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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

LOGAN SHANE CRABTREE, individually,
on behalf of the Class, and all similarly situated
aggrieved employees,

Plaintiff,

v.

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

Defendants.

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

CLASS ACTION

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

Date: September 2, 2022

Time: 1:30 pm

Dept: CX101

Judge: Hon. Glenda Sanders

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PLEASE TAKE NOTICE that on September 2, 2022 at 1:30 p.m., or as soon thereafter as this matter may be heard in Department CX101 of the Orange County Superior Court, located at 751 W. Santa Ana Boulevard, Santa Ana, CA 92701, Class Plaintiffs BRAYDEN HUMPHERYS and JEREMY HATCHER and Private Attorneys General Act of 2004 (“**PAGA**”) Plaintiff LOGAN SHANE CRABTREE will and hereby move the Court for an Order: (1) certifying a class for settlement purposes only; (2) providing Preliminary Approval of the Amended and Restated Joint Stipulation of Class Action Settlement; (3) approving the Class Notice and notice and administration process; and (4) scheduling a hearing for Final Approval of the Settlement.

Pursuant to California Labor Code §2699(1)(2), a copy of the proposed Amended and Restated Joint Stipulation of Class Action and PAGA Settlement, as well as information regarding the preliminary approval hearing on this matter, were submitted to the California Labor Workforce Development Agency via online filing at <https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html> on June 17, 2022.

Pursuant to California Rule of Court 3.769(c), the Motion will be based on this Notice of Motion; the Memorandum of Points and Authorities; the Declaration of Attorney Jason E. Baker and Exhibits attached thereto; the Declaration of Attorney Eric D. Norvell; the Declarations of Plaintiffs Brayden Humpherys, Jeremy Hatcher, and PAGA Plaintiff Logan Shane Crabtree; the Declaration of Julie Green of CPT Group, Inc. and Exhibits attached thereto; the papers and records filed herein, and on such oral and documentary evidence as may be presented at the hearing of the Motion.

Dated: June 17, 2022

By: /s/ Jason E. Baker
Jason E. Baker, Esq.
John J. Weber, Esq.
Attorneys for Plaintiffs BRAYDEN
HUMPHERYS, JEREMY HATCHER and
LOGAN SHANE CRABTREE, on behalf
of the Class, and all similarly situated
aggrieved employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Motion is submitted in support of Plaintiffs BRAYDEN HUMPHERYS (“**Humpherys**”)
4 and JEREMY HATCHER (“**Hatcher**”) and PAGA Plaintiff LOGAN SHANE CRABTREE’s
5 (“**Crabtree**”) (collectively referred to as “**Plaintiffs**”) Motion for Preliminary Approval of Class Action
6 Settlement. The Amended and Restated Joint Stipulation of Class Action Settlement, together with
7 Exhibits A & B thereto, is attached as ***Exhibit 1*** to the Declaration of Jason E. Baker (hereafter “**Baker**
8 **Dec.**”) filed in support of this motion (the “**Settlement Agreement**” or “**Settlement**”).¹

9 The Settlement was achieved after the Parties engaged in three mediation sessions with the
10 Honorable Francisco Firmat (Ret.), a preeminent wage and hour class action mediator in Orange County,
11 California and formerly a Judge of the Orange County Superior Court - Complex Division. The Parties
12 continued their settlement discussions (directly and through Judge Firmat) and ultimately finalized the
13 settlement terms on or about May 3, 2022 which was amended and restated on June 15, 2022. (Baker
14 Dec. ¶6).

15 In the Settlement Agreement, the Parties propose to settle this action by providing significant
16 relief for the benefit of the “**Class**” (as defined below) consisting of the agreement by Defendants
17 VIVINT, INC; VIVINT SMART HOME, INC.; SMART HOME PROS, INC.; ARM SECURITY, INC.
18 (collectively referred to as the “**Defendants**”) to (a) pay Six Million Five Hundred Thousand Dollars
19 (\$6,500,000) (“**Gross Settlement Fund**”); and (b) for all Class Members who separated from
20 employment during the Class Period (i.e., before June 1, 2022) who do not Opt-Out to release and waive
21 (i) certain claims for unearned advances (approx. \$1,973,760.49) and (ii) claims for violations of post-
22 termination non-solicitation restrictions up through the date of Preliminary Approval. (Baker Dec. ¶4).

23 The Settlement benefits approximately 5,541 Class Members and would constitute a complete
24 settlement of this case, including PAGA claims. (Baker Dec. ¶5). The Settlement is fair, reasonable,
25 adequate, and in the best interest of the Class and therefore, should be preliminarily approved.

26
27
28 ¹ Capitalized terms used, but not defined in this Memorandum, are used as defined in the Amended and Restated Joint Stipulation of Class Action Settlement.

II. FACTUAL BACKGROUND

A. The Parties

Defendants are Utah based subsidiaries, predecessors, and affiliates doing business as “VIVINT SMART HOME,” a company that sells residential alarm systems and solar systems to homeowners in many states, including California. Defendants primarily make sales through door-to-door sales employees, who drive their own vehicles to the field and use their personal communication devices for business purposes, such as to pull credit reports and log sales. Defendants paid door-to-door sales employees on a “commission only” basis without any of the protections afforded by the California Labor Code, such as training pay and expense reimbursement. Defendants also paid wage advances that, if not earned through the terms of the advance, would be due upon termination. Defendants also imposed post-termination employee non-solicitation restrictions that included a \$25,000 liquidated damage penalty *per violation* and employer attorneys’ fees for enforcement of such restrictions. (Baker Dec. ¶¶7-10).

Plaintiff Humpherys worked in door-to-door sales for Defendants between approximately May 2016 to March 2018. Plaintiff Hatcher worked in door-to-door sales and was a sales manager for Defendants between approximately March 2014 to March 2019. PAGA Plaintiff Crabtree worked in door-to-door sales and was a sales manager for Defendants between approximately April 2016 to May 2019. (Humpherys Dec. ¶5, Hatcher Dec. ¶5, Crabtree Dec. ¶¶5&7). All Plaintiffs worked in California under the same compensation plans and suffered the same types of damages. (*Id.*)

B. Summary of the Litigation and Claims

This case was filed by Plaintiff Crabtree on June 3, 2020 as a class action, with a First Amended Complaint filed on or about September 15, 2020 to include claims under PAGA. Plaintiff Crabtree’s individual claims were ordered to arbitration on August 9, 2021 and the Class and PAGA claims stayed. On or about December 22, 2021, Plaintiff Crabtree sought leave to file a Second Amendment Complaint (“SAC”) to substitute Plaintiffs Humpherys and Hatcher on the class claims because they were similarly situated as Crabtree, but did not sign the same arbitration agreement. Plaintiff Crabtree’s Motion for Leave to File a SAC was set for hearing on May 6, 2022, but this Settlement was initially reached on May 3, 2022 and has since been amended and restated. As part of the Settlement, the Parties have

1 stipulated for leave to file a SAC adding Humphreys and Hatcher as lead plaintiffs. (Baker Dec. ¶¶11-
2 13, 16).

3 In the SAC, Plaintiffs allege that Defendants developed and enforced a series of work policies
4 implemented across all of its California locations that: (a) shifted the burden for employment taxes to
5 its workers through independent contractor and direct seller misclassification; (b) failed to pay lawful
6 minimum wage for non-exempt work time, such as training, non-commute travel and meeting time; (c)
7 required employees to incur various work-related expenses without reimbursement, such as vehicle use,
8 telephone, and cellular and data plans; (d) made unlawful deductions from some employees' earned
9 wages; (e) failed to provide non-exempt workers accurate itemized wages statements; (f) caused
10 unlawful commission forfeiture at termination of employment; and (g) imposed unlawful contractual
11 terms of employment, such as post-termination non-solicitation restrictions. Plaintiffs sought to recover
12 damages for the Class, disgorgement from the Defendants, related penalties under PAGA, and attorneys'
13 fees. (Baker Dec. ¶10).

14 **C. Investigative and Settlement Efforts**

15 Class Counsel was able to thoroughly investigate and analyze Defendants' compensation
16 policies to make an informed decision on the Settlement. (Baker Dec. ¶¶17-34; Norvell Dec. ¶¶4-12)).
17 Class Counsel was thoroughly experienced with the issues prevalent in the Utah based door-to-door
18 sales industry through four other wage and hour class actions (including a heavily litigated class action
19 against Defendants' "sister company," Vivint Solar), each with similar compensation structures and
20 deficiencies under California law. (Baker Dec. ¶¶18, 29; Norvell Dec. ¶5).

21 Although no formal discovery was allowed because of the early stay in proceedings, Class
22 Counsel's investigation was aided by a mobilized a group of 149 Class Members who provided
23 documents, gave interviews, and submitted wage authorizations to Defendants for Class Counsel to
24 obtain their employment files and wage records. This group included Class Members who worked
25 throughout California at differing portions of the Class Period, and even included current employees
26 and persons formerly in management. (Baker Dec. ¶32; Norvell Dec. ¶6).

27 Once Plaintiffs established a likelihood of prevailing and settlement negotiations began,
28 Defendants were reasonably cooperative in providing detailed class data and additional information that

1 Plaintiffs requested, both to dissuade Plaintiffs from perceived marginal claims, and to allow an inquiry
2 into other claims under the mediation privilege. (Baker Dec. ¶30). From this group, Plaintiffs were able
3 to conduct wage audit samplings and verify the accuracy of the information provided to create a
4 reasonably precise damage model. (Baker Dec. ¶32; Norvell Dec. ¶7-8). Plaintiffs had over 57,703 pages
5 of documents to review, including documents and policies obtained from Defendants; documents
6 obtained under mediation privilege; documents obtained from Labor Code records demands; publicly
7 available records such as from the CSLB; Defendants Annual and Quarterly Reports; and Class-
8 Member-provided documents including tax returns, wage statements, cell phone records, driving
9 records, text messages, and emails and company policies. (Baker Dec. ¶31).

10 The Parties negotiated at arm's length through Judge Firmat in three mediation sessions before
11 the Settlement was finalized. The Settlement was reached in conjunction with extensive litigation,
12 including a motion to compel arbitration, motion to quash subpoena, motion for preliminary injunction,
13 and a motion for leave to amend the complaint; voluminous document exchange; extensive interviews
14 of putative Class Members; a review and analysis of wage statements and sales production records
15 produced by putative Class Members (independent of Defendants' production); production of all data
16 related to damages; construction of a damage model; ongoing efforts to investigate the strength of the
17 allegations; disclosure of policy and procedure documents; and analysis of more than four (4) years of
18 payroll data for many Class Members. (Baker Dec. ¶56).

19 During the approximately two-year pendency of this case, Plaintiffs' and proposed Class
20 Counsel's investigative efforts made clear that Defendants' employment and compensation policies and
21 procedures were substantially similar to the unlawful provisions prevalent in the door-to-door sales
22 industry, and support settlement of Plaintiffs' class and PAGA claims for the consideration and on the
23 terms set forth in the Settlement Agreement. (Baker Dec. ¶¶17-34).

24 **D. Summary of the Settlement Terms**

25 Class Definitions. The Settlement is for the benefit of the Class Members who do not "Opt- Out"
26 of the Settlement defined as:

27 All persons **currently and formerly** employed by Defendants in solar or alarm sales in the State
28 of California on a door-to-door basis who made at least one sale in California between June 3,
2016 and June 1, 2022 (the "**Class Period**"). (Baker Dec. ¶38).

1 The inclusion of a “one sale” qualifier was required for ascertainability because verifiable
2 California work activity is primarily tied to a completed sale at a California residential address. (Baker
3 Dec. ¶39).

4 Class Size. The Class includes approximately 5,541 Class Members. (Baker Dec. ¶40). The
5 Settlement Agreement includes an escalator clause if the Class List exceeds the represented total by
6 more than ten percent (10%). (*Id.*).

7 Gross Settlement Fund. Defendants will pay the Gross Settlement Fund in three installments on
8 November 30, 2022, January 6, 2023 and January 5, 2024. Although the last payment is deferred until
9 8-12 months past the projected Final Approval date, it is unlikely the Action could be resolved before
10 the same date if this remained litigated on three fronts. (Baker Dec. ¶¶36-37). The Settlement
11 Administrator will make payments pro-rata as installments are received. (Baker Dec. ¶36).

12 Agreed Upon Payments from the Gross Settlement Fund. The following deductions are proposed
13 to be from the Gross Settlement Fund: (a) no more than \$80,000 in Enhancement Awards; (b) PAGA
14 Penalties of \$130,000 (75% to the LWDA); (c) Class Counsel attorneys’ fees of not more than 33.33%
15 of the combined value of the Gross Settlement Fund and advances released; (d) reimbursement of up to
16 \$25,000 in costs of litigation; and (e) costs of the Settlement Administrator of \$32,500. (Baker Dec. ¶41,
17 46; Norvell Dec. ¶13). Amounts not awarded by the Court will be added to the Net Settlement Amount.
18 (*Id.*).

19 Gross Settlement Funding Allocation. The Gross Settlement Fund will be used to satisfy all
20 payments due under the Settlement Agreement and is a common fund with no reversion to Defendants.
21 (Baker Dec. ¶41). Assuming full awards, the remaining balance of the Gross Settlement Fund would be
22 \$3,440,696 (the “**Net Settlement Amount**”) and distributed to participating Class Members as follows:

- 23 • one (1) point for each workweek in a door-to-door sales position (including
24 managers); plus
- 25 • two (2) points for each completed alarm installation recorded under each Class
26 Member’s unique badge ID during the Class Period (excluding team
27 overrides); plus
- 28 • three (3) points for each completed solar installation recorded under each Class
Member’s unique badge ID (excluding team overrides).
- PAGA Penalties payable pro-rata to the PAGA Represented Employees.
(*Id.*).

1 Weighted Allocation Formula. The weighted points system is preferable to a commonly used
2 workweek allocation because higher producing Class Members with greater work production, measured
3 by completed sales, likely incurred more unreimbursed business expenses, more unpaid training and
4 meeting time, and suffered a greater degree of potentially unlawful deductions compared to persons with
5 little California work activity. Solar installs were less frequent than alarm installations and thus, a higher
6 weighting value was justified. The Notice given to each Class Member will be individualized and
7 identify the total points credited to such Class Member from the Class List, with a dispute resolution
8 process available to Class Members. (Baker Dec. ¶42). Based on the data reported for mediation, the
9 recovery for those in the top 7% of the Class would be approximately \$14,093.71(gross)/\$7,458.89 (net)
10 and the recovery for those in the bottom of the Class would receive \$26.68 (gross)/\$14.12 (net), with
11 the average Class Member projected to receive \$2,934.80 (gross)/\$1,553.25 (net). (Baker Dec. ¶73;
12 Norvell Dec. ¶18).

13 Release of Certain Class Members from Wage Advance Repayment Obligations. Formerly
14 employed Class Members as of June 1, 2022, who do not Opt-Out will be relieved of repayment
15 obligations for advances that were given by Defendants and unpaid. (Baker Dec. ¶44). Defendants report
16 that the unpaid advances still owed is \$1,973,760.49. (*Id.*). Excluded from this release by Defendants
17 are 15 perceived “bad actors” engaged in pending litigation or arbitration with Defendants for repayment
18 of these advances who Defendants were not willing to release as part of this Settlement. (*Id.*). Notice of
19 this exclusion is featured prominently in the Class Notice. (*Id.*).

20 Release of Certain Class Members from Post-Termination Employee Non-Solicitation
21 Restrictions. All formerly employed Class Members as of June 1, 2022, who do not Opt-Out will also
22 be released by Defendants for claims of violations of post-termination employee non-solicitation
23 restrictions that occurred before Preliminary Approval. (Baker Dec. ¶44). This release is valuable
24 because Defendants have vigorously enforced these restrictions to impede employee mobility and deter
25 competition – which was the subject of Plaintiff Crabtree’s efforts seeking a preliminary injunction to
26 stop such enforcement. This claim comes with risk of a \$25,000 liquidated damage penalty per violation
27 plus attorneys’ fees. (*Id.*).

28 Class Release. As part of the Settlement, all Class Members who do not Opt-Out of the

Settlement will release all claims against Defendants specifically alleged in or arising from the same set of operative facts alleged in, the SAC, including PAGA. (Baker Dec. ¶49). Class Members who Opt-Out of the Settlement will not be bound by the release (other than the PAGA release) and will not receive any benefits of the Settlement (other than a pro-rata share of PAGA Penalties, if eligible). (*Id.*).

PAGA Release. The Release includes all PAGA claims during the PAGA Period. A copy of the PAGA Notice and Notice of Settlement served upon the LWDA, with proof of submissions, are attached as *Exhibits 3* and *4* to the Baker Dec. (Baker Dec. ¶¶95-96).

Unclaimed Funds. To encourage 100% participation, no claim forms are required for Class Members and no monies revert back to Defendants. Instead, unclaimed funds shall be distributed to the Controller of the State of California pursuant to the Unclaimed Property Law. (Baker Dec. ¶50).

Settlement Administrator's Fees. The Settlement Administrator's charges are \$32,500 and to be paid from the Gross Settlement Fund. (Baker Dec. ¶51; Green Dec. ¶9).

Class Counsel and Class Representatives. Plaintiffs Humpherys and Hatcher seek to be appointed as Lead Plaintiffs and Plaintiff Crabtree appointed as the PAGA Representative. Keegan & Baker, LLP, and Eric D. Norvell, Attorney, P.A., seek to be approved as Class Counsel. (Baker Dec. ¶¶52-53). The attorneys' fees, costs, and Enhancement Awards in the Settlement are well within the range of amounts approved by many courts in class settlements and the requests will fully determined and supported at Final Approval.

III. ARGUMENT FOR PRELIMINARY APPROVAL OF THE SETTLEMENT

The law favors settlements. (See, *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1382). This is particularly true in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. However, a class action may not be dismissed, compromised, or settled without the Court's approval. (California Rules of Court, Rule 3.769(a); *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794). "In general, questions whether a settlement was fair and reasonable, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35 (disapproved on other grounds)). As such, any settlement of class litigation must be reviewed and approved by the Court.

1 This is done in two steps: an earlier conditional review by the trial court, and then a detailed
2 review after the period during which notice is distributed to the class members for their comment or
3 objections. (See California Rules of Court, Rule 3.769 et seq.). This procedure, commonly utilized by
4 both federal and California courts, assures class members of the protection of procedural due process
5 safeguards and enables the Court to fulfill its role as the guardian of class interests. (See, *Manual for*
6 *Complex Litigation* (3rd Ed.), §30.41; *Newberg on Class Actions* (4th Ed.), §11.24). In reviewing a
7 request for preliminary approval, the Court's task is to determine whether the proposed settlement is
8 within the "range of reasonableness" that would warrant sending out a notice of the settlement and
9 giving the class members the opportunity to object. (*Id.*). The Court's ultimate duty is to determine
10 whether the settlement is fair, adequate, and reasonable. (See, *Dunk*, 48 Cal.App.4th at 1801) (setting
11 forth the "fair, adequate, and reasonable" standard) (citing *Officers for Justice v. Civil Service Comm'n*
12 (1982) 688 F.2d 615, 625); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal.App.4th 734, 742-43 (a
13 trial court must approve a class action settlement agreement, but only after determining that it is "fair,
14 adequate and reasonable," considering factors such as the "risk, expense, [and] complexity" of continued
15 litigation) (citations omitted)). The Court enjoys broad discretion in making its fairness determination,
16 and should consider factors including, but not limited to:

17 "[T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of
18 further litigation, the risk of maintaining class action status through trial, the amount
19 offered in settlement, the extent of discovery completed and the stage of the proceedings,
20 the experience and views of counsel . . . and the reaction of the class members to the
proposed settlement." (*Dunk*, 48 Cal.App.4th at 1801 (setting forth a non-exhaustive
list of factors for the court's consideration at final approval)).

21 The above factors are not exclusive ". . . and the court is free to engage in a balancing and
22 weighing of factors depending on the circumstances of each case." (*Wershba*, 91 Cal.App.4th at 245).
23 However, in doing so, the Court must give "[due] regard to what is otherwise a private consensual
24 agreement between the parties." (*Id.*) The inquiry must be limited "to the extent necessary to reach a
25 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
26 between, the negotiating parties." (*Id.* (citation and internal quotation marks omitted)).

27 As shown below, the Settlement falls well within the range of approval because there are no
28 grounds to doubt its fairness.

1 **A. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE AND ENTITLED**
2 **TO A PRESUMPTION OF FAIRNESS**

3 There is a presumption that settlement negotiations were conducted in good faith and class
4 actions are entitled to a presumption of fairness. (See, *In re Chicken Anti-Trust Litigation* (MD GA
5 1980) 560 F. Supp 957, 962). A presumption of fairness in a class action settlement agreement exists
6 where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery
7 are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
8 litigation; and (4) the percentage of objectors is small. (See, *Dunk* 48 Cal.App.4th at 1802 (citing
9 *Newberg & Conte, Newberg on Class Actions* (3d ed. 1992) §11.41, p.11-91)). Fairness is also presumed
10 where the settlement follows a formal mediation, especially where the mediator is a respected member
11 of the legal community and recommends the settlement. (*Id.*). The proposed Settlement before the Court
12 meets these criteria and merits the Court's preliminary approval, as explained more fully below.

13 **1) The Settlement is a Product of Arm's-Length Negotiations With a Mediator**

14 The case took two years to resolve. As discussed above and in the Declaration of Jason Baker,
15 the Parties negotiated at arm's length through Judge Firmat (Ret.) in three mediation sessions occurring
16 over 18 months before the deal was finalized. (Baker Dec. ¶¶6, 56). During the time between mediations,
17 Plaintiffs pursued litigation against Defendants to improve their bargaining position. (Baker Dec. ¶¶12,
18 25, 45, 56). During all settlement discussions, the Parties conducted their negotiations at arms' length
19 and, despite a mutual desire to resolve the case, always in an adversarial manner. The Parties have been
20 able to construct a settlement that, given the constraints and realities of the case, is fair, reasonable,
21 adequate, and in the best interests of the Class. (Baker Dec. ¶¶34, 84).

22 Arriving at a settlement acceptable to the Parties was no small achievement. Defendants and
23 their counsel felt strongly about their ability to prevail on the issue of class certification, compel
24 individual arbitrations, and believed that Defendants had significant defenses to a potentially large
25 number, if not all, of the individual claims within the Class, including via the "direct seller,"
26 "independent contractor," and "outside sales" exemptions. Additionally, Defendants believed they had
27 cognizable claims for the \$1,973,760.49 in unpaid advances which would serve to offset damages and
28 potentially create individual issues to defeat certification. (Baker Dec. ¶¶14-15).

Conversely, as detailed in the accompanying Declarations of Jason E. Baker, Eric D. Norvell and Plaintiffs, Plaintiffs and Class Counsel believe that they would have been able to defeat any challenge to class certification and prevail at trial.

2) The Extent of Litigation and Investigation Is More Than Sufficient to Permit Preliminary Approval of The Settlement

As stated above, this case has been vigorously litigated for approximately two years. (Baker Dec. ¶¶12, 25, 45, 56). Despite the fact that no discovery was allowed because of the stay of this case, Plaintiffs and proposed Class Counsel have engaged in extensive liability analysis, reviewed over 57,703 pages of documents from Defendants, putative Class Members, and publicly available records, conducted extensive interviews with more than 149 putative Class Members, and conducted wage audit samplings of 63 putative Class Members' records. (Baker Dec. ¶¶31-32). Plaintiffs believe that the investigation and research discovered has supported their views on the Settlement. (Humpherys Dec. ¶¶14-19; Crabtree Dec ¶¶13-18, 27-31; Hatcher Dec.¶¶14-19).

3) The Settlement Is Fair and Reasonable and Provides Robust Relief for the Class

The Settlement provides robust monetary relief for the Class consisting of payment of \$6,500,000 and a release of \$1,973,760.49 in unpaid wage advances, for a total monetary value of nearly \$8,500,000. Additionally, the Settlement provides the aforementioned releases from Defendants which has tangible value because Defendants have sued Class Members for unpaid advances, have sent repayment and arbitration demands to others, and vigorously pursued enforcement of non-solicitation restrictions to impede employee mobility and deter competition – threatening **\$25,000 liquidated damage penalty per violation plus attorneys' fees.** At least one Class Member reportedly *paid Defendants* approximately \$50,000 in settlement of these claims, and another reportedly forfeited stock options for allegedly soliciting Defendants' employees, post-termination. (Baker Dec. ¶45). This Settlement allows formerly employed Class Members to be free from the risk of these violations which occurred before Preliminary Approval. (*Id.*).

Finally, this case has resulted in significant 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. (Baker Dec. ¶54, 82).

Proposed Class Counsel’s effectiveness in prosecuting this case has translated into tangible benefits for the Class Members in the following respects: (a) Class Member recoveries over a reasonably short period of time as opposed to waiting additional years for the same, or a potentially worse, result; (b) a guaranteed result that compares favorably with other similar class action settlements of this type; (c) a substantially valuable waiver of claims and elimination of liability for unpaid advances; (d) waiver of onerous post-termination employee non-solicitation restrictions that impeded employee mobility and deterred competition; and (e) significant savings in proposed Class Counsel’s fees and costs which would have only increased sharply had the case progressed through trial, appeals, etc.

There is little question that the result achieved in this litigation is fair and reasonable – in fact, the results constitute a robust recovery for the Class. For the vast majority of the Class Members, receipt of this recovery will be nothing short of a windfall in that the vast majority of Class Members will receive a portion of their unpaid wages without having to find an attorney, file their own action, participate in the action, incur the risk of costs if the action is unsuccessful, and without the risk of retaliation and cross-claims.

4) Class Counsel’s Analysis of Maximum Liability

Prior to each mediation session, Class Counsel analyzed the sampling of wage records and other relevant documents to quantify potential damages. The damage analysis is complex because of: (a) the transient nature of the workforce; (b) the intermittent nature and location of the work; (c) differing methods to verify actual work activity; (d) Defendants’ frequently changing compensation plan in response to competitive market conditions; and (e) differing productivity levels of Class Members. These challenges make the analysis not easily presentable under the more commonly used “workweek analysis.” (Baker Dec. ¶57). Nevertheless, Class Members have several distinct Labor Code claims, the best which, when stacked together and assuming complete victory, and as measured per Class Member without offset for unpaid advances or employment contract violations, could generate damages of approximately \$21,332,850 to \$104,724,900 (exclusive of interest, penalties and attorneys’ fees) estimated as follow:

Expense Reimbursement (\$250 - \$2,500 avg. per Class Member)	\$1,385,250 to \$13,852,500
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Minimum Wage/OT for Non-Exempt Initial Training Time (\$100 - 400 avg. per Class Member)	\$554,100 to \$2,216,400
Unlawful Deductions (\$500 to \$2,000 avg. per Class Member)	\$2,770,500 to \$11,082,000
Waiting Time Penalties (\$2000 to \$5,000 avg. per Class Member)	\$11,082,000 to \$27,705,000
Forfeited Commission in Pipeline at Termination (\$1,000 to \$10,000 per person)	\$5,541,000 to \$55,410,000

(Baker Dec. ¶58).

The Settlement provides total combined monetary relief of \$8,473,760.49 in Settlement Payments and release of advance wage obligations. Thus, the Settlement results in gross monetary recovery of 39.72% and 7.68% when adding the value of the wage advance release. (Baker Dec. ¶59).

The expected high and low individual recovery for Class Members is fluid, in part, because there is a lag in reporting between sale, installation, and activation that will not be fully captured by Defendants until preparation of the Class List. However, based on the data reported for mediation, and making a reasonable interim extrapolation based on past production, applying the weighted allocation formula, the recovery for those in the top 7% of the Class would be approximately \$14,093.71 (gross)/\$7,458.89 (net) and the recovery for those in the bottom of the Class would be approximately \$26.68 (gross)/\$14.12 (net). The large range is caused by significant employee turnover and a seasonal workforce, with approximately 31% of the Class working less than one year with minimal production, and 58% of the Class working less than two years of the Class Period. Indeed, the Class distribution is 1 workweek and 1 install on the low end, and 313 workweeks and excess of 900 installs on the high end. However, the average Class Member earned approximately \$37,000 - \$54,000 per year (excluding outliers) and is projected to receive approximately \$2,934.80 (gross)/\$1,553.25 (net). (Baker Dec. ¶73; Norvell Dec. ¶8).

5) The PAGA Settlement Terms Are Within the Range of Reasonableness

Plaintiff Crabtree asserted PAGA claims for the same violations alleged as class action claims. (Baker Dec. ¶74, Ex. 3). However, as more fully laid out in the Baker Dec., the proper valuation of the PAGA claims, especially for settlement purposes, can be imprecise and challenging because (a) courts have not clearly addressed whether Plaintiffs can “stack” penalties for multiple predicate Labor Code

1 violations in a single pay period; (b) courts have wide discretion to award less than the full statutory
2 penalties; (c) recent cases hold that heightened penalties for subsequent violations under PAGA cannot
3 be imposed until the employer has been notified of a violation by the Labor Commissioner or a court;
4 and (d) although many PAGA penalties are measured by “pay periods,” there are not numerous pay
5 periods per worker. (Baker Dec. ¶¶76-78). Courts have also recently began imposing a “manageability”
6 analysis into PAGA claims, and although Plaintiffs do not agree that a manageability requirement is
7 proper, the value of PAGA claims must be reduced for settlement purposes by the risk of an imposed
8 manageability requirement. (Baker Dec. ¶79).

9 Also, “neither the California legislature, nor the California Supreme Court, nor the California
10 Courts of Appeal, nor the [LWDA] has provided any definitive answer’ as to what the appropriate
11 standard is for approval of a PAGA settlement.” (See, *Jordan v. NCI Grp., Inc.* (C.D. Cal. Jan. 5, 2018)
12 No. EDCV161701JVSSPX, 2018 WL 1409590, at *2). Instead, Courts are instructed to
13 evaluate PAGA settlements applying the same “fair, reasonable, and adequate” standard from class
14 action cases to ensure they serve PAGA's purposes. (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th
15 56, 77). Where PAGA claims are settled in the same agreement with the underlying Labor Code claims,
16 courts have also looked to the interplay of the two recoveries to determine whether PAGA’s purposes
17 have been served. (*O'Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1133). And,
18 where the settlement of Labor Code claims provides “robust” relief to the class, it supports a greater
19 reduction in PAGA penalties. (*Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016) No. 15-cv-02198-
20 EMC, 2016 WL 5907869, at *9). (Baker Dec. ¶¶80-81).

21 Further, as indicated by the newly issued Supreme Court decision in *Viking River Cruises, Inc.,*
22 *v. Moriana*, Case No. 20-1573, there are competing policies and interpretations that make enforcement
23 of PAGA, and valuing of PAGA claims, imprecise and uncertain, with amplified risks and costs for each
24 party in continued litigation. Consequently, it is of increased importance and benefit to the Parties to
25 gain certainty in ending litigation by this Settlement. (Baker Dec. ¶79).

26 Here, the Settlement allocates 2% of the Gross Settlement Amount (\$130,000) to PAGA
27 Penalties. As detailed in the Baker Dec., the settlement of the PAGA claims is fair, reasonable, and
28 adequate, provides “robust” relief to the Class, and numerous courts have approved allocations to PAGA

penalties lower than 2%. (Baker Dec. ¶¶82-83).

6) The Risks Inherent in Continued Litigation Are Significant and Justify a Reasonable Compromise of Claims

To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court also should consider “[t]he strength of plaintiff’s case, the risk, expense, complexity, and likely duration of further litigation, [and] the risk of maintaining class action status.” (See, *Dunk*, 48 Cal.App.4th at 1801). A settlement is not judged solely against what might have been recovered at trial, nor does the settlement have to provide 100% of the damages sought to be to be a fair and reasonable settlement. (See, *Wershba*, 91 Cal.App.4th at 250). Compromise is inherent in the settlement process. (*Id.*).

All class cases bear risk of loss on the merits, a risk that some or all the claims may not be certified, and risk of appellate delay. Because the compensation plan changed during the Class Period, Plaintiffs appreciated the risk that the Court might not grant class certification on some claims and/or find the Class Members were partially properly compensated under California law. (Baker Dec. ¶¶34, 61). However, this case presents several additional issues that favored Settlement on the proposed terms.

First, the recent decision in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, impacted Plaintiffs’ negotiating leverage where the California Supreme Court held that wages are not recoverable by private litigants under PAGA. Also, the 4th District recently issued a perceived unfavorable class certification opinion in *Wilson v. La Jolla Group* (2021) 61 Cal.App.5th 897, which is inapposite, yet gave Defendants renewed confidence. (Baker Dec. ¶62).

Second, Plaintiffs’ claims for Labor Code §2802 expense reimbursement are very strong, but the level of proof is granular. Plaintiffs have an alternative common method of proof that is not dependent upon individual records, but such a method of proof may be considered imprecise or could result in inadequate reimbursement to certain Class Members. Defendants would also argue that much of the drive time expense is non-reimbursable commute time and would rely on cases which have denied certification of Labor Code §2802 claims.² (Baker Dec. ¶63).

² See *Morgan v. Wet Seal, Inc.* (2012) 210 Cal. App. 4th 1341, 1357-58, 1371 (affirming denial of motion for class certification of former employee's action against retail employer alleging that it violated California law by requiring employees to travel between business locations without mileage reimbursement); *Ortiz v. CVS Caremark Corp.* (N.D.Cal. Dec. 2, 2013) 2013 WL 6236743, at *11 (holding that business expense subclass failed to satisfy the commonality requirement).

1 Third, although Class Members complained about misclassification, the Class was largely
2 exempt from minimum wage, rest periods, meal periods, and overtime claims under the “outside sales”
3 exemption.” (Labor Code §1171). Defendants also claim the Class is exempt from payroll taxes under
4 the “direct seller” exemption, which, if upheld, would allow Defendants to pay the Class as independent
5 contractors for payroll purposes. (See, Unemployment Insurance Code §650.) As such, the amount of
6 time the Class Members spent in non-sales activities would be at minimum wage. (Baker Dec. ¶64).

7 Fourth, the claim for initial training time (non-exempt work) pay is very strong, but there will be
8 disputes about the length of training and possible difficulty proving the online training occurred in
9 California. Even where training pay is proven on a class-wide basis, the amount owed could vary
10 between \$100 and \$500 per Class Member. (Baker Dec. ¶65).

11 Fifth, Class Members assert claims for “unpaid recurring meeting time,” but success on that
12 claim could be dependent, under California law, on whether the meeting was training related
13 (compensable), or sales related (exempt under the outside sales exemption). (Baker Dec. ¶66).

14 Sixth, deductions were taken from Class Members’ commissions, however, Defendants contend
15 the reasons and circumstances are individualized and not amenable to class treatment. While Plaintiffs
16 have a certification plan for this claim, not all Class Members suffered unlawful deductions during each
17 pay period. (Baker Dec. ¶67).

18 Seventh, the wage statements were not always compliant with Labor Code §226, but the
19 violations are intermittent as Class Members were paid only as sales closed. Thus, the number of pay
20 periods per employee per year is significantly less than in a typical wage and hour class action. For
21 example, in Plaintiffs’ sampling of records, the Class Member average received 29 wage statements in
22 a year, with the low being 1 and the high being 66. (Baker Dec. ¶68).

23 Eighth, the claim for unlawful forfeiture of commissions upon termination of employment has
24 potentially conflicting bodies of law. Plaintiffs would rely on cases finding forfeiture provisions in
25 commission agreements to be unconscionable and unenforceable, yet Defendants would rely on cases
26 finding that such provisions are legally binding and enforceable because the commissions are not earned
27

1 until actually paid. (Baker Dec. ¶69).

2 Ninth, some Class Members raised additional ancillary claims that may not be typical, common,
3 or pervasive throughout the Class Period justifying additional Class settlement value. Instead, Class
4 Members who separately or independently value these claims are free to Opt-Out of the Settlement to
5 pursue such claims. (Baker Dec. ¶70).

6 Tenth, some portion of the Class signed arbitration agreements substantially similar to Plaintiff
7 Crabtree's. While it does not appear that anyone before October 2018 signed the same version, nor that
8 everyone working in California signed the same version under the same circumstances as Crabtree, it is
9 possible some portion of the Class could be subject to arbitration. While, Class Members might
10 potentially recover more on their claims through arbitration, they would have to individually prove their
11 damages and could face cross-claims from Defendants. (Baker Dec. ¶71).

12 In light of the foregoing, proceeding with litigation would potentially impose risk of no recovery
13 as well as ongoing and substantial additional expenditures of time, resources, and risk to Class Members.
14 By contrast, the Settlement will not only yield a prompt and certain recovery for the Class Members,
15 but one that is substantial and benefits the Parties and the Court.

16 **7) Plaintiffs' Counsel Is Experienced in Similar Wage-And-Hour Litigation and Recommends**
17 **the Settlement**

18 The view of attorneys actively conducting the litigation is "entitled to significant weight" in
19 deciding whether to approve the Settlement. (*Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87
20 F.R.D. 15, 18 *aff'd*. 661 F.2d 939 (9th Cir. 1981)). Here, experienced counsel, operating at arms-length,
21 have weighed the strength of the case and examined all issues and risks and endorse the Settlement.
22 (Baker Dec. ¶¶84-86; Norvell Dec. ¶¶43-46). Numerous state and federal courts have certified proposed
23 Class Counsel as adequate and competent class counsel in such class actions, including many cases
24 specifically involving wage and hour class actions lawsuits on behalf of similar employee classes.
25 (Baker Dec. ¶¶88-93; Norvell Dec. ¶58). Proposed Class Counsel believes this is a fair, adequate, and
26 reasonable settlement in light of the complexities of the case, the state of the law, the uncertainties of
27 class certification and litigation, the defenses asserted, and is in the best interests of Class Members and
28 should be preliminarily approved.

B. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES

The court may make an order approving certification of a provisional settlement class. (California Rules of Court, Rule 3.769(d)). For settlement purposes, courts use a less stringent standard for certification of classes. (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859). “The reason for this is that no trial is anticipated in a settlement class case, so the case management issues inherent in the ascertainable class determination need not be confronted.” (*Id.*; *See, 7-Eleven Owners for Fair Franchising v. Southland Corp.*, (2000) 85 Cal.App.4th 1135, 1161-1162). Defendants have stipulated to certification of the proposed class action for Settlement (Baker Dec. ¶87) and indeed, the requirements under California Code of Civil Procedure §382 are all met for the purposes of certifying this Class for settlement purposes:

- **Ascertainability:** The proposed “Settlement Class” is ascertainable based on Defendants’ own records which are tied to production based on zip codes. (Baker Dec. ¶87(a)).

- **Numerosity:** The Settlement Class is composed of 5,541 current and former employees, which is sufficiently numerous. (Baker Dec. ¶87(b)).

The community of interest requirement “embodies three factors: (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.” (*Dunk*, 48 Cal.App.4th at 1806). Plaintiffs easily satisfy all three requirements.

- **Commonality/Predominance:** Common questions of law and fact, as alleged by the Plaintiffs, are present. Plaintiffs contend that Defendants engaged in a uniform course of conduct with respect to the Settlement Class and the only question is whether Defendants’ conduct supports a meritorious claim. Such suits challenging the legality of a standardized course of conduct in the wage and hour context are generally appropriate for resolution by means of a class action. The existence of individual issues or facts—generally present in any case arising from employment—is not a bar to class certification as long as they do not render class litigation unmanageable or predominate over the common issues. (*See B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, (1987) 191 Cal.App.3d 1341, 1354). (Baker Dec. ¶87(c)).

- **Typicality:** The test of typicality for a class representative is whether other members

1 have the same or similar injury, whether the action is based on conduct which is not unique to the named
2 plaintiff, and whether other class members have been injured by the same course of conduct. (*Seastrom*
3 *v. Neways, Inc.*, (2007) 149 Cal.App.4th 1496, 1502). Here, Plaintiffs, like every other member of the
4 Class, were employed by Defendants and subject to the same compensation plans and performed the
5 same type of work as the other Class Members and injured in the same way. Thus, the claims of Plaintiffs
6 and the Class Members arise from the same course of conduct by Defendants, involve the same work
7 performed, and are based on the same legal theories. (Baker Dec. ¶87(d)).

8 • **Adequacy:** Plaintiffs are well aware of their duties as representatives of the Class and
9 actively participated in the prosecution of this case. Each Plaintiff effectively communicated with
10 proposed Class Counsel, spending several hours providing a better understanding of their work
11 environments and requirements, provided documents, participated in mediation, and participated
12 extensively in the investigation and negotiations in this action. Plaintiffs do not have any interests that
13 are averse to the interests of the other Class Members. Plaintiffs also retained competent counsel who
14 has extensive experience in employment class actions. (Baker Dec. ¶87(e)).

15 • **Superiority:** A class action is superior to other available means for the fair and efficient
16 adjudication of this controversy because joinder of all members of the Class is impractical, class
17 treatment will permit similarly situated persons to resolve their common claims in a single forum for
18 settlement purposes without unnecessary duplication of effort and expense, and, because some Class
19 Members are current employees, the fear of retaliation further supports superiority of class-wide relief.
20 Further, individual actions arising out of the same operative facts would unduly burden the courts and
21 could result in inconsistent results. Finally, a class action is superior because engaging in individual
22 arbitrations would, for many Class Members, result in cross-claims, offsets, and potential additional
23 exposure. Indeed, class certification for settlement would serve as the only means to deter and
24 comprehensively redress the alleged violations. (See, *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429,
25 434). (Baker Dec. ¶86(f)).

26 **C. THE PROPOSED CLASS NOTICE AND NOTICE PROCEDURE SHOULD BE**
27 **APPROVED**

28 As explained in the Settlement Agreement, which is attached as *Exhibit 1* to the Baker Dec.,

there will be a Notice of Class Action Settlement and Final Approval Hearing (“**Notice**”), which the Parties have drafted. The proposed Notice is attached as Exhibit A to the Settlement Agreement and is modeled after the Federal Judicial Center’s “Illustrative” Forms of Class Action Notice. The content and manner of the Notice complies with California Rules of Court, Rule 3.776(d) and (e). (Baker Dec. ¶48). The Notice will be mailed, emailed, and posted on the Settlement Administrator’s website. (*Id.*).

The Parties selected CPT Group, Inc. as the Settlement Administrator and agreed to a sixty (60) day administration period. (*Id.*). Filed concurrently herewith is a Declaration from Julie Green from CPT attesting to its qualifications. No claim forms are required for Class Members to participate. (*Id.*). The Settlement Administrator will mail and email the Class Notice using Defendants’ employment records, using the Class List (updated prior to distribution), and provide personalized calculations for the weighted points system. Class Members can dispute personalized settlement data or Opt-Out of or object to the Settlement during the administration period as provided in the Settlement Agreement. (*Id.*; Baker Dec. ¶43). The Settlement includes skip-tracing and additional administration time for undeliverable Class Notices. (Baker Dec. ¶48).

**D. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING
APPROX. 130 DAYS AFTER PRELIMINARY APPROVAL**

The Parties propose that the Court schedule a hearing for final approval of the Settlement approximately 130 days after Preliminary Approval. The Parties further propose that Plaintiffs’ motion for attorneys’ fees and costs (which will be filed as part of the final approval motion) shall also be heard at the final approval and fairness hearing. The proposed Order for Preliminary Approval of Class Action Settlement is submitted herewith.

IV. CONCLUSION

On the basis of the foregoing, the Parties respectfully urge the Court to take the following actions:

1. Certify the Class for settlement purposes only;
2. Review and preliminarily approve the Settlement Agreement, attached to the Baker Dec. as ***Exhibit 1***;
3. Review and approve the proposed Class Notice and notice and administration process;

- 1 4. Enter the proposed Order for Preliminary Approval of Class Action Settlement;
2 5. Approve CPT Group, Inc. as Settlement Administrator; and
3 6. Set a hearing date for Final Approval of the proposed Settlement approximately 130 days
4 after Preliminary Approval.

6 **RESPECTFULLY SUBMITTED,**

7 **KEEGAN & BAKER, LLP**

8 Dated: June 17, 2022

9 By: /s/ Jason E. Baker
10 Jason E. Baker, Esq.
11 John J. Weber, Esq.
12 Attorneys for Class Plaintiffs BRAYDEN
13 HUMPHERYS, JEREMY HATCHER and
14 PAGA Plaintiff LOGAN SHANE
15 CRABTREE, on behalf of the Class, and
16 all similarly situated aggrieved employees
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