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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| KEITH GUTHRIE, individually, on a representative basis, and on behalf of all others similarly situated;<br><br>Plaintiff,<br><br>vs.<br><br>ITS LOGISTICS, LLC, a Delaware Company, and DOES 1 through 20, inclusive;<br><br>Defendants. | Case No.: 1:21-CV-00729-AWI-EPG<br>*[Assigned to Hon. Anthony W. Ishii, U.S. District Judge, Courtroom 2]*<br><br>**FRCP RULE 23 CLASS ACTION**<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELMINARY APPROVAL OF CLASS ACTION SETTLEMENT**<br><br>Hearing<br>Date: July 25, 2022<br>Time: 1:30 p.m.<br>Courtroom: 2<br><br>Complaint filed: March 9, 2021 |

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## I. INTRODUCTION

Through this unopposed motion, Keith Guthrie seeks the Court's preliminary approval of a Class Action Settlement Agreement and Release of Claims ("Settlement, "Settlement Agreement" or "S.A.")[1] that resolves each of the claims set forth in Plaintiff's Complaint. (Dkt. 1-1). The Settlement provides that Defendant ITS Logistics, LLC ("ITS" or "Defendant") will pay the Gross Settlement Amount ("GSA" or "Settlement Amount") of $350,000 on a <u>non-reversionary basis</u> to fund a class-wide settlement on behalf of the "Settlement Class Members," defined as follows:

> All current and former truck drivers who resided in California and who were employed by Defendant ITS Logistics at any time during the period of March 1, 2019, through May 7, 2022 (the "Class Period").

Plaintiff also seeks settlement approval of PAGA Claims as a representative action under the Private Attorneys General Act under California Labor Code § 2698 et seq. ("PAGA") on behalf of the following:

> All current and former truck drivers who resided in California and who were employed by Defendant, ITS Logistics, LLC at any time during the period of March 9, 2020, through May 7, 2022 (the "PAGA Period").

In total, there are an estimated 276 Settlement Class Members. Under the terms of the Settlement Agreement, Defendant will not oppose Plaintiff's Counsel's application for (1) a reasonable award of attorney's fees not to exceed $87,500 (25 percent of the Gross Settlement Amount), (2) compensation of Plaintiff's litigation expenses not to exceed $15,000, (3) a settlement administrator payment not to exceed $7,500, (4) PAGA Penalties of $35,000 (of which $26,250 or 75% will be paid to the Labor and Workforce

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[1] A true and correct copy of the Settlement Agreement is attached to the Declaration of Misty Lauby ("Lauby Decl.") as **Exhibit 1**, and the proposed Class Notice is attached as **Exhibit 1 to the Settlement Agreement**.

Development Agency ("LWDA") and the remaining $8,750 or 25% will be paid to the Settlement Class Members), and (5) Service Award to Plaintiff not to exceed $7,500.

After all Court-approved deductions from the Gross Settlement Amount, it is estimated that $197,500 will be available to pay the Individual Settlement Payments to the Participating Class Members (i.e., those Settlement Class Members who do not opt-out of the settlement), as follows:

| | **Total Amount** |
|---|---|
| *Gross Settlement Amount* | $350,000 |
| Attorneys' Fees (25 percent of GSA) | $87,500 |
| Litigation Costs (Not to Exceed) | $15,000 |
| Administrator Costs (Not to Exceed) | $7,500 |
| PAGA Penalties | $35,000 |
| Class Representative's Service Award (Not to Exceed) | $7,500 |
| ***Net Settlement Amount*** | **$197,500** |

The Net Settlement Amount will be allocated and paid on a pro rata basis based on each Class Member's number of Weeks Credited during the Class Period with each Class Member receiving a minimum of $100. The truck drivers in the class were paid a flat daily rate, by the load on a mileage basis or on an hourly rate – and many were paid in some combination of these pay methods, depending on the route and the client they were serving. However, since the claims primarily involve time in which the drivers were paid a flat rate or by the load on a mileage basis, the Parties agreed that "Weeks Credited" to each Class Member will include all weeks in which the driver was paid in whole or in part on a mileage or flat rate basis while being employed by Defendant and residing in California." The average Individual Settlement Payment for each of the estimated 276 Class Members is approximately $715 (including the $100 Flat Payment that is the minimum Individual Settlement Payment) and the average each of the estimated 169 Aggrieved Employee's share of the PAGA Penalties is approximately $31 (before payroll deductions and withholdings on the portion of the settlement payment allocated to wages). Defendant will separately pay its share of payroll taxes.

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

## II. BACKGROUND

### A. PROCEDURAL HISTORY

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

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

After the Conference, the Parties exchanged initial disclosures and met and conferred further regarding discovery and depositions. (Lauby Decl. ¶¶ 10).

Although Defendant fully denied the allegations, the Parties agreed to submit the matter to mediation prior to expending substantial time and fees on discovery, out-of-state depositions and the class certification process. In preparation for mediation, the Parties engaged in an extensive informal discovery process where information, correspondence, documents, and legal analysis were exchanged, including procedures, payroll and time keeping records, and evidence relating to the class size. Specifically, Plaintiff requested (1) the total number of class members employed during the class period; (2) the total number of per day drivers during the class period; (3) the total number of class members that separated from their employment since March 9, 2017; (4) the total number of per day drivers that separated from their employment since March 9, 2017; (5) the total number of workweeks worked by class members during the class period; (6) the total number of workweeks worked by per day drivers during the class period; (7) the total number of shifts worked by per day drivers during the class period; (8) the average hour rate of pay for class members paid on an hourly basis during the class period; (9) the average daily rate for per day drivers during the class period; (10) the total number of PAGA class members that performed work for Defendant during the PAGA Period; (11) the total number of per day drivers that performed work for Defendant during the PAGA Period; (12) the total number of workweeks during which the PAGA class members performed work for Defendant during the PAGA Period; (13) the total number of workweeks during which the per day drivers performed work for Defendant during the PAGA Period; (14) the number of PAGA class members that ceased performing work for Defendant during the PAGA Period; (15) the number of per day drivers that ceased performing work for Defendant during the PAGA Period; (16) the total number of pay periods worked by PAGA class members during the PAGA Period; (17) the total number of pay periods worked by per day drivers during the PAGA Period; (18) the total number of wage statements issued to PAGA class members during the

PAGA Period; (19) the total number of wage statements issued to per day drivers during the PAGA Period; (20) documents that relate to Plaintiff and/or work performed by Plaintiff during his time spent as a truck driver for Defendant (from January 2017 onward); (21) all versions of rules, policies, and/or procedures in effect during the Class and PAGA Periods for the class members; (22) all employee handbooks, including revisions or addendums thereto, in effect for the class members at any time during the Class and PAGA Periods; (23) all procedures, policies and guidelines on how the class members were required to record their hours worked or clock-in/out for a workday during the Class and PAGA Periods; (24) all procedures, policies and guidelines on the calculation and payment of wages, including hourly compensation, piece-rate, flat-rate, bonus pay, incentives, stop pay, any other compensated activities (including chaining, clean inspection incentives, layover pay, detention pay, breakdown pay, post-accident activities, safety meetings, and rest breaks) and all other forms of compensation in effect for the class members during the Class and PAGA Periods; (25) all procedures, policies and guidelines on rest periods applicable to the class members at any time during the Class and PAGA Periods; (26) all procedures, policies and guidelines on expense reimbursement applicable to the Class Members at any time during the Class and PAGA Periods. Defendant also provided Plaintiff with a sampling of timekeeping and payroll records amounting to nearly 2,000 trips driven by the drivers. The informal exchange enabled Plaintiff and his expert to take a deep look into the validity of the claims and Defendant's defenses, enabling Plaintiff's counsel the ability to analyze, research, and investigate the potential claims of all similarly situated employees. (Lauby Decl. ¶¶ 11). Defendant provided data for the class period beginning on March 1, 2019, which was truncated due to a previous class release in the matter of *Michael Caufield, et al. v. ITS Logistics, LLC*, Superior Court of the State of California for the County of San Diego, Case No. 37-2016-00044111-CU-OE-CTL. The data provided included the number of drivers, average hourly and daily rates of pay, total weeks worked at each rate, number of former drivers and estimated number of shifts worked during the class and PAGA periods. (Lauby Decl. ¶¶ 12).

On March 8, 2022, Plaintiff and Defendants participated in an all-day mediation Hon. Michael Marcus (Ret.). The matter resolved at mediation for $350,000 pursuant to a mediator's proposal. Thereafter, the Parties memorialized the terms of the settlement in a long-form Settlement Agreement, which was negotiated following the mediation. (Lauby Decl. ¶¶ 13, **Exhibit 3**).

### B. SUMMARY OF PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES

Plaintiff alleged that Defendant subjected the Class Members to numerous violations of the California Labor Code, including: (1) failure to pay minimum wages; (2) failure to pay for rest and recovery periods under Labor Code § 226.2; (3) failure to provide rest breaks; (4) failure to provide meal periods; (5) failure to reimburse expenses; (6) failure to timely pay wages; (7) failure to provide accurate itemized wage statements; (8) unfair and unlawful competition. Additionally, Plaintiff alleged PAGA claims for (9) failure to pay minimum wages; (10) failure to pay for rest and recovery periods under Labor Code § 226.2; (11) failure to provide rest breaks; (12) failure to provide meal periods; (13) failure to reimburse business expenses; (14) failure to timely pay wages each period; (15) failure to timely pay final wages; and (16) failure to provide accurate itemized wage statements.

One of the primary claims in this action is for wage statement violations, due to Defendant's failure to provide wage statements to Plaintiff and the Class that included the total hours worked each pay period. Plaintiff alleged that these uniform wage statements ran afoul of Labor Code § 226(a)(2), which requires wage statements to accurately state "total hours worked by the employee."

Defendants raised two main defenses to this claim. *First*, Defendant argued that Labor Code § 226 is inapplicable to its workers under *Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732 arguing that § 226 does not apply if a driver's principal place of work is not California. However, Plaintiff alleges that *Ward* strengthens – not weakens – Plaintiff's claims, as the California Supreme Court held that § 226 applies when

"California serves as the physical location where the worker presents himself or herself to begin work." *Id.* at 755. And, here, Plaintiff alleged that he worked exclusively in California which means that § 226 will apply.[2]

*Second*, Defendant argued that it was not required to include "total hours worked" on wage statements for drivers paid on a flat daily rate or by the load on a mileage basis – likening the payments to a "salary." Although Defendant is correct that a salaried employee is not entitled to itemization of total hours worked on wage statements,[3] Plaintiff alleged that Defendant's reliance on this exception is misplaced. Indeed, as the statute states, the employee must be paid "solely based on salary" for the exception to apply. Yet, here, Plaintiff alleges the Class Members were paid a piece-rate, plus additional compensation for certain tasks, such as $12.50 per stop, $20 per DOT inspection, etc. Moreover, Defendant's pay policy does not meet the required definition for a "salary" under California law. See *Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 399 ("salary" is "a predetermined amount that is not subject to reduction based upon the quantity or quality of work").

Additionally, Plaintiff brought a claim for unpaid wages due to an illegal piece-rate pay policy that subjects Defendant to substantial exposure. For example, Plaintiff alleges that, at all relevant times, Plaintiff and the Class Members were primarily paid piece-rate compensation (*i.e.*, per-day or per-load pay) and that , under California law, employers are required to provide <u>separate</u> hourly compensation for tasks that do not earn piece-rate pay (such as detention time, loading/unloading, etc.). See Labor Code § 226.2. Yet Defendant failed to provide any hourly compensation during shifts where Plaintiff and the Class Members were earning pay per day; instead, the only payment was on a piece-rate basis, in violation of California law.

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[2] Moreover, in *Oman*, *supra*, 9 Cal.5th 762, the California Supreme Court clarified that § 226 will apply to all pay periods, even where Class Members spent time outside California.

[3] See Labor Code § 226(j)(1) [wage statement not required to show total hours worked if the employee's compensation is "solely based on salary'].

Defendant denied that its driver pay policies violated California law. In defense of its flat daily rate pay policy, Defendant argued that Section 226.2 does not apply because flat daily-rate pay is not piece-rate pay. Section 226.2 only applies to "employees who are compensated on a piece-rate basis for any work performed during a pay period." Cal Labor Code § 226.2. The Division of Labor Standards Enforcement Policies and Interpretations Manual defines Piece Rate as "work paid for according to the number of units turned out." DLSE Manual § 2.5.1. It must be "based upon an ascertainable figure paid for completing a particular task or making a particular piece of goods." *Id*. The flat daily-rate pay Plaintiff and Class Members earned on this pay plan was not paid "for completing a particular task." Rather, Defendant paid Plaintiff a flat amount per day for all the hours Plaintiff worked on a given day, regardless of how many loads the Plaintiff delivered.

In its defense of the per load pay policy, Defendant relied upon *Ayala v. U.S. Xpress Enters.*, 851 Fed. Appx. 53 (9th. Cir 2021) where the Ninth Circuit recently determined that a policy similar to Defendant's policy where it paid drivers per load on a cents-per-mile basis that was meant to cover all work performed by the employee and was valid under California law. Defendant contends that the drivers agreed that this load pay policy included compensation for all of the tasks to deliver the load and they were properly paid under *Ayala*.

But Plaintiff believes that Defendant is mistaken. Plaintiff argues that in *Ayala*, the court specifically held that employers and employees may reach an agreement on what is included within the defined "piece," but every task included in the piece must be expressly stated. Here, the opposite occurred, as Defendant's policies expressly stated that Class Members were supposed to separately pay for certain tasks, such as $12.50 for each stop/delivery, $20 for each roadside inspection, along with <u>paid</u> rest breaks. Thus, because these separate tasks are not expressly *included* in the piece-rate (instead, they were clearly *excluded*), this case is distinguishable from *Ayala* and Defendant's piece rate policy violates Labor Code § 226.2.

Moreover, Plaintiff alleges that Defendant failed to follow its own written policies regarding payment of wages for distinct non-piece-earning tasks. The California Supreme Court recently confirmed that this is illegal, since employers are required to keep "any promises it has made to provide particular amounts of compensation for particular tasks or periods of work." *Oman v. Delta Airlines* (2020) 9 Cal. 5th 762, 782

Importantly, Defendant's liability on these unpaid wage claims triggers liability and exposure for the unpaid wages and various penalties, including full 30-day waiting time penalties for each former employee under Labor Code § 203.

Plaintiff also alleges that Defendant faces liability on other claims, such as the failure to provide compliant meal periods and rest breaks. Although meal and rest break claims are generally preempted, *see Int'l Bhd. Of Teamsters, Local 2785 v. Fed Motor Carrier Safety Admin.,* 986 F.3d 841, 854 (9th Cir. 2021) (preempting California's meal and rest break rules), Plaintiff argued that is not true where Defendant's policy (which serves as a binding contract) guaranteed California-specific rest breaks for employees. Because Plaintiff's break related claims relied upon a theory of contractual obligation, only the rest break would result in damages due to the alleged contract in question providing only for paid rest breaks. As a result, Plaintiff's alleged meal period claims are nonviable. Defendant disputed Plaintiff's contract-based rest break pay argument because any obligation to provide paid rest breaks is derived from California's meal and rest break rules. Once those rules were found to be preempted, Defendant had no obligation to provide paid rest breaks.

Additionally, Plaintiff claims that Defendant is liable under Labor Code § 2802 due to its written policy that required Class Members to use personal cell phones - without reimbursement. However, this policy changed in 2021 when Defendant expressly told its employees that they were no longer required to provide cell phones for work calling into question the extent of such damages. But Defendant disputed the § 2802 claim for the entire class period arguing that it provided an in-cab device so Plaintiff and the Class Members could communicate with Defendant and, therefore, it was not necessary for drivers to use their personal cell phones for business purposes.

Plaintiff further alleged derivative claims that Defendant failed to comply with the mandates of Labor Code § 204 regarding the timing of the payment of wages to its employees each period, including meal and rest period premiums. Additionally, Defendant failed to pay Claimant and the Class their final wages within the timeframe required by Labor Code §§ 201 – 203. Because each of these claims was derived from the substantive claims discussed above, Defendant contends that they also fail because of the defenses to the substantive claims.

Finally, Plaintiff made a claim for unfair and unlawful competition under Business and Professions Code §17200, et seq. ("UCL"). The UCL '… provide[s] an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices.'" (*Solus Industrial Innovations, LLC v. Superior Court* 4 Cal.5th 316, 340 (2018).) "By prohibiting unlawful business practices, '"section 17200 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable.'" (*Lee v. Luxottica Retail North America, Inc.*, 65 Cal. App. 5th 793, 799 *citing De La Torre v. CashCall, Inc.* 5 Cal.5th 966, 980 (2018). The Court in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134 found that remedies under the UCL are limited. *Id*. at 1144. The court explained, "the language of section 17203 is clear that the equitable powers of a court are to be used to 'prevent' practices that constitute unfair competition and to 'restore to any person in interest' any money or property acquired through unfair practices. ([Bus. & Prof. Code,] § 17203; *Lee*, 65 Cal. App. 5th at 801.) In *Cortez v. Purolator Air Filtration Products Co.* 23 Cal.4th 163 (2000) (Cortez), the court held that earned but unlawfully withheld wages are recoverable as a restitutionary remedy under the UCL, because the wages once earned are "as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice."4 (*Cortez*, at pp. 177–178; *Lee*, 65 Cal. App. 5th at 802). Here, because restitution of wages is the only monetary remedy available to Plaintiff and the Class, the value of this claim lies almost entirely in the four-year statute of limitations extending the wage claims beyond what is allowed under the Labor Code. However, since there was a class release in a prior driver class action against Defendant, *Caufield, et al. v. ITS Logistics, LLC*, Superior Court of the State of California for the County of San Diego, Case No. 37-2016-00044111-CU-OE-CTL, the class period here only dates back to March 1, 2019 or approximately 2 years prior to filing the Complaint, and there is no extension of the class period under the UCL.

## III. SUMMARY OF THE PROPOSED SETTLEMENT

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

### A. SETTLEMENT CONSIDERATION AND ALLOCATION

The Gross Settlement Amount (or "GSA") of $350,000 is non-reversionary. The Net Settlement Amount will be paid to Participating Class Members (defined as all Class Members except those who opt-out) without the need to submit a claim form or take any affirmative action. (S.A., § 26). Under no circumstance will any portion of the GSA revert to Defendant. (S.A., § 51). The GSA includes all Individual Settlement Amounts payable to the Participating Class Members, amounts awarded to Class Counsel for attorneys' fees and litigation costs, the service award to the Plaintiff, the payment to the LWDA and Aggrieved Employees to resolve claims under the PAGA, and Settlement Administration Costs. (S.A., § 49(a)). Defendant will separately pay its share of employer-side payroll taxes as required by law. (*Id*.)

After all Court-approved deductions from the GSA, it is estimated that $197,500 will be available to pay the Individual Settlement Amounts of the approximately 276 Class Members.

### B. NOTICE PROCEDURES

The proposed Class Notice, subject to Court approval, is attached as **Exhibit 1** to the Settlement Agreement. Within 21 days after entry of the Preliminary Approval Order by the Court, Defendant shall provide the Settlement Administrator with Class and

Aggrieved Employee Data (i.e., a list of Class Members, their contact information and the total numbers of Weeks Credited during the Class Period, and, for those Class Members who are also Aggrieved Employees, the total PAGA Pay Periods during the PAGA Period). (S.A., §§ 6, 67).

Within 10 days after receiving the Class and Aggrieved Employee Data, the Settlement Administrator will determine the estimated Individual Settlement Amount for each Class Member based on the number of Weeks Credited, as well as each Aggrieved Employee's estimated share of the PAGA Penalties based on the number of PAGA Pay Periods worked during the PAGA Period by the Aggrieved Employee, and populate the Class Notice for each Class Member. In an effort to ensure that the Class Notice is received by all Class Members, 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., § 68-69).

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., § 66).

### C. SETTLEMENT ALLOCATION FORMULA FOR SETTLEMENT SHARES

The Net Settlement Amount of approximately $197,500 will be paid to the Settlement Class Members on a pro rata basis according to the number of Weeks Credited during the Class Period. Specifically, the Individual Settlement Amount for each Settlement Class Member will be calculated by the Settlement Administrator using the Class Data provided by Defendant as follows. First, each Settlement Class Member will receive a minimum Individual Settlement Payment of $100.00 from the Net Settlement Amount (the "Flat Payment") (which is intended to account for all time periods worked in which a driver does not earn Weeks Credited, such as trips paid on an hourly basis). Next, the Settlement Administrator will then calculate the total number of Weeks

Credited to each Settlement Class Member and the aggregate total number of Weeks Credited by all Settlement Class Members during the Class Period. Finally, to determine each Settlement Class Member's estimated Individual Settlement Payment, the Settlement Administrator will use the following formula: After allocating the $100 Flat Payment to all Settlement Class Members, the remainder of the Net Settlement Amount will be divided by the aggregate total number of Weeks Credited, resulting in the "Per Week Value." Each Settlement Class Member's Individual Settlement Payment will be calculated by multiplying his or her total number of Weeks Credited during the Class Period by the Per Week Value and adding that amount to the $100 Flat Payment. If there are any valid and timely submitted Requests for Exclusion, the Settlement Administrator shall proportionately increase the Individual Settlement Amounts for each Participating Class Member so that the amount actually distributed to Participating Class Members equals 100% of the Net Settlement Amount. (S.A., § 49(c)).

The Class Notice will inform each Class Member of the number of Weeks Credited and the estimated Individual Settlement Payment.

A Class Member may dispute the Weeks Credited if he/she feels that Defendant's records are inaccurate by submitting documentation to the Settlement Administrator. (S.A., § 70).

### D. DISTRIBUTION OF UNCLAIMED SETTLEMENT SHARES AND UNCASHED CHECKS

Participating Class Members will have 180 days 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., § 75).

### 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

Member without having to submit a claim form or take any other action. To opt-out of the Settlement, the Class Member must submit a written request to the Settlement Administrator no later than 45 days after being mailed by the Settlement Administrator ("Notice Response Deadline"). Any Opt-Out Request that is not postmarked by the Notice Response Deadline will be invalid, unless both Parties agree to accept the late Opt-Out Request. (S.A., § 72(a)).

The Class Notice shall inform the Class Members of their right to object to the Settlement. Any Class Member who wishes to object to the Settlement must submit a written objection to the Settlement Administrator no later than the 45-day Notice Response Deadline, stating the basis of the objection. (S.A., § 72(c)).

### F. RELEASE OF CLAIMS

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

> "Released Class Claims" by the Participating Class Members upon Final Approval of the Settlement shall mean any and all actual or potential claims, rights, demands, liabilities and causes of action that were or could have been pled under local, state, or federal law arising out of or relating to the facts alleged in the Complaint against the Released Parties for the duration of the Class Period, including: (a) failure to pay minimum and regular wages, (b) failure to pay rest and recovery and other nonproductive time under LC 226.2 and under agreement or contract, (c) failure to provide rest breaks; (d) failure to provide meal breaks; (e) failure to reimburse expenses, (f) failure to timely pay wages each period, (g) failure to timely pay final wages, (h) failure to provide accurate itemized wage statements, (i) unfair and unlawful competition, and (j) all other claims for statutory penalties or interest based on the facts and theories set forth in the Complaint, and based on or arising from alleged violations of California Labor Code §§ 200, 201, 202, 203, 218.6, 226, 226.2, 226.3, 226.7, 512, 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. § 31).

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

The Settlement Agreement at ¶ 25 also defines the release of PAGA Claims in a narrow and reasonable manner, as follows:

> "PAGA Released Claims" shall mean any and all actual or potential claims for civil penalties under PAGA, that Plaintiff alleged or could have alleged against the Released Parties, on behalf of Aggrieved Employees and the State of California, reasonably arising out of or relating to the facts or claims alleged in the Complaint and in Plaintiff's March 5, 2021, notice letter to the LWDA, including all PAGA claims seeking civil penalties, attorneys' fees and/or interest premised upon: (a) failure to pay minimum and regular wages, (b) failure to pay rest and recovery and other nonproductive time under LC 226.2 and Under Agreement or Contract, (c) failure to provide rest breaks; (d) failure to provide meal breaks; (e) failure to reimburse expenses, (f) failure to timely pay wages each period; (g) failure to timely pay final wages, (h) failure to provide accurate itemized wage statements, (and (i) all other claims for civil penalties recoverable under the PAGA based on the facts or claims alleged in the Complaint or in the relevant LWDA notice letter, or arising from alleged violations of California

> Labor Code §§ 201, 202, 203, 218.6, 226, 226.2, 226.3, 226.7, 512, 558, 1194, 1194.2, and 2802, and of the applicable California Wage Order No. 9.. The time period governing the PAGA Released Claims shall be any time during the PAGA Period. The PAGA Released Claims do not release any potential claims for wages or statutory penalties. (S.A. § 25).

Thus, upon entry of the Final Approval Order and Defendant's funding of the Settlement Amount, Plaintiff, standing in the shoes of the Labor Commissioner/LWDA, and on behalf of the State of California and all Aggrieved Employees, will forever completely release and discharge the Released Parties from the PAGA Released Claims through the PAGA Period. It is the intent of the Parties that the Final Approval Order and judgment entered by the Court shall have full equitable and collateral estoppel and *res judicata* effect and be final and binding upon Aggrieved Employees regarding the PAGA Released Claims. (S.A. § 54). Even if an Aggrieved Employee requests exclusion from the Class settlement, that individual will still be subject to the PAGA Released Claims to the fullest extent permitted by law and will receive a pro-rata share of PAGA Penalties. (S.A. § 72(a)).

### G. TIMING OF SETTLEMENT DISBURSEMENTS

Within 15 days after the Effective Date (which is the date of final approval if no Class Member objects), Defendant shall deposit $350,000 into a Qualified Settlement Fund to be established by the Settlement Administrator (plus the employer's share of payroll taxes and withholdings once advised by the Settlement Administrator of the proper amount). After the Effective Date, the Gross Settlement Amount will be used to fund: the (i) Individual Settlement Payments for the Participating Class Members; (ii) amounts awarded to Class Counsel for attorneys' fees, costs, and expenses; (iii) the Service Award to the Plaintiff, (iv) PAGA Penalties to the LWDA and Aggrieved Employees, and (v) Settlement Administration Costs. The Settlement Administrator will issue the court-approved payments within 10 days of receipt. (S.A. § 73-74).

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### H. TAX TREATMENT

The Settlement Agreement provides that one-third (33.333%) of the Individual Settlement Payments will be allocated as wages subject to withholding of all applicable local, state and federal taxes (with IRS W-2 reporting), and two-thirds (66.667%) will be allocated for penalties and interest from which no taxes will be withheld (both with 1099 reporting). (S.A. § 49(d)). Defendant's share of employer payroll taxes will be paid separately by Defendant. The Settlement Administrator will be responsible for issuing all tax forms and paying all deductions and withholdings from the GSA.

## IV. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR PURPOSES OF SETTLEMENT

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

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

Class certification is governed by the Federal Rules of Civil Procedure, which provide that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all." Fed. R. Civ. P. 23(a). Plaintiff seeks conditional approval of the class for settlement pursuant to Rule 23(e). The parties have stipulated that the Court may, for settlement purposes only, certify a Settlement Class. In the event this Settlement is either not granted preliminary or final approval, or is reversed on appeal, Defendant reserves its right to oppose class certification.

### A. THE SETTLEMENT SATISFIES THE REQUIREMENTS OF RULE 23(A)

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

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

#### *1. Numerosity*

With approximately 276 Class Members, the numerosity requirement is met.

#### *2. Commonality*

Rule 23(a) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality "does not mean merely that [class members] have all suffered a violation of the same provision of law," but that their "claims must depend upon a common contention." *Dukes*, 564 U.S. at 350. In this case, because the parties have resolved their disputes, they will not need to prove any individualized issues relating to liability. As a result, the facts that define the class – their employment with Defendant and being a member of the Class – satisfies Rule 23(a)(2)'s commonality requirement.

### *3. Typicality*

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

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

### *4. Fair and Adequate Representation*

Absentee class members must be adequately represented for judgment to be binding upon them. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Accordingly, this prerequisite is satisfied if the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "[R]esolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. 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. (Mankin Decl., ¶¶ 2-7; Lauby Decl., ¶¶ 2-8).

### B. Certification of a Class Under Rule 23(b)(3)

Once the requirements of Rule 23(a) are satisfied, a class may only be certified if it is maintainable under Rule 23(b). Fed. R. Civ. P. 23(b); *see also Narouz*, 591 F.3d at 1266. Plaintiff asserts that "parties agree for purposes of the Settlement only that certification of the Class is appropriate under Rule 23(b)(3) because the Settlement obviates the litigation of individual liability and damage issues, 'questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for the fair adjudication of the controversy.'" (quoting Fed. R. Civ. P. 23(b)(3)). Therefore, the conditional class is maintainable under Rule 23(b)(3).

## V. PRELIMINARY APPROVAL OF THE SETTLEMENT

Settlement of a class action requires approval of the Court, which may be granted "only after a hearing and on finding that [the settlement] is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Approval is required to ensure the settlement is consistent with Plaintiff's fiduciary obligations to the class. *See Ficalora v. Lockheed Cal. Co.,* 751 F.2d 995, 996 (9th Cir. 1985). The Ninth Circuit has set forth a number of factors to determine whether a settlement agreement meets these standards, including: the strength of plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Staton*, 327 F.3d at 959.

Further, a court may consider whether settlement is "the product of collusion among the negotiating parties." *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d at 458 (citing *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992)). That is particularly so where, as here, the settlement is reached prior to formal class certification. *In Re Bluetooth Headset Products Liability Litigation*, 654 F. 3d 935 (9th Cir. 2011) (applying "higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair). But "[t]he court need not reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." *Class Plaintiffs*, 955 F.2d at 1291.

### A. THE SETTLEMENT FALLS WELL WITHIN THE RANGE OF POSSIBLE APPROVAL

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

Of particular relevance to the reasonableness of the proposed Settlement is the fact that significant legal and factual grounds for defending this action exist. First, in addition to disputing the merits, Defendant strongly disputed that Plaintiff could obtain class certification, arguing a lack of commonality of the legal claims and injuries. Defendant further argued that it complied with the applicable law and that any purported deviations therefrom were individualized in nature, thereby limiting Plaintiff's ability to certify the class. While Plaintiff asserts that this is a suitable case for certification, he realizes that there is always a significant risk associated with class certification proceedings, which could significantly limit the claims that he could pursue on a class basis.

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

Based upon detailed data obtained through informal discovery and information exchanges, Plaintiff's counsel estimated the following data points through the date of mediation: (1) approximately 180 flat daily rate drivers and 239 total Class Members including hourly rate drivers, (2) approximately 3159 workweeks for flat daily rate drivers through mediation for the Class Period, and (3) approximately 1,885 workweeks for flat rate drivers during the PAGA Period through mediation. 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.

**Wage Statement Claims**

Plaintiff contends that the strongest claim was for wage statement violations, based on the allegation that Defendant failed to include all information required by Labor Code § 226(a). Plaintiff calculated the maximum potential value of this claim as $306,900 under the $50/$100 formula in § 226(e). In addition to the defenses set forth above, Defendant raised further defenses, including that: (a) these violations, if any, did not result in any "injury" under § 226(e), (b) the violations, if any, were not "knowing and intentional" and could not support the assessment of penalties, and (c) "derivative" wage statement claims are without merit. As a result of the defenses, Plaintiff assigned a 50% risk adjustment and calculated the value of damages to be $153,450. (Lauby Decl. ¶ 14).

**<u>Failure to Pay Wages</u>**

Next, Plaintiff alleges that Defendant employed two violative policies: (1) failure to pay all wages due, including stop pay per contract of $12.50 per stop, and (2) unpaid rest period wages. Plaintiff calculated the maximum potential value of the stop pay claims to be $1,184,625 estimating a total of 6 stops per day per driver and a maximum value of $126,360 for unpaid rest wages at approximately $40 per the 3,159 workweeks for a total maximum unpaid wage claims of $1,310,985. At mediation, Defendant argued that this claim could not be certified due to the individualized nature of the proof regarding the number of stops each driver took and that the number estimated by Plaintiff was far too high since many drivers did not take 6 stops per day. 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. 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 $296,156.25 for stop pay claims (75% discount) and $31,590 for unpaid rest wages (75% discount) for a total of approximately $327,746.25. (Lauby Decl. ¶ 15).

**<u>Meal and Rest Break Claims</u>**

Plaintiff also alleged failure to provide meal and rest break claims against Defendant. However, on January 15, 2021, the United States Court of Appeals for the Ninth Circuit unanimously upheld FMCSA's December 2018 determination that California meal and rest break laws are preempted by federal law, as applied to drivers involved in interstate commerce and subject to federal regulation. *See Int'l Brotherhood of Teamsters,* 986 F.3d at 854. As a result, Plaintiff addressed the rest break damages as unpaid wages (above) and determined that because meal periods are unpaid, there were no damages attached to any potential claims even if required under contract. Accordingly, Plaintiff did not assign any value to the meal period claims. (Lauby Decl. ¶¶ 16).

**Failure to Reimburse Business Expenses**

Plaintiff further alleged that Defendant failed to reimburse Plaintiff and the Class despite having a written policy requiring its employees to provide their own cell phones for work purposes. Plaintiff estimated the maximum damages at $10 per 3,195 workweeks for a total of $31,590. Defendant raised defenses to this claim that including that in 2021, Defendant issued an interoffice memo that told drivers they were no longer required to provide a cell phone for work. Consequently, Plaintiff assigned a 50% risk adjustment to this claim for a total value of $15,795. (Lauby Decl. ¶¶ 17).

**Failure to Timely Pay Wages Upon Separation of Employment**

Plaintiff also alleges that Defendant failed to timely pay all wages owed to the Class Members upon separation of employment. Based on this theory of liability, Plaintiff calculated the maximum waiting time penalties to be $1,252,524 (124 former flat daily rate drivers since March 1, 2019 x $336.70 average flat daily rate x 30). However, Defendant argued that its defenses to the unpaid wages and Section 2802 also apply to the derivative Section 203 claim, that any underpayment of wages was not "willful" and/or that Defendant had a good faith defense to imposition of waiting time penalties. While Plaintiff was confident this claim is viable, Plaintiff gave a 75% discount as with the failure to pay wages claim and a 15% discount reflecting the good faith defense for a risk-adjusted value of $125,252.40. (Lauby Decl. ¶ 18).

**UCL Claim**

Finally, as set forth above, Plaintiff's UCL claims value lies in the restitution of wages as the only monetary remedy available. Because unpaid wages are already accounted for in the wage claims, any additional value of this claim would lie entirely in the extension of the statute of limitations. However, the class release in *Caufield* limits the class period in this matter to March 1, 2019. As a result, the UCL claim is assigned no value. (Lauby Decl. ¶ 19).

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

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|---|---|
| • Wage Statements: | $ 153,450.00 |
| • Wages, including Rest: | $ 327,746.25 |
| • Meal/Rest Period Claims: | $ 0 |
| • 2802 Claims: | $ 15,795.00 |
| • Labor Code §§ 201 - 203 Claims: | $ 125,252.40 |
| • UCL Claims: | $ 0 |
| • **TOTAL RISK-ADJUSTED PENALTIES AND DAMAGES**: | $ 622,243.65 |

(Lauby Decl. ¶ 20).

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"). Assuming that a PAGA penalty is available in the default amount of $100 per pay period and is not reduced, the maximum potential PAGA penalty would be $188,500 per viable PAGA claim for the 1885 pay periods in the PAGA period. *See* Cal. Lab. Code. § 2699(f)(2);

Here, Plaintiff calculates the PAGA penalties as follows:

| | | |
|---|---|---|
| • | Wage Statements | $188,500 |
| • | Unpaid wage claims | $188,500 |
| • | Meal and Rest | $ 0 |
| • | 204 Claims | $188,500 |
| • | 203 Claims (124 x $100) | $ 12,400 |
| • | Business Expenses | $188,500 |
| | TOTAL | $766,400 |

(Lauby Decl. ¶ 21).

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

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

Taking into consideration all defenses raised and the potential for reduction, the risk adjusted value of PAGA claims is $191,600 (75% reduction). (Lauby Decl. ¶ 22-24).

Taken together, the total risk adjusted value of the class claims and the PAGA claims is $813,843.65. The reasonableness of the settlement is apparent from the fact that the proposed settlement binds Defendant to pay approximately 43% of the risk-adjusted class damages and PAGA penalties. Given the realistic value of Plaintiff's claims, the $350,000 settlement is an excellent result for the Class. (Lauby Decl. ¶ 25).

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### B. <u>Risk, Expense, Complexity, and Likely Duration of Further Litigation and/or of Obtaining Class Status</u>

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

Additionally, Plaintiff further acknowledges that there is a substantial risk that a class may not be certified by the Court. See, e.g. *Brown v. Federal Express Corp*., 249 F.R.D. 580 (C.D. Cal 2008); *White v. Starbucks Corp*., 497 F. Supp. 2d 1080 (C.D. Cal. 2007). Defendant further argued that for the same reasons that class certification is inappropriate, Plaintiff would be unsuccessful in establishing the propriety of a class action and/or PAGA representative action claim. *See e.g., Ortiz v. CVS Caremark Corp.,* No. C-12-05859 EDL, 2014 WL 117614, at *4 (N.D. Cal. Mar. 19, 2014) (striking as unmanageable PAGA claim seeking penalties for off the clock work, overtime, meal and rest periods, timely payment of wages and business expense reimbursement and wage statements); *Raphael,* 2015 WL 5680310, at *3-4 (C.D. Cal. Sep. 25, 2015) (dismissing as unmanageable PAGA action seeking penalties for off the clock work, overtime, meal and rest periods, timely payment of wages and business expense reimbursement and wage statements where individualized inquiries would be necessary). Thus, if litigation continued, there was a substantial risk that the Class Members may not recover any funds.

### C. <u>The Settlement was the Product of Informed Negotiations</u>

The Settlement was reached after informed, arm's length negotiations between the parties. Both parties conducted extensive investigation allowing them to assess the strengths and weaknesses of the case, including Defendant providing informal discovery and documents in preparation for mediation, including payroll data, time records, and policies and practices for Defendant's compensation systems for the Class, and a sampling of timekeeping and payroll records. (Lauby Decl. ¶¶ 26). The parties participated in mediation with a highly experienced mediator, who is also a retired judge, and the settlement was eventually reached at the amount proposed by Judge Marcus. (*Id*. at ¶ 27). The Settlement is the product of non-collusive negotiations.

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

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

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

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

The Settlement Agreement caps Plaintiff's counsel's costs at $15,000. Plaintiff's Counsel will submit a detailed expense report with the fee motion. Any unused costs will return to the Net Settlement Amount for payment to the Class Members.

### E. <u>THE CLASS REPRESENTATIVE SERVICE AWARD IS FAIR AND APPROPRIATE</u>

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

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

## VI. THE COURT SHOULD APPOINT ILYM GROUP AS ADMINISTRATOR

Subject to the Court's approval, the parties stipulated to ILYM Group serving as the Settlement Administrator. ILYM Group is experienced in administering class action settlements, and has agreed to administer this settlement in an amount not to exceed the $7,500 cap that the Parties agreed to in the Settlement Agreement. (Lauby Decl. ¶ 28). Any discount from this amount will be placed in the Net Settlement Amount and paid to the Participating Class Members.

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## VII. TIMELINE AND SCHEDULING A FINAL APPROVAL HEARING

The Parties propose that the Court schedule a final approval hearing approximately 120 days after preliminary approval, in accordance with the following schedule:

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| July 25, 2022 | Preliminary approval (PA) hearing. |
| August 25, 2022 (31 days after PA) | Deadline for Settlement Administrator to complete first mailing of the Class Notice to all Class Members. |
| October 9, 2022 (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 November 22, 2022 –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. |

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## 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: June 15, 2022

LAUBY, MANKIN & LAUBY LLP

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