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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

STEVEN KANE, on behalf of
himself and other similarly-situated
employees,

Plaintiff,

vs.

SMITHFIELD DIRECT, LLC, a
Delaware Limited Liability
Company; and DOES 1 through 10,
inclusive,

Defendants.

CASE NO. 21-CV-04832 PA (JCx)

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR ORDER
GRANTING FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
ENTERING JUDGMENT**

Date: August 1, 2022

Time: 1:30 p.m.

Judge: Percy Anderson

Ctrm.: 9A

Filed: April 12, 2021

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THE PARTIES	1
A. Defendant, Smithfield Direct, LLC	1
B. Plaintiff, Steven Kane	1
C. The Class and Aggrieved Employees	3
D. Smithfield's Contentions and Affirmative Defenses	3
III. PROCEDURAL HISTORY	5
IV. DISCOVERY CONDUCTED PRIOR TO MEDIATION	6
V. MEDIATION	7
VI. SETTLEMENT, PRELIMINARY APPROVAL, AND CLASS NOTICE	8
A. Settlement Terms	8
B. Preliminary Approval.....	10
C. Dissemination of Court-Approved Class Notice	10
VII. CLASS CERTIFICATION SHOULD BE GRANTED FOR PURPOSES OF FINAL APPROVAL	11
VIII. FINAL APPROVAL SHOULD BE GRANTED	11
A. Class Action Settlements are Subject to Court Review	11
B. The Settlement Is Fair, Adequate, and Reasonable	11
C. Class Notice Has Been Effectuated and Comports with Rule 23 and Due Process	12
D. The Settlement is Entitled to the Presumption of Fairness	13
IX. CONCLUSION	14

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Bell v. H.F. Cox, Inc.</i> 209 Cal.App.4th 62 (2012)	4
<i>Boyd v. Bechtel Corp.</i> 485 F. Supp. 610, 624 (N.D. Cal. 1979)	14
<i>Brown v. American Honda Motor Co., Inc.</i> 2010 U.S. Dist. Lexis 145475 (C.D. Cal. July 29, 2010).....	14
<i>Collins v. Overnite Transp. Co.</i> 105 Cal.App.4th 171 (2003)	3
<i>Dunleavy v. Nadler</i> 213 F.3d 454 (9th Cir. 2000)	11
<i>Garner v. State Farm Auto Ins. Co.</i> 2010 U.S. Dist. Lexis 49477 (N.D. Cal. Ap. 22, 2010)	12
<i>Hanlon v. Chrysler Corp.</i> 150 F.3d 1011 (9th Cir. 1998)	11
<i>In re: Omnivision Techs.</i> 559 F. Supp.2d, 1036 (N.D. Cal. 2007)	13
<i>Int’l Bhd of Teamsters, Local 2785 v. FMCSA</i> 986 F. 3d 841(9th Cir. 2021)	4
<i>Linney v. Cellular Alaska Partnership</i> 151 F.3d 1234 (9th Cir. 1998)	11
<i>Martin v. AmeriPride Servcs.</i> 2011 U.S. Dist. Lexis 61796 (S.D. Cal. June 9, 2011)	13
<i>Mullane v. Central Hanover Bank and Trust Co.</i> 339 U.S. 306 (1950)	12
<i>Murillo v. Pac. Gas & Elec. Co.</i> 266 F.R.D. 468, 473 (E.D. Cal. 2010)	2
<i>Nieto v. Fresno Beverage Co., Inc.</i> 33 Cal.App.5th 274 (2019)	4

1	<i>Officers for Justice v. Civil Serv. Comm'n</i>	
2	688 F. 2d 615 (9th Cir. 1982), cert. den. (1983) 459 U.S. 1217	11, 12
3	<i>Rodriguez v. West Publishing Corp.</i>	
4	2007 U.S. Dist. LEXIS 74849 (C.D. Ca. Sept. 10, 2007).....	13
5	<i>Rodriguez v. West Publ'g Corp.</i>	
6	563 F.3d 948 (9th Cir. 2009)	11
7	<i>Saulic v. Symantec Corp.</i>	
8	596 F. Supp.2d 1323 (C.D. Cal. 2009).....	12
9	<i>Staton v. Boeing Co.</i>	
10	327 F. 938, 952 (9th Cir. 2003).....	11

STATUTES AND REGULATIONS

		<u>Page</u>
13	<u>California Code of Regulations</u>	
14	8 § 11070(2)(J)	4
15	<u>California Labor Code</u>	
16	§ 510	4
17	§ 1171	4
18	<u>Federal Rules of Civil Procedure</u>	
19	Rule 23.....	12, 14
20	Rule 23(a)	11
21	Rule 23(b)(3)	11
22	Rule 23(c)(2)(B)	12
23	Rule 23(e)	11, 12
24	Rule 23(e)(1).....	12
25	Rule 26(a)	6
26	<u>United States Code</u>	
27	28 U.S.C. §1132(a)	5
28	28 U.S.C. §1367(a)	5
	28 U.S.C. §1441.....	5
	29 U.S.C. §213(b)(1)	4
	49 U.S.C. §31136	3
	49 U.S.C. §31141	3
	49 U.S.C. §31502	4

MISCELLANEOUS AUTHORITIES

Page

<u>Herbert Newberg & Alba Conte 4 Newberg on Class Actions, vol. 4 (5th ed. 2014)</u>	
§ 13:39, et seq.....	12
<u>Manual for Complex Litigation (4th ed. 2004)</u>	
§ 21.61	4

I. INTRODUCTION

Plaintiff Steven Kane, individually and on behalf of the Conditionally Certified Class, moves for final approval of a \$350,000.00 non-reversionary, pre-certification wage and hour class and representative action Settlement (“Gross Settlement Amount” or “GSA”), paying an estimated \$176,603.37 (“Net Settlement Amount” or “NSA”) to 47 Class Members employed as Route Sales Representatives or Relief Route Sales Representatives (“RSRs”) in California at any time between April 12, 2017 and November 30, 2020. Declaration of J. Jason Hill, (“Hill Decl.”), ¶10; Supplemental Declaration of Irvin Garcia, on behalf of CPT Group, Inc., (Supp. CPT Decl.), ¶15.

The Settlement was preliminarily approved on December 29, 2021. Dkt. 37. On February 16, 2022, the Court-approved Notice Packet (consisting of the Notice of Class Action Settlement, Change of Address form, and pre-printed return envelope) was sent to Class Members informing them of their rights and benefits under the Settlement, including the estimated amount of their Settlement Payments if they did not request exclusion, and the April 18, 2022 deadline to dispute workweeks, request exclusion, or object to the Settlement. An extended deadline of May 3, 2022 was provided to Class Members whose Notice Packets were remailed to an updated mailing address. Hill Decl. ¶¶11, 34, 35; Supp. CPT Decl. ¶¶6-9.

Support for the Settlement is strong. No Class Member objected or requested exclusion. Supp. CPT Decl. ¶¶11, 12. The proposed Settlement will pay Class Members based on tenure using the number of weeks worked during the Class Period, paying Class Members on average \$3,757.52 and highest payments of \$6,473.63. Those Class Members who worked during the PAGA Period will also receive a proportional share of the \$3,750 PAGA Payment paying on average \$79.79 and highest PAGA Payment estimated at \$158.57. Hill Decl. ¶¶12, 35; Supp. CPT Decl. ¶¶16, 17.

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II. THE PARTIES

A. Defendant, Smithfield Direct, LLC

Smithfield Direct, LLC (“Smithfield”) supplies packaged meat products to stores throughout the United States, including California. During the April 12, 2017 through November 30, 2020 Class Period, Smithfield operated out of only two branches in California, in Fresno and Ontario, and employed RSRs in both those locations. Smithfield closed both branches in November 2020 and ceased operations in those locations.

B. Plaintiff, Steven Kane

Plaintiff Steven Kane was employed by Smithfield as an RSR at Smithfield’s Ontario, California location for nearly five years, from November 30, 2015 through November 13, 2020. Plaintiff contends that, throughout the Class Period, his job entailed driving, delivering and stocking products to, and taking back expired products from, large commercial retailers in California such as Dollar General, Big Lots, local food markets, and other chain stores. Hill Decl. ¶13. Declaration of Steven Kane filed in Support of Class Certification, (Kane Cert. Decl.), Dkt. 27-14. Smithfield disagrees that these were Kane’s only job duties, and views the RSR as an outside sales representative, charged with maintaining and developing business in his or her territory. (See Section D, below.)

Smithfield paid Plaintiff, and other RSRs, a base hourly rate of \$10.00 to \$10.50 per hour, plus the greater of a \$425.00 commission or actual commissions earned each workweek. Including these commissions, RSRs were paid at least minimum wage for all hours worked. Hill Decl. ¶14. Plaintiff alleges that during his tenure with Smithfield, there were only three instances where he earned commissions from sales greater than the \$425.00 minimum weekly commission. Dkt. 27-14, ¶¶9, 15. Other Class Members contend they had similar experiences. Dkt. 27-15, ¶¶4, 6 (Victor Davila Decl); Dkt. 27-16, ¶¶4, 7 (David Gillum Decl).

Hill Decl. ¶15. Smithfield disagrees and contends that most weekly commission payments for RSRs exceeded the guaranteed minimum.

C. The Class and Aggrieved Employees

The proposed Class is defined as all individuals employed by Smithfield in California as hourly Route Sales Representatives or Relief Route Sales Representatives during the Class Period, April 12, 2017 through November 30, 2020. Stipulation of Class Action and PAGA Settlement and Release of Claims, Dkt. 34-3, (“SA”), ¶7. There are 47 Class Members, including Plaintiff, who worked 5,156 weeks during the Class Period. Supp. CPT Decl. ¶16. A subset of the Class, PAGA Members, were employed for at least some period during the March 7, 2020 through November 30, 2020 PAGA Period. SA ¶¶26, 28. There are 28 PAGA Members with 875 Pay Periods¹ during the PAGA Period. Hill Decl. ¶¶16, 17; Supp. CPT Decl. ¶17.

D. Smithfield’s Contentions and Affirmative Defenses

Smithfield denies Plaintiff’s allegations and continues to deny Plaintiff, or any other Class Member, is entitled to any relief whatsoever. Smithfield denies it violated California law and maintains it fully complied with the law at all times. Smithfield contends Plaintiff and other RSRs were timely provided all compensation as required by law.

Smithfield contends Plaintiff and the proposed Class were exempt from California’s overtime laws under state law and the Federal Motor Carrier Safety Act of 1984, 49 U.S.C. §§ 31136, 31141 (FMCSA). Smithfield contends that Industrial Welfare Commission (“IWC”) Wage Orders expressly exempt drivers of trucks that weigh over 26,000 pounds, like Plaintiff and the Class, from California’s overtime requirements. *See, e.g.*, IWC Wage Order No. 9-2001 at sec. 3, sub. (L); *see also* D.L.S.E. Opinion Letter 1996.07.10; *Collins v. Overnite*

¹Class Members were paid weekly during the Class Period, so Pay Periods and Work Weeks are the same period of time. SA ¶29.

1 *Transp. Co.*, 105 Cal.App.4th 171, 177-180 (2003) (recognizing that truck drivers
2 are exempt from the overtime rules of Labor Code section 510). Drivers of trucks
3 weighing between 10,000 and 26,001 pounds are similarly exempt from
4 California's overtime laws if the goods that they are carrying are transported
5 across states—regardless of whether or not the drivers or trucks, themselves, also
6 cross state lines. 29 U.S.C. § 213(b)(1); 49 U.S.C. § 31502; see *Bell v. H.F. Cox,*
7 *Inc.*, 209 Cal.App.4th 62, 79-80 (2012); *Nieto v. Fresno Beverage Co., Inc.*, 33
8 Cal.App.5th 274, (2019). Smithfield contends Plaintiff and the Class are exempt
9 from California's overtime laws because they all drove trucks weighing over
10 26,001 pounds, and were engaged in interstate commerce as the goods they
11 delivered in California originated from out of state.

12 Smithfield also contends Plaintiff and the Class were exempt from
13 California's meal and rest break laws. The Ninth Circuit has held that federal law
14 preempts California's meal and rest break laws as applied to drivers of property-
15 carrying commercial motor vehicles who are subject to FMCSA safety
16 regulations. *International Brotherhood of Teamsters, Local 2785 v. Federal*
17 *Motor Carrier Safety Administration*, 986 F.3d 841 (9th Cir. 2021); see
18 *California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers*,
19 83 Fed. Reg. 67470-01, 2018 WL 6809341 (Dec. 28, 2018). Smithfield contends
20 that as drivers of commercial motor vehicles weighing 10,001 lbs. or more in
21 interstate commerce, Plaintiff and the Class are subject to FMCSA safety
22 regulations and thus, are exempt from California's meal and rest break laws.

23 Smithfield also contends the Class was exempt from California's overtime
24 and meal and rest break laws under the outside sales exemption, as the RSRs spent
25 nearly all of their working time on commercial trucks and on-site with customers,
26 selling and delivering products. See 8 CCR § 11070 at 2(J); Cal. Labor Code §
27 1171. Finally, because Plaintiff's claims for overtime, rest and meal break
28 premiums fail, Defendant contends so do the derivative claims for inaccurate

1 wage statements and untimely final wages.

2 **III. PROCEDURAL HISTORY**

3 On February 22, 2021, Plaintiff filed charges with the Labor and Workforce
4 Development Agency alleging various violations of the Labor Code. On April 12,
5 2021, Plaintiff filed a complaint in the Superior Court of California, County of
6 Los Angeles, entitled *Steven Kane v. Smithfield Direct, LLC.*, Case No.
7 21STCV13736. Plaintiff alleged Smithfield (1) failed to pay for all time worked
8 while clocked out for meal periods; (2) failed to properly pay overtime wages,
9 premium wages for non-compliant meal and rest periods, and sick leave pay
10 because Smithfield did not properly calculate the Class Members' regular rate
11 pay; (3) failed to maintain a compliant meal and rest period policy; and derivative
12 claims for (4) inaccurate wage statements and (5) untimely final wages. Without
13 indication from the LWDA that it intended to investigate Plaintiff's charges, on
14 May 11, 2021, a First Amended Class Action Complaint (FAC) was filed adding
15 claims for civil penalties arising under PAGA.

16 On June 14, 2021, Defendant removed the Action to this Court under 28
17 U.S.C. § 1441 and 28 U.S.C. § 1332(a), and for supplemental jurisdiction under
18 28 U.S.C. § 1367(a), alleging diversity of citizenship and that the individual
19 amount in controversy was \$75,000.00 or more. Dkt. 1. Smithfield answered the
20 FAC on June 21, 2021. Dkt. 10. Plaintiff filed a motion to remand the Action to
21 state court on July 14, 2021. Dkt. No. 13. The Court denied the motion on August
22 3, 2021, with a finding Defendant had satisfied its burden to establish diversity
23 jurisdiction. Dkt. 25.

24 On October 12, 2021, following an exchange of written discovery, Initial
25 Disclosures, and depositions taken, Plaintiff filed his motion to certify a class of
26 individuals employed by Smithfield as Route Sales Representatives. Dkt. 27. The
27 motion was supported by substantial evidence, including declarations from
28 Plaintiff and two other Class Members. Prior to the hearing on the motion set for

1 November 22, 2021, the Parties attended mediation on October 25, 2021. After a
2 day of intense negotiations, and the acceptance of a mediator's proposal days
3 later, Plaintiff withdrew the motion. Dkts. 28, 33.

4 On November 9, 2021, the Court held a status conference at which the
5 Parties informed the Court of the proposed Settlement and recited its terms on the
6 record. A motion for preliminary approval was then set for January 10, 2022, with
7 a filing deadline of December 10, 2021. Dkt. 32.

8 **IV. DISCOVERY CONDUCTED PRIOR TO MEDIATION**

9 The Parties conducted significant formal written discovery prior to the
10 filing of Plaintiff's Motion for Class Certification and engaged in informal
11 discovery prior to the scheduled mediation. Hill Decl. ¶18.

12 On July 6, 2021, Plaintiff served Smithfield with interrogatories, to which it
13 responded on August 6, 2021. Smithfield served Plaintiff with interrogatories and
14 requests for document production on August 13, 2021, to which Plaintiff
15 responded and produced documents on September 15, 2021. Hill Decl. ¶19.

16 The Parties exchanged FRCP Rule 26(a) Initial Disclosure Statements
17 identifying numerous potential witnesses possessing information relevant to the
18 alleged claims on August 30, 2021. Plaintiff's disclosures included 147 pages of
19 pay stubs, wage statements and IRS Form W-2 Wage and Tax Statements,
20 company handbook materials and policies, and various other documents. Hill
21 Decl. ¶20.

22 With respect to the discovery and release of Class Member contact
23 information to Plaintiff's Counsel, the Parties agreed upon the use of a *Belaire-*
24 *West* opt-out privacy notice. On September 27, 2021, the agreed-upon privacy
25 notice was mailed to 45 Class Members giving them until October 27, 2021 to opt
26 out of the release of their contact information. Following the close of the
27 November 3, 2021 opt out deadline, Plaintiff's Counsel was provided with the
28 contact information for Class Members. Hill Decl. ¶21.

1 Prior to the release of the Class' contact information, and in support of
2 Plaintiff's class certification motion, Plaintiff's Counsel conducted several
3 telephonic interviews of Class Members whose names had been obtained through
4 their own investigation. Declarations from two class members were filed in
5 support of Plaintiff's certification motion. Dkts. 27-15, 27-16; Hill Decl. ¶22.

6 Smithfield's counsel deposed Plaintiff Kane on October 18, 2021. On
7 October 19, 2021, pursuant to FRCP 30(b)(6), Plaintiff's Counsel took depositions
8 of Smithfield's persons most knowledgeable: Crystal Delorey, Senior Director of
9 Payroll, and Michael Hughey, Senior Director of Operations. Hill Decl. ¶23.

10 On October 8, 2021, following agreement to attend mediation, Smithfield
11 informally produced 781 pages of documents that included (1) relevant
12 timekeeping and meal and rest period policies and procedures; (2) job descriptions
13 for years 2017 - 2020; (3) total number of Class Members and their Work weeks
14 during the Class Period; (4) total number of PAGA Members and their Pay
15 Periods during the PAGA period; (5) number of terminated employees; and (6)
16 hourly rates paid from April 12, 2017 to December 31, 2017 - \$10/hour; and from
17 January 1, 2018 through November 2020 - \$10.50/hour. Smithfield also produced
18 two Microsoft excel spreadsheets containing over 23,000 lines of data of time
19 punch details for Plaintiff and fourteen other randomly-selected Class Members.
20 On receipt of the data, and review of the information gathered from Class
21 Counsel's investigations and informal Class Member interviews, Plaintiff's
22 Counsel analyzed the data and calculated its assessment of Class-wide damages
23 for mediation. Hill Decl. ¶24.

24 **V. MEDIATION.**

25 On October 25, 2021, the Parties attended mediation with Deborah Saxe,
26 Esquire of JAMS, an experienced and respected wage and hour mediator in
27 Southern California. After a full day of negotiations facilitated by Ms. Saxe, the
28 Parties were not able to reach agreement, although considerable progress had been

1 made. A mediator’s proposal was tendered to the Parties, which was accepted with
2 minor modifications on October 27, 2021. Hill Decl. ¶25. The Parties thereafter
3 continued to negotiate at arms’-length the balance of the terms contained in the
4 long-form Settlement Agreement preliminarily approved on December 29, 2021.
5 Dkt. 34-3. *Id.*

6 **VI. SETTLEMENT, PRELIMINARY APPROVAL, AND CLASS NOTICE**

7 **A. Settlement Terms**

8 The Parties have agreed, subject to Court approval, that the Action may be
9 settled for the Gross Settlement Amount of \$350,000.00 (“GSA”), no part of
10 which may revert to Smithfield. The GSA includes (i) Class Counsel’s attorneys’
11 fees up to \$116,666.00 to compensate Class Counsel for work performed and
12 remaining to be performed to secure final settlement approval², and (ii) litigation
13 expenses of \$16,293.78 (originally estimated at \$19,000.00); (iii) a Class
14 Representative Service Payment of \$10,000.00 to Plaintiff Steven Kane, for acting
15 as the sole representative for the Class, work performed, risks undertaken for
16 Smithfield’s costs if the case had been lost, and the substantial benefits conferred
17 upon 46 other members of the Class; (iv) Administration expenses of \$6,500.00;
18 and (e) PAGA Payment of \$15,000.00, apportioned: 75% (\$11,250.00) to the to
19 the Labor Workforce and Development Agency (LWDA Payment), and 25%
20 (\$3,750.00) to PAGA Members, distributed based on the number of Pay Periods
21 worked during the PAGA Period. SA ¶22; Hill Decl. ¶26.

22 After all Court-approved deductions from the GSA, less the Employer Tax
23 Obligations estimated at \$8,936.85, the remaining Net Settlement Amount
24 (“NSA”) of \$176,603.37 will be distributed entirely to Participating Class
25 Members based on the number of Weeks Worked during the Class Period. With
26

27 ²Plaintiff consented in writing to apportionment of attorneys’ fees awarded in the
28 following amounts: one-third to the Davtyan Law Firm, Inc., and two-thirds to
Cohelan Khoury & Singer. Hill Decl. ¶27.

1 an aggregate 5,156 Weeks Worked, Class Members may expect to receive an
2 estimated \$34.25 for per Week Worked during the Class Period. Hill Decl. ¶¶10,
3 16, 28; Supp. CPT Decl. ¶¶15, 16.

4 The method of distribution provided for by the Settlement Agreement
5 allocates funds based on each Class Member's tenure with Smithfield (i.e., using
6 the number of weeks worked during the Class Period) and does not give
7 preference to any Class Member. The information and data needed to distribute
8 the funds is readily available from Smithfield's records, and the Administrator can
9 apply the formula fairly and transparently. Settlement Payments will be allocated
10 one-third to wages, for which an IRS W-2 Form will be issued, and two-thirds to
11 interest and penalties, for which IRS 1099 Forms will be issued. Participating
12 Class Members will release the Released Parties from the Released Claims arising
13 from the factual allegations of the First Amended Complaint. SA ¶¶ 36, 60-63;
14 Hill Decl. ¶29.

15 If a Class Member is also a PAGA Member, he or she will also receive a
16 portion of the \$3,750.00 PAGA Member Payment based on the number of Pay
17 Periods worked during the PAGA Period. With 875 Pay Periods worked by 28
18 PAGA Members, each may expect to receive \$4.29 per Pay Period, whether or not
19 they opt out of the Class settlement. Hill Decl. ¶¶17, 30; Supp. CPT Decl. ¶17.
20 PAGA Members will receive an IRS Form 1099 for their portion of the \$3,750.00
21 PAGA Payment. SA ¶63; Hill Decl. ¶31.

22 Following Final Approval and the Effective Date of settlement,
23 Participating Class Members will receive their Settlement Payment checks, and
24 PAGA Members will receive a share of the \$3,750.00 PAGA Payment even if
25 they should opt-out of the Class settlement. A postcard reminding Class Members
26 to cash their checks will be mailed within 30 days of issuance of the checks, and
27 after 90 days of issuance, all uncashed checks will be voided and funds forwarded
28 to California's Controller, Unclaimed Property Division for further handling on

1 behalf of the Class Member whose check was voided. SA ¶¶76, 77; Hill Decl.
2 ¶32.

3 **B. Preliminary Approval**

4 On December 10, 2021, Plaintiff's Motion for Preliminary Approval was
5 filed and served on the LWDA the same date. The motion was noticed for January
6 10, 2022. Dkt. 34. Hill Decl. ¶33. On December 29, 2021, the Court issued its
7 Order Granting Plaintiff's Motion for Preliminary Approval and Conditional
8 Certification of the Class, and vacated the January 10, 2022 hearing. Dkts. 34, 37.
9 Having evaluated the terms of the Settlement that provided for direct notice to the
10 Class via First Class U.S. Mail, and a notice plan that included the Administrator's
11 search of the National Change of Address database to update stale addresses prior
12 to the initial mailing of the Notice Packet, and skip-tracing of returned and
13 undelivered Notice Packets using the Class Member's social security number, the
14 Court determined the Settlement's "notice plan was reasonably calculated to reach
15 the members of the Class". Dkt. 37, II.D; Hill Decl. ¶34.

16 **C. Dissemination of Court-Approved Class Notice**

17 On February 16, 2022, the Notice of Class Action Settlement, Change of
18 Address form and pre-printed return envelope ("Notice Packets") were mailed to
19 all identified Class Members giving them through April 18, 2022 to postmark and
20 return written objections, requests for exclusion, and disputes of the information
21 on which their Settlement Payments would be calculated. An extended deadline of
22 May 3, 2022 was provided to Class Members whose Notice Packets were returned
23 as undelivered, and remailed to an updated mailing address. Supp. CPT Decl. ¶9;
24 Hill Decl. ¶¶11, 35. Plaintiff filed a motion for Attorneys' Fees on April 1, 2022.
25 Dkt. 38. No objections or requests for exclusion have been received. Supp. CPT
26 Decl. ¶¶11, 12; Hill Decl. ¶¶12, 35.

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28 ///

VII. CLASS CERTIFICATION SHOULD BE GRANTED FOR PURPOSES OF FINAL APPROVAL.

The Court determined at preliminary approval that the Class met the requirements for class certification under Rule 23(a)'s numerosity, typicality, commonality, and adequacy requirements, and Rule 23(b)(3)'s predominance and superiority standards, and conditionally certified the Class. Dkt. 37, ¶¶II.A(1-4) and II.B (1-2).

VIII. FINAL APPROVAL SHOULD BE GRANTED

A. Class Action Settlements are Subject to Court Review

A class action may not be settled without court approval. Rule 23(e). To grant final approval to a class action settlement, a district court must find the proposed settlement is fundamentally fair, adequate, and reasonable. *Staton v. Boeing Co.*, 327 F. 938, 952 (9th Cir. 2003).

B. The Settlement Is Fair, Adequate, and Reasonable

The decision whether a proposed settlement is fair, reasonable, and adequate is committed to the Court's sound discretion. *Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000) (citing *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1238 (9th Cir. 1998); Manual for Complex Litigation (4th ed. 2004) § 21.61 at 308, *Officers for Justice v. Civil Serv. Comm'n. of the City and County of San Francisco* (9th Cir. 1982) 688 F. 2d 615, 625, cert. denied (1983) 459 U.S. 1217.)

Although the Court has discretion to determine whether a proposed class settlement is fair, the Ninth Circuit has "long deferred to the private consensual decision of the parties." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). "[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or

1 overreaching by, or collusion between, the negotiating parties, and that the
2 Settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”
3 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d at 625. “[T]he Court’s
4 function is not to second guess the Settlement’s terms.” *Garner v. State Farm*
5 *Auto Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 U.S. Dist. Lexis 49477, *21
6 (N.D. Cal. Ap. 22, 2010).

7 Rule 23(e) settlement approval has three steps: (1) preliminary approval of
8 the settlement;(2) notice of the settlement to Class Members; and (3) a final
9 fairness hearing at which Class Members may be heard and at which evidence and
10 argument regarding the settlement may be considered. *Murillo v. Pac. Gas & Elec.*
11 *Co.*, 266 F.R.D. 468, 473 (E.D. Cal. 2010). This procedure safeguards Class
12 Members’ due process rights and enables the Court to fulfill its role as a fiduciary,
13 protecting interests of absent class members. See William Rubenstein, Alba Conte
14 & Herbert Newberg, *4 Newberg on Class Actions* (5th ed. 2014) (“*Newberg*”), §§
15 13:39, *et seq.*

16 **C. Class Notice Has Been Effectuated and Comports with Rule 23**
17 **and Due Process**

18 Before final approval of a class action can issue, notice of the Settlement
19 must be provided to the Class. Fed. R. Civ. P. 23(e)(1). Rule 23 requires that the
20 Class receive “the best notice practicable under the circumstances, including
21 individual notice to all members who can be identified through reasonable effort.”
22 Fed. R. Civ. P. 23(c)(2)(B). Notice to the Class must be “reasonably calculated
23 under all the circumstances, to apprise interested Parties of the pendency of the
24 action and afford them an opportunity to present their objections.” *Mullane v.*
25 *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *Saulic v.*
26 *Symantec Corp.*, 596 F. Supp.2d 1323, 1327 (C.D. Cal. 2009).

27 The Court approved the Class Notice and found that it fairly and adequately
28 advised the Class and PAGA Members of the terms of the proposed Settlement, the

benefits available to them, of the Final Approval Hearing date, and the right to appear at the hearing, among other things. Preliminary Approval Order, Dkt. 37. The Court found that “The proposed notice describes the essential terms of the proposed Settlement Agreement, defines the class, sets forth the procedures for opting out of the class, filing objections to the proposed Settlement Agreement, and provides information on the date, time, and location of the fairness hearing. The Court finds that these notice methods are reasonably calculated to afford the class members an opportunity to present their objections.” *Id.* ¶II.D.

D. The Settlement is Entitled to the Presumption of Fairness

“[I]n the Ninth Circuit, a court affords a presumption of fairness to a settlement if: ‘(1) the negotiations occurred at arms’ length; (2) there was sufficient discovery; (3) the proponents of the Settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.’” (cite omitted) *Rodriguez v. West Publishing Corp.*, No. CV-05-3222 R(MCx) 2007 U.S. Dist. LEXIS 74849 at 32-33 (C.D. Cal. Sept. 10, 2007).

The Preliminary Approval Motion thoroughly analyzed the terms of the Settlement in light of the *Rodriguez* factors, that the proposed Settlement is in the Class’ best interest, is adequate and reasonable, and entitled to a presumption of fairness. Dkt. 34-1, 7:24-21-17; Dkt. 34-2, ¶¶19-24. In granting preliminary approval, the Court found the first three *Rodriguez* factors satisfied; the fourth factor, the number of objectors, was unknown until the Class had an opportunity to respond to the Class Notice. Subject only to the Class’ reaction, the Court preliminarily presumed the Settlement was fair, adequate and reasonable. See, Dkt. 37.

No Class Member objected or opted-out. Supp. CPT Decl.¶¶11, 12. The lack of objections supports the presumption the Settlement is fair, adequate and reasonable. *Martin v. AmeriPride Servcs.*, 2011 U.S. Dist. Lexis 61796 at *21 (S.D. Cal. June 9, 2011); *In re: Omnivision Techs.*, 559 F. Supp.2d, 1036, 1043

(N.D. Cal. 2007) (“By any standard, the lack of objection of the Class Members favors approval of the Settlement.”); see also *Brown v. American Honda Motor Co., Inc.*, 2010 U.S. Dist. Lexis 145475, at *49 (C.D. Cal. July 29, 2010) (comparatively low number of opt-outs indicates class members favor settlement and find it fair). A lack of objections provides persuasive evidence the Settlement is reasonable. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979).

Nothing has changed since the Court granted preliminary approval of the settlement to negate the presumption of fairness. With the Class’ favorable reaction to the Settlement, Class Counsel remains convinced the Settlement is in the Class’ best interest based on detailed knowledge of the issues presented and the negotiations. The length and risks of trial and the perils of litigation that affect the value of the claims were all carefully weighed. The affirmative defenses asserted by Defendant, the uncertainty of obtaining and maintaining Rule 23 certification, the prospect of an adverse summary judgment ruling, the difficulties of complex litigation, the lengthy process of establishing damages, and the risks and delays of appeals, were all carefully considered by Class Counsel in arriving at the Settlement. Hill Decl. ¶36.

IX. CONCLUSION

Plaintiff respectfully requests the Court enter an order granting Plaintiff’s Motion for Final Approval and Entering Judgment, and approve the Class Representative Service Payment,³ Class Counsels’ attorneys’ fees and litigation

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³Plaintiff is estimated to receive a \$6,593 individual settlement payment. Supp. CPT Decl. ¶18. His supporting declaration was filed with the Motion for Fees. Dkt. 38-8.

1 costs, and the administrator's expenses as requested in the earlier filed Motion,
2 Dkt. 38.

3 Respectfully submitted,

4 COHELAN KHOURY & SINGER
5 DAVTYAN LAW FIRM, P.C.

6 Dated: June 30, 2022

By: s/ J. Jason Hill

7 J. Jason Hill

8 Attorneys for Plaintiff Steven Kane
9 and the Conditionally Certified Class
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