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7 individually and on behalf of all others similarly  
situated

8  
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF RIVERSIDE**

11 KENNETH KERNITZKI, individually, and on  
12 behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 QUALITY CAR SHIPPERS, LLC, a California  
16 limited liability company; and DOES 1 through  
50, inclusive,

17 Defendants.  
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Case No. CVRI2100564

*[Assigned to Harold W. Hopp, Department 10]*

**Complex Class Action**

**DECLARATION OF GREG TAYLOR IN  
SUPPROT OF MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
AND PAGA REPRESENTATIVE ACTION  
SETTLEMENT**

Date: May 2, 2023

Time: 8:30 AM

Dept: 10

Reservation No.: 948175813983

Complaint filed: February 5, 2021

Trial date: None set

**DECLARATION OF GREG TAYLOR**

I, Greg Taylor, declare:

1. I am a member in good standing of the State Bar of California, and I am an attorney at The Kick Law Firm, APC, attorneys for Plaintiff Kenneth Kernitzki (“Plaintiff”) in this action. I make this Declaration on behalf of Plaintiff and in support of the Motion for Preliminary Approval of Class and PAGA Representative Action Settlement. If sworn as a witness, I could competently testify to each fact set forth herein from my own personal knowledge.

2. A true and correct copy of the fully executed Class Action and PAGA Settlement Agreement (“Settlement,” “Settlement Agreement,” or “SA”) is attached as **Exhibit 1**. The proposed Notice of Class Action Settlement (“Class Notice”) is attached to the Settlement as Exhibit A. In addition, a true and correct copy of the parties’ Codicil to the Settlement Agreement, executed March 28, 2023, is attached hereto as **Exhibit 2**.

3. On September 11, 2020, pursuant to Labor Code § 2699.3, Plaintiff submitted notice to the Labor and Workforce Development Agency (“LWDA”) and to Defendant, LWDA case number LWDA-CM-805937-20, of his intention to litigate various alleged Labor Code violations. Attached as **Exhibit 3** is a true and correct copy of Plaintiff’s September 11, 2020, notice to the LWDA.

4. On February 5, 2021, Plaintiff filed the initial complaint on behalf of himself and others similarly situated to recover damages and penalties for the Labor Code violations alleged against Defendant (“the Action”). Plaintiff alleged further that these violations constituted unfair and unlawful business practices under the Unfair Competition Law, Bus. & Prof. Code § 17200, *et seq.*, and that Defendant was liable for penalties under the Private Attorneys General Act (“PAGA”), Lab. Code § 2698, *et seq.*

5. Both before and after initiating the Action on behalf of the putative class, Plaintiff and Class Counsel diligently investigated the claims alleged and conducted legal research regarding Defendant’s potential liability and defenses. As discussed in detail below, the parties engaged in both formal and informal discovery, and Class Counsel carefully reviewed and assessed Defendant’s production of data and documents relating to Plaintiff’s claims.

6. Defendant also produced records documenting its financial difficulties in recent years, including income tax returns for 2019 and 2020, showing sizeable losses in these years, and Class Counsel

1 considered the impact of Defendant's financial condition. Defendant also produced an arbitration  
2 agreement and class action waiver signed by Plaintiff, which Plaintiff contends is unenforceable but  
3 recognizes the risk the Court could disagree.

4         7.       Based on continued good faith meet and confer efforts, the parties discussed resolution  
5 through arm's-length settlement negotiations. Indeed, Settlement negotiations were conducted in good faith  
6 between qualified and experienced Class Counsel at The Kick Law Firm, APC and defense counsel at  
7 Larson & Gaston, LLP. At all times, negotiations were vigorous, truly arm's-length and involved a  
8 contentious—albeit collegial—debate. As a result of the parties' substantial investigation and discovery,  
9 Class Counsel was able to act intelligently and effectively. Upon reaching a settlement in principle, the  
10 parties negotiated the terms of a long form settlement agreement, which the parties based on a template  
11 issued by the Complex Civil Department of the Los Angeles Superior Court. (Ex. 1.)

12         8.       Based on their own independent investigation, discovery, and evaluation, and considering  
13 Defendant's limited financial resources, Class Counsel has determined that the settlement terms and  
14 conditions are in the best interests of Plaintiff and the members of the Class.

15         9.       Were litigation to proceed, there is a strong likelihood it would be protracted and  
16 contentious, as Defendant disputes all aspects of Plaintiff's claims. Plaintiff would have to prepare and file  
17 a motion for class certification, which outcome is uncertain based on Defendant's anticipated contentions,  
18 *inter alia*, that individual questions of fact predominate, that Plaintiff had signed an enforceable arbitration  
19 agreement and class action waiver, and that Plaintiff cannot show the "willfulness" requirement for Section  
20 203 penalties. If the motion were granted, Defendant would likely move for decertification, appeal  
21 certification, or move for Summary Judgment. Plaintiff believes he would prevail on certification, but the  
22 risks to absent Class Members are significant.

23         10.      To succeed on the merits, Plaintiff would have to prove Defendant actually engaged in the  
24 practices and policies alleged and that those practices and policies violated the law. For some claims,  
25 Plaintiff anticipates he would be unable to overcome Defendant's contentions, such as with respect to  
26 federal preemption of Plaintiff's meal and rest break claims. While Class Counsel believe strong evidence  
27 exists showing Defendant's liability of Plaintiff's non-preempted claims, there remains a risk that the trier  
28 of fact might find otherwise. If the case were to proceed to trial, additional discovery would be needed and

1 the Parties would thus incur significant additional expenses, which money could go instead to fund a  
2 settlement for the benefit of the Class as a whole. Moreover, discovery disputes would have certainly arisen,  
3 which would have cost the Parties additional time and money. Further, regardless of which Party prevailed,  
4 appellate practice would no doubt ensue, further delaying any possible recovery by Class Members. In  
5 other words, both Parties would likely incur substantial attorneys' fees and costs from continued discovery,  
6 law and motion, and trial preparation, likely approaching hundreds of thousands of dollars. Moreover,  
7 Plaintiff faced the risk of inability to collect due to Defendant's financial condition as Defendant suffered  
8 sizeable financial losses in recent years.

9 11. In evaluating the Settlement, Class Counsel weighed the numerous risks to continuing to  
10 litigate, including potentially viable defenses that Defendant asserted or could have asserted as outlined in  
11 paragraphs 20 through 22 below, including the risk of non-collection due to Defendant's financial  
12 condition, the risk of non-certification of Plaintiff's class claims, federal preemption of Plaintiff's claims,  
13 alleged binding arbitration agreements, the disputed legality of Defendant's compensation policy,  
14 increasing litigation costs, and other risks and defenses.

15 12. As discussed in the concurrently filed Declaration of Taras Kick, Class Counsel, The Kick  
16 Law Firm, APC, has significant experience in complex litigation, including wage and hour class actions,  
17 and has been diligent in representing the putative Settlement Class. Plaintiff Kenneth Kernitzki, the  
18 proposed Class Representative, has participated actively at all stages of the litigation, and his interests are  
19 not in conflict with the absent class members. Plaintiff agreed to act as Class Representative and  
20 understands his responsibility to assist Class Counsel in prosecuting the action on behalf of the Class.  
21 Plaintiff is a member of the proposed class and was subject to the same employment policies and practices  
22 as all other Class Members. Indeed, the claims of the Class Members and the named Plaintiff are  
23 coextensive and there is no conflict between Plaintiff and his counsel, on the one hand, and any other Class  
24 Member. In this case, not only is there no conflict of interest, but Plaintiff's interests are essentially  
25 identical, if not entirely identical, to the interests of all the members of the Settlement Class.

#### 26 **Department 10 Case Management Order**

27 13. The remainder of this declaration aims to track the requirements for Motions for Preliminary  
28 Approval of Settlement set forth in the Department 10 Class Action Case Management Order ("CMO").

## **Settlement Agreements in General**

14. **CMO § G(1)(a):** To ensure compliance with this requirement, the Parties entered into a Codicil to the Settlement Agreement (“Codicil”), attached as Exhibit 2. Accordingly, the Settlement, as amended by the Codicil, does not require any order, notice, form, or judgment to include any provision prohibited by the CMO.

15. **CMO § G(1)(b):** As required, the Settlement Agreement is written, signed by all necessary parties, and filed as an authenticated attachment to this declaration. (See Ex. 1.)

## **Notices of Settlement**

16. **CMO § G(2):** As required, Counsel has not filed a Notice of Settlement of Entire Case (Judicial Council form CM-200).

## **The Motion in General**

17. **CMO § G(3)(a)(i):** The Settlement Agreement states at paragraph 8 that based on a review of its records to date, Defendant estimates there are 106 Class Members during the Class Period and 74 Aggrieved Employees during the PAGA Period. (See SA, ¶ 8.)

18. **CMO § G(3)(a)(ii):** Below is a chart demonstrating Class Counsel’s estimate of the maximum possible damages and monetary penalties that the class could be awarded if *entirely successful* on all claims at trial, including the collective total for all of the claims and the figures used for calculations. This maximum exposure calculation does not take into account the realistic risks of litigation or the strengths and weaknesses of the claims.

| <b><i>Figures used for calculations</i></b>                                  |                                                                                            |
|------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| 106                                                                          | Number of Employees in Class (provided by defense counsel)                                 |
| 2/5/17-10/8/22                                                               | Time period for figures provided by defense                                                |
| 74                                                                           | Number of PAGA Members (provided by defense counsel)                                       |
| 69%                                                                          | Percentage of Time Driven in California (based on data sampling provided by defense)       |
| 4,086                                                                        | Total Class Pay Periods Worked by All Class Members (provided by defense)                  |
| 2,233                                                                        | Total PAGA Pay Periods in the PAGA Period (provided by defense)                            |
| \$9,980.19                                                                   | Average Gross Pay per Pay Period during PAGA Period (twice a month) (provided by defense)  |
| \$11,225.71                                                                  | Average Gross Pay per Pay Period during Class Period (twice a month) (provided by defense) |
| <b><i>DAMAGES, RESTITUTION &amp; REIMBURSEMENT</i></b>                       |                                                                                            |
| <b><i>Meal Break Violations - as Compensatory Damages or Restitution</i></b> |                                                                                            |
| \$0.00                                                                       | <b>Maximum Damages for Meal Break Violations (preempted by FMCSA)</b>                      |

|                                                                                  |                                                                                                                                                                         |
|----------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Rest Break Violations – as Compensatory Damages or Restitution</i>            |                                                                                                                                                                         |
| \$0.00                                                                           | <b>Maximum Damages for Rest Break Violations (preempted by FMCSA)</b>                                                                                                   |
| <i>Unpaid Minimum Wages – as Compensatory Damages &amp; Restitution</i>          |                                                                                                                                                                         |
| 4%                                                                               | Estimated average percentage of unpaid time worked by Class Members (based on Plaintiff's experience in which he estimates 30 minutes of unpaid work per 12-hour shift) |
| 4,086                                                                            | Total Class Pay Periods Worked by All Class Members (provided by defense)                                                                                               |
| \$9,980.19                                                                       | Average Gross Pay Per Pay Period During PAGA Period (twice a month) (provided by defense)                                                                               |
| \$1,631,162.25                                                                   | <b>Maximum Damages for Unpaid Minimum Wages</b>                                                                                                                         |
| <i>Business Expenses - Compensatory Damages or Restitution</i>                   |                                                                                                                                                                         |
| \$50.00                                                                          | Estimated Unreimbursed/Deducted Expenses Per Pay Period Per Class Member                                                                                                |
| 4,086                                                                            | Total Class Pay Periods Worked by All Class Members (provided by defense)                                                                                               |
| \$204,300.00                                                                     | <b>Maximum Damages for Unreimbursed and/or Deducted Expenses</b>                                                                                                        |
| <b>STATUTORY PENALTIES</b>                                                       |                                                                                                                                                                         |
| <i>Final Wage Waiting Time Penalties (§ 203)</i>                                 |                                                                                                                                                                         |
| 86                                                                               | Terminated Employees Three Years Prior to Complaint (provided by defense)                                                                                               |
| \$11,225.71                                                                      | Average Gross Pay Per Pay Period During Class Period (twice a month) (provided by defense)                                                                              |
| 8                                                                                | Average Estimated Number of Days Worked Per Class Member Per Pay Period (based on Plaintiff's experience)                                                               |
| 30                                                                               | Maximum Penalty Days Per Employee                                                                                                                                       |
| \$3,620,291.48                                                                   | <b>Maximum Labor Code § 203 Final Wage Statutory Penalties</b>                                                                                                          |
| <i>Labor Code § 226(e) Accurate Wage Statement Violation Statutory Penalties</i> |                                                                                                                                                                         |
| 74                                                                               | Class Members from One Year Prior to Complaint                                                                                                                          |
| 30.18                                                                            | Average Pay Periods Worked by Class Members One Year Prior to Complaint (from defense)                                                                                  |
| \$50                                                                             | Penalty Per Pay Period                                                                                                                                                  |
| \$111,666                                                                        | <b>Maximum Labor Code § 226(e) Accurate Wage Statement Penalties</b>                                                                                                    |
| <b>PAGA PENALTIES</b>                                                            |                                                                                                                                                                         |
| 74                                                                               | Total Aggrieved Employees (provided by defense)                                                                                                                         |
| 2,233                                                                            | Total PAGA Pay Periods (provided by defense)                                                                                                                            |
| \$50.00                                                                          | PAGA Penalty for Failure to Pay Minimum Wage (Cal. Lab. Code § 558)                                                                                                     |
| \$100.00                                                                         | PAGA Penalty for Wage Statement Violations (Cal. Lab. Code § 226(a))                                                                                                    |
| \$100.00                                                                         | PAGA Penalty for Other Employment Violations (Cal. Lab. Code § 2699(f)(2))                                                                                              |
| \$111,650                                                                        | Maximum Estimated PAGA Penalties for Minimum Wage Violations                                                                                                            |
| \$158,543                                                                        | Maximum Estimated PAGA Penalties for Wage Statement Violations                                                                                                          |
| \$158,543                                                                        | Maximum Estimated PAGA Penalties for Failure to Maintain Records                                                                                                        |
| \$223,300                                                                        | Maximum Estimated PAGA Penalties for Failure to Reimburse Business Expenses                                                                                             |
| <b>TOTAL DAMAGES &amp; PENALTIES</b>                                             |                                                                                                                                                                         |
| \$1,835,462.25                                                                   | Maximum Total Damages                                                                                                                                                   |
| \$652,036.00                                                                     | Maximum Total PAGA Penalties                                                                                                                                            |
| \$3,731,957.48                                                                   | Maximum Total Statutory Penalties                                                                                                                                       |
| <b>\$6,219,455.73</b>                                                            | <b>Maximum Total Damages and Penalties</b>                                                                                                                              |

1           19.       Accordingly, if Plaintiff were to prevail on all liability related to unpaid compensation, these  
2       compensatory damages total \$1,835,462.25, meaning the proposed \$450,000 equals about 24.5% of that.  
3       Further, if one were also to include all possible PAGA penalties, without discretionary reduction by this  
4       Court, and add them to the unpaid compensation, together these equal an estimated maximum total  
5       exposure of \$6,219,455.73. However, this maximum exposure calculation fails to account for arbitration  
6       agreements and other risks and defenses.

7           20.       **CMO § G(3)(a)(iii):** Class Counsel considered the numerous risks to continuing to litigate,  
8       including potentially viable defenses that Defendant asserted or could have asserted, including the  
9       following:

- 10           a) **Risk of Non-Collection.** Plaintiff faced the risk of inability to collect on a trial judgment due  
11           to Defendant's limited financial resources. Defendant disclosed it suffered from significant  
12           financial difficulties in the years prior to reaching the proposed settlement, and produced  
13           documents demonstrating that Defendant suffered a loss of \$77,155.00 in 2019 and a loss of  
14           \$573,901.00 in 2020. In settlement negotiations, Class Counsel considered the impact of  
15           Defendant's financial condition and the realistic risk of non-collection on a judgment.
- 16           b) **Federal Preemption.** Defendant argues that because Defendant is an interstate carrier,  
17           Plaintiff's claims are preempted by application of federal law regulating the conduct of  
18           interstate transportation including but not limited to 49 USC § 14501. (*See Answer*, ¶ 27.)  
19           Defendant further argues that Plaintiff's claims under the Labor Code and Plaintiff's claims of  
20           misclassification are preempted by the FAAAA because such claims would alter the terms of  
21           the parties' privately negotiated contracts. (*Id.*, ¶¶ 26, 30.) Plaintiff anticipates he would be  
22           unable to overcome any argument that the meal and rest break claims are entirely preempted  
23           in light of the FMCSA's 2018 preemption decision (83 Fed. Reg. 67470, 67470 (Dec. 28,  
24           2018)) and the Ninth Circuit's 2021 decision in *Int'l Bhd. Of Teamsters, Local 2785 v. Fed.*  
25           *Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021).
- 26           c) **Arbitration Agreements.** Defendant might try to argue that Plaintiff and many members of  
27           the putative class are subject to binding arbitration agreements, which would not only prevent  
28           class certification, but also allow Defendant to compel to arbitration any such driver who  
          becomes a party to the action. (*Answer*, ¶ 39.) Though Plaintiff very strongly disputes the

1 enforceability of such arbitration agreements in this field, possibly the court might disagree,  
2 which could preclude certification or substantially reduce the potential recoverable damages..

3 d) **Legality of Defendants' Compensation Policy.** Plaintiff faces the risk Defendant's driver  
4 compensation scheme could be found lawful based on the Supreme Court's decision in *Oman*  
5 *v. Delta Air Lines, Inc.*, (2020) 9 Cal.5th 762. The *Oman* Court held that "[f]or purposes of  
6 evaluating whether an employee has received at least the hourly minimum wage for tasks or  
7 periods compensated under the contract, it is generally permissible to translate the contractual  
8 compensation—whether it be done by task, work period, or other reasonable basis—into an  
9 hourly rate by averaging pay across those tasks or periods." Plaintiff argued that Defendant  
10 required its misclassified drivers to perform work that drivers were not compensated for, such  
11 as during unproductive time, because Defendant only paid drivers by the trip. However,  
12 Plaintiff faces significant risk that a Court would agree with Defendant's position that payment  
13 per trip is permissible when based on a contract between the parties if the overall compensation  
14 results in an average of at least minimum wage for all time worked.

15 e) **Non-Certification and Liability.** Had the Action not settled, Defendant would have  
16 challenged class certification and liability, as Defendant vigorously disputes all of Plaintiff's  
17 contentions. Plaintiff also faced the risk Defendant would successfully argue that  
18 individualized questions of fact predominate over any common issues, and that such issues  
19 would preclude certification. Defendant could argue that the Class is uncertifiable due to  
20 hundreds of individual inquiries as to each Class Member's experience with supposedly  
21 working unpaid time between paid trips.

22 f) **No Derivative Penalties.** Defendant could also argue Plaintiff's claims for wage statement  
23 and waiting time penalties claims are entirely derivative of Plaintiff's rest period and wage  
24 claims, and therefore suffered from not only the same preemption defense as the rest break  
25 claims, but also additional risks unique to these claims. With respect to Plaintiff's waiting time  
26 penalty claim, Plaintiff would also be required to establish Defendant's *willfulness*. However,  
27 Defendant denies any willful failure to pay any alleged compensation. Moreover, "an  
28 employer's reasonable, good faith belief that wages are not owed may negate a finding of  
willfulness." *Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468. With respect to

1 Plaintiff's wage statement, wage timing, and records maintenance claims, even if non-  
2 certification was not a bar to recovery, Plaintiff concedes that potential recovery is limited to  
3 pay periods in which Plaintiff and the Class principally worked in California. *Ward v. United*  
4 *Airlines*, 9 Cal.5th 732, 760-61 (2020). Plaintiff also faced the risk Defendant could rely on  
5 *Maldonado, et al. v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1334-37 (April 18, 2018)  
6 where the Court reversed an award for penalties for inaccurate wage statements because the  
7 Court found that inaccurate wage statements alone based on derivative Labor Code violations  
8 do not justify penalties, and that the plaintiff arguably might need to establish injury from the  
9 inaccuracy and independent inaccuracies different from underpayments or derivative claims.  
10 This defense could call into question whether the Class could recover derivative penalties  
11 under Labor Code §§ 201-203 and 226 based on underlying claims. While Plaintiff remains  
12 prepared to zealously pursue the claims, he recognizes the risks of losing on the merits.

13 g) **Discretionary PAGA Penalties.** Under Labor Code § 2699(e)(2), a court may award a lesser  
14 amount than the maximum civil penalty specified under PAGA, if based on the facts and  
15 circumstances of the particular case, to do otherwise would result in an award that is unjust,  
16 arbitrary and oppressive or confiscatory. Courts have exercised their discretion to reduce the  
17 amount of PAGA penalties awarded to as little as \$5.00 per pay period. *See e.g., Fleming v.*  
18 *Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at \*4 (reducing PAGA penalties  
19 by 82%). Here, Plaintiff's arguments for PAGA penalties rest on the disputed issues of driver  
20 classification and the legality of Defendant's per-trip compensation structure. Defendant  
21 argues that any violations were not intentional or willful and that the imposition of penalties in  
22 this action would be inequitable and unjust. (*See, e.g., Answer*, ¶ 22.) Plaintiff anticipates  
23 Defendant would argue the Court should exercise its discretion to substantially reduce PAGA  
24 penalties due to Defendant's financial difficulties and in light of Defendant's alleged good  
25 faith efforts to comply with California law. *See* Cal. Labor Code § 2699(e)(2); *Thurman v.*  
*Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1135 (2012).

26 h) **Other Risk Factors.** Plaintiff also had to take into account other risks, including, the risks of  
27 losing on appeal, the possibility of law changing, and the time value of money, among other  
28 things.

- i) **Costs.** The Action clearly involves complex legal issues, including misclassification and class certification. With regard to expected duration, litigating Plaintiff's claims through trial could last two or more years if the proposed settlement is not approved. This would be expensive for all parties and delay or jeopardize what is now a certain recovery for the putative class.

21. Below is a chart demonstrating Class Counsel's estimate of the total possible damages and monetary penalties that the class could reasonably expect to be awarded at trial, taking into account taking into account difficulties of proof, the defendant's defenses, and other attendant risks. The below chart provides a visual demonstration of how Class Counsel has taken into account the litigation risks and weaknesses specific to this case, which are discussed in more detail below. The realistic expected value of the Class claims is estimated by applying the following risk-adjustment "discounts" to the maximum potential value to account for the litigation risks and weaknesses specific to this case: 35% discount for the risk of non-certification; at least 50% for the risk of Defendant prevailing on liability, including as a result of the *Oman* defense and Defendant's contention that any misclassification or underpayment was not intentional or willful; 5% discount for the risk that arbitration agreements are found enforceable; 30% discount on penalty claims under *Maldonado*; 85% discount on PAGA claims for the Court's discretion to reduce penalties and underlying risks; and a 25% discount for the risk of inability to collect a judgment.

| <b>REALISTIC ESTIMATED RECOVERY</b>         |                       |                          |                  |                    |                       |                    |                      |
|---------------------------------------------|-----------------------|--------------------------|------------------|--------------------|-----------------------|--------------------|----------------------|
| <b>Claims</b>                               | <b>Max. Potential</b> | <b>Non-Certification</b> | <b>Liability</b> | <b>Arb. Clause</b> | <b>Non-Collection</b> | <b>Other Risks</b> | <b>Risk-Adjusted</b> |
| Unpaid Minimum Wages                        | \$1,631,162.25        | 35%                      | 50%              | 5%                 | 25%                   | -                  | \$377,716.01         |
| Unreimbursed Expenses                       | \$204,300.00          | 35%                      | 50%              | 5%                 | 25%                   | -                  | \$47,308.22          |
| Final Wage Statutory Penalties (L.C. § 203) | \$3,620,291.48        | 35%                      | 90%              | 5%                 | 25%                   | 30%                | \$117,365.32         |
| Wage Statement Penalties (L.C. § 226(e))    | \$111,666.00          | 35%                      | 50%              | 5%                 | 25%                   | 30%                | \$18,100.36          |
| Maximum PAGA Penalties                      | \$652,036.00          | -                        | 50%              | 5%                 | 25%                   | 85%                | \$34,843.17          |
| <b>Estimated total risk-adjusted value</b>  |                       |                          |                  |                    |                       |                    | <b>\$595,333.09</b>  |

22. By this analysis, the proposed settlement of \$450,000.00 represents approximately **75.6%** of the *realistic* maximum value after accounting for real litigation risks, relative strengths and weaknesses of Plaintiff's claims, and other factors.

23. **CMO § G(3)(a)(iv):** Class Counsel estimates that the average Individual Class Payment will be approximately \$2,235.85, in addition to any amount payable as an Individual PAGA Payment. Each Participating Class Member's pro rata share of the Net Settlement Agreement will be calculated according to the number of Workweeks and/or Class Pay Periods worked during the Class Period. Class Counsel estimates the lowest and highest Individual Class Payments will be approximately \$58.00 and \$7,830.40, respectively.

24. **CMO § G(3)(a)(v):** Class Counsel estimates that the average Individual PAGA Payment will be approximately \$101.35, in addition to the amounts payable as Individual Class Payments.

25. **CMO § G(3)(a)(vi):** The parties engaged in substantial formal and informal discovery and factual investigation to evaluate the strength and weaknesses of the Class claims and the size of the Class. With respect to formal discovery, Defendant propounded and Plaintiff responded to requests for admissions, special interrogatories, form interrogatories, and requests for production of documents. In addition, Plaintiff obtained through informal discovery hundreds of documents, including contractor agreements, trip invoices, bills of lading, settlement reports and pay statements. Defendant also produced data detailing the miles driven in California for a sample of 25% of the putative settlement class. Class Counsel carefully considered the class claims at issue and its analysis of Defendant's driver trip data. Factual investigation also involved analysis of employment-related documents provided by the proposed class representative, Mr. Kernitzki, and numerous discussions between Class Counsel and Mr. Kernitzki. In negotiating the long form settlement agreement, Class Counsel was informed that based on a review of its records to date, Defendant estimates that, as of the date of the Settlement Agreement, there are 106 Class Members who collectively worked a total of 4,086 Class Pay Periods, and 74 Aggrieved Employees who worked a total of 2,233 PAGA Pay Periods. (SA, ¶¶ 4.1, 8.) Furthermore, Defendant provided Class Counsel with driver and pay period data which allowed Class Counsel to independently confirm the class size figure.

1           26.     **CMO § G(3)(a)(vii):** Class Counsel are not aware of any class, representative or other  
2 collective action in any other court in this or any other jurisdiction that asserts claims similar to those  
3 asserted in this action on behalf of a class or group of individuals some or all of whom would also be  
4 members of the class defined in this action. Class Counsel conducted a diligent search and reasonably  
5 inquiry online, including through Westlaw and Courthouse News Service. Class Counsel also inquired of  
6 defense counsel and was informed the same, as stated in the concurrently filed Declaration of Defense  
7 Counsel Victor Consentino (“Consentino Decl.”).

8           27.     **CMO § G(3)(b):** Class Counsel requested a declaration from defense counsel in compliance  
9 with this item on the CMO. In the concurrently filed Declaration of Defense Counsel Victor Consentino,  
10 defense counsel attests he is not aware of any other such action. (*See* Consentino Decl.)

11           28.     **CMO § G(3)(c):** In light of the Court’s preference expressed in the CMO, the parties have  
12 agreed that the value of any uncashed settlement checks will first be redistributed back to those class  
13 members who have cashed their checks. (Ex. 2, Codicil, ¶ 5.) The Settlement Administrator has agreed to  
14 conduct this second distribution and has included the cost in its administration bid. (*See* Declaration of Eric  
15 Springer, Ex. C.) The parties have further agreed that after the second distribution of checks, any remaining  
16 funds represented by any uncashed or undeliverable checks will be distributed, subject to approval by the  
17 Court, as follows: 50% to Plaintiff’s proposed cy pres recipient Public Citizen Foundation, and 50% to  
18 Defendant’s proposed recipient St. Christopher Truckers Development & Fund Inc. (Ex. 2, Codicil, ¶ 5.)  
19 Public Citizen Foundation is a 501(c)(3) consumer advocacy organization that works to protect consumer  
20 rights through education and litigation. (*See* concurrently filed Declaration of Robert Weissman of Public  
21 Citizen Foundation [“Weissman Decl.”].) I believe such distribution is appropriate and fulfills the purposes  
22 of this wage and hour class action because I am informed Public Citizen is an organization that substantially  
23 advocates on behalf of workers and consumers such as those at issue in this case. (*Id.*)

24           29.     **CMO § G(3)(c)(iii):** To comply with the CMO’s requirement to provide declarations from  
25 the proposed cy pres recipient(s), Class Counsel requested a declaration from Public Citizen Foundation  
26 addressing the issues stated in CMO §§ G(3)(c)(iii)(A)-(C). (*See* Weissman Decl.) Class Counsel also  
27 asked defense counsel to provide a declaration from Defendant’s proposed recipient, and though it has not  
28

1 been received yet, Class Counsel will make a good faith effort to obtain and file such a declaration prior to  
2 the hearing on preliminary approval.

3 30. **CMO § G(3)(c)(iv):** After inquiring with all attorneys at this firm and our client, I  
4 confirmed that neither I nor any other member of this firm, nor the Plaintiff, have any financial interest in  
5 Public Citizen, nor involvement in the governance of the organization.<sup>1</sup> Likewise, defense counsel Victor  
6 Consentino attests in his concurrently filed declaration that defense counsel and Defendant have no  
7 financial interest or involvement in the governance or work of the proposed cy pres recipients. (*See*  
8 Consentino Decl.)

9 31. **CMO § G(3)(c)(v):** As required, the agreement does not provide that the unclaimed funds  
10 be deposited into the Industrial Relations Unpaid Wage Fund. Cal. Lab. Code § 96.6.

11 32. **CMO § G(3)(d):** The Parties have selected Simpluris, Inc. to serve as the Settlement  
12 Administrator. Class Counsel sought bids from two reputable third-party administrators and Simpluris was  
13 the lower bidder at \$8,000. A declaration from Simpluris describing its experience, commitment to security  
14 and fee calculation is filed concurrently herewith, and the bid is attached to the declaration as Exhibit C.  
15 (*See Declaration of Eric Springer on Behalf of Simpluris, Inc. [“Simpluris Decl.”], Ex. C.)*

16 33. **CMO § G(3)(e):** The Release terms for Participating Class Members are set forth in  
17 paragraph 3 of the Codicil to the Settlement Agreement. (*See Ex. 2, ¶ 3.*)

18 34. **CMO § G(3)(e)(i):** Pursuant to paragraph 2 of the Codicil, the “Released Parties” are  
19 defined as follows: “*Defendant Quality Car Shippers, LLC, together with its officers, directors, employees,*  
20 *and agents, including its owners and managing agents.*” (Ex. 2, ¶ 2.)

21 35. **CMO §§ G(3)(e)(ii)-(iii):** To comply with the CMO’s requirements regarding release  
22 language, the parties amended the language of the Release given by Participating Class Members in the  
23 Codicil. The Release by Participating Class Members is limited to “*all claims that were alleged, or*  
24 *reasonably could have been alleged, based on the facts alleged in the Operative Complaint*” and excludes  
25 “*claims based on facts occurring outside the Class Period.*” (Ex. 2, ¶ 3.) The Release is limited to claims  
26 based on facts occurring during the Class Period. (*Id.*)

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28 <sup>1</sup> I am informed that Taras Kick of The Kick Law Firm, APC is a member of Public Citizen Foundation, but has no  
financial interest or involvement in the governance of the organization.

1           36.     **CMO § G(3)(e)(iv):** To comply with the CMO’s requirements regarding release language,  
2 the parties amended the language of the PAGA Release in the Codicil. The Release is defined at paragraph  
3 4 of the Codicil to state that “*Plaintiff is deemed to release the Released Parties from all claims for statutory*  
4 *penalties that could have been sought by the Labor Commissioner for the violations identified in Plaintiff’s*  
5 *pre-filing letter to the LWDA and only to the extent such violations are alleged in the Operative Complaint.*  
6 *This release shall bind only Plaintiff and the State of California. Plaintiff does not release any aggrieved*  
7 *employee’s claim for wages or damages.*”

8           37.     **CMO § G(3)(f):** The Settlement provides that Notice will be provided to Class Members  
9 by First Class U.S. Mail and will be written in both English and Spanish. (SA, ¶ 7.4.2.) Proposed settlement  
10 administrator Simpluris, Inc. has included the cost of a Spanish translation in its “not to exceed” bid of  
11 \$8,000 for administration services. (See Simpluris Decl., Ex. C.)

12           38.     **CMO § G(3)(g):** There is no requirement to submit a claim. The Settlement provides that  
13 the Administrator will disburse the entire Gross Settlement Amount without asking or requiring  
14 Participating Class Members or Aggrieved Employees to submit any claim as a condition of payment. (SA,  
15 ¶ 3.1.)

16           39.     **CMO § G(3)(h):** The Settlement provides that none of the Gross Settlement Amount  
17 (“GSA”) will revert to Defendant. (SA, ¶ 3.1.)

18           40.     **CMO § G(3)(i):** The Settlement provides that in addition to the GSA, Defendant will  
19 separately pay any and all employer-side payroll taxes owed on the Wage Portions of the Individual Class  
20 Payments and that the Settlement Administrator shall provide the calculations for employer-side payroll  
21 taxes. (SA, ¶ 3.1.)

22           41.     **CMO § G(3)(j):** The Settlement provides that 20% of each Participating Class Member’s  
23 Individual Class Payment will be allocated to settlement of wage claims (the “Wage Portion”). The Wage  
24 Portions are subject to tax withholding and will be reported on an IRS W-2 Form. The remaining 80% of  
25 each Participating Class Member’s Individual Class Payment will be allocated to settlement of claims for  
26 interest and penalties (the “Non-Wage Portion”). (SA, ¶ 3.2.4.1.) This allocation was negotiated by the  
27 parties and intended to reflect the approximate portion of total damages and penalties estimated to be  
28 recoverable damages for wage-related damages.

42. **CMO § G(3)(k):** The proposed class notice is based on the LA Superior Court Model Class Action Notice (LASC CIV296) and drafted in plain English, in a manner that is intended to be readily understood by members of the Class. A Spanish translation of the class notice will also be distributed, though the class members are all expected to understand English due to federal regulations for commercial drivers, as stated in the concurrently filed Declaration of Quality Car Shippers, LLC (“QCS Decl.”). Class Counsel requested the QCS Decl. from Defendant regarding Class Members’ background in order to comply with this item in the CMO. (See QCS Decl.) Furthermore, the proposed objection form and exclusion form are also drafted in plain English, in a manner that is intended to be readily understood by members of the Class.

#### **The Proposed Order**

43. **CMO § G(4)(a)-(j):** The motion is accompanied by a separate proposed order which includes, as attachments to the order, the proposed notice, proposed exclusion form, and proposed objection form. In drafting the proposed order, Class Counsel has taken care to follow the requirements of CMO § G(4)(a)-(j).

#### **The Proposed Notice**

44. **CMO § G(5)(a)-(f):** The proposed class notice is based on the LA Superior Court Model Class Action Notice (LASC CIV296). Class Counsel believes the class notice follows each of the requirements of CMO § G(5)(a)-(f), including: advising class members of their likely recovery and how to object to the settlement in writing or at the final approval hearing, informing class members of where to find the Settlement Agreement, providing a description of the release being given by Participating Class Members, and providing a description of the PAGA settlement terms. The notice also provides an estimated Individual PAGA Payment and states that such payments will be reported on IRS 1099 Forms.

#### **The Proposed Claim Form**

45. **CMO § G(6):** Not applicable. This is a no claim form settlement. (SA, ¶ 3.1.)

#### **The Proposed Objection Form**

46. **CMO § G(7)(a)-(c):** In drafting the proposed objection form, Class Counsel has taken care to follow the requirements of CMO § G(7)(a)-(c), including: instructing the objecting class member where to mail the objection form, clearly stating the response deadline, and only requiring the class member to

1 provide minimal identifying and contact information.

### 2 **The Proposed Exclusion Form**

3 47. **CMO § G(8)(a)-(c):** In drafting the proposed exclusion form, Class Counsel has taken care  
4 to follow the requirements of CMO § G(8)(a)-(c), including: instructing the class member seeking  
5 exclusion where to mail the exclusion form, clearly stating the response deadline, and only requiring the  
6 class member to provide minimal identifying and contact information. Further, the exclusion form clearly  
7 indicates that exclusion from the class settlement will not result in exclusion from any PAGA settlement.

### 8 **PAGA Penalties**

9 48. **CMO § G(9)(a):** As set forth in the concurrently filed Motion, the Settlement details the  
10 terms of the PAGA settlement, including the Aggrieved Employee definition (SA, ¶ 1.4), PAGA Period  
11 (SA, ¶ 1.32), release terms (SA, ¶ 5.5), monetary terms (SA, ¶ 3.2.5), and notice administration terms (SA,  
12 ¶ 7.4.2).

13 49. **CMO § G(9)(b):** The damages charts and factual analysis at paragraphs 18 through 22  
14 above demonstrate the bases for Class Counsel’s calculated estimates of the maximum possible PAGA  
15 penalties that the class could be awarded all PAGA penalties sought as well as the realistic risk-adjusted  
16 estimated recovery. As shown in the damages chart at paragraph 18, the maximum potential PAGA  
17 penalties for allegations of failure to pay minimum wage and failure to reimburse necessary business  
18 expenses were calculated at \$50 and \$100 per penalty, respectively, with one penalty per PAGA Pay Period.  
19 (*See* Cal. Labor Code §§ 558, 2699(f)(2); *see also* *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 181.)  
20 The total number of PAGA Pay Periods was provided by the defense based on a review of Defendant’s  
21 records. Plaintiff recognizes that under current law, enhanced penalties of \$200 per violation would not be  
22 warranted as there was not yet a finding the alleged conduct was wrongful. *Bernstein v. Virgin Am., Inc.*,  
23 3 F.4th 1127, 1144 (9th Cir. 2021). Plaintiff also recognizes there are no grounds for heightened penalties  
24 for wage statement violations as “heightened penalties under section 226.3 apply only where the employer  
25 either fails to provide a wage statement or fails to keep required records as required by section 226(a).”  
26 *Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334 (2021). Here, Plaintiff has only alleged that  
27 Defendant failed to provide *adequate* wage statements rather than no wage statements at all. With respect  
28 to Defendant’s alleged wage statement violations and failure to maintain required records, the estimated

1 maximum potential PAGA penalties take into account that Defendant's data shows Class members spent  
2 the majority of their time working in California during approximately 71% of the pay periods. According  
3 to the California Supreme Court in *Ward*, such penalties would only be recoverable for violations occurring  
4 in majority-California pay periods. *See Ward v. United States*, 9 Cal. 5th 732, 754 (2020) (finding that  
5 when a worker primarily works in California during a specified pay period, the paystub requirement  
6 applies). Further, the discussion at paragraphs 20 through 22 above outline the realistic risks and estimated  
7 recovery, including the likelihood of the Court reducing PAGA penalties based on Defendant's financial  
8 difficulties and Defendant's arguments that any violations were not intentional or willful and that the  
9 imposition of penalties in this action would be inequitable and unjust. (*See, e.g., Answer*, ¶ 22.) Lastly,  
10 Plaintiff recognizes no PAGA penalties would be recoverable for meal or rest break violations because  
11 California's meal and rest break requirements are preempted by the Federal Motor Carrier Safety  
12 Administration ("FMCSA") Order, issued December 28, 2018. *See Int'l Bhd. Of Teamsters, Local 2785 v.*  
13 *Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021) (affirming the validity of the FMCSA's  
14 decision that California meal and rest break laws are preempted).

15 50. **CMO § G(9)(c)**: The Settlement provides that PAGA penalties will be distributed to  
16 aggrieved employees even if they choose to opt out of the class portion of the settlement. (Settlement,  
17 ¶ 7.5.4). This is also stated on page 2 of the Class Notice. (Settlement, Ex. A, pg. 2.)

18 51. **CMO § G(9)(d)**: The terms of the PAGA release are outlined at paragraph 37 above in  
19 response to § G(3)(e)(iv).

20 **Notice to the LWDA**

21 52. On March 20, 2023, I will submit the Settlement, Motion for Preliminary Approval of  
22 Class and PAGA Action Settlement, and supporting declarations to the LWDA pursuant to the PAGA.

23 I declare under penalty of perjury that the foregoing is true and correct to the best of my belief and  
24 knowledge.

25 Executed this 30<sup>th</sup> day of March 2023, in Los Angeles, California.

26 /s/ Greg Taylor

27 Greg Taylor

# **EXHIBIT 1**

## CLASS ACTION AND PAGA SETTLEMENT AGREEMENT AND CLASS NOTICE

This Class Action and PAGA Settlement Agreement (“Agreement”) is made by and between Plaintiff Kenneth Kernitzki (“Plaintiff”), individually and on behalf of all others similarly situated and Defendant Quality Car Shippers, LLC, a California Limited Liability Company (“Defendant”). The Agreement refers to Plaintiff and Defendant collectively as “Parties,” or individually as “Party.”

### 1. DEFINITIONS.

- 1.1 “Action” means the Plaintiff’s lawsuit alleging wage and hour violations against Defendant captioned *Kernitzki v. Quality Car Shippers, LLC*, initiated on February 5, 2021, and pending in Superior Court of the State of California, County of Riverside, Case No. CVRI2100564.
- 1.2 “Administrator” means Simpluris, Inc., the neutral entity the Parties have agreed to appoint to administer the Settlement.
- 1.3 “Administration Expenses Payment” means the amount the Administrator will be paid from the Gross Settlement Amount to reimburse its reasonable fees and expenses in accordance with the Administrator’s “not to exceed” bid submitted to the Court in connection with Preliminary Approval of the Settlement.
- 1.4 “Aggrieved Employee” means all Class Members who worked for Defendant during the PAGA Period.
- 1.5 “Class” means all current and former drivers, classified by Defendant as independent contractors, who hauled for Defendant at any time during the Class Period.
- 1.6 “Class Counsel” means The Kick Law Firm, APC.
- 1.7 “Class Counsel Fees Payment” and “Class Counsel Litigation Expenses Payment” mean the amounts allocated to Class Counsel for reimbursement of reasonable attorneys’ fees and expenses, respectively, incurred to prosecute the Action.
- 1.8 “Class Data” means Class Member identifying information in Defendant’s possession including the Class Member’s name, employee identification number, last-known mailing address, telephone numbers, email addresses, Social Security number, inclusive dates of active employment during the Class Period, and number of Class Period Workweeks and/or Class Pay Periods and PAGA Pay Periods.
- 1.9 “Class Member” or “Settlement Class Member” means a member of the Class, as either a Participating Class Member or Non-Participating Class Member (including a Non- Participating Class Member who qualifies as an Aggrieved Employee).
- 1.10 “Class Member Address Search” means the Administrator’s investigation and search for current Class Member mailing addresses using all reasonably available sources, methods and means including, but not limited to, the National Change of Address database, skip traces, and direct contact by the Administrator with Class Members.

- 1.11 “Class Notice” means the COURT APPROVED NOTICE OF CLASS ACTION SETTLEMENT AND HEARING DATE FOR FINAL COURT APPROVAL, to be mailed to Class Members in English, with Spanish translation, in the form, without material variation, attached as Exhibit A and incorporated by reference into this Agreement.
- 1.12 “Class Pay Period” means any semi-monthly pay period during which a Class Member worked for Defendant for at least one day in California, during the Class Period.
- 1.13 “Class Period” means the period from February 5, 2017, through the date Plaintiff files a motion for preliminary approval of this Settlement.
- 1.14 “Class Representative” means the named Plaintiff in the operative complaint in the Action seeking Court approval to serve as a Class Representative.
- 1.15 “Class Representative Service Payment” means the payment to the Class Representative for initiating the Action and providing services in support of the Action.
- 1.16 “Court” means the Superior Court of California, County of Riverside.
- 1.17 “Defendant” means named Defendant Quality Car Shippers, LLC, a California Limited Liability Company.
- 1.18 “Defense Counsel” means Larson & Gaston, LLP.
- 1.19 “Effective Date” means the date by when both of the following have occurred: (a) the Court enters a Judgment on its Order Granting Final Approval of the Settlement; and (b) the Judgment is final. The Judgment is final as of the latest of the following occurrences: (a) if no Participating Class Member objects to the Settlement, the day the Court enters Judgment; (b) if one or more Participating Class Members objects to the Settlement, the day after the deadline for filing a notice of appeal from the Judgment; or if a timely appeal from the Judgment is filed, the day after the appellate court affirms the Judgment and issues a remittitur.
- 1.20 “Final Approval” means the Court’s order granting final approval of the Settlement.
- 1.21 “Final Approval Hearing” means the Court’s hearing on the Motion for Final Approval of the Settlement.
- 1.22 “Final Judgment” means the Judgment Entered by the Court upon Granting Final Approval of the Settlement.
- 1.23 “Gross Settlement Amount” means \$450,000.00 which is the total amount Defendant agrees to pay under the Settlement. The Gross Settlement Amount will be used to pay Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Expenses, Class Representative Service Payment and the Administrator’s Expenses.

- 1.24 “Individual Class Payment” means the Participating Class Member’s pro rata share of the Net Settlement Amount calculated according to the number of Workweeks and/or Class Pay Periods worked during the Class Period.
- 1.25 “Individual PAGA Payment” means the Aggrieved Employee’s pro rata share of 25% of the PAGA Penalties calculated according to the number of PAGA Pay Periods worked during the PAGA Period.
- 1.26 “Judgment” means the judgment entered by the Court based upon the Final Approval.
- 1.27 “LWDA” means the California Labor and Workforce Development Agency, the agency entitled, under Labor Code section 2699, subd. (i).
- 1.28 “LWDA PAGA Payment” means the 75% of the PAGA Penalties paid to the LWDA under Labor Code section 2699, subd. (i).
- 1.29 “Net Settlement Amount” means the Gross Settlement Amount, less the following payments in the amounts approved by the Court: Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. The remainder is to be paid to Participating Class Members as Individual Class Payments.
- 1.30 “Non-Participating Class Member” means any Class Member who opts out of the Settlement by sending the Administrator a valid and timely Request for Exclusion.
- 1.31 “PAGA Pay Period” means any -semi-monthly pay period during which an Aggrieved Employee worked for Defendant for at least one day in California during the PAGA Period.
- 1.32 “PAGA Period” means the period from September 11, 2019 through the date Plaintiff files a motion for preliminary approval of this Settlement.
- 1.33 “PAGA” means the Private Attorneys General Act (Labor Code §§ 2698. et seq.).
- 1.34 “PAGA Notice” means Plaintiff’s September 11, 2020 letter to Defendant and the LWDA providing notice pursuant to Labor Code section 2699.3, subd.(a).
- 1.35 “PAGA Penalties” means the total amount of PAGA civil penalties to be paid from the Gross Settlement Amount (\$30,000), allocated 25% to the Aggrieved Employees (\$7,500) and the 75% to LWDA (\$22,500) in settlement of PAGA claims.
- 1.36 “Participating Class Member” means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement.
- 1.37 “Plaintiff” means Kenneth Kernitzki, the named plaintiff in the Action.
- 1.38 “Preliminary Approval” means the Court’s Order Granting Preliminary Approval of the Settlement.

- 1.39 "Preliminary Approval Order" means the proposed Order Granting Preliminary Approval and Approval of PAGA Settlement.
- 1.40 "Released Class Claims" means the claims being released as described in Paragraph 5.4 below.
- 1.41 "Released PAGA Claims" means the claims being released as described in Paragraph 5.5 below.
- 1.42 "Released Parties" means Defendant and all of its former or present parents, subsidiaries, successors, predecessors, affiliates, assigns, joint employers, officers, directors, employees, insurers, directors, executors, attorneys, shareholders, related corporations, profit sharing, savings, health, and other employee benefit plans of any nature, the successors of such plans, and those plans' respective current or former trustees and administrators, agents, employees, fiduciaries, and the predecessors and successors, assigns, and legal representatives of all such entities and individuals.
- 1.43 "Request for Exclusion" means a Class Member's submission of a written request to be excluded from the Class Settlement signed by the Class Member.
- 1.44 "Response Deadline" means 45 days after the Administrator mails Notice to Class Members and Aggrieved Employees and shall be the last date on which Class Members may: (a) fax, email, or mail Requests for Exclusion from the Settlement, or (b) fax, email, or mail his or her Objection to the Settlement. Class Members to whom Notice Packets are resent after having been returned undeliverable to the Administrator shall have an additional 14 calendar days beyond the Response Deadline has expired.
- 1.45 "Settlement" means the disposition of the Action effected by this Agreement and the Judgment.
- 1.46 "Workweek" means any week during which a Class Member worked for Defendant for at least one day, during the Class Period.

## **2. RECITALS.**

- 2.1 On February 5, 2021, Plaintiff commenced this Action by filing a Complaint alleging causes of action against Defendant for (1) failure to provide meal periods; (2) failure to provide rest periods; (3) failure to pay minimum wage; (4) failure to timely pay all wages at separation; (5) failure to provide accurate itemized wage statements; (6) failure to indemnify for necessary business expenses; (7) unlawful deductions; (8) unlawful and unfair business practices; and (9) penalties under the Labor Code Private Attorneys General Act ("PAGA"). The Complaint is the operative complaint in the Action (the "Operative Complaint"). Defendant denies the allegations in the Operative Complaint, denies any failure to comply with the laws identified in the Operative Complaint and denies any and all liability for the causes of action alleged.
- 2.2 Pursuant to Labor Code section 2699.3, subd.(a), Plaintiff gave timely written notice to Defendant and the LWDA by sending the PAGA Notice.

- 2.3 Prior to the Parties reaching a resolution of this matter, the Parties engaged in formal discovery and extensive good faith meet and confer efforts. Along with informal settlement negotiations, the Parties have exchanged informal discovery, including some of Defendant's financial documents that it offered to support its claim of financial difficulties. Moreover, Defendant has agreed to provide confirmatory discovery, including of its financial condition, and to cooperate with appropriate *Kullar* evidence. Plaintiff's investigation was sufficient to satisfy the criteria for court approval set forth in *Dunk v. Foot Locker Retail, Inc.* (1996) 48 Cal.App.4<sup>th</sup> 1794, 1801 and *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4<sup>th</sup> 116, 129-130 ("*Dunk/Kullar*").
- 2.4 The Court has not granted class certification, as no motion for certification has been filed to date. The Parties agree to certification of this matter as a class action pursuant to California Code of Civil Procedure § 382 for the purposes of this Agreement and the settlement of this Action only.
- 2.5 The Parties, Class Counsel and Defense Counsel represent that they are not aware of any other pending matter or action asserting claims that will be extinguished or affected by the Settlement.

### 3. MONETARY TERMS.

- 3.1 Gross Settlement Amount. Defendant promises to pay \$450,000 and no more as the Gross Settlement Amount and to separately pay any and all employer-side payroll taxes owed on the Wage Portions of the Individual Class Payments. The Settlement Administrator shall provide the calculations for employer-side payroll taxes. Defendant has no obligation to pay the Gross Settlement Amount (or any payroll taxes) prior to the deadline stated in Paragraph 4.3 of this Agreement. The Administrator will disburse the entire Gross Settlement Amount without asking or requiring Participating Class Members or Aggrieved Employees to submit any claim as a condition of payment. None of the Gross Settlement Amount will revert to Defendant.
- 3.2 Payments from the Gross Settlement Amount. The Administrator will make and deduct the following payments from the Gross Settlement Amount, in the amounts specified by the Court in the Final Approval:
- 3.2.1 To Plaintiff: Class Representative Service Payment to the Class Representative of not more than \$10,000 (in addition to any Individual Class Payment and any Individual PAGA Payment the Class Representative is entitled to receive as a Participating Class Member). Defendant will not oppose Plaintiff's request for a Class Representative Service Payment that does not exceed this amount. As part of the motion for Class Counsel Fees Payment and Class Litigation Expenses Payment, Plaintiff will seek Court approval for any Class Representative Service Payments no later than 16 court days prior to the Final Approval Hearing. If the Court approves a Class Representative Service Payment less than the amount requested, the Administrator will retain the remainder in the Net Settlement Amount. The

Administrator will pay the Class Representative Service Payment using IRS Form 1099. Plaintiff assumes full responsibility and liability for employee taxes owed on the Class Representative Service Payment.

- 3.2.2 To Class Counsel: A Class Counsel Fees Payment of not more than one-third (33 $\frac{1}{3}$ %), which is currently estimated to be \$150,000 and a Class Counsel Litigation Expenses Payment of not more than \$15,000. Defendant will not oppose requests for these payments provided that do not exceed these amounts. Plaintiff and/or Class Counsel will file a motion for Final Approval and for Class Counsel Fees Payment and Class Litigation Expenses Payment no later than 16 court days prior to the Final Approval Hearing. If the Court approves a Class Counsel Fees Payment and/or a Class Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability to Class Counsel or any other Plaintiff's Counsel arising from any claim to any portion any Class Counsel Fee Payment and/or Class Counsel Litigation Expenses Payment. The Administrator will pay the Class Counsel Fees Payment and Class Counsel Expenses Payment using one or more IRS 1099 Forms.
- 3.2.3 To the Administrator: An Administrator Expenses Payment not to exceed \$7,000.00 except for a showing of good cause and as approved by the Court. To the extent the Administration Expenses are less, or the Court approves payment less than \$7,000.00, the Administrator will retain the remainder in the Net Settlement Amount.
- 3.2.4 To Each Participating Class Member: An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks.
- 3.2.4.1 Tax Allocation of Individual Class Payments. 20% of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. The remaining 80% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed on their Individual Class Payment.
- 3.2.4.2 Effect of Non-Participating Class Members on Calculation of Individual Class Payments. Non-Participating Class Members will not receive any Individual Class Payments. The Administrator will retain amounts equal to their Individual Class Payments in the Net

Settlement Amount for distribution to Participating Class Members on a pro rata basis.

3.2.5 To the LWDA and Aggrieved Employees: PAGA Penalties in the amount of \$30,000 to be paid from the Gross Settlement Amount, with 75% (\$22,500) allocated to the LWDA PAGA Payment and 25% (\$7,500) allocated to the Individual PAGA Payments.

3.2.5.1 The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$7,500) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment.

3.2.5.2 If the Court approves PAGA Penalties of less than the amount requested, the Administrator will allocate the remainder to the Net Settlement Amount. The Administrator will report the Individual PAGA Payments on IRS 1099 Forms.

#### **4. SETTLEMENT FUNDING AND PAYMENTS.**

4.1 Class Pay Periods and Aggrieved Employee Pay Periods. Based on a review of its records to date, Defendant estimates that, as of the date of this Settlement Agreement, there are 106 Class Members who collectively worked a total of 4,086 Class Pay Periods, and 74 Aggrieved Employees who worked a total of 2,233 PAGA Pay Periods.

4.2 Class Data. Not later than 15 days after the Court grants Preliminary Approval of the Settlement, Defendant will deliver the Class Data to the Administrator, in the form of a Microsoft Excel spreadsheet. Defendant will supplement the Class Data upon receipt of changes to class member information. To protect Class Members' privacy rights, the Administrator must maintain the Class Data in confidence, use the Class Data only for purposes of this Settlement and for no other purpose, and restrict access to the Class Data to Administrator employees who need access to the Class Data to effect and perform under this Agreement. Defendant has a continuing duty to immediately notify Class Counsel if they discover that the Class Data omitted class member identifying information and to provide corrected or updated Class Data as soon as reasonably feasible. Without any extension of the deadline by which Defendant must send the Class Data to the Administrator, the Parties and their counsel will expeditiously use best efforts, in good faith, to reconstruct or otherwise resolve any issues related to missing or omitted Class Data.

4.3 Funding of Gross Settlement Amount. Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the Administrator within 20 days

following final approval of the settlement by the Superior Court or June 14, 2023, whichever is later.

- 4.4 Payments from the Gross Settlement Amount. Within 7 days after Defendant funds the Gross Settlement Amount, the Administrator will mail checks for all Individual Class Payments, all Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Class Representative Service Payment. Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payment shall not precede disbursement of Individual Class Payments and Individual PAGA Payments.

4.4.1 The Administrator will issue checks for the Individual Class Payments and/or Individual PAGA Payments and send them to the Class Members via First Class U.S. Mail, postage prepaid. The face of each check shall prominently state the date (not less than 180 days after the date of mailing) when the check will be voided. For any checks not cashed within 90 days of the Administrator sending them, the Administrator will do another skip-trace address update and send those Class Members an additional postcard reminder about their checks not yet being cashed. The Administrator will cancel all checks not cashed by the void date. The Administrator will send checks for Individual Settlement Payments to all Participating Class Members (including those for whom Class Notice was returned undelivered). The Administrator will send checks for Individual PAGA Payments to all Aggrieved Employees including Non-Participating Class Members who qualify as Aggrieved Employees (including those for whom Class Notice was returned undelivered). The Administrator may send Participating Class Members a single check combining the Individual Class Payment and the Individual PAGA Payment. Before mailing any checks, the Settlement Administrator must update the recipients' mailing addresses using the National Change of Address Database.

4.4.2 The Administrator must conduct a Class Member Address Search for all other Class Members whose checks are returned undelivered without USPS forwarding address. Within 14 days of receiving a returned check the Administrator must re-mail checks to the USPS forwarding address provided or to an address ascertained through the Class Member Address Search. The Administrator need not take further steps to deliver checks to Class Members whose re-mailed checks are returned as undelivered. The Administrator shall promptly send a replacement check to any Class Member whose original check was lost or misplaced, requested by the Class Member prior to the void date.

4.4.3 For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the funds represented by such checks to the proposed cy pres recipients, subject to Court approval, without further amendment to this Agreement, consistent with Code of Civil Procedure

Section 384, subd. (b) (“Cy Pres Recipients”). The Parties propose that funds represented by any uncashed or undeliverable checks shall be distributed to two section 501(c)(3) non-profit organizations as follows: 50% to Defendants’ nominee St. Christopher Truckers Development & Relief Fund Inc. and 50% to Plaintiff’s nominee Public Citizen Foundation. The Parties, Class Counsel and Defense Counsel represent that they have no financial interest in the proposed Cy Pres Recipients and do not have members on the Board of Directors of the organizations, or hold any other governing type relationship with the organizations. Participating Class Members who do not cash their Individual Class Payment and Individual PAGA Payment checks remain bound to the terms of this Agreement.

- 4.4.4 The payment of Individual Class Payments and Individual PAGA Payments shall not obligate Defendant to confer any additional benefits or make any additional payments to Class Members (such as 401(k) contributions or bonuses) beyond those specified in this Agreement.

**5. RELEASES OF CLAIMS.** Effective on the date when Defendant fully funds the entire Gross Settlement Amount and fund all employer payroll taxes owed on the Wage Portion of the Individual Class Payments, Plaintiff, Class Members, and Defendant will release claims against all Released Parties as follows:

- 5.1 Mutual Release. With the exception of any of their respective rights and obligations created pursuant to this Agreement, each party to this Agreement mutually releases and discharges the other, its predecessors, successors and assigns and their respective officers, directors, employees, other representatives and shareholders, from any and all known claims, demands, causes of action, obligations, and liabilities of every kind and nature whatsoever which each had, or claims to have had, or now has, against the other, which relate to or arises out of any agreements, transactions, events or circumstances which are the subject of the Action.
- 5.2 Plaintiff’s Release. Without limiting the generality of the foregoing, Plaintiff and his or her respective former and present spouses, representatives, agents, attorneys, heirs, administrators, release and discharge Released Parties from all claims, transactions, or occurrences that occurred during the Class Period, including, but not limited to: (a) all claims that were, or reasonably could have been, alleged, based on the facts contained, in the Operative Complaint and (b) all PAGA claims that were, or reasonably could have been, alleged based on facts contained in the Operative Complaint, Plaintiff’s PAGA Notice, or ascertained during the Action and released below, pursuant to Civ. Code § 1542. (“Plaintiff’s Release.”) Plaintiff’s Release does not extend to any claims or actions to enforce this Agreement, or to any claims for vested benefits, unemployment benefits, disability benefits, social security benefits, workers’ compensation benefits that arose at any time, or based on occurrences outside the Class Period. Plaintiff acknowledges that Plaintiff may discover facts or law different from, or in addition to, the facts or law that Plaintiff now knows or believes to be true but agrees, nonetheless, that Plaintiff’s Release shall be and remain effective in all respects, notwithstanding such different or additional facts or Plaintiff’s discovery of them.

- 5.3 Plaintiff's Waiver of Rights Under California Civil Code Section 1542. For purposes of Plaintiff's Release, Plaintiff expressly waives and relinquishes the provisions, rights, and benefits, if any, of Section 1542 of the California Civil Code, which reads:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release, and that if known by him or her would have materially affected his or her settlement with the debtor or Released Party.

- 5.4 Release by Participating Class Members: All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint, Plaintiff's PAGA Notice, or otherwise ascertained in the course of the Action. Except as set forth in Section 5.4 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period.
- 5.5 Release by Aggrieved Employees: All Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, the PAGA Notice, and ascertained in the course of the Action.

**6. MOTION FOR PRELIMINARY APPROVAL.** The Parties agree to jointly prepare and file a motion for preliminary approval ("Motion for Preliminary Approval") that complies with the Court's current checklist for Preliminary Approvals.

- 6.1 Defendant's Declaration in Support of Preliminary Approval. Within 7 days of the full execution of this Agreement, Defendant will prepare and deliver to Class Counsel a signed Declaration from Defendant and Defense Counsel disclosing all facts relevant to any actual or potential conflicts of interest with the Administrator and Cy Pres Recipient. In their Declarations, Defense Counsel and Defendant shall aver that they are not aware of any other pending matter or action asserting claims that will be extinguished or adversely affected by the Settlement.
- 6.2 Plaintiff's Responsibilities. Plaintiff will prepare and deliver to Defense Counsel all documents necessary for obtaining Preliminary Approval, including: (i) a draft of the notice, and memorandum in support, of the Motion for Preliminary Approval that includes an analysis of the Settlement under *Dunk/Kullar* and a request for approval of the PAGA Settlement under Labor Code Section 2699, subd. (f)(2); (ii) a draft proposed Order Granting Preliminary Approval and Approval of PAGA Settlement; and (iii) a draft proposed Class Notice.
- 6.3 Responsibilities of Counsel. Class Counsel and Defense Counsel are jointly

responsible for making best efforts to expeditiously finalize and file the Motion for Preliminary Approval no later than 30 days after the full execution of this Agreement; obtain a prompt hearing date for the Motion for Preliminary Approval; and appear in Court to advocate in favor of the Motion for Preliminary Approval. Class Counsel is responsible for delivering the Court's Preliminary Approval to the Administrator.

- 6.4 Duty to Cooperate. If the Parties disagree on any aspect of the proposed Motion for Preliminary Approval and/or the supporting declarations and documents, Class Counsel and Defense Counsel will expeditiously work together on behalf of the Parties by meeting in person or by telephone, and in good faith, to resolve the disagreement. If the Court does not grant Preliminary Approval or conditions Preliminary Approval on any material change to this Agreement, Class Counsel and Defense Counsel will expeditiously work together on behalf of the Parties by meeting in person or by telephone, and in good faith, to modify the Agreement and otherwise satisfy the Court's concerns.

## 7. SETTLEMENT ADMINISTRATION.

- 7.1 Selection of Administrator. The Parties have jointly selected Simpluris, Inc. to serve as the Administrator and verified that, as a condition of appointment, Simpluris, Inc. agrees to be bound by this Agreement and to perform, as a fiduciary, all duties specified in this Agreement in exchange for payment of Administration Expenses. The Parties and their Counsel represent that they have no interest or relationship, financial or otherwise, with the Administrator other than a professional relationship arising out of prior experiences administering settlements. Out of two highly regarded settlement administrators with substantial class action administration experience, the lower bid was provided by Simpluris, Inc., with a "not to exceed" cap of \$7,000. Class Counsel deems the bid to be reasonable considering the Class size, amount of mailing, and services provided, including skip tracing, re-mailing, calculating payroll tax, and other duties.
- 7.2 Employer Identification Number. The Administrator shall have and use its own Employer Identification Number for purposes of calculating payroll tax withholdings and providing reports state and federal tax authorities.
- 7.3 Qualified Settlement Fund. The Administrator shall establish a settlement fund that meets the requirements of a Qualified Settlement Fund ("QSF") under US Treasury Regulation section 468B-1.
- 7.4 Notice to Class Members.
- 7.4.1 No later than three (3) business days after receipt of the Class Data, the Administrator shall notify Class Counsel that the list has been received and state the number of Class Members, PAGA Members, Workweeks, and Pay Periods in the Class Data.
- 7.4.2 Using best efforts to perform as soon as possible, and in no event later than 14 days after receiving the Class Data, the Administrator will send to all Class

Members identified in the Class Data, via first-class United States Postal Service (“USPS”) mail, the Class Notice with Spanish translation substantially in the form attached to this Agreement as Exhibit A. The first page of the Class Notice shall prominently estimate the dollar amounts of any Individual Class Payment and/or Individual PAGA Payment payable to the Class Member, and the number of Workweeks and PAGA Pay Periods (if applicable) used to calculate these amounts. Before mailing Class Notices, the Administrator shall update Class Member addresses using the National Change of Address database.

- 7.4.3 Not later than 3 business days after the Administrator’s receipt of any Class Notice returned by the USPS as undelivered, the Administrator shall re-mail the Class Notice using any forwarding address provided by the USPS. If the USPS does not provide a forwarding address, the Administrator shall conduct a Class Member Address Search, and re-mail the Class Notice to the most current address obtained. The Administrator has no obligation to make further attempts to locate or send Class Notice to Class Members whose Class Notice is returned by the USPS a second time.
- 7.4.4 The deadlines for Class Members’ written objections, Challenges to Workweeks and/or Pay Periods, and Requests for Exclusion will be extended an additional 14 days beyond the 45 days otherwise provided in the Class Notice for all Class Members whose notice is re-mailed. The Administrator will inform the Class Member of the extended deadline with the re-mailed Class Notice.
- 7.4.5 If the Administrator, Defendant, or Class Counsel are contacted by or otherwise discover any persons who believe they should have been included in the Class Data and should have received Class Notice, the Parties will expeditiously meet and confer in person or by telephone, and in good faith in an effort to agree on whether to include them as Class Members. If the Parties agree, such persons will be Class Members entitled to the same rights and subject to the same releases as other Class Members, and the Administrator will send, via email or overnight delivery, a Class Notice requiring them to exercise options under this Agreement not later than 14 days after receipt of Class Notice, or the deadline dates in the Class Notice, which ever are later.

## 7.5 Requests for Exclusion (Opt-Outs).

- 7.5.1 Class Members who wish to exclude themselves (opt-out of) the Class Settlement must send the Administrator, by fax, email, or mail, a signed written Request for Exclusion not later than 45 days after the Administrator mails the Class Notice (plus an additional 14 days for Class Members whose Class Notice is re-mailed). A Request for Exclusion is a letter from a Class Member or his/her representative that reasonably communicates the Class Member’s election to be excluded from the Settlement and includes the Class Member’s name, address and email address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed, or postmarked

by the Response Deadline.

- 7.5.2 The Administrator may not reject a Request for Exclusion as invalid because it fails to contain all the information specified in the Class Notice. The Administrator shall accept any Request for Exclusion as valid if the Administrator can reasonably ascertain the identity of the person as a Class Member and the Class Member's desire to be excluded. The Administrator's determination shall be final and not appealable or otherwise susceptible to challenge. If the Administrator has reason to question the authenticity of a Request for Exclusion, the Administrator may demand additional proof of the Class Member's identity. The Administrator's determination of authenticity shall be final and not appealable or otherwise susceptible to challenge.
- 7.5.3 Every Class Member who does not submit a timely and valid Request for Exclusion is deemed to be a Participating Class Member under this Agreement, entitled to all benefits and bound by all terms and conditions of the Settlement, including the Participating Class Members' Releases under Paragraphs 5.4 of this Agreement, regardless of whether the Participating Class Member actually receives the Class Notice or objects to the Settlement.
- 7.5.4 Every Class Member who submits a valid and timely Request for Exclusion is a Non-Participating Class Member and shall not receive an Individual Class Payment nor have the right to object to the class action components of the Settlement. Because future PAGA claims are subject to claim preclusion upon entry of the Judgment, Non-Participating Class Members who are Aggrieved Employees are deemed to release the claims identified in Paragraph 5.5 of this Agreement and are eligible for an Individual PAGA Payment.

7.6 Challenges to Calculation of Workweeks. Each Class Member shall have 45 days after the Administrator mails the Class Notice (plus an additional 14 days for Class Members whose Class Notice is re-mailed) to challenge the number of Class Workweeks and PAGA Pay Periods (if any) allocated to the Class Member in the Class Notice. The Class Member may challenge the allocation by communicating with the Administrator via fax, email or mail. The Administrator must encourage the challenging Class Member to submit supporting documentation. In the absence of any contrary documentation, the Administrator is entitled to presume that the Workweeks contained in the Class Notice are correct so long as they are consistent with the Class Data. The Administrator's determination of each Class Member's allocation of Workweeks and/or Pay Periods shall be final and not appealable or otherwise susceptible to challenge. The Administrator shall promptly provide copies of all challenges to calculation of Workweeks and/or Pay Periods to Defense Counsel and Class Counsel and the Administrator's determination the challenges.

7.7 Objections to Settlement.

- 7.7.1 Only Participating Class Members may object to the class action components of the Settlement and/or this Agreement, including contesting the fairness of

the Settlement, and/or amounts requested for the Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment and/or Class Representative Service Payment.

7.7.2 Participating Class Members may send written objections to the Administrator by fax, email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A Participating Class Member who elects to send a written objection to the Administrator must do so not later than 45 days after the Administrator's mailing of the Class Notice (plus an additional 14 days for Class Members whose Class Notice was re-mailed).

7.7.3 Non-Participating Class Members have no right to object to any of the class action components of the Settlement.

7.8 Administrator Duties. The Administrator has a duty to perform or observe all tasks to be performed or observed by the Administrator contained in this Agreement or otherwise.

7.8.1 Website, Email Address and Toll-Free Number. The Administrator will establish and maintain and use an internet website to post information of interest to Class Members including the date, time and location for the Final Approval Hearing and copies of the Settlement Agreement, Motion for Preliminary Approval, the Preliminary Approval, the Class Notice, the Motion for Final Approval, the Motion for Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment and Class Representative Service Payment, the Final Approval and the Judgment. The Administrator will also maintain and monitor an email address and a toll-free telephone number to receive Class Member calls, faxes and emails.

7.8.2 Requests for Exclusion (Opt-outs) and Exclusion List. The Administrator will promptly review on a rolling basis Requests for Exclusion to ascertain their validity. Not later than 5 days after the expiration of the deadline for submitting Requests for Exclusion, the Administrator shall email a list to Class Counsel and Defense Counsel containing (a) the names and other identifying information of Class Members who have timely submitted valid Requests for Exclusion ("Exclusion List"); (b) the names and other identifying information of Class Members who have submitted invalid Requests for Exclusion; (c) copies of all Requests for Exclusion from Settlement submitted (whether valid or invalid).

7.8.3 Weekly Reports. The Administrator must, on a weekly basis, provide written reports to Class Counsel and Defense Counsel that, among other things, tally the number of: Class Notices mailed or re-mailed, Class Notices returned undelivered, Requests for Exclusion (whether valid or invalid) received, objections received, challenges to Workweeks and/or Pay Periods received and/or resolved, and checks mailed for Individual Class Payments and

Individual PAGA Payments (“Weekly Report”). The Weekly Reports must include provide the Administrator’s assessment of the validity of Requests for Exclusion and attach copies of all Requests for Exclusion and objections received.

7.8.4 Workweek and/or Pay Period Challenges. The Administrator has the authority to address and make final decisions consistent with the terms of this Agreement on all Class Member challenges over the calculation of Workweeks and/or Pay Periods. The Administrator’s decision shall be final and not appealable or otherwise susceptible to challenge.

7.8.5 Administrator’s Declaration. Not later than 14 days before the date by which Plaintiff is required to file the Motion for Final Approval of the Settlement, the Administrator will provide to Class Counsel and Defense Counsel, a signed declaration suitable for filing in Court attesting to its due diligence and compliance with all of its obligations under this Agreement, including, but not limited to, its mailing of Class Notice, the Class Notices returned as undelivered, the re-mailing of Class Notices, attempts to locate Class Members, the total number of Requests for Exclusion from Settlement it received (both valid or invalid), the number of written objections and attach the Exclusion List. The Administrator will supplement its declaration as needed or requested by the Parties and/or the Court. Class Counsel is responsible for filing the Administrator’s declaration(s) in Court.

7.8.6 Final Report by Settlement Administrator. Within 10 days after the Administrator disburses all funds in the Gross Settlement Amount, the Administrator will provide Class Counsel and Defense Counsel with a final report detailing its disbursements by employee identification number only of all payments made under this Agreement. At least 15 days before any deadline set by the Court, the Administrator will prepare, and submit to Class Counsel and Defense Counsel, a signed declaration suitable for filing in Court attesting to its disbursement of all payments required under this Agreement. Class Counsel is responsible for filing the Administrator's declaration in Court.

8. **CLASS SIZE ESTIMATES.** Based on its records, Defendant estimates that, as of the date of this Settlement Agreement, (1) there are 106 Class Members and 4,086 Class Pay Periods during the Class Period and (2) there were 74 Aggrieved Employees who worked 2,233 Pay Periods during the PAGA Period.

9. **DEFENDANT’S RIGHT TO WITHDRAW.** If the number of valid Requests for Exclusion identified in the Exclusion List exceeds 10% of the total of all Class Members, Defendant may elect, but are not obligated, to withdraw from the Settlement. The Parties agree that, if Defendant withdraws, the Settlement shall be void ab initio, have no force or effect whatsoever, and that neither Party will have any further obligation to perform under this Agreement; provided, however, Defendant will remain responsible for paying all Settlement Administration Expenses incurred to that point. Defendant must notify Class Counsel and the Court of their election to withdraw not later than seven days after the Administrator sends the final Exclusion List to

Defense Counsel; late elections will have no effect.

10. **MOTION FOR FINAL APPROVAL.** Not later than 16 court days before the calendared Final Approval Hearing, Plaintiff will file in Court, a motion for final approval of the Settlement that includes a request for approval of the PAGA settlement under Labor Code section 2699, subd. (l), a Proposed Final Approval Order and a proposed Judgment (collectively “Motion for Final Approval”). Plaintiff shall provide drafts of these documents to Defense Counsel not later than three days prior to filing the Motion for Final Approval. Class Counsel and Defense Counsel will expeditiously meet and confer in person or by telephone, and in good faith, to resolve any disagreements concerning the Motion for Final Approval.

10.1 **Response to Objections.** Each Party retains the right to respond to any objection raised by a Participating Class Member, including the right to file responsive documents in Court no later than five court days prior to the Final Approval Hearing, or as otherwise ordered or accepted by the Court.

10.2 **Duty to Cooperate.** If the Court does not grant Final Approval or conditions Final Approval on any material change to the Settlement (including, but not limited to, the scope of release to be granted by Class Members), the Parties will expeditiously work together in good faith to address the Court’s concerns by revising the Agreement as necessary to obtain Final Approval. The Court’s decision to award less than the amounts requested for the Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment and/or Administrator Expenses Payment shall not constitute a material modification to the Agreement within the meaning of this paragraph.

10.3 **Continuing Jurisdiction of the Court.** The Parties agree that, after entry of Judgment, the Court will retain jurisdiction over the Parties, Action, and the Settlement solely for purposes of (i) enforcing this Agreement and/or Judgment, (ii) addressing settlement administration matters, and (iii) addressing such post-Judgment matters as are permitted by law.

10.4 **Waiver of Right to Appeal.** Provided the Judgment is consistent with the terms and conditions of this Agreement, specifically including the Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment reflected set forth in this Settlement, the Parties, their respective counsel, and all Participating Class Members who did not object to the Settlement as provided in this Agreement, waive all rights to appeal from the Judgment, including all rights to post-judgment and appellate proceedings, the right to file motions to vacate judgment, motions for new trial, extraordinary writs, and appeals. The waiver of appeal does not include any waiver of the right to oppose such motions, writs or appeals. If an objector appeals the Judgment, the Parties’ obligations to perform under this Agreement will be suspended until such time as the appeal is finally resolved and the Judgment becomes final, except as to matters that do not affect the amount of the Net Settlement Amount.

10.5 **Appellate Court Orders to Vacate, Reverse, or Materially Modify Judgment.** If the reviewing Court vacates, reverses, or modifies the Judgment in a manner that requires a material modification of this Agreement (including, but not limited to, the scope of

release to be granted by Class Members), this Agreement shall be null and void. The Parties shall nevertheless expeditiously work together in good faith to address the appellate court's concerns and to obtain Final Approval and entry of Judgment, sharing, on a 50-50 basis, any additional Administration Expenses reasonably incurred after remittitur. An appellate decision to vacate, reverse, or modify the Court's award of the Class Representative Service Payment or any payments to Class Counsel shall not constitute a material modification of the Judgment within the meaning of this paragraph, as long as the Gross Settlement Amount remains unchanged.

11. **AMENDED JUDGMENT.** If any amended judgment is required under Code of Civil Procedure section 384, the Parties will work together in good faith to jointly submit and a proposed amended judgment.

12. **ADDITIONAL PROVISIONS.**

12.1 **No Admission of Liability, Class Certification or Representative Manageability for Other Purposes.** This Agreement represents a compromise and settlement of highly disputed claims. Nothing in this Agreement is intended or should be construed as an admission by Defendant that any of the allegations in the Operative Complaint have merit or that Defendant has any liability for any claims asserted; nor should it be intended or construed as an admission by Plaintiff that Defendant's defenses in the Action have merit. The Parties agree that class certification and representative treatment is for purposes of this Settlement only. If, for any reason the Court does not grant Preliminary Approval, Final Approval or enter Judgment, Defendant reserves the right to contest certification of any class for any reasons, and Defendant reserves all available defenses to the claims in the Action, and Plaintiff reserves the right to move for class certification on any grounds available and to contest Defendant's defenses. The Settlement, this Agreement and Parties' willingness to settle the Action will have no bearing on, and will not be admissible in connection with, any litigation (except for proceedings to enforce or effectuate the Settlement and this Agreement).

12.2 **Confidentiality Prior to Preliminary Approval.** Plaintiff, Class Counsel, Defendant, and Defense Counsel separately agree that, until the Motion for Preliminary Approval of Settlement is filed, they and each of them will not disclose, disseminate and/or publicize, or cause or permit another person to disclose, disseminate or publicize, any of the terms of the Agreement directly or indirectly, specifically or generally, to any person, corporation, association, government agency, or other entity except: (1) to the Parties' attorneys, accountants, or spouses, all of whom will be instructed to keep this Agreement confidential; (2) counsel in a related matter; (3) to the extent necessary to report income to appropriate taxing authorities; (4) in response to a court order or subpoena; or (5) in response to an inquiry or subpoena issued by a state or federal government agency. Each Party agrees to immediately notify each other Party of any judicial or agency order, inquiry, or subpoena seeking such information. Plaintiff, Class Counsel, Defendant, and Defense Counsel separately agree not to, directly or indirectly, initiate any conversation or other communication, before the filing of the Motion for Preliminary Approval, with any third party regarding this

Agreement or the matters giving rise to this Agreement except to respond only that “the matter was resolved,” or words to that effect. This paragraph does not restrict Class Counsel’s communications with Class Members in accordance with Class Counsel’s ethical obligations owed to Class Members.

- 12.3 Neutral Employment Reference. If Defendant receives any requests from prospective employers or other persons about Plaintiff’s employment, Defendant shall provide a neutral and objective employment reference, to the extent permitted by law, and refrain from subjectively characterizing Plaintiff’s personal characteristics, qualities, or job performance in any manner that reflects poorly on Plaintiff and shall not refer to the Action or this Settlement.
- 12.4 No Solicitation. The Parties separately agree that they and their respective counsel and employees will not solicit any Class Member to opt out of or object to the Settlement, or appeal from the Judgment. Nothing in this paragraph shall be construed to restrict Class Counsel’s ability to communicate with Class Members in accordance with Class Counsel’s ethical obligations owed to Class Members.
- 12.5 Integrated Agreement. Upon execution by all Parties and their counsel, this Agreement together with its attached exhibits shall constitute the entire agreement between the Parties relating to the Settlement, superseding any and all oral representations, warranties, covenants, or inducements made to or by any Party.
- 12.6 Attorney Authorization. Class Counsel and Defense Counsel separately warrant and represent that they are authorized by Plaintiff and Defendant, respectively, to take all appropriate action required or permitted to be taken by such Parties pursuant to this Agreement to effectuate its terms, and to execute any other documents reasonably required to effectuate the terms of this Agreement including any amendments to this Agreement.
- 12.7 Cooperation. The Parties and their counsel will cooperate with each other and use their best efforts, in good faith, to implement the Settlement by, among other things, modifying the Settlement Agreement, submitting supplemental evidence and supplementing points and authorities as requested by the Court. In the event the Parties are unable to agree upon the form or content of any document necessary to implement the Settlement, or on any modification of the Agreement that may become necessary to implement the Settlement, the Parties will seek the assistance of a mediator and/or the Court for resolution.
- 12.8 No Prior Assignments. The Parties separately represent and warrant that they have not directly or indirectly assigned, transferred, encumbered, or purported to assign, transfer, or encumber to any person or entity and portion of any liability, claim, demand, action, cause of action, or right released and discharged by the Party in this Settlement.
- 12.9 No Tax Advice. Neither Plaintiff, Class Counsel, Defendant nor Defense Counsel are providing any advice regarding taxes or taxability, nor shall anything in this Settlement be relied upon as such within the meaning of United States Treasury

Department Circular 230 (31 CFR Part 10, as amended) or otherwise.

- 12.10 Modification of Agreement. This Agreement, and all parts of it, may be amended, modified, changed, or waived only by an express written instrument signed by all Parties or their representatives, and approved by the Court.
- 12.11 Agreement Binding on Successors. This Agreement will be binding upon, and inure to the benefit of, the successors of each of the Parties.
- 12.12 Applicable Law. All terms and conditions of this Agreement and its exhibits will be governed by and interpreted according to the internal laws of the state of California, without regard to conflict of law principles.
- 12.13 Cooperation in Drafting. The Parties have cooperated in the drafting and preparation of this Agreement. This Agreement will not be construed against any Party on the basis that the Party was the drafter or participated in the drafting.
- 12.14 Confidentiality. To the extent permitted by law, all agreements made, and orders entered during Action and in this Agreement relating to the confidentiality of information shall survive the execution of this Agreement.
- 12.15 Headings. The descriptive heading of any section or paragraph of this Agreement is inserted for convenience of reference only and does not constitute a part of this Agreement.
- 12.16 Calendar Days. Unless otherwise noted, all reference to “days” in this Agreement shall be to calendar days. In the event any date or deadline set forth in this Agreement falls on a weekend or federal legal holiday, such date or deadline shall be on the first business day thereafter.
- 12.17 Notice. All notices, demands or other communications between the Parties in connection with this Agreement will be in writing and deemed to have been duly given as of the third business day after mailing by United States mail, or the day sent by email or messenger, addressed as follows:

To Plaintiff:

The Kick Law Firm, APC  
815 Moraga Drive  
Los Angeles, CA 90049

To Defendant:

Larson & Gaston, LLP  
200 South Los Robles Avenue, Suite 530  
Pasadena, California 91101

- 12.18 Execution in Counterparts. This Agreement may be executed in one or more counterparts by facsimile, electronically (i.e. DocuSign), or email which for purposes of this Agreement shall be accepted as an original. All executed counterparts and

each of them will be deemed to be one and the same instrument if counsel for the Parties will exchange between themselves signed counterparts. Any executed counterpart will be admissible in evidence to prove the existence and contents of this Agreement.

- 12.19 Stay of Litigation. The Parties agree that upon the execution of this Agreement the litigation shall be stayed, except to effectuate the terms of this Agreement. The Parties further agree that upon the signing of this Agreement that pursuant to CCP section 583.330 to extend the date to bring a case to trial under CCP section 583.310 for the entire period of this settlement process.

Date: 12/23/2022

By:   
C15E1929DE944F3...  
Kenneth Kernitzki  
Plaintiff and Class Representative

Date: \_\_\_\_\_

By: \_\_\_\_\_  
For Defendant

APPROVED AS TO FORM ONLY:

Date: 12/23/2022

By:   
6DE1B9716B564B2...  
Taras Kick  
The Kick Law Firm, APC  
Attorneys for Plaintiff and the Class

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Victor J. Cosentino  
Gloria G. Medel  
Larson & Gaston, LLP  
Attorneys for Defendant

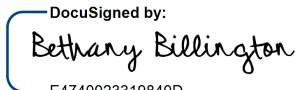
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Date: \_\_\_\_\_

By: \_\_\_\_\_  
Kenneth Kernitzki  
Plaintiff and Class Representative

Date: 12/2/2022  
\_\_\_\_\_

By:  \_\_\_\_\_  
For Defendant

APPROVED AS TO FORM ONLY:

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Taras Kick  
The Kick Law Firm, APC  
Attorneys for Plaintiff and the Class

Date: 12/2/2022  
\_\_\_\_\_

By:  \_\_\_\_\_  
Victor J. Cosentino  
Gloria G. Medel  
Larson & Gaston, LLP  
Attorneys for Defendant

# **EXHIBIT A**

# COURT APPROVED NOTICE OF CLASS ACTION & PAGA SETTLEMENT AND HEARING DATE FOR FINAL COURT APPROVAL

(Kernitzki v. Quality Car Shippers, LLC, Riverside Superior Court Case No.  
CVRI2100564)

***The Superior Court for the State of California authorized this Notice. Read it carefully!  
It's not junk mail, spam, an advertisement, or solicitation by a lawyer. You are not being sued.***

**You may be eligible to receive money** from an employee class action lawsuit ("Action") against Defendant Quality Car Shippers, LLC, a California Limited Liability Company (hereinafter referred to as "QCS" or "Defendant") for alleged wage and hour violations. The Action was filed by former QCS employee Kenneth Kernitzki ("Plaintiff") and seeks payment of (1) back wages and other relief for a class of all current and former drivers, classified by Defendant as independent contractors, who hauled for Defendant at any time during the Class Period ("Class Members"); and (2) penalties under the California Private Attorney General Act ("PAGA") for all Class Members who worked for QCS during the PAGA Period ("Aggrieved Employees"). The Class Period is from February 5, 2017 through <<PA filing date>>. The PAGA Period is from September 11, 2019 through <<PA filing date>>.

The proposed Settlement has two main parts: (1) a Class Settlement requiring QCS to fund Individual Class Payments, and (2) a PAGA Settlement requiring QCS to fund Individual PAGA Payments and pay penalties to the California Labor and Workforce Development Agency ("LWDA").

Based on QCS's records, and the Parties' current assumptions, **your Individual Class Payment is estimated to be \$** <<PA filing date>> **(less withholding) and your Individual PAGA Payment is estimated to be \$** <<PA filing date>>. The actual amount you may receive likely will be different and will depend on a number of factors. (If no amount is stated for your Individual PAGA Payment, then according to QCS's records you are not eligible for an Individual PAGA Payment under the Settlement because you didn't work during the PAGA Period.)

The above estimates are based on QCS's records showing that **you worked** <<PA filing date>> **workweeks** during the Class Period and **you worked** <<PA filing date>> **workweeks** during the PAGA Period. If you believe that you worked more workweeks during either period, you can submit a challenge by the deadline date. See Section 4 of this Notice.

The Court has already preliminarily approved the proposed Settlement and approved this Notice. The Court has not yet decided whether to grant final approval. Your legal rights are affected whether you act or do not act. Read this Notice carefully. You will be deemed to have carefully read and understood it. At the Final Approval Hearing, the Court will decide whether to finally approve the Settlement and how much of the Settlement will be paid to Plaintiff and Plaintiff's attorneys ("Class Counsel"). The Court will also decide whether to enter a judgment that requires QCS to make payments under the Settlement and requires Class Members and Aggrieved Employees to give up their rights to assert certain claims against QCS.

If you worked for QCS during the Class Period and/or the PAGA Period, you have two basic options under the Settlement:

(1) **Do Nothing.** You don't have to do anything to participate in the proposed Settlement and be eligible for an Individual Class Payment and/or an Individual PAGA Payment. As a Participating Class Member, though, you will give up your right to assert Class Period wage claims and PAGA Period penalty claims against QCS.

(2) **Opt-Out of the Class Settlement.** You can exclude yourself from the Class Settlement (opt-out) by submitting the written Request for Exclusion or otherwise notifying the Administrator in writing. If you opt-out of the Settlement, you will not receive an Individual Class Payment. You will, however, preserve your right to personally pursue Class Period wage claims against QCS, and, if you are an Aggrieved Employee, remain eligible for an Individual PAGA Payment. You cannot opt-out of the PAGA portion of the proposed Settlement.

**QCS will not retaliate against you for any actions you take with respect to the proposed Settlement.**

#### **SUMMARY OF YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT**

|                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|---------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| You Don't Have to Do Anything to Participate in the Settlement                                                            | If you do nothing, you will be a Participating Class Member, eligible for an Individual Class Payment and an Individual PAGA Payment (if any). In exchange, you will give up your right to assert the wage claims against QCS that are covered by this Settlement (Released Claims).                                                                                                                                                                                                                                                                                                                                                                                   |
| You Can Opt-out of the Class Settlement but not the PAGA Settlement<br><br>The Opt-out Deadline is<br>[RESPONSE DEADLINE] | <p>If you don't want to fully participate in the proposed Settlement, you can opt-out of the Class Settlement by sending the Administrator a written Request for Exclusion. Once excluded, you will be a Non-Participating Class Member and no longer eligible for an Individual Class Payment. Non-Participating Class Members cannot object to any portion of the proposed Settlement. See Section 6 of this Notice.</p> <p>You cannot opt-out of the PAGA portion of the proposed Settlement. QCS must pay Individual PAGA Payments to all Aggrieved Employees and the Aggrieved Employees must give up their rights to pursue Released Claims (defined below).</p> |

|                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Participating Class Members Can Object to the Class Settlement but not the PAGA Settlement</p> <p>Written Objections Must be Submitted by<br/>[RESPONSE DEADLINE]</p> | <p>All Class Members who do not opt-out (“Participating Class Members”) can object to any aspect of the proposed Settlement. The Court’s decision whether to finally approve the Settlement will include a determination of how much will be paid to Class Counsel and Plaintiff who pursued the Action on behalf of the Class. You are not personally responsible for any payments to Class Counsel or Plaintiff, but every dollar paid to Class Counsel and Plaintiff reduces the overall amount paid to Participating Class Members. You can object to the amounts requested by Class Counsel or Plaintiff if you think they are unreasonable. See Section 7 of this Notice.</p> |
| <p>You Can Participate in the [ ] Final Approval Hearing</p>                                                                                                             | <p>The Court’s Final Approval Hearing is scheduled to take place on [ ]. You don’t have to attend but you do have the right to appear (or hire an attorney to appear on your behalf at your own cost), in person, by telephone or by using the Court’s virtual appearance platform. Participating Class Members can verbally object to the Settlement at the Final Approval Hearing. See Section 8 of this Notice.</p>                                                                                                                                                                                                                                                              |
| <p>You Can Challenge the Calculation of Your Workweeks/Pay Periods</p> <p>Written Challenges Must be Submitted by<br/>[RESPONSE DEADLINE]</p>                            | <p>The amount of your Individual Class Payment and PAGA Payment (if any) depend on how many workweeks you worked at least one day during the Class Period and how many Pay Periods you worked at least one day during the PAGA Period, respectively. The number Class Period Workweeks and number of PAGA Period Pay Periods you worked according to QCS’s records is stated on the first page of this Notice. If you disagree with either of these numbers, you must challenge it by [RESPONSE DEADLINE]. See Section 4 of this Notice.</p>                                                                                                                                        |

## 1. WHAT IS THE ACTION ABOUT?

Plaintiff is a former employee of QCS. The Action accuses QCS of violating California labor laws by failing to pay minimum wages, wages due upon separation, and reimbursable expenses and failing to provide meal periods, rest breaks, and accurate itemized wage statements. Based on the same claims, Plaintiff has also asserted a claim for civil penalties under the California Private Attorneys General Act (Labor Code §§ 2698, et seq.) (“PAGA”). Plaintiff is represented by attorneys in the Action: The Kick Law Firm, APC (“Class Counsel”).

QCS strongly denies violating any laws or failing to pay any wages and contends it complied with all applicable laws.

## 2. WHAT DOES IT MEAN THAT THE ACTION HAS SETTLED?

So far, the Court has made no determination whether QCS or Plaintiff is correct on the merits. In the meantime, Plaintiff and QCS through counsel negotiated over several weeks to resolve the Action by voluntary agreement (settle the case) rather than continuing the expensive and time-consuming process of litigation. The negotiations were successful. By signing a lengthy written settlement agreement (“Agreement”) and agreeing to jointly ask the Court to enter a judgment ending the Action and enforcing the Agreement, Plaintiff and QCS have negotiated a proposed Settlement that is subject to the Court’s Final Approval. Both sides agree the proposed Settlement is a compromise of disputed claims. By agreeing to settle, QCS does not admit any violations or concede the merit of any claims.

Plaintiff and Class Counsel strongly believe the Settlement is a good deal for you because they believe that: (1) QCS has agreed to pay a fair, reasonable and adequate amount considering the strength of the claims and the risks and uncertainties of continued litigation; and (2) Settlement is in the best interests of the Class Members and Aggrieved Employees. The Court preliminarily approved the proposed Settlement as fair, reasonable and adequate, authorized this Notice, and scheduled a hearing to determine Final Approval.

## 3. WHAT ARE THE IMPORTANT TERMS OF THE PROPOSED SETTLEMENT?

- A. QCS Will Pay \$450,000 as the Gross Settlement Amount (“Gross Settlement”). QCS has agreed to deposit the Gross Settlement into an account controlled by the Administrator of the Settlement. The Administrator will use the Gross Settlement to pay the Individual Class Payments, Individual PAGA Payments, Class Representative Service Payment, Class Counsel’s attorney’s fees and expenses, the Administrator’s expenses, and penalties to be paid to the California Labor and Workforce Development Agency (“LWDA”). Assuming the Court grants Final Approval, QCS will fund the Gross Settlement within 20 days following final approval of the settlement by the Superior Court or June 14, 2023, whichever is later. The Judgment will be final on the date the Court enters Judgment, or a later date if Participating Class Members object to the proposed Settlement or the Judgment is appealed.
- B. Court Approved Deductions from Gross Settlement. At the Final Approval Hearing, Plaintiff and/or Class Counsel will ask the Court to approve the following deductions from the Gross Settlement, the amounts of which will be decided by the Court at the Final Approval Hearing:
  - i. Up to one-third (33⅓%) of the Gross Settlement, which is currently estimated to be \$150,000 to Class Counsel for attorneys’ fees and up to \$15,000 for their litigation expenses. To date, Class Counsel have worked and incurred expenses on the Action without payment.
  - ii. Up to \$10,000 as a Class Representative Award for filing the Action, working with Class Counsel and representing the Class. A Class Representative Award will be the only monies Plaintiff will receive other

than Plaintiff's Individual Class Payment and any Individual PAGA Payment.

- iii. Up to \$7,000 to the Administrator for services administering the Settlement.
- iv. Up to \$30,000 for PAGA Penalties, allocated 75% to the LWDA PAGA Payment and 25% in Individual PAGA Payments to the Aggrieved Employees based on their PAGA Period Pay Periods.

Participating Class Members have the right to object to any of these deductions. The Court will consider all objections.

- C. Net Settlement Distributed to Class Members. After making the above deductions in amounts approved by the Court, the Administrator will distribute the rest of the Gross Settlement (the "Net Settlement") by making Individual Class Payments to Participating Class Members based on their Class Period Workweeks.
- D. Taxes Owed on Payments to Class Members. Plaintiff and QCS are asking the Court to approve an allocation of 20% of each Individual Class Payment to taxable wages ("Wage Portion") and 80% to interest and penalties ("Non-Wage Portion"). The Wage Portion is subject to withholdings and will be reported on IRS W-2 Forms. The Individual PAGA Payments are counted as penalties rather than wages for tax purposes. The Administrator will report the Individual PAGA Payments and the Non-Wage Portions of the Individual Class Payments on IRS 1099 Forms.

Although Plaintiff and QCS have agreed to these allocations, neither side is giving you any advice on whether your Payments are taxable or how much you might owe in taxes. You are responsible for paying all taxes (including penalties and interest on back taxes) on any Payments received from the proposed Settlement. You should consult a tax advisor if you have any questions about the tax consequences of the proposed Settlement.

- E. Need to Promptly Cash Payment Checks. The front of every check issued for Individual Class Payments and Individual PAGA Payments will show the date when the check expires (the void date). If you don't cash it by the void date, your check will be automatically cancelled, and the monies represented by your check will be irrevocably lost to you because they will be paid to non-profit organizations ("Cy Pres Recipients").
- F. Requests for Exclusion from the Class Settlement (Opt-Outs). You will be treated as a Participating Class Member, participating fully in the Class Settlement, unless you notify the Administrator in writing, not later than [RESPONSE DEADLINE], that you wish to opt-out. The easiest way to notify the Administrator is to send a written and signed Request for Exclusion by the [REDACTED] Response Deadline. The Request for Exclusion should be a letter from a Class Member or his/her representative setting forth a Class Member's name, present address, telephone number, and a simple statement electing to be excluded from the Settlement.

Excluded Class Members (i.e., Non-Participating Class Members) will not receive Individual Class Payments, but will preserve their rights to personally pursue wage and hour claims against QCS.

You cannot opt-out of the PAGA portion of the Settlement. Class Members who exclude themselves from the Class Settlement (Non-Participating Class Members) remain eligible for Individual PAGA Payments and are required to give up their right to assert PAGA claims against QCS based on the PAGA Period facts alleged in the Action.

- G. The Proposed Settlement Will be Void if the Court Denies Final Approval. It is possible the Court will decline to grant Final Approval of the Settlement or decline enter a Judgment. It is also possible the Court will enter a Judgment that is reversed on appeal. Plaintiffs and QCS have agreed that, in either case, the Settlement will be void: QCS will not pay any money and Class Members will not release any claims against QCS.
- H. Administrator. The Court has appointed a neutral company, Simpluris, Inc. (the “Administrator”) to send this Notice, calculate and make payments, and process Class Members’ Requests for Exclusion. The Administrator will also decide Class Member Challenges over Workweeks, mail and re- mail settlement checks and tax forms, and perform other tasks necessary to administer the Settlement. The Administrator’s contact information is contained in Section 9 of this Notice.
- I. Participating Class Members’ Release. After the Judgment is final and QCS has fully funded the Gross Settlement and separately paid all employer payroll taxes, Participating Class Members will be legally barred from asserting any of the claims released under the Settlement. This means that unless you opted out by validly excluding yourself from the Class Settlement, you cannot sue, continue to sue, or be part of any other lawsuit against QCS or related entities for wages based on the Class Period facts and PAGA penalties based on PAGA Period facts, as alleged in the Action and resolved by this Settlement.

The Participating Class Members will be bound by the following release:

All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint. Except as set forth in Section 5.4 of the Settlement Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers’ compensation, or claims based on facts occurring outside the Class Period.

- J. Aggrieved Employees' PAGA Release. After the Court's judgment is final, and QCS has paid the Gross Settlement and separately paid the employer-side payroll taxes, all Aggrieved Employees will be barred from asserting PAGA claims against QCS, whether or not they exclude themselves from the Settlement. This means that all Aggrieved Employees, including those who are Participating Class Members and those who opt-out of the Class Settlement, cannot sue, continue to sue, or participate in any other PAGA claim against QCS or its related entities based on the PAGA Period facts alleged in the Action and resolved by this Settlement.

The Aggrieved Employees' Releases for Participating and Non-Participating Class Members are as follows:

All Participating and Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties, from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice.

#### 4. **HOW WILL THE ADMINISTRATOR CALCULATE MY PAYMENT?**

- A. Individual Class Payments. The Administrator will calculate Individual Class Payments by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members, and (b) multiplying the result by the number of Workweeks worked by each individual Participating Class Member.
- B. Individual PAGA Payments. The Administrator will calculate Individual PAGA Payments by (a) dividing \$7,500 by the total number of PAGA Pay Periods worked by all Aggrieved Employees and (b) multiplying the result by the number of PAGA Period Pay Periods worked by each individual Aggrieved Employee.
- C. Workweek/Pay Period Challenges. The number of Class Workweeks you worked during the Class Period and the number of PAGA Pay Periods you worked during the PAGA Period, as recorded in QCS's records, are stated in the first page of this Notice. You have until **[RESPONSE DEADLINE]** to challenge the number of Workweeks and/or Pay Periods credited to you. You can submit your challenge by signing and sending a letter to the Administrator via mail, email or fax. Section 9 of this Notice has the Administrator's contact information.

You need to support your challenge by sending copies of pay stubs or other records. The Administrator will accept QCS's calculation of Workweeks and/or Pay Periods based on QCS's records as accurate unless you send copies of records containing contrary information. You should send copies rather than originals because the documents will not be returned to you. The Administrator will resolve Workweek and/or Pay Period challenges based on your submission and on input from Class

Counsel (who will advocate on behalf of Participating Class Members) and QCS's Counsel. The Administrator's decision is final. You can't appeal or otherwise challenge its final decision.

## 5. HOW WILL I GET PAID?

- A. Participating Class Members. The Administrator will send, by U.S. mail, a single check to every Participating Class Member (i.e., every Class Member who doesn't opt-out) including those who also qualify as Aggrieved Employees. The single check will combine the Individual Class Payment and the Individual PAGA Payment.
- B. Non-Participating Class Members. The Administrator will send, by U.S. mail, a single Individual PAGA Payment check to every Aggrieved Employee who opts out of the Class Settlement (i.e., every Non-Participating Class Member).

**Your check will be sent to the same address as this Notice. If you change your address, be sure to notify the Administrator as soon as possible. Section 9 of this Notice has the Administrator's contact information.**

## 6. HOW DO I OPT-OUT OF THE CLASS SETTLEMENT?

Submit a written and signed letter with your name, present address, telephone number, and a simple statement that you do not want to participate in the Settlement. The Administrator will exclude you based on any writing communicating your request be excluded. Be sure to personally sign your request, identify the Action as *Kernitzki v. Quality Car Shippers, LLC*, Riverside Superior Court Case No. CVRI2100564, and include your identifying information (full name, address, telephone number, approximate dates of employment, and social security number for verification purposes). You must make the request yourself. If someone else makes the request for you, it will not be valid. **The Administrator must be sent your request to be excluded by [RESPONSE DEADLINE], or it will be invalid.** Section 9 of the Notice has the Administrator's contact information.

## 7. HOW DO I OBJECT TO THE SETTLEMENT?

Only Participating Class Members have the right to object to the Settlement. Before deciding whether to object, you may wish to see what Plaintiff and QCS are asking the Court to approve. At least 16 days before the [REDACTED] Final Approval Hearing, Class Counsel and/or Plaintiff will file in Court (1) a Motion for Final Approval that includes, among other things, the reasons why the proposed Settlement is fair, and (2) a Motion for Fees, Litigation Expenses and Service Award stating (i) the amount Class Counsel is requesting for attorneys' fees and litigation expenses; and (ii) the amount Plaintiff is requesting as a Class Representative Service Award. Upon reasonable request, Class Counsel (whose contact information is in Section 9 of this Notice) will send you copies of these documents at no cost to you. You can also view

them on the Administrator's Website (url) or the Court's website at <https://epublic-access.riverside.courts.ca.gov/public-portal/>.

A Participating Class Member who disagrees with any aspect of the Agreement, the Motion for Final Approval and/or Motion for Fees, Litigation Expenses and Service Award may wish to object, for example, that the proposed Settlement is unfair, or that the amounts requested by Class Counsel or Plaintiff are too high or too low. **The deadline for sending written objections to the Administrator is [RESPONSE DEADLINE]**. Be sure to tell the Administrator what you object to, why you object, and any facts that support your objection. Make sure you identify the Action as *Kernitzki v. Quality Car Shippers, LLC*, Riverside Superior Court Case No. CVRI2100564 and include your name, current address, telephone number, and approximate dates of employment for QCS and sign the objection. Section 9 of this Notice has the Administrator's contact information.

Alternatively, a Participating Class Member can object (or personally retain a lawyer to object at your own cost) by attending the Final Approval Hearing. You (or your attorney) should be ready to tell the Court what you object to, why you object, and any facts that support your objection. See Section 8 of this Notice (immediately below) for specifics regarding the Final Approval Hearing.

#### 8. CAN I ATTEND THE FINAL APPROVAL HEARING?

You can, but don't have to, attend the Final Approval Hearing on (date) at (time) in Department 10 of the Riverside Superior Court, located at 4050 Main Street, Riverside, CA 92501. At the Hearing, the judge will decide whether to grant Final Approval of the Settlement and how much of the Gross Settlement will be paid to Class Counsel, Plaintiff, and the Administrator. The Court will invite comment from objectors, Class Counsel and Defense Counsel before making a decision. You can attend (or hire a lawyer to attend) either personally or virtually via the department's Zoom link, which can be accessed through the Riverside Superior Court's website at <https://www.riverside.courts.ca.gov/PublicNotices/remote-appearances.php>. Check the Court's website for the most current information.

It's possible the Court will reschedule the Final Approval Hearing. You should check the Administrator's website beforehand or contact Class Counsel to verify the date and time of the Final Approval Hearing.

#### 9. HOW CAN I GET MORE INFORMATION?

The Agreement sets forth everything QCS and Plaintiff have promised to do under the proposed Class Action and PAGA Settlement Agreement ("Agreement"). The easiest way to read the Agreement, the Judgment or any other Settlement documents is to go to Simpluris' website at (url). You can also telephone or send an email to Class Counsel or the Administrator using the contact information listed below, or consult the Riverside County Superior Court website by going to <https://epublic-access.riverside.courts.ca.gov/public-portal/> and searching the Case

Number for the Action, Case No. CVRI2100564. The Agreement was filed with the Riverside County Superior Court, located at 4050 Main Street, Riverside, CA 92501, on [preliminary approval filing date] as Exhibit 1 to the Declaration of Greg Taylor in Support of Plaintiff's Motion for Preliminary Approval of Class and PAGA Representative Action Settlement.

**DO NOT TELEPHONE THE SUPERIOR COURT TO OBTAIN INFORMATION  
ABOUT THE SETTLEMENT**

Class Counsel:

Name of Attorney: Taras Kick

Email Address: taras@kicklawfirm.com

Name of Firm: The Kick Law Firm, APC

Mailing Address: 815 Moraga Drive, Los Angeles, CA 90049

Telephone: (310) 395-2988

Settlement Administrator:

Name of Company: Simpluris, Inc.

Email Address: CaseSupport@Simpluris.com

Mailing Address: P.O. Box 26170 Santa Ana, CA 92799

Telephone: (888) 369-3780

**10. WHAT IF I LOSE MY SETTLEMENT CHECK?**

If you lose or misplace your settlement check before cashing it, the Administrator will replace it as long as you request a replacement before the void date on the face of the original check. If your check is already void, you will have no way to recover the money.

**11. WHAT IF I CHANGE MY ADDRESS?**

To receive your check, you should immediately notify the Administrator if you move or otherwise change your mailing address.

# **EXHIBIT 2**

## CODICIL TO THE SETTLEMENT AGREEMENT

1. To the extent that any provisions of the Class Action and PAGA Settlement Agreement and Class Notice (“Settlement”), executed December 23, 2022, are inconsistent with the Court’s Class Action Case Management Order (“CMO”), the parties agree that the terms of the CMO shall govern and supersede the inconsistent terms in the Settlement, provided that such CMO terms do not materially alter the primary terms and conditions of the Settlement (e.g., the gross settlement amount).
2. The parties to the Settlement are specifically amending the definition of “Released Parties” in the Settlement. Rather than the definition stated at paragraph 1.42 of the Settlement, the parties agree on the following modified definition:

“Released Parties” means Defendant Quality Car Shippers, LLC, together with its officers, directors, employees, and agents, including its owners and managing agents.

3. The parties to the Settlement also are specifically amending the “Release by Participating Class Members” in the Settlement. Rather than the language stated at paragraph 5.4 of the Settlement, the parties agree on the following modified release language:

Release by Participating Class Members: All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from all claims that were alleged, or reasonably could have been alleged, based on the facts alleged in the Operative Complaint. Except as set forth in Section 5.5 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers’ compensation, or claims based on facts occurring outside the Class Period.

4. The parties to the Settlement also are specifically amending the “Release by Aggrieved Employees” in the Settlement. Rather than the language stated at paragraph 5.5 of the Settlement, the parties agree on the following modified release language:

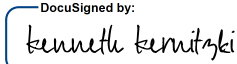
Release by Aggrieved Employees: Plaintiff is deemed to release the Released Parties from all claims for statutory penalties that could have been sought by the Labor Commissioner for the violations identified in Plaintiff’s pre-filing letter to the LWDA and only to the extent such violations are alleged in the Operative Complaint. This release shall bind only Plaintiff and the State of California. Plaintiff does not release any aggrieved employee’s claim for wages or damages.

5. In light of the Court’s preference expressed in the CMO, the parties also agree to amend the terms governing distribution of the value of uncashed checks. Rather than the language stated at paragraph 4.4.3 of the Settlement, the parties agree on the following modified language:

The Parties agree that the value of any uncashed or undeliverable Individual Class Payment checks or Individual PAGA Payment checks will first be redistributed back to those Class Members who have cashed their checks. If, after this second

distribution, any Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall then transmit the funds represented by such checks to the Parties' proposed cy pres recipients, subject to Court approval, without further amendment to the Settlement, consistent with Code of Civil Procedure Section 384, subd. (b) ("Cy Pres Recipients"). The Parties propose that funds represented by any such uncashed or undeliverable checks shall be distributed to two section 501(c)(3) non-profit organizations as follows: 50% to Defendants' nominee St. Christopher Truckers Development & Relief Fund Inc. and 50% to Plaintiff's nominee Public Citizen Foundation. The Parties, Class Counsel and Defense Counsel represent that they have no financial interest in the proposed Cy Pres Recipients and do not have members on the Board of Directors of the organizations, or hold any other governing type relationship with the organizations. Participating Class Members who do not cash their Individual Class Payment and Individual PAGA Payment checks remain bound to the terms of this Agreement.

Date: 3/28/2023

DocuSigned by:  
  
 By: Kenneth Kernitzki  
 Kenneth Kernitzki  
 Plaintiff and Class Representative

Date: 03 / 27 / 2023

*Bethany Billington*  
 By: Bethany Billington  
 For Defendant  
 Bethany Billington  
 President

APPROVED AS TO FORM ONLY:

Date: 3/28/2023

DocuSigned by:  
  
 By: Taras Kick  
 Taras Kick  
 Greg Taylor  
 The Kick Law Firm, APC  
 Attorneys for Plaintiff and the Class

Date: March 27, 2023

  
 By: Victor J. Cosentino  
 Gloria G. Medel  
 Larson & Gaston, LLP  
 Attorneys for Defendant

# **EXHIBIT 3**

# The Kick Law Firm

A Professional Corporation

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815 Moraga Drive  
Los Angeles, CA 90049  
310 395 2988 / Fax 310 395 2088

September 11, 2020

**Via Certified U.S. Mail – Return  
Receipt Requested**

Quality Car Shippers, LLC  
c/o Rebecca Kort  
30056 Point Marina Dr.  
Canyon Lake, CA 92587

**Via Online Submission**

Department of Industrial Relations  
Accounting Unit  
Attn. PAGA Administrator  
455 Golden Gate Ave, 10th Floor  
San Francisco, CA 94102

**Re: Notice Pursuant to California Labor Code § 2699.3**

**Employee:** Kenneth Kernitzki

**Employers:** Quality Car Shippers, LLC and related entities

To Whom It May Concern:

This office represents Kenneth Kernitzki (“Mr. Kernitzki”), who was employed by Quality Car Shippers, LLC and related entities (collectively, “Employers”) as a driver. Pursuant to the California Labor Code Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698, *et seq.*, this letter sets forth the specific provisions of the Labor Code and Industrial Welfare Commission (“IWC”) Wage Order No. 9-2001, which Mr. Kernitzki alleges Employers have violated, including the facts and theories to support the alleged violations. Please be advised that this letter constitutes written notice required by Labor Code § 2699.3, subdivisions (a)(1)(A) and (c)(1)(A) and may lead to immediate action against Employers in a court of law and/or administrative proceedings, as well as the imposition of substantial penalties and other remedies against Employers. Enclosed please find a draft of Mr. Kernitzki’s proposed complaint, which is incorporated by reference into this notice. Under separate cover, our office is sending a check in the amount of \$75.00 to the Accounting Unit of the Department of Industrial Relations for the requisite filing fee, pursuant to Labor Code § 2699.3, subdivisions (a)(1)(B) and (c)(1)(B).

This letter also serves as notice of Mr. Kernitzki’s demand for preservation and non-spoilation of evidence, requesting that all relevant documents and data be saved and that all electronic files and hard-copy documents that are related to Mr. Kernitzki’s employment and potential claims must be preserved, even without a court order. Spoliation of evidence may result in legal claims for damages and monetary and evidentiary sanctions, including “adverse inference” jury instructions. Furthermore, intentional spoliation of evidence may carry criminal consequences pursuant to California Penal Code § 135.

We are investigating a potential class and representative action on behalf of Employers’ current and former non-exempt employees in the State of California regarding, among other things, the following violations: failure to provide meal and rest periods to employees in violation of Labor Code §§ 226.7 and 512 and Wage Order No. 9-2001, §§ 11-12; failure to pay one additional hour of compensation at the employee’s regular rate of compensation for each workday that a meal or rest period is not provided in violation of Labor Code § 226.7 and Wage Order No. 9-2001, §§ 11(B) and 12(B); failure to pay employees minimum wages for all hours worked in violation of

Labor Code §§ 1194, 1197 and 1197.1 and Wage Order No. 9-2001, § 4; failure to pay employees overtime wages in violation of Labor Code §§ 510 and 1194 and Wage Order No. 9-2001, § 3; failure to timely pay employees all wages earned in violation of Labor Code § 204; willful failure to pay all wages due to discharged and quitting employees in violation of Labor Code §§ 201-203; failure to furnish accurate itemized wage statements to employees in violation of Labor Code § 226; failure to maintain required records pursuant to Labor Code §§ 226, 1174 and 1174.5 and Wage Order No. 9-2001, § 7; failure to indemnify employees for necessary expenditures incurred in discharge of duties in violation of Labor Code § 2802(a); failure to provide suitable seating in violation of Labor Code § 1198 and Wage Order No. 9-2001, § 14; unlawful deductions and withholdings from employees' wages in violation of Labor Code §§ 221, 222.5, 223 and 224; and willful misclassification as independent contractors in violation of Labor Code § 226.8.

The allegations made by Mr. Kernitzki on behalf of himself and all other similarly-situated current and former non-exempt employees of Employers (including, but not limited to those employees misclassified as independent contractors) in the State of California during the four years preceding the date of this notice are based on the following facts and theories: meal periods were less than thirty minutes, late (first meal periods starting after the fifth hour of work and/or second meal periods starting after the tenth hour), not given at all (including second meal periods after ten hours of work), or interrupted; rest periods were less than ten minutes, not provided, interrupted, and/or late; employees were not provided one hour of pay for each workday a meal period was not provided; employees were not provided one hour of pay for each workday a rest break was not authorized and permitted; and employees were not paid proper minimum and overtime wages for all hours worked as required by California law.<sup>1</sup> Given the overtime, meal period and rest period violations and Employers' failure to compensate their employees fully, as set forth above, employees' wage statements were inaccurate and failed to comply with California law. In short, Employers' unlawful employment practices and policies have deprived their employees of earned wages and other compensation.

### **Failure to Provide Meal Periods**

Pursuant to Labor Code §§ 226.7 and 512 and Wage Order No. 9-2001, § 11, an employer is required to provide meal periods to its employees. An employer must provide a meal period to any employee who works a shift of more than five (5) hours and a second meal period to any employee who works a shift of more than ten (10) hours. Furthermore, an employer must pay one extra hour of compensation for each workday a meal period is not provided.

If an employee is not relieved of all duty during a meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. A paid "on duty" meal period is permitted only when 1) the nature of the work prevents an employee from being relieved of all duty and 2) the parties have agreed in writing to on duty meal periods.

Mr. Kernitzki and other aggrieved employees are non-exempt employees and are entitled to the protections of California Labor Code §§ 226.7 and 512 and Wage Order No. 9-2001, § 11. Employers failed to provide their employees timely and uninterrupted thirty-minute meal breaks. In fact, Mr. Kernitzki's and other aggrieved employees' meal periods were short (less than thirty

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<sup>1</sup> "[T]he statement that defendant has not provided its employees with proper rest periods states both the facts and the theory." *Gutierrez v. California Commerce Club, Inc.* (2010) 187 Cal.App.4th 969, 979 n.5.

minutes), late (first meal periods after the fifth hour of work and second meal periods after the tenth hour), interrupted and/or missed. Employers consistently failed to provide Mr. Kernitzki and other aggrieved employees meal breaks because Mr. Kernitzki and other aggrieved employees were given too much work to perform to take meal breaks.

Employers further violated Labor Code § 226.7 and Wage Order No. 9-2001 by failing to compensate Mr. Kernitzki and other aggrieved employees who were not provided with meal periods in accordance with California law one additional hour of pay at each employee's regular rate of compensation for each workday a meal period was not provided.

### **Failure to Authorize and Permit Rest Periods**

Pursuant to Labor Code § 226.7 and Wage Order No. 9-2001, § 12, an employer is required to provide rest periods to its employees. An employer must provide a ten (10) minute rest period for every four (4) hours worked or major action thereof which insofar as practicable shall be in the middle of each work period. Furthermore, an employer must pay one extra hour of compensation for each workday a rest period is not authorized and permitted.

Mr. Kernitzki and other aggrieved employees were and are non-exempt employees and are entitled to the protections of Labor Code § 226.7 and Wage Order No. 9-2001. Employers failed to authorize and permit their employees to take required rest periods. Specifically, Employers maintained a policy or practice of not authorizing and permitting Mr. Kernitzki and other aggrieved employees to take one 10-minute rest break for shifts 3.5-6.0 hours, a second rest break for shifts greater than 6 hours and less than or equal to 10 hours, and a third rest break for shifts in excess of 10 hours. Employers consistently failed to authorize and permit Mr. Kernitzki and other similarly-situated individuals to take rest breaks because Mr. Kernitzki and other similarly-situated individuals were given too much work to perform to take rest breaks. When Mr. Kernitzki and other aggrieved employees were able to take rest breaks, Employers failed to authorize and permit Mr. Kernitzki and other aggrieved employees to take their rest breaks in the middle of each work period insofar as practicable.

Employers further violated Labor Code § 226.7 and Wage Order No. 9-2001, § 12 by failing to pay Mr. Kernitzki and other aggrieved employees one additional hour of pay at each employee's regular rate of compensation for each workday a rest period was not authorized and permitted.

### **Failure to Pay Minimum Wages**

Pursuant to Labor Code §§ 1194 and 1197 and Wage Order No. 9-2001, § 4, payment to an employee of less than the applicable minimum wage for all hours worked in a payroll period is unlawful.

Mr. Kernitzki and other aggrieved employees are current and former non-exempt employees and are entitled to the protections of Labor Code §§ 1194 and 1197 and Wage Order No. 9-2001, § 4. Employers failed to pay Mr. Kernitzki and other aggrieved employees minimum wages for all hours worked by, among other things: requiring, suffering or permitting Mr. Kernitzki and other similarly-situated individuals to work off-the-clock; requiring, suffering or

permitting Mr. Kernitzki and other aggrieved employees to work through their meal breaks but not compensating them for this time; illegally and inaccurately recording time worked by Mr. Kernitzki and other aggrieved employees; failing to properly maintain Mr. Kernitzki's and other aggrieved employees' records; failing to provide accurate itemized wage statements to Mr. Kernitzki and other aggrieved employees for each pay period; and other methods to be discovered.

Employers' conduct violates Labor Code §§ 1194 and 1197 and Wage Order No. 9-2001, § 4.

### **Failure to Pay Overtime Wages**

Pursuant to California Labor Code §§ 510 and 1194 and Wage Order No. 9-2001, § 3, an employer must compensate its employees for all overtime, which is calculated at one and one-half (1 ½) times the regular rate of pay for hours worked in excess of eight (8) hours per day and/or forty (40) hours per week, and for the first eight (8) hours on the seventh consecutive work day, with double time for all hours worked in excess of eight (8) hours on the seventh day of any workweek, or after twelve (12) hours in any workday.

Mr. Kernitzki and other aggrieved employees are current and former non-exempt employees and are entitled to the protections of Labor Code §§ 510 and 1194 and Wage Order No. 9-2001. Employers failed to compensate Mr. Kernitzki and other aggrieved employees for all overtime hours worked as required under the foregoing provisions of the Labor Code and IWC Wage Order by, among other things: failing to pay overtime at one and one-half (1 ½) times or double the regular rate of pay as provided by Labor Code §§ 510 and 1194 and Wage Order No. 9-2001, § 3; requiring, suffering or permitting Mr. Kernitzki and other aggrieved employees to work off-the-clock; requiring, suffering or permitting Mr. Kernitzki and other aggrieved employees to work through meal periods but not compensating them for this time; illegally and inaccurately recording time worked by Mr. Kernitzki and other aggrieved employees; failing to properly maintain Mr. Kernitzki's and other aggrieved employees' records through falsifying hours worked; failing to provide accurate itemized statements to Mr. Kernitzki and other aggrieved employees for each pay period; and other methods to be discovered.

In violation of California law, Employers have refused to perform their obligations to compensate Mr. Kernitzki and other aggrieved employees for all wages earned and all hours worked. Employers' conduct violates Labor Code §§ 510 and 1194 and Wage Order No. 9-2001, § 3.

### **Failure to Timely Pay All Wages Earned**

Pursuant to Labor Code § 204, an employer must pay its employees at least twice a month for all wages earned during the preceding pay period. Labor Code § 204 provides that labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. An employer using an alternate payday schedule must pay wages within seven calendar days of the end of the payroll period in which the wages were earned.

Employers failed to pay Mr. Kernitzki and other aggrieved employees on their regularly scheduled payday for all work performed during the preceding pay period. Specifically, Employers required Mr. Kernitzki and other aggrieved employees to work off-the-clock without compensation, including but not limited time spent awaiting loads and/or dispatches, and required Mr. Kernitzki and other aggrieved employees to work through required meal breaks without compensation. Additionally, Employers failed to pay Mr. Kernitzki and other aggrieved employees premium wages owed for each workday a meal period was not provided and each workday a rest period was not authorized and permitted.

Employers also failed to pay Mr. Kernitzki and other aggrieved employees for the overtime wages they earned in violation of Labor Code § 204. Labor Code § 204 requires an employer to pay overtime wages no later than the payday for the next regular payroll period following the payroll period in which the overtime wages were earned. Employers knew they were required to pay overtime wages, yet on many occasions failed to pay Mr. Kernitzki and other aggrieved employees overtime wages on any payday.

### **Failure to Pay All Wages Due Upon Separation**

Pursuant to Labor Code § 201, 202 and 203, an employer is required to pay all earned and unpaid wages to an employee upon separation. Labor Code § 201 mandates that if an employer discharges an employee, the employee's wages accrued and unpaid at the time of discharge are due and payable immediately. Pursuant to Labor Code § 202, an employer is required to pay all accrued wages due to an employee no later than 72 hours after the employee quits his or her employment, unless the employee provided 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

Labor Code § 203 provides that if an employer willfully fails to pay, in accordance with Labor Code §§ 201 and 202, any wages of an employee who is discharged or who quits, the employer is liable for waiting time penalties in the form of continued compensation to the employee at the same rate for up to thirty (30) days.

Employers willfully failed to pay accrued wages and other compensation to Mr. Kernitzki and other aggrieved employees in accordance with Labor Code §§ 201 and 202. Because Employers required Mr. Kernitzki and other aggrieved employees to work off-the-clock without compensation and through required meal breaks without compensation and failed to pay Mr. Kernitzki and other aggrieved employees the premium wages for all meal periods which were not provided and all rest periods which were not authorized or permitted, Employers failed and continue to fail to pay the full earned and unpaid wages due to Mr. Kernitzki and other aggrieved employees upon separation.

### **Failure to Furnish Accurate Itemized Wage Statements**

Labor Code § 226 requires every employer to furnish each of its employees an accurate itemized wage statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits

of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Employers failed to provide Mr. Kernitzki and other aggrieved employees with timely and accurate itemized wage statements in writing showing each employee's gross wages earned, total hours worked, the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, all deductions made, net wages earned, the inclusive dates of the period for which the employee is paid, the name and address of the legal entity or entities employing Mr. Kernitzki and other aggrieved employees, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate, in violation of Labor Code § 226 and Wage Order No. 9-2001, § 7.

Specifically, Employers had knowledge they were not providing their employees with proper meal and rest breaks; nevertheless, Employers knowingly failed to include in the wage statements the extra hour of compensation owed for each workday a meal break was not provided and each workday a rest break was not authorized and permitted. As a result, Mr. Kernitzki and other aggrieved employees lost wages. In addition, Employers had knowledge they were requiring employees to work off-the-clock and were not properly compensating their employees for all hours worked, yet Employers knowingly failed to include this time worked in the wage statements. As a result, Mr. Kernitzki and other aggrieved employees lost wages. Employers also did not properly calculate the regular rate of pay of Mr. Kernitzki and other aggrieved employees. As a result, Mr. Kernitzki's and other aggrieved employees' wage statements did not include all applicable hourly rates in effect during the pay period and the corresponding number of hours worked.

#### **Failure to Maintain Required Records**

Employers failed to maintain records as required under Labor Code §§ 226 and 1174 and Wage Order No. 9-2001, § 7, including but not limited to the following records: total daily hours worked by each employee; applicable rates of pay; all deductions; meal periods; time records showing when each employee begins and ends each work period; and accurate itemized statements.

Specifically, Employers had knowledge they were not providing their employees with proper meal and rest breaks; nevertheless, Employers knowingly failed to include in the wage statements the extra hour of compensation owed for each workday a meal break was not provided and each workday a rest break was not authorized and permitted. In addition, Employers had knowledge they were requiring employees to work off-the-clock and were not properly compensating their employees for all hours worked, yet Employers knowingly failed to include this time worked in the regular rate of pay of aggrieved employees.

#### **Failure to Indemnify Employees for Necessary Expenditures Incurred in Discharge of Duties, and Unlawful Deductions**

Labor Code § 2802(a) requires an employer to indemnify an employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of her his

or her duties, or of his or her obedience to the directions of the employer. Employers failed to indemnify Mr. Kernitzki and other aggrieved employees for all business expenses and/or losses incurred in direct consequence of the discharge of their duties while working under the direction of Employers, including but not limited to expenses for cell phones, equipment, fees, fines, fuel, maintenance, travel-related expenses, and other employment-related expenses, in violation of Labor Code § 2802.

Moreover, Labor Code §§ 221, 222.5, and 223 makes it unlawful to deduct or withhold from employees' wages outside of circumstances specified in Labor Code § 224. Employers, however, made such deductions directly from Mr. Kernitzki and other aggrieved employees' compensation in violation of Labor Code §§ 221, 222.5, 223 and 224. Specifically, such deductions included, but were not limited to deductions for insurance, leased equipment, fuel, and fees. Furthermore, Labor Code § 450 provides that no employer "may compel or coerce an employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of any thing of value."

### **Willful Misclassification as Independent Contractors**

Labor Code § 226.8(a) states in part that it is "unlawful for any person or employer to engage" in the "(1) Willful misclassification of an individual as an independent contractor." Moreover, Labor Code § 226.8(a) goes on to also state that it is similarly "unlawful for any person or employer to engage" in the "(2) Charging an individual who has been willfully misclassified as an independent contractor a fee, or making any deduction from compensation, for any purpose... arising from the individuals employment where any of the acts described... would have violated the law if the individual had not been misclassified." Mr. Kernitzki and other aggrieved employees were willfully misclassified as independent contractors and required to pay, by direct payment and/or deductions from wages, for various goods, materials, space rental, services, government licenses, repairs, equipment maintenance, or fines arising from their employment by Employers in violation of Labor Code § 226.8.

Specifically, Employers willfully misclassified Mr. Kernitzki and other aggrieved employees as independent contractors, "owner-operators" or "lease-operators" to avoid compliance with the California Labor Code and the applicable IWC Orders' wages. Moreover, Employers' willful misclassification made Mr. Kernitzki and other aggrieved employees assume Employers' responsibilities to pay operational expenses, including but not limited to administrative fees, fees for the use of equipment, maintenance, fuel expenses, and the costs of workers' compensation/occupational accident insurance for Mr. Kernitzki and other aggrieved employees. For instance, Mr. Kernitzki and/or other aggrieved employees were required to pay for their own truck, trailer, onboard equipment, fuel, and insurance by paying Employers or a source chosen by Employers, but still were only allowed to transport loads for Employers, were required to take the loads dictated to them, were required to follow the specific delivery instructions provided to them, and to do so for the amount of compensation determined for them by Employers or Employers' dispatchers and other agents.

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This notice is hereby given to Employers and any and all related and/or alter ego companies, corporations, partnerships, and/or business entities, as well as against any and all

officers, owners, directors, managers, managing agents, or entities who are or may be liable under California law for any of the violations alleged herein as to any locations or employees who worked at any time in the State of California.

This notice is made on behalf of all persons who are, were, or will be non-exempt employees of Employers, or any related or alter-ego company, corporation, partnership, and/or business entity at any time on or after a date four years prior to the date of this letter in the State of California.

This notice shall be construed as extending without limitation to any past, present, future, or continuing violation of the Labor Code, the applicable IWC Wage Order, or any applicable regulation which might be discovered as a result of a reasonable and diligent investigation made pursuant to this notice.

**This notice shall further represent Mr. Kernitzki's reasonable attempt to settle his dispute with Employers prior to litigation. Pursuant to *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004), this notice serves to apprise Employers of Mr. Kernitzki's aforementioned grievances and the proposed remedies as detailed below, while affording Employers reasonable opportunity to meet Mr. Kernitzki's demands.**

Demand is hereby made that Employer shall agree, in writing received at this office no later than 30 calendar days from the postmark date of this notice, as follows:

1. Employers shall pay Mr. Kernitzki and all other similarly-situated persons employed by Employers at any time during the past 48 months back pay and compensation for the above-referenced violations.

2. Employers shall comply with all California labor laws and ensure that their non-exempt employees are paid proper overtime compensation and given required meal and rest periods.

3. Employers shall conduct a survey or interview all current and former non-exempt employees in California during the past 48 months to obtain information from them regarding the number of meal breaks which were not provided, the number of rest breaks which were not authorized and permitted, and the number of employees who were required to pay for cell phones, equipment, maintenance, travel-related expenses, fuel, insurance, fines, or other expenditures in the discharge of their duties, with the investigation to be completed within 60 days.

4. Employers shall pay each employee one hour of pay for each workday he or she was not authorized and permitted one or more rest periods, as required by Labor Code § 226.7. Employers also shall pay each employee one hour of pay for each workday he or she was not provided one or more and meal periods, as required by Labor Code § 226.7.

5. Employers shall reimburse those employees who were forced to pay for any business expenses incurred for Employers' benefit, as well as those items employees were compelled and coerced to purchase from Employers or other persons, that include but are not limited to leases, equipment, maintenance, insurance, fuel, fees, fines, phone, and travel-related expenses.

6. Employers shall pay waiting time penalties, equal to thirty days of pay, to each former employee who was not paid all wages due as described herein.

7. Employers shall pay accrued interest to all employees at the rate of ten percent per annum for said unpaid wages.

8. Employers shall pay all penalties arising from the violations of the Labor Code and IWC Wage Order sections referenced above and pursuant to PAGA, Labor Code § 2698 *et seq.*, including but not limited to penalties under Labor Code §§ 206.5, 210, 225.5, 226.3, 558, 1174.5, 1182.12, 1197.1, 1198, 1199 and 2699 and Wage Order No. 9-2001, § 20.

If the Labor and Workforce Development Agency intends to investigate the allegations set forth herein, please notify this office of that decision by certified mail addressed to The Kick Law Firm, APC, 815 Moraga Drive, Los Angeles, CA 90049. Additionally, please advise us if the Agency or Employers require additional information regarding Mr. Kernitzki's complaints.

Thank you for your prompt attention to this matter.

Very truly yours,

**The Kick Law Firm, APC**



Daniel J. Bass