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Others Similarly Situated, Other Aggrieved
Employees, and the General Public

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

ASHLEY CABALLERO, an individual, on
behalf of herself, all other aggrieved
employees, and the general public,

Plaintiffs,

v.

FIDELITONE LAST MILE, INC., a
Delaware corporation; and DOES 1 through
25, inclusive,

Defendant.

Case No. CIVSB2102002

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

Date: February 10, 2022

Time: 10:00 a.m.

Judge: Hon. David S. Cohn

Dept.: S26

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I. INTRODUCTION

Plaintiffs Ashley Caballero, America Caballero, and Luis Venegas (“Plaintiffs”), on behalf of themselves and the approximately 161-member putative class, respectfully request that this Court preliminarily approve the Stipulation of Settlement¹ (“Settlement”) entered into between Plaintiffs and Defendant Fidelitone Last Mile, Inc. (“Defendant” or “Fidelitone”) (Plaintiffs and Defendant are collectively referred to as the “Parties”). The Parties’ Settlement seeks to resolve claims raised against Defendant in this matter in exchange for a non-reversionary \$1,000,000 Gross Settlement Fund (“GSF”). The proposed class is comprised of all individuals who worked for Fidelitone as Contract Carriers, Drivers and/or Helpers in the State of California (but excluding acknowledged employees of Fidelitone) during the Claims Period, and all entities owned and controlled by Contract Carriers which contracted directly with Fidelitone to perform freight delivery services during the Claims Period (“Class Members” or “Settlement Class Members”). The Class Period is the time period beginning on July 31, 2016, through November 6, 2021.²

It is requested that the Court grant preliminary approval, as, when analyzing the strengths and vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this proposed settlement of \$1,000,000 – **which is estimated to pay class members an average settlement share of approximately \$3,333.54**³ – is well within the range of reasonableness. Moreover, the proposed Agreement satisfies all of the criteria for preliminary approval under Rule 3.769 of the California Rules of Court.

As the following sections show, Class Counsel are convinced that the proposed settlement is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues present in this action. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the uncertainty of class certification, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in arriving

¹ The Settlement is attached to the Declaration of David Mara, Esq. (“Mara Dec.”) as **Exhibit 1**.

² November 9, 2021 is sixty (60) days after the Parties’ acceptance of the mediator’s proposal.

³ \$536,700 estimated Net Settlement Amount (“NSA”) / 161 class members = \$3,333.54 average payout per Class Member.

1 at the proposed settlement. The Settlement was the product of an all-day mediation with well-regarded
2 and experienced mediator Mark Rudy and was the product of non-collusive, arm's-length negotiations
3 by informed counsel and parties. The settlement is fair, reasonable, and adequate to all. Accordingly,
4 Plaintiffs seek: (1) preliminary approval of the terms contained in the Joint Stipulation; (2) provisional
5 certification of the Class; (3) appointment of Plaintiffs as Class Representatives; (4) appointment of
6 Mara Law Firm, PC, Kizirian Law Firm, P.C., and Boyamian Law, Inc. as Class Counsel; (5) approval
7 of the Parties' proposed notice of class action settlement⁴ (referred to herein as the "Class Notice" or
8 "Notice") and method of notifying the Class about the settlement; and (6) set a hearing date for final
9 approval.

10 II. FACTUAL/PROCEDURAL BACKGROUND

11 Defendant is in the business of transporting freight for their customers. In order to transport its
12 customers' freight, Defendant both contracts directly with entities or individuals to provide these
13 freight delivery services ("Contract Carriers"), as well as utilizes "Drivers" and "Helpers" who work
14 for a Contract Carrier to either drive a truck and delivered freight for Defendant or assisted a Driver
15 on his or her route in the delivery of freight. Plaintiffs America Caballero and Ashley Caballero
16 contracted directly with Defendant as Contractor Carriers, and Plaintiff Luis Venegas worked as a
17 Driver and Helper. Mara Dec. ¶ 9.

18 On July 29, 2020, in compliance with Labor Code § 2699.3(a)(1), Plaintiff Ashley Caballero
19 submitted written notice via online filing to the LWDA, setting forth the facts and theories of the
20 violations alleged against Defendant, claiming that she and others were misclassified by Defendant as
21 independent contractors. Plaintiff Ashley Caballero then filed this PAGA action against Defendant on
22 January 7, 2021, in San Bernardino Superior Court, Case No. CIVSB2102002, entitled *Ashley*
23 *Caballero v. Fidelitone Last Mile, Inc.* ("Caballero PAGA Action"). She alleged a single cause of
24 action on behalf of herself and other Contract Carriers seeking civil penalties pursuant to PAGA. Mara
25 Dec. ¶ 10.

26 Plaintiff America Caballero filed a class action against Defendant on July 31, 2020, in Alameda
27 Superior Court, Case No. RG20069582, entitled *America Caballero v. Fidelitone Last Mile, Inc.*
28

⁴ The Class Notice is attached to the Settlement as **Exhibit 3**.

1 (“Caballero Class Action”). Claiming that she and others were misclassified by Defendant as
2 independent contractors, she alleged causes of action on behalf of herself and other Contract Carriers
3 for: (1) Failure to Pay Minimum Wage; (2) Failure to Pay Overtime; (3) Failure to Reimburse Business
4 Expenses; (4) Unlawful Deduction from Wages; (5) Failure to Provide Meal Periods; (6) Failure to
5 Authorize and Permit Rest Periods; (7) Failure to Furnish Accurate Wage Statements; (8) Waiting
6 Time Penalties; and (9) Violation of Unfair Competition Law. Mara Dec. ¶ 11.

7 On April 28, 2020, in compliance with Labor Code § 2699.3(a)(1), Plaintiff Luis Venegas
8 submitted written notice via online filing to the LWDA, setting forth the facts and theories of the
9 violations alleged against Defendant, claiming that he and others were misclassified by Defendant as
10 independent contractors. Plaintiff Luis Venegas then filed his PAGA action against Defendant on
11 August 3, 2020, in Contra Costa Superior Court, Case No. C20-01468, entitled *Luis Venegas v.*
12 *Fidelitone Last Mile, Inc.* (“Venegas PAGA Action”). He alleged causes of action on behalf of himself
13 and other Drivers and Helpers seeking civil penalties under PAGA for: (1) Failure to Pay for All Time
14 Worked; (2) Failure to Provide Meal Periods; (3) Failure to Authorize and Permit Rest Periods; (4)
15 Failure to Pay All Wages Due at Termination; (5) Failure to Provide Itemized Wage Statements; (6)
16 Failure to Provide Sick Leave; and (7) Failure to Pay All Wages Owed Twice Per Month. Mara Dec
17 ¶ 12.

18 Plaintiff Luis Venegas filed a class action against Defendant on August 3, 2020, in Contra
19 Costa Superior Court, Case No. Case No. C20-01469, entitled *Luis Venegas v. Fidelitone Last Mile,*
20 *Inc.* (“Venegas Class Action”). Claiming that he and others were misclassified by Defendant as
21 independent contractors, he alleged causes of action on behalf of himself and other Drivers and Helpers
22 for: (1) Failure to Pay for All Time Worked; (2) Failure to Provide Meal Periods; (3) Failure to
23 Authorize and Permit Rest Periods; (4) Failure to Provide Itemized Wage Statements; (5) Failure to
24 Pay All Wages Due at Termination; and (6) Violation of Unfair Competition Law. Mara Dec. ¶ 13.

25 Shortly after the filing of the Caballero Class Action and the Venegas Class Action, Defendant
26 removed both matters to the United States District Court, Northern District of California, on individual
27 diversity grounds. Both Plaintiff America Caballero and Plaintiff Luis Venegas filed motions to
28 remand the case due to lack of subject matter jurisdiction, and both cases were remanded to the

Alameda Superior Court on or around December 15, 2020, and to the Contra Costa Superior Court on or around December 16, 2020, respectively. Mara Dec. ¶ 14.

As part of the settlement process, the Parties agreed to stipulate for leave to file a First Amended Complaint in this matter in order to encompass all the claims alleged in the Caballero Class Action, the Venegas Class Action, and the Venegas PAGA Action. This stipulation was submitted to the Court on or around October 12, 2021, but the register of actions does not currently reflect it has been filed or ruled upon. The agreed upon First Amended Complaint is attached to the Settlement as **Exhibit 1**. Should the Court not address the Parties' stipulation by the February 10, 2022, Preliminary Approval Hearing Date, Plaintiffs respectfully request that the Court deem filed the First Amended Complaint and deem it answered with the answer currently on file in this action. Mara Dec. ¶ 15.

Defendant denies the allegations of the action in its entirety, deny any liability or wrongdoing of any kind associated with the claims alleged in this action, and further deny that, for any purpose other than settling this action, this matter is appropriate for class treatment. Defendant further contends that it has complied with all applicable California laws, the California Labor Code, the applicable California Wage Order(s), and the Unfair Competition Law. Defendant finally contends that, if this matter were to be litigated further, it would have strong defenses to oppose class certification and succeed on the merits of Plaintiffs' causes of action. Mara Dec. ¶ 16.

III. LITIGATION HISTORY/PARTIES CONTENTIONS

a. Discovery and Investigation

Through discovery, Plaintiffs sought numerous documents and substantial amounts of data that were needed to evaluate the case. These documents included the contracts entered into between Defendant and Contract Carriers, records detailing all of the routes driven by Class Members for Defendant during the Claims Period, policies and practices in place during the class period, detailing requirements and expectations for Class Members when delivering freight for Defendant's customers, as well as data surrounding the number of current and former employees. Mara Dec. ¶ 17.

This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the production of numerous documents and thousands of lines of data. Using the records detailing the routes driven by Class Members and the data surrounding the number of current and former Class

Members, Plaintiffs’ expert was able to provide numerous data points used in establishing a potential exposure model in preparation for mediation. Mara Dec. ¶ 18.

b. The Parties’ Staunchly Conflicting Positions

i. The Issue of Misclassification

Based upon the discovery conducted, Plaintiffs contend – and Defendant denies – that Defendant misclassified Plaintiffs and other Contract Carriers, Drivers, and Helpers as independent contractors, denying them the protections provided to employees under California law. Based on documents and data produced in this matter, Plaintiffs contend that Defendant substantially controls the Class Members and would meet the factors delineated in the *Borello* test in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, as well as the “ABC test” outlined in the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.

Plaintiffs contend that Defendant can terminate Class Members with or without cause, which is “the strongest evidence of the right to control...” *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531. Plaintiffs further allege that Defendant also retains the ability to dictate what the Class Members are and are not permitted to haul and forbids them from subletting any of the deliveries provided to them from Defendant, requires Class Members to wear uniforms when required by the customer, follow Defendant’s accident reporting procedures, and, per the terms of the contracts, follow any and all requirements set forth by the customer and/or Defendant at any time without any limitations, or risk termination. Additionally, Defendant obtains the customers and enters into agreements to deliver their freight, negotiates and sets the rates the customers are to pay, and assigns and dispatches the Class Members to transport the freight for the customer. Mara Dec. ¶ 19.

Defendant contends that Plaintiffs and putative class members are not its employees, and that it does not control Class Members’ hiring, firing, schedules, and/or pay. Defendant argues that that Class Members have independence on how to perform their jobs. Defendant contends that it does not control what Class Members do or how they perform their jobs. Defendant argues that it cannot simply unilaterally decide to “terminate” Class Members at will. Defendant claims they can merely terminate the agreement entered into with Contract Carriers through the very terms of the agreement itself,

1 severely limiting their ability to “terminate” Contract Carriers at will. Furthermore, Defendant states
2 they have absolutely zero control over the hiring or firing of Drivers and Helpers, as those tasks are
3 clearly delegated to the Contract Carriers as a part of the agreements. Defendant also points out that
4 the various “controls” exerted on Class Members and “requirements” for how Class Members are to
5 deliver freight are set forth by the customers, not Defendant, and as such, these things cannot be
6 considered as actions undertaken by the Defendant. Mara Dec. ¶ 20.

7 While Plaintiffs believe in the strength of their arguments, they also recognize the risk that the
8 Court may determine Plaintiffs and the putative class were not employees of Defendant. **If the Court**
9 **ruled in favor of Defendant on this issue, all of Plaintiffs’ claims below would be extinguished,**
10 **as they are all dependent upon the Court agreeing that Defendant is Plaintiffs’ and Class**
11 **Members employer under California law.** Mara Dec. ¶ 21.

12 **ii. Reimbursements and Deductions**

13 Plaintiffs claim that because Defendant misclassifies Class Members as independent
14 contractors, Defendant forces Contract Carriers to pay for the costs of doing business in violation of
15 Labor Code § 2802. Labor Code § 2802 provides “[a]n employer shall indemnify his or her employee
16 for all necessary expenditures or losses incurred by the employee in direct consequence of the
17 discharge of his or her duties.” Labor Code § 2802 “is designed to prevent employers from passing
18 their operating expenses on to their employees.” *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42
19 Cal.4th 554, 562.

20 Defendant requires Contract Carriers to shoulder the costs of insuring their trucks, fueling their
21 trucks, amongst various other costs. Here, as Plaintiffs allege the Contract Carriers are misclassified
22 as independent contractors when, under California law, they should be classified as employees. Just
23 as Defendant could not charge its own employee drivers the cost of fuel and insurance in the
24 furtherance of Defendant’s business, it cannot do so to the Contract Carriers, as they, too, are
25 Defendant’s employees under California law. Mara Dec. ¶ 22.

26 Defendant argues that because Contract Carriers are not employees and properly classified as
27 independent contractors, it does not need to reimburse them for business expenses. Defendant argues
28 that California Labor Code § 2802 only obligates an employer to indemnify its employee for expenses

1 that the employee incurred while performing his or her job duties. As Defendant claims it is lawfully
2 contracting with the Contract Carriers to facilitate the delivery of the customer's freight, these
3 expenses are properly borne by the Contract Carriers pursuant to the terms of the agreements. Mara
4 Dec. ¶ 23.

5 **iii. Meal and Rest Periods**

6 Plaintiffs further contend that Defendant, as a result of its misclassification scheme, completely
7 fail to provide Class Members with meal and rest periods. Under California Labor Code section 512,
8 no employer shall employ any person for a work period of more than five hours without providing a
9 meal period of not less than thirty minutes. *See also Brinker Rest. Corp. v. Superior Court* (2012) 53
10 Cal.4th 1004, 1037. Further, the IWC Wage Orders mandate that every employer authorize and permit
11 all employees to take rest periods at the minimum rate of a net ten consecutive minutes for each four
12 hour work period, or major fraction thereof.

13 Defendant has no evidence they provided Class Members with meal or rest periods. They have
14 no meal or rest period policies they communicate to Class Members. They also have no records of
15 meal or rest periods. Thus, it will be fairly simple to show Defendant failed to provide meal and rest
16 periods to Class Members, who will be owed a 226.7 premium on every qualifying shift. Mara Dec. ¶
17 24.

18 Defendant again argues that because Class Members are not employees and properly classified
19 as independent contractors, it is under no obligation to provide Class Members with meal or rest
20 periods, as California law only requires an "employer" to provide them to its "employees." Defendant
21 claims it is lawfully engaging with and utilizing Class Members to facilitate the delivery of the through
22 the use of the agreements it enters into with the Contract Carriers, and that the agreements clearly state
23 that all of that any Class Member performing work under the terms of the agreements are independent
24 contractors, not employees. Mara Dec. ¶ 25.

25 Defendant also points out that the Federal Motor Carrier Safety Administration's (FMCSA)
26 December 21, 2018, determination wherein the FMCSA found that California's meal and rest break
27 laws are preempted as applied to drivers of property-carrying commercial motor vehicles who are
28 subject to the FMCSA's own break regulations would similarly extinguish all of Plaintiffs' meal and

1 rest period claims. On January 15, 2021, the Ninth Circuit upheld the FMCSA’s determination that
2 federal law preempted California’s meal and rest break rules. *See Int’l Bhd. of Teamsters, Local 2785*
3 *v. Fed. Motor Carrier Safety Admin.* (2021) 986 F.3d 841. As such, Defendant argues that FMCSA’s
4 December 21, 2018, determination provides affirmative preemption defenses to Plaintiffs’ claims for
5 meal and rest break violations. Mara Dec. ¶ 26.

6 Plaintiffs argue that the FMCSA’s determination does not apply retroactively. Federal agency
7 decisions and orders, like the FMCSA Order, are “subject to the presumption of prospectivity that
8 attends true exercises of legislative authority.” *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144 (10th
9 Cir. 2016) (citing *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015)). Hence, as the United
10 Supreme Court found over thirty years ago, administrative rules and orders are not retroactively
11 applied unless “the power to promulgate retroactive rules...is conveyed by Congress in express
12 terms.” *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Evaluating whether the
13 preemption decision is retroactive requires determining whether the decision explicitly states that it
14 applies retroactively, and if it does not, determining whether the decision would have a retroactive
15 effect on the rights of private individuals. *See In re ADC Telecoms., Inc. Sec. Litig.*, 409 F.3d 974, 976
16 (8th Cir. 2005). If the statute or regulation does not explicitly state that it applies retroactively, and its
17 application would have retroactive effect, the court may not apply it retroactively. *Id.* As neither the
18 decision nor its authorizing statute contain any explicit language on retroactivity, and because a
19 retroactive application of the decision would detrimentally effect the right of private individuals
20 (namely, extinguishing Plaintiffs’ claims for meal and rest periods entirely), the preemption decision
21 cannot be applied retroactively. Mara Dec. ¶ 27.

22 **iv. Unpaid Wages**

23 Plaintiffs also allege that Defendant failed to pay all wages owed to Class Members. Regardless
24 of how compensation is measured, California law mandates “[e]very employer shall pay to each
25 employee on the established payday for the period involved, not less than the applicable minimum
26 wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece,
27 commission, or otherwise.” Wage Order 9-2004; Cal. Code Regs., Title 8, section 11040, subd. (4)(B);
28 Cal. Lab. Code, section 1194; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 44;

1 *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323. Further, Labor Code sections 221, 222, &
2 223 “require an employer to pay all employee hours at either the statutory or agreed rate and prohibit
3 an employer from using any part of that rate as a credit against its minimum wage obligation.”
4 *Gonzalez*, 135 Cal.App.4th at 47-48; *Armenta*, 135 Cal.App.4th at 323.

5 Contract Carriers are paid by the mile and by the delivery, they are not paid for time when “the
6 wheels are not moving,” but they are not stopped for a delivery, such as fueling up, sitting in traffic,
7 for breakdowns, etc. A piece-rate pay formula that does not “compensate for all time worked does not
8 comply with the California Labor Code, even if, averaged out, it would pay at least minimum wage
9 for all hours worked.” *Cardenas v. McLane Foodservices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d 1246,
10 1252; See also, *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 49; *Armenta v.*
11 *Osmose, Inc.* (2005) 135 Cal.App.4th 314, 320; *Reinhardt v. Gemini Motor Transport* (E.D. Cal.2012)
12 869 F.Supp.2d 1158, 1168. Mara Dec. ¶ 28.

13 Drivers and Helpers are paid a daily flat rate. In California, wage structures that do not
14 compensate by the hour, like a salary or a commission, are only said to compensate for *non-overtime*
15 *hours*. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 565 (“[T]he flat sum
16 compensates the worker for only non- overtime hours worked.”). Put differently, flat daily rates earned
17 are only compensation for eight daily hours and forty weekly hours. For any work over 8 daily or 40
18 weekly, employees are receiving no compensation under the flat rate pay structure. To find otherwise,
19 meaning piece-rate and flat rate pay structures also pay for hours in excess of eight daily or forty
20 weekly, would mean employees paid via these compensation methods would be paid *less* money per
21 hour for overtime work, which is an interpretation that does not favor the protection of the employee’s
22 interest or discourage employers from imposing overtime work and cannot stand. *Id.* at 562 (“...[W]e
23 are obligated to prefer an interpretation that discourages employers from imposing overtime work that
24 favors the protection of the employee’s interests.”). Because these pay structures – like all non-hourly
25 pay systems – can only pay for non-overtime hours, Drivers and Helpers are paid nothing for any
26 hours worked in excess of eight in a single day. Mara Dec. ¶ 29.

27 Defendant contends that as Class Members are properly classified as independent contractors
28 under California law, none of the authorities relied upon by Plaintiffs renders Defendant liable for any

1 unpaid wages whatsoever. Defendant the only monetary compensation it is required to provide to the
2 Class Members at all at any point in time is solely based on the provisions of the agreements it enters
3 into with the Contract Carriers, which compensates them for all the hours and various tasks necessary
4 in furtherance of the freight deliveries. Furthermore, while Defendant acknowledges that the
5 agreements call for it to provide the Contract Carriers with certain forms of compensation pursuant to
6 the terms of the agreements, Defendant is under no duty to provide any form of compensation to the
7 Drivers and the Helpers. Mara Dec. ¶ 30.

8 As evidenced above, the Parties took staunchly conflicting positions with respect to Plaintiffs'
9 claims.

10 **c. The Parties Agreed to Attend Mediation**

11 The Parties agreed to attend mediation with respected wage and hour mediator Mark Rudy on
12 August 24, 2021. After a full day of mediation, Mr. Rudy issued a mediator's proposal, which the
13 Parties accepted on September 7, 2021. Since then, the Parties have met and conferred regarding the
14 terms of the settlement and finalized their agreement in the Stipulation of Settlement. The Parties seek
15 preliminary approval of the Settlement in the instant motion. (Mara Dec. ¶ 31; **Exhibit 1**).

16 **d. The Terms of the Proposed Settlement**

17 Under the terms of the proposed settlement, Defendants will create a settlement fund of
18 \$1,000,000.

19 **i. Deductions From the Settlement**

20 The Parties have agreed (subject to and contingent upon the Court's approval) that this action
21 be settled and compromised for the non-reversionary total sum of \$1,000,000 ("Gross Settlement
22 Fund" or "GSF"), which includes, subject to Court approval: (a) attorneys' fees of up to \$333,300 (33
23 1/3 % of the GSF) to compensate Class Counsel for work already performed and all work remaining
24 to be performed in documenting the settlement, administering the settlement, and securing Court
25 approval; (b) litigation expenses estimated not to exceed, \$30,000;⁵ (c) Class Representative
26 Enhancement Payments to the named class representatives, Ashley Caballero, America Caballero, and
27 _____

28 ⁵ These will be tabulated and presented to the Court at final approval. Plaintiffs will only seek the
amount of actual expenses incurred during the litigation of this case. Should the actual expenses exceed
\$30,000, Plaintiffs will only seek reimbursement of costs up to \$30,000.

1 Luis Venegas, in a sum not to exceed \$10,000 each in consideration for agreeing to a general release
2 of their claims against Defendant which is broader than that of other class members, and in recognition
3 of their efforts in prosecuting their actions; (d) claims administration fees and expenses to Phoenix
4 Class Action Administration Solutions (hereinafter “Phoenix”), estimated not to exceed approximately
5 \$20,000;⁶ and (e) \$50,000 allocated to Plaintiffs’ PAGA claims, which is to be distributed only to
6 “Aggrieved Employees.” Class Members who worked during the “PAGA Period” (April 28, 2019,
7 through November 6, 2021).

8 **ii. Calculation of the Settlement Payments**

9 The Net and PAGA Settlement Amounts shall be divided, for distribution to Settlement Class
10 Members and Aggrieved Employees, into two parts as follows: (a) 55% to those Settlement Class
11 Members and Aggrieved Employees who worked for Fidelitone during the Claims Period and/or
12 PAGA Period as Contract Carriers; and (b) 45% to those Settlement Class Members and Aggrieved
13 Employees who worked for Fidelitone during the Claims Period and/or PAGA Period as Drivers
14 and/or Helpers. **Exhibit 1** attached to the Mara Dec. at Section 9, Paragraph 9.1.1. As explained in
15 further detail below, this division of the Net and PAGA Settlement Amounts was determined due to
16 the larger amount of potential exposure for the claims of the Contract Carriers when compared to the
17 claims of the Drivers and Helpers, most notably due to the reimbursement exposure attributable to the
18 Contract Carriers.

19 After all Court-approved deductions from the GSF, it is estimated that \$536,700 (“Net
20 Settlement Amount” or “NSA”), less all applicable employee payroll taxes⁷, will be distributed to
21 Participating Class Members.⁸ Subject to the terms and conditions of the settlement, the Settlement
22 Administrator will calculate and issue Individual Settlement Shares based on the following formula:

23 _____
24 ⁶ Phoenix will present to the Court a declaration in conjunction with the final approval motion
25 outlining the costs of the settlement administration process. If the settlement administration costs are
26 lower than the amount allocated in the Settlement, the difference will be added to the NSA for
27 distribution to Participating Class Members.

28 ⁷ The employer’s share of payroll taxes due on the portion of the Individual Settlement Shares that is
allocated to wages shall be paid by Defendant separately and in addition to the GSF. **Exhibit 1** attached
to the Mara Dec. at Section 1, Paragraph 1.17.

⁸ Participating Class Members are Class Members who do not submit a valid and timely request to
exclude themselves from this Settlement. **Exhibit 1** attached to the Mara Dec. at Section I, Paragraph
24.

[T]he Settlement Administrator will calculate the amount of the Individual Settlement Share due to each Settlement Class Member based on the Workweeks of Settlement Class Member during the Claims Period, as reflected in Fidelitone's records. Specifically, each Settlement Class Member's Settlement Award will be calculated by multiplying the fraction x/y by the total of the applicable portion of Net Settlement Amount (*i.e.*, 55% for Contract Carriers or 45% for Drivers/Helpers, as applicable), where "x" equals the total number of Workweeks for each Settlement Class Member, and "y" equals the total number of Workweeks in which all Settlement Class Members worked for Fidelitone. **Exhibit 1** attached to the Mara Dec. at Section 9, Paragraph 9.1.2.

Furthermore, the Settlement allocates \$50,000 in consideration for the settlement of Plaintiffs' PAGA claims, which is to be distributed separately from the NSA. Settlement Class Members who performed work for Defendant from April 28, 2019, one year prior to the submission of the first written notice of Labor Code violations to the LWDA pursuant to Labor Code § 2699.3(a)(1), through November 6, 2021 ("PAGA Period") are also deemed "Aggrieved Employees" and able to recover their share of the civil penalties under the settlement. 75% of this \$50,000, or \$37,500, will be paid to the LWDA, while the remaining 25%, or \$12,500, will be distributed to the Aggrieved Employees. The Settlement Administrator will calculate and issue PAGA Settlement Shares based on the following formula:

[T]he Settlement Administrator will calculate the amount of the PAGA Settlement Share due to each Aggrieved Employee based on the Workweeks of Aggrieved Employee during the PAGA Period, as reflected in Fidelitone's records. Specifically, each Aggrieved Employee's Settlement Award will be calculated by multiplying the fraction x/y by the total of the applicable portion of Aggrieved Employee Payment (*i.e.*, 55% for Contract Carriers or 45% for Drivers/Helpers, as applicable), where "x" equals the total number of Workweeks for each Aggrieved Employee, and "y" equals the total number of Workweeks in which all Aggrieved Employees worked for Fidelitone. **Exhibit 1** attached to the Mara Dec. at Section 9, Paragraph 9.1.3.

The precise number of compensable weeks worked per class member will not be known until the administrator tabulates them, following preliminary approval. Under no circumstances will any portion of the \$1,000,000 settlement revert to Defendants and one hundred percent (100%) of the NSA is available for Class Members to claim.

The Individual Settlement Shares will be divided into a "wage portion" to compensate Participating Class Members for alleged unpaid wages and a "non-wage portion" to compensate Participating Class Members for alleged interest and penalties. Participating Class Members'

individual settlement shares will be apportioned as follows: forty percent (40%) wages, thirty percent (30%) interest, and thirty percent (30%) penalties. The PAGA Settlement Shares will be apportioned as one-hundred percent (100%) penalties.

iii. Notice to the Class

Upon the Court granting preliminary approval of this Settlement, Defendant shall provide the Settlement Administrator, in electronic form, a list which sets forth the following information (to the extent known by Fidelitone) pertaining to each Class Member and Aggrieved Employee: (a) full name; (b) current or last known residence or mailing address; (c) social security number; (d) current or last known telephone number; and (e) number of Workweeks worked during the Claims Period and PAGA Period.

Within thirty (30) days of Preliminary Approval of this Settlement, the Settlement Administrator will send all Class Members and Aggrieved Employees by First Class Mail, at their current or last known address, the Court-approved Class Notice. Before mailing this Notice, the Settlement Administrator shall conduct a “national change of address search.” The Settlement Administrator will use reasonable efforts, including tracing, to identify the correct address and re-mail all returned, undelivered mail within five (5) days of receiving notice that a Class Notice was undeliverable. The Parties agree to cooperate with the Settlement Administrator to locate Class Members and Aggrieved Employees, if necessary.

There are two versions of the Class Notice that the Parties provide the Court for approval in conjunction with the Settlement, both of which are attached to the Settlement as **Exhibit 3**. The first proposed Class Notice that would be sent to Class Members and Aggrieved Employees for whom which Fidelitone was able to provide a Taxpayer Identification Number (TIN), or social security number, to the Settlement Administrator. For Class Members and Aggrieved Employees for which Fidelitone was unable to provide the Settlement Administrator their TINs, the second proposed Class Notice shall also explain that, because the Settlement Administrator does not have their TINs, the Settlement Class Members and Aggrieved Employees will have to submit to the Settlement Administrator an IRS W-9 Form (also provided as a part of the Class Notice) in order to receive their Individual Settlement and PAGA Settlement Shares.

1 Class Members shall have forty-five (45) days after the Class Notices are mailed to respond
2 by submitting a challenge to the number of workweeks attributed to them, submitting an objection, or
3 requesting to be excluded from the Settlement.

4 **iv. Distribution of Funds**

5 Within fifteen (15) business days after entry of the Final Approval Order, Fidelitone shall fund
6 the Settlement by wiring the GSF amount into an account established by the Settlement Administrator.
7 Within fifteen (15) business days after wiring of the funds, the Settlement Administrator will distribute
8 all payments due under the Settlement.

9 Checks issued to Settlement Class Members and Aggrieved Employees shall contain a legend
10 that they are in accord and satisfaction of all claims alleged in the Action and Related Cases and shall
11 be valid for 120 days. Individual and PAGA Settlement Share checks may be negotiated in any lawful
12 manner subject to applicable law and the requirements of the institution that is negotiating such checks.
13 The funds represented by any checks that were not issued because a current address could not be
14 obtained for a Class Member and/or Aggrieved Employee by the Settlement Administrator, or checks
15 that were mailed but not timely cashed, shall be deemed residue. If the total amount of the residue
16 funds equals or exceeds Ten Thousand Dollars (\$10,000), the Settlement Administrator shall re-
17 distribute the residue to Settlement Class Members and Aggrieved Employees. If the total amount of
18 the residue funds is less than Ten Thousand Dollars (\$10,000), those funds shall be distributed in
19 accordance with Section 384 of the California Code of Civil Procedure to Legal Aid at Work, the cy
20 pres recipient selected by the Parties, subject to Court approval.

21 **v. Release of Claims**

22 Under the terms of the Settlement, the Plaintiffs and the Settlement Class Members, release
23 any and all claims that are asserted in the First Amended Complaint and which could have been
24 asserted based on the facts alleged in the complaint. A full recital of the released claims can be found
25 in **Exhibit 1** attached to the Declaration of David Mara, Esq., which is the Settlement, in Section 5,
26 Paragraphs 5.1 and 5.2.

27 In addition, Plaintiffs agreed to a general release of their claims against Defendants. (*See*
28 **Exhibit 1** to the Mara Dec., Section 5, Paragraph 5.3). At final approval, Class Counsel will seek

1 approval of these Class Representative Enhancement Payments to each named Plaintiff in the sum of
2 \$10,000. As will be detailed at final approval, the requested Class Representative Enhancement
3 Payments are reasonable in light of the broad general release Plaintiffs are giving to Defendant in
4 exchange for the \$10,000 payment.

5 In addition, these payments are further supported by the fact that plaintiffs are often subjected
6 to the stigma associated with bringing these types of lawsuits. In this age of technology, employers
7 engage in thorough background checks on their employees. As these case filings are all public record,
8 a simple “Google” search is all it would take for Plaintiffs’ names to appear associated with these
9 pending lawsuits against their former employers. This could be a significant factor in any employer’s
10 decision to hire Plaintiffs in the future.

11 Plaintiffs took it upon themselves to delay recovery of their individual wage and hour claims
12 by proceeding with class and representative actions, with a full understanding of the risks involved.
13 Plaintiffs were fully aware that class action and representative litigation would cause Defendant to
14 incur hefty costs throughout the litigation, and that if they were unsuccessful in these cases, may be
15 liable for some, or even all, of these costs. Despite this knowledge, Plaintiffs pushed forward with the
16 litigation; they were always readily available by phone and fully participated every step of the way
17 throughout the entirety of this process.

18 Courts routinely approve service payments, or incentive awards, to compensate named
19 plaintiffs for the services they provide and the risks they incur during class litigation. See *In re*
20 *Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393; see also *Bell v. Farmers Ins.*
21 *Exch.* (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class representatives);
22 Manual § 21.62 n.971 (noting that service payments are warranted). Based on the foregoing, the
23 \$10,000 payment to each named Class Representative is fair, appropriate and justified as part of the
24 overall settlement.

25 **IV. ARGUMENT**

26 **a. Class Action Settlements are Subject to Court Review and Approval Under the 27 California Rules of Court**

28 Rule 3.769 requires court approval for class action settlements.⁹ “Before final approval, the

⁹ The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23

1 court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of Court,
2 Rule 3.769(g).) Rule 3.769 further requires a noticed motion for preliminary approval of class
3 settlements:

4 (a) A settlement or compromise of an entire class action, or a cause of action in a
5 class action, or as to a party, requires the approval of the court after hearing.

6 (c) Any party to a settlement agreement may serve and file a written notice of
7 motion for preliminary approval of the settlement. The settlement agreement
8 and proposed notice to class members must be filed with the motion, and the
proposed order must be lodged with the motion.

9 Courts act within their discretion in approving settlements that are fair, not collusive, and take into
10 account “all the normal perils of litigation as well as the additional uncertainties inherent in complex
11 class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179, cert. den.
12 sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452 U.S. 905.

13 **b. The Settlement is Fair, Reasonable, and Adequate**

14 In deciding whether to approve a proposed class action settlement under Code of Civil
15 Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.”
16 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is
17 **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-length
18 negotiations; (2) investigation and discovery were sufficient to allow counsel and the court to act
19 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
20 small. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these elements – with
21 the exception of the percentage of objectors, which cannot be anticipated at this stage of the litigation
22 – bearing on the fairness of the proposed settlement are present here and the Court’s grant of
23 preliminary approval is therefore requested.

24 **i. The Settlement was Reached as a Result of Arm’s Length Negotiations**

25 The settlement was reached as a result of arm’s-length negotiations. Though cordial and
26 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
27

28 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the
Parties cite Federal Rule 23 and federal case law in addition to California law.

1 nature. At the mediation and the following negotiations through the mediator, Counsel for the Parties
2 conducted extensive arm's length settlement negotiations until the settlement was reached. The terms
3 of the settlement are memorialized in the Settlement which is attached to the Declaration of David
4 Mara, Esq. as **Exhibit 1**.

5 **ii. The Settlement is the Result of Thorough Investigation and Discovery**

6 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before
7 reaching the proposed settlement, and engaged in sufficient investigation, research and discovery to
8 support the settlement. The settlement was only possible following discovery and evaluation of
9 Defendant's policies and procedures, as well as the data produced for the putative class, which
10 permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages.
11 This litigation has reached the stage where "the Parties certainly have a clear view of the strengths and
12 weaknesses of their cases" sufficient to support the settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979)
13 485 F. Supp. 610, 617.

14 **iii. Counsel for Both Parties are Experienced in Similar Litigation**

15 Both Plaintiffs' Counsel and Defendant's Counsel are particularly experienced in wage and
16 hour employment law and class actions. Plaintiffs' Counsel has significant experience in litigating
17 unpaid wages, unprovided meal and rest periods, misclassification, overtime, and expense
18 reimbursement class actions. Plaintiffs' Counsel has prosecuted numerous wage and hour class action
19 cases on behalf of employees for California Labor Code violations and thus are experienced and
20 qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis,
21 and to evaluate the viability of the defenses. Mara Dec. ¶¶ 2-8; Declaration of Michael H. Boyamian,
22 Esq. ("Boyamian Dec.") ¶¶ 2-7; Declaration of Armand R. Kizirian, Esq. ("Kizirian Dec.") ¶¶ 2-5.
23 Indeed, Mara Law Firm, PC was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*,
24 which is the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court*
25 (2012) 53 Cal.4th 1004. Mara Dec. ¶ 4. This experience instructed Plaintiffs' Counsel on the risks and
26 uncertainties of further litigation and guided their determination to endorse the proposed settlement.
27 Defendant's Counsel has extensive experience representing companies and regularly deals with wage
28 and hour litigation matters. Accordingly, both Parties' Counsel are experienced in wage and hour

1 employment law and class actions.¹⁰

2 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

3 An understanding of the amount in controversy is an important factor into whether the
4 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses of the
5 claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168
6 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
7 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case for plaintiffs
8 on the merits, balanced against the amount offered in settlement.” *Id.*

9 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to “decide
10 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the
11 attorneys.” *Kullar, supra*, 168 Cal.App.4th at 133. Finally, *Kullar* does not require an explicit
12 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,
13 provided there is a record which allows “an understanding of the amount that is in controversy and the
14 realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409. Put differently, “as the
15 court does when it approves a settlement as in good faith under Code of Civil Procedure § 877.6, the
16 court must at least satisfy itself that the class settlement is within the ‘ballpark’ of reasonableness.”
17 *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38
18 Cal.3d 488, 499-500. As the following subsections show, the Parties’ investigation and discovery
19 revealed plenty of reasons to discount claims and agree to this settlement.

20 **1. The Settlement is Fair and Reasonable Based on the Strengths of
21 Plaintiff’s Case and the Risks and Costs of Further Litigation**

22 The proposed settlement was only possible following significant discovery, an evaluation of
23 Defendant’s relevant policies and procedures, and Plaintiffs’ independent investigation. This
24 permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The
25 discovery conducted resulted in Plaintiffs’ central theories of liability, which are predicated on
26 Plaintiffs’ claims that Defendant misclassified Plaintiffs and Class Members as independent
27 contractors, resulting in Defendant’s failure to provide Class Members with compliant meal and rest

28 ¹⁰ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Class
Notice has been provided to the class and they have had an opportunity to respond. This information
will be provided to the Court in conjunction with the final approval motion.

1 periods, failed to pay them for all time worked, and failed to reimburse them for business expenses.
2 As explained above, Defendant maintains that the discovery produced demonstrates that it would
3 succeed at both class certification and on the merits.

4 Although, Plaintiffs believe this case is suitable for certification on the claimed bases that the
5 relevant contracts at issue are all uniform, and that there are company-wide policies and practices
6 applicable to Class Members, both of which result in the requisite amount of control to render Class
7 Members as employees under California Law, Defendants' counter-arguments and affirmative
8 defenses raise uncertainties with respect to both class certification and success on the merits. As the
9 California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification
10 is always a matter of the trial court's sound discretion. Decisions following *Sav-On* have reached
11 different conclusions, with respect to certification of wage and hour claims.¹¹ While remaining
12 confident in the strengths of their claims, all of these factors led Plaintiffs to discount the following
13 maximum potential damage claims.

14 **2. Exposure and the Risks for Each Claim**

15 In addition to being able to discover the strengths and vulnerabilities associated with Plaintiffs'
16 claims, Defendant provided Plaintiffs with information and data points which Plaintiffs submitted to
17 an expert to establish a representative damage model, as explained below. At the time of mediation,
18 of the approximately 161 Class Members, 26 are Contract Carriers and 135 are Drivers and Helpers.
19 Mara Dec. ¶ 32.

20 **A. Reimbursement**

21 Plaintiffs allege that as a result of Defendant's misclassification of Class Members, Contract
22 Carriers are forced to shoulder the costs of fuel and insurance in the furtherance of Defendant's
23 business, costs which Defendant would not be permitted to pass off to employees under California
24 law. If Plaintiffs were to prevail on this theory of liability, Contract Carriers would be entitled to the

25 ¹¹ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class
26 claiming misclassification and ordering summary adjudication in favor of employees), *review granted*,
27 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON*
28 *Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class claiming
misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of
certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422 (affirming denial of
certification).

1 reimbursement of these costs. At the time of mediation, Plaintiffs were able to estimate that Contract
2 Carriers each incurred approximately \$30,000 per year in insurance costs, and approximately \$2,000
3 per week in fuel costs. Therefore, the *maximum potential exposure* under this theory of liability would
4 be \$7,274,232 (\$30,000 x 17 active primaries on average at any given time x 3.396 year Claims
5 Period¹² = \$1,731,960 in insurance costs) + (\$2,000 x 17 active primaries on average at any given time
6 x 48 weeks per year x 3.396 year Claims Period = \$5,542,272 in fuel costs) (\$1,731,960 + \$5,542,272
7 = \$7,274,232). Mara Dec. ¶ 33. This maximum potential exposure, however, had to be discounted
8 considerably in light of Defendant's arguments, which are outlined below.

9 Defendant argues that because Contract Carriers are not employees and properly classified as
10 independent contractors, it does not need to reimburse them for business expenses. Defendant argues
11 that California Labor Code § 2802 only obligates an employer to indemnify its employee for expenses
12 that the employee incurred while performing his or her job duties. As Defendant claims it is lawfully
13 contracting with the Contract Carriers to facilitate the delivery of the customer's freight, these
14 expenses are properly borne by the Contract Carriers pursuant to the terms of the agreements.
15 Furthermore, Defendant points out that Plaintiffs would be unable to obtain class certification on this
16 claim, claiming that Plaintiffs and Class Members would be unable to present adequate records of
17 these supposed costs not only making damages completely unmanageable, but also calling into
18 question the issue of liability, as Plaintiffs and Class Members would be unable to establish that they
19 actually suffered this harm on a classwide basis. Should litigation continue, Plaintiffs' risk the Court
20 siding with Defendants' view, which would extinguish any potential recovery on this cause of action.
21 Mara Dec. ¶ 34.

22 **B. Meal and Rest Periods**

23 Plaintiffs contend that because Defendant misclassifies Plaintiffs and Class Members as
24 independent contractors, they are not provided with meal or rest periods, as independent contractors
25 are not entitled to the protections California law provides for employees. If Plaintiffs were to prevail
26 on this theory of liability, Class Members would be entitled to a meal and rest period premium for
27 each shift worked. For Contract Carriers, the exposure under these causes of action is \$578,010 (6,069
28

¹² A prior settlement involving the Contract Carriers extinguished claims prior to April 2, 2018.

1 shifts x \$47.62 average hourly rate¹³ x 2 meal/rest period premiums per shift = \$578,010). For Drivers
2 and Helpers, the exposure under these causes of action is \$759,686 (17,875 shifts x \$21.25 average
3 hourly rate¹⁴ x 2 meal/rest period premiums per shift = \$759,686). Therefore, the **maximum potential**
4 **exposure** under this theory of liability would be **\$1,337,696** (\$578,010 + \$759,686 = \$1,337,696).
5 Mara Dec. ¶ 35. This maximum potential exposure, however, had to be discounted considerably in
6 light of Defendant's arguments, which are outlined below.

7 Defendant again argues that because Class Members are not employees and properly classified
8 as independent contractors, it is under no obligation to provide Class Members with meal or rest
9 periods, as California law only requires an "employer" to provide them to its "employees." Defendant
10 claims it is lawfully engaging with and utilizing Class Members to facilitate the delivery of the through
11 the use of the agreements it enters into with the Contract Carriers, and that the agreements clearly state
12 that all of that any Class Member performing work under the terms of the agreements are independent
13 contractors, not employees. Additionally, Defendant again points out that the FMCSA December 21,
14 2018, determination would similarly serve to completely extinguish these causes of action as preempted
15 under Federal law. Should the Court agree with Defendant's arguments, Plaintiffs' and Class Members
16 would be entitled to no recovery under these causes of action. Mara Dec. ¶ 36.

17 C. Unpaid Wages

18 Plaintiffs further allege that Defendants have failed to pay Class Members for all hours worked,
19 as Defendant unlawfully misclassified them as independent contractors as opposed to employees.
20 Contract Carriers were paid by the mile and by the delivery, and therefore were not compensated for
21 any other time spent working. For Contract Carriers, the exposure under this cause of action is
22 \$1,372,777 (6,069 shifts x 4.75 average hours spent on other work tasks per day x \$47.62 =
23 \$1,372,777). Drivers and Helpers were paid a daily flat rate, and therefore were not paid for any hours
24 worked after 8 hours had been worked in a shift. For Drivers and Helpers, the exposure under this
25 cause of action is \$1,519,375 (17,875 shifts x 4 additional hours worked per day x \$21.25 =

26 _____
27 ¹³ At the time of mediation, Plaintiffs estimated Contract Carriers were paid on average approximately
28 \$4,000 per week. Based on a 7 day workweek with a 12 hour average shift length, Plaintiffs estimate
the hourly average rate for Contract Carriers to be \$47.62 (\$4,000 / 7 / 12 = \$47.62).

¹⁴ At the time of mediation, Plaintiffs estimated that Drivers and Helpers were paid a flat daily rate
of approximately \$170 on average (\$170 / 8 hours = \$21.25).

1 \$1,372,777). Accordingly, Defendant's *maximum* exposure under Plaintiffs' unpaid wages claim is
2 **\$2,892,152** ($\$1,372,777 + \$1,519,375 = \$2,892,152$). Mara Dec. ¶ 37.

3 Further, if Plaintiffs were to prevail on their unpaid wages claims, they may also be entitled to
4 waiting time penalties. For Contract Carriers, the exposure under this cause of action is \$394,293 (12
5 hour average day worked x \$47.62 average hourly rate x 30 days x 23 Contract Carriers = \$394,293).
6 For Drivers and Helpers, the exposure under this cause of action is \$887,400 (12 hour average day
7 worked x \$21.25 average hourly rate x 30 days x 116 former Drivers and Helpers = \$887,400).
8 Plaintiffs calculate the potential *maximum* exposure under the waiting time penalties cause of action
9 as **\$1,281,693** ($\$394,293 + \$887,400$). Mara Dec. ¶ 38.

10 Additionally, if Plaintiffs were to prevail on their unpaid wages claims, they may also be
11 entitled to wage statement penalties. For Contract Carriers, the exposure under this cause of action is
12 \$84,000 (21 Contract Carriers in the statutory period x \$4,000 maximum penalties = \$84,000). For
13 Drivers and Helpers, the exposure under this cause of action is \$188,000 (47 Drivers and Helpers in
14 the statutory period x \$4,000 maximum penalties = \$188,000). Plaintiffs calculate the potential
15 *maximum* exposure under the wage statement cause of action as **\$272,000** ($\$84,000 + \$188,000$).
16 Mara Dec. ¶ 39.

17 As explained above, Defendant contends that as Class Members are properly classified as
18 independent contractors under California law, none of the authorities relied upon by Plaintiffs renders
19 Defendant liable for any unpaid wages whatsoever. Defendant the only monetary compensation it is
20 required to provide to the Class Members at all at any point in time is solely based on the provisions
21 of the agreements it enters into with the Contract Carriers, which compensates them for all the hours
22 and various tasks necessary in furtherance of the freight deliveries. Furthermore, while Defendant
23 acknowledges that the agreements call for it to provide the Contract Carriers with certain forms of
24 compensation pursuant to the terms of the agreements, Defendant is under no duty to provide any form
25 of compensation to the Drivers and the Helpers. Furthermore, Defendant points out that Plaintiffs
26 would be unable to obtain class certification on this claim, claiming that Plaintiffs and Class Members
27 would be unable to present adequate records of these supposed unpaid wages not only making damages
28 completely unmanageable, but also calling into question the issue of liability, as Plaintiffs and Class

Members would be unable to establish that they actually suffered this harm on a classwide basis. Mara Dec. ¶ 40.

As Plaintiffs' claims for waiting time and wage statement penalties are derivative of their wage claims, Defendant argues that it would not be liable for these either. Plaintiffs had to consider that the Court might disagree with their arguments and agree with the Defendant's position. If this were to occur, this claim would fail. Mara Dec. ¶ 41.

D. PAGA

Plaintiffs are also seeking PAGA penalties. PAGA allows the private enforcement of certain California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2) provides for a standard penalty amount where a civil penalty is not otherwise specified by statute:

[T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

Plaintiffs allege that Defendant has six (6) violations – unlawful meal periods, unlawful rest periods, failure to pay all time worked, failure to pay wages due at termination, failure to provide accurate, itemized wage statements, and for the Contract Carriers, failure to reimburse business expenses – of the Labor Code sections which give rise to PAGA penalties. The statute of limitations for PAGA violations goes back one year. Plaintiffs calculated Defendants' potential maximum exposure under PAGA as follows:

\$100 x 6 PAGA violations x 699 pay periods during the one-year statutory period = \$419,400 for

Contract Carriers

\$100 x 5 PAGA violations x 1,441 pay periods during the one-year statutory period = \$720,500 for

the Drivers and Helpers

$\$419,400 + \$720,500 = \$1,139,900$

Mara Dec. ¶ 42.

Plaintiffs' PAGA claims are subject to the same risks on the merits as Plaintiffs' non-PAGA claims. In addition, Labor Code § 2699, subdivision (e)(2) provides that "[i]n any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum penalty amount specified by this part if, based on the

1 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
2 arbitrary, oppressive, or confiscatory.” In *Thurman v. Bayshore Transit Management, Inc.*
3 (“*Thurman*”) (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum
4 penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the
5 maximum amount. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112,
6 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has taken its
7 obligations to comply with the law seriously. *Id.* Defendant maintains that if the case were to continue
8 in litigation, they would be able to show that they took their obligations to comply with the law
9 seriously. As such, if Plaintiffs were able to prevail on the merits of their PAGA claims, it is likely
10 that the Court would reduce the maximum penalty allowed.

11 In addition, as the PAGA violations asserted by Plaintiffs are predicated on the same unlawful
12 conduct that Plaintiffs base their other claims, Plaintiffs’ PAGA claims are subject to the same risks
13 on the merits as Plaintiffs’ class claims. If Plaintiffs are ultimately unable to prevail on any one of
14 their class claims, their recovery under the PAGA as to that violation would also fail. The likelihood
15 of the Court reducing the PAGA damages awarded to Plaintiffs and the aggrieved employees –
16 assuming liability is proven as to each of Plaintiffs’ claims – is also higher in this case where these
17 same individuals will also be receiving money for the same unlawful conduct under the class claims.
18 *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO,
19 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially
20 duplicative of penalties granted by the underlying Labor Code violations, *see, e.g.*, Cal. Lab. Code §§
21 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award
22 PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA
23 penalties are highly uncertain.”).

24 **3. The Settlement Amount of \$1,000,000 is Reasonable**

25 Not taking into account any of their defenses or arguments, Defendant’s total exposure if
26 Plaintiffs were successful in their core claims would be approximately \$11,504,080 [\$7,274,232
27 (reimbursement exposure) + \$1,337,696 (meal and rest period exposure) + \$2,892,152 (unpaid wages
28 exposure) = \$11,504,080]. If Plaintiffs’ are successful in their unpaid wages claims, they may also be
entitled to damages for waiting time penalties in the amount of \$1,281,693 and wage statement

1 penalties in the amount of \$272,000. If all of Plaintiffs' claims are successful, they may also be entitled
2 to PAGA penalties in the maximum amount of \$1,139,900. Mara Dec. ¶ 43.

3 Based upon the risks just discussed, Plaintiffs had to discount their maximum potential
4 exposure. Plaintiffs also had to consider that, should the Court agree with their theories and grant
5 certification as to each of their claims, they may not be awarded the full exposure at trial. This is
6 particularly true when dealing with matters regarding the misclassification of employees as
7 independent contractors. The only way Plaintiffs and the Class Members would be entitled to **any**
8 **recovery** hinges entirely on whether Defendant misclassified them as independent contractors. Should
9 the Court determine that Defendant did not misclassify Plaintiffs and Class Members, they would
10 recover **nothing**. Further, even if the Court determined that Defendant misclassified Plaintiffs and
11 Class Members, the Court could still deny certification or abstain from awarding any damages as to
12 the alleged causes of action pursuant to Defendant's additional counter arguments and defenses. All
13 of these factors led Plaintiffs to reduce the realistic potential exposure in order to gain a definite
14 monetary recovery for the class.

15 In light of the risks Plaintiffs' claims faced, Plaintiffs and their Counsel believe that the
16 settlement amount of \$1,000,000 – **with an average settlement share amount estimated at**
17 **\$3,333.54** – is a reasonable and fair settlement amount. Mara Dec. ¶ 44.

18 A settlement is not judged **solely** against what might have been recovered, had the plaintiffs
19 prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and
20 reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells*
21 *Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; "Compromise is inherent and necessary in the
22 settlement process...even if the relief afforded by the proposed settlement is substantially narrower
23 than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because
24 the public interest may indeed be served by a voluntary settlement in which each side gives ground in
25 the interest of avoiding litigation." *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm'n*
26 (9th Cir. 1982) 688 F.2d 615, 628 ("It is well-settled law that a cash settlement amounting to only a
27 fraction of the potential recovery does not...render the settlement inadequate or unfair").
28

1 **c. Provisional Class Certification Should be Granted**

2 Under California law, a class action is appropriate when the class is ascertainable and there is
3 “a well-defined community of interest in the questions of law and fact involved affecting the parties
4 to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code of Civil
5 Procedure § 382 for class certification follow federal law according to Rule 23 of the Federal Rule of
6 Civil Procedure: numerosity, typicality of the class representatives’ claims, adequacy of
7 representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also*
8 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court
9 must certify a class for settlement purposes if a class has not already been certified, “it is well
10 established that trial courts should use different standards to determine the propriety of a settlement
11 class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used
12 for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836,
13 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

14 Plaintiffs contend, and Defendant does not dispute for settlement purposes only, each of these
15 elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 237-38.
16 Plaintiffs seek approval of the following Class for settlement purposes only: All individuals who
17 worked for Fidelitone as Contract Carriers, Drivers and/or Helpers in the State of California (but
18 excluding acknowledged employees of Fidelitone) during the Claims Period, and all entities owned
19 and controlled by Contract Carriers which contracted directly with Fidelitone to perform freight
20 delivery services at any time from July 31, 2016, through November 6, 2021.

21 **i. The Proposed Settlement Class is Ascertainable**

22 Plaintiffs contend that the proposed Settlement Class is ascertainable because of all of the class
23 members have performed work for Defendant and have been identified through Defendant’s own
24 records. *See Rose v City of Hayward* (1981) 126 Cal.App.3d 926,932 (finding that “Class Members
25 are ‘ascertainable’ where they may be readily identified without unreasonable expense or time by
26 reference to official records.”); *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (“[c]lass
27 members are ‘ascertainable’ where they may be readily identified without unreasonable expense or
28 time by reference to official [or business] records.”). Thus, the ascertainability requirement is met.

1 **ii. The Proposed Settlement Class is Sufficiently Numerous**

2 The numerosity requirement is met if the class is so large that joinder of all members would be
3 impracticable. *Gay v. Waiters' & Dairy Lunchmen's Union* (N.D. Cal. 1980) 489 F. Supp. 282, *aff'd*
4 (9th Cir. 1982) 694 F.2d 531. "There is no set number required to maintain a class action, and the
5 statutory test is whether a class is so numerous that 'it is impracticable to bring them all before the
6 court.'" *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223
7 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior Court* (1995)
8 44 Cal.2d 574 (upholding a class of ten members). "The numerosity requirement is more readily met
9 when a class contains employees suing their present employer . . . This is because class members may
10 be unwilling to sue their employer individually out of fear of retaliation." *Romero v. Producers Dairy*
11 *Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the California Supreme Court, "fear of
12 retaliation for individual suits against an employer is a justification for class certification in the arena
13 of employment litigation, even when it is otherwise questionable that the numerosity requirements
14 were satisfied . . . It needs no argument to show that fear of economic retaliation might often operate
15 to induce aggrieved employees quietly to accept substandard conditions." *Gentry v. Superior Court*
16 (2007) 42 Cal.4th 443, 460 (citation omitted), overruled on other grounds in *Iskanian v. CLS Transp.*
17 *Los Angeles, LLC* (2014) 59 Cal.4th 348.

18 Here, Defendant's records show that the proposed Settlement Class has approximately one
19 hundred and sixty-one (161) members. Plaintiffs contend that joinder of all Settlement Class Members
20 is impracticable and, therefore, a class wide proceeding is preferable. *See Hebbard v. Colgrove* (1972)
21 28 Cal.App.3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite,
22 but that a class of as few as 28 is acceptable.). In fact, a class of ten (10) has been certified as a class
23 action. *Id.*, citing *Bowles v. Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue
24 have held that classes of over forty (40) individuals are numerous enough to meet the numerosity
25 requirement. *See Ikonen v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly,
26 the Class that is comprised of approximately one hundred and sixty-one (161) members is sufficient
27 to satisfy the numerosity requirement.
28

1 **iii. The Commonality Requirement is Met**

2 The commonality requirement is met if there are questions of law and fact common to the class.
3 *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual
4 predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies
5 within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members to
6 individually establish eligibility and damages does not mean individual fact questions predominate.’”
7 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. Commonality exists if there
8 is a predominant common legal question regarding how an employer’s policies impact its employees.
9 *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) (“[T]he common legal
10 question remains the overall impact of Diva’s policies on its drives.”). Whether Plaintiff is likely to
11 prevail on his theory of recovery is irrelevant at the certification stage since the question is “essentially
12 a procedural one that does not ask whether an action is legally or factually meritorious.” *Linder v.*
13 *Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-440.

14 Here, Plaintiffs contend that the proposed Class Members’ claims all stem from the same
15 allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiffs
16 seek the same legal remedies under state law on behalf of themselves and all Class Members. As
17 liability as to all Class Members is predicated on the same policies and practices, which Plaintiffs
18 allege violates California law, the commonality requirement has been satisfied.

19 **iv. The Typicality Requirement is Met**

20 The typicality requirement is met if the claims of the named representative are typical of those
21 of the class, though, “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at 1020;
22 *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiffs contend that their claims are typical of
23 the Class Members’ claims because they arise from the same factual basis and are based on the same
24 legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.* (N.D. Cal. 1987)
25 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and practices. Plaintiffs
26 allege that Defendant’s misclassification scheme uniformly applied to all Class Members. Factual
27 differences may exist between Plaintiffs and the Class Members so long as the claims arise from the
28 same events or course of conduct and are based on the same legal theories. *Hanlon, supra*, 150 F. 3d

1 at 1020; *see also Wehner, supra*, 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. § 3:15, p.335
2 [When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff
3 and the class sought to be represented, the typicality requirement is usually met irrespective of varying
4 fact patterns which underlie individual claims.] As such, the typicality requirement is satisfied.

5 **v. The Adequacy Requirement is Met**

6 The adequacy requirement is met if Plaintiffs have no interests adverse to the interests of the
7 proposed Class Members and is committed to vigorously prosecuting the case on behalf of the class.
8 *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51.
9 Plaintiffs contend those standards are met here. Plaintiffs do not have any conflicts of interest with the
10 Class. They have been and continue to be committed to vigorously prosecuting this case. If any Class
11 Member wishes to opt-out of the Settlement, he or she may do so. Therefore, there is no conflict of
12 interest between Plaintiffs and the Class Members.

13 **vi. Notice to Class Members Complies with California Rule of Court 3.769(f)**

14 California Rule of Court 3.769(f), provides:

15 If the court has certified the action as a class action, notice of the final approval hearing
16 must be given to class members in the manner specified by the court. The notice must
17 contain an explanation of the proposed settlement and procedures for class members to
18 follow in filing written objections to it and in arranging to appear at the settlement
hearing and state any objections to the proposed settlement.

19 The proposed Class Notices meet all of these requirements. The proposed Class Notices advise
20 the class of their rights to participate in the settlement, how to and when to object to or request
21 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
22 proposed Class Notices are attached as **Exhibit 3** to the Settlement.

23 \\\

24 \\\

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28 \\\

1 **V. CONCLUSION**

2 Plaintiffs respectfully submit that the proposed settlement is in the best interests of the class
3 and class members, as it is fair, adequate, and reasonable, and one that should ultimately be granted
4 final approval. Under the applicable class action criteria and guidelines, the proposed settlement
5 should be preliminarily approved by the Court, the class should be conditionally certified for purposes
6 of settlement only, and the Notice of Class Action Settlement should be approved.

7
8 Respectfully Submitted,

9 **MARA LAW FIRM, PC**

10
11 Date: January 19, 2022

Signed: 
 David Mara, Esq.
 Matthew Crawford, Esq.
 Attorneys for Plaintiffs