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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN

DANIEL STEPHENSON, an individual, on
behalf of himself and others similarly situated,

PLAINTIFF,

v.

BAKERSFIELD DODGE, INC.; and DOES 1
thru 50, inclusive,

DEFENDANTS.

CASE NO.: BCV-20-102693

[Case Assigned for All Purposes to Hon. Judge
Thomas S. Clark in Dept. 17]

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

*[Filed concurrently with the Declaration of
Kelsey M. Szamet and Proposed Order]*

Date: March 23, 2022

Time: 8:30 a.m.

Dept.: 17

Complaint Filed: November 18, 2020

FAC Filed: February 18, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on March 23, 2022 at 8:30 a.m. in Department 17 of the
3 above-entitled court, Plaintiff DANIEL STEPHENSON will move the Court for an Order of
4 Preliminary Approval of the Stipulation of Class Action Settlement and Release of Claims
5 (“Settlement” or “Agreement”), a copy of which is filed concurrently herewith.

6 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
7 reasonable, and in the best interest of the Class and the Parties.

8 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
9 and Authorities, the Declaration of Kelsey M. Szamet, the Settlement and Release Agreement, all
10 other papers and records on file in this action, and on such oral and documentary evidence as may
11 be presented at the hearing on this Motion.

12
13 DATED: February 28, 2022

KINGSLEY & KINGSLEY, APC

14
15 By: _____

16 Kelsey M. Szamet
17 Attorneys for Plaintiff Daniel Stephenson and the
18 Proposed Class
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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND.....	1
A.	Litigation Overview and Procedural History	1
B.	The Discovery Process.....	2
III.	THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES	3
A.	The Proposed Classes Are Ascertainable and Sufficiently Numerous	4
1.	Ascertainability	4
2.	Numerosity.....	4
B.	There Is a Well-Defined Community of Interest	4
1.	There Are Predominant Questions of Law and Fact.....	4
2.	The Plaintiff Has Claims Typical of the Proposed Class.....	5
3.	Plaintiff Contends That He Has and Will Fairly Represent the Interests of the Settlement Class Members.....	5
C.	The Class Action Vehicle Is Superior to the Alternatives	6
IV.	THE SETTLEMENT	7
A.	The Class Members.....	7
B.	Gross Settlement Amount	7
C.	Process for Administering Settlement after Preliminary Approval	8
D.	Process for Class Members to Respond to Class Notice	8
V.	ARGUMENT	9
A.	Plaintiff Requests Approval of This Class Action Settlement.....	9
1.	The Strength of Plaintiff’s Case.....	9
2.	The Risk, Expense, Complexity, and Likely Duration of Further Litigation	13
3.	The Risk of Maintaining Class Action Status through Trial.....	14
4.	The Amount Offered in Settlement.....	14

1	5.	The Extent of Discovery Completed and Stage of the proceedings	16
2	6.	The Experience and Views of Counsel	17
3	7.	The Presence of a Governmental Participant.....	17
4	8.	The Reaction of the Class Members to the Proposed Settlement	17
5	B.	The Proposed Plan of Allocation Is Fair and Reasonable.....	17
6	C.	The Proposed Notice Fairly Apprises the Class Members of the Terms of the	
7		Settlement and of the Class Members’ Rights under the Settlement.....	18
8	VI.	THE SERVICE AWARD TO THE NAMED PLAINTIFF	19
9	VII.	SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY.	19
10	VIII.	CONCLUSION.....	19

TABLE OF AUTHORITIES

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Bernstein v. Virgin America Inc.,

(9th Cir. 2021) 990 F.3d 1157 19

McKenzie v. Federal Exp. Corp.,

(C.D. Cal. 2011) 765 F. Supp. 2d 1222 14, 16

Officers for Justice v. Civil Service Comm’n,

(9th Cir. 1982) 688 F.2d 615 21

Reinhardt v. Gemini Motor Transport,

(E.D. Cal. 2012 879 F.Supp.2d 1138..... 14

Willner v. Manpower Inc.,

(N.D. Cal. 2014) 35 F. Supp. 3d 1116 16

State Cases

Amaral v. Cintas Corp. No. 2,

(2008) 163 Cal.App.4th 1157 18, 19

Blue Chip Stamps v. Superior Court,

(1976) 18 Cal.3d 381 10

Brinker Restaurant Corp. v. Superior Court,

(2012) 53 Cal.4th 1004 7

Carrington v. Starbucks Corporation,

(2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647..... 16

Cartt v. Superior Court,

(1975) 50 Cal.App.3d 960 21

Collins v. Rocha,

(1972) 7 Cal.3d 232 6, 8

Fireside Bank v. Sup. Court,

(2007) 40 Cal.4th 1069 6, 7

Hicks v. Kaufman & Broad Home Corp.,

1	(2001) 89 Cal.App.4th 908	8
2	<u>Knapp v. AT&T Wireless Services, Inc.,</u>	
3	(2011) 195 Cal.App.4th 932	8
4	<u>Kullar v. Foot Locker Retail, Inc.,</u>	
5	(2008) 168 Cal.App.4th 116	12
6	<u>Linder v. Thrifty Oil Co.,</u>	
7	(2000) 23 Cal.4th 429	6
8	<u>Lockheed Martin Corp. v. Superior Court,</u>	
9	(2003) 29 Cal.App.4th 1096	9, 10
10	<u>Lopez v. Friant & Assocs., LLC,</u>	
11	(2017) 15 Cal. App. 5th 773	15, 16
12	<u>Miller v. Woods,</u>	
13	(1983) 148 Cal.App.3d 862	7
14	<u>Nordstrom Commissions Cases,</u>	
15	186 Cal.App.4th 576 (2010)	17
16	<u>Richmond v. Dart Industries, Inc.,</u>	
17	(1981) 29 Cal.3d 462	6, 10
18	<u>Rose v. City of Hayward,</u>	
19	(1981) 126 Cal.App.3d 926	7
20	<u>Sav-on Drug Stores, Inc. v. Superior Court,</u>	
21	(2004) 34 Cal.4th 319	6, 8
22	<u>Seastrom v. Neways, Inc.,</u>	
23	(2007) 149 Cal.App.4th 1496	8
24	<u>Simons v. Horowitz,</u>	
25	(1984) 151 Cal.App.3d 834	9
26	<u>Trotsky v. L.A. Fed. Sav. & Loan Ass’n,</u>	
27	(1975) 48 Cal.App.3d 134	22
28	<u>Vasquez v. Superior Court,</u>	

1	(1971) 4 Cal.3d 800	10
2	<u>Wershba v. Apple Computer, Inc.</u> ,	
3	(2001) 91 Cal.App.4th 224.....	20
4	<u>State Statutes</u>	
5	Code of Civil Procedure § 382.....	6, 7
6	Labor Code § 226.....	14
7	Labor Code § 226(2)(C).....	14
8	Labor Code § 226(a)	passim
9	Labor Code § 226(a)(2)	8, 13, 14
10	Labor Code § 226(a)(7)	16
11	Labor Code § 226(a)(9)	8, 13, 14
12	Labor Code § 226(e)	passim
13	Labor Code § 226(e)(1)	13, 15, 16, 18
14	Labor Code § 226(e)(2)(B)	13
15	Labor Code § 226.3.....	14
16	Labor Code § 2698.....	15
17	Labor Code § 2699.....	5, 15

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff DANIEL STEPHENSON (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Stipulation of Class
5 Action Settlement and Release of Claims reached between Plaintiff and Defendant
6 BAKERSFIELD DODGE, INC. (“Defendant”).

7 By this Motion, Plaintiff requests that the Court:

8 (1) Grant preliminary approval of the fully-executed Stipulation of Class Action
9 Settlement and Release of Claims (“Settlement Agreement”). A true and correct copy of the
10 Settlement is attached hereto as Exhibit “1”;

11 (2) Approve the proposed Notice of Class Action Settlement (“Notice”) to Class
12 Members, a copy of which is attached to the Settlement Agreement as Exhibit “A,” and direct that
13 the Notice be sent to Class Members in the manner set forth in the Settlement Agreement;

14 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
15 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
16 may be heard (“Final Approval Hearing”).

17 **II. FACTUAL BACKGROUND**

18 A. Litigation Overview and Procedural History

19 On November 18, 2020, Plaintiff filed a notice with California’s Labor and Workforce
20 Development Agency (“LWDA”) regarding his intent to file an action seeking civil penalties under
21 the Labor Code Private Attorney General Act of 2004, § 2699, et seq. (“PAGA”). (Declaration of
22 Kelsey M. Szamet (“Szamet Decl.”) ¶ 4.) On November 18, 2020, Plaintiff DANIEL
23 STEPHENSON filed a Class Action Complaint entitled *DANIEL STEPHENSON, an individual,*
24 *on behalf of himself and others similarly situated v. BAKERSFIELD DODGE, INC.*; and Does 1
25 thru 50, inclusive, Case No. BCV-20-102693 in the Kern County Superior Court (“Action” or
26 “Lawsuit”). (*Id.* at ¶ 5.) The Action alleges two claims: (1) failure to issue accurate itemized wage
27 statements in compliance with Labor Code §226(a); and (2) violations of Labor Code section 2699,
28 *et seq.* (“PAGA”). (*Id.* at ¶ 6.)

1 On February 18, 2021, Plaintiff filed the First Amended Complaint (“FAC”), adding his
2 PAGA claim, after the pre-filing notice period had lapsed. (*Id.* at ¶ 7.)

3 B. The Discovery Process

4 Once the matter was at issue, the Parties immediately began to engage in informal
5 discovery and direct settlement negotiations to understand the nature of the allegations and the
6 scope of potential liability. (Szamet Decl. ¶ 8.) Defendant provided Plaintiff’s counsel with
7 pertinent class data and the number of pay periods during the liability period. (Szamet Decl. ¶ 9.)
8 Plaintiff learned that the number of class members was approximately 98 (including Plaintiff) and
9 there was a maximum of 2,018 pay periods during the Covered Period¹ that are at issue. (*Id.* at ¶
10 10.)

11 Defendant denies any liability or wrongdoing of any kind associated with the claims
12 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
13 that, for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or
14 representative action treatment. (Szamet Decl. ¶ 11.) Defendant contends, among other things,
15 that, at all times, it has complied with the California Labor Code, and the Industrial Wage
16 Commission Orders. (*Ibid.*)

17 Based on their own independent investigation and evaluation, Class Counsel is of the
18 opinion that the Settlement with Defendant is fair, reasonable, adequate, and in the best interest of
19 the class members in light of all known facts and circumstances, including the risk of significant
20 delay, defenses asserted by Defendant, uncertainties regarding a class and representative action
21 trial on the merits, and numerous potential appellate issues. (Szamet Decl. ¶ 12.) Although
22 Defendant denies any liability, Defendant is agreeing to this Settlement solely to avoid the cost of
23 litigation. (*Ibid.*) Accordingly, the Parties and their counsel desire to fully, finally, and forever
24 settle, compromise and discharge all disputes and claims arising from or relating to the Action on
25 the terms set forth here. (*Ibid.*)

26 ///

27
28 ¹ The “Covered Period” means the period from November 18, 2019 through March 25, 2021.
(Settlement Agreement, Ex. 1 § I, ¶ 6.)

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever “the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court...” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069, 1078.) They serve an important function by “establishing a technique whereby the claims of many individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.)

The certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440.) A court ruling on a certification motion must determine “whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.) The California Supreme Court has identified three certification requirements: (1) “the existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of interest”; and (3) “substantial benefits from certification that render proceeding as a class superior to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) The “community of interest” requirement includes three additional requirements: (1) common questions of law or fact predominant over individual questions; (2) the class representatives have claims or defenses typical of the class; and (3) the class representatives can adequately represent the class. (*Ibid, citing Fireside Bank, supra*, 40 Cal.4th at 1089.)

Class certification for settlement purposes is proper in this case as the proposed Settlement Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this

1 Court should certify the putative settlement class.

2 A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

3 1. Ascertainability

4 Putative class members are deemed “ascertainable” when they may be “readily identified
5 without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward*
6 (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court
7 scrutinizes the class definition, the size of the class and the means of identifying class members.
8 (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Here, Plaintiff maintains that the proposed
9 Settlement Class is ascertainable because Defendant’s records demonstrate which employees were
10 subject to an alleged violation, and Defendant has agreed to provide the settlement administrator
11 with each Settlement Class Member’s full name, last known address, social security or other
12 identifying number, and number of relevant pay periods. (Szamet Decl. ¶ 13; Ex. 1 at § I, ¶ 4.)

13 2. Numerosity

14 There is no set number that is required as a matter of law to maintain a class action. (*See*
15 *e.g., Rose, supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Settlement Class contains
16 approximately 98 hourly employees. (Szamet Decl. ¶ 14.) Therefore, the proposed Settlement
17 Class is ascertainable and sufficiently numerous. (*Id.* at ¶ 15.)

18 B. There Is a Well-Defined Community of Interest

19 1. There Are Predominant Questions of Law and Fact

20 In deciding whether questions of common or general interest predominate, a court must
21 determine whether “the issues which may be jointly tried, when compared with those requiring
22 separate adjudication, are so numerous or substantial that the maintenance of a class action would
23 be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d
24 232, 238; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a general
25 matter, if the defendant’s liability can be determined by facts common to all members of the class,
26 a class will be certified even if the members must individually prove their damages.” (*Hicks v.*
27 *Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *Knapp v. AT&T Wireless*
28 *Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

1 Here, Plaintiff argues that there are questions of law and fact common to the proposed
2 Settlement Class that predominate over any questions affecting only individual Class Members.
3 (Szamet Decl. ¶ 16.) Plaintiff alleges that Settlement Class Members worked in the same capacity
4 for the same employer and were subject to the same relevant employment policies and practices,
5 namely the uniform failure to provide compliant itemized wage statements under Labor Code §
6 226(a)(2) and (9) by failing to include the total hours worked by Class Members, the corresponding
7 rates and the number of hours worked at each corresponding rate during the pay period. (Szamet
8 Decl. ¶ 17.) For purposes of settlement, Plaintiff contends that the evidence reviewed by Class
9 Counsel demonstrates that common wage policies applied to the proposed Settlement Class
10 Members and certification for settlement purposes is appropriate. (Szamet Decl. ¶ 18.)

11 2. The Plaintiff Has Claims Typical of the Proposed Class

12 A putative class representative's claim must be "typical," but not necessarily identical, to
13 the claims of other class members. The test of typicality "is whether other members have the same
14 or similar injury, whether the action is based on conduct which is not unique to the Class
15 Representatives, and whether other class members have been injured by the same course of
16 conduct." (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient
17 that the representative is similarly situated so that he or she will have the motive to litigate on
18 behalf of all class members. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Here,
19 Plaintiff worked for Defendant as a non-exempt hourly employee and contends that he did not
20 receive accurate itemized wage statements because he alleges that Defendant failed to show the
21 total hours worked by Plaintiff, the applicable hourly rates in effect during the pay period, and the
22 corresponding number of hours worked at each hourly rate by Plaintiff. (Szamet Decl. ¶ 19.) Thus,
23 Plaintiff believes that his claims are typical of those of the Settlement Class. (Szamet Decl. ¶ 20.)

24 3. Plaintiff Contends That He Has and Will Fairly Represent the Interests of
25 the Settlement Class Members

26 A putative class representative must show that he or she can adequately represent the class.
27 (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative,
28 through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests

1 of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

2 Plaintiff believes that he is capable of fairly representing and adequately protecting the
3 interests of the proposed Settlement Class Members. (Szamet Decl. ¶ 21.) Plaintiff’s interests in
4 this litigation are coextensive with the interests of the proposed Settlement Class Members. (*Ibid.*)
5 The members of the proposed Settlement Class all worked for Defendant during the relevant time
6 period and incurred the same type of alleged damages with regard to Defendant’s alleged violations
7 of the law. (Szamet Decl. ¶ 22.) Moreover, Plaintiff has agreed to serve as class representative and
8 has retained qualified counsel who is experienced in prosecuting wage and hour class actions.
9 (Szamet Decl. ¶ 23.) This demonstrates Plaintiff’s commitment to bringing about the best possible
10 results for the benefit of the proposed Settlement Class. (Szamet Decl. ¶ 24.) Plaintiff has provided
11 Class Counsel with all necessary and pertinent information. (Szamet Decl. ¶ 25.) Plaintiff has
12 actively participated in this litigation and worked closely with Class Counsel to develop theories
13 of liability. (Szamet Decl. ¶ 26.) Plaintiff was informed of and involved in all of the Settlement
14 negotiations. (Szamet Decl. ¶ 27.) Therefore, Plaintiff believes that he will continue to adequately
15 represent the proposed Settlement Class Members. (Szamet Decl. ¶ 28.)

16 C. The Class Action Vehicle Is Superior to the Alternatives

17 “The ultimate question in every case of this type is whether...the issues which may be
18 jointly tried, when compared with those requiring separate adjudication, are so numerous or
19 substantial that the maintenance of a class action would be advantageous to the judicial process
20 and to the litigants.” (*Lockheed Martin, supra*, 29 Cal.App.4th at pp. 1104–1105.) The California
21 Supreme Court has directed the courts to utilize the class action device to fashion “an effective
22 and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
23 Normally, if the causes of action may be adjudicated in a single proceeding, thereby saving time,
24 reducing waste, and limiting duplication of effort, class certification is superior to individual
25 litigation. (*See, e.g., Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties seek
26 Court approval of a settlement, Plaintiff submits that there is not as much need as in an ordinary
27 motion for class certification to determine that the case can be manageably tried.

28 All the same, Plaintiff maintains that class treatment would be the superior method of

managing this case. A class action is superior to individual litigation “when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In cases such as this, where individual damages may be small, the class action device is the most feasible method of recovery. (*See, e.g. Lockheed Martin, supra*, 29 Cal.4th at p. 1131.) In this regard, Plaintiff contends the superiority of class treatment is evident here because individual pursuit of class members’ claims may not be economically viable. (Szamet Decl. ¶ 29.) The only alternative to certification would be to force over 90 employees to join this action, file individual, uniform actions, or abandon their legal rights altogether. (Szamet Decl. ¶ 30.) Plaintiff maintains that this economic reality could result in a windfall for Defendant if this case were not certified. (Szamet Decl. ¶ 31.)

IV. THE SETTLEMENT

A. The Class Members

For purposes of Settlement, the Class Members are defined as: “all persons who are employed or have been employed as an hourly employee by BAKERSFIELD DODGE, INC., in the State of California who worked one or more pay periods during the Class Period.” (“Class Members”) (Szamet Decl. ¶ 32; Settlement, Ex. 1 at § I, ¶ 5.)

The Covered Period is November 18, 2019 through March 25, 2021. (Szamet Decl. ¶ 33; Ex. 1 at § I, ¶ 6.)

Based on documents and other information produced by Defendant, there are approximately 98 Class Members and there is a maximum of 2,018 pay periods during the Covered Period that are at issue. (Szamet Decl. ¶ 34; Ex. 1 at § III, ¶ 30.)

B. Gross Settlement Amount

As detailed fully in the Settlement Agreement the Settlement provides for Defendant to pay a Gross Settlement Amount of \$50,000.00, which includes the sum of the Individual Settlement Payments, the Class Representative Enhancement, the Class Counsel Award, the PAGA Payment, and the Settlement Administration Costs. (Szamet Decl. ¶ 35; Ex. 1 at § I, ¶ 35.) This is a non-reversionary Settlement, meaning Defendant will pay the Gross Settlement Amount

and no portion will revert to Defendant. (Ex. 1 at § II, ¶ 15.)

The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award, Class Representative Enhancement, Class Counsel's Fees, Class Counsel's Costs, the PAGA Payment, and Settlement Administration Costs. (Szamet Decl. ¶ 36; *Id.* at Ex. 1 at § II, ¶ 15.)

The Parties estimate the amount of the Net Settlement Amount as follows:

Gross Settlement Amount:	\$	50,000.00
Less Class Representative Enhancement:	\$	5,000.00
Less Class Counsel's Fees:	\$	16,666.67
Less Class Counsel's Costs:	\$	3,000.00
PAGA Payment	\$	4,000.00
		<i>(\$3,000.00 to the LWDA and \$1,000.00 to remain in the Net Settlement Amount)</i>
<u>Less Settlement Administrator Costs:</u>	<u>\$</u>	<u>\$5,000</u>
Anticipated Net Settlement Amount	\$	17,333.34

(*Id.* at Ex. 1 at § II, ¶ 15.)

The amount of each Class Member's individual settlement payment will be an individualized amount that is based on the number of Compensable Workweeks during which s/he worked in proportion to the aggregate number of workweeks worked by all Settlement Class Members. (Ex. 1 at § I, ¶ 16; *see also* Ex. A to the Settlement Agreement at pp. 3 [Class Notice].) This individual amount shall be determined according to the formula set forth in the Settlement Agreement (*See* Ex. 1 at § III, ¶ 17; *Id.* at Ex. A to the Settlement Agreement [Class Notice].) The Settlement Agreement provides for a specific and detailed dispute process regarding the dates of employment stated on their Notice of Class Action Settlement. (*See* Ex. 1 at § III, ¶ 9.)

C. Process for Administering Settlement after Preliminary Approval

The detailed Notice Procedure established by the Settlement Agreement will efficiently and accurately ensure that Notice is provided to the Class Members. (Ex. 1 at § III, ¶ 7-8.)

The Parties have agreed to use a reputable third-party claims administrator, ILYM Group, Inc. ("ILYM" or "Settlement Administrator"), to administer the settlement. (Ex. 1 at § I ¶ 33.)

D. Process for Class Members to Respond to Class Notice

As detailed in the Settlement Agreement, Class Members will have an opportunity to request exclusion from the Settlement (*i.e.*, opt out) and to object to the Settlement at the Final

Approval Hearing. (See Ex. 1 at § III ¶ 11-12; see also Ex. A to the Settlement Agreement at pp. 2 and 4 [Class Notice].) The Settlement Agreement and Class Notice contain details about the process to request exclusion or object. (*Id.* at Ex. 1 at § III ¶ 11-12; see also Ex. A to the Settlement Agreement at pp. 2 and 4 [Class Notice].)

V. ARGUMENT

A. Plaintiff Requests Approval of This Class Action Settlement

The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, sets forth several factors that the Court should analyze in determining whether to approve a class action settlement. These factors include: (1) the strength of plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

The proposed settlement satisfies each of these factors. Class Counsel conducted informal discovery before entering into meaningful settlement negotiations in this matter. (Szamet Decl. ¶ 37.) This informal discovery and settlement negotiations permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Szamet Decl. ¶ 38.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Settlement. (Szamet Decl. ¶ 39.)

1. The Strength of Plaintiff's Case

a) The Risks Associated with the Wage Statement Claim

Labor Code §226(a) requires, in relevant part:

An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee ... an accurate itemized statement in writing showing ... (2) total hours worked by the employee...(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. (Labor Code §§ 226(a)(2) and (9), respectively.

Here, the gravamen of Plaintiff's complaint is that Defendant violated this provision by issuing itemized wage statements that fail to show the total hours worked by the employee, the

1 applicable hourly rates in effect during the pay period and the corresponding number of hours
2 worked at each hourly rate by the employee in violation of Labor Code §226(a)(2), (9). (Szamet
3 Decl. ¶ 40.)

4 Plaintiff takes the position that a review of the paystubs at issue reveals that Defendant's
5 itemized wage statements simply do not show the required information. Through the informal
6 exchange of information, Defendant has indicated that there are 98 members in the Settlement
7 Class and 2,018 pay periods at issue. Given that, Plaintiff was confident that he could establish
8 that Defendant violated Labor Code § 226(a) on a class wide basis. (Szamet Decl. ¶ 41.) However,
9 there were certainly risks to be weighed. (Szamet Decl. ¶ 42.)

10 (1) The Parties' Staunchly Conflicting Positions

11 Defendant maintained that Plaintiff was required to show injury per the Labor Code § 226
12 (e)(1) and that Plaintiff could not articulate a cognizable injury here. ["An employee suffering
13 injury as a result of a knowing and intentional failure by an employer to comply with subdivision
14 (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay
15 period in which a violation occurs and one hundred dollars (\$100) per employee for each violation
16 in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000),
17 and is entitled to an award of costs and reasonable attorney's fees."] (Szamet Decl. ¶ 43.) In
18 response, Plaintiff maintains that pursuant to Labor Code § 226(e)(2)(B) injury is presumed by
19 virtue of an employer failing to provide a properly itemized wage statement. ["An employee is
20 deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate
21 and complete information as required by any one or more of items (1) to (9), inclusive, of
22 subdivision (a) and the employee cannot promptly and easily determine² from the wage statement
23 alone... information required to be provided".] (Szamet Decl. ¶ 44.)

24 Plaintiff certainly anticipated that Defendant would argue Plaintiff could "promptly and
25 easily" determine the total hours Plaintiff worked, applicable hourly rates in effect during the pay
26 period and the total corresponding number of hours worked at each hourly rate by Plaintiff by

27 ² Lab. Code § 226(2)(C) provides: For purposes of this paragraph, "promptly and easily determine" means a
28 reasonable person would be able to readily ascertain the information without reference to other documents or
information.

1 reviewing Plaintiff's paystubs and completing simple calculations based on the gross wages paid
2 from the face of the wage statement alone. (Szamet Decl. ¶ 45.) Contrary to Defendant's
3 anticipated argument, Plaintiff maintains that Plaintiff would have to look at documents outside
4 the four corners of the wage statement, and have to engage in discovery and perform complex
5 mathematical calculations to reconstruct time records in order to determine if he was correctly paid
6 for all hours worked at the appropriate rate of pay, thus having suffered injury under Section 226.
7 (Szamet Decl. ¶ 46; *Reinhardt v. Gemini Motor Transport* (E.D. Cal. 2012 879 F.Supp.2d 1138;
8 *Ibid.*.) Additionally, Plaintiff maintains that courts have long held that confusion is sufficient to
9 establish injury under this simple standard. (*McKenzie v. Federal Exp. Corp.*, (C.D. Cal. 2011)
10 765 F. Supp. 2d 1222, 1231. Accordingly, Plaintiff perceived little risk that he would not be able
11 to establish injury. (Szamet Decl., ¶ 47.)

12 Most importantly from a risk analysis perspective, however, is Plaintiff's ability to show
13 that any alleged Section 226(a) violation was "knowing and intentional." (Szamet Decl. ¶ 48.)
14 Defendant maintained that if a Court determined that there was any violation, it would be only a
15 technical violation of Labor Code § 226(a)(2) and (9) that did not merit the imposition of penalties.
16 (Szamet Decl. ¶ 49.) Pursuant to Labor Code § 226(e), employees are only entitled to the statutory
17 penalty for a "knowing and intentional failure by an employer to comply with subdivision (a)."
18 Pursuant to Labor Code § 226.3, the Labor Commissioner has the discretion to "decide not to
19 penalize an employer for a first violation when that violation was due to a clerical error or
20 inadvertent mistake." Plaintiff anticipated that at trial, Defendant would argue that any alleged
21 violation was the result of a clerical oversight and, accordingly, Plaintiff could not prove the
22 violation was "knowing and intentional." (Szamet Decl. ¶ 50.) Consequently, if Defendant could
23 make a potentially persuasive argument that if Defendant did not act knowingly or intentionally
24 there would be no penalties available under Labor Code § 226(e) to the Class Members. (Szamet
25 Decl. ¶ 51.) While Class Counsel maintains that it could establish that the alleged violation was
26 "knowing and intentional," nonetheless Class Counsel had to recognize that there was risk that a
27 trier of fact might ultimately be swayed by Defendant's arguments. (Szamet Decl. ¶ 52.)

28 ///

1 b) The Risks Associated with the PAGA Claim

2 California’s Private Attorneys General Act (“PAGA”), Labor Code § 2698, *et seq.*, permits
3 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
4 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
5 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
6 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

7 For the purposes of a PAGA claim under Labor Code section 2699, Plaintiff contends that
8 it is immaterial whether Plaintiff and the aggrieved employees suffered an injury as defined by
9 Labor Code § 226(e). (Szamet Decl. ¶ 53.) Recent case law makes it quite clear that there is no
10 question that, for a PAGA claim, an employer’s failure to include the required information alone
11 triggers liability and entitles Plaintiff and other aggrieved employees to recover civil penalties.
12 (Szamet Decl. ¶54.)

13 In *Lopez v. Friant*, the California Court of Appeal reversed a summary judgment ruling
14 that applied the “knowing and intentional” standard of Labor Code section 226(e) to a Private
15 Attorneys General Act (“PAGA”) claim for violation of section 226(a). The court held that PAGA
16 claims based on wage statement violations are not subject to the statutory penalty requirements of
17 section 226(e)(1). (*Lopez v. Friant & Assocs., LLC* (2017) 15 Cal. App. 5th 773.)

18 As explained in *Lopez*, PAGA was designed to incentivize the enforcement of Labor Code
19 provisions for which there was no private right of action, and to supplement the limited resources
20 of state enforcement agencies. The plaintiff in *Lopez*’s PAGA claim was based on a violation of
21 Labor Code section 226(a)(7), which requires the issuance of wage statements that include either
22 the last four digits of the employee’s social security number, or some other employee identification
23 number. The defendant moved for summary judgment against that predicate violation, arguing
24 that the employer’s failure to include an identification number was not “knowing and intentional”
25 as required for statutory damages or penalties under section 226(e)(1). The trial court granted
26 summary judgment in favor of the defendant. The plaintiff appealed.

27 Plaintiff’s primary argument on appeal was that the “knowing and intentional”
28 requirement under section 226(e) does not apply to a PAGA action based on a wage statement

violation under section 226(a). The appellate court agreed and held: “Because section 226(e)(1) sets forth the elements of a private cause of action for damages and statutory penalties, its requirement that a plaintiff demonstrate “injury” resulting from a “knowing and intentional” violation of section 226(a) is not applicable to a PAGA claim for recovery of civil penalties.” *Id.* at 784.³

Plaintiff discounted the PAGA claim for multiple reasons. First, the aggrieved employees’ PAGA claims are arguably derivative of all the foregoing class claims. (Szamet Decl. ¶55.) Second, and most importantly, a court has discretion to award less than the maximum penalty. (Szamet Decl. ¶56; Labor Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). *See e.g., Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty).⁴ Finally, the Settlement Class is compensated for these violations in the proposed Joint Stipulation of Settlement, and thus any PAGA recovery for these same violations could arguably be construed as duplicative. (Szamet Decl. ¶ 57.) As such, Plaintiff contends that the Settlement’s contemplated PAGA payment of \$4,000 is appropriate. (Szamet Decl. ¶ 58.) *See Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

There is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated settlement now. (Szamet Decl. ¶ 59.) If the

³ *See also McKenzie v. Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1231 [The Court flatly rejected the defendant’s argument and granted summary judgment in favor of Plaintiff on the PAGA claim, concluding that there is no injury requirement whatsoever to prevail on a PAGA violation premised on underlying violations of Labor Code § 226(a)]; *see also Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F. Supp. 3d 1116, 1136 [holding that a plaintiff “is not required to establish injury in order to obtain judgment on this [PAGA] claim. All she needs to establish is a violation of section 226(a), which she has done”].)

⁴ After a trial, Los Angeles Superior Court Complex Judge Ann Jones awarded only \$55,000 in back wages after trial plus \$770,000 in civil penalties which was just 2% of the \$41 million amount workers were seeking in back pay and PAGA penalties. *Sanchez et al. v. McDonald’s Restaurants of California Inc. et al.*, Case No. BC499888

1 Court did eventually certify a class, trial of a case involving approximately 98 Class Members
2 would require the retention of expensive expert witnesses, the accrual of extensive litigation costs,
3 and a significant time overlay by the parties. (Szamet Decl. ¶ 60.) Moreover, given the complexity
4 and unsettled nature of the issues in this case it is likely that any outcome at trial would have
5 resulted in a lengthy and costly appeal. (Szamet Decl. ¶ 61.) An appeal would result in further
6 delay for the Class Members who are waiting for a resolution in this matter. (*Ibid.*)

7 3. The Risk of Maintaining Class Action Status through Trial

8 This case has not been certified to be tried as a class action. (Szamet Decl. ¶ 62.) While
9 Plaintiff believes there is strong evidence to support certification of several classes and subclasses,
10 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
11 decertification is always a possibility. (*Ibid.*) In attempting to certify a class, the Parties would
12 need to conduct multiple depositions, including of the Class Representative and of several
13 person(s) most knowledgeable regarding Defendant's policies. (*Ibid.*) There is a risk for both sides
14 as to what these depositions will reveal and whether they will support class certification to the
15 extent expected. (*Ibid.*)

16 4. The Amount Offered in Settlement

17 It was very difficult for the Parties to reach this Settlement of \$50,000.00. (Szamet Decl.
18 ¶ 63.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
19 (Szamet Decl. ¶ 64.) The Parties arrived at it after extensive informal discovery and settlement
20 negotiations, careful evaluation of the law, risks, and all information substantiating the amount of
21 penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable.
22 (*Ibid.*)

23 a) Plaintiff's Assessment of Defendant's Maximum Exposure

24 As for valuation of the Labor Code § 226(a) claim, Labor Code § 226(e) sets forth the
25 penalty scheme of \$50 for the initial violation and \$100 for each pay period thereafter with a
26 maximum of \$4,000 per employee.⁵ Here, there are approximately 98 Settlement Class Members
27

28 ⁵ Labor Code § 226(e)(1): "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for

1 and 2,108 pay periods at issue. Therefore, Plaintiff contends that the maximum possible penalty
2 would be \$201,750. This amount is comprised of \$100 x 2,018 for each violation at the
3 “subsequent” amount minus the “initial” violation of \$50 so $\$201,800 - \$50 = \$201,750$.

4 There is much debate about whether and when the “initial” versus “subsequent” penalty
5 would attach. The statute’s plain language indicates that an employer will be assessed a lower,
6 “initial” penalty for each initial pay period in which a violation occurs, and a higher, “subsequent”
7 penalty for each subsequent pay period in which a violation occurs. (Lab. Code § 226(e).) In
8 *Amaral*, however, the court held, “Until the employer has been notified that it is violating a Labor
9 Code provision (whether or not the commissioner or court chooses to impose penalties), the
10 employer cannot be presumed to be aware that its continuing underpayment of employees is a
11 ‘violation’ subject to penalties [and will be assessed only the ‘initial’ violation rate].” (*Amaral v.*
12 *Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209.)⁶ This language could be read as
13 indicating that until a court (or possibly the Labor Commissioner) informs an employer that it has
14 violated the Labor Code, the employer can only be assessed the “initial” violation rate. On the
15 other hand, it could be argued that the plain language speaks for itself and “initial” means first and
16 “subsequent” means any itemized wage statements issued thereafter. (Szamet Decl. ¶ 66.) If the
17 maximum penalty amount was limited to the “initial” \$50 per pay period, that would reduce the
18 maximum potential penalty award to \$100,900 ($2,018 \times \$50 = 100,900$).

19 As for the maximum potential exposure on the PAGA claim, if the Court were to award
20 \$100 per pay period, the maximum potential penalty award would be \$201,800 ($2,018 \times \$100 =$
21 $\$201,800$).

22 The main risk taken into account with PAGA is the discretionary nature of the penalty
23 award. (Szamet Decl. ¶ 67.) As discussed above, a judge can award the statutory maximum of \$50
24 for the initial violation and \$100 thereafter or – in theory – one cent per wage statement. (Szamet
25 Decl. ¶ 68.) While there is a dearth of available authority, in Plaintiff’s view it is not likely that a

26 each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000),
27 and is entitled to an award of costs and reasonable attorney’s fees.”

28 ⁶ *Amaral* certainly is not directly on point as it is not discussing the penalty provisions of Labor Code §226(e), but
another Labor Code statute altogether. However, there is a dearth of legal authority and Plaintiff’s Counsel is not
aware of any other case that sheds more light on the issue than *Amaral*. (Szamet Decl. ¶ 65.)

Judge would award the maximum amount of penalties. (Szamet Decl. ¶ 69.)

In addition, the “subsequent” amounts under Labor Code §226(e) and PAGA have recently been called into question. (Szamet Decl. ¶ 70.) Indeed, the most recent authority suggests that the “subsequent” penalty is not available until the employer has received formal “notice” of its violation of the law either through an administrative decision or a court ruling.⁷

Under this new ruling, Defendant would certainly argue that it had not received formal “notice” and the \$50 penalty was the maximum potential amount per pay period. (Szamet Decl. ¶ 71.) Of course, Defendant would certainly argue the same legal analysis applies to the “initial” and “subsequent” amounts available under Labor Code §226(e). (Szamet Decl. ¶ 72.) If Defendant were successful with these arguments, the maximum potential exposure decreases dramatically to \$100,900 for the Labor Code §226(a). Using this figure, the recovery provided for under the settlement represents 49.6% of the maximum potential recovery. Assuming PAGA penalties were not awarded, then the proposed settlement remains 49.6% of the maximum potential recovery.

As a result of this risk and the risks on the merits discussed above, Class Counsel believes the Gross Settlement Amount of \$50,000.00 is fair and reasonable. (Szamet Decl. ¶ 73.)

5. The Extent of Discovery Completed and Stage of the proceedings

As outlined above, Class Counsel conducted a thorough investigation into the facts of the claims alleged. (Szamet Decl. ¶ 74.) The agreement to settle did not occur until Class Counsel

⁷ Most practitioners have been calculating the heightened penalties of PAGA by assuming that the initial violation was \$100 and that any later violation was a “subsequent” violation automatically resulting in a \$200 penalty per aggrieved employee per pay period. A recent Ninth Circuit ruling, however, has potentially reduced this exposure for heightened penalties by holding that the \$200 subsequent penalty cannot be assessed until the employer has “notice” it is violating the Labor Code section at issue.

In *Bernstein v. Virgin America Inc.* (9th Cir. 2021) 990 F.3d 1157, the Ninth Circuit, applying California law, held that simply violating a Labor Code section again after an initial violation does not automatically establish a subsequent violation as contemplated by PAGA. Rather, the “subsequent” violation requires the employer to be notified it is in violation of the section, either through an administrative decision or a court ruling. (*Bernstein*, *supra*, at 1172.)

The *Bernstein* Court cited the decision in *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 614, applying the “good faith” defense to the imposition of penalties. The court explained that “when an employer presents a defense based in law or fact which, if successful, would preclude any recovery on the part of the employee,” the employer cannot be presumed to be aware that its continuing conduct is a violation subject to penalties. (*Bernstein*, *supra*, at 1172-1173 [quoting and citing *Amaral*, *supra*, at 614].)

1 exchanged and possessed sufficient information to make an informed judgement regarding the
2 likelihood of success on the merits and the results that could be obtained through further litigation.
3 (*Ibid.*)

4 6. The Experience and Views of Counsel

5 Finally, Class Counsel’s experience and success in similar class actions also weigh in favor
6 of preliminary approval. (*See Wershba, supra*, 91 Cal.App.4th at 245.) Kingsley & Kingsley, APC
7 is experienced in prosecuting complex employment litigation, and the firm has focused its practice
8 since the year 2000 on complex wage, hour, and working condition violations. (Szamet Decl. ¶¶
9 75-76.) The firm is well versed in class action litigation and has diligently and aggressively pursued
10 this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens of
11 pending class action lawsuits in Northern, Central, and Southern California. (*Ibid.*) A list of
12 representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying
13 declaration of Kelsey M. Szamet. (*Ibid.*) After factoring in the risks explained above, Class
14 Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶ 78.)

15 7. The Presence of a Governmental Participant

16 There is no governmental participant in this action except, arguably, the LWDA as there is
17 a PAGA claim at issue. (Szamet Decl. ¶ 79.)

18 8. The Reaction of the Class Members to the Proposed Settlement

19 Since the proposed settlement is only at the preliminary approval stage, Notice has not
20 yet been disseminated to the Class. (Szamet Decl. ¶ 80.) Nonetheless, Plaintiff has every reason
21 to believe the proposed Settlement will be well received by the Class. (Szamet Decl. ¶ 81.) At
22 the final approval state, Plaintiff will provide detailed information regarding the reaction of the
23 Class to the proposed Settlement. (Szamet Decl. ¶ 82.)

24 B. The Proposed Plan of Allocation Is Fair and Reasonable

25 Plans of allocation are subject to the same standard of review as class action settlements;
26 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*
27 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
28 compensates Class Members pro rata based on the number of Compensable Workweeks during

1 which s/he worked in proportion to the aggregate number of workweeks worked by all Settlement
2 Class Members. (Ex. 1 at § I ¶ 16.) This allocation distributes Settlement funds proportionally to
3 each Class Member’s potential damages and should therefore be approved as fair, adequate, and
4 reasonable. (Szamet Decl. ¶ 83.)

5 C. The Proposed Notice Fairly Apprises the Class Members of the Terms of the
6 Settlement and of the Class Members’ Rights under the Settlement

7 Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The
8 standard for determining the adequacy of notice is whether the notice has “a reasonable chance of
9 reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50
10 Cal.App.3d 960, 974.) Pursuant to the Settlement Agreement, the Notice will be sent to the last
11 known address of all Class Members, or to an updated address if one is located in the National
12 Change of Address Database. (Ex. 1 at § III ¶ 7.) If any Notices are returned as undeliverable, the
13 Administrator will undertake another reasonable address verification measure, *i.e.* skip-tracing, or
14 other search using the name, address and/or social security number of the Settlement Class
15 Member whose notice was undeliverable, to locate a valid mailing address and will promptly send
16 the Notice to the new address within ten (10) days of receiving notice that a notice was
17 undeliverable. Settlement Class members who receive a re-emailed Notice of Class Action
18 Settlement shall have their Response Deadline extended twenty (20) days from the original
19 Response Deadline. (Ex. 1 at § III ¶ 8.) As such, the Notice is likely to reach most, if not all, Class
20 Members.

21 With respect to the contents of the Notice, the “notice given to the class must fairly apprise
22 the class members of the terms of the proposed compromise and of the options open to dissenting
23 class members.” (*Trotsky v. L.A. Fed. Sav. & Loan Ass’n* (1975) 48 Cal.App.3d 134, 151–52.)
24 The purpose of a class notice is to give class members sufficient information to decide whether
25 they should accept the benefits offered, opt out and pursue their own remedies, or object to the
26 settlement. (*Ibid.*)

27 Here, the Notice clearly explains the proposed Settlement and the options to opt out of the
28 Settlement or object to it at the Final Approval Hearing. (Ex. 1 at § III ¶¶ 11-12.) In short, the

1 Court should approve the proposed Class Notice because it describes the proposed settlement with
2 enough specificity to allow Class Members to make an informed choice regarding whether to
3 participate.

4 **VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF**

5 Class Counsel requests an enhancement for Plaintiff's effort and time expended in this
6 matter. (Szamet Decl. ¶ 84.) The time spent by DANIEL STEPHENSON includes providing
7 information to Class Counsel regarding the nature of the work at BAKERSFIELD DODGE, INC.,
8 compiling documents, meeting with his attorneys to discuss the status of the case, the theories of
9 liability, and responding promptly to Class Counsel's communications regarding settlement.
10 (*Ibid.*) Thus, in addition to the sums paid to Class Members, Plaintiff requests a proposed litigation
11 enhancement in the amount of \$5,000.00, to be paid from the Gross Settlement Amount. (Ex. 1,
12 § III ¶ 21.)

13 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶ 85.)
14 The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in
15 coming forward to litigate this matter on behalf of all Class Members. (*Ibid.*) Plaintiff will provide
16 a detailed declaration with the Final Approval Motion detailing his participation and further
17 justification for the enhancement. (*Ibid.*)

18 **VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

19 As indicated on the Proof of Service, Plaintiff's Motion for Preliminary Approval of Class
20 Action Settlement ("Motion") will be concurrently uploaded to LWDA website on the date this
21 Motion is filed as required by statute. Proof of submission of Plaintiff's Motion, all related
22 documents, and copy of the email from the LWDA confirming receipt is attached to the
23 Declaration of Kelsey M. Szamet as Exhibit "2." (Szamet Decl. ¶ 86.)

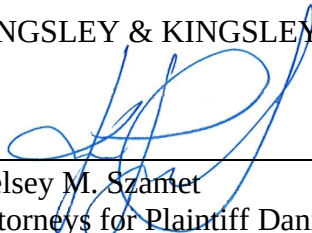
24 **VIII. CONCLUSION**

25 Plaintiff respectfully submits that the proposed Settlement is fair, adequate, reasonable, and
26 in the best interest of the Class Members. Therefore, the Parties respectfully request that the Court
27 (1) grant preliminary approval of the Stipulation of Class Action Settlement and Release of Claims,
28 and all of its terms; (2) approve the proposed form of notice, and direct that the Notice be sent to

1 Class Members in the manner set forth in the Stipulation of Class Action Settlement and Release
2 of Claims; and (3) schedule a hearing on final approval of the Settlement and Class Counsel's
3 application for an award of attorney's fees and litigation costs.

4
5 DATED: February 28, 2022

KINGSLEY & KINGSLEY, APC

6
7 By: 

8 Kelsey M. Szamet
9 Attorneys for Plaintiff Daniel Stephenson and the
10 Proposed Class
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(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On February 28, 2022, I served all interested parties in this action the following documents described as: **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

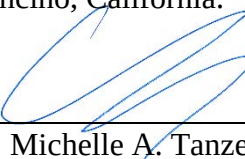
Daniel K. Klingenberg dklingenberger@lebeauthelen.com LeBeau Thelen LLP 5001 E. Commercenter Drive, Suite 300 P.O. Box 12092 Bakersfield, CA 93389-2092	Emil Davtyan emil@davtyanlaw.com Davtyan Law Firm, Inc. 880 E. Broadway Glendale, CA 91205
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[XX] (BY ELECTRONIC MAIL TRANSMISSION): I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 28, 2022, at Encino, California.



Michelle A. Tanzer