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and other similarly-situated employees

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

**DECLARATION OF J. JASON HILL
IN SUPPORT OF MOTION FOR
ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: January 10, 2022

Time: 1:30 p.m.

Judge: Percy Anderson

Ctrm.: 9A

Filed: April 12, 2021

Removed: June 14, 2021

Trial date: June 14, 2022

1 I, J. Jason Hill, declare as follows:

2 1. I am a Partner with the law firm of Cohelan Khoury & Singer, co-
3 counsel of record for Plaintiff Steven Kane. I make this Declaration in support of
4 Plaintiff's Motion for an Order Granting Preliminary Approval of Class Action
5 Settlement. This Declaration is based on my personal knowledge and if called to
6 testify I could and would competently testify to the matters contained in this
7 Declaration.

8 2. I am a 1992 graduate of the University of Illinois at Urbana-
9 Champaign and hold a B.A. in Philosophy, Political Science and
10 Communications. In 1995, I received my J.D. degree from California Western
11 School of Law, where I was a member of the Law Review an International Law
12 Journal, as well as editor of the Telecommunications Law Forum. Currently, I
13 am admitted to the bar in both California and Illinois.

14 3. In 1981, Timothy D. Cohelan and Isam C. Khoury formed Cohelan
15 & Khoury, a Partnership of Professional Law Corporations, and within a few
16 years began to focus on class actions. In 2009, Cohelan & Khoury became
17 Cohelan Khoury & Singer. Our firm represents plaintiffs in complex, class and
18 representative action litigation, including wage and hour, labor and employment,
19 antitrust, consumer protection, construction defect and other public interest type
20 class and representative actions.

21 4. Managing Partner Michael D. Singer was admitted as a fellow to the
22 College of Labor and Employment Attorneys in 2020, and named to the Daily
23 Journal 2012, 2013, and 2018 list of Top California Labor and Employment
24 Attorneys. He, along with Isam Khoury, a founding Partner of the firm, and
25 Partner Diana M. Khoury, have also been selected by their peers based on ethics,
26 experience and reputation as Super Lawyers in Civil Litigation by the Southern
27 California Super Lawyers Magazine for the years 2012 through the present.

28 5. Cohelan Khoury & Singer has been certified by the State Bar of

1 California to provide the Mandatory Continuing Legal Education activity entitled
2 “Litigating California Class Actions” and has conducted MCLE certified
3 seminars on this topic. Senior Partner, Timothy D. Cohelan, is the author of
4 Cohelan on California Class Actions (1997-2021, updated annually), part of
5 Thomson Reuters Expert Series updated annually. Michael D. Singer is a
6 contributing author on the CEB publication California Wage and Hour Law:
7 Compliance and Litigation (2010-2021 updated annually), in which he wrote the
8 opening chapter overview on California Wage and Hour laws, including the
9 public policy underpinnings for those laws, and the Private Attorneys General
10 Act (PAGA) Claim chapter. He is also a contributing author to the CEB
11 Practitioner (2020), including guidelines for oral argument and forms for PAGA
12 litigation. Mr. Singer has served as a columnist for the California State Bar,
13 Litigation Section on wage and hour litigation and has contributed articles on
14 wage and hour and class action issues through the years to numerous California
15 publications. Prior to COVID, he typically lectured several times per year for
16 continuing education courses on wage and hour and class action issues at events
17 in San Diego, Orange County, Los Angeles, and San Francisco. For over twelve
18 years, Mr. Singer has served as wage and hour amicus co-chair and liaison for
19 the California Employment Lawyers Association, drafting, reviewing, and
20 coordinating amicus filings on wage and hour issues in the California Supreme
21 Court and Courts of Appeal. He has been engaged in the practice of labor and
22 employment law since 2000, handling well over 300 wage and hour class and
23 PAGA actions and several individual labor cases. He has litigated several types
24 of employment actions, including complex ERISA employee welfare benefit
25 plan cases, as well as wage and hour class actions before Federal and State
26 Courts in California. In 2014, I, along with Managing Partner Michael D. Singer,
27 tried a wage and hour class action involving claims for illegally deducted wages
28 and unreimbursed expenses. *Dilts v Penske Logistics LLC, Inc.* We successfully

1 appealed the trial court ruling in *Dilts* finding state laws preempted by the
2 FAAAA for truck drivers.

3 6. Mr. Singer has participated in over 50 appellate cases and argued
4 writs and appeals before several California District Courts of Appeal, arguing for
5 plaintiffs on rehearing in *Brinker International Inc. v. Superior Court* before the
6 Fourth District Court of Appeal, as well as federal appeals in the Second, Third,
7 and Ninth Circuit Courts of Appeals. In addition, Mr. Singer has drafted
8 numerous appellate briefs as the appellant, respondent, or amicus curiae in
9 employment class and individual actions. As co-Class Counsel in *Brinker*
10 *Restaurant Corp. v. Superior Court* [formerly reported at (2008)165 Cal.App.4th
11 25], Mr. Singer argued before the Fourth District Court of Appeal in May 2008
12 on transfer from the California Supreme Court, and co-authored the successful
13 Petition for Review. My firm has successfully tried class cases, obtained
14 appellate reversals of class certification denials (*Hicks v. Kaufman and Broad*,
15 (2001) 89 Cal.App.4th 908), and certified multiple wage and hour classes.

16 7. As a part of our overall firm philosophy lawyers perform
17 community service and pro bono work. Firm volunteer work includes service
18 through the Legal Aid at Work, San Diego Volunteer Lawyer Program, the San
19 Diego County Bar Foundation and Consumer Attorneys of San Diego. During
20 law school, Partner Jeff Geraci interned for the ACLU and Equal Rights
21 Assistance assisting on impact litigation class action lawsuits. Mr. Geraci is a
22 past recipient of the Wiley W. Manuel Award for Pro Bono Service. Mr. Singer
23 has served on the Legal Aid at Work Board of Directors since 2011. Mr. Cohelan
24 served as the Chair of the San Diego Volunteer Lawyers Program from 2015-
25 2018, and currently sits on the Board as past Chair. He completed 24 years of
26 volunteer judicial service as a Judge Pro Tem of the San Diego Superior Court.
27 Since admission to the California Bar, Partner Diana M. Khoury has been a
28 member of the San Diego County Bar Association, Consumer Attorneys of San

1 Diego, Consumer Attorneys of California, and American Association for Justice
2 serving and chairing various committees through the years for these
3 organizations. For six years from 2010 through 2015, Ms. Khoury served on the
4 Board of Directors for Consumer Attorneys of San Diego. Since 2013, Ms.
5 Khoury actively serves on the Board of Directors for the San Diego County Bar
6 Foundation, the 501(c)(3) charitable arm of the San Diego County Bar
7 Association providing access to justice to the underserved and impoverished in
8 the San Diego County region. Our firm's recent pro bono victories include a
9 settlement which prohibits the City of San Diego from targeting homeless people
10 for illegal lodging tickets under Penal Code Section 467(j). (*Spencer v. City of*
11 *San Diego*, USDC Case No 04CV-2314 BEN (WMC).) The *Spencer* settlement
12 had the effect of increasing the number of available shelter beds in San Diego.

13 8. Cohelan Khoury & Singer has been certified Class Counsel in the
14 following contested proceedings: *Aguilar v. Atlantic Richfield, et al.*, San Diego
15 County Superior Court Case No. 00700810; *Andino v. Kaiser Foundation*
16 *Hospitals*, Alameda County Superior Court Case No. RG11580548; *Arellano, et*
17 *al. v. Container Connection of Southern California, Inc.*, Los Angeles County
18 Superior Court Case No. BC500675; *BANK OF AMERICA WAGE AND HOUR*
19 *EMPLOYMENT PRACTICES LITIGATION*, United States District Court,
20 District of Kansas MDL Case No. 2138 (FLSA Condition Certification); *Czuchaj*
21 *v. Conair Corporation*, United States District Court, Southern District of
22 California Case No. 13CV1901; *Dilts, et al. v. Penske Logistics, L.L.C., et al.*,
23 United States District Court, Southern District of California Case No.
24 08CV0318; *Englert, et al. v. AT&T Wireless Services, Inc., et al.*, Circuit Court
25 of the Second Circuit, State of Hawaii Case No. 02-1-0074; *Evans v. Washington*
26 *Mutual Bank*, Orange County Superior Court Case No. 02CC15415; *Filion v.*
27 *Ethan Allen Retail Inc.*, United States District Court, Southern District of
28 California Case No. 05CV2340; *Gerard v. Les Schwab Tire Centers of*

1 *California, Inc.*, Sacramento County Superior Court Case No. 2007-30000003;
2 *Grana, et al. v. PICO Enterprises, Inc. dba Phyle Inventory Control Specialist*
3 *and PICS L.A.S.C.* Case No. BC472891; *Gutierrez v. Save Mart Supermarkets*
4 *San Mateo Superior* Case No. CIV530955; *Wilcox v Albertsons*, San Diego
5 County Superior Court Case No. GIC833922; *Gonzalez, et al. v. Freedom*
6 *Communications, Inc. d/b/a The Orange County Register*, Orange County
7 Superior Court Case No. 03CC08756; *Graham, et al. v. Overland Solutions, Inc.*,
8 United States District Court, Southern District of California Case No. 10CV0672
9 (FLSA Conditional Certification); *Hicks v. Kaufman and Broad Home Corp.*,
10 Los Angeles County Superior Court Case No. B198414; *Hohnbaum, et al. v.*
11 *Brinker Restaurant Corporation, et al.*, San Diego County Superior Court Case
12 No. GIC834348; *KEMP, et al. v. CSEA, et al.*, Circuit Court of the First Circuit,
13 State of Hawaii Case No. 98-3815-08; *LIBERTY MUTUAL OVERTIME CASES*,
14 Los Angeles County Superior Court Case No. JCCP 4234; *Mitchell, et al. v.*
15 *Acosta, Inc., dba Acosta Sales and Marketing Company*, United States District
16 Court, Central District of California Case No.11CV07196 (FLSA Conditional
17 Certification); *Santana v. Rady Children's Hospital-San Diego*, San Diego
18 County Superior Court Case No. 37-2014-00022411; *Schaffer v. Rady*
19 *Children's Hospital-San Diego*, San Diego County Superior Court Case No.
20 337-2015-00022978; *Schneider, et al. v. Catholic Healthcare West*, San
21 Francisco County Superior Court Case No. CGC-10-506243; *Salucci v. Amada*
22 *Senior Care, Inc.*, Orange County Superior Court Case No. 37-2015-00778081;
23 *Smith v. California Pizza Kitchen*, San Diego County Superior Court Case No.
24 37-2008-00083992; *STEROID HORMONE PRODUCT CASES*, Los Angeles
25 County Superior Court Case No. JCCP 4363; *Stevenson Aibangbee v. Victoria*
26 *Apartments, et al.*, Los Angeles County Superior Court Case No. BC299498;
27 *Swift v. Liebert Corp.*, Orange County Superior Court Case No. 00CC04588;
28 *Sylvia, et al. v. Wells Fargo Home Mortgage, Inc.*, Orange County Superior

1 Court Case No. 03CC05747; *Vaquero v. Ashley Furniture Industries, Inc., et al.*,
2 United States District Court, Central District of California Case No. 12CV8590;
3 *Vaquero v. Stoneledge Furniture LLC*, Los Angeles County Superior Court Case
4 No. BC522676; *Vazquez v. Kraft Heinz Foods Company*, United States District
5 Court, Southern District of California Case No. 16-CV-02749; *Watson v.*
6 *Raytheon Company*, United States District Court, Southern District of California
7 Case No. 10CV0634; and *Weigle v. FedEx Ground Package System, Inc.*,
8 United States District Court, Southern District of California Case No.
9 06CV1330, among others, as well as being appointed Class Counsel in
10 connection with well over 200 class action settlements.

11 9. Cohelan Khoury & Singer has actively commenced, prosecuted and
12 concluded numerous state and federal class and representative actions. Since
13 2016, Cohelan Khoury & Singer has played a central role in the resolution of
14 over 200 such cases, including the following, which have received court
15 approval: (a) *Arellano, et al. v. Container Connection of Southern California,*
16 *Inc.*, Los Angeles County Superior Court, Case No. BC500675, Hon. Anne I.
17 Jones; (b) *Castro v. Home Depot U.S.A., Inc.*, Los Angeles County Superior
18 Court, Case No. BC577885, Hon. Elihu M. Berle; (c) *Czuchaj v. Conair*
19 *Corporation*, United States District Court, Southern District of California, Case
20 No. 13-CV-1901 BEN, Hon. Roger T. Benitez; (d) *Gardiner v. TSYS*, United
21 States District Court, Central District of California, Case No. 18-cv-00415, Hon.
22 David O. Carter; (e) *Grana v. PICO Enterprises, Inc.*, Los Angeles County
23 Superior Court, Case No. BC472891, Hon. Stephanie M. Bowick; (f) *Gutierrez*
24 *v. Save Mart Supermarkets*, San Mateo County Superior Court, Case No.
25 CIV530955, Hon. Marie S. Weiner; (g) *Hernandez v. Workforce Enterprises*
26 *WFE, Inc.*, Los Angeles County Superior Court Case No. BC590913, Hon. Elihu
27 M. Berle; (h) *Hicks v. Poway Academy of Hair Design, Inc.*, San Diego County
28 Superior Court, Case No. 2014-00026517, Hon. Ronald L. Styn; (i) *Hubbard v.*

1 *Caliber Home Loans, Inc.*, Orange County Superior Court, Case No. 2018-
2 01017838; (j) *Klein v. Loomis Armored US, LLC*, San Bernardino County
3 Superior Court, Case No. CIVDS1704547, Hon. David Cohn; (k) *Laureano v.*
4 *The Art of Shaving*, Los Angeles County Superior Court, Case No. BC550093,
5 Hon. Amy D. Hogue; (l) *Lopez, et al. v. Management & Training Corporation,*
6 *et al.*, United States District Court, Southern District of California, Case No. 17-
7 CV-010624 JM, Hon. Jeffrey T. Miller; (m) *Magdaleno v. Shelly Automotive,*
8 *LLC*, Orange County Superior Court Case No. 2013-0043958, Hon. Kim. G.
9 Dunning; (n) *McGrath, et al. v. Wyndham Resort Development Corporation, et*
10 *al.*, United States District Court, Southern District of California, Case. No. 15-
11 CV-1631 JM, Hon. Jeffrey T. Miller; (o) *Mena v. Wolfgang Puck Catering*, Los
12 Angeles County Superior Court Case No. BC582743, Hon. John Shepard Wiley,
13 Jr.; (p) *Morales v. The Los Angeles Country Club*, Los Angeles County Superior
14 Court, Case No. BC566493, Hon. William F. Highberger; (q) *Nijmeh v. Bon*
15 *Appetit Management Company, Inc.*, Santa Clara County Superior Court, Case
16 No. 16CV294127, Hon. Thomas E. Kuhnle; (r) *Plascencia v. Aramark Services,*
17 *Inc.*, Santa Clara County Superior Court, Case No. 2015-1-CV-288310, Hon.
18 Brian C. Walsh; (s) *Plimpton v. Gordon Trucking, Inc.*, San Bernardino County
19 Superior Court, Case No. CIV-DS-1511918, Hon. Donald Alvarez; (t) *Raya v.*
20 *Amazon*, USDC, Northern District of California, Case No. 15-CV-02005 MMC,
21 Hon. Maxine M. Chesney; (u) *Rivas v. ESA Management*, USDC, Central
22 District of California, Case No. 14-CV-5767, Hon. Dale S. Fischer; (v)
23 *Rodriguez v Healthcare Partner Medical Group, Inc.*, Los Angeles County
24 Superior Court, Case No. BC541313, Hon. Kenneth Freeman; (w) *Ryan v.*
25 *Dignity Health*, Sacramento County Superior Court Case No. 2013-00147371,
26 Honorable Alan G. Perkins; (x) *Santana v. Rady Children's Hospital-San Diego,*
27 San Diego County Superior Court Case No. 37-2014-00022411, Hon. Joel R.
28 Wohlfeil; (y) *Schaffer v. Rady Children's Hospital-San Diego*, San Diego

County Superior Court Case No. 337-2015-00022978; Hon. Joel R. Wohlfeil; (z) *Schneider v. Catholic Healthcare West*, San Francisco County Superior Court, Case No. CGC-10-506243, Hon. Angela Bradstreet; (aa) *Schwartz v Bank of the West*, San Francisco County Superior Court, Case No. CGC-14-538955, Hon. Harold E. Kahn; (bb) *Syed v. M.I. Swaco*, USDC, Eastern District of California, Case No. 12-CV-01718 DAD, Hon. Dale A. Drozd; (cc) *Vaquero, et al. v. Stoneledge Furniture, LLC*, Los Angeles County Superior Court Case No. BC522676, Hon. Elihu M. Berle; (dd) *Vazquez v. Kraft Heinz Foods Company*, USDC, Southern District of California Case No. 16-CV-02749, Hon. William Q. Hayes; (ee) *Walsh v. Cedars-Sinai Medical Center*, Los Angeles County Superior Court Case No. BC487290, Hon. William F. Highberger; among others.

10. 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. Attached as Exhibit A is a true and correct copy of the Stipulation of Class Action and PAGA Settlement and Release of Claims (“Settlement Agreement”).

11. 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.

12. 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

1 minimum wage for all hours worked.

2 13. Plaintiff alleges that during his tenure with Smithfield, there were
3 only three instances where he earned commissions from sales greater than the
4 \$425 minimum weekly commission.

5 14. The proposed Class is defined as all individuals employed by
6 Smithfield in California as hourly Route Sales Representatives or Relief Route
7 Sales Representatives during the April 12, 2017 through November 30, 2020
8 Class Period. There are 45 Class Members, including Plaintiff, who worked an
9 estimated 5,114 total Workweeks during the Class Period. A subset of the Class,
10 PAGA Members, were employed sometime during the March 7, 2020 through
11 November 30, 2020 PAGA Period. There are **28** PAGA Members with **875** Pay
12 Periods during the PAGA Period.

13 15. On April 12, 2021, Plaintiff filed a complaint in the Superior Court
14 of California, County of Los Angeles, *Steven Kane v. Smithfield Direct, LLC.*,
15 Case No. 21STCV13736. Plaintiff alleged Smithfield (1) failed to pay for all
16 time worked while clocked out for meal periods; (2) failed to properly pay
17 overtime wages, premium wages for non-compliant meal and rest periods, and
18 sick leave pay because Smithfield did not properly calculate the Class Member's
19 regular rate pay; (3) failed to maintain a compliant meal and rest period policy;
20 and derivative claims for (4) inaccurate wage statements and (5) untimely final
21 wages. On May 11, 2021, a First Amended Complaint (FAC) was filed adding
22 claims for civil penalties arising under PAGA.

23 16. On June 14, 2021, Defendant removed the Action to this Court
24 under 28 U.S.C. § 1441 and 28 U.S.C. § 1332(a), and for supplemental
25 jurisdiction under 28 U.S.C. § 1367(a), alleging diversity of citizenship and that
26 the individual amount in controversy was \$75,000 or more. Dkt. 1. Smithfield
27 answered the FAC on June 21, 2021. Dkt. 10. Plaintiff filed a motion to remand
28 the Action to state court on July 14, 2021. Dkt. No. 13. The Court denied the

1 motion on August 3, 2021, with a finding Defendant had satisfied its burden to
2 establish diversity jurisdiction. Dkt. 25.

3 17. On October 12, 2021, Plaintiff filed his certification motion with a
4 hearing date of November 22, 2021, seeking to certify a class of individuals
5 employed by Smithfield as RSRs. Dkt. 27. Plaintiff contends the motion was
6 supported by substantial evidence, including declarations from Plaintiff and two
7 other Class Members. Prior to the hearing on the motion, the Parties attended
8 mediation on October 25, 2021. After a day of negotiations, and the later
9 acceptance of a mediator's proposal, Plaintiff withdrew the motion. Dkts. 28, 33.

10 18. On November 9, 2021, the Court held a status conference. The
11 Parties informed the Court of the proposed Settlement and recited the terms of
12 the settlement on the record. The Court set a preliminary approval hearing for
13 January 10, 2022, with a filing deadline of December 10, 2021. Dkt. 32.

14 19. On July 6, 2021, Plaintiff served Defendant with interrogatories, to
15 which Defendant responded on August 6, 2021. Defendant served Plaintiff with
16 interrogatories and requests for document production on August 13, 2021, to
17 which Plaintiff responded and produced documents on September 15, 2021.

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

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

1 November 3, 2021 opt out deadline, Plaintiff's Counsel was provided with the
2 contact information for all Class Members.

3 22. Prior to the release of the Class' contact information, and in support
4 of Plaintiff's class certification motion, Plaintiff's Counsel conducted several
5 telephonic interviews of Class Members whose names had been obtained
6 through their investigation. Two Class Members provided declarations filed in
7 support of Plaintiff's certification motion. Dkts. 27-15 & 27-16.

8 23. Smithfield's counsel deposed Mr. Kane on October 18, 2021. On
9 October 19, 2021, pursuant to FRCP 30(b)(6), Plaintiff's Counsel took
10 depositions of Smithfield's persons most knowledgeable: Crystal Delorey-Senior
11 Director of Payroll, and Michael Hughley-Senior Director of Operations for
12 DSD, Direct Store Delivery.

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

27 25. On October 25, 2021, the Parties attended mediation with Deborah
28 Saxe, Esq. of JAMS, an experienced and respected wage and hour mediator in

1 Southern California. Following a full day of mediation, the Parties did not reach
2 agreement, although considerable progress had been made. A mediator's
3 proposal was tendered to the Parties, which they accepted with minor
4 modifications on October 27, 2021. The Parties thereafter continued to negotiate
5 at arms'-length the balance of the terms contained in the long-form Settlement
6 Agreement.

7 26. The Parties have agreed, subject to Court approval, that the Action
8 may be settled for the Gross Settlement Amount of \$350,000 (GSA), no part of
9 which may revert to Smithfield. The GSA includes (i) Class Counsel's attorneys'
10 fees up to \$116,666 to compensate Class Counsel for work performed and
11 remaining to be performed to secure final settlement approval (Plaintiff consented
12 in writing to apportionment of attorneys' fees awarded in the following amounts: 1/3 to
13 the Davtyan Law Firm, Inc., and 2/3 to Cohelan Khoury & Singer), and (ii) litigation
14 expenses estimated at \$19,000; (iii) a Class Representative Service Payment to
15 Plaintiff of \$10,000 for acting as the sole representative for the Class, work
16 performed, risks undertaken for Smithfield's costs if the case had been lost, and
17 the substantial benefits conferred upon 44 other members of the Class;
18 (iv) Administration expenses not to exceed \$6,500; and (e) PAGA Payment of
19 \$15,000, apportioned: 75% (\$11,250) to the to the Labor Workforce and
20 Development Agency (LWDA Payment), and 25% (\$3,750) to all eligible
21 aggrieved employees (PAGA Member Payment).

22 27. After all Court-approved deductions from the GSA, less the
23 Employer Tax Obligations estimated at \$8,806.50, the remaining estimated Net
24 Settlement Amount (NSA) of \$174,027.50 will be entirely distributed to
25 Participating Class Members based on the number of weeks worked during the
26 Class Period in relation to the total number of weeks worked by all Participating
27 Class Members. With an aggregate estimated at 5,114 Workweeks, Class
28 Members may expect to receive an estimated \$34.03 for each week worked

1 during the Class Period. If the Class Member is an eligible PAGA Member, he or
2 she will also receive a portion of the \$3,750 PAGA Member Payment based on
3 the number of Pay Periods worked during the PAGA Period. With 875 Pay
4 Periods worked by the 28 PAGA Members, each may expect to receive \$4.28 per
5 Pay Period, whether or not they opt out of the Class settlement.

6 28. The method of distribution allocates the funds based on each Class
7 Member's tenure with Smithfield, i.e., using their number of weeks worked
8 during the Class Period, and does not give preference to any Class Member. The
9 information needed to distribute the funds is readily available from Smithfield's
10 records, and the Administrator can apply the formula fairly and transparently.
11 Settlement payments will be allocated one-third to wages, for which an IRS W-2
12 Form will be issued, and two-thirds to interest and penalties, for which IRS 1099
13 Forms will be issued. PAGA Members will receive an IRS Form 1099 for their
14 portion of the \$3,750 PAGA Payment.

15 29. Following Final Approval and the Effective Date of Settlement,
16 each Class Member who did not opt out will receive their share of the NSA,
17 without the need to submit a claim form. Each PAGA Member will be mailed
18 their share of the \$3,750 PAGA Payment even if they opt-out of the Class
19 settlement. All uncashed checks after 90 days after issuance will be voided, and
20 forwarded to the State of California's Controller, Unclaimed Property Division
21 for further handling on behalf of the Class Member whose check was voided.

22 30. The Parties selected CPT Group, Inc. (CPT) to administer the
23 Settlement. Following preliminary approval, CPT will conduct a search of the
24 National Change of Address database to update Class Member addresses, and
25 mail a Notice of Class Action Settlement (Class Notice), Change of Address
26 form, and pre-printed return envelope (Notice Packet) to all Class Members
27 identified by Defendant's employment records. On the return of undelivered
28 Notice Packets, CPT will skip trace using the Class Member's social security

1 number to locate a better address and remail the Notice Packet.

2 31. The Notice advises the Class of their right, manner and timing to:
3 participate in the Settlement; dispute the basis of their payment; object; and, opt-
4 out. The Notice also informs Class Members of their individualized payment,
5 release to be given, date of the Final Approval hearing, and how to obtain further
6 information through Class Counsel, the Administrator's website, or the Court's
7 docket.

8 32. Participating Class Members will release the Released Parties from
9 the Released Claims arising from the factual allegations of the First Amended
10 Complaint.

11 33. Released Parties means: Defendant and each of its respective past,
12 present and future owners, stockholders, parent corporations, related or affiliated
13 companies, subsidiaries, officers, directors, shareholders, employees, agents,
14 principals, heirs, representatives, accountants, attorneys, auditors, consultants,
15 insurers and re-insurers, and each of their company-sponsored employee benefit
16 plans of any nature (including, without limitation, profit-sharing plans, pension
17 plans, 401(k) plans, and severance plans) and all of their respective officers,
18 directors, employees, administrators, fiduciaries, trustees and agents, and any
19 individual or entity which could be jointly liable with Defendant.

20 34. Released Claims are defined as all claims, demands, rights,
21 liabilities, and causes of action, arising during the Class Period, that were pled in
22 the Complaint, or which could have been pled based on the facts alleged,
23 whether in tort, contract, statute, rule, ordinance, order, regulation, or otherwise,
24 for state and federal wage and hour laws (including, but not limited to, California
25 Labor Code §§ 201-203, 227.3, 218.5, 226, 226.7, 246, 510, 512, 551, 552, 558,
26 1174, 1194 1194.2, 1197 or 2698 *et seq.* (PAGA) and the Industrial Welfare
27 Commission Wage Orders), whether for economic damages, non-economic
28 damages, restitution, penalties, wages, liquidated damages, interest or attorneys'

1 fees, including but not limited to: the causes of action asserted in the Complaint
2 for Defendant's alleged failure (1) to pay wages including minimum wages and
3 overtime, (2) to pay vacation and sick leave, (3) to provide meal or rest periods
4 or pay additional wages in lieu thereof, (4) to provide accurate itemized wage
5 statements, (5) to timely pay all wages upon termination, and (6) as related to the
6 foregoing, the causes of action for alleged unlawful, unfair and/or fraudulent
7 business practices under California Business and Professions Code § 17200, *et*
8 *seq.*, and (7) civil penalties pursuant to the Private Attorneys General Act of
9 2004, Labor Code §§ 2698, *et seq.*

10 35. Plaintiff believed his case was suitable for certification on the basis
11 there were company-wide policies that affected RSRs which could be established
12 using representative testimony that would not require separate mini-trials on
13 liability. Smithfield, through its counsel, also presented several significant
14 defenses to the claims as well as good faith objections to Plaintiff's ability to
15 certify the class. Smithfield maintains resolution of these issues requires
16 individualized analysis of the nature of the Class members' job duties and
17 responsibilities as RSRs, because the Company's practices and procedures varied
18 by location, supervisor, job, and employee. Smithfield maintains individual
19 issues predominate and certification would be unlikely, despite a common pay
20 scheme and common defense. Thus, while Plaintiff believed and continues to
21 believe this is a strong case for certification, significant risks exist associated
22 with class certification and potential defenses.

23 36. Plaintiff recognized and considered the inherent risks and
24 uncertainty of litigation, including: (i) denial of certification; (ii) if certified,
25 decertification; (iii) a grant of summary judgment or adjudication; (iv) the need
26 for a unanimous jury; (v) the possibility of an unfavorable, or less favorable,
27 result at trial; (vi) the possibility post-trial motions may result in an unfavorable,
28 or less favorable, result than trial; and, (vii) the possibility of an unfavorable, or

1 less favorable result on appeal, and the certainty that process would be lengthy.

2 37. Plaintiff's claims involve complex disputed legal and factual issues.
3 While Plaintiff believes in the strength of his claims, Smithfield's defenses,
4 particularly its motor carrier and outside sales exemption defenses, create a
5 significant possibility Class claims would not be certified or would fail on the
6 merits.

7 38. Continued litigation would take substantial time, create risk of no
8 recovery, and possibly confer no Class benefit. By contrast, the proposed
9 Settlement will yield a prompt, certain, and substantial Class recovery without
10 requiring additional time or judicial resources.

11 39. With more than a full day of intense negotiation facilitated by an
12 experienced and knowledgeable mediator, and several more days to
13 independently evaluate the mediator's proposal, the case is clearly at a stage
14 supporting Settlement.

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

19 41. Class Counsel Cohelan Khoury & Singer and Davtyan Law Firm,
20 Inc. have significant wage and hour class action experience and have obtained
21 certification and settlement approval in dozens of cases.

22 42. Defendant's counsel Roland Juarez and Steven Morphy, and their
23 firm Hunton Andrews Kurth LLP, are extremely knowledgeable, experienced,
24 and capable in wage and hour law and class action litigation.

25 43. As Class Counsel have prosecuted numerous wage and hour class
26 actions, they are qualified to evaluate the claims, risks and potential outcome of
27 further litigation, and propriety of Settlement of this Action.

28 44. Class Counsel believes the proposed Settlement is in the Class' best

1 interest based on detailed knowledge of the factual and legal issues present.
2 Counsel considered, among other risks, Smithfield's reliance upon the FMCSA
3 exemptions, adverse class certification, decertification, or summary judgment
4 rulings, loss or lesser outcome at trial, post-trial, and appeal, and other perils of
5 litigation that affect the value of all claims.

6 45. Based on data provided, 45 Class Members were identified with
7 5,114 weeks worked during the Class Period, with an hourly rate of \$10.00 per
8 hour through December 31, 2017, and \$10.50 from January 1, 2018 through
9 November 2020, and a guaranteed weekly commission of \$425.00.

10 46. Minimum wages must be paid for all time worked or subject to the
11 employer's control. Labor Code § 1194. Plaintiff contends RSRs were not paid
12 for time worked while clocked out for meal periods due to time pressures, of
13 which Plaintiff alleges, Smithfield was aware. Plaintiff contends the RSRs are
14 owed minimum wages for this unpaid time. Plaintiff estimates RSRs worked on
15 average 30 minutes—or 0.5 hour—off-the-clock while clocked out for meal
16 periods per workweek. Plaintiff estimates unpaid minimum wages during the
17 Class Period at \$29,814.25.

18 47. Smithfield contends that the RSRs did not engage in off-the-clock
19 work during meal breaks. The RSRs were paid for all hours worked and worked
20 alone independently in their trucks, each determining the timing of their meal
21 breaks. As such, Plaintiff faced two significant, if not insurmountable huddles in
22 recovering anything on this claim: (a) no contemporaneous records to document
23 the off-the-clock work, making their proof at trial extremely unlikely, and (b)
24 significant individual issues that would predominate, making class treatment
25 unlikely. Even if the RSRs did occasionally work during meal breaks, Plaintiff
26 would be charged with proving Defendant knew or should have known that off-
27 the-clock work was occurring, an element of proof difficult in these factual
28 circumstances.

1 48. Plaintiff reduced its estimate of Smithfield's exposure by 50% to
2 **\$14,907.12.**

3 49. Plaintiff contends Smithfield misclassified RSRs as outside sales
4 exempt, because RSRs never spent more than half their time—or virtually any
5 time at all—engaged in sales. Plaintiff further contends that RSRs were not
6 exempt under the FMSCA exemption and RSRs could not be exempt under the
7 FMCSA exemption because they never drove across states lines to perform their
8 jobs, and could not reasonably have expected that Smithfield would ask them to
9 do so.

10 50. Based on Class Member interviews, and review of the data
11 provided, Plaintiff estimated that RSR's worked 10 hours of overtime each week
12 throughout the Class Period. Contending that the RSRs were entitled to overtime
13 premiums, Plaintiff estimated underpaid overtime wages of \$866,882.90.

14 51. Plaintiff reduced its assessment of Smithfield's exposure by 75% to
15 **\$216,720.73.**

16 52. Plaintiff contends that if an employer fails to provide an employee a
17 meal or rest period in accordance with California law, the employer must pay the
18 employee one hour of pay at the employee's regular rate for each work day a
19 meal or rest period is not provided. Smithfield contends that as commercial truck
20 drivers, RSRs were not subject to California's meal and rest break laws.

21 53. Plaintiff estimated the RSRs' regular rate of pay at \$20.63 in 2017
22 and \$21.13 from 2018 through November, 2020. Plaintiff used the blended
23 regular rate of pay, \$21.03, to estimate meal and rest period premiums. Plaintiff
24 contends RSRs suffered at least two meal violations per week. At the regular rate
25 of \$21.03 per hour x 2 violations x 5,114 workweeks, maximum exposure was
26 valued at \$215,094.84.

27 54. Plaintiff reduced its estimate of Smithfield's exposure by 75% to
28 **\$53,773.71.**

1 55. For alleged rest break violations, based on the information provided
2 and Class Member interviews, Plaintiff estimated two missed rest breaks per
3 week. Over 5,114 workweeks, Plaintiff estimated maximum liability of
4 \$215,094.84. Given that rest period claims are inherently difficult to certify, that
5 Class Members likely could not remember which, if any, shifts had non-
6 compliant or missed rest periods, and the lack of rest period records, Plaintiff
7 reduced its exposure estimate by 75% to **\$53,773.71**.

8 56. Plaintiff contends sick pay was underpaid because it was based on
9 the RSRs' hourly rate of pay instead of their regular rate of pay, which Plaintiff
10 contends should have taken into consideration the \$425 weekly commission.

11 57. Plaintiff calculated that Smithfield paid 560 sick leave hours to 14
12 randomly-selected RSRs over the Class Period (average of 40 sick pay hours to
13 each RSR). Smithfield paid RSRs sick leave at the base hourly rate of pay of
14 \$10 per hour in 2017; and \$10.50 per hour from 2018 through November, 2020.
15 Thus, Plaintiff estimates Smithfield paid each RSR approximately \$416.00 for
16 sick leave pay. As above, Plaintiff estimates the RSRs' regular rate of pay at
17 \$20.63 in 2017 and \$21.13 from 2018 through November 2020. Plaintiff, thus
18 contends each RSR should have been paid \$841.20 for sick leave, and underpaid
19 by \$425.20. Therefore, Smithfield's liability for underpaid sick leave wages is
20 estimated at **\$19,134** (\$425.20 x 45 RSRs).

21 58. Smithfield paid vacation pay to RSRs at their base hourly rate of
22 pay—which was less than minimum wage—instead of at their regular rate of
23 pay, which should have included the \$425 weekly commission.

24 59. Plaintiff calculated that Smithfield paid 2,198.70 vacation pay hours
25 to 14 randomly-selected RSRs over the Class Period (average of 157.05 vacation
26 pay hours per RSR). Vacation pay was paid at \$10/hour in 2017 and \$10.50/hour
27 from 2018 through November 2020. Each RSR was paid an estimated \$1,633.32.
28 Plaintiff contends Smithfield should have paid RSRs using their regular rates of

1 pay, that would have paid out vacation pay of \$3,302.76. Thus, RSRs were
2 underpaid by \$1,669.44. Smithfield's total exposure for this underpaid claim was
3 estimated at **\$75,124.94.**

4 60. Assuming Plaintiff prevailed on the underlying vacation and sick
5 leave claims, with 39 formerly employed Class Members during the Class
6 Period, Plaintiff estimated potential waiting time maximum penalties at
7 \$271,884.60 (39 RSRs x \$6,971.40 (\$232.38 x 30 days)).

8 61. Since these claims require proof of the underlying claims, and are
9 subject to class certification obstacles, Plaintiff discounted his estimate by 50%
10 to **\$135,942.30.**

11 62. Plaintiff contends Smithfield's wage statements failed to show the
12 accurate total hours worked, net and gross wage earned, and all applicable hourly
13 rates in effect during the pay period and the corresponding number of hours
14 worked at each hourly rate. Thus, Plaintiff assumed the maximum \$4,000
15 penalty for each of the RSRs resulting in an estimate of \$180,000 (45 x \$4,000).
16 [45 RSRs worked 5,114 weeks during the Class Period; or on average 114
17 weeks. At 41 weeks, assuming a wage statement violation occurred each week,
18 the maximum penalty of \$4,000 per RSR would be reached: \$50 for first week
19 plus \$100 for subsequent weeks x 40 workweeks (or \$4,000) = \$4,050)].

20 63. As this claim is derivative as well, similar to the defenses to the
21 waiting time penalty claims, it not only requires Plaintiff to prevail on the
22 underlying claims, but also to show that Smithfield knowingly and intentionally
23 failed to pay wages, and to overcome Smithfield's good faith defense it did not
24 act intentionally.

25 64. Based on the foregoing defenses and arguments against recovery on
26 such derivative claims, Plaintiff discounted the value of this claim by 50% to
27 **\$90,000.**

28 65. The GSA represents 53% of Plaintiff's estimated reasonable value

1 of the claims in this Action evincing the reasonableness of the Settlement.

2 66. Plaintiff calculated the maximum PAGA civil penalties, using the
3 initial violation rate for all 875 Pay Periods during the PAGA Period, as \$100 for
4 each Pay Period for (a) Minimum Wages (Section 1194); (b) Overtime Wages
5 (Section 510); (c) Meal Periods (Sections 226.7, 512); (d) Rest Periods (Section
6 226.7); (e) Sick Pay (Section 246); (f) Vacation Pay (Section 227.3); (g)
7 Untimely Final Wages for 39 RSRs (Section 203), and (h) \$250 for each Pay
8 Period for Wage Statements (Section 226).

9 67. Plaintiff estimated maximum PAGA penalties at \$87,500 [875 pay-
10 periods x \$100 civil penalty, subject to Court approval and subject to reductions
11 as authorized under Labor Code § 2699(e)(2).

12 68. The LWDA was served with Plaintiff's charges on February 22,
13 2021 indicating an intention to file a representative action on behalf of himself
14 and all other RSRs seeking civil penalties. Attached as Exhibit B is the LWDA
15 Confirmation of Receipt of the February 22, 2021 PAGA Notice.

16 69. Following the filing of the FAC to add civil penalties under PAGA
17 for Labor Code violations, a copy of the FAC was served upon the LWDA.
18 Attached as Exhibit C is the May 12, 2021 LWDA Confirmation of Receipt of
19 the First Amended Complaint.

20 70. Through the present, the LWDA has not stepped forward or notified
21 Plaintiff or his counsel it intended to investigate the alleged claims.

22 71. Class Counsel will file a motion for reimbursement of litigation
23 expenses of up to \$19,000 and an award of fees not to exceed \$116,666 (one-
24 third of GSA). Class Counsel will file their motion for attorneys' fees and
25 litigation costs 14 days prior to the deadline for Class Members that will detail
26 the all hours expended, their lodestar fee, and expenses incurred.

27 72. There are 45 putative Class Members, which satisfies the
28 numerosity element for class certification.

1 73. Adequacy is established when a proposed Class Representative has
2 no conflict of interest with Class Members and is represented by qualified
3 counsel. Plaintiff has no conflict with the Class, and his counsel are qualified
4 Class Counsel because they are experienced wage and hour class action attorneys
5 fully able to pursue the interests of the Class.

6 74. This motion was provided to the LWDA, via its website on the date
7 the Motion was filed with the Court.) Attached as Exhibit D is a true and correct
8 copy of the LWDA confirmation of receipt.

9
10 I declare under penalty of perjury under the laws of the United States of
11 America and the State of California that the matters stated in this Declaration are
12 true and correct and that it was executed by me on December 10, 2021, in San
13 Diego, California.

14
15 s/ J. Jason Hill
16 J. Jason Hill
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