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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 KEITH GUTHRIE, individually, on a
12 representative basis, and on behalf of all
13 others similarly situated;

14 Plaintiff,

15 vs.

16
17 ITS LOGISTICS, LLC, a Delaware
18 Company, and DOES 1 through 20,
19 inclusive;

20 Defendants.

Case No.: 1:21-CV-00729-KES-EPG

FRCP RULE 23 CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RENEWED MOTION FOR
PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing

Date: April 21, 2025
Time: 1:30 p.m.
Courtroom: 6

Complaint filed: March 9, 2021

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1 **I. INTRODUCTION**

2 Through this unopposed motion, Keith Guthrie seeks the Court’s preliminary
3 approval of a Class Action Settlement Agreement and Release of Claims (“Settlement,
4 “Settlement Agreement” or “S.A.”)¹ that resolves each of the claims set forth in
5 Plaintiff’s First Amended Complaint. (Dkt. 56). The Settlement provides that Defendant
6 ITS Logistics, LLC (“ITS” or “Defendant”) will pay the Gross Settlement Amount
7 (“GSA” or “Settlement Amount”) of \$550,000 on a non-reversionary basis to fund a
8 class-wide settlement on behalf of the “Settlement Class Members,” defined as follows:

9 All current and former truck drivers who resided in California
10 and who were employed by Defendants and paid on a piece-rate
11 basis (e.g. per day or per mile) at any time between March 1,
12 2019² through June 28, 2024 (the “Class Period”).

13 In total, there are an estimated 235 Settlement Class Members. Under the terms of
14 the Settlement Agreement, Plaintiff’s Counsel will apply for (1) a reasonable award of
15 attorney’s fees not to exceed \$137,500 (25 percent of the Gross Settlement Amount), (2)
16 compensation of Plaintiff’s litigation expenses not to exceed \$27,000, (3) a settlement
17 administrator payment not to exceed \$8,000, (4) PAGA Penalties of \$100,000 (of which
18 \$75,000 or 75% will be paid to the Labor and Workforce Development Agency
19 (“LWDA”) and the remaining \$25,000 or 25% will be paid to the Aggrieved Employees,
20 and (5) Service Award to Plaintiff not to exceed \$7,500.

21 After all Court-approved deductions from the Gross Settlement Amount, it is
22 estimated that \$270,000 will be available to pay the Individual Settlement Payments to
23 the Participating Class Members (i.e., those Settlement Class Members who do not opt-
24 out of the settlement), as follows:

25 _____
26 ¹ A true and correct copy of the Settlement Agreement is attached to the Declaration of Misty Lauby
27 (“Lauby Decl.”) as **Exhibit 3**, and the proposed Class Notice is attached as **Exhibit 1 to the Settlement**
28 **Agreement**.

² The beginning date for the Class Period is March 1, 2019 as a result of the release of claims given by
the Class Members in *Caufield v. ITS Logistics, LLC*, San Diego Superior Court, No. 37-2016-0044111-
CU-OE-CTL, and approved by the court on May 31, 2019

	Total Amount
<i>Gross Settlement Amount</i>	\$550,000
Attorneys' Fees (25 percent of GSA)	\$137,500
Litigation Costs (Not to Exceed)	\$27,000
Administrator Costs (Not to Exceed)	\$8,000
PAGA Penalties	\$100,000
Class Representative's Service Award (Not to Exceed)	\$7,500
<i>Net Settlement Amount</i>	\$270,000

The Net Settlement Amount will be allocated and paid based on a number of criteria including: (1) the Net Settlement will be divided up using the percentage of the estimated maximum value attributed to each claim, and/or subclaim to arrive at an estimated total for each claim/subclaim category ("Estimated Total for Claim"); (2) the Estimated Total for Claim will be divided by the total number of weeks worked by the drivers impacted by each claim/subclaim ("Per Claim Workweeks") to arrive at a dollar figure share ("Per Claim Share") for each week worked for that claim/subclaim; (3) each Class Member's workweeks allocated by the number of weeks each driver worked at greater than 50% flat rate ("Flat Rate Driver Weeks Worked") and/or greater than 50% mileage rate ("Mileage Rate Driver Weeks Worked") for the minimum wage claims and by all applicable weeks for the remaining claims ("Other Weeks Worked"); (4) the Per Claim Share will be multiplied by the number of Flat Rate Driver Weeks Worked, the Mileage Rate Driver Weeks Worked, and Other Weeks Worked for every claim that each Class Member was potentially impacted based upon the dates they drove at each rate ("Individual Per Claim Totals"); (5) the Individual Per Claim Totals will be added together for each Class Member to obtain a total individual class settlement payment ("Total Individual Class Settlement Payment"). The average Individual Class Settlement Payment for each of the 235 Class Members is approximately \$1,149 (\$270,000 Net Settlement Amount/235 Class Members). The average for each of the estimated 160 Aggrieved Employee's share of the PAGA Penalties is approximately \$156.25

1 (\$25,000/150). Defendant will separately pay its share of payroll taxes. (Lauby Decl. ¶¶
2 37-42).

3 The settlement is fair and reasonable, especially considering Defendant's defenses
4 and the fact that ongoing litigation would be risky and take many years before a final
5 decision could be achieved. Accordingly, Plaintiff respectfully requests that the Court
6 enter an order preliminarily approving the settlement, conditionally certifying the Class
7 for settlement purposes, approving the proposed Class Notice, appointing Plaintiff's
8 counsel as class counsel, appointing ILYM as the Settlement Administrator, and
9 scheduling a hearing for final approval of the Settlement.

10 **II. BACKGROUND**

11 **A. PROCEDURAL HISTORY**

12 On about March 5, 2021, Plaintiff submitted a letter to the California Labor and
13 Workforce Development Agency ("LWDA") for civil penalties under PAGA. The
14 LWDA did not assert jurisdiction over the PAGA claims, so Plaintiff then filed a class
15 and representative action complaint against Defendant in Superior Court, County of
16 Merced, on March 9, 2021, alleging claims for failure to pay minimum and regular wages
17 for all hours worked, including rest and recovery periods under Labor Code section
18 226.2, failure to provide meal and rest breaks, failure to reimburse for business expenses,
19 failure to timely pay final wages, failure to provide accurate itemized wage statements,
20 unfair and unlawful competition, and related claims under the PAGA. On about May 4,
21 2021, Defendant filed its answer to the Complaint, denying Plaintiff's claims as without
22 merit and asserting various affirmative defenses. On May 5, 2021, Defendant removed
23 the case to the United States District Court for the Eastern District of California under
24 CAFA. (Dkt. 1). (Lauby Decl. ¶ 14).

25 In preparation for the Rule 26 conference, the Parties engaged in a series of meet
26 and confers regarding the merits of the claims and defenses, the scope of class discovery,
27 briefing schedules and other matters. As set forth in the Rule 26 Report, the Parties
28 vigorously disputed the claims and set forth a schedule for class certification and trial.

1 After the Conference, the Parties exchanged initial disclosures and met and conferred
2 further regarding discovery and depositions. (Lauby Decl. ¶ 15).

3 Although Defendant fully denied the allegations, the Parties agreed to submit the
4 matter to mediation prior to expending substantial time and fees on discovery, out-of-
5 state depositions and the class certification process. In preparation for the first mediation,
6 the Parties engaged in an extensive informal discovery process where information,
7 correspondence, documents, and legal analysis were exchanged, including procedures,
8 payroll and time keeping records, and evidence relating to the class size. (Lauby Decl. ¶
9 16).

10 Defendant provided data for the class period beginning on March 1, 2019. The
11 data provided included the number of drivers, average hourly and daily rates of pay, total
12 weeks worked at each rate, number of former drivers and estimated number of shifts
13 worked during the class and PAGA periods. (Lauby Decl. ¶ 17).

14 On March 8, 2022, Plaintiff and Defendants participated in an all-day mediation
15 with Hon. Michael Marcus (Ret.). The matter resolved at mediation for \$350,000
16 pursuant to a mediator's proposal. Thereafter, the Parties memorialized the terms of the
17 settlement in a long-form Settlement Agreement, which was negotiated following the
18 mediation. (Lauby Decl. ¶ 18).

19 Plaintiff filed his Motion for Preliminary Approval on June 15, 2022 or hearing on
20 July 25, 2022. After approximately a year of briefing, on June 30, 2023, Judge de Alba
21 entered an Order Adopting the Findings and Recommendations (Lauby Decl. ¶¶ 19-24).

22 On December 26, 2023, Plaintiff filed a First Amended Complaint ("FAC") to
23 address some of the issues the Court had with the original settlement, alleging class and
24 PAGA claims in the United States District Court for the Eastern District of California
25 against Defendant and Does 1 through 20, alleging claims for: (a) failure to pay minimum
26 and regular wages for all hours worked, (b) failure to pay for nonproductive time under
27 Labor Code section 226.2, (c) breach of contract, (d) failure to reimburse for business
28 expenses, (e) failure to timely pay wages each period; (f) failure to pay final wages, (g)

1 failure to provide accurate itemized wage statements, and (h) related claims under PAGA
2 (ECF No. 56; Lauby Decl. ¶ 25)

3 Since then, Plaintiff has conducted a thorough investigation into the facts of the
4 Action. (Lauby Decl. ¶ 26)

5 On August 6, 2024, Plaintiff and Defendant participated in mediation before
6 Tripper Ortman, a well-respected mediator. The matter did not resolve at mediation
7 because Plaintiff needed some additional data to properly evaluate the claims, but the
8 Parties continued to negotiate with the aid of the mediator. Defendant produced
9 additional post mediation data for analysis by Plaintiff's expert. Plaintiff's expert
10 provided his analysis of the data on December 4, 2024. After further negotiations, the
11 Parties agreed to settle on December 9, 2024. (Lauby Decl. ¶ 27).

12 **B. SUMMARY OF PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES**

13 Plaintiff alleged that Defendant subjected the Class Members to numerous
14 violations of the California Labor Code, including: (1) failure to pay minimum wages; (2)
15 failure to pay nonproductive time under Labor Code § 226.2; (3) breach of contract; (4)
16 failure to reimburse business expenses; (5) failure to timely pay wages; and (6) failure to
17 provide accurate itemized wage statements. Additionally, Plaintiff alleged PAGA claims
18 for (7) failure to pay minimum wages; (8) failure to pay for nonproductive time under
19 Labor Code § 226.2; (9) failure to reimburse business expenses; (10) failure to timely pay
20 wages each period; (11) failure to timely pay final wages; and (12) failure to provide
21 accurate itemized wage statements. (Lauby Decl. ¶ 28).

22 One of the primary claims in this action is for unpaid wages based on three theories
23 as to each of the two categories of driver (Flat Rate Drivers "FRDs" and Mileage Rate
24 Drivers "MRDs"): that Defendant failed to properly pay (1) for non-productive time such
25 as required pre/post trip inspections, fueling, stops, etc. under Labor Code § 226.2 which
26 requires employers to provide separate hourly compensation for tasks that do not earn
27 piece-rate pay; (2) stop pay that Plaintiff alleged was promised under contract (policy
28 documents/offer letters) with the drivers alleging that Defendant's policies expressly

1 stated that Class Members were supposed to separately pay for certain tasks, such as
2 \$12.50 for each stop/delivery, \$20 for each roadside inspection in violation of the
3 California Supreme Court decision that confirmed that this is illegal, since employers are
4 required to keep “any promises it has made to provide particular amounts of
5 compensation for particular tasks or periods of work.” *Oman v. Delta Airlines* (2020) 9
6 Cal. 5th 762, 782; and (3) rest break pay that was also promised under contract (policy
7 documents/offer letters) that is problematic for the same reasons that the failure to pay for
8 stop pay is problematic. Defendant denied that its driver pay policies violated California
9 law. (Lauby Decl. ¶ 29).

10 In defense of its flat daily rate pay policy (flat rate weeks with > 50% flat rate days
11 driven makes up 76% of total workweeks as set forth below), Defendant argued that
12 Section 226.2 does not apply because flat daily-rate pay is not piece-rate pay. Section
13 226.2 only applies to “employees who are compensated on a piece-rate basis for any
14 work performed during a pay period.” Cal Labor Code § 226.2. The Division of Labor
15 Standards Enforcement Policies and Interpretations Manual defines Piece Rate as “work
16 paid for according to the number of units turned out.” DLSE Manual § 2.5.1. It must be
17 “based upon an ascertainable figure paid for completing a particular task or making a
18 particular piece of goods.” *Id.* The flat daily-rate pay Plaintiff and Class Members earned
19 on this pay plan was not paid “for completing a particular task.” Rather, Defendant paid
20 Plaintiff a flat amount per day for all the hours Plaintiff worked on a given day,
21 regardless of how many loads the Plaintiff delivered. Also, in its defense of the mileage-
22 based pay policy, Defendant relied upon *Ayala v. U.S. Xpress Enters.*, 851 Fed. Appx. 53
23 (9th. Cir 2021) where the Ninth Circuit recently determined that a policy similar to
24 Defendant’s policy where it paid drivers per load on a cents-per-mile basis that was
25 meant to cover all work performed by the employee was valid under California law.
26 Defendant contended that the drivers agreed that this load pay policy included
27 compensation for all of the tasks to deliver the load and they were properly paid under
28 *Ayala* and not required to be paid separately for alleged non-productive time. And, in

1 fact, in talking to several Class Members, Plaintiff's counsel received mixed information
2 from flat rate drivers as to whether or not they believed that their Flat Daily Rate pay was
3 inclusive of all nonproductive time during their shift. (Lauby Decl. ¶ 30).

4 Defendant also argued that with respect to stop pay, the only potential time period
5 that applies to the Flat Daily Rate drivers is from March 1, 2019 through May 2020. In
6 support, Defendant argued that in 2019, driver pay policies were primarily contained in
7 the letter offering the driver a position with Defendant. These offer letters included a
8 "responsibilities and expectations of your position" section including, "[s]top pay is paid
9 at \$12.50 per stop after the first delivery or could be greater if assigned specific runs." By
10 no later than October 7, 2019, Defendant's offer letters no longer contained a section
11 discussing the section referencing stop pay. (Aboussleman Decl. Paragraph 5-8). Then,
12 in May of 2020, each driver received an Interoffice Memo regarding a pay plan that
13 included personalized information regarding the base rate of pay applicable to that driver
14 based on their tenure and their specific assignment. (Aboussleman Decl. Paragraph 9). In
15 September 2020, ITS implemented a California Driver Compensation Policy ("2020
16 DCP") for mileage-based drivers only, that again reference an additional compensation
17 for stop pay at \$12.50 per stop or \$25 per stop if the stop involved touch freight.
18 Defendant argued that it paid the California-based mileage rate drivers in accordance
19 with the 2020 DCP including any additional stop pay for qualifying stops. (Aboussleman
20 Decl. ¶10). (Lauby Decl. ¶ 31).

21 Defendant also disputed Plaintiff's claim that it failed to properly pay drivers for
22 rest breaks because all work and all rest breaks taken were paid by the flat daily rate pay
23 drivers who were working under that pay plan received. For drivers paid under the
24 mileage-based pay plan, Defendant submitted documentation to Plaintiff showing that
25 drivers operating under that pay plan were paid for meal breaks taken. Defendant further
26 argued that because California's meal and rest break laws are preempted, drivers
27 typically did not take rest breaks other than the 30-minute break mandated under the
28 federal hours of service regulations promulgated by the U.S. Department of

1 Transportation at 49 C.F.R. Part 395. Finally, because drivers are not required to record
2 their rest breaks so Plaintiff has no common, classwide evidence to establish any liability
3 on this claim, and the claim would not be certified. (Lauby Decl. ¶ 32).

4 Plaintiff also alleged that Defendant's liability on these unpaid wage claims
5 triggers derivative liability and exposure for the unpaid wages and various penalties,
6 including full 30-day waiting time penalties for each former employee under Labor Code
7 § 203. (Lauby Decl. ¶ 33).

8 Additionally, Plaintiff alleged wage statement violations due to Defendant's failure
9 to provide wage statements to Plaintiff and the Class that included the total hours worked
10 each pay period. Plaintiff alleged that these uniform wage statements ran afoul of Labor
11 Code § 226(a)(2), which requires wage statements to accurately state "total hours worked
12 by the employee" and alleged that Defendant's pay policy does not meet the required
13 definition for a "salary" under California law. See *Negri v. Koning & Associates* (2013)
14 216 Cal.App.4th 392, 399 ("salary" is "a predetermined amount that is not subject to
15 reduction based upon the quantity or quality of work"). However, Defendant contended
16 that it is not required to list the total hours worked on the drivers' wage statements for flat
17 daily rate under Section 226. Under IWC Wage Order 9-2001, drivers whose hours of
18 service are subject to regulations promulgated by the DOT, 49 C.F.R. Part 395, or the
19 California hours-of-service regulations, Cal. Code Regs., tit. 13, ch. 6.5, § 1200 et. seq.,
20 like Plaintiff and the class members here, are exempt from the payment of overtime.
21 Despite Plaintiff's claims, Defendant contends that it has been unable to locate any case
22 that addresses Section 226's requirement to include total hours worked when the worker
23 is paid a flat amount for each day of work and that paying drivers on an agreed flat daily
24 rate is a salary under Section 226 because the drivers receive the exact same pay no
25 matter how much work they perform – if Plaintiff had a short route with only two
26 dealership stops, he received the same daily rate as if he had a route with six dealership
27 stops. Aboussleman Decl., ¶ 15. This fits squarely within *Negri's* definition of a "salary"
28 as "a predetermined amount that is not subject to reduction based upon the quantity or

1 quality of the work”. 216 Cal.App.4th at 399. Moreover, Defendant argued that because
2 the flat daily rate drivers were not paid on an hourly basis, including the total hours
3 worked does nothing to help them ensure that they were paid correctly, and they did not
4 suffer any injury from the missing information. Further, because of Defendant’s good-
5 faith belief that it was not required to list the hours worked, there was no “knowing and
6 intentional failure” by Defendant to comply with Section 226(a), and no penalty is
7 warranted. Finally, on April 23, 2021, Defendant began listing the total hours worked on
8 its wage statements for all drivers. Aboussleman Decl., ¶ 20; *Exhibit C*. (Lauby Decl. ¶
9 34).

10 Plaintiff also alleged that Defendant is liable under Labor Code § 2802 due to its
11 written policy that required Class Members to use personal cell phones - without
12 reimbursement. However, this policy changed in 2021 when Defendant expressly told its
13 employees that they were no longer required to provide cell phones for work, calling into
14 question the extent of such damages. Defendant also disputed the § 2802 claim for the
15 entire class period arguing that it provided an in-cab device so Plaintiff and the Class
16 Members could communicate with Defendant and, therefore, it was not necessary for
17 drivers to use their personal cell phones for business purposes. (Lauby Decl. ¶ 35).

18 Finally, Plaintiff further alleged derivative claims that Defendant failed to comply
19 with the mandates of Labor Code § 204 regarding the timing of the payment of wages to
20 its employees each period, including meal and rest period premiums. Additionally,
21 Defendant failed to pay Plaintiff and the Class their final wages within the timeframe
22 required by Labor Code §§ 201 – 203. Because each of these claims was derived from the
23 substantive claims discussed above, Defendant contends that they also fail because of the
24 defenses to the substantive claims. (Lauby Decl. ¶ 36).

25 **III. SUMMARY OF THE PROPOSED SETTLEMENT**

26 The following is a summary of the principal terms of the Settlement Agreement:

27 **A. SETTLEMENT CONSIDERATION AND ALLOCATION**

28 The Gross Settlement Amount (or “GSA”) of \$550,000 is non-reversionary. The

1 Net Settlement Amount will be paid to Participating Class Members (defined as all Class
2 Members except those who opt-out) without the need to submit a claim form or take any
3 affirmative action. (S.A., ¶ 29). Under no circumstance will any portion of the GSA
4 revert to Defendant. (S.A., ¶ 54). The GSA includes all Individual Settlement Amounts
5 payable to the Participating Class Members, amounts awarded to Class Counsel for
6 attorneys' fees and litigation costs, the service award to the Plaintiff, the payment to the
7 LWDA and Aggrieved Employees to resolve claims under the PAGA, and Settlement
8 Administration Costs. (S.A., ¶ 52(a)). Defendant will separately pay its share of
9 employer-side payroll taxes as required by law. (*Id.*)

10 After all Court-approved deductions from the GSA, it is estimated that \$270,000
11 will be available to pay the Individual Settlement Amounts of the approximately 235
12 Class Members.

13 **B. NOTICE PROCEDURES**

14 The proposed Class Notice, subject to Court approval, is attached as Exhibit 1 to
15 the Settlement Agreement. Within 21 days after entry of the Preliminary Approval Order
16 by the Court, Defendant shall provide the Settlement Administrator with Class and
17 Aggrieved Employee Data (i.e., a list of Class Members, their contact information and
18 the total numbers of weeks credited during the Class Period as described in further detail
19 below, and, for those Class Members who are also Aggrieved Employees, the total
20 PAGA Pay Periods during the PAGA Period). (S.A., ¶¶ 6, 72).

21 Within 10 days after receiving from Defendant the Class and Aggrieved Employee
22 Data, the Settlement Administrator will populate the Class Notice for each Class Member
23 with the estimated Individual Settlement Amount for each Class Member based on the
24 Estimated Total for Claim and the Per Claim Workweeks, as well as each Aggrieved
25 Employee's estimated share of the PAGA Penalties based on the number of PAGA Pay
26 Periods worked during the PAGA Period by the Aggrieved Employee, and mail the
27 Notice via first class mail. In an effort to ensure that the Class Notice is received by all
28 Class Members, the Settlement Administrator will update the addresses for the Class

Members using the National Change of Address database. In the event that any Class Notice is returned as undelivered, the Settlement Administrator shall perform a skip trace search and seek an address correction for such Class Member(s), and shall re-mail the Class Notice to any new or different address that is obtained. (S.A., ¶¶ 72-74).

Within 10 /days after filing of this Motion, Defendant shall serve all necessary Attorneys General a notice of the proposed settlement, including the information and materials listed in 28 U.S.C. § 1715(b)(1)-(8), as required by CAFA. (S.A., ¶ 71).

C. SETTLEMENT ALLOCATION FORMULA FOR SETTLEMENT SHARES

The Net Settlement Amount of approximately \$270,000 will be paid to the Settlement Class Members and Total Individual Class Settlement Payments will be calculated and apportioned from the Net Settlement Amount as follows:

<i>Claim</i>	<i>% of NSA for Claim</i>	<i>Total WW Per Claim</i>	<i>Per WW \$</i>	<i>Total \$ for Claim</i>
<i>Flat Rate Drivers (“FRD”)(> 50% of week – 76% of WW) – Wage Claims</i>				
Non-Productive Time (3/1/2019- 6/28/2024)	47% of FRD wage claim	Total FRD WW x 47%	Total for Claim/Total WW Per Claim	Total FRD Wage Claims x 47%
Minimum Wage -Stop Pay (3/1/2019 - 5/31/303)	26% of FRD wage claim	Total FRD WW x 26%	Total for Claim/Total WW Per Claim	Total FRD Wage Claims x 26%
Minimum Wage -Rest Break (3/1/2019- 6/28/2024)	27% of FRD wage claim	Tota FRD WW x 27%	Total for Claim/Total WW Per Claim	Total FRD Wage Claims x 27%
Total FRD Wage Claims	11% of Net Settlement Amount	Total WW x 11%		NSA x 11%

<i>Mileage Rate Drivers (“MRD”) (> 50% of week – 24% of WW) – Wage Claims</i>				
Non-Productive Time (3/1/2019-6/28/2024)	20% of MRD wage claim	Total MRD WW x 20%	Total for Claim/Total WW Per Claim	Total MRD Wage Claims x 20%
Minimum Wage -Stop Pay (3/1/2019 - 5/31/303)	72% of MRD wage claim	Total MRD WW x 72%	Total for Claim/Total WW for Claim	Total MRD Wage Claims x 72%
Minimum Wage -Rest Break (3/1/2019-6/28/2024)	8% of MRD wage claim	Total MRD WW x 8%	Total for Claim/Total WW for Claim	Total MRD Wage Claims x 8%
Total MRD Wage Claims	5% of Net Settlement Amount	Total WW x 5%		NSA x 5%
<i>Flat Rate Driver – Waiting Time Penalties</i>				
Section 201-203 (3/1/2019-6/28/2024)	90% of LC 203 Claims	Total Final Wage Claim WW x 90%	Total for Claim/Total WW for Claim	Total Final Wage Claim x 90%
<i>Mileage Rate Drivers – Waiting Time Penalties</i>				
Section 201-203 (3/1/2019-6/28/2024)	10% of LC 203 Claims	Total Final Wage Claims WW x 10%	Total for Claim/WW for Claim	Total Final Wage Claim x 10%
Totals Final Wage Claims	71% of Net Settlement Amount	Total WW x 71%		NSA x 71%
All Drivers				
Cell Phone Reimbursement	5% of Net Settlement Amount	Total WW x 5%	Total for Claim/WW for Claim	NSA x 5%

(3/1/2019 - 9/18/2021)				
Wage Statements (3/9/2020 - 4/23/2021)	8% of Net Settlement Amount	Total WW x 8%	Total for Claim/WW for Claim	NSA x 8%

The Net Settlement Amount will be allocated and paid based on a number of criteria including:

- i. the Net Settlement will be divided up using the percentage of the estimated maximum value attributed to each claim, and/or subclaim to arrive at an estimated total for each claim/subclaim category ("Estimated Total for Claim");
- ii. the Estimated Total for Claim will be divided by the total number of weeks worked by the drivers impacted by each claim/subclaim ("Per Claim Workweeks"), which will be provided by Defendant to the Administrator, to arrive at a dollar figure share ("Per Claim Share") for each week worked for that claim/subclaim;
- iii. each Class Member's workweeks allocated by the number of weeks each driver worked at greater than 50% flat rate ("Flat Rate Driver Weeks Worked") or greater than 50% mileage rate ("Mileage Rate Driver Weeks Worked") for the minimum wage claims and by all applicable weeks for the remaining claims ("Other Weeks Worked");
- iv. the Per Claim Share will be multiplied by the number of Flat Rate Driver Weeks Worked, the Mileage Rate Driver Weeks Worked, and Other Weeks Worked for every claim that each Class Member was potentially impacted based upon the dates they drove at each rate ("Individual Per Claim Totals");

- v. the Individual Per Claim Totals will be added together for each Class Member to obtain a total individual class settlement payment ("Total Individual Class Settlement Payment").
- vi. The Settlement Administrator will then add the totals of all claim categories attributable to each Class Member to determine each Settlement Class Member's Total Individual Class Settlement Payment.
- vii. Individual Settlement Payments will be reduced by any required deductions for each Participating Class Member as specifically set forth herein, including employee-side tax withholdings and deductions.

(S.A., ¶ 52(c)).

The Notice will inform Settlement Class Members/Aggrieved Employees of his/her reported start and end dates of their employment with ITS, their estimated Per Claim Share for each claim, the Individual Per Claim Totals and the estimated Total Individual Class Settlement Payment, and the number of PAGA Pay Periods during the PAGA Period and the anticipated PAGA Individual Penalty Payment. Settlement Class Members/Aggrieved Employees may dispute their start and end dates of employment or PAGA Pay Periods if they feel they should be credited with more than Defendant's records show by timely submitting evidence to the Settlement Administrator (S.A., ¶ 74).

D. DISTRIBUTION OF UNCLAIMED SETTLEMENT SHARES AND UNCASHED CHECKS

Participating Class Members will have 180 days from the date of mailing to cash a settlement check. If a Participating Class Member fails to timely cash a check, then the Settlement Administrator shall deposit the unclaimed funds to the California State Controller's Office in the name of the Class Member, unless the Court directs the Parties to issue the unpaid residue to some other fund. (S.A., ¶ 79).

E. EXCLUSION AND OBJECTION PROCEDURES

Class Members who do not submit a timely Request for Exclusion (*i.e.*, opt-out) will be deemed to participate in the Settlement and shall become a Participating Class

1 Member without having to submit a claim form or take any other action. To opt-out of
2 the Settlement, the Class Member must submit a written request to the Settlement
3 Administrator no later than 45 days after being mailed by the Settlement Administrator
4 (“Notice Response Deadline”). Any Opt-Out Request that is not postmarked by the
5 Notice Response Deadline will be invalid, unless both Parties agree to accept the late
6 Opt-Out Request. (S.A., ¶ 76(a)).

7 The Class Notice shall inform the Class Members of their right to object to the
8 Settlement. Any Class Member who wishes to object to the Settlement must submit a
9 written objection to the Settlement Administrator no later than the 45-day Notice
10 Response Deadline, stating the basis of the objection. (S.A., ¶ 76(c)).

11 **F. RELEASE OF CLAIMS**

12 Plaintiff and the Participating Class Members’ release of the Released Class
13 Claims is narrowly limited to the claims alleged in Plaintiff’s Complaint or that could
14 have been alleged based on the allegations and facts therein, as follows:

15 “Released Class Claims” by the Participating Class Members
16 upon Final Approval of the Settlement shall mean any and all
17 actual or potential claims, rights, demands, liabilities and causes
18 of action, that were or could have been pled under local, state, or
19 federal law reasonably arising out of or relating to the facts
20 alleged in the Complaint against the Released Parties for the
21 duration of the Class Period, including: (a) failure to pay
22 minimum and regular wages, (b) failure to pay nonproductive
23 time under LC 226.2 and under agreement or contract (including
24 failure to pay for rest breaks), (c) breach of contract, (d) failure
25 to reimburse expenses, (e) failure to pay final wages, (f) failure
26 to provide accurate itemized wage statements, and (g) all other
27 claims for statutory penalties or interest based on the facts and
28 theories set forth in the First Amended Complaint, and based on
or arising from alleged violations of California Labor Code §§
200, 201, 202, 203, 218.6, 226, 226.2, 226.3, 558, 1194, 1194.2,
and 2802, and of the applicable California Wage Order No. 9.
The time period governing the Released Class Claims shall be
the same as the Class Period. (See S.A. ¶ 34).

1 Of course, the Settlement Agreement will not release any person, party or entity
2 from claims, if any, by Class Members for workers compensation, unemployment, or
3 disability benefits of any nature, nor does it release any claims, actions, or causes of
4 action which may be possessed by Settlement Class Members under state or federal
5 discrimination statutes including, without limitation, the Cal. Fair Employment and
6 Housing Act, the Cal. Government Code § 12940, et seq.; the Unruh Civil Rights Act, the
7 Cal. Civil Code § 51, et seq.; the California Constitution; Title VII of the Civil Rights Act
8 of 1964, 42 U.S.C. § 2000, et seq.; the Americans with Disabilities Act, as amended, 42
9 U.S.C. § 12101, et seq.; the Employee Retirement Income Security Act of 1974, as
10 amended, 29 U.S.C. § 1001 et seq.; and all of their implementing regulations and
11 interpretive guidelines.

12 The Settlement Agreement at ¶ 28 also defines the release of PAGA Claims in a
13 narrow and reasonable manner, as follows:

14 “PAGA Released Claims” shall mean any and all actual or
15 potential claims for civil penalties under PAGA, that Plaintiff
16 alleged or could have alleged against the Released Parties, on
17 behalf of Aggrieved Employees and the State of California,
18 reasonably arising out of or relating to the facts or claims alleged,
19 in the Complaint and in Plaintiff’s March 5, 2021, notice letter to
20 the LWDA, including all PAGA claims seeking civil penalties,
21 attorneys’ fees and/or interest premised upon: (a) failure to pay
22 minimum and regular wages; (b) failure to pay nonproductive
23 time under LC 226.2 (including failure to pay for rest breaks);
24 (c) failure to reimburse expenses; (d) failure to timely pay wages
25 each period; (e) failure to timely pay final wages; (f) failure to
26 provide accurate itemized wage statements; and (i) all other
27 claims for civil penalties recoverable under the PAGA based on
28 the facts or claims alleged in the First Amended Complaint or in
the relevant LWDA notice letter (with the exception of any meal
break or rest period claims), or arising from alleged violations of
California Labor Code §§ 201, 202, 203, 226, 226.2, 226.3, 558,
1194, 1194.2, and 2802. The time period governing the PAGA
Released Claims shall be the same as the PAGA Period. The
PAGA Released Claims do not release any potential claims for

1 wages or statutory penalties. (S.A. ¶ 28).

2
3 Thus, upon entry of the Final Approval Order and Defendant's funding of the
4 Settlement Amount, Plaintiff, standing in the shoes of the Labor Commissioner/LWDA,
5 and on behalf of the State of California and all Aggrieved Employees, will forever
6 completely release and discharge the Released Parties from the PAGA Released Claims
7 through the PAGA Period. It is the intent of the Parties that the Final Approval Order
8 and judgment entered by the Court shall have full equitable and collateral estoppel and
9 *res judicata* effect and be final and binding upon Aggrieved Employees regarding the
10 PAGA Released Claims. (S.A. ¶ 57). Even if an Aggrieved Employee requests
11 exclusion from the Class settlement, that individual will still be subject to the PAGA
12 Released Claims to the fullest extent permitted by law and will receive a pro-rata share of
13 PAGA Penalties. (S.A. ¶ 76(a)).

14 **G. TIMING OF SETTLEMENT DISBURSEMENTS**

15 Within 15 days after the Effective Date (which is the date of final approval if no
16 Class Member objects), Defendant shall deposit \$550,000 into a Qualified Settlement
17 Fund to be established by the Settlement Administrator (plus the employer's share of
18 payroll taxes and withholdings once advised by the Settlement Administrator of the
19 proper amount). After the Effective Date, the Gross Settlement Amount will be used to
20 fund: the (i) Individual Settlement Payments for the Participating Class Members; (ii)
21 amounts awarded to Class Counsel for attorneys' fees, costs, and expenses; (iii) the
22 Service Award to the Plaintiff, (iv) PAGA Penalties to the LWDA and Aggrieved
23 Employees, and (v) Settlement Administration Costs. The Settlement Administrator will
24 issue the court-approved payments within 10 days of receipt. (S.A. ¶ 77-78).

25 **H. TAX TREATMENT**

26 The Settlement Agreement provides that one-third (33.333%) of the Individual
27 Settlement Payments will be allocated as wages subject to withholding of all applicable
28 local, state and federal taxes (with IRS W-2 reporting), and two-thirds (66.667%) will be

1 allocated for penalties and interest from which no taxes will be withheld (both with 1099
2 reporting). (S.A. ¶ 52(d)). Defendant's share of employer payroll taxes will be paid
3 separately by Defendant. The Settlement Administrator will be responsible for issuing all
4 tax forms and paying all deductions and withholdings from the GSA.

5 **IV. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE** 6 **FOR PURPOSES OF SETTLEMENT**

7 The law favors settlement, particularly in class actions and other complex cases
8 where substantial resources can be conserved by avoiding the time, cost, and rigors of
9 formal litigation. *City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v.*
10 *Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). "Voluntary conciliation and settlement
11 are the preferred means of dispute resolution. This is especially true in complex class
12 action litigation." *Officers for Justice v. Civil Service Com'n of City and County of San*
13 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

14 When parties reach a settlement agreement prior to class certification, the Court
15 has an obligation to "peruse the proposed compromise to ratify both the propriety of the
16 certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952
17 (9th Cir. 2003). In the settlement context, courts must give "undiluted, even heightened,
18 attention" to class certification requirements. *Amchem Products, Inc. v. Windsor*, 521
19 U.S. 591, 620 (1997) Preliminary approval of a class settlement is generally a two-step
20 process. First, the Court must assess whether a class exists. *Id.* (citing *Amchem Prods.,*
21 *Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Second, the Court must "determine whether
22 the proposed settlement is fundamentally fair, adequate, and reasonable." *Id.* (citing
23 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). The decision to approve
24 or reject a settlement is within the Court's discretion. *Hanlon*, 150 F.3d at 1026.

25 Class certification is governed by the Federal Rules of Civil Procedure, which
26 provide that "[o]ne or more members of a class may sue or be sued as representative
27 parties on behalf of all." Fed. R. Civ. P. 23(a). Plaintiff seeks conditional approval of the
28 class for settlement pursuant to Rule 23(e) . The parties have stipulated that the Court

1 may, for settlement purposes only, certify a Settlement Class. In the event this Settlement
2 is either not granted preliminary or final approval, or is reversed on appeal, Defendant
3 reserves its right to oppose class certification.

4 **A. THE SETTLEMENT SATISFIES THE REQUIREMENTS OF RULE 23(A)**

5 Parties seeking class certification bear the burden of demonstrating the elements of
6 Rule 23(a) are satisfied, and “must affirmatively demonstrate ... compliance with the
7 Rule.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Doninger v. Pacific*
8 *Northwest Bell, Inc.*, 563 F.2d 1304, 1308 (9th Cir. 1977). If an action meets the
9 prerequisites of Rule 23(a), the court must consider whether the class is maintainable
10 under one or more of the three alternatives set forth in Rule 23(b). *Narouz v. Charter*
11 *Communs., LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010).

12 The prerequisites of Rule 23(a) “effectively limit the class claims to those fairly
13 encompassed by the named plaintiff’s claims.” *General Telephone Co. of the Southwest v.*
14 *Falcon*, 457 U.S. 147, 155-56 (1982) (citing *General Telephone Co. v. EEOC*, 446 U.S.
15 318, 330 (1980)). The Rule 23(a) prerequisites are commonly referred to as numerosity,
16 commonality, typicality, and adequacy of representation. *Falcon*, 457 U.S. at 156.

17 At the preliminary approval stage, a plaintiff need only make a “prima facie
18 showing” of the requirements of Rule 23.³ In determining the propriety of class
19 certification, a court may not delve into the underlying merits of the claims. The
20 fundamental question “is not whether . . . plaintiffs have stated a cause of action or will
21 prevail on the merits, but rather whether the requirements of Rule 23 are met.” *Eisen v.*
22 *Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

23 The Ninth Circuit has established that, when ruling on the propriety of class
24 certification, a district court “is bound to take the substantive allegations of the complaint
25 as true.” *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975). A court “may not
26

27 ³ See, Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial §
28 10:573 (The Rutter Group 2006)

1 require plaintiffs to make a preliminary proof of their claim; it requires only sufficient
2 information to form a reasonable judgment.” *Baldwin & Flynn v. Nat’l. Safety Associates*,
3 149 F.R.D. 598, 600 (N.D. Cal. 1993). Under these standards, this action meets the
4 requirements for certification under Rule 23(a) and Rule 23(b)(3).

5 ***1. Numerosity***

6 Under Rule 23(a)(1), a class action may be maintained where “the class is so
7 numerous that joinder of all members is impracticable.” In determining whether joinder
8 would be impracticable, a court may consider not only the sheer number of class
9 members, *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (numbers alone
10 may be dispositive), but also “the nature of the action, the size of the individual claims,
11 [and] the inconvenience of trying individual suits.” *Wang v. Chinese Daily News*, 231
12 F.R.D. 602, 606 (C.D. Cal. 2005). “A class action may proceed upon estimates as to the
13 size of the proposed class.” *Lewis v. Gross*, 663 F. Supp. 1164, 1169 (E.D.N.Y. 1986).
14 *See also, In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 679 (N.D. Cal. 1986)
15 (class certified where plaintiffs did not establish exact size, but demonstrated that class
16 would “obviously be sufficiently numerous”).

17 With approximately 235 Class Members, the numerosity requirement is met.

18 ***2. Commonality***

19 Rule 23(a) requires “questions of law or fact common to the class.” Fed. R. Civ. P.
20 23(a)(2). Rule 23(a)(2) requires that there be “questions of law or fact common to the
21 class.” This commonality requirement is “construed permissively.” *Hanlon v. Chrysler*
22 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Plaintiffs need not demonstrate that all
23 questions of fact and law are common. “The existence of shared legal issues with
24 divergent factual predicates is sufficient.” *Id.* Where a class is united by a common
25 interest in determining whether a defendant’s broad course of conduct is actionable,
26 commonality is not defeated “by slight differences in class members’ positions.” *Blackie*,
27 524 F.2d at 901 n.17.

1 In this litigation, all Class Members share a common interest in determining
2 whether Defendant properly paid all wages, nonproductive time, stop pay, and rest
3 breaks, properly reimbursed business expenses, properly provided accurate itemized
4 wage statements, and timely paid all wages upon termination.

5 Given the permissive standard that courts in the Ninth Circuit employ when
6 determining commonality, certification of the Class for settlement purposes is appropriate
7 as Rule 23(a)(2) is satisfied.

8 Once it is established that common issues of law or fact exist, for Rule 23(b)(3)
9 purposes, the Court next examines whether those common issues predominate. The
10 predominance inquiry focuses on whether the class is “sufficiently cohesive to warrant
11 adjudication by representation.” *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*,
12 244 F.3d 1152, 1162 (9th Cir. 2001). Central to predominance is “the notion that the
13 adjudication of common issues will help achieve judicial economy.” *Zinser v. Accufix*
14 *Research Institute, Inc.*, 253 F.3d 1188, 1189 (9th Cir. 2001). When common questions
15 represent a significant aspect of the case and they can be resolved for all members of the
16 class in a single adjudication, there is clear justification for handling the dispute on a
17 representative rather than on an individual basis.” Hanlon, 150 F.3d at 1022. It is well
18 settled that the need for determining differing amounts of damages suffered by different
19 class members does not preclude class certification. See, Blackie, 524 F.2d at 905; Wang,
20 231 F.R.D. at 613.

21 There are common issues that may predominate over individual issues in this
22 litigation. For example: (1) whether Defendant’s policies resulted in unpaid wages such
23 as non-productive time, stop pay and/or rest breaks; (2) whether Defendant properly
24 reimbursed the Class for business use of their cell phones (3) whether Defendant
25 provided putative Class Members with itemized wage statements that were inaccurate in
26 violation of Labor Code § 226; and (4) whether Defendant failed to pay all wages due
27 and payable to former employees within the times specified under the California Labor
28 Code.

1 **3. *Typicality***

2 The typicality requirement demands that the “claims or defenses of the
3 representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P.
4 23(a)(3). The standards under this rule are permissive, and a claim or defense is not
5 required to be identical, but rather “reasonably coextensive” with those of the absent class
6 members. *Hanlon*, 150 F.3d at 1020. “The test of typicality is whether other members
7 have the same or similar injury, whether the action is based on conduct which is not
8 unique to the named plaintiffs, and whether other class members have been injured by the
9 same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.
10 1992); *see also Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir. 1995) (typicality
11 is satisfied when named plaintiffs have the same claims as other members of the class and
12 are not subject to unique defenses).

13 Here, Plaintiff was employed by Defendant as a truck driver and alleges that he
14 was subjected to Defendant’s uniform policies and practices that are at the core of the
15 lawsuit, including alleged violations relating to unpaid wages (including not receiving
16 separate hourly compensation for on-duty non-driving time, stop pay and rest breaks),
17 failure to reimburse expenses, and failure to provide accurate wage statements, among
18 others. These are the same issues to which Plaintiff alleges all Class Members were also
19 subjected. Therefore, the typicality requirement is satisfied.

20 **4. *Fair and Adequate Representation***

21 Absentee class members must be adequately represented for judgment to be
22 binding upon them. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Accordingly, this
23 prerequisite is satisfied if the “representative parties will fairly and adequately protect the
24 interests of the class.” Fed. R. Civ. P. 23(a)(4). “[R]esolution of this issue requires that
25 two questions be addressed: (a) do the named plaintiffs and their counsel have any
26 conflicts of interest with other class members, and (b) will the named plaintiffs and their
27 counsel prosecute the action vigorously on behalf of the class?” *In re Mego Fin. Corp.*
28 *Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000) (citing *Hanlon*, 150 F.3d at 1020).

Specifically, Plaintiff is adequate to represent the class because he was employed by Defendant during the Class Period, alleges that he experienced the same wage and hour practices as the rest of the Class, understood his duties as Class Representative, has been willing to undergo the risk of litigation, and has no conflict of interest.

Adequacy of counsel may be established by the fact that counsel are experienced practitioners. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). Here, Plaintiff is represented by Class Counsel with extensive experience in wage and hour class actions, including class actions like the instant matter. (Lauby Decl., ¶¶ 2-13).

5. Superiority

In deciding whether to certify a class for settlement purposes, a court considers the following factors to determine whether a class action is superior: (a) class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; and (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum.⁴ Some courts have found that the third Rule 23(b)(3) factor is "conceptually irrelevant in the context of a settlement." *See Strube v. American Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla. 2005). "With the settlement in hand, the desirability of concentrating the litigation in one forum is obvious." *Elkins v. Equitable Life Ins. Of Iowa*, 1998 WL 133747, at *19 (M.D. Fla. 1998).

⁴ Rule 23(b)(3)(A)-(C). When a court reviews a class action settlement, it does not consider Rule 23(b)(3)(D), the fourth factor, regarding difficulties of managing a class action. *Amchem Products Inc. v. Woodward* (1997) 521 U.S. 591, 620 (in deciding whether to certify a class for settlement purposes, a district court "need not inquire whether the case, if tried, would present intractable management problems").

1 To determine whether the superiority requirements of Rule 23(b)(3) are satisfied, a
2 court compares a class action with alternative methods for adjudicating the parties'
3 claims. Lack of a viable alternative to a class action necessarily means that it satisfies the
4 superiority requirement. *See Valentino v. Carter-Wallace*, 97 F.3d 1227, 1235-36 (9th
5 Cir. 1996) ("a class action is a superior method for managing litigation if no realistic
6 alternative exists"). "[I]f a comparable evaluation of other procedures reveals no other
7 realistic possibilities, [the] superiority portion of Rule 23(b)(3) has been satisfied."
8 *Culinary/Bartender Trust Fund*, 244 F.3d at 1163. In *Culinary/ Bartender Trust Fund*,
9 the Ninth Circuit held that the "case involve[d] multiple claims for relatively small sums"
10 and that the class action clearly served as the only method that would "permit the
11 plaintiffs to pool claims which would be uneconomical to litigate individually." *Id.* at
12 1163.

13 The class action is superior here as it is the only method that will allow Class
14 Members "to pool [their individual] claims which would be uneconomical to litigate
15 individually." *Id.*

16 The factors articulated in Rule 23(b)(3)(A), (B) and (C) also favor class
17 certification. It is difficult to believe that any Class Members have an interest in
18 individually controlling the prosecution of separate actions, given the relatively small
19 sums involved for any one Class Member. Any Class Member who wants to pursue a
20 separate action can opt out of the Settlement.

21 Also, it is desirable to concentrate the issues in this forum. The Settlement allows
22 all individuals to resolve similar claims against Defendant through a process that does not
23 even require the submission of a claim form.

24 **B. CERTIFICATION OF A CLASS UNDER RULE 23(B)(3)**

25 Once the requirements of Rule 23(a) are satisfied, a class may only be certified if it
26 is maintainable under Rule 23(b). Fed. R. Civ. P. 23(b); *see also Narouz*, 591 F.3d at
27 1266. Plaintiff asserts that parties agree for purposes of the Settlement only that
28 certification of the Class is appropriate under Rule 23(b)(3) because the Settlement

1 obviates the litigation of individual liability and damage issues, questions of law or fact
2 common to the members of the class predominate over any questions affecting only
3 individual members, and ... a class action is superior to other available methods for the
4 fair adjudication of the controversy. Therefore, the conditional class is maintainable
5 under Rule 23(b)(3).

6 **V. PRELIMINARY APPROVAL OF THE SETTLEMENT**

7 Settlement of a class action requires approval of the Court, which may be granted
8 “only after a hearing and on finding that [the settlement] is fair, reasonable, and
9 adequate.” Fed. R. Civ. P. 23(e)(2). Approval is required to ensure the settlement is
10 consistent with Plaintiff’s fiduciary obligations to the class. *See Ficalora v. Lockheed*
11 *Cal. Co.*, 751 F.2d 995, 996 (9th Cir. 1985).

12 The Ninth Circuit has set forth a number of factors to determine whether a
13 settlement agreement meets these standards, including: (A) the class representatives and
14 class counsel have adequately represented the class; (B) the proposal was negotiated at
15 arm’s length; (C) the relief provided for the class is adequate, taking into account: (i) the
16 costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of
17 distributing relief to the class, including the method of processing class-member claims;
18 (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
19 (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal
20 treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2).

21 The Ninth Circuit has provided the following guidance regarding Rule 23(e)(2):

22 In this Circuit, a district court examining whether a proposed settlement
23 comports with Rule 23(e)(2) is guided by the eight “*Churchill* factors,” viz.,
24 “(1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and
25 likely duration of further litigation; (3) the risk of maintaining class action
26 status throughout the trial; (4) the amount offered in settlement; (5) the extent
27 of discovery completed and the stage of the proceedings; (6) the experience
28 and views of counsel; (7) the presence of a governmental participant; and (8)
the reaction of the class members of the proposed settlement.”

1 *Kim*, 8 F.4th at 1178 (quoting *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d
2 935, 946 (9th Cir. 2011)); see *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th
3 Cir. 2004) (listing the Churchill factors). “In addition, the settlement may not be the
4 product of collusion among the negotiating parties.” *In re Mego*, 213 F.3d at 458. “This
5 list is not exclusive and different factors may predominate in different factual contexts.”
6 *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (citations omitted).

7 No single criterion determines whether a class action settlement meets the
8 requirements of Rule 23(e). The Ninth Circuit has directed district courts to consider a
9 variety of factors without providing an “exhaustive list” or suggesting which factors are
10 most important. See, *Staton*, 327 F.3d at 959. “The relative degree of importance to be
11 attached to any particular factor will depend upon and be dictated by the nature of the
12 claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances
13 presented by each individual case.” *Officers for Justice v. Civil Service Commission of*
14 *City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

15 Due to the impossibility of predicting any litigation result with certainty, a district
16 court’s evaluation of a settlement essentially amounts to ““an amalgam of delicate
17 balancing, gross approximations and rough justice.”” *Id.* at 625. The ultimate touchstone,
18 however, is whether “class counsel adequately pursued the interests of the class as a
19 whole.” *Staton*, 327 F.3d at 961.

20 As the Ninth Circuit explained in *Officers for Justice*, the district court’s role in
21 evaluating a class action settlement is therefore tailored to meet that narrow objective.
22 *Officers for Justice*, 688 F.2d at 625. Review under Rule 23(e) “must be limited to the
23 extent necessary to reach a reasoned judgment that the agreement is not the product of
24 fraud or overreaching by, or collusion between, the negotiating parties.” *Id.* Accordingly,
25 the Ninth Circuit will not reverse a district court’s approval of a class action settlement
26 “unless the fees and relief provisions clearly suggest the possibility that class interests
27 gave way to self-interest.” *Staton*, 327 F.3d at 961.

1 There is a presumption that the negotiations were conducted in good faith.
2 *Newberg*, §11.51; *Pridd v. Edelman*, 883 F.2d 438, 447 (6th Circuit 1989); *Mars Steel*
3 *Corp. v. Continental Illinois National Bank and Trust Co.*, 834 F.2d 677, 682 (7th Cir.
4 1987). Courts do not substitute their judgment for that of the proponents, particularly
5 where, as here, settlement has been reached with the participation of experienced counsel
6 familiar with the litigation. *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *In re*
7 *Armored Car Anti-Trust Litigation*, 472 F. Supp. 1357 (N.D. GA 1979); *Sommers v.*
8 *Abraham Lincoln Federal Savings & Loan Association*, 79 F.R.D. 571 (E.D. PA 1978).
9 The fact that settlement results from arms-length negotiations following “relevant
10 discovery” creates “a presumption that the agreement is fair.” *Linney v. Cellular Alaska*
11 *Partnership*, 1997 WL 450064, *5 (N.D. Cal. 1997); *See In re Immune Response*
12 *Securities Litigation*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) (settlement approved
13 where informal discovery gave parties clear view of strengths and weaknesses of cases).

14 Here, the Parties reached a non-collusive settlement after discovery and extended
15 Negotiations, including two mediations. The settlement was finally reached after a day of
16 arm’s length negotiations before Tripper Ortman, a highly-respected mediator skilled at
17 helping parties attempting to negotiate reasonable settlements in wage and hour class
18 actions, and follow-up negotiations. Obtaining class certification and establishing liability
19 posed significant hurdles for the class that justified the settlement. The Stipulation falls
20 within the range of reasonable outcomes and merits approval under Rule 23(e). (Lauby
21 Decl., ¶¶ 14-27)

22 Further, a court may consider whether settlement is “the product of collusion
23 among the negotiating parties.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 458 (citing
24 *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992)). That is particularly so
25 where, as here, the settlement is reached prior to formal class certification. *In Re*
26 *Bluetooth Headset Products Liability Litigation*, 654 F. 3d 935 (9th Cir. 2011)(applying
27 “higher level of scrutiny for evidence of collusion or other conflicts of interest than is
28 ordinarily required under Rule 23(e) before securing the court’s approval as fair). But

1 “[t]he court need not reach any ultimate conclusions on the contested issues of fact and
2 law which underlie the merits of the dispute.” *Class Plaintiffs*, 955 F.2d at 1291.

3 **A. THE SETTLEMENT FALLS WELL WITHIN THE RANGE OF POSSIBLE**
4 **APPROVAL**

5 To determine whether a settlement “falls within the range of possible approval,” a
6 court focuses on “substantive fairness and adequacy,” and “consider plaintiffs’ expected
7 recovery balanced against the value of the settlement offer.” *In re Tableware Antitrust*
8 *Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). “Of course, the very essence of a
9 settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’”
10 *Officers for Justice v. Civil Service Com’n of City and County of San Francisco*, 688 F.2d
11 615, 624 (9th Cir. 1982).

12 Of relevance to the reasonableness of the proposed Settlement are the risks
13 associated with the significant legal and factual grounds for defending this action. These
14 risks include: (1) the potential that Plaintiff would be unable to establish liability for
15 allegedly unpaid wages, *Duran v US Bank Nat’l Ass’n*, 59 Cal. 4th 1, 39 & n. 33 (2014)
16 (citing *Dilts v. Panske Logistics, LLC*, 2014 WL 205039 (S.D. Cal. 2014) (dismissing
17 certified off-the-clock claims based on proof at trial.)); (2) the risk Defendant’s
18 challenged employment policies might not ultimately support class certification or a
19 class-wide liability finding, *Duran*, 59, Cal. 4th at 14 & n. 28; (3) the risk that
20 uncertainties pertaining to the ultimate legality of Defendant’s policies could preclude
21 any recovery; (4) the risk that individual differences between Settlement Class Members
22 could be construed as pertaining to liability, and not solely to damages, *Duran*, 59 Cal. 4th
23 at 19; (5) the risk that class treatment could be deemed improper as to one or more claims
24 except for settlement purposes; (6) the risk that differences in work experiences of
25 employees assigned to different customers and/or routes in different locations would
26 make both certification and proof of liability prohibitively unlikely; (7) the risk that any
27 civil penalties award under the PAGA could be reduced substantially by the Court in its
28

1 discretion, Cal. Labor Code § 2699(e)(1);⁵ and (8) the risk that lengthy appellate
2 litigation could ensue. Continued litigation of this lawsuit presented Plaintiff with
3 substantial legal risks that were (and continue to be) very difficult to assess.

4 First, in addition to disputing the merits, Defendant strongly disputed that Plaintiff
5 could obtain class certification, arguing a lack of commonality of the legal claims and
6 injuries. Defendant further argued that it complied with the applicable law and that any
7 purported deviations therefrom were individualized in nature, thereby limiting Plaintiff's
8 ability to certify the class. While Plaintiff asserts that this is a suitable case for
9 certification, he realizes that there is always a significant risk associated with class
10 certification proceedings, which could significantly limit the claims that he could pursue
11 on a class basis.

12 Considering the uncertainties of protracted litigation and the state of the law
13 regarding the legal positions of the parties, the settlement amount reflects the best
14 practicable recovery for the Class Members. The settlement amount is, of course, a
15 compromise figure. By necessity it considered risks related to liability, damages, and all
16 defenses asserted by Defendant. Based upon detailed data obtained through formal
17 discovery and information exchanges prior to and during two rounds of mediation, and
18 factoring in claim certification probabilities and liability probabilities, Plaintiff analyzed
19 the maximum theoretical and risk-adjusted values, as follows.

20 Based upon detailed data obtained through formal discovery and information
21 exchanges, Plaintiff's counsel and their consultant determined the following data points
22 through the date of mediation:
23
24
25

26 ⁵ See also *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) ("Although the trial court may have disagreed
27 with Starbucks regarding the issue of liability, it clearly took the circumstances proffered by Starbucks into consideration
28 when it imposed the penalty, as evidence from the significant reduction of the \$50 maximum penalty (per initial violation) to
the penalty imposed - only \$5 per initial violation [,] which] [t]he trial court stated [] was warranted because imposing the
maximum penalty would be unjust, arbitrary, and oppressive based on Starbucks's 'good faith attempts' to comply with meal
break obligations and because the court found the violations were minimal.")

CLASS DATA (3/1/19 – 6/28/24)	
Total Class Members	235
Total Former Class Members	226
Total Workweeks	10,370
Total Workweeks (> 50% Flat Rate)	7,845
Total Workweeks (> 50% Mileage Rate)	2,486
Avg. Daily Flat Rate	\$337.54
Avg. Mileage Rate Per Mile	\$0.53
Total Flat Rate Days Driven	25,009
Total Flat Rate Shifts (3.5-6 hours)	2,226
Total Flat Rate Shifts (6-10 hours)	9,365
Total Flat Rate Shifts (10-14 hours)	9,170
Avg. Hours Per Shift at Flat Rate	8.6
Total Mileage Rate Days Driven	4,152
Total Mileage Rate Shifts (3.5-6 hours)	268
Total Mileage Rate Shifts (6-10 hours)	696
Total Mileage Rate Shifts (10-14 hours)	1,342
Avg. Hours Per Day Mileage Rate	9.16
PAGA DATA (3/9/2020 – 6/28/24)	
Total Aggrieved Employees	160
Total Wage Statements (3/9/20 – 4/3/21)	3131

From these metrics, and when factoring in claim certification probabilities and liability probabilities, Class Counsel formulated detailed damages models to value the claims in preparation for mediation and to reach a realistic and reasonable resolution. (Lauby Decl. ¶ 43).

Failure to Pay Wages

Plaintiff based these claims on three theories: (1) failure to pay for non-productive time such as pre/post trip inspections, fueling, paperwork, etc., under Labor Code § 226.2; (2) failure to pay including stop pay per contract of \$12.50 per stop, and (3) unpaid rest period wages per contract. Plaintiff calculated the maximum potential value for these claims as follows:

FLAT RATE DRIVERS	
Non-Productive Time (pre/post trip, fueling, stops) Flat Rate (226.2) - (7,845 weeks worked at flat rate x est.3 days a week at flat rate = 23,535 est. total flat rate shifts) (25,009 total days/7,845 total weeks = 3 days per week) [=Minimum wage avg. \$14/60)*30 mins per day*23,535]	\$164,745
Stop Pay (Est. 2 stops per day @ \$12.50) per contract (3,656 weeks worked between 3/1/19 - 5/31/2020 (4,301 weeks work by all drivers during that period - allocate 85% to Flat Rate) [3,656 x 2 x \$12.5]	\$91,400
Rest Breaks per offer letters/Handbooks Flat Rate Drivers (2 breaks per 20,761 days over 3.5 hours)[(\$14 min wage/60) x 20 \$96,885 minutes x 20,761]	\$96,885
<i>Subtotal for Unpaid Wages for Flat Rate Drivers</i>	<i>\$353,030</i>
MILEAGE RATE DRIVERS	
Non-Productive Time (pre/post trip, fueling, stops) Mileage Rate (226.2)[(\$14 min wage/60) x 30 mins per day x 4,152 days driven @ mileage rate]	\$29,064
Stop Pay (Est. 2 stops per day @ \$12.50) per contract [4,125 days driven @ mileage rate x est. 2 stops per day x \$12.50]	\$103,800
Rest Breaks per offer letters/Handbooks Mileage Rate Drivers [(\$14 min wage/60) x 20 minutes per day x 2,306 days driven over 3.5 hours @ mileage rate]	\$10,761
<i>Subtotal Unpaid Wages for Mileage Rate Drivers</i>	<i>\$143,625</i>
Total Potential Max Class Damages Re Unpaid Wages	\$496,655

As referenced above, Defendant argued that this claim could not be certified due to the individualized nature of the proof regarding the amount of nonproductive time each shift, the number of stops each driver took, and the inability to establish when rest breaks

were actually taken and not paid. Additionally, Defendant argued that the wage claims would be defeated on the merits under *Ayala*, because both its flat rate pay policy and its mileage-based pay policy covered all activities required to complete the assigned work, and for large portions of the class period, the stop pay policies did not apply to flat rate drivers. With respect to MRDs, Defendant further claimed that at least for a portion of the class period, the stop pay and rest break pay was properly paid when applicable. Moreover, Defendant maintained that despite any policy documents allowing for rest breaks, California rest break requirements were nullified by the FMCSA's determination that such requirements were preempted by federal law and, therefore, no unpaid wages would be owed.

After applying appropriate discounts relating to Defendant's arguments at the class certification stage and on the merits, Plaintiff estimated the risk-adjusted value of the unpaid wage claims to be \$144,808 calculated as follows:

FLAT RATE DRIVERS				
Category	Max	Cert Risk	Merits Risk	Risk Adj.
Non-Productive Time	\$164,745	50%	50%	\$41,186
Stop Pay	\$91,400	50%	75%	\$11,425
Rest Breaks	\$96,885	50%	50%	\$24,221
<i>Subtotal for FRDs</i>	<i>\$353,030</i>			<i>\$76,832</i>
MILEAGE RATE DRIVERS				
Category	Max	Cert Risk	Merits Risk	Risk Adj.
Non-Productive Time	\$29,064	50%	10%	\$13,079
Stop Pay	\$103,800	30%	30%	\$50,862
Rest Breaks	\$10,761	50%	25%	\$4,036
<i>Subtotal for MRDs</i>	<i>\$143,625</i>			<i>\$67,976</i>
Total Risk-Adjusted Class Damages Re Unpaid Wages				\$144,808

1 This result here is fully supportable as reasonable. First, off-the-clock claims like
2 those involving non-productive time have proven to be extremely difficult to certify by
3 their very nature. Second, Defendant argues that the policies relating to the promises of
4 stop pay and/or rest break pay differ according to pay type and different periods of time
5 that the policies were in effect calling into question whether the criteria for commonality
6 and typicality can be met. Third, Plaintiff's claims for rest breaks and stop pay are
7 dependent on breach of contract theories requiring that Plaintiff prove there was an
8 agreement to pay, but in speaking with a number of other drivers, that theory was called
9 into question because a few of the drivers reported that they believed that their pay rate
10 encompassed all of their work. Fourth, because of the nature of the work, the drivers were
11 subject to somewhat differing conditions, (for example, they operated out of different
12 locations, serviced different clients and routes, and had different hours and numbers of
13 stops). Therefore, Plaintiff made merits-based adjustments on the flat rate claims of 50%
14 for non-productive time and rest breaks due to the risk that Defendant's argument that the
15 flat rate was all inclusive would prevail. An additional 25% deduction was added to the
16 stop pay arguments because alleged promises to pay stop pay to the flat rate drivers by
17 way of the offer letters was ended early in the class period and at least a few of the flat
18 rate drivers Plaintiff's counsel spoke to had no expectation of being paid any stop pay
19 because they specifically reported that they believed that their flat rate pay encompassed
20 all of their work in a day.

21 With respect to certification matters, either the claim will be certified, or it will not,
22 making a 50% discount a reasonable estimate, since if the claim fails to be certified, the
23 value to the class is zero. Plaintiff estimates a slightly lower 30% risk on the mileage rate
24 pay, stop pay issues because Defendant does not dispute that the policy existed as to
25 those drivers. However, it does argue that the stop-pay was duly paid when applicable
26 which justifies some certification risk. Moreover, with respect to rest breaks, Defendant
27 argues that it paid rest breaks to MRDs when applicable and that any right to take or be
28 paid for rest breaks is pre-empted by the FMCSA further justifying risk reduction on rest

1 break claims.

2 By obtaining reasonable value for these claims in light of the substantial risks of
3 protracted litigation, the risk of motions for summary judgement on certain issues, and
4 the risk that the wage claims may not be certified, Plaintiff clearly achieved a fair
5 settlement that merits approval, particularly in light of the risks faced. (Lauby Decl. ¶¶
6 44-49).

7 **Wage Statement Claims**

8 Plaintiff alleged direct wage statement violations that Defendant failed to include all
9 information required by Labor Code § 226(a). Plaintiff calculated the maximum
10 potential value of this claim as \$244,000 under the \$50/\$100 formula in § 226(e) on
11 3,131 total wage statements in the one-year statute of limitations with a \$4,000 per
12 employee cap as calculated by Plaintiff's consultant. In addition to the defenses set forth
13 above, Defendant raised further defenses, including that: (a) these violations, if any, did
14 not result in any "injury" under § 226(e), (b) the violations, if any, were not "knowing
15 and intentional" and could not support the assessment of penalties, and any (c)
16 "derivative" wage statement claims are without merit. As a result of the defenses,
17 Plaintiff assigned a 20% risk adjustment at the class certification stage and a 40% risk
18 adjustment at the merits stage for a risk adjusted value of \$117,120. Plaintiff assigned a
19 small risk at the certification stage because while not certain, the issues seemed well
20 suited to class treatment as it relates to a class-wide wage statement policy. However, a
21 larger deduction was assigned on the merits due to Defendant's potential to defeat the
22 claim on the theory that the flat rate pay structure is equivalent to a "salary" and
23 therefore, listing the hourly rate was not required. (Lauby Decl. ¶ 50).

24 **Failure to Reimburse Business Expenses**

25 Plaintiff further alleged that Defendant failed to reimburse Plaintiff and the Class
26 despite having a written policy requiring its employees to provide their own cell phones
27 for work purposes. Plaintiff estimated the maximum damages at \$20 per 7,613
28 workweeks between the March 9, 2020 beginning of the three-year statute of limitations

for Labor Code §2802 claims, through September 18, 2021 when Defendant changed its policies and began paying cell phone reimbursements for a total of \$152,260. Defendant also raised defenses to this claim that including that it provided an in-truck messaging system so personal cell phone use was not required and, in 2021, Defendant issued an interoffice memo that told drivers they were no longer required to provide a cell phone for work but establishing a policy to pay for any usage incurred. Consequently, Plaintiff assigned a 20% class certification adjustment and 30% merits adjustment to this claim for a total value of \$85,266. The adjustments here are appropriate because certification challenges may arise due to the individualized nature of whether drivers actually utilized their own phones for work and at what cost. For the same reasons, there would also be significant risks when arguing the merits of the claim in trying to establish damages especially after 2021. (Lauby Decl. ¶ 51).

Failure to Timely Pay Wages Upon Separation of Employment

Plaintiff also alleges that Defendant failed to timely pay all wages owed to the 226 former Class Members upon separation of employment. Based on this theory of liability, Plaintiff calculated the maximum waiting time penalties to be \$2,148,623 as calculated below:

FLAT RATE DRIVERS	
% of Days Driven at Flat Rate (25,009 days out of 29,161 per Daily Data)	90%
Former Flat Rate Drivers	203
Avg. Flat Rate Per Day	\$337.54
Max Value Subtotal for FRD Waiting Time Penalties [\$337.54 x 30 x 203]	\$2,059,669
MILEAGE RATE DRIVERS	
% of Days Driven at Mileage Rate	10%
Former Mileage Rate Drivers	23
Average Per Day Earnings at Mileage Rate	\$199.98

Max Value Subtotal for MRD Waiting Time Penalties [\$199.98 x 30 x 23 = \$135,586]	\$137,986
Total Max Value Waiting Time Claims	\$2,197,655

Defendant argued that Plaintiff's Section 203 claim is derivative of his substantive claims – each of which has significant shortcomings. Moreover, the claim fails because ITS acted with a good faith belief that its pay policies fully and properly compensated its drivers, and Plaintiff has provided no evidence that Defendant “willfully” failed to pay the class any wage.

Due to the derivative nature of the waiting time claims, Plaintiff utilized the average discount attributed to the wage claims above to arrive at the risk adjusted values as set forth below:

FLAT RATE DRIVERS				
Category	Max	Cert Risk	Merits Risk	Risk Adj.
Flat Rate Waiting Time	\$2,059,669	50%	58%	\$432,531
MILEAGE RATE DRIVERS				
Category	Max	Cert Risk	Merits Risk	Risk Adj.
Mileage Waiting Time	\$137,986	43%	22%	\$61,349
Total Risk-Adjusted Class Damages Re Unpaid Wages				\$493,879

(Lauby Decl. ¶ 52-53).

In sum when factoring in defenses and risks of ongoing litigation, Plaintiff estimates the risk-adjusted class recovery as follows:

- Wages, incl. NPT, Stop Pay, & Rest: \$ 144,808
- Wage Statements: \$ 117,120
- 2802 Claims: \$ 85,266
- Labor Code §§ 201 – 203 Claims: \$ 493,879
- **TOTAL RISK-ADJUSTED PENALTIES AND DAMAGES:** **\$ 841,073**

(Lauby Decl. ¶ 54).

For the approximately 235 members of the Class, the average gross recovery before deductions for taxes, fees, and other costs, is approximately \$2,340.43 (\$550,000/235). The average net recovery is \$1,148.94 (\$270,000/235). Moreover, each Class Member will be given the opportunity to opt out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement to pursue their own claims. (Lauby Decl. ¶ 55).

The fundamental fairness of this settlement is also confirmed by the fact that the Parties undertook painstaking data collection and analysis to ensure that each Class Member will be compensated based on the number of weeks that they work at each pay rate category for each claim they were potentially subjected to based upon their dates of work and the time periods under which each claim was an issue to ensure that the Class Members are treated equitably relative to each other. (Lauby Decl. ¶ 56).

Therefore, the value of the settlement reflects a fair compromise well within the range of reasonableness considering similar settlements⁶, and given the strong case that

⁶ See e.g. *Maria Bustos Ramirez v. Merril Gardens, LLC*, U.S. Dist. Court, Eastern District of California, Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (January 9, 2024) (ECF No. 54) (approving a \$218.25 per class member settlement on a settlement of 7.9% of the maximum calculated reasonable exposure); see *Thomas v. Cognizant Tech. Sols. U.S. Corp.*, No. SACV111123JSTANX, 2013 WL 12371622, at *6 (C.D. Cal. June 24, 2013) (granting final approval in wage and hour action where settlement encompassed between 4.4% and 5% of the maximum estimated liability figure); *In re Uber FCRA Litig.*, No. 14-CV-05200-EMC, 2017 WL 2806698, at *5 (N.D. Cal. June 29, 2017) (granting preliminary approval of settlement of Fair Credit Reporting Act claims which encompassed as low as 0.75% to 7.5% of maximum valuation if willful violations were proved at trial); *In re AT & T Corp.*, 455 F.3d 160, 170 (3d Cir. 2006) (in securities fraud case, affirming class settlement approval where settlement was only 4% of original valuation, which was devalued after summary judgment); *Rinky Dink Inc v. Elec. Merch. Sys. Inc.*, No. C13-1347 JCC, 2015 WL 11234156, at *4-5 (W.D. Wash. Dec. 11, 2015) (granting preliminary approval of settlement of \$1,250,000 where "potential exposure under the negligence standard can easily exceed \$90,000,000," which is approximately 1.4% of the liability, based partially on proffered argument that defendant could not pay a large settlement, with caveat that "in their Final Approval Brief, the parties must present concrete facts in support of the assertion that they were 'fully informed' and could thereby reasonably conclude that it was doubtful whether Defendants would be able to pay a higher judgment."); *Stovall-Gusman v. W.W. Granger, Inc.*, No. 13-CV-02540-HSG, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (granting final approval in wage and hour action where total settlement amount represented approximately 10% of potential value, and net settlement amount represented 7.3% of valuation); *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC, 2014 WL 360196, at *5 (C.D. Cal. Jan. 31, 2014) (granting preliminary approval of wage and hour settlement for 9.1% as within "range of reasonableness"); *In re MyFord Touch Consumer Litig.*, No. 13-CV-03072-EMC, 2019 WL 1411510, at *10 (N.D. Cal. Mar. 28, 2019) (granting preliminary approval of settlement of consumer warranty claims for approximately 6% of valuation); *Thompson v. Costco Wholesale Corp.*, No. 14-CV-2778-CAB-WVG,

1 Defendant could bring to bear to challenge certification and liability, this is not an
2 inconsequential sum. (Lauby Decl. ¶ 57).

3 The Gross Settlement amount of \$550,000 is approximately 65% of the \$841,073
4 estimate of the class “risk-adjusted recovery” and 18% of the estimated maximum class
5 value of \$3,090,570. (Lauby Decl. ¶ 58).

6 The Net Settlement Amount of \$270,000 is approximately 32% of the \$841,073
7 estimate of the class “risk-adjusted recovery” and 9% of the estimated maximum class
8 value of \$3,090,570. (Lauby Decl. ¶ 59).

9
10 2017 WL 1957552, at *8 (S.D. Cal. May 11, 2017) (granting preliminary approval of settlement reflecting
11 approximately 10% of exposure, based on Court’s experience with wage and hour class actions but stating at “the
12 final approval hearing, the Court will give careful consideration to any objections from class members (or the lack thereof)
13 when determining whether final approval is warranted.”); *Deaver v. Compass Bank*, No. 13-CV-00222- JSC, 2015 WL
14 4999953, at *10 (N.D. Cal. Aug. 21, 2015) (granting preliminary approval of wage and hour settlement representing 10.7%
15 of liabilities and also noting concerns better addressed at final approval following claims administration process); *In re Pool*
16 *Prod. Distribution Mkt. Antitrust Litig.*, 310 F.R.D. 300, 316 (E.D. La. 2015) (granting preliminary approval of settlement of
17 2.5% of valuation in antitrust action, as “best-case scenario”); *Schuler v. Medicines Co.*, No. CV 14-1149 (CCC), 2016 WL
18 3457218, at *8 (D.N.J. June 24, 2016) (granting final approval in securities class action where settlement reflected
19 approximately 4% of estimated recoverable damages); *Balderas v. Massage Envy Franchising, LLC*, No. 12-CV-06327 NC,
20 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (granting preliminary approval of settlement of claims regarding failure to
21 reimburse business expenses where gross settlement represented approximately 8% of liability and net settlement represented
22 5%, as within range of possible approval based on risks and expense of continued litigation, with caveat that “at the final
23 approval hearing, the parties must be prepared to present evidence that the Court’s calculation of the percentage of the
24 maximum recovery is incorrect, or to explain why the especially low recovery is warranted based on the circumstances of this
25 case.”); *Martin v. Sysco Corp.*, No. 116CV00990DADSAB, 2019 WL 3253878, at *5 (E.D. Cal. July 19, 2019) (while
26 granting preliminary approval of settlement encompassing approximately 11% of total value of meal and rest break claims,
27 adding caveat that “the court does not presently have material before it sufficient to make a reasoned determination of
28 whether the settlement amount proposed in the Agreement is adequate [but] [r]ather than denying preliminary approval of the
Agreement in its entirety, however, the court finds that the most prudent course is to raise the issue for the parties’ awareness
and invite them to provide additional argument and evidence in preparation for the final fairness hearing [as] [i]t may well be
that in light of the serious litigation risks faced by plaintiff and the class, settlement at such a dollar amount is warranted in
this case.”); *Cooley v. Indian River Transp. Co.*, No. 1:18- CV-00491, 2019 WL 316634, at *8 (E.D. Cal. Jan. 24, 2019)
(granting preliminary approval of wage and hour settlement at approximately 11% of liability and despite concerns regarding
attorney’s fees award); *Singh v. Roadrunner Intermodal Servs., LLC*, No. 115CV01497DADBAM, 2018 WL 2412325, at *7
(E.D. Cal. May 29, 2018) (granting preliminary approval of wage and hour settlement for approximately 12% of liability),
modified, No. 115CV01497DADBAM, 2018 WL 4382202 (E.D. Cal. Sept. 13, 2018); *Custom LED, LLC v. eBay, Inc.*, No.
12-CV-00350-JST, 2013 WL 6114379, at *3 (N.D. Cal. Nov. 20, 2013) (granting preliminary approval with range of
recovery from 1.8% for one subclass, to 16% for another subclass of eBay sellers); *Hendricks v. Starkist Co.*, No. 13-CV-
00729-HSG, 2016 WL 5462423, at *5 (N.D. Cal. Sept. 29, 2016) (granting final approval in consumer class action and
noting that while “[t]he \$12,000,000 settlement amount, while constituting only a single-digit percentage of the maximum
potential exposure, is reasonable given the stage of the proceedings and the defenses asserted in this action.”), *aff’d sub nom.*
Hendricks v. Ference, 754 F. App’x 510 (9th Cir. 2018); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA
EMC, 2012 WL 5878390, at *6–7 (N.D. Cal. Nov. 21, 2012) (preliminarily approving settlement of approximately 15% of
valuation despite concerns of such discount, noting the risks of pursuing trial and that counsel acknowledged that some of
Plaintiff’s claims were not as viable as they had originally envisioned, fact that parties agreed to reduce proposed attorney’s
fees proportion from 33% to 25%, and further stating that “[a]t any rate, issues concerning the amount of the settlement are
better resolved at the final approval hearing,” as after claims process is completed the parties and court are in better position
to accurately calculate the value of settlement.).

Plaintiff also sought PAGA penalties for each violation for which they are available and alleged that these penalties can be “stacked.” *See Gonzalez v. Corecivic of Tennessee, LLC*, No. 1:16-cv-01891-DAD-JLT, 2018 WL 4388425 (E.D. Cal. Sept. 12, 2018) (“‘stacking’ PAGA penalties is not inappropriate under California law”). Plaintiff calculated the maximum value of the PAGA claims as follows:

CLAIM	PENALTIES
Unpaid Wage Claims [7760 Total Wage Statements in the PAGA Period assuming a 100% violation rate x \$100]	\$776,000
Failure to Pay Wages Each Period under LC 204 [7760 Total Wage Statements in the PAGA Period assuming a 100% violation rate x \$100]	\$776,000
Failure to Reimburse Business Expenses [6502 Flat Rate Pay Periods + 1258 Mileage Rate Pay Periods in PAGA Period – 940 Pay Periods with Cell Phone Reimbursements = 6,820 x \$100]	\$682,000
Wage Statement Violations [3131 Wage Statements between 3/1/19 – 4/23/2021 x \$100]	\$313,100
Failure to Timely Pay Final Wages [165 former drivers during PAGA Period x \$100]	\$16,500
TOTAL	\$2,563,600

(Lauby Decl. ¶ 60).

However, this figure fails to account for numerous unclear issues relating to PAGA claims. First, it is unclear whether stacking is permissible and/or whether the court would award penalties in such a way (especially for purely derivative penalties such as 203 and 204 claims). Second, the maximum figure fails to acknowledge that courts have wide latitude to reduce the amount of civil penalties “based on the facts and circumstances of a particular case” and if “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(h); *Cotter v. Lyft, Inc.*, 193 F.

1 Supp. 3d 1030, 1037 (N.D. Cal. 2016) (noting in the context of approving settlement that
2 a reduction in PAGA penalties would be “appropriate” based on the “unjust, arbitrary and
3 oppressive, or confiscatory” factors because (i) the employer did not “deliberately
4 evad[e] a clear obligation to provide legally required pay and benefits to employees,” (ii)
5 the employer did not “negligently fail to learn about its obligations under the wage and
6 hour laws,” and (iii) the employer’s obligations were “genuinely unclear” because “there
7 is no straight answer to the question.”). (Lauby Decl. ¶ 61).

8 Plaintiff is also cognizant of the risks facing PAGA claims in federal court,
9 including cases holding that PAGA claims do not satisfy constitutional standing
10 requirements. *See, e.g., Raphael v. Tesoro Ref. & Mktg. Co. LLC*, No. 2:15-CV-02862-
11 ODW, 2015 WL 5680310 at *2 (C.D. Cal. Sept. 25, 2015) (PAGA claim lacked
12 constitutional standing because “[a]lthough PAGA authorizes representative actions,
13 California state law cannot alter federal procedural and jurisdictional requirements”).
14 (Lauby Decl. ¶ 62).

15 It would also be appropriate to evaluate the request for approval by examining only
16 the class damages at issue, excluding penalties and interest.⁷ (Lauby Decl. ¶ 63).

17 Taking into consideration all defenses raised and the potential for reduction,
18 Plaintiff assigned a 50% risk adjustment on the basis of merits and an additional 30% for
19 discretionary reduction bringing the risk adjusted value of PAGA claims to \$897,260.
20 (Lauby Decl. ¶ 64).

21
22
23 ⁷ The exclusion of interest and penalties from the fairness evaluation is proper because,
24 first, PAGA penalties are discretionary (see Lab. Code § 2699(e)(2) (the court in its
25 discretion “may award a lesser amount than the maximum civil penalty amount specified
26 by this part...”), and, second, courts evaluate the strength of a proposed settlement
27 without taking potential penalties or interest into consideration. *See Rodriguez v. West*
28 *Publishing Corp.*, 563 F.3d 948, 955 (9th Cir. 2000); *see also Miller v. CEVA Logistics*
U.S.A., Inc., 2015 WL 729638, at *7 (E.D. Cal. Feb. 19, 2015) (court utilized calculation
of a defendant’s exposure exclusive of interest and penalties to determine whether the
settlement fell within the range of possible approval).

1 The allocation of \$100,000 to the PAGA claims is 11% of the risk-adjusted value
2 and 4% of the maximum value of the PAGA claims of \$2,563,600. (Lauby Decl. ¶ 65).

3 Taken together, the total risk adjusted value of the class claims and the PAGA
4 claims is \$1,738,333. The reasonableness of the settlement is apparent from the fact that
5 the proposed settlement binds Defendant to pay approximately 32% of the risk-adjusted
6 class damages and PAGA penalties. Given the realistic value of Plaintiff's claims, the
7 \$550,000 settlement is an excellent result for the Class. (Lauby Decl. ¶ 66).

8 **B. RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF FURTHER**
9 **LITIGATION AND/OR OF OBTAINING CLASS STATUS**

10 Approval of settlement is “preferable to lengthy and expensive litigation with
11 uncertain results.” *Nat'l Rural Telecomms. Coop. v. ITS, Inc.*, 221 F.R.D. 523, 529 (C.D.
12 Cal. 2004). If the settlement were to be rejected, the parties would have to engage in
13 further litigation, including litigating the propriety of certifying the class and, if certified,
14 discovery on damages issues. The time and expense of continued litigation, including the
15 potential for appeals, could potentially outweigh any additional recovery obtained
16 through successful litigation. On the other hand, the proposed settlement provides for
17 immediate recovery for the class, which weighs in favor of approval.

18 Additionally, Plaintiff further acknowledges that there is a substantial risk that a
19 class may not be certified by the Court. See, e.g. *Brown v. Federal Express Corp.*, 249
20 F.R.D. 580 (C.D. Cal 2008); *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080 (C.D. Cal.
21 2007). Defendant further argued that, due to individualized issues, Plaintiff would be
22 unsuccessful in establishing the propriety of a class action and/or PAGA representative
23 action claim. Thus, if litigation continued, there was a substantial risk that the Class
24 Members may not recover any funds.

25 **C. THE SETTLEMENT WAS THE PRODUCT OF INFORMED NEGOTIATIONS**

26 The Settlement was reached after informed, arm's length negotiations between the
27 parties. Both parties conducted extensive investigation allowing them to assess the
28 strengths and weaknesses of the case, including Defendant providing formal discovery,

1 and informal discovery and documents in preparation for mediation, including payroll
2 data, time records, and policies and practices for Defendant's compensation systems for
3 the Class, and a sampling of timekeeping and payroll records. The parties participated in
4 two mediations with highly experienced mediators. The Settlement is the product of non-
5 collusive negotiations. (Lauby Decl. ¶¶ 14-36).

6 **D. THE ATTORNEYS' FEES AND COST ALLOCATION IS FAIR AND REASONABLE**

7 The Settlement Agreement authorizes Class Counsel to seek the federal benchmark
8 of 25% of the Settlement Amount, which is equal to \$87,500 in attorneys' fees. *See*
9 *Tawfilis v. Allergan, Inc.*, No. 8:15-cv-00307-JLS-JCG, 2018 U.S. Dist. LEXIS 173687,
10 at *11 (C.D. Cal. Aug. 27, 2018) ("In the Ninth Circuit, the benchmark for a fee award in
11 common fund cases is 25% of the recovery obtained").

12 A fee award of the 25% benchmark is appropriate for the following reasons: (1)
13 Class Counsel obtained a good recovery for the settlement class after diligently litigating
14 the claims, (2) Class Counsel displayed considerable skill (commensurate with their
15 extensive class action wage-and-hour experience) in reaching such a favorable settlement
16 given the complex and nuanced issues in the litigation, (3) Class Counsel faced
17 substantial risk in this matter because of the myriad defenses to certification and on the
18 merits, (4) the risk and financial burden borne by Class Counsel in litigating this
19 contingency-fee action, and (5) the requested 25% fee award is projected to be less than
20 Class Counsel's projected lodestar.

21 Plaintiff's counsel will submit a comprehensive motion for attorneys' fees and
22 costs within the Notice Periods and the deadlines set by the Court in considering the final
23 approval of the settlement that further discusses all of these factors.

24 The Settlement Agreement caps Plaintiff's counsel's costs at \$27,000. Plaintiff's
25 Counsel will submit a detailed expense report with the fee motion. Any unused costs will
26 return to the Net Settlement Amount for payment to the Class Members.

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28 ///

1 **E. THE CLASS REPRESENTATIVE SERVICE AWARD IS FAIR AND APPROPRIATE**

2 The Settlement Agreement authorizes an incentive award payment of up to \$7,500
3 to the Class Representative. The Class Representative assumed significant risk in
4 bringing this litigation while he continued to be employed by Defendant. Moreover, had
5 he lost, he could have been ordered to pay Defendant's costs. Plaintiff also provided
6 invaluable assistance to Class Counsel and the Class in this case, including providing
7 factual background for the mediation and the Complaint; providing documents about
8 Defendant's compensation plan; participating in phone calls to discuss litigation and
9 settlement strategy; and reviewing the settlement documents. Plaintiff agreed to
10 participate in this case with no guarantee of personal benefit.

11 The incentive award also falls within the range of incentive payments typically
12 awarded to Class Representatives in similar class actions. *See e.g. Bond v. Ferguson*
13 *Enterprises, Inc.*, No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879 (E.D. Cal. June 30,
14 2011) (approving \$11,250.00 service award to each of the two class representatives in a
15 trucker meal break class action); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482,
16 493 (E.D. Cal. 2010) (approving service awards in the amount of \$10,000.00 each); *West*
17 *v. Circle K Stores, Inc.*, NO. CIV. S-04-0438 WBS GGH, 2006 U.S. Dist. LEXIS 76558,
18 at *28 (E.D. Cal. Oct. 19, 2006) ("the court finds plaintiffs' enhancement payments of
19 \$15,000 each to be reasonable.")

20 **VI. THE COURT SHOULD APPOINT ILYM AS ADMINISTRATOR**

21 Subject to the Court's approval, the parties stipulated to ILYM serving as the
22 Settlement Administrator. ILYM is experienced in administering class action
23 settlements, and has agreed to administer this settlement in an amount not to exceed the
24 \$8,000 cap that the Parties agreed to in the Settlement Agreement. (Lauby Decl. ¶ 75).
25 Any discount from this amount will be placed in the Net Settlement Amount and paid to
26 the Participating Class Members.

27 **VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING**

28 The Parties propose that the Court schedule a final approval hearing approximately

120 days after preliminary approval, in accordance with the following schedule:

April 25, 2025	Preliminary approval (PA) hearing.
May 22, 2025 (31 days after PA)	Deadline for Settlement Administrator to complete first mailing of the Class Notice to all Class Members.
July 7, 2025 (45 days after mailing Class Notice)	Deadline for Class Members to submit Requests for Exclusion and Objections to the settlement.
To be determined by the Court	Deadline for Plaintiff to file and serve Motion for Fees/Costs and Motion for Final Approval of Settlement.
TBD (Approximately August 18, 2025 –120 days after PA is granted)	Final Approval Hearing.
15 days after Effective Date	Defendant to deliver court approved funds to Settlement Administrator.
25 days after Effective Date	Settlement Administrator to issue checks.

VIII. CONCLUSION

Based upon all of the foregoing, Class Counsel respectfully requests that the Court preliminarily approve the Settlement Agreement, and enter the [proposed] Order Granting Preliminary Approval of Class Action Settlement.

Dated: March 24, 2025

LAUBY MANKIN LAUBY LLP

BY: s/ Misty M. Lauby
Misty M. Lauby, Esq.
Attorneys for Plaintiff

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