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individually and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

Scott Fiske, individually and on behalf of all
others similarly situated,

Plaintiff,

vs.

Robertson's Transport, Ltd.; and Does 1
through 20, Inclusive,

Defendants.

Case No.: CIVDS2018316

Hon. David Cohn – Dept. S-26

**PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

[Declaration of Jonathan M. Lebe, Report re:
Compliance with Court Checklist, Declaration of
Scott Fiske, and [Proposed] Order Filed
Herewith]

Hearing Information:

Date: October 29, 2021

Time: 10:00 a.m.

Location: Dept. S-26

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

2 PLEASE TAKE NOTICE that on October 29, 2021, in Department S-26 of the above-
3 entitled Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff Scott Fiske
4 on behalf of himself and the settlement class members described herein, will and hereby do move
5 for an order: (1) preliminarily approving the proposed class action and Private Attorney General
6 Act ("PAGA") settlement pursuant to the Parties' Settlement Agreement, appointing Plaintiff as
7 Class Representatives for settlement purposes only; (2) appointing Jonathan M. Lebe and Annaliz
8 Loera of Lebe Law, APLC as Class Counsel for settlement purposes only; (3) preliminarily
9 certifying the proposed class for settlement purposes only; (4) appointing CPT Group, Inc. as the
10 third party settlement administrator; (5) approving the proposed form notice of the class action
11 settlement and the PAGA settlement; (6) approving the schedule for dissemination of notice to
12 class members; and (7) scheduling a final fairness hearing.

13 This motion is based on this notice and motion, the attached memorandum of points and
14 authorities, the declarations of Jonathan M. Lebe and Plaintiff, all documents on file in this action,
15 and upon such oral argument as may be presented at the time of hearing.

16
17 Dated: October 6, 2021

Lebe Law, APLC

18
19 By:



Jonathan M. Lebe

21 Attorney for Plaintiff Scott Fiske, individually and on behalf
22 of all others similarly situated
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Scott Fiske (“Plaintiff”), as representative of the putative settlement class, requests
4 preliminary approval of a class action settlement to resolve this action in its entirety. The crux of
5 Plaintiff’s claims in this case is that Defendant Robertson’s Transport, Ltd. (“Defendant”), violated
6 California wage and hour laws by Defendant’s failure to pay for all time worked, including pre-
7 and post-trip inspection work duties and other non-driving time performing work
8 duties, Defendant’s failure to provide accurate itemized wage statements, Defendant’s failure to
9 provide legally-compliant meal and rest breaks, Defendant’s failure to reimburse all necessary
10 business expenses, including but not limited to use of personal cellular telephones and Defendant’s
11 failure to pay all final wages. The Parties have entered into a Settlement Agreement which, subject
12 to approval by this Court, fully releases Defendant from all class and Private Attorney General Act
13 (“PAGA”) claims in this action in exchange for lump sum payment of \$1,500,000.

14 The Settlement Agreement was reached through arm’s-length negotiations by informed
15 counsel following extensive investigation of the asserted claims and relevant law, the exchange of
16 informal discovery, and a mediation with Hon. Carl J. West (Ret.) on April 28, 2021. The
17 settlement provides significant benefits to members of the settlement class, which will be
18 distributed to the class, less Plaintiff’s counsels’ fees and costs, settlement administration costs,
19 payment to the Labor Workforce and Development Agency, and a small enhancement to Plaintiff
20 for his services. Once appropriate deductions have been made from the gross settlement fund,
21 class members will recover an average of approximately **\$1,074.26 per class member**. Plaintiff
22 respectfully requests that the Court preliminarily approve this settlement because it reflects a fair
23 and reasonable compromise of the disputed claims in this action.

24 To effectuate the settlement, the Plaintiff respectfully requests that the Court: (1) grant
25 preliminary approval of the settlement in accordance with the Parties’ Settlement Agreement; (2)
26 certify the proposed settlement class for settlement purposes only; (3) appoint Jonathan M. Lebe
27 and Annaliz Loera of Lebe Law, APLC as class counsel for settlement purposes; (4) appoint
28 Plaintiff as a class representative for settlement purposes; (5) approve the proposed class and

1 PAGA notice, which is attached as Exhibit 1 to the Settlement Agreement, which is Exhibit A,
2 both of which are attached to the Declaration of Jonathan M. Lebe (“Lebe Decl.”); (6) appoint
3 CPT Group, Inc. as the third party administrator for the settlement; and (7) schedule a fairness
4 hearing for final approval of the settlement.

5 Plaintiff submits that the proposed settlement is in compliance with the Court’s checklist
6 for class action settlements, as specifically detailed in Plaintiff’s Report Re: Compliance with
7 Checklist for Preliminary Approval of Class Action Settlements filed concurrently with this
8 Motion. Accordingly, Plaintiff respectfully requests that the Court grant this motion.

9 **II. FACTUAL BACKGROUND**

10 **A. Procedural History**

11 Defendant is a trucking company and is headquartered in Rialto, California. Plaintiff
12 worked for Defendant from approximately October 21, 2019, to approximately March 8, 2021, as
13 a Transport Driver. (Declaration of Scott Fiske, ¶ 2.)

14 On August 21, 2020, Plaintiff filed his complaint asserting claims for: (1) failure to pay
15 minimum wages; (2) failure to pay overtime wages; (3) failure to timely pay all earned wages; (4)
16 unlawful deduction of wages; (5) failure to pay for rest and recovery periods; (6) failure to provide
17 meal periods; (7) failure to permit rest breaks; (8) failure to provide accurate itemized wage
18 statements; (9) failure to reimburse necessary business expenses; and (10) violation of Business
19 and Professions Code §§ 17200, *et seq.* (Lebe Decl., ¶ 10.) On December 21, 2020, Plaintiff filed
20 an amended complaint to add an additional cause of action for civil penalties pursuant to PAGA.
21 (Lebe Decl., ¶ 11.)

22 On April 28, 2021, the Parties mediated with Hon. Carl J. West (Ret.), a very experienced
23 mediator of wage and hour class actions. (Lebe Decl., ¶ 12.) In advance of the mediation, the
24 parties engaged in informal discovery, whereby Defendant provided the following information
25 related to Defendant’s employees: (1) the number of class members; (2) the number of former
26 employees; (3) workweeks worked; (4) the number of pay periods; (5) company handbook and
27 policies pertaining to wage and hour issues; (6) all time records for class members; and (7) a
28 random sampling of class members’ payroll records. (*Id.*)

1 **B. The Settlement**

2 **1. Settlement Negotiations**

3 The Parties engaged in settlement negotiations at the mediation after months of analysis
4 and informal discovery. (Lebe Decl., ¶ 13.) At the mediation, on April 28, 2021, the Parties
5 engaged in settlement negotiations, including the exchange of legal analysis and data pertaining to
6 the claims. (Id.) Negotiations were rigorous and conducted at arms' length. (Id.) The Parties did
7 not settle at mediation but continued their settlement negotiations with the assistance of the
8 mediator. (Id.) Thereafter, on July 21, 2021, the Parties agreed to settle the case. (Id.) The Parties
9 agreed to settle on a class wide and PAGA basis. (Id.)

10 Defendant adamantly denies any wrongdoing and believe that they have meritorious
11 defenses to the class issue and on the merits but have concluded that the further defense of this
12 action would be lengthy and expensive for all parties. (Id.) Plaintiff and his counsel have
13 considered the uncertainty and risk involved in further litigation, including the difficulties and
14 potential delays in seeking class certification and the financial health of Defendant. (Id.) Based
15 upon these considerations, Plaintiff and proposed class counsel have determined that the settlement
16 is fair, adequate, and reasonable, and is in the best interests of the class. (Id.)

17 **2. Settlement Terms**

18 The settlement was reached on a class basis. The settlement class includes Plaintiff and
19 non-exempt employees who held the position of Transport Driver of Defendant in California who,
20 based on Defendant's records, were employed during the class period between April 6, 2016,
21 through the date of preliminary approval of the Settlement. (Lebe Decl., ¶ 15.)

22 In exchange for a release of claims, Defendant is providing substantial compensation to
23 Plaintiff and the settlement class. Defendant has agreed to pay an amount of \$1,500,000 to settle
24 the class and PAGA claims, of which \$15,000 is reserved to settle the PAGA claims. (Id.) The
25 settlement includes the following: (1) Plaintiff's attorneys' fees up to \$500,000; (2) Plaintiff's
26 counsels' reasonable litigation costs necessary to prosecute and settle this litigation and administer
27 the Agreement, estimated at no more than \$15,000; (3) a \$7,500 enhancement award to Plaintiff;
28 (4) settlement administration costs not to exceed \$15,000, currently estimated at \$11,000; (5) and

a payment of \$11,250 to the LWDA, which represents 75% of the PAGA settlement amount. (Id.) After deduction of these amounts, the remaining net settlement fund of \$951,250, which includes \$3,750 reserved for the PAGA aggrieved employees and will be distributed to class members and PAGA aggrieved employees based on the number of workweeks employed with Defendant. (Id.) Class members will not be required to return any claims form. (Id.)

3. Notice To Class Members And Right To Opt Out Or/Object To Settlement

Following preliminary approval of the settlement, and in accordance with California Rule of Court 3.769(f), the Notice of Class Action Settlement together with a change of address form, and pre-printed return envelope (“Notice Packet”), will be mailed by first-class mail to each settlement class member at the last known address according to Defendant’s records. (Lebe Decl., ¶ 16.) The proposed Notice of Class Action Settlement (“class notice”) is attached as Exhibit 1 to the Settlement Agreement. (Id.) The class notice includes information on the claims asserted, the material settlement terms, the right to object, or to opt out and the timing and manner to do either. (Id.) Class members will have 30 days to object or request exclusion from the settlement. The class notice will also inform the class of the date, place and time of the final approval hearing. (Id.)

The settlement administrator will use standard skip-tracing methods to obtain forwarding addresses of any class members whose Notice Packets are returned as undeliverable. (Id.)

III. LEGAL ARGUMENT

A. Standard For Preliminary Settlement Approval

To prevent fraud, collusion, or unfairness to the class, settlement of a class action requires court approval. (Dunk v. Ford Motor Co. (1996) 48 Cal. App. 4th 1794, 1800-01, as modified (Sept. 30, 1996) (citations omitted); Cal. Rules of Court 3.769(c), 3.770(a).) When “the court grants preliminary approval, it must set a final approval hearing, and provide for notice . . . to the class.” (Luckey v. Superior Court (Oct. 29, 2014) 228 Cal. App. 4th 81, 93, *review denied*; see Cal. Rule of Court 3.769(e).)

1 The preliminary approval stage “is not a fairness hearing.” (Armstrong v. Bd. of Sch.
2 Directors of City of Milwaukee (7th Cir. 1980) 616 F.2d 305, 314 (*overruled on other grounds*
3 Felzen v. Andreas (7th Cir. 1998) 134 F.3d 873). At the preliminary approval stage, the court
4 “limits its inquiry to the extent necessary to reach a reasoned judgment that the agreement is not
5 the product of fraud or overreaching by, or collusion between, the negotiating parties.” (In re
6 Microsoft I-V Cases (2006) 135 Cal. App. 4th 706, 723, (internal citations omitted); 7-Eleven
7 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal. App. 4th 1135, 1145.)

8 A class action settlement is presumed to be fair where: “(1) the settlement is reached
9 through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel
10 and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the
11 percentage of objectors is small.” (Chavez, 162 Cal. App. 4th at 52 [citing Dunk, 48 Cal. App. 4th
12 at 1802]; In re Microsoft I-V Cases, 135 Cal. App. 4th at 723; 7-Eleven Owners for Fair
13 Franchising, 85 Cal. App. 4th at 1146.) Where there is no extrinsic evidence of fraud or collusion,
14 the court should assume that negotiations were conducted in good faith. (Newberg on Class
15 Actions § 11.51 (3d ed. 1992); Cho v. Seagate Tech. Holdings, Inc. (2009) 177 Cal. App. 4th 734,
16 748, (denying objector’s request for discovery where there was no evidence of collusion between
17 the parties during negotiations); In re Cellphone Termination Fee Cases (2009) 180 Cal. App. 4th
18 1110, 1122-23 [citing Cho, 177 Cal. App. 4th at 748].) Here, when measured against the above
19 standards, the settlement satisfies the requirements for preliminary approval, because it is well
20 within the range of possible approval, reached after extensive litigation in which both parties have
21 thoroughly evaluated the claims, and there are no grounds to doubt its fairness.

22 **B. The Proposed Settlement Satisfies The Standards For Preliminary Approval**

23 In Kullar v Foot Locker Retail, Inc. (2008) 168 Cal. App. 4th 116, the California Appellate
24 Court held that a presumption of fairness exists when:

- 25 • The settlement is reached through arm's-length bargaining;
- 26 • Investigation and discovery are sufficient to allow counsel and the court to act
- 27 intelligently;
- 28

- Counsel is experienced in similar litigation; and
- The percentage of objectors is small.

The Court also confirmed that the trial court should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct. (168 Cal. App. 4th at 129.) Here, all four Kullar elements are met.

1. The Settlement Is the Result of Arm's Length Bargaining

The parties engaged in settlement negotiations at the mediation after months of analysis and informal discovery. (Lebe Decl., ¶ 13.) Counsel aggressively pursued their respective positions before eventually reaching an agreement. (Id.) Each side provided the other with several detailed settlement proposals before the agreement was reached. (Id.) The negotiations were rigorous and conducted at arm's length. (Id.) The settlement cannot be described as fraudulent or collusive. (Id.) Rather, the settlement is the product of informed and rigorous negotiations by experienced counsel. (Id.) The settlement is fair, adequate, and reasonable for Plaintiff and the class. (Id.)

2. There Has Been Sufficient Investigation and Discovery to Allow Plaintiff and the Court to Act Intelligently and Evaluate the Settlement

Prior to reaching agreement to settle the class claims, the parties engaged in substantial informal discovery. In advance of the mediation, the parties engaged in informal discovery, whereby Defendants provided the following information related to class members: (1) the number of class members; (2) the number of former employees (3) workweeks worked; (4) the number of pay periods; (5) company handbook and policies pertaining to wage and hour; (6) all time records for class members; and (7) a random sampling of class members' payroll records. (Lebe Decl., ¶ 12.) Counsel for Plaintiff did an extensive analysis of the wage and hour claims presented by this class action, including a detailed exposure analysis brought to the mediation, upon which settlement negotiations were based at the mediation. (Id.) The investigation permitted counsel for

1 Plaintiff to do a rigorous damages analysis and come up with Defendant's total exposure presented
2 by this case, which is detailed below.

3 **3. Plaintiff and Their Counsel Support the Proposed Settlement and**
4 **Counsel Are Experienced in Similar Litigation**

5 Plaintiff and their counsel fully support the settlement. (Lebe Decl., ¶ 8; Declaration of
6 Scott Fiske, ¶ 7.) Plaintiff's counsel have considerable experience prosecuting class wage and
7 hour litigation, having been approved as class counsel and co-class counsel in numerous class
8 actions. (Lebe Decl., ¶¶ 3-8.)

9 Plaintiff's counsel are prepared to litigate Plaintiff's claims through trial and any resulting
10 appellate proceeding. (Lebe Decl., ¶ 9.) However, because of the interest in avoiding the risks
11 and expenses associated with this litigation, and the substantial benefits the settlement confers
12 upon settlement class members and the named Plaintiff, Plaintiff and his counsel have determined
13 that the settlement is in the best interests of Plaintiff and the class. (*Id.*)

14 **4. There Is No Known Opposition to the Settlement**

15 To date, Plaintiff is unaware of any opposition to the settlement. (Lebe Decl., ¶ 19.) To
16 the extent there are objectors following the mailing of the Notice Packet, Class Members will have
17 the opportunity to file objections to or opt-out of the settlement. (*Id.*)

18 **5. The Proposed Settlement Is Fair and Reasonable Given the Substantial**
19 **Benefits to Class Members and the Risks and Expense of Complex and**
20 **Protracted Litigation**

21 The settlement confers substantial benefits on settlement class members. In particular,
22 Defendants have agreed to a lump sum payment of \$1,500,000, which will be distributed to the
23 class, less Plaintiff's counsel's fees and costs, settlement administration costs, payment to the
24 LWDA, and a small enhancement to Plaintiff for his services. Once appropriate deductions have
25 been made from the gross settlement fund, class members will recover an average of approximately
26 \$1,074.26 per class member. Additionally, the LWDA and aggrieved employees will receive
27 \$15,000 for PAGA penalties. Plaintiff respectfully requests that the Court preliminarily approve
28

1 this settlement because it reflects a fair and reasonable compromise of the disputed claims in this
2 action.

3 This concrete and substantial benefit compares favorably to the uncertainty associated with
4 continued litigation over contested issues. (See Munoz v. BCI Coca-Cola Bottling Co. of L.A.
5 (2010) 186 Cal. App. 4th 399, 410-11.) Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal. App.
6 4th 116, requires information be presented to the Court, acting as a fiduciary for the absent class
7 members "... to ensure that the recovery represents a reasonable compromise, given the magnitude
8 and apparent merit of the claims being released, discounted by the risks and expenses of attempting
9 to establish and collect on those claims by pursuing the litigation..." (Kullar, 168 Cal. App.4th at
10 129.)

11 Here, Plaintiff's Counsel calculated Defendant's total potential exposure assuming
12 Plaintiff prevailed on all aspects of his claims at trial but weighed that value against the chance of
13 succeeding at class certification and trial. Moreover, Plaintiff's calculated Defendant's total
14 potential exposure assuming there were 882 total class members, including 624 class members in
15 the wage statement subclass, 343 former employees in the waiting time penalties subclass and
16 116,444 workweeks.

17 In order to calculate this exposure, prior to mediation, Plaintiff received informal discovery
18 from Defendant crucial information for calculating damages in this case including: the number of
19 class members, the number of former employees, the number of workweeks, the number of pay
20 periods, all time records for class members, and a sampling of payroll records. (Lebe Decl., ¶ 12.)
21 Defendant also produced the company handbook and employment policies pertaining to wage and
22 hour. (Id.)

23 Failure to Pay Minimum Wages for All Hours Worked: Plaintiff's claim for failure to pay
24 minimum wages for all hours worked is premised on the theory that Defendant failed to pay class
25 members all minimum wages owed due to Defendant's alleged practice of failing to pay for time
26 spent on pre- and post-trip inspection work duties and other non-driving time performing work
27 duties. (Lebe Decl., ¶ 14.) Plaintiff and his expert calculated Defendant's exposure as to this
28 causes of action based on the applicable labor code statute, Labor Code Section 1194(a) which

1 provides that: “Notwithstanding any agreement to work for a lesser wage, any employee receiving
2 less than the legal minimum wage or the legal overtime compensation applicable to the employee
3 is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage
4 or overtime compensation. . . .” (Id.)

5 By using the information provided by Defendant in advance of and during the mediation
6 and the records of class members, Plaintiff and his expert were able to calculate the exposure of
7 Defendant for this causes of action. (Id.) Specifically, by multiplying the total number of
8 workweeks, the number of full-time equivalent employees and the weighted minimum wage
9 applicable during the class period by an estimated thirty minutes per shift, Plaintiff and his expert
10 estimated that Defendant’s maximum exposure for this claim was **\$2,028,341** and with interest
11 could have reached approximately **\$2,302,526**. (Id.)

12 Failure to Provide Accurate and Itemized Wage Statements: Plaintiff’s claim for failure to
13 provide accurate and itemized wage statements is premised on the theory that Defendant failed to
14 include all required information pursuant to Labor Code Section 226 in one single document. (Id.)
15 Moreover, the wage statements allegedly did not include all the required information pursuant to
16 Labor Code Section 226, including but not limited to the correct applicable rates, total hours
17 worked, gross wages earned, and net wages earned. (Id.) Plaintiff and his expert calculated
18 Defendant’s exposure as to this cause of action based on the applicable labor code statute, Labor
19 Code Section 226.3, which provide that: “Any employer who violates subdivision (a) of Section
20 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per
21 employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for
22 each violation in a subsequent citation, for which the employer fails to provide the employee a
23 wage deduction statement or fails to keep the records required in subdivision (a) of Section 226.
24 The civil penalties provided for in this section are in addition to any other penalty provided by
25 law...” (Id.)

26 By using the information provided by Defendant in advance of and during the mediation
27 and the records of class members, Plaintiff and his expert were able to calculate the exposure of
28 Defendant for this cause of action. (Id.) Specifically, by multiplying the total number of pay

1 periods, the 624 class members in the wage statement subclass number of full-time equivalent
2 employees and the civil penalty pursuant to Labor Code Section 226.3, Plaintiff and his expert
3 estimated that Defendant's maximum exposure for this claim was **\$2,496,000**. (Id.)

4 Failure to Reimburse All Reasonable and Necessary Business Expenses: Plaintiff's claim
5 for failure to reimburse all business expenses is premised on the theory that Defendant's failed to
6 reimburse for business expenses of work-related use of personal cellular telephone. (Id.) Plaintiff
7 and his expert calculated Defendant's exposure as to this cause of action based on the applicable
8 labor code statute, Labor Code Section 2802, which provide that: "An employer shall indemnify
9 his or her employee for all necessary expenditures or losses incurred by the employee in direct
10 consequence of the discharge of his or her duties." (Id.)

11 By using the information provided by Defendant in advance of and during the mediation
12 and the records of class members, Plaintiff and his expert were able to calculate the exposure of
13 Defendant for this cause of action. (Id.) Specifically, by multiplying the total number of
14 workweeks, the number of full-time equivalent employees during the class period by an estimated
15 \$50 for monthly cellular telephone expenses, Plaintiff and his expert estimated that Defendant's
16 maximum exposure for this claim was **\$1,421,050** and with interest could have reached
17 approximately **\$1,756,209**. (Id.)

18 Failure to Timely Pay All Wages due to Terminated/Separated Employees: Plaintiff's
19 claim for failure to timely pay all wages due to terminated/separated employees is premised on the
20 theory that Defendant's failed to paid final wages timely. (Id.) Plaintiff and his expert calculated
21 Defendant's exposure as to this cause of action based on the applicable labor code statute, Labor
22 Code Section 203, which provide that: "If an employer willfully fails to pay, without abatement or
23 reduction, in accordance with Sections 201, 201.3, 201.5, 201.9, 202, and 205.5, any wages of an
24 employee who is discharged or who quits, the wages of the employee shall continue as a penalty
25 from the due date thereof at the same rate until paid or until an action therefor is commenced; but
26 the wages shall not continue for more than 30 days. An employee who secretes or absents
27 themselves or themselves to avoid payment to him or her, or who refuses to receive the payment
28 when fully tendered to him or her, including any penalty then accrued under this section, is not

entitled to any benefit under this section for the time during which he or she so avoids payment.”

(Id.)

By using the information provided by Defendant in advance of and during the mediation and the records of class members, Plaintiff and his expert were able to calculate the exposure of Defendant for this cause of action. Specifically, by multiplying the 323 separated employees by their average monthly wages, Plaintiff and his expert estimated that Defendant’s maximum exposure for this claim was **\$1,994,399**. (Id.)

Failure to Provide Timely and Compliant Meal Periods: Plaintiff’s claim for failure to provide timely and compliant meal periods is premised on the theory that Defendant failed to provide meal periods for each five hours worked, and purported meal periods were often short, late or interrupted. (Id.) Plaintiff and his expert calculated Defendant’s exposure as to this cause of action based on the applicable labor code statute, Labor Code Section 226.7(c), which provide that: “If an Employers fails to provide an employee a meal or rest or recovery period in accordance with a state law, including but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the Employers shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period is not provided.” (Id.)

By using the information provided by Defendant in advance of and during the mediation and the records of class members, Plaintiff and his expert able to calculate the exposure of Defendant for this cause of action. (Id.) Specifically, by multiplying the number of unique meal break violations from the time records produced by the average hourly rate paid, Plaintiff and his expert estimated that Defendant’s maximum exposure for this claim was **\$5,352,174** and with interest could have reached approximately **\$5,877,493**. (Id.)

Failure to Provide Timely and Compliant Rest Breaks: Plaintiff’s claim for failure to provide timely and compliant rest breaks is premised on the theory that Defendant failed to authorize or permit ten-minute rest breaks for every four hours or major fraction thereof worked. (Id.) Plaintiff and his expert calculated Defendant’s exposure as to this cause of action based on

1 the applicable labor code statute, Labor Code Section 226.7(c), which provide that: “If an
2 Employers fails to provide an employee a meal or rest or recovery period in accordance with a
3 state law, including but not limited to, an applicable statute or applicable regulation, standard, or
4 order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board,
5 or the Division of Occupational Safety and Health, the Employers shall pay the employee one
6 additional hour of pay at the employee’s regular rate of compensation for each workday that the
7 meal or rest or recovery period is not provided.” (Id.)

8 By using the information provided by Defendant in advance of and during the mediation
9 and the records of class members, Plaintiff and his expert were able to calculate the exposure of
10 Defendant for this cause of action. (Id.) Specifically, by multiplying the total number of
11 workweeks, the number of full-time equivalent employees and the average hourly rate applicable
12 during the class period, and assuming a 50 percent violation rate, Plaintiff and her expert estimated
13 that Defendant’s maximum exposure was **\$2,698,440** and with interest could have reached
14 approximately **\$2,962,685**. (Id.)

15 Summary of Class Exposure Analysis: Plaintiff estimated that Defendant’s maximum
16 potential exposure on class claims excluding PAGA penalties and interest could have reached
17 **\$15,990,404** if Plaintiff had successfully certified each claim, overcame Defendant’s arguments
18 that the classes should not be certified due to individualized issues, and prevailed at trial. (Id.)

19 While the amount of the class members’ maximum potential damages – if proven – is
20 substantial, the legitimate and serious risks above compelled a considerable discount for
21 settlement. (Id.) The risks associated with proceeding to trial are meaningful. Indeed, the issue
22 of class certification had not yet been presented to the Court. Defendant argues that there all hours
23 worked were paid for at the correct rate, and if there was, individual issues predominate as to what
24 extent class members worked off-the-clock for non-productive time and that it did in fact pay for
25 non-productive time. Defendant also argues that none of their wage and hour policies are facially
26 invalid, and that Defendant appropriately paid its employees at all times and was compliant with
27 all applicable wage-and-hour laws. Moreover, Defendant argued Plaintiff’s meal and rest break
28 claims are preempted by the Motor Carrier Act and the Federal Motor Carrier Safety

Administration, which would wipe out those claims completely if true. Defendant argues that it provided addendums to wage statements that provided the necessary information pursuant to Labor Code section 226.

If successful at defeating a class certification motion, the class would recover nothing as a result of this litigation. Class certification is a major hurdle for Plaintiff and the Class. (*See Munoz*, 186 Cal. App. 4th at 411 [uncertainty of class treatment was significant question which supported the decision to settle].) Class certification briefing would be lengthy and expensive and both sides risked an unfavorable ruling. Moreover, Courts have the discretion to reduce PAGA penalties. Based on the significant benefits to the class and equally significant potential risks to proceeding to trial, Plaintiff believe the settlement is in the best interest of the class. (Lebe Decl., ¶ 9.)

In sum, Defendant raised defenses to Plaintiff's claims. The four claims that drove settlement in this matter – the unpaid minimum wage claim for non-productive time, the wage statement penalties claim, business expense reimbursement claim and the waiting time penalties claim – were valued by counsel for Plaintiff as presenting **\$8,549,134** in maximum damages. (Lebe Decl., ¶ 14.) Thus, the \$1,500,000 proposed settlement amounts to 17.5 percent of the maximum damages of the primary claims in this action. (*Id.*) Plaintiff submits that the settlement is fair, reasonable and provides a good result for the class. (*Id.*)

Summary of PAGA Exposure Analysis: Plaintiff and her expert calculated Defendant's maximum liability under the PAGA to be approximately **\$24,551,100**. (Lebe Decl., ¶ 14.) Plaintiff reached this figure by multiplying the number of pay periods during the PAGA period in which a violation occurred by the applicable civil penalty for subsequent violations for minimum wage violations under PAGA Labor Code section 1197.1, wage statement violations under PAGA Labor Code section 226, and business expense violations under PAGA Labor Code section 2802. (*Id.*)

The relevant exposure related to PAGA penalties was reduced by Plaintiff's counsel for various reasons. (*Id.*) First, the PAGA claims could also have been deemed unmanageable by the Court. Second, the Court has discretion to reduce the PAGA award based on whether the amount of the award would be "unjust, arbitrary and oppressive, or confiscatory." Labor Code §

2699(e)(2). (Id.) For instance, it is within a trial court’s discretion to significantly reduce PAGA penalties even when there is a finding that a violation of the Labor Code occurred. (See Carrington v. Starbucks, (2018) 30 Cal. App. 5th 504.) (Id.) In theory, the Court could reduce the award by 99%. (Id.) Based on the foregoing, Plaintiff believe the \$15,000 for distribution to the LWDA and class members for the settlement of the PAGA civil penalty claims is appropriate. (Id.)

C. The Court Should Certify A Settlement Class

California courts may certify a “settlement class” for settlement purposes only. (See Wershba, 91 Cal. App. 4th at 237-38; Dunk, 48 Cal. App. 4th at 1807.) Where a court evaluates class certification in the context of settlement, the evaluation may differ from the litigation context. (Luckey, 228 Cal. App. 4th at 93.) For example, protecting absent class members “by blocking unwarranted or overbroad class definitions require[s] heightened scrutiny in the settlement-only class context” since the court will lack the opportunity to adjust the class based on information ascertained through litigation. (Id. at 94.) “The court is, in short, acting in a fiduciary capacity as guardian of the rights” of absent class members. (Id. at 103.)

Before granting class certification in the settlement context, the court must find that the proposed class satisfies the requirements of California Code of Civil Procedure § 382. (See Wershba, 91 Cal. App. 4th at 237.) The parties must show the existence of “an ascertainable class and a well-defined community of interest among class members.” (Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 326.) Here, both elements are present.

1. The Proposed Settlement Class Is Ascertainable

“Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members.” (Global Minerals & Metals Corp. v. Superior Court (2003) 113 Cal. App. 4th 836, 849.) Here, the proposed class consists of individuals employed by Defendant as non-exempt employees who held or currently hold the position of Transport Driver within the State of California during the class period. This class definition provides “common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.” (Aguirre v. Amscan Holdings, Inc. (2015) 234 Cal. App. 4th 1290, 1300, *reh’g denied, review denied* (June

17, 2015); Bartold v. Glendale Fed. Bank (2000) 81 Cal. App. 4th 816, 828, , *overturned due to legislative action on other grounds*.

The class includes approximately 882 individuals, which is sufficient to meet the numerosity requirement of section 382. (See Rose v. City of Hayward (1981) 126 Cal. App. 3d 926, 934.) And, class members can easily be identified, since Defendant maintains for each class member their last known address and social security number.

2. The Proposed Settlement Class Comprises a Community of Interest

The proposed settlement class comprises a sufficient community of interest. A community of interest exists where (i) legal or factual questions common to the class predominate over questions affecting individual class members; (ii) claims of the class representatives are typical of the claims or defenses of the class; and (iii) the class representatives are able to protect adequately and fairly the interests of the class. (See Sav-on, 34 Cal. 4th at 326; Wershba, 91 Cal. App. 4th at 238.)

Here, the proposed settlement class satisfies the above three factors. For settlement purposes, the class members share questions of law or fact that are substantially similar. (Wershba, 91 Cal. App. 4th at 238.) Plaintiff alleges that class members were not paid all wages, including minimum and overtime wages. These wage and hour violations were suffered on a class wide basis as a result of Defendant's failure to pay for pre- and post-trip inspection work duties and other non-driving time performing work duties. Moreover, Plaintiff alleges Defendant failed to provide accurate itemized wage statements with all the information required under Labor Code Section 226 in a single document. Plaintiff also alleges that class members were not provided timely and compliant meal and rest breaks. The wage and hour violations were therefore consistent throughout the class. For these same reasons, Plaintiff's claims are typical of the claims of settlement class members, as the Plaintiff and all settlement class members worked for Defendant in California and suffered the same violations.

Third, Plaintiff can adequately protect the interests of the settlement class. (See Wershba, 91 Cal. App. 4th at 238.) This factor considers whether Plaintiff's attorneys are qualified to conduct the litigation and the plaintiff's interests are not antagonistic to the interests of the class.

(McGhee v. Bank of Am. (1976) 60 Cal. App. 3d 442, 450.) Here, Plaintiff’s counsel have no conflicts of interest, have vigorously prosecuted this action on behalf of Plaintiff and the settlement class, and have significant experience litigating class actions, including those involving similar claims. Further, no conflict exists between the named Plaintiff and the class. The Plaintiff and settlement class members have co-extensive claims and the terms of the class settlement apply to all class members equally. There is no potential for conflicts in allocating the settlement fund since funds will be distributed on a *pro rata* basis to settlement class members based on the amount of work weeks worked by each class member and their rate of pay. In short, the Court should certify the class for settlement purposes only.

D. The Court Should Approve The Proposed Notice

Rule of Court 3.769(f) requires notice of the final approval hearing to be provided to class members in the manner specified by the court. “The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.” (See Litwin v. iRenew Bio Energy Solutions, LLC (2014) 226 Cal. App. 4th 877, 883.) Notice should provide each class member sufficient information to decide whether to accept the benefit he would receive under the settlement, or to opt out and pursue his own claim. (Chavez v. Netflix, Inc. (2008) 162 Cal. App. 4th 43, 56.)

The proposed notice meets this standard; it reasonably informs all class members of the nature and status of the litigation and the important terms of the settlement. In particular, the notice provides each class member with an estimate of the value of their share of the settlement, explains their right to object to the settlement at the fairness hearing, and informs class members of their right to opt out of the settlement. In short, the notice provides settlement class members with ample information to allow an informed decision about their participation in the settlement.

The proposed manner of notice and timetable for further proceedings are also reasonable. Under the proposed schedule, notice will be sent via first-class mail to all class members twenty-eight (28) calendar days after the Court preliminarily approves the settlement. Class members will then have thirty (30) calendar days from the mailing date of notice to file a written request to be

1 excluded from the settlement. This is sufficient time. (See Torrise v. Tucson Elec. Power Co. (9th
2 Cir. 1993) 8 F.3d 1370, 1375 [31 day period for written objections]; Williams v. Costco Wholesale
3 Corp. (S.D. Cal. July 7, 2010), 2010 U.S. Dist. LEXIS 67731 at *4-5 [30-day opt-out period].)
4 Following the end of this time period, Plaintiff will file a motion for final approval of the
5 settlement. The parties will take all needed actions to secure final approval of the settlement.

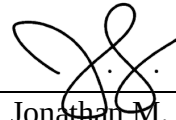
6 **IV. CONCLUSION**

7 For the foregoing reasons, the parties respectfully request that the Court grant preliminary
8 approval of the proposed settlement and enter the proposed Order Granting Preliminary Approval,
9 authorize mailing of the class notice, and set a date for a final approval hearing.

10
11 Dated: October 6, 2021

Lebe Law, APLC

12
13 By:



Jonathan M. Lebe

15 Attorney for Plaintiff Scott Fiske, individually and on behalf
16 of all others similarly situated
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