

1 Jason E. Baker, Esq. (SBN: 197666)
jbaker@keeganbaker.com

2 John J. Weber, Esq. (SBN: 313824)
jweber@keeganbaker.com

3 **KEEGAN & BAKER, LLP**
4 5820 Oberlin Drive, Suite 205
5 San Diego, CA 92121
Telephone: (858) 558-9402/7
Facsimile: (858) 558-9401

6 Eric D. Norvell, Esq. (SBN: 309688)
enorvell@norvellfirm.com
7 **ERIC D. NORVELL, ATTORNEY, P.A.**
8 445 Marine View Avenue, Suite 300
9 Del Mar, CA 92014
Telephone: (760) 452-0808
Facsimile: (760) 454-3802

10 Attorneys for Plaintiff BRAYDEN HUMPHERYS, JEREMY HATCHER individually, on behalf
11 of the Class and LOGAN SHANE CRABTREE, on behalf of all similarly situated aggrieved
employees

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF ORANGE**

14 BRAYDEN HUMPHERYS, and JEREMY
15 HATCHER, each individually, on behalf of all
16 similarly situated former and current
17 employees, and LOGAN SHANE
CRABTREE, on behalf of the similarly
situated aggrieved employees,

18 Plaintiffs,

19 v.

20 VIVINT, INC., a Delaware corporation;
21 VIVINT SMART HOME, INC., a Delaware
22 corporation; SMART HOME PROS, INC., a
23 Delaware corporation; ARM SECURITY,
INC., a corporation state unknown; and DOES
1 through 50, inclusive,

24 Defendants.

CASE NO. 30-2020-01141910-CU-OE-CXC

CLASS ACTION

DECLARATION OF LEAD ATTORNEY
JASON E. BAKER IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF
CLASS ACTION AND
REPRESENTATIVE ACTION
SETTLEMENT

[Includes Support for Application for
Enhancement Awards, Attorneys Fees,
Administration Expenses and Costs of Suit].

Date: December 8, 2023

Time: 1:30 p.m.

Dept: CX103

Judge: Hon. Lon Hurwitz

25
26 I, JASON E. BAKER, declare:

27 1. I am a partner in the law firm of Keegan & Baker, LLP counsel of record for the
28 Class Plaintiffs BRAYDEN HUMPHERYS and JEREMY HATCHER and PAGA Plaintiff

1 LOGAN SHANE CRABTREE (the “**Plaintiffs**”) and proposed Class Counsel for the proposed
2 Class. As such, I am fully familiar with the facts, pleadings and history of this matter. The
3 following facts are within my own personal knowledge, and if called as a witness, I would testify
4 competently and consistently to the matters stated herein.

5 2. This Declaration is submitted in support of Plaintiffs’ Motion for Final Approval
6 of Class Action and Representative Action Settlement (which includes the application for
7 attorneys’ fees, costs, and Enhancement Awards) (“**Final Approval**”) for the Settlement that was
8 preliminarily approved by this Court on July 27, 2023 [ROA 356].¹

9 **A. INTRODUCTION**

10 3. The Settlement provides significant relief for the “**Settlement Class**” (as defined
11 below) consisting of the agreement by Defendants VIVINT, INC., a Delaware corporation;
12 VIVINT SMART HOME, INC., a Delaware corporation; SMART HOME PROS, INC., a
13 Delaware corporation; and ARM SECURITY, INC., a corporation (collectively referred to as the
14 “**Defendants**”) to (a) pay Six Million Five Hundred Thousand and 00/100th Dollars (\$6,500,000)
15 (“**Gross Settlement Fund**”); and (b) release and waive claims against certain Settlement Class
16 Members who separated from employment during the Class Period for (i) alleged unearned wage
17 advances retained by Class Members (\$1,927,148.09); and (ii) for violation of post-termination
18 employee non-solicitation restrictions which occurred on or before July 27, 2023. The Settlement
19 includes 2% of the Gross Settlement Fund allocated to PAGA Penalties.

20 4. The Class Notice was sent to current and former eligible employees, of which
21 5,547 are Class Members and 342 are only PAGA aggrieved employees because they were hired
22 after the Class Period ended but before Preliminary Approval. (See, CPT Group Dec. ¶¶ 5-12).
23 The 60-day administration process is complete and only seven (7) Class Members elected to Opt-
24 Out and only one objected to the Settlement. (See, CPT Group Dec. ¶¶ 16-18; Objection attached
25 to the NOL as **Exhibit B** and the Opposition to the Sole Objection filed concurrently herewith).

26 ///

27 ¹ Capitalized terms are used as defined in the Amended and Restated Joint Stipulation of Class Action Settlement
28 (the “**Settlement Agreement**”) attached to the NOL as **Exhibit A**. Page/line references are to the Settlement
Agreement.

1 **B. SUMMARY OF CLASS AND PAGA CLAIMS AND KEY PROCEEDINGS**

2 5. Defendants are Utah based subsidiaries, predecessors, and affiliates doing business
3 as “VIVINT SMART HOME,” a company that sells residential alarm systems and solar systems
4 to homeowners in many states, including California. Defendants make sales primarily through
5 door-to-door sales employees, who often drive their own vehicles to the field and use their personal
6 communication devices for business purposes, such as to pull credit and log sales.

7 6. Plaintiffs and the Class made sales on a door-to-door basis and were paid primarily
8 on a commission-only basis. Defendants classified Class Members as “direct sellers” (in home
9 sales) and paid them as independent contractors under *Unemployment Insurance Code §§ 650,*
10 *13004.1* and *Internal Revenue Code § 3508*.

11 7. Defendants also paid wage advances that, if not earned, would be due upon
12 termination, and imposed post-termination employee non-solicitation restrictions with a \$25,000
13 liquidated damage penalty *per violation* and employer attorneys’ fees for enforcement. Plaintiffs
14 contend these provisions were unlawful, anti-competitive, and unlawfully impeded employee
15 mobility because of the ever-present threat of litigation, liquidated damages and attorneys’ fees.

16 8. Plaintiffs claim that Defendants engaged in: (a) independent contractor and direct
17 seller misclassification; (b) minimum wage violations for non-exempt work time; (c) expense
18 reimbursement violations; (d) unlawful deductions from wages; (e) wages statement violations;
19 (f) unlawful commission forfeiture; and (g) imposing unlawful contractual terms, summarized
20 above. Plaintiffs sought damages, disgorgement, and penalties under the Private Attorneys
21 General Act of 2004 (“PAGA”) and an injunction against enforcement of the repayment
22 agreements and post-termination non-solicitation clause.

23 9. This class action was filed by Plaintiff Crabtree on June 3, 2020. On June 9, 2020,
24 Plaintiff Crabtree submitted a notice of potential PAGA violations to the California Labor &
25 Workforce Development Agency (“LWDA”) (*See, Exhibit C* to the NOL) and eventually filed a
26 First Amended Complaint on September 15, 2020 to include the PAGA claims.

27 10. Plaintiff Crabtree’s individual claims were ordered to arbitration on August 9,
28 2021 and the Class and PAGA claims stayed. Plaintiff Crabtree’s individual claims are stayed by

1 stipulation pending Final Approval of this Settlement. If the Settlement achieves Final Approval,
2 Plaintiff Crabtree's individual claims will be dismissed, meaning Plaintiff Crabtree sacrificed the
3 potential value of his individual claims to achieve the Settlement and benefit the Class in
4 exchange for the opportunity to seek a \$30,000 Enhancement Award (inclusive of waiver of his
5 individual claims). (See, Declaration of Crabtree ¶¶ 4-11 and ¶¶ 64, 74-77 below). In reality,
6 Defendants' agreement to the \$30,000 allocation for Crabtree was a way to get Crabtree value for
7 his individual claim waiver but conditioned on Final Approval of a global settlement.

8 11. Plaintiffs filed a Second Amendment Complaint on July 28, 2023 [ROA 359] to
9 substitute Plaintiffs Humpherys and Hatcher on the class claims because they were similarly
10 situated as Plaintiff Crabtree but, unlike Crabtree, did not sign a mutual arbitration agreement.

11 **C. ADEQUACY OF INVESTIGATIVE EFFORTS, LITIGATION AND DISCOVERY**

12 12. I provided an extensive showing of the adequacy of our investigation in my
13 Declaration filed in support of Preliminary Approval. (ROA 280 ¶¶ 17-34), which began in or
14 about January 2020, but summarize the key issues below.

15 13. Although the parties mediated early, Defendants had implemented various
16 arbitration agreements that they chose to defend, relying on potentially compelling Crabtree to
17 arbitration and thereby, defeating certification.

18 14. On August 9, 2021, Plaintiff Crabtree's individual claims were ordered to
19 arbitration by the Hon. Glenda Saunders and the Class and PAGA claims stayed. Defendants
20 believed the threat of class litigation had been neutralized, and thus, withdrew from settlement
21 negotiations.

22 15. Fortunately, we had mobilized 149 current and former employees of Defendants,
23 including some formerly in management, to assist with prosecution of this case. From this group,
24 I submitted Labor Code wage authorizations from 63 putative Class Members to obtain their
25 personnel files and wage records from Defendants. Although many Class Members were
26 unwilling to submit a wage authorization for fear of lawsuits from Defendants, retaliation in the
27 industry, or other reasons, most were nonetheless helpful in connecting us with additional
28 witnesses and providing corroborating documents and evidence to use for comparison purposes.

1 16. Mobilizing these class members was tedious and time-consuming work, but was
2 the primary catalyst to counteracting Defendants’ class certification defenses and presenting an
3 alternate risk model whereby Defendants could face trifurcated proceedings of a class action, a
4 distinct PAGA action, and a multitude of serial arbitrations.

5 17. Plaintiffs Hatcher and Humpherys, who were actively assisting Plaintiff Crabtree’s
6 efforts (including providing testimony supporting Plaintiff’s preliminary injunction motion) were
7 similarly situated, knowledgeable, credible, and I deemed they would be adequate class
8 representatives. Unlike Plaintiff Crabtree, neither signed mutual arbitration agreements with
9 Defendants. As such, each agreed to serve as class representative to preserve the class action.

10 18. Only after Plaintiffs filed their motion for leave to amend and substitute Plaintiffs
11 Hatcher and Humpherys as lead plaintiffs, did Defendants agree to attend a third mediation
12 session with the Hon. Francisco Firmat (Ret.) on January 4, 2022.

13 19. Dissuading Defendants from their belief that their overall exposure had been
14 minimized by compelling Plaintiff Crabtree’s individual claims to arbitration was achieved
15 through the mobilization of 149 Class Members – which created a powerful inference that serial
16 arbitrations would be forthcoming and would counteract the class waiver from an efficiency, cost
17 and exposure analysis.

18 20. “Cooperating Class Members” Jacob Kaempfer, Kieffer Taylor, and Tristan
19 Yoder were very influential and well-regarded Class Members who gathered documents,
20 organized other Class Members, and made initial “offers of proof” to demonstrate Defendants’
21 risk of serial arbitrations. These “Cooperating Class Members” declined to pursue individual
22 arbitration pending this Court’s decision on Final Approval of the Settlement, but without their
23 efforts, the Settlement would not likely have been achieved. (*See*, accompanying Declarations of
24 Jacob Kaempfer, Kieffer Taylor, and Tristan Yoder; ¶¶74-77 below).

25 21. Once Plaintiffs counteracted the effects of the Crabtree arbitration, and settlement
26 negotiations began, Defendants were more cooperative in providing detailed class data and
27 additional information that Plaintiffs requested without formal discovery, to both dissuade us
28 from perceived marginal claims, and to allow an inquiry into others under the mediation privilege.

1 Ultimately, we had at least ten comprehensive settlement meetings (utilizing the mediation and
2 settlement privileges) with Defendants' litigation counsel, and Defendants' in-house General
3 Counsel Kent Hansen, Esq., to discuss and verify facts, claims, legal theories, defenses, and
4 related issues. This method resulted in direct investigative and effective settlement efforts.

5 22. Eventually, we received the entire Class List with all requested data for the Class
6 to evaluate and compare to our representative sampling.

7 23. From our efforts, Plaintiffs had over 57,703 pages of documents to review,
8 including documents and policies obtained from Defendants; documents obtained under
9 mediation privilege; documents obtained from Labor Code records demands; publicly available
10 records such as from the CSLB; Defendants' Annual and Quarterly Reports; Class-Member-
11 provided documents, including tax returns, wage statements, cell phone records, driving records
12 and text messages and emails; and company policies such as Employee Handbook, Meal Breaks
13 Policy, Gift & Incentives Policy, Expense Reimbursement Policy and Travel Policy and an
14 inestimable amount of Excel data to be used for sampling and damage models.

15 24. Because we had contact with over 149 Class Members, including current
16 employees and some formerly in management, we were able to conduct interviews, conduct wage
17 audit samplings, and verify the accuracy of the information provided to create a reasonably
18 reliable damage model.

19 25. We have also invested extensive time investigating the applicable law, which is
20 constantly evolving as it relates to wage and hour, expense reimbursement obligations, arbitration,
21 independent contractor misclassification, extra-territorial jurisdiction, non-solicitation and non-
22 competition restrictions, training pay, joint employer liability, commission forfeitures, state and
23 federal exemptions for "outside sales" and "direct seller" classifications, class certification, and
24 PAGA, under both California and Utah law.

25 26. A major complication of this case was the choice of law analysis because
26 Defendants were headquartered in Utah, many documents were signed remotely and had Utah
27 choice of law provisions, and some or all Class Members lived or worked in multiple states during
28 the Class Period, including California. This complexity was often raised in defense by Defendants

1 because Utah law was much more *employer* friendly compared to California law.

2 27. Plaintiffs also engaged in extensive motion practice, including contested motions
3 for leave to amend the complaint, to quash a subpoena, to compel arbitration, to dismiss the
4 arbitration, two motions for preliminary injunction, and extensive work for approval of the
5 Settlement. Indeed, there are over 380 entries in the Register of Actions.

6 28. Class Counsel has expended approximately 3,000 hours in the prosecution of this
7 action to date and thus I have a reasonable basis to assert that the investigation and discovery
8 conducted have been sufficient to ensure the Court that “given the magnitude and apparent merit
9 of the claims being released, discounted by the risks and expenses of attempting to establish and
10 collect on those claims by pursuing the litigation,” a fair settlement has been reached. (*Kullar v.*
11 *Foot Locker Retail* (2008) 168 Cal.App.4th 116, 129).

12 **D. MEDIATION EFFORTS AND SUMMARY DAMAGE ANALYSIS**

13 29. The Parties engaged in three continuing mediation sessions on January 25, 2021,
14 April 19, 2021, and January 4, 2022 with the Honorable Francisco Firmat (Ret.), who is a
15 preeminent wage and hour class action mediator in Orange County, California and formerly of
16 the Orange County Superior Court - Complex Division. The parties continued their settlement
17 discussions (directly and through Judge Firmat) and ultimately finalized the Settlement on or
18 about May 3, 2022, which was amended and restated on June 15, 2022.

19 30. Defendants disputed the merits and class treatment and contended the Class owed
20 over \$2,000,000 in unearned wage advances and an indeterminate amount of liquidated damages
21 for violation on non-solicitation provisions. Defendants also contended that many Class Members
22 were subject to Utah law.

23 31. Defendants further contended that Plaintiffs’ claims were not certifiable because
24 a large portion of the Class signed enforceable arbitration agreements (which Plaintiffs dispute),
25 making classwide relief unobtainable. I provided an extensive description of Defendants’ claimed
26 defenses in my Third Supplemental Declaration in Support of Preliminary Approval [ROA 345
27 ¶¶38-71].

28 ///

1 32. The damage model used for mediation was complex because of (a) the part-time,
2 seasonal, and transient nature of this door-to-door salesforce; (b) the intermittent nature of
3 unsupervised door-to-door sales work; (c) differing methods to verify actual work activity; (d)
4 Defendants’ frequently changing compensation plan in response to competitive market
5 conditions; and (e) that fact that some of the workforce, at times, worked from, and in, other states
6 where different laws apply. These characteristics rendered the commonly used “workweek
7 analysis” less than ideal.

8 33. It was further clear that a traditional workweek analysis was not the most suitable
9 damage metric because the work was “outside sales exempt” under Labor Code §1174 (exemption
10 from minimum wage, overtime, meal and rest periods) and the compensation structure was
11 primarily commission based. Instead, we analyzed compensable training and meeting time,
12 expense reimbursement, and production (installations, cancellations, and commission earnings)
13 methodologies.

14 34. As provided in my declarations submitted in support of Preliminary Approval
15 [ROA 280 ¶¶58-73; ROA 323 ¶¶ 16-24; ROA 345 ¶¶ 22-32], Class Members have several distinct
16 Labor Code claims, the best of which, when stacked together and assuming complete victory, and
17 as measured per Class Member without offset for unpaid advances or employment contract
18 violations, could generate damages of approximately \$21,332,850 to \$110,265,900 (exclusive of
19 interest, penalties, and attorneys’ fees).

20 35. The Settlement provides \$6,500,000 in gross monetary recovery towards all
21 claims. We applied discounts from the maximum claim value of 50% for risk of loss on the merits,
22 50% for risk of certification, 50% for the risk of inability to aggregate damages classwide, and
23 50% for the avoidance of the uncertain risk, expense, complexity of litigation, and likely delays
24 from further litigation and potential appeals. Alternatively, and equally significant, a 90%
25 discount from the maximum can be justified to account for disputes about the enforceability and
26 scope of Defendants’ various arbitration agreements (some with class waivers). [ROA 345 ¶¶
27 22-32].

28 ///

1 36. Also, numerous formerly employed Class Members had approximately \$2M
2 cumulatively in outstanding wage advances that were potentially subject to collection, or offset,
3 by Defendants, that was Defendants used to deter individual litigation/arbitration.

4 37. The Settlement provides \$6,500,000 in new monetary recovery and release of
5 \$1,927,148.09 in unpaid wage advance obligations that Class Members will *retain without offset*,
6 for a total settlement value of \$8,427,148.09. Thus, based on the reasonable value of the
7 predominant wage claims, the Settlement results in a recovery of approximately 6% to 30% when
8 compared to the new monetary recovery, and approximately 8% to 40% when including the
9 advances retained by Class Members. However, each claim has a potential value of \$0 if
10 certification was not achievable and for many Class Members, could have resulted in owing
11 Defendants wage advance repayment, liquidated damages, and attorneys' fees.

12 **E. SUMMARY OF THE SETTLEMENT**

13 38. The material terms and conditions of the Settlement Agreement are summarized
14 below.

15 39. Settlement Benefits. Defendants will pay \$6,500,000, release certain Class
16 Members from \$1,927,148.09 in wage advance obligations, and provide the releases described
17 below for a total settlement value of \$8,427,148.09.

18 40. PAGA Penalties. PAGA Penalties are 2% of the Gross Settlement Fund
19 (\$130,000). (Sett. Agr. p. 19:2-8).

20 41. Class Definitions. The Settlement Class is defined as:

21 All persons currently and formerly employed by Defendants in solar or alarm sales in the
22 State of California on a door-to-door basis who made at least one sale in California between
23 June 3, 2016 and June 1, 2022 (the "**Class Period**"). (Sett. Agr. p. 3:4-6).

24 The inclusion of a "one sale" qualifier was required for ascertainability.

25 42. Class Size. The Class includes 5,547 Class Members, less seven (7) Opt-Outs, or
26 5,540 Class Members. (CPT Dec. ¶¶17-20). The Settlement Agreement included an escalator
27 clause if the Class exceeded the represented size of 5,541 by more than ten percent (10%) – which
28 did not occur. (*Id.*). There are only seven (7) Opt-Outs and one objection – which demonstrates
28 how well the Class regards the Settlement. (*See*, Objection attached to the NOL as *Exhibit B* and

1 the Opposition to the Sole Objection filed concurrently herewith).

2 43. Gross Settlement Fund Allocation. The Gross Settlement Fund is a common fund
3 with no reversion and will be used to satisfy all payments due under the Settlement. (Sett. Agr. p.
4 17:28 – 18:7). Assuming final approval on December 8, 2023, Defendants will pay the Gross
5 Settlement Fund by January 5, 2024. After Court-approved payments from the Gross Settlement
6 Fund, the Net Settlement Amount will be disbursed on a weighted allocation formula system
7 considering a Class Member’s California work activity during the Class Period, as described in
8 Sections 12 and 13 of the Class Notice. The Class Notice given to each Class Member was
9 individualized and identified the total points credited to such Class Member from the Class List.

10 44. Dispute Resolution Opportunity. Class Members had an opportunity to dispute the
11 individualized points data in the Class Notice with their own records. (Sett. Agr. p. 12:23 – 13:15).
12 Four (4) points disputes were raised by Class Members during administration and all were
13 satisfactorily resolved. (CPT Dec. ¶16).

14 45. Release of Certain Class Members from Wage Advance Repayment Obligations.
15 Certain formerly employed Class Members as of June 1, 2022 (end of the Class Period) can keep
16 wage advances given but unearned – which total \$1,927,148.09.² (Sett. Agr. p. 27:21 – 28:14).
17 This release has tangible value because Defendants have sued former employees for unpaid
18 advances and Defendants have sent repayment and arbitration demands to other Class Members
19 pursuing collection. This term allows these Class Members to retain \$1,927,148.09 risk-free.

20 46. Release of Post-Termination Employee Non-Solicitation Restrictions. Formerly
21 employed Class Members will also be relieved of any post-termination employee non-solicitation
22 restrictions. (Sett. Agr. p. 27:21 – 28:14). This release is also valuable because Defendants have
23 vigorously enforced these restrictions to impede employee mobility and deter competition.³

24 ² The following Class Members are carved out of the wage advance release in the Settlement Agreement because of
25 pending legal claims: John Barsoumian; Jeremy Bega; Terence Celestine; Tyler Clougher; Michael Deaunovich;
26 Matthew Griffin; Justin Holt; Terrance Jesclard; Kekoa Kane; Briant Katilus; Jeffrey Proebstle; Joseph Schoendorf;
Jared Tripp; and JonPaul Winton.

27 ³ As detailed in the Opposition to the Motion to Compel Arbitration [ROA 112, 114 & 116] and Motion for Preliminary
28 Injunction [ROAs 41, 47, 102, 212 & 224], Defendants have a documented history of taking legal action against former
employees for unpaid advances, misappropriation of customers and leads and other claims, as a deterrent against
employee mobility and competition. For some period of time, Utah companies secured repayment through Confessions
of Judgment filed upon default, causing employees to fear post-termination retribution. [ROA 345 ¶62].

Pursuant to the employment contract, violations of such restrictions could result in a **\$25,000 liquidated damage penalty per violation plus attorneys' fees**. Challenging this anti-solicitation provision was a major goal of this litigation. Indeed, the parties argued a Motion for Preliminary Injunction to enjoin enforcement of the post-termination employee non-solicitation clause on November 12, 2021. This was such an important unresolved issue (and commonly abused employment tactic) that on September 1, 2023 California added *Bus. & Professions Code §16600.5* to extend the prohibitions against non-compete agreements to those entered outside California and added a private right of action with attorneys' fees for enforcement. This Settlement, reached long before California enacted the new protections, allows formerly employed Class Members to be free from threats and risk of litigation for past violations.

47. Supplementary Relief. This case has also resulted in positive changes to Defendants' employment policies, which now provide for training pay separate from commissions and added expense reimbursement tracking capabilities and mileage reimbursement obligations. With this Settlement, and the enactment of *Bus. & Professions Code §16600.5*, Plaintiffs claims have been rectified.

48. Payroll Taxes. The Parties stipulated for settlement purposes that Defendants' classification of the Class as "direct sellers" (which is a payroll tax exemption under *Unemployment Insurance Code §650* and *Internal Revenue Code § 3508* for certain in-home sales) was not improper, and thus, Class Members will receive an IRS Form 1099 for their Individual Settlement Payment. (Sett. Agr. p. 20:11-19). This is consistent with how the Class Members were paid during the Class Period and how other door-to-door companies classify and pay their direct seller workforce.

49. Administration Process. CPT Group, Inc. served as the Settlement Administrator. Filed concurrently herewith is a Declaration from Laura Singh attesting to the Settlement Administrator's administration steps completed and requested fee of \$32,500 for administration.

50. Class Release. As part of the Settlement, Class Members will release claims against Defendants arising out of the same set of operative facts and theories alleged in the SAC. (Sett. Agr. p. 23:22 – 25:5). Class Members who Opt-Out will not be bound by the release (other

1 than PAGA) and will not receive any benefits of the Settlement (other than a pro-rata share of
2 PAGA Penalties if eligible).

3 51. PAGA Release. There is a separate PAGA release for claims arising out of the
4 same set of operative facts and PAGA theories alleged in the SAC. (Sett. Agr. p. 28:15 - 20).

5 52. Unclaimed Funds. No claim forms were required and no monies revert back to
6 Defendants. Class Members can receive Individual Settlement Payments via ACH, direct deposit,
7 digital payment, or check. A reminder postcard will be sent and skip tracing will be used to locate
8 missing Class Members, if necessary, for checks uncashed after 75 days. After 130 days, the
9 uncashed checks will be distributed to the California Controller to be held pursuant to the
10 Unclaimed Property Law, Civil Code §1500, *et seq.* (Sett. Agr. p. 22:2-10).

11 53. Average Pay Outs. Based on the weighted points system (and without crediting
12 the wage advances released), each weighted point is worth \$8.44/\$5.04 (gross/expected net),
13 making the highest individual recovery \$38,265.55/\$22,823.48 (gross/expected net), the lowest
14 individual recovery \$42.25/\$25.22, and the average individual recovery \$ \$1,106.95/\$660.
15 However, the average is misleading and not illustrative of the strength of the Settlement because
16 of great variance in the California production of seasonal/par-time/occasional California workers
17 versus full time California workers. For example, 39% of the Class worked *in California* less
18 than 10 days and the median average of California workdays was 16. While the bottom half of
19 the Class (based on California activity) will still receive a share of the Net Settlement Amount for
20 their California activity, the weighted allocation formula justifiably results in more recovery for
21 those Class Members with higher California activity. As a further example, the total number of
22 California sales during the Class Period was 242,817, which should average 43 sales.⁴ However,
23 929 Class Members (16.7% of the Class) closed only one California sale and 2,942 (53% of the
24 Class) closed nine or fewer California sales. Put another way, well over half of the Class closed

25 _____
26 ⁴ Similarly, the low performing Class Members averaged 3.2 sales, whereas the high performing Class Members
27 averaged 136 closed sales. Therefore, given the varying level of performance within the Class, referencing the entire
28 data set's aggregate average does not represent a clear perspective on reasonableness. A large portion of the Class
will have a nominal to moderate recovery when compared to the rest of the Class. However, each Class Member's
recovery is proportionate to their California work activity or potential individual recovery.

1 fewer than 5% of total sales during the Class Period. By comparison, the top 25% of Class
2 Members (1,346 Class Members) closed nearly 86% of total sales (208,383) averaging 150
3 California sales. As such, the large pool of seasonal/part-time/occasional California workers drags
4 down the average. For the top 1,346 Class Members (25% of the Class), the average recovery is
5 \$3,797.72 (gross) and \$2,282.05 (expected net).

6 54. The Settlement satisfies all factors in *Dunk v. Ford Motor Co.* (1996) 48
7 Cal.App.4th 1794, 1801, as discussed in the accompanying Motion for Final Approval.

8 **F. THERE IS A SUFFICIENT BASIS FOR CERTIFICATION**

9 55. The parties stipulated to class certification for settlement purposes. (Sett. Agr. p.
10 8:23-25). Notwithstanding the stipulation, the Class is ascertainable and numerous because
11 Defendants identified 5,547 persons who qualified as Class Members; the common questions of
12 law and fact, as alleged by the Plaintiffs, are present, specifically the question of whether the
13 door-to-door sales employees employed by Defendants were misclassified; were “exempt” from
14 minimum wage, overtime, expense reimbursement under California law; and were subject to the
15 same compensation plans, and the same wage and hour procedures. Plaintiffs contend that
16 Defendants engaged in a uniform course of conduct with respect to the Settlement Class and the
17 only question is whether Defendants’ conduct supports a meritorious claim. Such suits
18 challenging the legality of a standardized course of conduct in the wage and hour context are
19 generally appropriate for resolution by means of a class action.

20 56. All three Plaintiffs are adequate and typical representatives because they served in
21 all relevant door-to-door positions, including management, during the Class Period. (*See*,
22 accompanying Declarations of Plaintiffs).

23 **G. THE RISKS INHERENT IN CONTINUED LITIGATION FAVOR FINAL**
24 **APPROVAL OF THE SETTLEMENT**

25 57. All class cases bear risk of loss on the merits, a risk that some or all of the claims
26 may not be certified, and risk of appellate delay and collection – which justify a settlement
27 discount. However, this case presented several additional issues that favored Settlement on the
28 proposed terms and was described in extensive detail in the Second and Third Supplemental

1 Declarations of Jason E. Baker filed in support of Preliminary Approval [ROAs 323 & 345].

2 58. To avoid repetition of my prior Declarations, the justification for the reduction can
3 be summarized as: (a) unfavorable new precedent relating to PAGA and class certification; (b)
4 the granular level of proof possibly required to prove up some claims; (c) the outside sales
5 exemption applied to most of their employment periods; (d) disputed proof of when and where
6 unpaid training occurred (perhaps not California); (e) California law allows some “sales meeting
7 time” to be exempt work time under the outside sales exemption, potentially minimizing the value
8 of that claim; (f) some commission deduction claims could be individualized and therefore,
9 difficult to certify; (g) wage statements were issued intermittently (and not weekly); (h) there are
10 potentially conflicting bodies of law about commission forfeitures at termination; (i) ancillary
11 claims, such as unlawful deductions and individualized commission arrangements, were not
12 likely common and pervasive throughout the Class Period; (j) a portion of the Class signed
13 arbitration agreements which could hamper certification efforts; and (k) the two releases obtained
14 for the Class are each significant and equally as important for some Class Members as the
15 monetary recovery. These factors justify the 50/50/50/50 discount analysis (*See*, ¶ 35 above).

16 **H. NOTICE PROCESS AND APPROVAL RATE**

17 59. The notice process was compliant with the Settlement Agreement. (CPT Group
18 Dec. ¶¶5-15). The 60-day notice process included both mail and email. Of the 5,888 persons
19 notified, and despite diligent efforts to locate them, only 5 notices were deemed undeliverable
20 through either mail or email – **a 99.91% successful delivery rate**. (CPT Group Dec. ¶12).

21 60. The Settlement was well-received by Class Members because there were only
22 seven (7) requests for exclusion (i.e., “Opt-Outs”) and one objection to the Settlement. Only four
23 (4) Class Members disputed their personalized settlement data, and all were satisfactorily
24 resolved. (CPT Group Dec. ¶16). Class Members’ 99.85% acceptance rate is testament to the
25 fairness, reasonableness, and adequacy of the Settlement.

26 61. The plaintiffs/Class Members in the two “potentially related” cases against
27 Defendant(s) (Adam Webb and Samuel Silva) both elected to Opt-Out from the Settlement and
28

1 therefore, are not bound by this Settlement, including its release of claims.⁵ (CPT Group Dec.
2 ¶17).

3 **I. REQUESTED PAYMENTS FROM THE GROSS SETTLEMENT FUND**

4 62. Plaintiffs seek the following payments from the Gross Settlement Fund: (a) PAGA
5 Penalties of \$130,000, which is 2% of the Gross Settlement Fund; (b) \$80,000 in Enhancement
6 Awards; (c) costs of the Settlement Administrator of \$32,500; (d) \$2,359,164 to Class Counsel
7 for attorneys' fees; and (e) \$17,425.74 in costs of litigation. (Sett. Agr. p. 16:12 – 18:28).
8 Assuming full awards, the Net Settlement Amount to be paid out would be \$3,913,410.55
9 (inclusive of 25% PAGA Penalties) and would result in an overall net recovery to the Class of
10 \$5,840,559.55 (considering the wage advances retained), which, even assuming full awards, nets
11 60-70% of the Settlement to Class Members.

12 **a. The Requested PAGA Penalty of \$130,000 is Fair, Reasonable, and Should be**
13 **Approved**

14 63. Plaintiff Crabtree asserted PAGA claims for the same violations alleged as class
15 action claims, which is proposed to be resolved for \$130,000 in PAGA Penalties. (Sett. Agr. p.
16 6:1-7; p. 6:11-13; p. 19:3-9). There are 4,106 participants in the PAGA Penalties.

17 64. Plaintiff Crabtree did not receive any direct compensation in settlement of his
18 individual claims, but concurrently herewith, is petitioning the Court for an Enhancement Award
19 of \$30,000, which is inclusive of his service as Class Representative, PAGA Representative, and
20 for waiver of his individual claims still pending in arbitration. (Sett. Agr. p. 4:22-26). (*See*,
21 Crabtree Declaration).

22 65. In declarations submitted in support of Preliminary Approval, I provided an
23 extensive valuation of the PAGA claims and justification for the PAGA Penalties allocation.
24 [ROA 280 at ¶¶ 82-83 ROA 345 ¶¶ 72-79].

25 66. Unfortunately, “neither the California legislature, nor the California Supreme
26 Court, nor the California Courts of Appeal, nor the [LWDA] has provided any definitive answer’
27 as to what the appropriate standard is for approval of a PAGA settlement.” (*Jordan v. NCI Grp.*,

28 ⁵ The history and potential relevance of these cases was explained in my Second Supp. Declaration [ROA 323¶¶5-15] and Third Supplemental Declaration [ROA 345 ¶¶ 11-21], both filed ISO Preliminary Approval.

1 *Inc.* (C.D. Cal. Jan. 5, 2018) No. EDCV161701JVSSPX, 2018 WL 1409590, at *2 (quoting
2 *Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal. 2017) 253 F. Supp. 3d 1074,
3 1075)). Instead, Courts are instructed to apply the same “fair, reasonable, and
4 adequate” standard from class action cases to evaluate whether PAGA settlements are adequate
5 in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to
6 maximize enforcement of state labor laws. (*See, Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th
7 56, 77).

8 67. Additionally, where PAGA claims are settled in the same agreement with the
9 underlying Labor Code claims, courts have looked to the interplay of the two recoveries to
10 determine whether PAGA’s purposes have been served. (*See, O’Connor v. Uber Techs., Inc.*
11 (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1133). The *O’Connor* court, for instance, adopted a
12 “sliding scale” approach, noting that “[b]y providing fair compensation to the class members as
13 employees and substantial monetary relief, a settlement not only vindicates the rights of the class
14 members as employees, but may have a deterrent effect upon the defendant employer and other
15 employers, an objective of PAGA.” (*Id.* at 1134). That is, where settlement of Labor Code claims
16 provides “robust” relief to the class, a greater reduction in PAGA penalties is warranted. (*Viceral*
17 *v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016) No. 15-cv-02198-EMC, 2016 WL 5907869, at
18 *9).

19 68. Here, the Settlement allocates 2% of the Gross Settlement Amount to PAGA
20 Penalties. As discussed in ¶¶38-47 above, the Settlement provides “robust” relief to the Class of
21 \$8,427,148.09 in monetary benefits, the waiver and release of claims that are typically asserted
22 against Class Members to impede employee mobility, and has resulted in positive changes to
23 Defendants’ employment policies.

24 69. Numerous Courts have approved allocations to PAGA penalties lower than 2% of
25 the gross settlement. (*See, e.g., McLeod v. Bank of Am., N.A.* (N.D. Cal. Nov. 14, 2018) No. 16-
26 CV-03294-EMC, 2018 WL 5982863, at *4 (finding \$50,000 PAGA allocation for PAGA claims
27 estimated at \$ 4.7 million – approximately 1.1% adequate); *Ruch v. AM Retail Grp., Inc.* (N.D.
28 Cal. Sept. 28, 2016) No. 14- CV-05352-MEJ, 2016 WL 5462451, at *2, 7 (settlement allocating

1 \$10,000 to PAGA penalties where potential value was over \$ 5.2 million or **0.2%** PAGA
2 recovery.); *Van Kempen v. Matheson Tri-Gas, Inc.* (N.D. Cal. Aug. 25, 2017) No. 15-CV-00660-
3 HSG, 2017 WL 3670787, at *10 (granting final approval of \$5,000 PAGA penalty from \$ 370,000
4 settlement, or **1.4%**); *Clemens v. Hair Club for Men, LLC* (N.D. Cal. June 23, 2016) No. C 15-
5 01431 WHA, 2016 WL 3442774, at *1 (\$500,000 settlement that allocated \$5,000, or **1%**, to
6 PAGA claims)).

7 70. Statutorily required notices were provided to the LWDA as required by Labor
8 Code 2699.3. The proofs of submission are collectively attached to the NOL as ***Exhibit D*** and
9 proofs of service filed as ROA 364. Concurrently with this filing, I caused my staff to serve the
10 Motion for Final Approval and accompanying documents upon the LWDA. (*See, Exhibit E*).

11 71. To date, I have not been contacted by the LWDA to dispute or object to the
12 proposed PAGA Penalties or any other aspect of the Settlement.

13 **b. The Requested Enhancement Awards to Each Named Plaintiff and**
14 **Cooperating Class Member is Fair, Reasonable, and Should Be Approved**

15 72. The Settlement Agreement provides for “**Enhancement Awards**” of \$80,000
16 (1.2% of the Gross Settlement Fund and .95% of the total Settlement value) proposed to be
17 allocated as: (a) Ten Thousand Dollars (\$10,000) for each Lead Plaintiff and Cooperating Class
18 Member; and (b) Thirty Thousand (\$30,000) for the PAGA Plaintiff, which includes the waiver
19 of his individual claims raised in arbitration. (*See, ¶10 & ¶64 above and Crabtree Declaration*).

20 73. The Enhancement Awards are well deserved. Each Plaintiff and Cooperating Class
21 Member was very instrumental in the success of the case and the Settlement and responsive,
22 knowledgeable, participatory, and principled in their pursuit of justice. Beyond the typical roles
23 filled by lead plaintiffs, here, each expended significant time recruiting and encouraging Class
24 Members to prosecute the case and provide me with wage records, testimony, and other data to
25 support the case. I believe that the mobilization of Class Members was most instrumental in
26 achieving the Settlement and it would not have been achieved without their support. (*See,*
27 *accompanying Declarations of Messrs. Crabtree, Humphreys, Hatcher, Yoder, Taylor, and*
28 *Kaempfer for additional evidentiary support.*)

1 74. Each actively participated in this litigation. As detailed in the accompanying
2 declarations, each spent substantial time participating in interviews, meetings, and telephone
3 consultations with me, and spent numerous hours gathering information to support the class
4 claims and assisting with mediations. Each directly assisted in evaluating the information
5 obtained from Defendants. This work was undertaken to prepare the complaints, prepare for
6 mediations, discovery, and the anticipated class certification motion. (*Clark v. American*
7 *Residential Services, LLC* (2009) 175 Cal.App.4th 785, 804-807; *See, also*, accompanying
8 Declarations of Messrs. Crabtree, Humphreys, Hatcher, Yoder, Taylor, and Kaempfer.)

9 75. Further, each has given up more rights than Class Members because each has
10 executed a “general release,” giving up all claims (in addition to wage and hour claims) they may
11 have against Defendants, which no other Class Member was required to do. Further, without the
12 Cooperating Class Members willingness to assert threats of serial individual arbitrations,
13 Defendants would not likely have entered into the Settlement.⁶

14 76. Each Plaintiff also assumed personal risk to benefit the Class. By agreeing to file
15 and maintain this case, each Plaintiff assumed the risk of a judgment for costs in the event of an
16 adverse outcome. In class action losses, the class representative is deemed the losing party and
17 thus potentially liable for the prevailing party’s costs. (*Earley v. Superior Court* (2000) 79
18 Cal.App.4th 1420, 1433-1434; *Whiteway v. Fedex Kinkos Office and Print Services, Inc.*, (N.D.
19 Cal. December 17, 2007) 2007 WL 4531783 - awarding \$56,788 in defense costs against the
20 named plaintiff after granting motion for summary judgment)).

21 77. Each declarant has no known conflicts of interest with other Class Members and
22 has expressed no interest antagonistic to the Class. Each has also rejected efforts at receiving an
23 individual settlement, and thereby delayed quick recovery of their back wages in favor of
24 adequately serving the Class. Indeed, each declarant could likely have been paid much earlier had

25 _____
26 ⁶ Courts may award an enhancement award to class members, other than named plaintiffs, if the recipients show they
27 contributed to the prosecution of the litigation or experienced some type of potential retaliation, which were not
28 shared by the class as a whole. (*Trujillo v. City of Ontario* No. EDCV 04-1015-VAP (C.D.Cal. Aug. 24, 2009), at
*13). Similarly, in *Boyd v. Bank of America Corp.*, No. 8:13-cv-00561-DOC (C.D. Cal. Jan. 19, 2016), the Hon.
David Carter approved service awards of \$25,000 for each of the four representative plaintiffs for their time and
effort in the litigation and their broader releases, and \$2,000 for each of the class member deponents for their time
and effort in providing deposition testimony supporting class claims. (*Id.*, at * 3).

1 they pursued an individual settlement.

2 **c. The Requested Fee of \$32,500 to the Settlement Administrator is Fair,**
3 **Reasonable, and Should be Approved**

4 78. CPT Group seeks a fee of \$32,500 for administration services, consistent with its
5 bid. (*See*, accompanying Declaration of Laura Singh of CPT Group, with accompanying invoice).

6 79. CPT Group effectively performed its obligations as settlement administrator and
7 should be paid the fee as requested from the Gross Settlement Fund.

8 **J. CLASS COUNSEL IS DULY QUALIFIED AND ENDORSES THE SETTLEMENT**

9 80. I have been the primary handling attorney on this case during its nearly four-year
10 pendency. I fully endorse the Settlement and based on my education, training and experience, and
11 my own independent investigation and evaluation, find the Settlement to be fair, reasonable,
12 adequate, and in the best interest of the Class.

13 81. I have been a licensed California Attorney continually in good standing since
14 1998. I received my Bachelor of Arts degree in Political Science from San Diego State University
15 in 1995, with distinction, and my Juris Doctor degree from University of San Diego, School of
16 Law in 1998.

17 82. For the last seven years, I have served as an Adjunct Professor at the University
18 of San Diego School of Law teaching an experiential advocacy course. Additionally, I am a
19 Martindale-Hubbell AV Preeminent rated attorney (the highest peer rating standard given by
20 Martindale-Hubbell), a recipient of the San Diego Super Lawyers recognition for the last ten years
21 (given to no more than five percent of lawyers by Thomson Reuters) and maintain a AVVO
22 Rating of 9.2 as a “Superb Attorney” in employment.

23 83. Throughout my career, I have focused my practice in various areas of litigation
24 including labor and employment both on behalf of class and individual claimants in every stage
25 of litigation. In connection with these actions, I have served as lead trial counsel, co-counsel,
26 argued motions, taken and defended depositions, conducted discovery, drafted pleadings, drafted
27 class notices, examined witnesses, represented class members at settlement conferences,
28 defended class representative depositions, and participated in final disposition hearings. I have

1 tried 16 cases to verdict. I have significant experience representing clients in employment and
2 labor matters, including but not limited to, litigating federal and state wage and hour cases,
3 wrongful discharge and discrimination cases, and advising employees and employers in
4 proceedings before the Department of Labor Standards Enforcement.

5 84. By no means exhaustive, I have personally successfully litigated and/or acted as
6 co-lead counsel on behalf of plaintiff classes in the following significant class action cases:

7 a. *Jason A. Park v. Cytodyne Technologies, Inc.*, Case No. GIC 768364, [2003 WL
8 21283814], California Superior Court, San Diego County, (Hon. Ronald L. Styn),
9 asserting claims under the Unfair Competition Laws (Business and Professions Code §§
10 17200 and 17500) in which we obtained a total judgment of \$18,080,742.14 in restitution,
11 attorneys' fees and costs, and additional prohibitive injunctive relief on behalf of the
12 certified class after a seven-week trial.

13 b. *Wathik Sabri, et al. v. GMAC Mortgage Corporation*, Case No. 03CC00423,
14 California Superior Court, Orange County, (Hon. Richard L. Bauer) represented
15 employees of GMAC Mortgage (dba DiTech.com) in an action asserting violations of
16 California Labor Code and the Unfair Competition Laws (Section 17200 of the Business
17 and Professions Code). We obtained a \$5 million settlement for class members.

18 c. *Lisa Hanna et al v. Home First Mortgage*, et al Case No. SACV06-933 JVS
19 (ANx), California Superior Court, Orange County, (Hon. Philip S. Gutierrez) (wage and
20 hour settlement of \$2,000,000.00 on behalf of the class of mortgage brokers in California).

21 d. *Arthur Montalvo v. Lenox Financial Mortgage Corporation*, et. al Case No.
22 06CC00249, California Superior Court, Orange County (Hon. David C. Velasquez) (wage
23 and hour settlement of up to \$450,000.00 on behalf of class of mortgage brokers in
24 California).

25 e. *Aaron Lopez et. al. v. Fry's Electronics, Inc.*, et. al, Case No. 1-06-CV-061162,
26 California Superior Court, Santa Clara County (Hon. Neal A. Cabrinha - assigned to Hon.
27 William Cahill (Ret.) at JAMS San Francisco for preliminary and final approval)
28 (approximate \$3,200,000.00 settlement on behalf of class of employees in California).

f. *Hernandez et al v. Diamond Environmental Services* et al, Case No. 37-2007-
00051019-CU-OE-NC, California Superior Court, San Diego County (Hon. Michael
Anello and Hon. Robert Dahlquist) (wage and hour settlement of \$515,000.00 on behalf
of worker class).

g. *Romero v. Collection Bureau of America, Ltd.*, Case No. 37-2008-00090572-CU-
MC-CTL, California Superior Court, San Diego County (Hon. William R. Nevitt)
(\$675,000.00 settlement on behalf of a nationwide class under the Telephone Consumer
Protection Act).

h. *Perez v. Jet Speed Plumbing, Inc.*, Case No. 37-2014-00010057-CU-OE-CTL,
California Superior Court, San Diego County (Hon. John S. Meyer) (\$300,000.00
settlement on behalf of an employee class of plumbers).

i. *Ko v. Natura Pet Products, Inc.* Case, No. 5:09cv02619, Northern District of
California (\$2,150,000.00 settlement on behalf of a nationwide class of consumers based
on claims of the Unfair Competition Laws).

j. *Santoli v. The Money Source, Inc.*, Case No. 30-2017-00917450-CU-OE-CXC,
California Superior Court, Orange County (Hon. Randall Sherman) (\$1,500,000.00 wage
and hour settlement on behalf of a California class of mortgage loan officers).

1 *k. D'Aquino v. Stonegate Mortgage*, Case No. 30-2016-00832495-CU-OE-CXC,
2 California Superior Court, Orange County (Hon. Randall Sherman) (\$1,705,218.00 wage
and hour settlement on behalf of a California class of mortgage loan officers).

3 *l. Gonzales v. Vivint Solar Developer, LLC*, Case No. 30-2018-00008020-CU-OE-
4 CTL (Hon. Katherine Bacal) (Approx. \$10,000,000 wage and hour class action settlement
on behalf of class of California door-to-door solar sales representatives).

5 *m. Jeffery v. Infinity Energy, Inc.*, Case No. JCCP 5139, California Superior Court,
6 San Diego County (Hon. Keri Katz) (\$3,454,409.70 wage and hour settlement on behalf
of class of California door-to-door solar sales representatives).

7 *n. Green v. LGCY Power, LLC*, Case No. 37-2019-00026629, California Superior
8 Court, San Diego County (Hon. Ronald Frazier) (\$6,708,629.46 wage and hour settlement
on behalf of class of California door-to-door solar sales representatives).

8 85. I have never been denied appointment as class counsel by any Court.

9 86. I have also successfully represented hundreds of individuals with aggregate,
10 collective, and individual wage and hour cases and serial arbitrations, in federal courts, state
11 courts, and in private arbitrations, recovering many millions in back wages for aggrieved
12 employees.

13 87. It is my extensive experience with class actions, and more specifically wage and
14 hour class actions, and extensive knowledge of the door-to-door sales industry, which enabled us
15 to effectively litigate this matter and to successfully combat the disproportionate resources of
16 Defendants and their legal team.

17 88. I do not have a pre-existing business, personal, social, familial, or financial
18 relationship with any of the parties or the Settlement Administrator.

19 **K. CLASS COUNSELS' REQUEST FOR ATTORNEYS' FEES OF \$2,359,164 IS**
20 **REASONABLE AND SHOULD BE GRANTED**

21 89. The Settlement Agreement provides for attorneys' fees of \$2,808,768 comprised
22 of 33.33% of the Gross Settlement Fund and the wage advances retained by Class Members.
23 However, Class Counsel seeks a reduced amount of \$2,359,164 comprised of 33.33% of the Gross
24 Settlement Fund and 10% of the wage advances retained by Class Members. The reduced request
25 is a fair measure of fees under both the "common fund/benefit" and "lodestar" methods.

26 90. Pursuant to Rule of Court 3.769(b), I disclose the existence of a "fee splitting
27 agreement" with Eric D. Norvell, Attorney P.A. that has been approved by Plaintiffs in writing.
28 However, the fee splitting agreement is based merely on the respective lodestar contributions of

each firm, as approved by the Court. Mr. Norvell filed a Declaration concurrently herewith attesting to his lodestar. No other fee splitting agreement exists.

1. The Common Fund Methodology Justifies the Requested Fee of \$2,359,164

91. The California Supreme Court has concluded that an appropriate method for awarding attorney's fees in class actions is to award a percentage of the recovered common fund *or the monetary value* of plaintiffs' recovery. (*Laffitte v. Robert Half International* (2016) 1 Cal.5th 480, 486 489; *See, also, City & County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-11; *Quinn v. State* (1975) 15 Cal.3d 162, 168; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26). An outgrowth of the "common fund" doctrine is the percentage of the "substantial benefit" created when the settlement results in a substantial, actual benefit, either pecuniary or non-pecuniary. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 38; *Woodland Hills Residents Ass'n v. City Council* (1979) 23 Cal.3d 917, 943).

92. Courts conclude that the percentage approach is preferable to the lodestar analysis because: (1) it aligns the interests of class counsel and absent class members; (2) it encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable settlement; and (3) it reduces the demands on judicial resources from having to scrutinize voluminous attorney time records. (*In re Activision Sec. Litig.*, (N.D. Cal. 1989) 723 F.Supp. 1373, 1378-79).

93. California courts routinely approve class action attorneys' fees awards "averag[ing] around one-third of the recovery." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 fn. 11 (lower court found up to 40% range of contingency fee in marketplace was appropriate in class actions)).⁷

94. However, numerous courts have awarded attorneys' fees of up to, or more than

⁷ *See, also, e.g., Ochoa v. Haralambos Beverage Co.*, No. BC319588 (Super. Ct., Los Angeles County, Feb. 1, 2007) (33.3% fee award with no mention of lodestar crosscheck); *Jones v. Alliance Imaging, Inc.*, No. RG05210418 (Super. Ct., Alameda County, Nov. 27, 2006) (33% fee award with no mention of lodestar crosscheck); *Wisniewski v. Pacific Maritime Assoc.*, No. BC293134 (Super. Ct., Los Angeles County, Nov. 20, 2006) (30.7% fee award from \$12.9 million settlement with no mention of lodestar crosscheck); *Garcia v. Save Mart Supermarkets*, No. 312026 (Super. Ct., Stanislaus County, Aug. 3, 2004) (33% fee award with no mention of lodestar crosscheck); *Terrell v. Ocean's 11 Casino, Inc.*, No. GIC795732 (Super. Ct., San Diego County, Feb. 10, 2004) (approving 33% fee award); *Big Lots Overtime Cases*, JCC Proceeding No. 4283, San Bernardino County Superior Court, Feb 4, 2004) (approving a 33% fee recovery); *Tokar v. GEICO*, (San Diego Superior Court, No. GIC 810166, July 9, 2004) (approving award of 33-1/3%); *Davis v. The Money Store, Inc.*, (San Diego County Superior Court, No. 9AS01716, December 26, 2000) (33-1/3% of the settlement).

1 40% of the common fund. (See, e.g., *Ammari Electronics, et al. v. Pacific Bell Directory*,
2 Alameda County Sup. Ct., Case No. RG05198014 (awarded 43.8%) (2015); *In re California*
3 *Indirect Purchaser X Ray Film Antitrust Litigation*, San Francisco Sup. Ct. 1998 (citing *Abzug v.*
4 *Kerkorian, Los Angeles Sup. Ct.*, Nov. 19, 1990, Case No. CA-00981 (45%) and *Haitz v. Meyer*,
5 Alameda County Sup. Ct., August 20, 1990, Case No. 5729683 (45%)); *Hall v. Cinema 7, Inc.*,
6 San Francisco Sup. Ct., July 16, 2008, Case No. CGC-01-409105 (53%); and *Rundberg v.*
7 *Intrawest Napa Dev. Co.*, Napa County Sup. Ct., January 15, 2014, Case No. 26- 56886 (40%)).

8 95. Here, the monetary value and substantial benefit to the Settlement Class is the
9 \$6,500,000 Gross Settlement Fund **plus** \$1,927,148.09 in advances retained (wage claims
10 released) – for a total settlement value of \$8,427,148.09. Additionally, although there is no
11 assigned monetary value to the second release and positive changes to Defendants’ practices,
12 there is substantial immeasurable benefit to the Class nonetheless. The fee request of \$2,359,164
13 equates to 36% of the Gross Settlement Fund, but only 28% of the total monetary value of the
14 Settlement. Both calculations are within the range of marketplace contingency fees, yet **less than**
15 provided by Plaintiffs’ contingency fee agreement and **less than** provided by the Settlement
16 Agreement.

17 96. Solely based on the commonly used “percentage of the benefit” or “common fund”
18 theory of recovery, the requested fees of \$2,359,164, should be granted. Class Counsel has
19 obtained a Settlement with substantial benefit for the Class and the results justify the award of
20 attorneys’ fees requested.

21 **2. The Lodestar Methodology Justifies the Requested Fee of \$2,359,164**

22 97. Since the percentage of the common fund is endorsed as the better measure of a
23 fee in a class action settlement creating a common fund, courts have discretion to forego a lodestar
24 cross-check or to use total lodestar approach simply to double check the reasonableness of the
25 requested fee. (*Laffitte v. Robert Half Internat., Inc., supra*, at 506). In doing so, the trial court
26 should give credence to the verified billing statements submitted by attorneys absent clear
27 indications that the records are erroneous. (See e.g., *Bender v. County of Los Angeles* (2013) 217
28 Cal.App.4th 968 987; *Horsford v. Board of Trustees of California* (2005) 132 Cal.App.4th 359,

396).

a. The Number of Hours Reported is Reasonable

98. The total amount of time expended by my firm in the 47-month pendency of this case (through Final Accounting) is 2,270 hours for a lodestar of \$1,294,742.46 as summarized below and detailed in the contemporaneously kept Timeslips records attached to the NOL as ***Exhibit F***. (See also, Declaration of Attorney John J. Weber).

Keegan & Baker, LLP					
<i>Name</i>	<i>Title</i>	<i>Bar Number</i>	<i>Rate</i>	<i>Total Hours</i>	<i>Lodestar</i>
Jason E. Baker	Partner	197666	\$695 - \$790	1,318.50	\$974,595.96
John Weber	Associate	313824	\$450 - \$525	499.50	\$232,105.50
Yadira Samaniego	Paralegal	n/a	\$185 - \$205	452.40	\$88,041.00

99. The total combined lodestar of both firms is \$1,801,792.46. (See, Declaration of Eric Norvell, with 822.50 hours and lodestar of \$507,050).

100. Prevailing counsel are entitled to be compensated “for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee paying client for all time reasonably expended on a matter.” (*Hensley v. Eckerhart* (1983) 461 U.S. 424,431 (internal quotations and citations omitted); *Serrano v. Unruh* (1982) 32 Cal.3d 621, 633 (“*Serrano IV*”) (parties may recover for all hours reasonably spent); *Meister v. Regents of Univ. of Cal.* (1998) 67 Cal.App.4th 437, 447-48).

101. Also, “necessary support services for attorneys, e.g., secretarial and paralegal services, are includable within an award of attorney fees.” (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 951; See also, *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 274 (awards of attorneys’ fees for paralegal time are commonplace and excluding paralegal time was improper)).

102. This litigation required an extraordinary expenditure of resources because: (a) we faced a Utah based defendant who believed its compensation plans were not unlawful under Utah law; (b) numerous affiliates who were potentially subject to joint employer liability; (c) novel and nuanced legal issues in an evolving legal landscape on arbitration, PAGA, joint employer liability, independent contractor misclassification, direct seller exemption, outside sales exemption, training pay, expense reimbursement obligations, commission forfeiture, class certification,

1 extra-territorial jurisdiction, and anti-competitive laws; (d) varied record keeping practices by
2 Defendants because of a lack of similar requirements in Utah; and (e) mobilization of 149 active
3 Class Member participants resulting in extraordinary expenditures of time for client management,
4 communications, record keeping, and individual record review and wage audit analysis. Indeed,
5 the strategy, commitment and diligence required to mobilize 149 Class Members to demonstrate
6 an alternate risk model whereby Defendants could face trifurcated proceedings of a class action,
7 a distinct PAGA action, and a multitude of serial arbitrations was the key to reaching this
8 Settlement.

9 103. Additionally, unlike many class action settlements, this class was actively
10 litigated, with over 380 entries in the Register of Action – significantly more than any other class
11 action cases pending before this Court in my recent evaluation. Our efforts included extensive
12 motion practice, including contested motions for leave to amend the complaint, to quash a
13 subpoena, to compel arbitration, to dismiss the arbitration, two motions for preliminary
14 injunction, and extensive work for approval of the Settlement.

15 104. Nevertheless, we litigated this matter with great efficiency considering the amount
16 of work required to achieve the Settlement. Indeed, by the date of final approval, this case has
17 been pending for nearly 48 months, which averages 47 hours expended per month. As much as
18 50% of the total time spent was mobilizing and maintaining support from Class Members,
19 evaluating their records, and conducting wage audits. Considering there were 149 engaged Class
20 Members, that equates to approximately 8-10 hours invested per Class Member.

21 105. Included in my firm's current lodestar is time for overseeing the completion of
22 administration of this Settlement including communicating with Class Members and the LWDA,
23 resolving claims disputes, monitoring the distribution of proceeds, following up on missing
24 payments, and ensuring post-Settlement administration acts are completed.

25 106. However, the amount of additional time needed after Final Approval is not easy
26 to predict. In a recent case I handled, I spent over 150 hours post-Judgment forcing payment
27 (including conducting out of state bank levies) and chasing down uncashed checks, all without
28 additional pay.

1 **b. The Requested Hourly Rates Are Reasonable**

2 107. Class Counsel are entitled to be compensated at hourly rates that reflect the
3 reasonable market value of their legal services, based on their experience and expertise. (*See*,
4 *Serrano IV*, 32 Cal.3d at 640-43 n.31; *San Bernardino Valley Audubon Soc'y v. County of San*
5 *Bernardino* (1984) 155 Cal.App.3d 738, 755). Courts have explained that payment at the full
6 market rate is essential to entice well-qualified counsel to undertake difficult cases that they might
7 otherwise be unwilling to take. (*Id.*).

8 108. The total lodestar results in a blended rate of approximately \$577. In calculating
9 my firm's lodestar, I used \$695 - \$790 for me, \$450 - \$525 for attorney John Weber, and \$185 -
10 \$205 for a paralegal with over twenty-five years of experience. (*See, In re Easysaver Rewards*
11 *Litig.*, No. 09-cv-02094-BAS-WVG, 2016 WL 4191048, 2016 U.S. Dist. LEXIS 105152 (S.D.
12 Cal. Aug. 9, 2016 - rates up to \$260.00 are reasonable for paralegals)).

13 109. As set forth above, my professional background and experience supports the
14 hourly rates stated above. I was approved in California Superior Court at \$695 in 2020 (*Gonzales*
15 *v. Vivint Solar Developer, LLC*, Case No. 30-2018-00008020-CU-OE-CTL (Hon. Katherine
16 Bacal)); \$725 in 2021 and \$750 in 2022 in *Jeffery v. Infinity Energy, Inc.*, Case No. JCCP 5139,
17 California Superior Court, San Diego County (Hon. Keri Katz) and *Green v. LGCY Power, LLC*,
18 Case No. 37-2019-00026629, California Superior Court, San Diego County (Hon. Ronald
19 Frazier). I used the same rates approved by other California trial courts in calculating my lodestar
20 hereunder.

21 110. These rates are within the range of rates I charge depending on the complexity of
22 matters and thus, necessarily reflect the current market value of our legal services in Orange
23 County and San Diego. This rate is within the comparable rates of similarly qualified lawyers
24 handling civil matters in San Diego and Orange County Superior Courts. If this was a private
25 non-contingency matter, these are the charges that would be made and presented to the client.

26 111. By comparison, this Court has recently implicitly approved (or did not reject)
27 similar hourly rates for attorneys with similar or lesser experience than I have. For example, in
28 *Walter v. Farfetch.com* (2020-01139875), \$950 an hour for Attorney Eric Grover (25+ years) and

1 \$675 for Attorneys Elizabeth Acevdeo (20 years), Robert Spencer (18 years) and Adrian Barnes
2 (16 years). Similarly, on August 16, 2023, in *Alvardo v. Citadel Servicing* (2019-01057617),
3 \$650 for Attorneys Edwin Aiwarzian (19 years), Arby Aiwarzian (13 years), and Joanna Ghosh (13
4 years), \$750-\$800 for Attorney Heather Davis (18 years), and \$625 - \$725 for Attorney Amir
5 Nayebedadash (19 years).

6 112. As a further comparison to the hourly rates, many courts have relied on the *Laffey*
7 *Matrix*. (*Syers Properties III, Inc., v. Rankin* (2014) 226 Cal.App.4th 691). According to the
8 current *Laffey Matrix*, an unadjusted hourly rate for me, with 25+ years of experience, is \$1,057,
9 for Attorney Weber is \$538, and for paralegals is \$239. (See, **Exhibit G** to NOL). Our proposed
10 rates are **well below** those approved by the *Laffey Matrix*.

11 113. My law firm also commissioned a survey by the *National Association of Legal*
12 *Fee Analysis* (“NALFA”). This expert group conducts surveys of billing rates (both charged and
13 court approved) of attorneys across the country. NAFLA’s survey concluded that attorneys with
14 a similar sized practice and years of experience justify an hourly rate for me of up to \$1,100 and
15 for Attorney Weber up to \$595. (See, **Exhibit H** to NOL). Our proposed rates are **well below** the
16 top rates identified in the NALFA survey.

17 **c. A 1.31 Multiplier Would Harmonize the Lodestar with the Common Fund**
18 **Award**

19 114. A court may apply a multiplier in consideration for risk, efficiency, and/or
20 obtaining a substantial result, to enhance the lodestar for purpose of cross-check. (See, *Ketchum*
21 *v. Moses* (2001) 24 Cal.4th 1122, 1133-34 (holding that a risk multiplier may be applied to
22 compensate contingency fee attorneys at a fair market rate)).

23 115. In making this determination, the Court “take[s] into account a variety of other
24 factors, including the quality of the representation, the novelty and complexity of the issues, the
25 results obtained, and the contingent risk presented.” (*Laffitte, supra*, at 489 (*quoting Lealao*, 82
26 Cal.App.4th at 26)). Such an enhancement “mirrors the established practice in the private legal
27 market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over
28 their normal hourly rates for winning contingency cases.” (*Ketchum*, 24 Cal.4th at 1132-34). A

1 risk multiplier also serves to bring the financial incentives for enforcing important rights “into
2 line with incentives [attorneys] have to undertake claims for which they are paid on a fee-for-
3 services basis.” (*Id.* at 1132).

4 116. Multipliers can range from 2 to 4 or even higher. (*Coalition for L.A. County*
5 *Planning etc., Interest v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251; *See, e.g., City of*
6 *Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 (affirming a **2.34** multiplier); *Wershba,*
7 91 Cal.App.4th at 224, 255 (“Multipliers can range from **2 to 4** or even higher”); *Sutter Health*
8 *Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (applying a **2.52** multiplier on a
9 lodestar cross-check); *Chavez, supra*, 162 Cal.App.4th at 66 (applying a **2.5** multiplier in a
10 consumer class action)).

11 117. Here, a nominal lodestar multiplier of 1.31 would achieve complete harmony
12 between the common fund and the lodestar methodologies, which helps to corroborate the
13 reasonableness of the requested fee requested by Class Counsel.

14 **3. The Contingent Nature of the Case and Expertise Required Justifies the Requested**
15 **Lodestar Enhancement and Requested Fee**

16 118. Perceived large fee awards in class action cases do not equate to pure profits and
17 sometimes merely offset other losses and the costs of doing business. This case was litigated on
18 a contingent basis for nearly four years with all the concomitant risk factors inherent in such an
19 uncertain undertaking. Practicing in this area of law involves a great deal of risk because these
20 cases can be lost on both procedural rulings and on the merits. For example, in a recent consumer
21 class case where we suffered an adverse class certification ruling during a six-year pending case,
22 my firm lost many thousands of billable hours, \$200,000 in advanced costs, and was potentially
23 liable for the national corporate defendant’s costs of litigation.

24 119. Sometimes even a successful case can result in no recovery. For example, the
25 2017 *Toys R Us* bankruptcy resulted in no recovery to us despite our having achieved a substantial
26 settlement of wage related claims that was not fulfilled prior to bankruptcy.

27 120. We are a small firm currently consisting of 3 attorneys. To properly handle and
28 prosecute this case, I was precluded from taking other cases, and in fact, had to turn away other

1 meritorious fee generating cases. For example, many months went by during which time I did
2 not accept new cases or recover contingent fees. During this same time, my firm advanced all
3 litigation costs and paid overhead and salaries, even though the ultimate result was far from
4 certain.

5 121. There is a substantial difference between the risk assumed by attorneys being paid
6 by the hour and attorneys working on a contingent fee basis. The attorney being paid by the hour
7 can go to the bank with his fee. The attorney working on a contingent basis can only log hours
8 while working without pay towards a result that will hopefully entitle him to a marketplace
9 contingent fee, considering the risk and other factors of the undertaking. Otherwise, the
10 contingent fee attorney receives nothing.

11 122. Counsel retained on a contingent fee basis should be entitled to a premium beyond
12 the standard, hourly, non-contingent fee schedule to compensate for both the risks and the delay
13 in payment, to offset time spent on the losses and because success is never guaranteed. Indeed, if
14 counsel is not adequately compensated for the risks inherent in difficult class actions, competent
15 attorneys will be discouraged from prosecuting similar cases. In fact, Plaintiffs' firms are only
16 able to undertake risky and expensive wage and hour cases because of the availability of the
17 enhanced fee awards in cases in which we prevail.

18 123. The complexity of employment class litigation requires great knowledge and skill
19 to address the constantly evolving substantive law and the procedural requirements of class action
20 litigation. Unlike single party cases, class actions require greater financial involvement, involve
21 a multitude of party interests, affect interstate commerce, federal and state wage exemptions, and
22 are more complex in that class counsel must consider the commonality of claims, the multiplicity
23 of laws, and navigate the procedural and substantive hurdles of class certification, preliminary
24 approval, class notice, class administration, and final approval.

25 **L. The Total Costs Advanced of \$17,425.74 Are Reasonable and Should be Approved**

26 124. The actual costs my firm incurred in prosecuting this litigation were \$15,766.74.
27 (Attached to the NOL as *Exhibit I* is our firm's cost bill). We incurred the necessary costs
28 associated with complex litigation, including court fees, mediation, consultant fees, expert fees,

1 video conferencing, cloud hosting services, attorney service costs, copying, research, docket
2 retrieval and other necessary costs. These expenses are all of a type normally charged to a fee-
3 paying client in the private legal marketplace. The expenses pertaining to this case are reflected
4 in the books and records of my firm and an accurate record of the expenses incurred. Included
5 within the costs are reasonably estimated costs to get through Final Approval and post-judgment
6 reporting.

7 125. Included in my firm's costs is a \$1,500 charge owed to CPT Group for some
8 additional costs associated with enabling Class Members to be paid via ACH, digital payment, or
9 direct costs through a third-party website. We had a good-faith disagreement with CPT about
10 whether that cost was included in their original bid of \$32,500, but to avoid exceeding the bid, I
11 agreed to pay it as a reimbursable case cost, subject, of course, to Court approval of
12 reimbursement.

13 126. These costs, including the \$1,659 in costs incurred by the Norvell firm, total
14 \$17,425.74 and are less than the \$25,000 in costs allowed by the Settlement Agreement and
15 disclosed to the Class. As such, these costs are reasonable and should be reimbursed from the
16 Gross Settlement Fund.

17 127. A Final Accounting hearing date for September 6, 2024 or later would give us
18 sufficient time to close out the administration and report back to the Court.

19 I declare under penalty of perjury, under the laws of the State of California, that the
20 foregoing is true and correct.

21 **RESPECTFULLY SUBMITTED,**

22 **KEEGAN & BAKER, LLP**

23 Dated: November 20, 2023

24 By: /s/ Jason E. Baker
25 Jason E. Baker, Esq.
26 Attorneys for Plaintiffs BRAYDEN
27 HUMPHERYS, JEREMY
28 HATCHER and LOGAN SHANE
CRABTREE