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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

PEDRO CORTEZ, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

BG TRUCKING, INC., an California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 37-2021-00010743-CU-OE-CTL

[Assigned for All Purposes to Hon. Joel R.
Wohlfeil, Dept. C-73]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS AND REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

Date: June 30, 2023
Time: 9:00 a.m.
Dept.: C-73

Reservation Number: 2967791

Complaint Filed: March 10, 2021

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 30, 2023, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Joel R. Wohlfeil, judge presiding, in Department S-26 of the above referenced Court located at 330 W. Broadway, San Diego, CA 92101, Plaintiff Pedro Cortez (“Plaintiff”) will seek an Order:

(1) approving the Joint Stipulation of Class and Representative Action Settlement (“Agreement” or “Settlement Agreement”) in this matter;

(2) conditionally certifying the following classes for settlement purposes only: all current and former non-exempt employees of Defendant in the State of California who were paid on a mileage basis at any time from March 10, 2017, through September 30, 2022.

(3) appointing Plaintiff as the Class Representative and Larry W. Lee, Kristen M. Agnew and Nicholas Rosenthal of Diversity Law Group, P.C., as Class Counsel;

(4) preliminarily approving the Settlement and the gross settlement amount of One Hundred Thirty Thousand Dollars (\$130,000.00);

(5) finding on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Enhancement Payment to Plaintiff, Class Counsel’s fees and costs, the settlement administration fees, and the allocation of payments to Settlement Class Members, that could ultimately be given final approval by this Court;

(6) approving the Notice of Class Action Settlement (“Class Notice”) to be sent to Class Members, which is attached as an exhibit to the Settlement Agreement;

(7) approving the distribution of the Class Notice to Class Members substantially in the manner and form set forth in the Settlement Agreement;

(8) appointing Phoenix Settlement Administrators as the settlement administrator; and

(9) setting the matter for a Final Fairness and Final Approval hearing.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for court approval of the settlement of a purported class action and allows the Court to preliminarily certify a class for settlement purposes.

1 The basis for this Motion, filed without any opposition from Defendant BG Trucking, Inc.
2 (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the procedures
3 proposed by the parties are adequate to ensure the opportunity of Class Members to participate in,
4 opt-out of, or object to the settlement.

5 This Motion will be based on the attached Memorandum of Points and Authorities, the
6 Settlement Agreement, the proposed Class Notice, and the supporting Declarations of Larry W.
7 Lee, Kristen M. Agnew, Nicholas Rosenthal, Plaintiff Pedro Cortez, and upon the oral arguments
8 of counsel (should there be any) and on the complete records and file herein.

9
10 Dated: January 30, 2023

DIVERSITY LAW GROUP, P.C.

11
12 By:

13 Larry W. Lee
14 Kristen M. Agnew
15 Nicholas Rosenthal
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a wage and hour class and representative Private Attorneys General Act
4 (“PAGA”) action. As set forth in the operative Second Amended Complaint, Plaintiff Pedro
5 Cortez (“Plaintiff”) alleges that Defendant BG Trucking, Inc. (“Defendant”) maintained a policy
6 and practice of: (a) failing to pay all minimum, regular, and overtime wages owed, in violation of
7 Labor Code sections 226.2, 510, 558, 1194, 1197 and 1197.1; (b) failing to provide paid rest
8 periods, in violation of Labor Code sections 226.2 and 226.7; (c) failing to pay all wages owed
9 upon separation of employment, in violation of Labor Code sections 201, 202 and 203; and (d)
10 failing to provide accurate, itemized wage statements, in violation of Labor Code section 226.
11 Plaintiff brings class and PAGA claims based on these violations.

12 With the assistance of a private mediator, Plaintiff and Defendant (collectively, the
13 “Parties”) have reached a proposed class-wide settlement, the terms of which are reflected in the
14 Joint Stipulation of Class and Representative Action Settlement (“Agreement” or “Settlement
15 Agreement”).¹ The Settlement Agreement calls for requires that Defendant pay the Gross
16 Settlement Amount of \$130,000.000, which will be distributed to the Class on a **non-**
17 **reversionary** basis.

18 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
19 to the class and PAGA claims alleged in the lawsuit and engaged in a thorough study of legal
20 principles applicable to the claims asserted against Defendant. Through the exchange of both
21 formal and informal discovery, Defendant provided necessary data pertaining to the number of
22 putative class members and number of pay periods at issue, as well as information pertaining to
23 Defendant’s payroll policies and practices. The Parties believe that the settlement for the
24 consideration and on the terms set forth in the Settlement Agreement is fair, adequate, and
25 reasonable, in light of all known circumstances and the expenses and risks inherent in litigation.
26

27
28 ¹ A true and correct copy of the Settlement Agreement (“SA”) is attached to the Declaration of
Kristen M. Agnew in Support of Plaintiff’s Motion for Preliminary Approval (“Agnew Decl.” or
“Agnew Declaration”) at **Exhibit A**.

Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. BACKGROUND OF THE SETTLEMENT

A. Summary of the Legal and Factual Allegations.

Plaintiff was employed by Defendant as a truck driver from on or about October 11, 2019, to on or about November 13, 2020. Declaration of Pedro Cortez (“Cortez Decl.”) ¶ 2. Throughout his employment, Plaintiff was paid on a mileage/piece-rate basis based on the number of miles he drove. *Id.*

As set forth in the operative Second Amended Class and Representative Action Complaint (“SAC” or “Second Amended Complaint”), Plaintiff contends that he and other employees who were compensated on a mileage/piece-rate basis, did not receive minimum, regular or overtime wages for time spent working for Defendant completing non-productive tasks. Agnew Decl. ¶ 7; Cortez Decl. ¶ 3. These non-productive tasks include, but are not limited to, pre-trip inspections, fueling the truck and loading/unloading the truck. Agnew Decl. ¶ 7; Cortez Decl. ¶ 3. In addition, because Plaintiff and other mileage/piece-rate employees did not receive an hourly wage, any duty-free rest breaks were not “paid” breaks. Agnew Decl. ¶ 7; Cortez Decl. ¶ 3.

Due to the underpayment and/or nonpayment of wages and rest period premiums, the wage statements provided to Plaintiff and other mileage/piece-rate employees displayed inaccurate rates of pay, net and gross wages earned, and total hours worked, in violation of Labor Code section 226(a). Agnew Decl. ¶ 7; Cortez Decl. ¶ 4. As a separate, independent violation of Labor Code section 226(a), the wage statements issued to these employees did not identify the applicable rates or miles used to calculate their wages. Agnew Decl. ¶ 7; Cortez Decl. ¶ 4. Rather, the wage statements simply listed the gross sum of the wages without any explanation. Agnew Decl. ¶ 7; Cortez Decl. ¶ 4.

Plaintiff further alleges that Defendant failed to pay the underpaid minimum, regular and overtime wages, and rest premium compensation at separation of employment. Agnew Decl. ¶ 7; Cortez Decl. ¶ 5. Thus, Defendant is liable for waiting time penalties under Labor Code section

203 to Plaintiff and other mileage/piece-rate employees who separated employment.

B. Plaintiff Initiates a Class and Representative Action Lawsuit.

On February 12, 2021, Plaintiff submitted written notice to the California Labor and Workforce Development Agency (“LWDA”), alleging that Defendant violated Labor Code sections 201, 202, 203, 204, 226, 226.2, 226.7, 227.3 510, 558, 1194, 1197, and 1197.1, pursuant to Labor Code section 2699 (“PAGA Notice”). Agnew Decl. ¶ 3.

On March 10, 2021, Plaintiff initiated this action in San Diego County Superior Court. Agnew Decl. ¶ 4. The initial complaint asserted class action claims for: (1) violation of Labor Code sections 226.2, 510, 558, 1194, 1197, and 1197.1; (2) violation of Labor Code sections 226.2 and 226.7; (3) violation of Labor Code sections 510, 558, and 1194; (4) violation of Labor Code section 226; (5) violation of Labor Code section 227.3; and (6) violation of Business and Professions Code section 17200, *et seq. Id.* On April 12, 2021, Plaintiff filed a first amended complaint, adding a representative action claim for violation of Labor Code section 2698, *et seq. Id.*

C. The Operative Second Amended Complaint.

On December 16, 2022, Plaintiff filed the operative Second Amended Class and Representative Action Complaint (“SAC” or “Second Amended Complaint”).² Agnew Decl. ¶ 6. As alleged in the Second Amended Class and Representative Action Complaint, Plaintiff contends that Defendant (a) failed to pay all minimum, regular, and overtime wages owed for time spent completing non-productive tasks, in violation of Labor Code sections 226.2, 510, 558, 1194, 1197, and 1197.1; (b) failed to provide paid rest periods, in violation of Labor Code sections 226.2 and 226.7; (c) failed to pay all wages owed upon separation of employment, in violation of Labor Code sections 201, 202, and 203; (d) failed to provide accurate, itemized wage statements, in violation of Labor Code section 226; and (e) engaged in Unfair Business Practices in violation of the UCL, the California Labor Code and the applicable IWC Wage Orders.

² As a condition of Settlement, Plaintiff agreed to withdraw the class and representative PAGA claims predicated on Defendant’s alleged failure to calculate the regular rate of pay for purposes of paying overtime wages and penalties for untimely payment of vacation wages. *See* SA § B-6; Agnew Decl. ¶ 18.

1 Plaintiff seeks to represent the Class and other Aggrieved Employees, and seeks damages,
2 penalties, attorneys' fees, and costs. *Id.*

3 **D. A Summary of Discovery and Investigation.**

4 The Parties engaged in an extensive exchange of documents and information, through
5 both formal and informal discovery. Agnew Decl. ¶¶ 8-14. Plaintiff propounded written
6 discovery relevant to the class and PAGA claims alleged in the Action. *Id.* at ¶¶ 9, 10. Amongst
7 other relevant topics, the discovery required Defendant to provide documents and information
8 relevant to class certification, including the number of putative class members, including the
9 number of putative class members, payroll records of putative class members, Defendant's wage
10 and hour policies. *Id.* at ¶ 9. More specifically, the discovery called for Defendant to produce its
11 policies with respect to the payment of wages to piece-rate employees for time spent completing
12 non-productive tasks, the payment of wages to piece-rate employees for duty-free rest periods,
13 meal and rest periods provided to Defendant's drivers, the calculation of the regular rate of
14 payment for purposes of paying overtime wages, and the display of the applicable rates of pay on
15 wage statements. *Id.*

16 The Parties met and conferred regarding Defendant's discovery responses. In connection
17 with these discussions, the Parties extensively discussed the factual allegations and the merits of
18 their respective claims and defenses. Agnew Decl. ¶¶ 11, 12.

19 In or around June 2022, the Parties agreed to participate in a private global mediation
20 with Michael Loeb, a respected and experienced mediator knowledgeable of both the wage and
21 hour laws and representative claims at issue in this Action. Agnew Decl. ¶ 13. Prior to the
22 mediation, Defendant produced data relevant to the potential value of the claims, including the
23 number of employees paid of mileage/piece-rate basis, the average hourly rates of mileage/piece-
24 rate employees, the number of pay periods worked by mileage/piece-rate employees, the number
25 of pay periods in which mileage/piece rate employees worked a shift lasting 3.5 hours or longer,
26 the number of mileage/piece rate employees whose employment separated during the liability
27 period, and the number of wage statements at issue. *Id.* at ¶ 14. Using the data provided by
28 Defendant, Class Counsel performed a comprehensive damages analysis. *Id.*

1 **E. The Parties Participate in Private Mediation.**

2 On September 30, 2022, the Parties engaged in an all-day mediation session before Mr.
3 Loeb. Agnew Decl. ¶ 15. After a full day of negotiation, the Parties were able to reach an
4 agreement for settlement and the key terms. *Id.* at ¶ 17. The Parties thereafter worked to
5 memorialize the terms of the settlement in a long-form settlement agreement. *Id.*

6 On or about January 10, 2023, the Parties executed the Joint Stipulation of Class and
7 Representative Action Settlement resolving all claims alleged in the Second Amended
8 Complaint. Agnew Decl. ¶ 19, Exhibit A. Based on their own independent investigation and
9 evaluation, Class Counsel is of the opinion that the settlement with Defendant for the
10 consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and
11 adequate and is in the best interest of Plaintiff and the Class, in light of all known facts and
12 circumstances, including the risk of significant delay, the uncertainty associated with litigation,
13 the various defenses asserted by Defendant, and the numerous potential appellate issues. Agnew
14 Decl. ¶ 49; Declaration of Larry W. Lee (“Lee Decl.”) ¶ 3; Declaration of Nicholas Rosenthal
15 (“Rosenthal Decl.”) ¶ 4. Defendant and its counsel also agree that the settlement is fair,
16 reasonable, and adequate.

17 **III. THE PROPOSED TERMS OF THE SETTLEMENT**

18 **A. Class Definition**

19 The proposed Class consists of the following group of employees: all current and former
20 non-exempt employees of Defendant in the State of California who were paid on a mileage basis
21 at any time from March 10, 2017, through September 30, 2022. *See* SA § A-4. There are
22 approximately 35 employees that comprise the Class. *See id.* at § C-9.

23 **B. Calculation of the Gross Settlement Amount.**

24 The Settlement provides for the gross settlement amount of One Hundred Thirty
25 Thousand Dollars (\$130,000.00). *See* SA §§ A-19, C-1. The Settlement allocates Five Thousand
26 Dollars (\$5,000.00) of the Gross Settlement Amount to PAGA penalties (“PAGA Payment”).
27 *See id.* at §§ A-23, C-6. Pursuant to the PAGA, seventy-five percent of the PAGA Payment, *i.e.*,
28 the sum of Three Thousand Seven Hundred Fifty Dollars (\$3,750.00), shall be paid to the LWDA.

1 *See id.* at § C-6. The remaining twenty-five percent of the PAGA Amount, *i.e.*, the sum of One
2 Thousand Two Hundred Fifty Dollars (\$1,250.00), shall be distributed to Aggrieved Employees.³
3 *See id.*

4 The amount Gross Settlement Amount was calculated with, and is premised on,
5 Defendant's representation that the Class is composed of 35 individuals who worked 2,279 pay
6 periods during the Class Period. *See SA* § C-9. If the actual number of pay periods at issue
7 exceeds 2,279 by ten percent or more, the Gross Settlement Amount shall be increased
8 proportionally to the amount of the total increase. *See id.*

9 **C. Calculation Individual Settlement and PAGA Payments.**

10 The balance of the Gross Settlement Amount remaining after deduction of the approved
11 Enhancement Payment to Plaintiff, Settlement Administration Costs, the PAGA Payment, and
12 Class Counsel Award constitutes the "Net Settlement Amount." *See SA* § A-20. The Net
13 Settlement Amount will be available for distribution to Settlement Class Members (*i.e.*, Class
14 Members who do not opt-out). *See id.* at §§ A-35, C-8. Class Members do not need to do
15 anything should they wish to receive their share of the settlement funds.⁴ *See id.* at §§ C-15, C-
16 17. All Individual Settlement Payments shall be allocated as 90% penalties and interests, and
17 10% wages. *See id.* at § C-27.

18 The amount allocated to each Settlement Class Member will be based on the number of
19 pay periods worked by the employee during the Class Period. *See SA* § C-8. Based on the size
20 of the Class, the number of pay periods at issue and the amount of the Gross Settlement
21 Amount, Class Members will be entitled to recover, on average, up to \$1,669.04 each or \$25.63
22 per pay period worked during the Class Period, after deductions for the Enhancement Payment
23

24
25 ³ As defined in the Settlement, "Aggrieved Employees" means "all current and former non-
26 exempt employees of Defendant in the State of California who were paid on a mileage basis at
any time from February 12, 2020, through September 30, 2022. *See SA* § A-19.

27 ⁴ This substantially decreases the amount of burden each Class Member must bear in order to
28 receive his/her settlement share. If a Class Member does not wish to take part in this settlement
and be bound by the release of the class claims, he/she must submit an exclusion request. Such
obligations are thoroughly identified in the Notice Packet. *See SA*, Ex. B.

1 to Plaintiff, Settlement Administration Costs, the PAGA Payment, and Class Counsel Award.
2 Agnew Decl. ¶ 29. The amount any particular Class Member will be entitled to recover will be
3 greater or lower than this average depending on the number of pay periods he or she worked,
4 with some entitled to receive more, and others less. *Id.* This is fair, as it directly allocates
5 greater recovery to individual Class Members who have allegedly suffered greater harm. *Id.*

6 In addition to the Individual Settlement Amounts, Class Members who are also
7 Aggrieved Employees are entitled to receive a pro-rate share of twenty-five percent of the
8 PAGA Amount (the “Aggrieved Employee Amount”). *See* SA § C-6. As detailed in the
9 Settlement, the amount of the payment shall be allocated proportionately to Aggrieved
10 Employees on a pro rata basis, based on the number of pay periods they employee worked
11 during the PAGA Period, regardless of whether the employee submits a timely and valid
12 Request for Exclusion from the Settlement Agreement. *See id.* at § C-7.⁵ The Individual PAGA
13 Payments shall be allocated as 100% penalties. *See id.* at § C-27.

14 **D. The Settlement is Non-Reversionary.**

15 This is a non-reversionary settlement as the entirety of the Gross Settlement Amount will
16 be fully paid out. *See* SA § C-1. Settlement Class Members and Aggrieved Employees will have
17 180 days from the mailing of the settlement payment to cash the check. *See id.* at § C-24. After the
18 expiration of 180 days, the funds represented by uncashed settlement checks will be paid out
19 pursuant to California Code of Civil Procedure section 384 to Legal Aid at Work, the designated
20 *cypres* recipient. *Id.* Neither Plaintiff nor Class Counsel maintains an interest in and/or relationship
21 with the *cypres* recipient. *See* Cortez Decl. ¶ 14; Agnew Decl. ¶ 32; Lee Decl. ¶ 9; Rosenthal Decl.
22 ¶ 8.

23 **E. Attorneys’ Fees and Reimbursement for Litigation Costs.**

24 As part of the Settlement, Defendant does not object to Class Counsel’s request for
25

26 ⁵ There is no right to opt-out of or object to the PAGA settlement under the Settlement
27 Agreement. Any Aggrieved Employee who opts out of the Settlement Agreement for purpose of
28 the proposed class action settlement will still be bound by the release of the PAGA claims and
receive a portion of the Aggrieved Employee Payment. *See* SA § C-18.

1 attorney's fees up to one-third of the Gross Settlement Amount, *i.e.*, the sum of Forty-Three
2 Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents (\$43,333.33), plus up to
3 Fifteen Thousand Dollars (\$15,000.00) for reimbursement of litigation costs, subject to the Court
4 finally approving this Settlement. *See* SA §§ A-6, C-3. Any portion of the requested attorneys'
5 fees and/or litigation costs not awarded to Class Counsel shall be added to the Net Settlement
6 Amount *See id.* at § C-3.

7 **F. Enhancement Payment to Plaintiff.**

8 Subject to approval by the Court, Plaintiff may request an Enhancement Payment in the
9 amount of Five Thousand Dollars (\$5,000.00). *See* SA § C-4. Both Plaintiff and Class Counsel
10 expressly acknowledge that the Court has final discretion in any fee award or Enhancement
11 Payment *See id.* at §§ C-3, C-4.

12 **G. Settlement Administration Costs.**

13 Finally, the Settlement provides for the payment of the fees and expenses reasonably
14 incurred by the Settlement Administrator. *See* SA § C-5. The Parties have received a quote from
15 Phoenix for a fee of approximately Three Thousand Two-Hundred Fifty Dollars (\$3,250.00). *See*
16 *id.* Any portion of the Settlement Administration Costs not used or approved by the Court shall
17 be added to the Net Settlement Fund. *Id.*

18 **H. Scope of the Class Members' Release.**

19 Upon the payment of the Gross Settlement Amount, Plaintiff and Settlement Class
20 Members will release the following claims against Defendant and the Released Parties:

21 [A]ll claims, including penalties, interest, costs, and attorneys' fees
22 related thereto, that were or could have been brought under the facts
23 and allegations made in the operative Second Amended Complaint
for violation of Labor Code sections 201, 202, 203, 204, 226, 226.2,
226.7, 510, 558, 1194, 1197, and 1197.1 during the Class Period.

24 *See* SA §§ A-27, C-33. The scope of the release, as listed above, is identified in the Class Notice.

25 Additionally, upon the payment of the Gross Settlement Amount, Aggrieved Employees
26 will entire into a release of derivative PAGA Claims:

27 [A]ll claims for penalties under the California Private Attorneys
28 General Act, including interest, costs and attorneys' fees related
thereto, predicated on the violation of Labor Code sections 201,

202, 203, 204, 226, 226.2, 226.7, 510, 558, 1194, 1197, and 1197.1
that accrued during the PAGA Period and were alleged in the
PAGA Notice and operative Second Amended Complaint

See SA §§ A-28, C-34. As shown, the scope of the release is narrow and is limited to the claims
asserted in the Operative Second Amended Complaint.

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT

To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
requires court approval. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). In
considering whether a settlement is reasonable, the trial court should consider relevant factors,
which may include the strength of plaintiff's case, the risk, expense, complexity and likely duration
of further litigation, the risk of maintaining class action status through trial, the amount offered in
settlement, the extent of discovery completed and the stage of the proceedings, the experience and
views of counsel, the presence of a governmental participant, and the reaction of the class members
to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008).

In order to approve a class action settlement, the court must satisfy itself that the class
settlement is within the "ballpark" of reasonableness. *Kullar*, 168 Cal. App. 4th. at 133. The record
need not contain an explicit statement of the maximum theoretical recovery. *Munoz v. BCI Coca-
Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 408-409 (2010).

A. The Settlement Was Reached Through Arm's Length Negotiations Between Experienced Wage and Hour Attorneys.

The Parties attended a full-day mediation with experienced wage and hour mediator,
Michael Loeb. Agnew Decl. ¶ 15. Both during and prior to the mediation, the Parties spoke at
length about the strengths and weaknesses of each sides' claims and defenses, the certifiability of
the claims, and the scope of Defendant's liability. *Id.* at ¶¶ 11, 12, 16. After a full day of mediation,
the Parties were able to reach an agreement on the key terms of settlement. *Id.* at ¶ 17.

B. The Parties Engaged in Significant Investigation and Informal Discovery.

Class Counsel conducted an adequate investigation of the allegations involved in this case.
See Agnew Decl. ¶¶ 8-14. In advance of the mediation, Defendant produced data relating to the
number of Class Members and the value of the claims. *Id.* at ¶ 14. Using the data provided by

Defendant, Class Counsel performed a comprehensive damages analysis. *Id.*

C. The Strengths and Weaknesses of the Claims.

Although Class Counsel believe in the merits of Plaintiff's claims, they are experienced and realistic, and understand the possibility of non-certification on one or more of the theories alleged in the operative complaints. Agnew Decl. ¶ 48; Lee Decl. ¶ 3; Rosenthal Decl. ¶¶ 3, 4.

1. Strengths and Weaknesses of Failure to Pay Wages for Non-Productive Time Claim.

Plaintiff and Class Members are truck drivers. Agnew Decl. ¶ 33. Defendant compensates Class Members on a piece-rate basis. *Id.* Under Defendant's compensation system, Class Members are paid a flat rate for each recorded mile based on the size of the load. *Id.* As a result of this compensation structure, Class Members did not receive minimum, regular or overtime wages for time spent completing non-productive tasks, including, but not limited to, pre-trip inspections, fueling the truck and loading/unloading the truck. *Id.*

Defendant contends that the claim is not suitable for class treatment because there is no common method of proof to establish liability. Agnew ¶ 34. As argued by defense counsel, there are no centralized records that will establish the number hours worked by each Class Member. *Id.* Thus, according to Defendant, it would be necessary to determine for each individual employee the amount and nature of the uncompensated work, including whether Defendant knew or should have known that employee was engaged in work-related tasks. Therefore individual, rather than common, questions would predominate. *Id.*

2. Strengths and Weaknesses of Rest Period Claim.

Because Class Members did not receive an hourly wage, any duty-free rest breaks were not "paid" breaks. Agnew Decl. ¶ 36. Defendant argues that the rest period claim is partially preempted by the Federal Motor Carrier Safety Administration's ("FMCSA") regulations. *Id.* at ¶ 12. The FMCSA regulations preempt California's meal and rest break statutes for interstate commercial motor vehicle drivers. *Id.* Here, Plaintiff and Class Members operated trucks that were used to transport goods from Mexico the United States and across state lines. *Id.* at ¶ 11.

3. Strengths and Weaknesses of Derivative Waiting Time Penalty Claim.

Plaintiff seeks waiting time penalties predicated on Defendant's alleged

1 underpayment/non-payment of wages. Agnew Decl. ¶ 42. The waiting time penalties claim is
2 contested on a number of grounds. Defendant contends that the claim is not suitable for class
3 treatment because there is no common method of proof to establish liability for the violation of the
4 underlying wage claim. *Id.* Defendant further argues that Plaintiff would need to prove that it
5 willfully delayed each final payment, and this this is an “inherently fact intensive inquiry,” which
6 is not susceptible to class-wide adjudication. *Id.*

7 **4. Strengths and Weaknesses of Wage Statement Claim.**

8 Labor Code section 226(a) expressly requires that wage statements display “the number of
9 piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis.”
10 Cal. Lab. Code § 226(a)(3). As touched on above, the wage statements provided to Class Members
11 did not identify the applicable rates or miles used to calculate their wages. Agnew Decl. ¶ 38. Thus,
12 a reasonable employee reviewing his or her wage statement would not understand how their gross
13 wages were calculated. *Id.* Courts have consistently found employers to be in violation of Section
14 226(a) where their wage statements failed to provide the accurate rates and corresponding hours
15 worked during the pay period. *See McKenzie v. Federal Exp. Corp.*, 765 F.Supp.2d 1222 (C.D.
16 Cal. 2011) (finding that the wage statements do comply with § 226(a)(9) for failure to list the
17 correct overtime rate and number of hours worked overtime); *Lopez v. G.A.T. Airline Ground*
18 *Support, Inc.*, 2010 WL 2839417, at *5 (S.D.Cal.,2010) (same). Furthermore, Labor Code section
19 226 requires that the employee be permitted to readily ascertain the piece-rate units earned and the
20 applicable piece rate from the wage statement alone. Labor Code § 226(e)(2)(B) (emphasis added).
21 Courts routinely grant class certification for similar wage statement violations. *See Lubin v. The*
22 *Wackenhut Corp.*, 5 Cal. App. 5th 926, 959 (2016); *Boyd v. Bank of America Corp.*, 300 F.R.D.
23 431, 440-44; *Magadia v. Wal-Mart Associates, Inc.*, 2018 WL 339139 (N.D. Cal. 2018).

24 Plaintiff’s claims are contested. Agnew Decl. ¶ 39. Defense counsel argues that, even if
25 Plaintiff established a technical violation of the statute, the alleged violation was not a “knowing
26 and intentional failure” by Defendant to comply with Labor Code section 226(a), and penalties are
27 therefore unwarranted. *Id.*; *See Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D.
28 Cal. 2009) (summary adjudication warranted on Section 226(e) claim where dispute existed as to

whether plaintiff was independent contractor or employee and record lacked evidence that conduct was knowing or willful); *Woods v. Vector Mktg. Corp.*, 2015 U.S. Dist. LEXIS 67303, at *8-*9, *12-*14 (N.D. Cal. May 22, 2015) (finding that when the defendant made a good faith claim that the employee was properly classified as exempt its failure to provide accurate wage statements was not knowing and intentional). Furthermore, as framed by Defendant, there was no injury because employees could promptly and easily determine the number of miles and applicable mileage rate, and no employees were underpaid for any hours worked. Agnew Decl. ¶ 39.

5. The Strengths and Weaknesses of PAGA Claim.

Plaintiff also pursued a derivative representative PAGA claim predicated on the Labor Code violations discussed above. As touched on above, Plaintiff believes that the could recover PAGA penalties had this matter proceeded to trial. However, even if Plaintiff was to prevail on the merits of the PAGA claim, the potential recovery is uncertain. Defendant argues that a court would not award duplicative statutory and PAGA civil penalties for the same alleged t violations. Agnew Decl. at ¶¶ 44, 45; *Guifu Li v. A Perfect Day Franchise, Inc.*, 2012 WL 2236752, *17 (N.D. Cal. Jun. 15, 2012) (finding that the plaintiffs “are not entitled to PAGA penalties for failure to provide accurate wage statements under [Section] 226” because “granting PAGA penalties for failure to provide accurate wage statements would be duplicative recovery”). Furthermore, the trial court has the discretion to reduce PAGA civil penalties “if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(e)(2). Defendant argues that trial courts regularly exercise this discretion to award PAGA civil penalties far below the statutory maximums. For example, in *Fleming v. Covidien*, the Court reduced PAGA civil penalties for wage statement violations from \$2,800,000 to \$500,000, an 82% discount, because “the aggrieved employees suffered no injury” as a result of the violations, the defendants “were not aware” their wage statements violated the law, and the defendants “took prompt steps to correct all violations once notified.” 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011); *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (affirming reduction of PAGA penalties where the trial court found the reduction was warranted based on the employer’s “good faith attempts” to comply with the Labor Code and

“because the court found the violations were minimal”).⁶

Under the particular circumstances of this case, Defendant could make a persuasive argument that nominal PAGA penalties should be awarded. In this respect, Defendant points to the absence of willfulness as grounds for the Court to award modest, if not nominal, penalties. Agnew Decl. ¶ 44.

D. Potential Estimated Value of the Class and Representative PAGA Claims.

Based on the class data provided by Defendant, Class Counsel estimates that Defendant would realistically face liability in the amount of approximately \$493,411.20 for the class and PAGA claims. Agnew Decl. ¶ 45. Thus, the Gross Settlement Fund represents 26.98% of the realistic maximum damages and penalties at issue. *Id.* at ¶ 46.⁷

1. Unpaid Wages for Non-Productive Time.

The data produced by Defendant indicates that there are approximately 35 Class Members. Agnew Decl. ¶ 35. These employees worked 2,279 pay periods during the Class Period, with an average hourly rate of \$17.50. *Id.* According to Defendant, employees spend up to approximately thirty-minutes conducting pre-trip inspections. *Id.* Assuming that Class Members spend 2.5 hours per pay period [30 minutes x 5 days] on non-productive tasks, at an hourly rate of \$17.50, Plaintiff estimates that Defendant’s exposure on this claim is \$99,706.25. *Id.*

2. Unpaid Rest Period Premiums.

Assuming that Class Members were entitled to 1.66 hours of paid rest periods per pay period [20 minutes x 5 days] on non-productive tasks, at an hourly rate of \$17.50, Plaintiff

⁶ As the California Supreme Court and Courts of Appeal have held, the purpose of PAGA is not to seek wages or recovery for the individual employees. *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (holding that an action to recover civil penalties “is fundamentally a law enforcement action designed to protect the public and **not** to benefit private parties”) (emphasis added); *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 1499 (2011).

⁷ Courts have held that gross settlements approximating between only 8 and 25% of the defendant’s potential exposure are fair and reasonable. *See Bellinghausen v. Tractor Supply Co.*, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (approving class settlement recovering between 8.5% and 25% of the defendant’s potential exposure); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (approving wage and hour class settlement which obtained only 9.1% of projected damages); *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that settlement of approximately 15% of the potential recovery was fair and reasonable).

estimates that Defendant's exposure on this claim is \$66,204.95. Agnew Decl. ¶ 37.

3. Derivative Waiting Time Penalties.

Based on the data provided by Defendant, there are 27 Class Members who separated employment during the period of March 10, 2018, through September 30, 2022. Agnew Decl. ¶ 42. Applying an average hourly rate of \$17.50, Plaintiff estimates that the waiting time penalty claim is worth approximately \$113,400 [27 x (\$17.50 x 8 x 30)]. *Id.*

4. Wage Statement Penalties.

The data produced by Defendant indicates that there are approximately 28 Class Members received a wage statement during the period of March 10, 2020 through September 30, 2022. Agnew Decl. ¶ 40. Assuming that each employees is entitled to receive the statutory maximum penalty of \$4,000, Plaintiff estimates that the Section 226(e) penalties total \$112,000. *Id.*

5. PAGA Penalties.

Based on the data provided by Defendant, Aggrieved Employees worked approximately 1,021 pay periods during the PAGA Period. Agnew Decl. ¶ 43. Applying the standard civil penalty of \$100 per pay period, yields \$102,100 in potential liability. *Id.* However, it is unrealistic to assume that the Court will award the full amount of PAGA penalties if Plaintiff prevails at trial. Indeed, the potential recovery is uncertain because the Court can decline to award the full amount of PAGA penalties where "...if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." As shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539; see *O'Connor v. Uber Techs., Inc.*, 2016 WL 4398271, at *17 (noting that even if PAGA penalties amounted to \$1 billion, such award "could well be reduced, as a court may reduce the penalty when to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory"). Thus, assuming that the Court uses *Carrington* as a benchmark and assesses PAGA penalties of approximately 10% of the total maximum, a more realistic estimate of the PAGA

penalties at issue is \$10,210. Agnew Decl. ¶ 44.

E. The Court Should Preliminarily Approve the Proposed Enhancement Payment to the Class Representative

Plaintiff requests an enhancement of Five Thousand Dollars (\$5,000.00). *See* SA § C-4. Plaintiff personally met with Class Counsel on various occasions to discuss the case, provide documents and information to Class Counsel, and review the Settlement Agreement. Cortez Decl. ¶ 8. In addition to the invaluable services that Plaintiff provided, he also took significant risks, both professionally and monetarily, in acting as the Class Representative and seeking benefits on behalf of the Class. *Id.* at ¶ 10. Because the claims alleged by the Class Representative involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the fees and costs of Defendant, had Plaintiff not prevailed in this action. *Id.* at ¶ 11.

Further, given that future employers are much less likely to hire individuals who have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face prejudice in the future from other potential employers. Plaintiff took this risk upon himself and the whole Class benefited from these risks taken by Plaintiff. Class Members did not have to file individual lawsuits and bear the risks of payment of fees and costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a public lawsuit.

Notably, courts have routinely granted approval of representative enhancements for far greater amounts than the \$5,000.00 sought by Plaintiff in this case. *See, e.g., Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiff requests a modest enhancement of \$5,000, which is reasonable and consistent with case law.

1 **F. The Requested Attorneys’ Fees and Litigation Costs Are Reasonable, Fair,**
2 **and Appropriate**

3 California state and federal courts have recognized that an appropriate method for
4 determining award of attorneys’ fees is based on a percentage of the total value of benefits to Class
5 Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001);
6 *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*, 444 U.S.
7 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose
8 of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
9 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
10 burden alone.” *Vincent*, 557 F.2d at 769.

11 Under California law, the award of attorneys’ fees in common fund wage and hour class
12 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal.
13 5th 480, 503 (Aug. 11, 2016) (“We join the overwhelming majority of federal and state courts in
14 holding that when class action litigation establishes a monetary fund for the benefit of the class
15 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
16 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
17 fund created”). Under the percentage of the fund method, the Court’s objective remains to “mimic
18 the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)
19 (J. Posner) (“When a fee is set by a court rather than by contract, the object is to set it at a level
20 that will approximate what the market will set...The judge, in other words, is trying to mimic the
21 market in legal services”).

22 The results delivered by Class Counsel also support the requested percentage of the fund.
23 Here, the Parties have agreed to a payment of a maximum of one-third of the Gross Settlement
24 Amount for payment to Class Counsel as attorneys’ fees. The Parties have agreed to a payment of
25 the foregoing attorney’s fees and, thus, this payment should be presumed to be fair. Further, it is
26 not uncommon for courts to award attorneys’ fees as one-third or 33.3% of the settlement amount
27 in wage and hour class action settlements. For example, in *McKinnon v. Best Buy Co., Inc.*,
28 (Alameda Superior Court Case No. RG03082294), the court awarded over \$9 million as attorneys’
fees, which was 33% of the maximum settlement amount of \$26.9 million. At the time of Final

1 Approval, Class Counsel will also provide the court with declarations and time records to show
2 that a payment of one-third of the recovery is justified and fair even under the lodestar method.

3 Further, the Parties have agreed to reimbursement of Class Counsel's litigation costs. Class
4 Counsel have, at their own risk, expended costs, for example, to file this instant action, service of
5 process, payment of mediation fees and other litigation related costs. Lee Decl. ¶ 4. Based on the
6 foregoing, the court should preliminarily approve the attorney's fees and costs being requested by
7 the Parties.

8 **G. The Settlement Administrator's Fees are Reasonable.**

9 The Parties request that Phoenix Settlement Administrators be appointed as the claims
10 representative in this case. The Parties have agreed to an estimated payment of Three Thousand
11 Two Hundred Fifty Dollars (\$3,250.00) to Phoenix to send notices and to administer this
12 settlement. Phoenix is a well-recognized class action settlement administrator. Declaration of
13 Jodey Lawrence ¶ 4, Ex. A.

14 **V. THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS**

15 **A. The Class is Ascertainable and Sufficiently Numerous.**

16 The Class that Plaintiff seeks to conditionally certify is ascertainable. "Class members are
17 'ascertainable' where they may be readily identified without unreasonable expense or time by
18 reference to official records." *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008); *see also*
19 *Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 240 (2013) (same). Here, members
20 of the Class are readily identifiable. Defendant has determined that there are approximately 35
21 employees that comprise the Class. *See* SA at § C-9. Thus, the Class is sufficiently numerous. *See*
22 *Preston v. Porch.com, Inc.*, 2022 WL 1214710, at *3 (S.D. Cal., 2022) (a "presumption of
23 numerosity created by twenty-five to thirty members"); *Slaven v. BP America, Inc.*, 190 F.R.D.
24 649, 654 (C.D. Cal. 2000) (numerosity requirement is satisfied by a showing of 25-30 members);
25 *Rannis v. Recchia*, 380 Fed.Appx. 646, 650 (9th Cir. 2010) (district court "did not abuse its
26 discretion in determining that the class of 20 satisfies the numerosity requirement").

27 **B. There are Common Questions of Law and Plaintiff's Claims are Typical of the Class.**

28 The commonality requirement is met when there are questions of law and fact common to

1 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared
2 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
3 facts couple with disparate legal remedies within the class”). Commonality requires only that some
4 common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation
5 are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant’s
6 conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d
7 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer’s
8 conduct is uniformly directed at a class of employees, as it is here, the class wide impact of the
9 Defendant’s policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward &*
10 *Co.*, 193 Cal. App. 3d 411, 421 (1987).

11 Plaintiff alleges, in part, that Defendant, as a matter of its corporate policy, practice, or
12 procedure violated the Labor Code by: (a) failing to pay all minimum, regular, and overtime wages
13 owed for time spent completing non-productive tasks, in violation of Labor Code sections 226.2,
14 510, 558, 1194, 1197, and 1197.1; (b) failing to provide paid rest periods, in violation of Labor
15 Code sections 226.2 and 226.7; (c) failing to pay all wages owed upon separation of employment,
16 in violation of Labor Code sections 201, 202, and 203; and (d) failing to provide accurate, itemized
17 wage statements, in violation of Labor Code section 226. Cortez Decl. ¶¶ 2-5. In other words,
18 Plaintiff was allegedly subjected to the same policy and practice as other Class Members. *Id.* Thus,
19 Plaintiff’s claims are typical to those of Class Members.

20 **C. Plaintiff and Class Counsel Have Adequately Represented the Class.**

21 The adequacy requirement is also met. “Adequacy of representation depends on whether
22 the plaintiff’s attorney is qualified to conduct the proposed litigation and the plaintiff’s interests
23 are not antagonistic to the interests of the class.” *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442,
24 450 (1976). Here, Plaintiff does not have any interests adverse to the Class, nor have any such
25 issues been raised or presented. Cortez Decl. ¶¶ 6, 7. Plaintiff has taken all necessary steps to
26 represent the interests of the Class, by providing information and documents. *Id.* For such reasons,
27 Plaintiff has adequately represented the Class Members and will continue to do so.

28 Further, as detailed in their declarations, Class Counsel are experienced and well-qualified

1 class action litigators who have litigated many wage and hour class actions and have each been
2 certified as class counsel in numerous other class actions, particularly wage and hour class actions.
3 Agnew Decl. ¶¶ 5-56; Lee Decl. ¶¶ 6, 7; Rosenthal Decl. ¶ 7. From the inception of the case, Class
4 Counsel have solely represented the interest of the Class. For example, Class Counsel expended
5 significant time and resources propounding written discovery, exchanging informal discovery,
6 drafting a mediation statement, and attending mediation. *See* Agnew Decl. Finally, the mediation
7 and settlement were also obtained for the benefit of the Class, not for the individual Plaintiff.

8 **VI. NOTICE TO THE LWDA**

9 Concurrently with the filing of this motion, Plaintiff submitted the Settlement Agreement
10 and supporting documents to the LWDA. Agnew Decl. ¶ 49.

11 **VII. CONCLUSION**

12 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both
13 substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the
14 result of informed, extensive, and arm's length negotiations conducted by counsel for the
15 respective Parties who are experienced in wage and hour class action litigation. For the foregoing
16 reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed
17 settlement, sign the proposed Order, approve and authorize mailing of the proposed Class Notice,
18 and set a date for a final approval hearing.

19
20 Dated: January 30, 2023

DIVERSITY LAW GROUP, P.C.

21 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class