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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
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: January 10, 2022

Time: 1:30 p.m.

Judge: Percy Anderson

Ctrm.: 9A

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TABLE OF CONTENTS

	<u>Page(s)</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	2
D. Smithfield's Contentions and Affirmative Defenses	2
III. PROCEDURAL HISTORY	3
IV. DISCOVERY CONDUCTED PRIOR TO MEDIATION	4
V. MEDIATION	4
VI. SUMMARY OF PROPOSED SETTLEMENT	4
A. Settlement Terms	4
B. Settlement Administration and Notice to the Class	6
C. Released Claims	6
VII. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED.....	6
A. Strength of Plaintiff's Case and Risk, Expense, Complexity and Likely Duration of Further Litigation	7
B. The Extent of Informal Discovery and Stage of Proceedings	8
C. The Settlement is the Product of Informed, Non-Collusive Negotiations by Class Counsel Experienced in Similar Litigation	9
VIII. THE SETTLEMENT IS A REASONABLE COMPROMISE.....	10
A. Minimum Wages. Labor Code §§ 1194, 1197.....	10
B. Overtime Wages – Labor Code §§510 and 1194.....	11
C. Meal Periods and Rest Breaks - Labor Code §§ 226.7, 512.....	13
D. Sick Pay – Labor Code § 246.....	15
E. Vacation Pay – Labor Code §§ 227.3 and 218.5	16
F. Untimely Final Wages - Labor Code §§ 201-203.....	16
G. Inaccurate Wage Statements– Labor Code §§ 226, 1174 – Derivative.....	17

1	H. PAGA CIVIL PENALTIES – LABOR CODE § 2699, et seq.....	18
2	IX. ATTORNEYS’ FEES AND SERVICE PAYMENT	21
3	A. Motion for Award of Attorneys’ Fees and Litigation Costs	21
4	B. Class Representative Service Payment	22
5	X. CONDITIONAL CERTIFICATION OF THE PROPOSED CLASS	22
6	A. All Rule 23(a) Prerequisites Certification Are Present.....	22
7	1. Rule 23(a)(1) —Numerosity	23
8	2. Rule 23(a)(2) —Commonality	23
9	3. Rule 23(a)(3) —Typicality	23
10	4. Rule 23(a)(4) —Adequacy of Representation	24
11	B. Rule 23(b)(3) —Predominance and Superiority	24
12	XI. CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Alcala v. Meyer Logistics, Inc.</i> 2019 LEXIS 166879 (C.D. Cal. June 17, 2019).....	20
<i>Alvarado v. Dart Container Corp. of Cal.</i> 4 Cal. 5th 542 (2018)	11
<i>Amaral v. Cintas Corp. No. 2</i> 163 Cal. App. 4th 1157 (2008).....	18
<i>Amchem Prods., Inc. v. Windsor</i> 521 U.S. 591 (1997)	22, 23, 24
<i>Bell v. H.F. Cox, Inc.</i> 209 Cal.App.4th 62 (2012)	3
<i>Blackie v. Barrack</i> 524 F.2d 891 (9th Cir. 1975)	23
<i>Boyd v. Bechtel Corp.</i> 485 F. Supp. 610 (N.D. Cal. 1979).....	8
<i>Brinker Restaurant Corp. v. Superior Court</i> 53 Cal. 4th 1004 (2012)	13
<i>Brotherton v. Cleveland</i> 141 F. supp. 2d 907 (S.D. Ohio 2001).....	22
<i>California Rural Legal Assistance, v. Legal Services Corp.</i> 917 F.2d 1171 (9th Cir. 1990)	23
<i>California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers</i> 2018 WL 6809341 (Dec. 28, 2018).....	3
<i>Collins v. Overnite Transp. Co.</i> 105 Cal.App.4th 171 (2003)	2
<i>Donohue v. AMN Services, LLC</i> 2021 Cal. LEXIS 1294 (February 25, 2021)	13

1	<i>Ehrlich v. Rich Prods. Corp.</i>	
2	2018 U.S. Dist. LEXIS 72642 (M.D. Fla. May 1, 2018)	13
3	<i>Ellis v. Naval Air Rework Facility</i>	
4	87 F.R.D. 15 (N.D. Cal. 1980)	10
5	<i>Esler v. Northrop Corp.</i>	
6	86 F.R.D. 20, 34 (W.D. Mo. 1979)	23
7	<i>Ferra v. Loews Hollywood Hotel, LLC</i>	
8	(2021) 11 Cal. 5th 858	13
9	<i>Glass v. UBS Financial Services</i>	
10	2007 U.S. Dist. LEXIS 8476, 50-52 (N.D. Cal. Jan. 26, 2007)	22
11	<i>Greer v. Dick's Sporting Goods, Inc.</i>	
12	2019 U.S. Dist. LEXIS 145847 (E.D. Cal. Aug. 26, 2019)	7
13	<i>Hanlon v. Chrysler Corp.,</i>	
14	150 F.3d 1011 (9th Cir. 1998)	7, 23, 24
15	<i>In re M.L. Stern Overtime Litig.</i>	
16	2009 LEXIS 31650 (S.D. Cal. Apr. 13, 2009)	21
17	<i>In Re Nordstrom Commission Cases</i>	
18	186 Cal. App. 4th 576 (2010)	18, 20, 21
19	<i>In re Omnivision Techs., Inc.</i>	
20	559 F. Supp. 2d 1036 (N.D. Cal. 2008)	10
21	<i>In re Wells Fargo Home Mortg. Overtime Pay Litig.</i>	
22	268 F.R.D. 604 (N.D. Cal. 2010)	13
23	<i>Int'l Bhd of Teamsters, Local 2785 v. FMCSA</i>	
24	986 F. 3d 841(9th Cir. 2021)	3, 14
25	<i>Kilbourne v. Coca-Cola Co.</i>	
26	2015 U.S. Dist. LEXIS 118756 (S.D. Cal. July 29, 2015)	11
27	<i>Ling v. P.F. Chang's China Bistro, Inc.</i>	
28	245 Cal. App. 4th 1241 (2016)	17
	<i>Lynne Wang v. Chinese Daily News, Inc.</i>	
	435 F. Supp. 2d 1042 (C.D. Cal. 2006)	16

1	<i>Magadia v. Wal-Mart Assocs.</i>	
2	384 F. Supp. 3d 1058 (2019)	19
3	<i>Magadia v. Wal-Mart Assocs.</i>	
4	999 F.3d 668 (2020)	19
5	<i>Naranjo v. Spectrum Security Services, Inc.</i>	
6	40 Cal.App.5th at 474 (2019)	17, 18
7	<i>Nieto v. Fresno Beverage Co., Inc.</i>	
8	33 Cal.App.5th 274 (2019)	3
9	<i>Pedroza v. PetSmart, Inc.</i>	
10	2012 U.S.Dist.LEXIS 189530 (C.D.Cal. June 14, 2012).....	17, 18
11	<i>Robinson v. Chefs' Warehouse, Inc.</i>	
12	2019 U.S. Dist. LEXIS 154383 (N.D. Cal. Sep. 10, 2019).....	14
13	<i>Rodriguez v. West Publishing Corp.</i>	
14	2007 U.S. Dist. LEXIS 74849 (C.D. Ca. Sept. 10, 2007)	9
15	<i>Shiferaw v. Sunrise Senior Living Mgmt.</i>	
16	2014 U.S. Dist. LEXIS 195245 (C.D. Cal. June 11, 2014).....	14
17	<i>Singer v. Becton Dickinson & Co.</i>	
18	2010 U.S. Dist. LEXIS 53416 (S.D. Cal. June 1, 2010)	22
19	<i>Stanton v. Boeing Company,</i>	
20	327 F.3d 938 (9th Cir. 2003)	22
21	<i>Sturm v. CB Transp., Inc.</i>	
22	943 F. Supp. 2d 1102 (D. Idaho 2013)	12
23	<i>Thurman v. Bayshore Transit Management, Inc.</i>	
24	203 Cal. App. 4th 1112 (2012)	20
25	<i>Torrissi v. Tucson Elec. Power Co.</i>	
26	8 F.3d 1370 (9th Cir. 1993)	7
27	<i>Van Vranken v. Atlantic Richfield Co.</i>	
28	901 F. Supp. 294, 299 (N.D. Cal. 1995).....	22
	<i>Ventura v. New York City Health and Hosp., Inc.</i>	
	125 F.R.D. 595 (S.D.N.Y. 1989).....	24

1	<i>Vieyara-Flores v. Sika Corp.</i>	
2	2019 U.S. Dist. LEXIS 98081 (C.D. Cal. 2019)	20
3	<i>Vigueras v. Red Robin Int'l</i>	
4	2018 U.S. Dist. LEXIS 225071 (C.D. Cal. Oct. 23, 2018)	25
5	<i>Wal-Mart Stores, Inc. v. Dukes</i>	
6	564 U.S. 338 (2011)	23, 25

STATUTES AND REGULATIONS

PAGE

9	<u><i>California Code of Regulations</i></u>	
10	8 § 11070	3
11	<u><i>California Labor Code</i></u>	
12	§ 201-203	16
13	§ 203	17, 19
14	§ 203(b).....	17
15	§ 226(a)(1), (2), (5), (8), (9)	18
16	§ 226.3	19
17	§ 227.3	16, 19
18	§ 218.5	16
19	§ 226	17, 19
20	§ 226.7	13, 17, 19, 25
21	§ 226.7(c).....	13
22	§ 246	15, 19
23	§ 246(1)(2).....	15
24	§ 510	2, 11, 19
25	§ 512	13, 19
26	§ 1171	3
27	§ 1174	17
28	§ 1194	10, 11, 19
	§ 1197	10
	§ 2699 et seq.	18, 19, 20
	§ 2699(e)(2)	20
	<u><i>Code of Federal Regulations</i></u>	
	29 § 778.109	3

Federal Rules of Civil Procedure

Rule 23.....	25
Rule 23(a)	22
Rule 23(a)(1).....	23
Rule 23(a)(2).....	23
Rule 23(a)(3).....	23
Rule 23(a)(4).....	24
Rule 23(b)	22
Rule 23(b)(3)	24
Rule 23(e)	6
Rule 23(e)(2).....	7

United States Code

29 U.S.C. §207(e)	16
29 U.S.C. §213(b)(1)	3
49 U.S.C. §31136	2
49 U.S.C. §31141	2
49 U.S.C. §31502	3

MISCELLANEOUS AUTHORITIES

Herbert Newberg & Alba Conte, 4 Newberg on Class Actions, vol. 4 (4th ed. 2002)

§ 11.22, et seq.	6
§ 11.25	6

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§ 23.22	23
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I. INTRODUCTION

Plaintiff seeks preliminary approval of a \$350,000 non-reversionary, pre-certification wage and hour class and representative action Settlement with Defendant Smithfield Direct, LLC (“Smithfield” or “Defendant”) on behalf of 45 members of the Class 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 Dec.) ¶10, Exhibit A – Stipulation of Class Action and PAGA Settlement and Release of Claims (Settlement Agreement or SA).

II. THE PARTIES

A. Defendant, Smithfield Direct, LLC. Smithfield supplies grocery products to stores throughout the United States, including California. During the April 12, 2017 and November 30, 2020 Class Period, Smithfield operated out of only two branches in California in Fresno and Ontario, and employed 45 RSRs in California. 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 Dec. ¶11. Declaration of Steven Kane filed in Support of Class Certification, (Kane Cert. Dec.), Dkt. 27-14.

Smithfield paid Plaintiff, and other RSRs, a base hourly rate of \$10 to \$10.50 per hour, plus the greater of a \$425 commission or actual commissions earned each workweek. Including these commissions, RSRs were paid at least minimum wage for all hours worked. Hill Dec. ¶12. Plaintiff alleges that during his tenure with

Smithfield, there were only three instances where he earned commissions from sales greater than the \$425 minimum weekly commission. Hill Dec. ¶13. (Dkt. 27-15, ¶4; Dkt. 27-16, ¶7.)

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 April 12, 2017 through November 30, 2020 Class Period. SA ¶7. There are 45 Class Members, including Plaintiff, who worked an estimated 5,114 total Workweeks during the Class Period. SA ¶41. A subset of the Class, PAGA Members, were employed sometime during the March 7, 2020 through November 30, 2020 PAGA Period. SA ¶28. There are **28** PAGA Members with **875** Pay Periods¹ during the PAGA Period. SA ¶¶26, 29; Hill Dec. ¶14.

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 Transp. Co.*, 105 Cal.App.4th 171, 177-180 (2003) (recognizing that truck drivers are exempt from the overtime rules of Labor Code section 510). Drivers of trucks weighing between

¹ Class Members were paid weekly during the Class Period, so Pay Periods and Workweeks are the same. SA ¶ 29.

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

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

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

27 **III. PROCEDURAL HISTORY**

28 A detailed description of the procedural history may be found in the

1 accompanying Declaration of J. Jason Hill filed herewith, paragraphs 15 through 18.

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

3 The Parties conducted significant formal written discovery before settlement,
4 as set forth in the Hill Declaration at paragraphs 19 through 24.

5 **V. MEDIATION.**

6 On October 25, 2021, the Parties attended mediation with Deborah Saxe, Esq.
7 of JAMS, an experienced and respected wage and hour mediator in Southern
8 California. Following a full day of mediation, the Parties did not reach agreement,
9 although considerable progress had been made. A mediator's proposal was tendered
10 to the Parties, which they accepted with minor modifications on October 27, 2021.
11 The Parties thereafter continued to negotiate at arms'-length the balance of the terms
12 contained in the long-form Settlement Agreement, attached to the Hill Declaration as
13 **Exhibit A**, presented for preliminary approval. Hill Dec. ¶25.

14 **VI. SUMMARY OF PROPOSED SETTLEMENT**

15 **A. Settlement Terms.** The Parties have agreed, subject to Court approval,
16 that the Action may be settled for the Gross Settlement Amount of \$350,000 (GSA),
17 no part of which may revert to Smithfield. The GSA includes (i) Class Counsel's
18 attorneys' fees up to \$116,666 to compensate Class Counsel for work performed and
19 remaining to be performed to secure final settlement approval², and (ii) litigation
20 expenses estimated at \$19,000; (iii) a Class Representative Service Payment to
21 Plaintiff of \$10,000 for acting as the sole representative for the Class, work
22 performed, risks undertaken for Smithfield's costs if the case had been lost, and the
23 substantial benefits conferred upon 44 other members of the Class;
24 (iv) Administration expenses not to exceed \$6,500; and (e) PAGA Payment of
25 \$15,000, apportioned: 75% (\$11,250) to the to the Labor Workforce and
26

27 ²Plaintiff consented in writing to apportionment of attorneys' fees awarded in the
28 following amounts: 1/3 to the Davtyan Law Firm, Inc., and 2/3 to Cohelan Khoury & Singer.

1 Development Agency (LWDA Payment), and 25% (\$3,750) to all eligible aggrieved
2 employees (PAGA Member Payment). Hill Dec. ¶26; SA ¶22.

3 After all Court-approved deductions from the GSA, less the Employer Tax
4 Obligations estimated at \$8,806.50, the remaining estimated Net Settlement Amount
5 (NSA) of \$174,027.50 will be entirely distributed to Participating Class Members
6 based on the number of weeks worked during the Class Period in relation to the total
7 number of weeks worked by all Participating Class Members. With an aggregate
8 estimated at 5,114 Workweeks, Class Members may expect to receive an estimated
9 \$34.03 for each week worked during the Class Period. If the Class Member is an
10 eligible PAGA Member, he or she will also receive a portion of the \$3,750 PAGA
11 Member Payment based on the number of Pay Periods worked during the PAGA
12 Period. With 875 Pay Periods worked by the 28 PAGA Members, each may expect to
13 receive \$4.28 per Pay Period, whether or not they opt out of the Class settlement. SA
14 ¶¶23, 29, 41; Hill Dec. ¶27.

15 The method of distribution allocates the funds based on each Class Member's
16 tenure with Smithfield, i.e., using their number of weeks worked during the Class
17 Period, and does not give preference to any Class Member. The information needed
18 to distribute the funds is readily available from Smithfield's records, and the
19 Administrator can apply the formula fairly and transparently. Settlement payments
20 will be allocated one-third to wages, for which an IRS W-2 Form will be issued, and
21 two-thirds to interest and penalties, for which IRS 1099 Forms will be issued. PAGA
22 Members will receive an IRS Form 1099 for their portion of the \$3,750 PAGA
23 Payment. SA ¶63; Hill Dec. ¶28.

24 Following Final Approval and the Effective Date of Settlement, each Class
25 Member who did not opt out will receive their share of the NSA, without the need to
26 submit a claim form. Each PAGA Member will be mailed their share of the \$3,750
27 PAGA Payment even if they opt-out of the Class settlement. All uncashed checks
28 after 90 days after issuance will be voided, and forwarded to the State of California's

1 Controller, Unclaimed Property Division for further handling on behalf of the Class
2 Member whose check was voided. SA ¶76; Hill Dec. ¶29.

3 **B. Settlement Administration and Notice to the Class.** The Parties
4 selected CPT Group, Inc. (CPT) to administer the Settlement. See, Declaration of
5 Julie Green on behalf of CPT. Following preliminary approval, CPT will conduct a
6 search of the National Change of Address database to update Class Member
7 addresses, and mail a Notice of Class Action Settlement (Class Notice), Change of
8 Address form, and pre-printed return envelope (Notice Packet) to all Class Members
9 identified by Defendant's employment records. On the return of undelivered Notice
10 Packets, CPT will skip trace using the Class Member's social security number to
11 locate a better address and remail the Notice Packet. Hill Dec. ¶30; SA ¶¶2, 57.C.

12 The Notice advises the Class of their right, manner and timing to: participate
13 in the Settlement; dispute the basis of their payment; object; and, opt-out. The Notice
14 also informs Class Members of their individualized payment, release to be given,
15 date of the Final Approval hearing, and how to obtain further information through
16 Class Counsel, the Administrator's website, or the Court's docket. SA ¶24, Exh. 1.;
17 Hill Dec. ¶31.

18 **C. Released Claims.** Participating Class Members will release the Released
19 Parties from the Released Claims arising from the factual allegations of the First
20 Amended Complaint. SA ¶¶ 36, 37 Hill Dec. ¶32.

21 **VII. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

22 A class action may not be settled without court approval. FRCP Rule 23(e).
23 This procedure safeguards Class Members' due process rights and fulfills the court's
24 role as a guardian of class interests. *See Alba Conte & Herbert Newberg, 4 Newberg*
25 *on Class Actions* (2002) ("*Newberg*"), §§ 11.22, *et seq.* The court initially determines
26 whether the proposed Settlement is within the "range of reasonableness," and
27 whether notice to the Class and a formal fairness hearing are appropriate. *Newberg* §
28 11.25, (preliminary approval is akin to "probable cause" to submit settlement to class

1 and hold final approval hearing).

2 At this stage, the Court does not make a final determination a settlement is
3 fair, reasonable, and adequate, rather, the Court decides whether, based upon the “the
4 parties’ showing that the court will likely be able to: [¶] [] approve the proposal
5 under Rule 23(e)(2).” *Greer v. Dick's Sporting Goods, Inc.*, 2019 U.S. Dist. LEXIS
6 145847, *7 (E.D. Cal. Aug. 26, 2019).

7 Courts must give “proper deference” to settlement agreements because, “the
8 court’s intrusion upon what is otherwise a private consensual agreement negotiated
9 between the parties to a lawsuit must be limited to the extent necessary to reach a
10 reasoned judgment that the agreement is not the product of fraud or overreaching by,
11 or collusion between the negotiating parties, and the settlement, taken as a whole, is
12 fair, reasonable and adequate to all concerned.” *Hanlon v. Chrysler Corp.*, 150 F.3d
13 1011, 1027 (9th Cir. 1988) (citations omitted.)

14 The Court’s determination of whether a proposed settlement is “fair,
15 reasonable and adequate” is often said to require a balancing of several factors. These
16 factors may include, among others: “the strength of plaintiff’s case; the risk, expense,
17 complexity, and the likely duration of further litigation; the risk of maintaining class
18 action status throughout the trial; the amount offered in settlement; the extent of
19 discovery completed, and the stage of the proceedings; the experience and views of
20 counsel; the presence of a governmental participant; and the reaction of the class
21 members to the proposed settlement. This list is not exclusive and different factors
22 may predominate in different factual contexts.” *Torrison v. Tucson Elec. Power Co.*, 8
23 F.3d 1370, 1378 (9th Cir. 1993) (citation and internal quotations omitted.)

24 **A. Strength of Plaintiff’s Case and Risk, Expense, Complexity and**
25 **Likely Duration of Further Litigation.** Plaintiff believed his case was suitable for
26 certification on the basis there were company-wide policies that affected RSRs which
27 could be established using representative testimony that would not require separate
28 mini-trials on liability. Smithfield, through its counsel, also presented several

1 significant defenses to the claims as well as good faith objections to Plaintiff's ability
2 to certify the class. Smithfield maintains resolution of these issues requires
3 individualized analysis of the nature of the Class members' job duties and
4 responsibilities as RSRs, because the Company's practices and procedures varied by
5 location, supervisor, job, and employee. Smithfield maintains individual issues
6 predominate and certification would be unlikely, despite a common pay scheme and
7 common defense. Thus, while Plaintiff believed and continues to believe this is a
8 strong case for certification, significant risks exist associated with class certification
9 and potential defenses. Hill Dec. ¶35.

10 Plaintiff recognized and considered the inherent risks and uncertainty of
11 litigation, including: (i) denial of certification; (ii) if certified, decertification; (iii) a
12 grant of summary judgment or adjudication; (iv) the need for a unanimous jury; (v)
13 the possibility of an unfavorable, or less favorable, result at trial; (vi) the possibility
14 post-trial motions may result in an unfavorable, or less favorable, result than trial;
15 and, (vii) the possibility of an unfavorable, or less favorable result on appeal, and the
16 certainty that process would be lengthy. Hill Dec. ¶36.

17 Plaintiff's claims involve complex disputed legal and factual issues. While
18 Plaintiff believes in the strength of his claims, Smithfield's defenses, particularly its
19 motor carrier and outside sales exemption defenses, create a significant possibility
20 Class claims would not be certified or would fail on the merits, as discussed below.
21 Hill Dec. ¶37.

22 Continued litigation would take substantial time, create risk of no recovery,
23 and possibly confer no Class benefit. By contrast, the proposed Settlement will yield
24 a prompt, certain, and substantial Class recovery without requiring additional time or
25 judicial resources. Hill Dec. ¶38.

26 **B. The Extent of Discovery and Stage of Proceedings.** The Parties
27 thoroughly investigated and evaluated the case and engaged in sufficient discovery to
28 support Settlement. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979).

1 Significant formal and informal discovery was conducted and Class Member data
2 was reviewed and analyzed. With more than a full day of intense negotiation
3 facilitated by an experienced and knowledgeable mediator, and several more days to
4 independently evaluate the mediator's proposal, the case is clearly at a stage
5 supporting Settlement. Hill Dec. ¶¶19-25, 39.

6 **C. The Settlement is the Product of Informed, Non-Collusive**
7 **Negotiations by Class Counsel Experienced in Similar Litigation.** "In the Ninth
8 Circuit, a Court affords a presumption of fairness to a settlement, if: '(1) the
9 negotiations occurred at arm's length; (2) there was sufficient discovery to allow
10 counsel to act and the Court to review their actions in an informed manner; (3) the
11 proponents of the settlement are experienced in similar litigation; and (4) only a
12 small fraction of the class objected.'" *Rodriguez v. West Publishing Corp.*, No. CV-
13 05-3222 R (MCx), 2007 U.S. Dist. LEXIS 74849, *33 (C.D. Ca. Sept. 10, 2007).
14 Three out of four factors are met now. The fourth must be evaluated after preliminary
15 approval and the Class has had an opportunity to react to notice of the Settlement.

16 Settlement was reached through compromise of disputed claims after extensive
17 investigation and discovery, substantial exchange of information, exhaustive
18 analysis, arms'-length negotiations at mediation, and thereafter with respect to
19 negotiations to reach agreement on terms of the Agreement. Hill Dec. ¶¶19-25, 40.

20 Class Counsel Cohelan Khoury & Singer and Davtyan Law Firm, Inc. have
21 significant wage and hour class action experience and have obtained certification and
22 settlement approval in dozens of cases. Hill Dec. ¶¶3-9, 41; Declaration of Emil
23 Davtyan. Defendant's counsel Roland Juarez and Steven Morphy, and their firm
24 Hunton Andrews Kurth LLP, are extremely knowledgeable, experienced, and capable
25 in wage and hour law and class action litigation. Hill Dec. ¶42.

26 As Class Counsel have prosecuted numerous wage and hour class actions, they
27 are qualified to evaluate the claims, risks and potential outcome of further litigation,
28 and propriety of Settlement of this Action. Hill Dec. ¶¶3-9, 43; Davtyan Dec. ¶¶4-6.

Experienced counsel, operating at arms'-length, weighed the strengths and risks of the case and endorse the proposed Settlement. The view of attorneys actively conducting the litigation "is entitled to considerable weight" in settlement approval. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*. 661 F.2d 939 (9th Cir. 1981). "[R]ecommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 10432 (N.D. Cal. 2007).

VIII. THE SETTLEMENT IS A REASONABLE COMPROMISE

Class Counsel believes the proposed Settlement is in the Class' best interest based on detailed knowledge of the factual and legal issues present. Counsel considered, among other risks, Smithfield's reliance upon the FMCSA exemptions, adverse class certification, decertification, or summary judgment rulings, loss or lesser outcome at trial, post-trial, and appeal, and other perils of litigation that affect the value of all claims. Hill Dec. ¶44.

Based on data provided, 45 Class Members were identified with 5,114 weeks worked during the Class Period, with an hourly rate of \$10.00 per hour through December 31, 2017, and \$10.50 from January 1, 2018 through November 2020, and a guaranteed weekly commission of \$425.00. The Class' recovery and applied rational discounts for certification and defenses to recovery are discussed below. Hill Dec. ¶45.

A. Minimum Wages. Labor Code §§ 1194, 1197. Minimum wages must be paid for all time worked or subject to the employer's control. Labor Code § 1194. Plaintiff contends RSRs were not paid for time worked while clocked out for meal periods due to time pressures, of which Plaintiff alleges, Smithfield was aware. Plaintiff contends the RSRs are owed minimum wages for this unpaid time.³ Plaintiff estimates RSRs worked on average 30 minutes—or 0.5 hour—off-the-clock while

³ Plaintiff does not pursue certain minimum wage theories contained in the FAC for off-the-clock Covid-19 medical checks and communications via text and phone with managers regarding the next day's deliveries. These were erroneously included in the complaint.

1 clocked out for meal periods per workweek. Plaintiff estimates unpaid minimum
2 wages during the Class Period at \$29,814.25⁴. Hill Dec. ¶46.

3 Smithfield contends that the RSRs did not engage in off-the-clock work during
4 meal breaks. The RSRs were paid for all hours worked and worked alone
5 independently in their trucks, each determining the timing of their meal breaks. As
6 such, Plaintiff faced two significant, if not insurmountable huddles in recovering
7 anything on this claim: (a) no contemporaneous records to document the off-the-
8 clock work, making their proof at trial extremely unlikely, and (b) significant
9 individual issues that would predominate, making class treatment unlikely. Even if
10 the RSRs did occasionally work during meal breaks, Plaintiff would be charged with
11 proving Defendant knew or should have known that off-the-clock work was
12 occurring, an element of proof difficult in these factual circumstances. Hill Dec. ¶47.

13 Given that courts often deny certification of off-the-clock claims due to the
14 need for individual inquiries as in *Kilbourne v. Coca-Cola Co.* (S.D. Cal. July 29,
15 2015) 2015 U.S. Dist. LEXIS 118756, at *46, Plaintiff reduced its estimate of
16 Smithfield's exposure by 50% to **\$14,907.12**. Hill Dec. ¶48. Smithfield contends that
17 the Class is not entitled to recover any damages on this claim.

18 **B. Overtime Wages – Labor Code §§510 and 1194.** Overtime wages
19 must be paid for hours worked over 8 per day or 40 per week at 1-1/2 times an
20 employee's regular rate of pay, which includes hourly pay, commissions, bonuses,
21 and any other regular pay. Labor Code § 510. Because RSRs earned \$425 per
22 workweek as a flat-sum, the regular rate of pay is calculated as all regular pay in a
23 workweek divided by the non-overtime hours worked in that workweek. *Alvarado v.*
24 *Dart Container Corp. of Cal.* (2018) 4 Cal. 5th 542, 568.

25 Employers need not pay overtime wages to employees who are exempt.

26 _____
27 ⁴ \$5,370.75 in 2017 (0.5 hours x \$10.50 minimum wage x 1,023 weeks in 2017); \$7,876.00
28 in 2018 (0.5 hours x \$11.00 minimum wage x 1,432 weeks in 2018); \$8,592.00 in 2019
(0.5 hours x \$12.00 minimum wage x 1,432 weeks in 2019); and \$7,975.50 in 2020 (0.5
hours x \$13.00 minimum wage x 1,227 weeks in 2020).

1 Plaintiff contends Smithfield misclassified RSRs as outside sales exempt, because
2 RSRs never spent more than half their time—or virtually any time at all—engaged in
3 sales.⁵ Plaintiff further contends that RSRs were not exempt under the FMSCA
4 exemption. “An employer can establish that the Motor Carrier exemption defense
5 applies by showing that (1) a driver can reasonably be expected to drive across state
6 lines, or (2) the driver hauled goods in the practical continuity of movement in
7 interstate commerce. [At the outer reaches of the exemption], [a] driver is considered
8 to be driving in interstate commerce if...because of company policy and activity, the
9 driver could reasonably be expected to drive in interstate commerce.” *Sturm v. CB*
10 *Transp., Inc.* (D. Idaho 2013) 943 F. Supp. 2d 1102, 1105. The employer has the
11 burden of proving each driver falls under the exemption, “so if [the employer]
12 want[s] the Court to make a decision regarding each individual Plaintiff, it
13 should...present[] evidence relating to each Plaintiff’s status under the exemption.”
14 *Id.* at 1119. Plaintiff contends RSRs could not be exempt under the FMCSA
15 exemption because they never drove across states lines to perform their jobs, and
16 could not reasonably have expected that Smithfield would ask them to do so. Hill
17 Dec. ¶49.

18 Smithfield contends that the RSRs were exempt from overtime, as RSRs all
19 drove trucks over 26,000 pounds and drivers of trucks over 26,000 pounds are
20 automatically exempt from overtime under both state and federal law, and Smithfield
21 contends the drivers spent more than half their time on sales activities. Smithfield
22 paid the RSRs for all hours worked at their base hourly rates of pay, plus
23 commissions, throughout the entire Class Period.

24 Based on Class Member interviews, and review of the data provided, Plaintiff
25 estimated that RSR’s worked 10 hours of overtime each week throughout the Class
26 Period. Contending that the RSRs were entitled to overtime premiums, Plaintiff

27
28 ⁵ Refer to Plaintiff’s Motion for Class Certification, Dkt. 27 for further explanation and
corroborating declarations by Plaintiff and putative Class Members.

1 estimated underpaid overtime wages of \$866,882.90. Hill Dec. ¶150. However, given
2 that drivers may be exempt under the FMCSA even if they do not drive interstate
3 when they transport goods as part of the “practical continuity of movement across
4 states lines,” *Ehrlich v. Rich Prods. Corp.*, 2018 U.S. Dist. LEXIS 72642, at *17
5 (M.D. Fla. May 1, 2018), and given that courts often decline to certify classes when
6 the Defendant raises an outside sales exemption requiring individualized inquiries, *In*
7 *re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 613 (N.D. Cal.
8 2010), Plaintiff reduced its assessment of Smithfield’s exposure by 75% to
9 **\$216,720.73**. Hill Dec. ¶151. Smithfield contends that because the RSRs are exempt
10 from overtime, the Class is not entitled to recover any damages at all on this claim.

11 **C. Meal Periods and Rest Breaks - Labor Code §§ 226.7, 512.**

12 California employers generally must provide “an uninterrupted 30-minute period
13 during which the employee is relieved of all duty.” First meal periods must start after
14 no more than five hours and second meal periods after no more than 10 hours.
15 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1035, 1042;
16 Labor Code § 226.7. A first rest period must be authorized and permitted in shifts
17 from three and one-half to six hours in length, a second in shifts between six and ten
18 hours in length, and a third in shifts over 10 hours in length. *Id.* at 1029. “[I]f a break
19 is not authorized, an employee has no opportunity to decline to take it.” *Brinker*,
20 *supra*, at 1033. If no records show compliant meal periods, “a rebuttable presumption
21 of liability arises.” *Donohue v. AMN Services, LLC* (February 25, 2021) 2021 Cal.
22 LEXIS 1294, *39.

23 Plaintiff contends that if an employer fails to provide an employee a meal or
24 rest period in accordance with California law, the employer must pay the employee
25 one hour of pay at the employee’s regular rate for each work day a meal or rest
26 period is not provided. Lab. Code § 226.7(c); IWC Wage Order(s), §§ 11(D), 12(B);
27 *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 863 (holding “the
28 calculation of premium pay for a noncompliant meal, rest, or recovery period, like

1 the calculation of overtime pay, must account for not only hourly wages but also
2 other nondiscretionary payments for work performed by the employee.”).

3 Smithfield contends that as commercial truck drivers, RSRs were not subject
4 to California’s meal and rest break laws. *See International Brotherhood of*
5 *Teamsters, Local 2785 v. Fed. Motor Carrier Safety Administration*, 986 F.3d 841
6 (9th Cir. 2021). Hill Dec. ¶52. As such, they contend RSRs are not entitled to recover
7 premiums for late or missed meal or rest periods.

8 Plaintiff estimated the RSRs’ regular rate of pay at \$20.63 in 2017 and \$21.13
9 from 2018 through November, 2020. Plaintiff used the blended regular rate of pay,
10 \$21.03, to estimate meal and rest period premiums. Plaintiff contends RSRs suffered
11 at least two meal violations per week. At the regular rate of \$21.03 per hour x 2
12 violations x 5,114 workweeks, maximum exposure was valued at \$215,094.84. Hill
13 Decl. ¶53.

14 Given that drivers may be exempt from meal period laws under the FMCSA if
15 they are subject to hours of service regulations, *Robinson v. Chefs' Warehouse, Inc.*,
16 2019 U.S. Dist. LEXIS 154383, at *9 (N.D. Cal. Sep. 10, 2019), and given courts
17 often decline to certify meal period classes due to the need for individualized
18 inquiries as to why they were missed, *Shiferaw v. Sunrise Senior Living Mgmt.*, 2014
19 U.S. Dist. LEXIS 195245, at *41 (C.D. Cal. June 11, 2014), among other issues,
20 Plaintiff reduced its estimate of Smithfield’s exposure by 75% to **\$53,773.71**. Hill
21 Dec. ¶54. Smithfield contends that because the RSRs are exempt from California’s
22 meal period laws, the Class is not entitled to recover any damages on this claim.

23 For alleged rest break violations, based on the information provided and Class
24 Member interviews, Plaintiff estimated two missed rest breaks per week. Over 5,114
25 workweeks, Plaintiff estimated maximum liability of \$215,094.84. Given that rest
26 period claims are inherently difficult to certify, that Class Members likely could not
27 remember which, if any, shifts had non-compliant or missed rest periods, and the lack
28 of rest period records, Plaintiff reduced its exposure estimate by 75% to **\$53,773.71**.

Hill Dec. ¶55. Smithfield contends that because the RSRs are exempt from California's rest period laws, the Class is not entitled to recover any damages on this claim.

D. Sick Pay – Labor Code § 246. Sick pay must be paid at an employee's regular rate of pay for the week in which sick leave is used or by "dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment." Labor Code § 246(l)(2).

Plaintiff contends sick pay was underpaid because it was based on the RSRs' hourly rate of pay instead of their regular rate of pay, which Plaintiff contends should have taken into consideration the \$425 weekly commission. Hill Dec. ¶56. Plaintiff calculated that Smithfield paid 560 sick leave hours to 14 randomly-selected RSRs over the Class Period (average of 40 sick pay hours to each RSR). Smithfield paid RSRs sick leave at the base hourly rate of pay of \$10 per hour in 2017; and \$10.50 per hour from 2018 through November, 2020. Thus, Plaintiff estimates Smithfield paid each RSR approximately \$416.00 for sick leave pay⁶. As above, Plaintiff estimates the RSRs' regular rate of pay at \$20.63 in 2017 and \$21.13 from 2018 through November 2020. Plaintiff, thus contends each RSR should have been paid \$841.20 for sick leave⁷, and underpaid by \$425.20. Therefore, Smithfield's liability for underpaid sick leave wages is estimated at **\$19,134** (\$425.20 x 45 RSRs). Hill Dec. ¶57.

Smithfield contends it properly paid the RSRs for their sick leave, as it paid the RSRs their full commission during days and weeks that they took sick leave. As such, Smithfield contends that the RSRs were fully paid for their sick leave, and the Class is not entitled to recover any damages on this claim.

⁶ 40 hours x [assuming 0.2 of sick leave taken in 2017] x \$10.00= \$80.00 plus 40 hours x [assuming 0.8 of sick leave taken in 2017] x \$10.50= \$336.00.

⁷ 40 hours x 0.2 x \$20.63= \$165.04 plus 40 hours x 0.8 x \$21.13= \$676.16.

1 **E. Vacation Pay – Labor Code §§ 227.3 and 218.5.** When an employer’s
2 policy provides for vacation pay, all vested but unused vacation hours must be paid
3 to employees at the time of their termination at their final rate of pay (Labor Code §
4 227.3), which means the employee’s final regular rate of pay. *Lynne Wang v. Chinese*
5 *Daily News, Inc.*, 435 F. Supp. 2d 1042, 1046 (C.D. Cal. 2006). The regular rate
6 includes “all remuneration for employment paid to, or on behalf of, the employee....”
7 29 U.S.C. § 207(e). Regular wages, bonuses, and commissions must be included in
8 the regular rate of pay. 29 C.F.R. § 778.109.

9 Plaintiff calculated that Smithfield paid 2,198.70 vacation pay hours to 14
10 randomly-selected RSRs over the Class Period (average of 157.05 vacation pay hours
11 per RSR). Vacation pay was paid at \$10/hour in 2017 and \$10.50/hour from 2018
12 through November 2020. Each RSR was paid an estimated \$1,633.32⁸. Plaintiff
13 contends Smithfield should have paid RSRs using their regular rates of pay, that
14 would have paid out vacation pay of \$3,302.76⁹. Thus, RSRs were underpaid by
15 \$1,669.44¹⁰. Smithfield’s total exposure for this underpaid claim was estimated at
16 **\$75,124.94¹¹**. Hill Dec. ¶59.

17 Smithfield contends that Plaintiff’s claim for unpaid vacation is limited to the
18 payout of vacation upon termination. Nonetheless, Smithfield contends that it had a
19 compliant vacation policy and that it paid the RSRs according to this policy, as
20 permitted by law. Smithfield contends the RSRs were, thus, fully paid for their
21 vacation, and the Class is not entitled to any damages on this claim.

22 **F. Untimely Final Wages - Labor Code §§ 201-203.** If an employer
23 willfully fails to timely pay all wages due to separated employees, the wages
24

25 ⁸\$10.00 x 157.05 vacation hours x 0.2= \$314.10 plus \$10.50 x 157.05 vacation hours x
0.8= \$1,319.22.

26 ⁹ \$20.63 x 157.05 vacation hours x 0.2= \$647.99 plus \$21.13 x 157.05 vacation hours x
27 0.8= \$2,654.77.

¹⁰ \$3,302.76 les \$1,633.32 actually paid.

28 ¹¹ \$1,669.44 x 45 RSRs

continue at the same rate for up to 30 days. Former employees are entitled to waiting time penalties. The statute of limitations is three years. Labor Code § 203(b). A failure to pay wages is “willful” when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Labor Code § 203. *Pedroza v. PetSmart, Inc.* (C.D.Cal. June 14, 2012, No. ED CV 11-298 GHK (DTBx)) 2012 U.S.Dist.LEXIS 189530.

Smithfield contends that to the extent the Section 203 claims are derivative of the alleged failure to pay meal and rest break premiums, Plaintiff cannot prevail, and relies upon *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th at 474 (noting that “an employer’s failure, however willful, to pay section 226.7 statutory remedies does not trigger section 203’s derivative penalty provisions for untimely wage payments.”); *Ling v. P.F. Chang’s China Bistro, Inc.*, 245 Cal. App. 4th 1241, 1261 (2016) (“Following *Kirby*, section 226.7 cannot support a section 203 penalty because section 203, subdivision (b) tethers the waiting time penalty to a separate action for wages.”); and *Guerrero v. Halliburton Energy Servs.* (E.D.Cal. Nov. 2, 2016, No. 1:16-CV-1300-LJO-JLT) (dismissing Section 203 claim to the extent that it was based on alleged failure to pay meal and rest premiums).

Assuming Plaintiff prevailed on the underlying vacation and sick leave claims, with 39 formerly employed Class Members during the Class Period, Plaintiff estimated potential waiting time maximum penalties at \$271,884.60 (39 RSRs x \$6,971.40 (\$232.38 x 30 days)). Hill Dec. ¶60. Since these claims require proof of the underlying claims, and are subject to class certification obstacles, Plaintiff discounted his estimate by 50% to **\$135,942.30**. Hill Dec. ¶61. Smithfield contends that because the underlying claims fail, the Class is not entitled to recover any damages on this claim.

G. Inaccurate Wage Statements—Labor Code §§ 226, 1174 – Derivative. Wage statements must show, among other things, “gross wages earned,”

1 “total hours worked by the employee,” “net wages earned,” “the name...of the legal
2 entity that is the employer,” and “all applicable hourly rates in effect during the pay
3 period and the corresponding number of hours worked at each hourly rate.” Labor
4 Code §§ 226 (a) (1), (2), (5), (8), (9).

5 As this claim is derivative as well, similar to the defenses to the waiting time
6 penalty claims, it not only requires Plaintiff to prevail on the underlying claims, but
7 also to show that Smithfield knowingly and intentionally failed to pay wages, and to
8 overcome Smithfield’s good faith defense it did not act intentionally. Hill Dec. ¶63.
9 *Pedroza v. PetSmart, Inc.*, supra. The good faith defense to the willfulness element of
10 these sections is clearly established under California law. *See Nordstrom Comm’n*
11 *Cases*, 186 Cal. App. 4th 576, 584, 112 Cal. Rptr. 3d 27 (2010) (“There is no willful
12 failure to pay wages if the employer and employee have a good faith dispute as to
13 whether and when the wages [*14] were due.”); *Amaral v. Cintas Corp. No. 2*, 163
14 Cal. App. 4th 1157, 1201, 78 Cal. Rptr. 3d 572 (2008).

15 Furthermore, in *Naranjo v. Spectrum*, 40 Cal. App. 5th 444 (2019), the Court
16 held that unpaid meal break premiums do not entitle plaintiff to wage statement
17 penalties. (See, discussion above). Based on the foregoing defenses and arguments
18 against recovery on such derivative claims, Plaintiff discounted the value of this
19 claim by 50% to **\$90,000**. Hill Dec. ¶64. Smithfield contends that because the
20 underlying claims fail, the Class is not entitled to recover any damages on this claim.

21 The GSA represents 53%¹² of Plaintiff’s estimated reasonable value of the
22 claims in this Action evincing the reasonableness of the Settlement. Hill Dec. ¶65.

23 **H. PAGA PENALTIES – LABOR CODE § 2699, et seq.** For each pay
24 period in which a violation of the Labor Code occurred, an aggrieved employee can
25 recover a penalty for the initial pay period, and a higher penalty for each
26

27 ¹² The reasonable value of the claims was estimated at **\$659,376.51** [\$14,907.12 (Minimum
28 Wages) + \$216,720.73 (Overtime Wages) + \$53,773.71 (Meal Periods) + \$53,773.71 (Rest
Periods) + \$19,134 (Sick Pay) + \$75,124.94 (Vacation Pay) + \$135,942.30 (Final Wages) +
\$90,000 (Wage Statements)]. $\$350,000/\$659,376.51 = 0.53$, or 53%.

1 “subsequent” pay period in which the same violation of the Labor Code occurs.
2 PAGA penalties are paid 75% to the California Labor and Workforce Development
3 Agency and 25% to the aggrieved employees. Thus, in wage and hour class action
4 cases that settle, [] very little of the total settlement is paid to PAGA penalties in
5 order to maximize payments to class members.” *Magadia v. Wal-Mart Assocs.*, 384
6 F. Supp. 3d 1058, 1101 (2019), disapproved on other grounds, *Magadia v. Wal-Mart*
7 *Assocs.*, 999 F.3d 668 (9th Cir., November 19, 2020).

8 For most PAGA violations, an employee may be awarded a \$100 penalty for
9 an initial pay period and a \$200 penalty for each subsequent violation. Labor Code
10 §2699, *et seq.* For wage violations, Plaintiff contends the amounts are \$250/\$1,000,
11 although Smithfield disagrees that this is the proper measure of penalties under Labor
12 Code § 226.3. Plaintiff calculated the maximum PAGA civil penalties, using the
13 initial violation rate for all 875 Pay Periods during the PAGA Period, as \$100 for
14 each Pay Period for (a) Minimum Wages (Section 1194); (b) Overtime Wages
15 (Section 510); (c) Meal Periods (Sections 226.7, 512); (d) Rest Periods (Section
16 226.7); (e) Sick Pay (Section 246); (f) Vacation Pay (Section 227.3); (g) Untimely
17 Final Wages for 39 RSRs (Section 203), and (h) \$250 for each Pay Period for Wage
18 Statements (Section 226). Hill Dec. ¶66.

19 Even though the penalties appear to be nominally very large, they were not
20 given any substantial value in the context of a class action settlement. PAGA
21 penalties are subject to judicial discretion, and of course, a liability determination in
22 favor of the Class on each alleged claim covered by PAGA.

23 Generally, with the provision of Labor Code statutory damages, courts are less
24 inclined to use their equitable power to assess substantial PAGA civil penalties.
25 PAGA penalties would generally be discounted by using only the initial violation
26 rates, based on the Defense argument, “courts have held that employers are not
27 subject to heightened penalties for subsequent violations unless and until a court or
28 commissioner notifies the employer that it is in violation of the Labor Code.”

1 *Vieyara-Flores v. Sika Corp.*, 2019 U.S. Dist. LEXIS 98081, *13 (C.D. Cal. 2019).

2 Further, Labor Code §2699 specifically grants the Court the discretion to
3 reduce or eliminate any civil penalty that is deemed punitive or confiscatory under
4 the circumstances. Case in point is *Carrington v. Starbucks*, 30 Cal.App.5th 504
5 (2018), where the Court, rather than imposing the full penalty of \$50 per violation,
6 noting it would be unjust, arbitrary and oppressive, imposed a penalty of only \$5 per
7 violation, reducing the penalty from \$1.5 million to \$150,000. The Court's discretion
8 was upheld by California's Fourth District Court of Appeal.

9 Maximum exposure would be further discounted for several reasons, i.e., the
10 risk of not proving underlying violations, and Court's authority to *completely reduce*
11 *penalties*, as long as not to "zero." *Thurman v. Bayshore Transit Management, Inc.*,
12 203 Cal. App. 4th 1112, 1135 (2012); and reduce civil penalties by 90%, by
13 assessing \$5.00 per pay period. *Carrington, supra*, 30 Cal. App. 5th at 529.
14 Smithfield also argues these civil penalties cannot be "stacked", which would limit
15 the PAGA exposure/recovery to one violation per Pay Period. See also, *In Re*
16 *Nordstrom Commission Cases* (2010) 186 Cal. App. 4th 576, 589 (holding trial court
17 did not abuse its discretion in approving settlement attributing \$0 to PAGA
18 penalties.)

19 Further, Plaintiff anticipated the court might deem a PAGA trial
20 unmanageable given the need to interview Class members as to off-the-clock work,
21 and rest and meal period violations. Here, using the same limiting principles of
22 *Carrington* and the one-year limitations period for PAGA civil penalties, and
23 assuming Plaintiffs were to prevail on all underlying claims, Plaintiff estimated
24 maximum PAGA penalties at \$87,500 [875 pay-periods x \$100 civil penalty, subject
25 to Court approval and subject to reductions as authorized under Labor Code §
26 2699(e)(2). Hill Dec. ¶167.

27 The \$15,000 amount allocated to PAGA, representing 4.3% of the GSA, is
28 higher than the allocations in other approved settlements. See, e.g., *Alcala v. Meyer*

1 *Logistics, Inc.* (C.D. Cal. June 17, 2019) 2019 LEXIS 166879, *26 (1.25% of
2 settlement reasonable); *In re M.L. Stern Overtime Litig.* (S.D. Cal. Apr. 13, 2009)
3 2009 LEXIS 31650, *1 (2% of settlement reasonable); *In Re Nordstrom*, 186 Cal.
4 App. 4th at 589. Moreover, the PAGA allocation of \$15,000 is reasonable in light of
5 Smithfield's strong exemption defenses to Plaintiff's minimum wage, overtime, meal
6 and rest break claims—for which it is likely that no PAGA penalties can be assessed.
7 For the same reason, it is likely that no PAGA penalties can be assessed on Plaintiff's
8 derivative claim for wage statement penalties. On Plaintiff's remaining claims for
9 vacation payout, sick leave, and failure to pay wages upon termination, the actual
10 number of pay periods at issue on each is much less than 875, as the claims for
11 vacation payout and failure to pay wages owed at termination each only apply to a
12 single pay period for each PAGA Member at the end of their employment (for a total
13 of 28 pay periods each), and the sick leave claim would only apply to sporadic pay
14 periods where PAGA Members actually took leave. Given that only a small number
15 of pay periods are actually at issue on these claims, and the likelihood that no
16 penalties can be assessed on Plaintiff's wage, meal, and rest period claims, the
17 \$15,000 PAGA Allocation (equal to \$100 penalty x 150 pay periods) is reasonable.

18 Further, the LWDA was served with Plaintiff's charges on February 22, 2021
19 indicating an intention to file a representative action on behalf of himself and all
20 other RSRs seeking civil penalties. Hill Dec. ¶68 - Exh. B. Following the filing of
21 the FAC to add civil penalties under PAGA for Labor Code violations, a copy of the
22 FAC was served upon the LWDA. Hill Dec. ¶69 - Exh C. Through the present, the
23 LWDA has not stepped forward or notified Plaintiff or his counsel it intended to
24 investigate the alleged claims. Hill Dec. ¶70.

25 **IX. ATTORNEYS' FEES AND SERVICE PAYMENT**

26 **A. Motion for Award of Attorneys' Fees and Litigation Costs.** Class
27 Counsel will file a motion for reimbursement of litigation expenses of up to \$19,000
28 and an award of fees not to exceed \$116,666 (one-third of GSA). Class Counsel will

1 file their motion for attorneys' fees and litigation costs 14 days prior to the deadline
2 for Class Members that will detail the all hours expended, their lodestar fee, and
3 expenses incurred. Hill Dec. ¶71.

4 **B. Class Representative Service Payment.** Class representatives are
5 eligible for reasonable service payments. A court evaluates awards individually,
6 using relevant factors including actions taken to protect class interests, the degree to
7 which the class benefitted from those actions, the amount of time and effort
8 expended, and reasonable fear of workplace retaliation. *Staton v. Boeing Corp.*, 327
9 F.3d 938, 977 (9th Cir. 2003).

10 Class Counsel will request \$10,000 for Plaintiff Steven Kane for his time,
11 effort, risks undertaken for the payment of costs in the event the Action were lost,
12 possible retaliation by potential employers, a general release of all claims, and for the
13 substantial benefits to be distributed to Class Members. This request is fair and
14 reasonable as Mr. Kane was instrumental in achieving the Settlement in this case.
15 Plaintiff invested a great deal of personal time and effort into the investigation,
16 prosecution, and the settlement of the case. See generally, Declaration of Plaintiff
17 Steven Kane. See, e.g., *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS
18 53416 at *24-26 (S.D. Cal. June 1, 2010) (" \$25,000 incentive award is ... well within
19 the acceptable range awarded in similar cases."); discussing, *Brotherton v. Cleveland*,
20 141 F. supp. 2d 907, 913-14 (S.D. Ohio 2001) \$50,000 class representative
21 payment]; and *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D.
22 Cal. 1995) (same); *Glass v. UBS Financial Services*, 2007 U.S. Dist. LEXIS 8476,
23 50-52 (N.D. Cal. Jan. 26, 2007) (\$25,000 class representative payment).

24 **X. CONDITIONAL CERTIFICATION OF THE PROPOSED CLASS**

25 **A. All Rule 23(a) Prerequisites Certification Are Present.** A court may
26 certify a settlement class at preliminary approval. *Amchem Prods., Inc. v.*
27 *Windsor*, 521 U.S. 591, 620 (1997). A settlement class is subject to FRCP Rule 23(a)
28 and (b) which are "designed to protect absentees by blocking unwarranted or

overbroad class definitions,” but, “[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, [] for the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620. The court takes the substantive allegations of the complaint as true when certifying a settlement class. *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

1. **Rule 23(a)(1) - Numerosity.** There are 45 putative Class Members. Hill Dec. ¶72. A putative class of 45 satisfies the Rule 23(a)(1) numerosity element. *Esler v. Northrop Corp.*, 86 F.R.D. 20, 34 (W.D. Mo. 1979) (classes of forty or more are generally certified); see 5 James Wm. Moore et al., *Moore’s Federal Practice*, § 23.22 (3d ed. 1999) (recognizing general rule that forty or more class members establishes numerosity).

2. **Rule 23(a)(2) - Commonality.** Rule 23(a)(2) commonality requirements are “minimal” and “construed permissively.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Only “a single common question” is required. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Plaintiff alleges numerous common questions, including whether the RSRs were categorically exempt from California’s overtime, meal, and rest break laws by nature of their job as commercial truck drivers; whether Smithfield properly calculated the rate of pay for sick leave and vacation; whether Smithfield issued accurate wage statements; and whether Smithfield timely paid all wages due. Plaintiff contends answering these questions would resolve Class-wide issues “in one stroke.” *Id.* at 350.

3. **Rule 23(a)(3) - Typicality.** Under this Rule’s “permissive standards,” Plaintiff’s claims are “typical” if “reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d at 1020. It is sufficient for a proposed Class representative’s claims to “arise from the same remedial and legal theories” as the Class claims. *California Rural Legal Assistance, v. Legal Services Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990). Plaintiff contends he personally suffered each violation

for which he has brought class claims, and alleges that all RSRs suffered the same violations. Smith Cert. Dec. ¶¶4-10. Plaintiff contends that his claims are typical of all other Class Members as Plaintiff contends all were exempted from the requirements of overtime compensation, were not paid overtime wages at 1-1/2 times their regular rate; were not provided with compliant rest and meal periods, and not paid one hour's pay for non-compliant meal periods or rest breaks at their regular rate of pay; were not paid vacation and sick leave at their regular rate of pay; were issued the same wage statements, were not paid all wages at the termination of their employment, were subject to the same pay policies, and their claims are based on identical legal theories. *Ventura v. New York City Health and Hosp., Inc.*, 125 F.R.D. 595, 600 (S.D.N.Y. 1989).

4. **Rule 23(a)(4) - Adequacy of Representation.** Adequacy is established when a proposed Class Representative has no conflict of interest with Class Members and is represented by qualified counsel. *Hanlon*, 150 F.3d at 1020. Plaintiff has no conflict with the Class, and his counsel are qualified Class Counsel because they are experienced wage and hour class action attorneys fully able to pursue the interests of the Class. Hill Dec. ¶73; Declaration of Steven Kane ¶8.

B. Rule 23(b)(3) - Predominance and Superiority. "The predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc.*, 521 U.S. at 623. Common questions of law and fact predominate regarding the application of the state and federal overtime and meal and rest break exemptions and the outside sales exemption, as well as Smithfield's alleged failure to pay overtime claims. Plaintiff contends he and the other RSR Class Members were primarily delivery drivers, and only on very rare occasion, had an opportunity to "sell" additional product to Smithfield's clients and to earn a commission over and above the guaranteed \$425 weekly payment. Plaintiff contends common questions also predominate on his rest period claim because, he contends, no written policy existed or de-facto policy to

1 authorize and permit 10-minute rest periods for every four hours or major fraction
2 thereof worked. Plaintiff further contends common questions also predominate on
3 Plaintiff's rest and meal period claims because Smithfield allegedly had no policy to
4 pay meal or rest period premiums under Labor Code §226.7 to pay Class Members
5 and this centralized policy – or lack thereof – makes class treatment appropriate
6 under the predominance standard. *Vigueras v. Red Robin Int'l*, 2018 U.S. Dist.
7 LEXIS 225071, at *6 (C.D. Cal. Oct. 23, 2018) (certifying meal and rest period
8 subclasses where company had no policy to pay rest period premiums and common
9 proof revealed Class Members were prevented from taking meal and rest periods).

10 Whether Plaintiff is correct or not, the findings on those issues would answer
11 Class-wide questions “in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at
12 350. Class treatment is the superior method for resolving the claims of the Class and
13 achieves judicial economy by avoiding multiple suits, and protects the rights of those
14 who may be unable to present individual claims.

15 **XI. CONCLUSION**

16 Plaintiff respectfully requests the Court preliminarily approve the proposed
17 Settlement, certify the proposed Class pursuant to FRCP Rule 23 for settlement
18 purposes, appoint Plaintiff Steven Kane as Class Representative, appoint Plaintiff's
19 attorneys as Class Counsel, appoint CPT Group, Inc., as the settlement
20 Administrator, approve the Class Notice and order it disseminated to the Class, set a
21 final approval hearing, to consider the proposed Settlement, Plaintiff's request for
22 attorneys' fees and litigation costs, and a Service Payment.

23 Respectfully submitted,

24 COHELAN KHOURY & SINGER
25 DAVTYAN LAW FIRM, P.C.

26 Dated: December 10, 2021

By: s/ J. Jason Hill

J. Jason Hill

27 Attorneys for Plaintiff Steven Kane
28 and the Putative Class