailing address by using the social security of the Class Member and standard skip tracing devices to conduct a search for a correct mailing address and by contacting Class Counsel and Defendant through Defendant's Counsel. (Settlement at ¶ 6.3.3(a).) Following each search that results in a corrected address, the Settlement Administrator shall promptly resend the original Notice Packet to the Class Member by first-class mail, postage prepaid. Following each search that results in no corrected address, the Settlement Administrator shall resend the Notice Packet to the Class Member, postage prepaid, to the original address, within five calendar days from the date of the skip trace. Only one (1) such re-mailing to the same address shall ever occur, per Class Member. (Settlement at ¶ 6.3.3(b).)

The Class Notice provides Class Members with everything they need to know in order to make an informed decision, including (a) information regarding the nature of the Action; (b) a summary of the Agreement's principal terms and specific directions on how Class Members can obtain a copy of the Settlement Agreement; (c) the Class definition; (d) the Class Member's estimated share of the Net Settlement Amount and the formula for calculating it; (e) the dates which comprise the Class Period, FLSA Claim Period, and PAGA Claim Period; (f) instructions on how to submit a timely and valid

FLSA Claim Form; (g) instructions on how to submit a timely and valid Data Dispute Form; (h) instructions on how to submit a timely and valid request for exclusion in order to opt-out of the Settlement; (i) instructions on how to submit an objection to the Settlement; (j) the deadlines by which the Class Members must postmark their FLSA Claim Form, Data Dispute Form, request for exclusion, or postmark an objection to the Settlement; and (k) the release language. Cal. Rules of Court, rule 3.766(d). (Settlement, Exhibit 1.)

The Class Notice advises the Class of where they can find the Settlement Agreement, by describing (a) the full title of the Settlement Agreement, and (b) the address of this courthouse. (Settlement, Exhibit 1, ¶ 18.)

C. Settlement Administration Process

Class Members are not required to submit claims to receive their Individual Settlement Payment or equitable share of the PAGA Payment. However, those eligible Class Members that wish to opt-in to receive their FLSA Settlement Payment must timely submit an FLSA Claim Form. The deadline to submit a FLSA Claim Form or Data Dispute Form, request exclusion, or make an objection is forty-five (45) calendar days from mailing of the Class Notice. (Settlement, ¶¶ 2.12, 6.4.1, 6.4.4.) The response deadline is reasonable because most Class Members likely reside in the State of California, as does the Settlement Administrator, and thus should receive their Notice of Settlement shortly after mailing.

IV. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A. Legal Standard

Any settlement of class litigation must be reviewed and approved by the court. Cal. Rules of Court, rule 3.769(a); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800 (1996). This is done in two steps: (1) a preliminary review by the court, and (2) a final review and approval by the court after notice has been distributed to the class members for their comment or objections. Cal. Rules of Court, rule 3.769(c)-(f). If the court has not yet certified the action as a class action when settlement is reached, the court must certify the class according to the standards set out in California Code of Civil Procedure § 382, in addition to distributing the settlement notice. Cal. Rules of Court, rule 3.769(d).

At the preliminary approval stage, "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." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 (2004). A court should grant preliminary approval of a class action settlement where it is within the "range of reasonableness." Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th Ed. 2009); *see also Hernandez v. Vitamin Shoppe Indus., Inc.*, 174 Cal. App. 4th 1441, 1446 (2009) (finding the proposed settlement was "within the range of reasonableness").

B. The Settlement May be Presumed Fair and Reasonable

"A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). While the recommendations of counsel proposing a settlement are not conclusive, the court can properly take them into account in recognition of counsel's duty to the entire class; this is particularly true where, as in the instant case, counsel has been involved in informal and formal discovery and negotiations for some period of time. *Id.* Absent evidence of fraud or collusion, courts typically defer to the opinion of counsel. *Id.*

1. Arms-Length Bargaining

The Settlement was achieved only after months of negotiations and informal discovery following an unsuccessful full-day mediation with experienced mediator Steven Pearl. The Parties have agreed that the Settlement reached is a compromise for the damages of absent Class Members for the alleged violations. The Settlement also compensates the Class Representatives for their claims and provides additional Enhancement Payments, thus taking into consideration the risks, time, effort and expenses incurred by the Class Representatives in coming forward, providing invaluable information, and assisting in the litigation of this matter on behalf of all Class Members.

Plaintiffs and Defendant hold strong opinions regarding liability and damages in the instant matter. However, based on their own independent investigations and evaluations, the Parties and their respective counsel are of the opinion that the Settlement, for the consideration and on the terms set forth in the Settlement, is fair, reasonable, adequate and in the best interest of the Class Representatives, Class Members, and Defendant in light of all known facts, circumstances and risks inherent in litigation, including Defendant's financial condition. (Yoon Decl. ¶ 5.)

2. Investigation and Discovery Prior to Settlement

Each side has apprised the other of their respective factual contentions, legal theories, and defenses, resulting in extensive arms-length negotiations taking place between the Parties. Plaintiff propounded formal written discovery, including Special Interrogatories and Requests for Production.

Ahead of mediation, Defendant produced hundreds of pages documenting its policies, practices, and procedures, pertinent collective bargaining agreements in effect, and a sampling of time and payroll data for approximately 10% of the putative class, as well as for Plaintiff. At mediation, Defendant also provided private financial documents regarding its financial condition. Plaintiff thoroughly analyzed each of the documents produced and the sampling of data for purposes of estimating the amount of wages owed and the damages exposure alleged by the Class. (Yoon Decl. ¶¶ 2-4.)

Following the unsuccessful mediation, Plaintiffs filed motions to compel further responses to Special Interrogatories and Requests for Production that were seeking further documents, policies, data, and the contact information for the putative class. On August 27, 2019, the Court granted Plaintiffs' motions in full. Following a *Belaire* opt-out procedure, Plaintiffs' counsel received the contact information for the putative class and personally spoke to numerous putative class members regarding the case. As the Parties re-engaged in settlement discussions, Defendant provided further evidence of Defendant's financial condition in the form of private and confidential documents under the Parties' protective order.

In sum, Plaintiff has obtained sufficient discovery on both liability and damages to apprise the Court of the fairness of the settlement. Despite the asserted fairness of the Settlement, should any potential Class Member, upon reviewing the Class Notice, object to the terms of the Settlement as set forth therein, each has the right to file an objection or seek exclusion. (Settlement at ¶¶ 6.4.4, 6.45.) By such procedure, Class Members may also attend the Final Approval Hearing for the purposes of objecting to one or more of the Settlement's terms.

Based on the above, the Settlement for each participating Class Member is fair, reasonable, and adequate, given the inherent risk of litigation, the risks and time of appeal, and the costs of pursuing such litigation.

3. Experience of Class Counsel

Here, Class Counsel and Defendant's counsel have a great deal of experience in wage and hour class action litigation. (Yoon Decl. ¶ 12-17.) Class Counsel have been approved as class counsel in numerous other wage/hour class actions and has in the past tried a wage and hour class action to successful verdict in federal court. (*Id*.) Moreover, as noted above and detailed below, Class Counsel conducted an investigation of the factual allegations involved in this case via formal and informal discovery conducted over the course of the years' long litigation, in addition to Defendant's financial condition. Thus, based upon such experience and knowledge of the claims asserted, Class Counsel believe that the current Settlement is fair, reasonable and adequate. (Yoon Decl. ¶ 18.) In sum, there should be a presumption of fairness because the factors establishing such a presumption are satisfied.

C. <u>The Settlement Meets the Standard of Fair, Reasonable, and Adequate</u>

Courts will consider the following non-exhaustive list of factors when making a determination regarding final settlement approval: (1) the strength of the plaintiffs' claims; (2) the expense, complexity and likely duration of continued litigation; (3) the risk of maintaining class action status through trial; (4) the settlement amount; (5) the stage of the proceedings and extent of any completed discovery; (6) experience and views of respective counsel; and (7) the reaction of the class members to the proposed settlement. *Dunk*, 48 Cal. App. 4th at 1800.

As discussed above, Plaintiffs believe they have strong meritorious claims; however, they recognize the risks associated with continued litigation. Further, continued litigation is likely to result in significant expenditure of additional time and resources. Plaintiffs have not yet prepared this action for trial. Thus, the expense and complexity of continued litigation would impose a significant burden on the Parties and the Court. This Settlement avoids that for actual money in hand for the Class now.

Counsel for both Parties are of the opinion the Settlement is fair, reasonable, and adequate. The Parties have negotiated a guaranteed, non-reversionary settlement that provides the Class with significant benefit when compared with the risks of continued litigation in the fact of Defendant's financial condition. After the Settlement Administrator calculates the actual estimated amounts on a per capita basis, Plaintiffs can provide additional detail in advance of the final approval hearing.

Plaintiffs therefore respectfully submit the Court should preliminarily approve the settlement as fair, reasonable, and adequate.

D. <u>The Settlement is Within the Range of Reasonableness in Light of the Estimate of Actual Loss</u>

Based upon the documents and datapoints produced by Defendant before mediation, Plaintiffs estimate a high-end approximation of actual loss exclusive of penalties to be $4,515,603.20 (Yoon Decl. ¶ 9(a-d)):

<u>Meal Period Premiums:</u> Plaintiffs estimated three meal premiums for each workweek, totaling approximately $431,863.96 for the class. The calculations covered only the non-unionized drivers because the existence of a collective bargaining agreement likely preempts the meal period claims for unionized drivers.

<u>Rest Break Premiums</u>: Plaintiffs estimate five rest break premiums for each workweek worked by drivers, totaling approximately $3,388,629.20. The calculations covered all drivers under the assumption the existence of a collective bargaining agreement does not similarly preempt rest breaks as it does meal periods. However, Plaintiffs were aware that in light of preemption, the value of this claim could be anywhere from zero to $3,388,629.20.

<u>Overtime</u>: Plaintiffs estimated a half hour of unpaid overtime three times a week, totaling approximately $323,925.04. The calculations covered only the non-unionized drivers because the existence of a collective bargaining agreement likely preempts the meal period claims for unionized drivers.

<u>Unpaid Reimbursements</u>: Plaintiffs estimate unreimbursed business expenses in the amount of $5.625 per week for necessary work-related cell phone use. Plaintiffs estimate damages for this claim in the amount of approximately $371,185.

When determining the reasonableness of a settlement, a "difference in value between what the claims are estimated to be worth and the Settlement Amount in itself does not invalidate the settlement." William B. Rubenstein et al., *Newberg on Class Actions* § 13:15 (5th ed. 2016) (quoting *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 427 (S.D.N.Y. 1993), judgment aff'd, 17 F.3d 600 (2d Cir. 1994)). In fact, courts have stated that even a gross settlement of only *a fraction of a single percent* of a class's total potential recovery can be reasonable depending on the circumstances surrounding the agreement: "[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." 5 *Newberg* § 13:15; *see also Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (compromise is essence of settlement); *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 455 & n.2 (2nd Cir. 1974) ("that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is" inadequate and should be disapproved).

Here, the settlement is well over a fraction "of a single percent of the potential recovery," and is well within the range of reasonableness in light of the fact the Gross Settlement accounts for over 6% of the high-end estimate of actual loss. Considering there was collective bargaining agreements in effect for a large portion of the class, the high-end damages estimated for the rest breaks may be discounted for the risk that claim could be altogether preempted. In light of all considerations, the Gross Settlement is well within the range of reasonableness. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 325 (3rd Cir. 2011) (there appears to be "no authority that requires a district court to assess the fairness of a settlement in light of the potential for trebled damages."); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("A settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery."); *Balderas v. Massage Envy Franchising, LLC*, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (granting preliminary approval of a net settlement amount representing 5% of the projected maximum recovery at trial). Plaintiffs therefore request the Court approve the Settlement.

<u>PAGA Penalties</u>: With regard to the PAGA portion of the Settlement, Plaintiffs submit that the 10% allocation of the Gross Settlement Amount is reasonable and should be approved. The PAGA statute permits a court to "exercise discretion to award lesser penalties based upon the enumerated considerations." *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1135 (2012). Further, where PAGA penalties are negotiated in good faith and "there is no indication that [the] amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009); *see, e.g., Nordstrom Comm'n Cases*, 186 Cal. App. 4th

576, 579 (2010) ("[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims.").

1. Defendant's Financial Condition

In evaluating the reasonableness of the Settlement, Plaintiffs provided significant consideration to Defendant's financial condition. As stated above, during the unsuccessful mediation and again in the months following, Defendant provided substantial evidence of its poor financial condition (that has only worsened in recent times). On its end, Defendant has provided a declaration attesting to its financial situation, and has agreed to provide evidence to the Court or any valid objector subject to the stipulated protective order in this action. *See* Declaration of Monica Escorza filed concurrently herewith; Settlement at ¶ 6.1.1.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE REQUESTED ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE ENHANCEMENT PAYMENTS

A. The Requested Attorneys' Fees and Costs Are Justified

Plaintiffs' counsel will seek an award of attorneys' fees in the amount of $99,750.00 of the Gross Settlement Amount, and an additional amount for reimbursement of actual advanced litigation costs (presently estimated not to exceed $15,000, which figure will be inserted in the Notice). Plaintiffs' counsel will file a timely motion for attorneys' fees and costs, in addition to an itemization of the costs incurred.

The requested award is commensurate with (1) the risk Plaintiffs' counsel took in commencing this action; (2) the time, effort and expense dedicated to the case; (3) the skill and special knowledge of Plaintiffs' counsel; and (4) the value of this guaranteed settlement achieved for Class Members. Here, Plaintiffs' counsel spent a substantial number of hours over the course of the years litigating this action. Plaintiffs' counsel is well-versed in wage-and-hour class and representative actions, which they practice almost exclusively. Plaintiffs' counsel have been deemed class counsel in numerous class actions in both California state and federal courts, both after class certification, through trial, and for purposes of settlement. (Yoon Decl. ¶ 16.)

B. Plaintiffs' Enhancement Payments Are Warranted

In evaluating the propriety of enhancement awards, courts consider relevant factors including the following: (1) the time and effort put into the litigation and the degree to which the class has benefited from those actions; (2) the duration of the litigation; (3) a comparison between the service awards and the range of monetary recovery available to the class; (4) whether the litigation will further the public policy underlying the statutory scheme; and (5) risks to the class representatives in participating in the lawsuit, including financial exposure, retaliation, and negative notoriety related to the lawsuit. *See Staton v. Boeing Co.*, 327 F. 3d 938, 977 (9th Cir. 2003); *Cook v. Niedert*, 142 F.3d 1004, 1015-16 (7th Cir. 1998); *Van Vranken v. Atlantic Richfield Co.*,, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 202 (S.D.N.Y. 1997).

"Incentive awards are fairly typical in class actions." *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (internal quotation marks and citations omitted). "The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." *Id.* at 1394. Particularly in employment class actions, named plaintiffs should be entitled to an enhancement award as an incentive to take the risks associated with pursuing employment claims on behalf of other employees. An award is justified where the plaintiff is a "present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril." *Roberts*, 979 F. Supp. at 201.

Plaintiffs request that the Court appoint them as Class Representatives and preliminarily approve Enhancement Payments in the amount of $6,000 for Plaintiff Santiago Giovanni Jovel Del Cid, $1,500 for Plaintiff Michael Harrington, and $1,000 for Plaintiff Derrick Carbajal. Plaintiffs will apply to the Court for approval of their Enhancement Paymentss with a detailed explanation of the tasks performed and the hardships endured in this action. However, in order to provide the Court with an understanding why the requested Enhancement Payments should be preliminarily approved, Plaintiffs provide as follows: Plaintiffs have assisted Class Counsel throughout the litigation in this case, including by reviewing documents, answering questions, being available throughout mediation, and otherwise assisting the action as needed. Plaintiffs were instrumental to obtaining a fair and reasonable settlement, and spent a substantial amount of time participating throughout the life of the case, including by communicating with Class Counsel regarding the facts of the case and commenting on the experiences of other employees. Further, as part of the Settlement, Plaintiffs have provided a full and general release of any and all claims, in addition to their release as Class Members. (Settlement at ¶ 2.8) For these reasons, Plaintiffs ask that their requested Enhancement Payments be preliminarily approved. Plaintiffs will provide a detailed declaration in support of this request prior to final approval, which will also provide additional details and facts about their efforts and sacrifices for this litigation.

The requested amounts for each Plaintiff is reasonable given the efforts and risks that Plaintiffs took and bore for the Class and the benefits each conveyed on the other Class Members. The Class Members should have the opportunity to comment on whether the amount is reasonable. Based on the foregoing, Plaintiffs request the Court preliminarily approve the requested Enhancement Payments.

VI. CLASS CERTIFICATION

The Settlement Class is defined as all persons employed in California by Empire Transportation, Inc., in a non-exempt position at any time during the Class Period. The Class Period is March 20, 2014 to the Preliminary Approval Date. (Settlement at ¶¶ 2.3; 2.6.)

A. **The Class is Sufficiently Numerous**

Based upon Defendant's representations the putative Class consists of about 1,632 individuals. Thus, the proposed Class is sufficiently numerous. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1531 n.5 (2008).

B. **The Class is Ascertainable**

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible." *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (2010) (internal quotation marks and citations omitted). "Thus, class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official or business records." *Id.*

The Class is readily identified without unreasonable expense official for the following primary reasons: (1) the class definition is stated in terms that are objectively easy to understand and do not require any specific knowledge of Defendant's business; (2) Defendant maintains records showing job titles and dates of employment for its non-exempt employees. The Class is therefore ascertainable. *See Sevidal*, 189 Cal. App. 4th at 919 (proposed class definition must provide "an objective means of identifying those persons who will be bound by the results of the litigation").

C. <u>There Exists a Community of Interests Amongst Class Members</u>

The community interest requirement has three essential elements: (1) predominant questions of law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000). For settlement purposes only, Defendant has stipulated and agreed that the requisites for establishing class certification are met.

1. Common Questions of Law and Fact Predominate

For common questions of law or fact to predominate, "the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the action advantageous to the judicial process and to the litigants." *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913-14 (2001)*; see also Medrazo v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 99-100 (2008) ("Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' [Citations.] Individual issues do not render class certification inappropriate so long as such issues may effectively be managed."). "The existence of even one significant issue common to the class" has been found sufficient to warrant certification. *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008).

This action concerns Defendant's statewide policies and practices which affected Class Members equally. *See Stephens v. Montgomery Ward*, 193 Cal. App. 3d 411, 421 (1987) (finding that company-wide policies and practices which affected all within the proposed class satisfied the commonality requirement). Plaintiffs contend Defendant, as a policy and practice, maintained policies that did not comply with California law on the payment of wages. Thus, Plaintiff contends the only question that needs to be resolved is whether or not Defendant's policies complied with California law. Defendant denies that it did not comply with California law on the payment of wages.

2. The Claims of the Class Representative are Typical of the Claims of the Class

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007) (internal quotation marks and citations omitted).

The requirement is satisfied here, where the claims alleged by Plaintiff arise from the same course of conduct that gave rise to the claims of the Class Members. Specifically, Plaintiffs assert they and the Class were not compensated for missed meal periods and rest breaks or paid because they – like the other Class Members – were required to sacrifice breaks around the needs of the business. Similarly, Plaintiffs assert they were not paid minimum wages for thirty minutes of deducted meal period time, and were not paid overtime for this time as well, just like the rest of the Class Members. Finally, Plaintiffs' reimbursement claims are based on the uniform failure of Defendant to reimburse class members for the use of personal cell phones.

Plaintiffs' claims are typical of the Class as a whole because they arise from the same factual basis and are based on the same legal theory as that applicable to the Class.

3. Class Counsel and the Class Representative are Adequate

"It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981). "But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Id.*

Here, no conflict exists between Plaintiffs and the Class where Plaintiffs contend they have been damaged by the same alleged conduct and have the incentive to fairly represent all Class Members to achieve the maximum possible recovery. Plaintiffs are fully informed of their duties as class representatives and are further aware that they surrendered any right to compromise the group action for their own individual gains. Plaintiffs were and remain willing to vigorously prosecute this action to the benefit of the Class.

Furthermore, Plaintiffs are represented by Class Counsel who have extensive experience in complex wage-and-hour litigation and have protected the interests of the Class Members. Accordingly, Plaintiffs and Class Counsel are adequate and will continue to fairly and adequately represent the Class.

D. <u>The Class Action Method is the Superior Means of Adjudication</u>

Class actions are the superior method of adjudication when they unify claims that would otherwise require adjudication of numerous separate actions arising out of the same basic facts. *See Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1308 (2010) ("[i]n light of the numerous common issues of fact and law that predominate in this lawsuit, we conclude that proceeding by way of class action is the superior method of adjudication"); *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004) ("As alleged, each class member's claim to unpaid overtime depends on whether he or she worked for defendant during the relevant period in a position that was misclassified . . . ."). Further, there is recognition by the courts that class actions are encouraged where "absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime." *Gentry v. Superior Court*, 42 Cal. 4th 443, 462 (2007).

Here, the numerous common issues of law and fact that predominate in this case make class treatment the superior method of adjudication. Plaintiffs' claims are based on alleged system-wide policies, procedures, and practices that applied to Class Members. The wage-and-hour claims of the Class Members are difficult to prosecute as individual employees because (1) many of the individual claims are likely to be relatively low-value and may need to be litigated in small claims court given the relatively short tenure of each employee; and (2) these employees are likely to be unaware of their right to meal periods or rest breaks, correct payment for the time deducted for these non-existent meal periods, and unpaid reimbursements stemming from the use of personal cell phones.

For all these reasons, a class action is the superior means of resolving Plaintiffs' and Class Members' claims, and this Court should enter an Order granting preliminary approval of the Settlement.

VII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the Court enter an order granting preliminary approval of the Settlement in this action.

DATED: January 25, 2021

YOON LAW, APC

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) **ss.**
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is One Wilshire Boulevard, Suite 2200, Los Angeles, California 90017.

On January 25, 2021, I served the following document(s) described as:

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

on all interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as shown on the attached mailing list.

[ ] (BY FACSIMILE)
I am readily familiar with the business practices of this office. The telephone number of the facsimile machine I used was (213) 489-9961. This facsimile machine complies with Rules 2003(3) of the California Rules of Court. Upon transmission, no error was reported by the facsimile machine and a printed copy of the machine's transmission record indicating that the transmission was successfully completed is attached to this declaration.

[ ] By having copies personally delivered to the designated party(ies).

[X] (BY E-MAIL)
The documents were sent as an attachment to an email, with two types of delivery confirmation: Delivery Receipt and Read Receipt. Upon sending, no error was reported and I received a Delivery Receipt, confirming that the message and documents reached the above email address.

[ ] (BY MAIL)
I am familiar with my employer's mail collection and processing practices; know that mail is collected and deposited with the United States Postal Services on the same day it is deposited in interoffice mail; and know that postage thereon is fully prepaid.

[ ] (BY ELECTRONIC SERVICE)
Based on a court order to accept service by electronic means, I caused a true and correct copy of the document(s) to be served electronically on counsel of record by transmission to an e-service provider designated by the Court.

[ ] (BY FEDERAL EXPRESS COURIER)
I am "readily familiar" with the firm's practice of collection and processing correspondence for Federal Express delivery. Under that practice it would be deposited with the Federal Express Courier on that same day at Los Angeles, California in the ordinary course of business.

[X] (State) I declare under penalty of perjury that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member the Bar of this Court at whose direction the service was made.

Executed on Monday, January 25, 2021, at Los Angeles, California.

DIANA JIMENEZ

Santiago Giovanni Jovel Del Cid v. Empire Transportation, Inc.
Superior Court of California, County of San Bernardino, Case No. CIVDS1806733

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