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12 situated, and on behalf of the general public

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF SAN DIEGO**

15 ABEL ESCOBEDO and CHRISTOPHER
16 CARVER on behalf of themselves, all others
17 similarly situated, and on behalf of the
general public,

18 Plaintiffs,

19 v.

20 MATHESON TRI-GAS, INC. an unknown
21 business entity; and DOES 1 through 25,
inclusive,

22 Defendant.
23
24
25
26
27
28

Case No. 37-2020-00044507-CU-OE-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL APPROVAL
HEARING DATE**

Date: March 3, 2023
Time: 8:30 a.m.
Judge: Hon. Ronald F. Frazier
Dept.: C-65

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Cases

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1 *Walsh v. IKON Solutions, Inc.*

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16 *Newberg on Class Actions*, 4th ed. § 3:15, p.335 23

I. INTRODUCTION

Plaintiffs Abel Escobedo and Christopher Carver (“Plaintiffs”), on behalf of themselves and the approximately 181-member putative class, respectfully request that this Court preliminarily approve the Stipulated Settlement Agreement and Release of Claims¹ (“Settlement Agreement”) entered into between Plaintiffs and Defendant Matheson Tri-Gas, Inc. (“Defendant”) (Plaintiffs and Defendant are collectively referred to as the “Parties”). The Parties’ Settlement Agreement seeks to resolve claims raised against Defendants in this matter in exchange for a non-reversionary \$750,000 Gross Fund Value Amount (“GFVA”). The proposed class is comprised of all non-exempt drivers, truck drivers, truck workers, or similar job designations and titles, and all other similarly situated non-exempt employees of Defendant during the Class Period (“Class Members”). The Class Period is the time period beginning on December 4, 2016 through the date of mediation, July 28, 2022.

It is requested that the Court grant preliminary approval, as, when analyzing the strengths and vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this proposed settlement of \$750,000 – **which is estimated to pay class members an average settlement share of approximately \$2,382.59²** – is well within the range of reasonableness. Moreover, the proposed Agreement satisfies all of the criteria for preliminary approval under Rule 3.769 of the California Rules of Court.

As the following sections show, Class Counsel are convinced that the proposed settlement is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues present in this action. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the uncertainty of class certification, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in arriving at the proposed settlement. The Settlement Agreement was the product of an all-day mediation with well-regarded and experienced mediator Jeff Ross and was the product of non-collusive, arm’s-length negotiations by informed counsel and parties. The settlement is fair, reasonable, and adequate to all.

¹ The Settlement Agreement is attached to the Declaration of David Mara, Esq. (“Mara Dec.”) as **Exhibit 1**.

² \$431,250 NFVA / 181 class members = \$2,382.59 average payout per Class Member.

1 Accordingly, Plaintiffs seek: (1) preliminary approval of the terms of the Settlement Agreement; (2)
2 provisional certification of the Class; (3) appointment of Plaintiffs as Class Representatives; (4)
3 appointment of Mara Law Firm, PC, Law Offices of Arthur R. Botham, Jr., A Law Corporation, and
4 Law Office of Zachary T. Tyson ALC as Class Counsel; (5) approval of the Parties' proposed notice
5 of class action settlement³ (referred to herein as the "Class Notice" or "Notice") and method of
6 notifying the Class about the settlement; and (6) set a hearing date for final approval.

7 **II. FACTUAL/PROCEDURAL BACKGROUND**

8 Defendant is a supplier of industrial and specialty gases, and gas handling equipment in the
9 United States. In order to conduct its business, Defendant hires hourly driver employees, such as
10 Plaintiffs and Class Members, to transport these gases and equipment in California. Mara Dec. ¶ 9.

11 On June 8, 2020, Plaintiff Escobedo sent notice to the California Labor and Workforce
12 Development Agency ("LWDA") of his intent to pursue various wage and our claims against
13 Defendant on behalf of similarly situated aggrieved employees. Shortly thereafter, Plaintiff Escobedo
14 filed a putative class action complaint on December 4, 2020, against Defendant in the San Diego
15 County Superior Court, Case No. 37-2020-00044507-CU-OE-CTL, alleging causes of action for: (1)
16 Failure to Pay Minimum Wage; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Accurate,
17 Itemized Wage Statements; (4) Failure to Permit Meal Periods; (5) Failure to Permit Rest Periods; (6)
18 Waiting time penalties; (7) Civil Penalties Under the Private Attorney General Act of 2004; and (8)
19 Unlawful Business Practices. Mara Dec. ¶ 10.

20 On March 4, 2021, Plaintiff Carver sent notice to the LWDA of his intent to pursue various
21 wage and our claims against Defendant on behalf of similarly situated aggrieved employees. Shortly
22 thereafter, Plaintiff Carver filed a putative class action complaint on May 10, 2021, against Defendant
23 in the San Diego County Superior Court, Case No. 37-2021-00020711-CU-OE-CTL, alleging causes
24 of action for: (1) Failure to Pay All Straight Time Wages; (2) Failure to Pay All Overtime Wages; (3)
25 Failure to Provide Meal Periods; (4) Failure to Authorize and Permit Rest Periods; (5) Knowing and
26 Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; (6) Failure to Pay
27 All Wages Due at the Time of Termination of Employment; (7) Irregular Pay Periods; (8) Failure to
28

³ The Class Notice is attached to the Settlement Agreement as **Exhibit A**.

1 Adopt a Compliant Sick Pay/Paid Time Off Policy; and (9) Violation of Unfair Competition Law.
2 Mara Dec. Plaintiff Carver also filed a separate action alleging identical violations of the California
3 Labor Code and seeking civil penalties under the PAGA on May 10, 2021, against Defendant in the
4 San Diego County Superior Court, Case No. 37-2021-00020726-CU-OE-CTL. Mara Dec. ¶ 11.

5 After agreement amongst the Parties to consolidate the matters, Plaintiffs filed a First Amended
6 Complaint in this matter on or around August 30, 2021, which added the entirety of the claims alleged
7 by Plaintiff Carver in the two other actions. The two actions filed by Plaintiff Carver were then
8 dismissed without prejudice. Mara Dec. ¶ 12.

9 Defendant filed an Answer to the First Amended Complaint on or around October 4, 2021.
10 Defendant denies the allegations of the action in its entirety, deny any liability or wrongdoing of any
11 kind associated with the claims alleged in this action, and further deny that, for any purpose other than
12 settling this action, this matter is appropriate for class treatment. Defendant further contends that they
13 have complied with all applicable California laws, the California Labor Code, the applicable California
14 Wage Order(s), and the Unfair Competition Law. Defendant finally contends that, if this matter were
15 to be litigated further, they would have strong defenses to oppose class certification and succeed on
16 the merits of Plaintiffs' causes of action. Mara Dec. ¶ 13.

17 **III. LITIGATION HISTORY/PARTIES CONTENTIONS**

18 **a. Discovery and Investigation**

19 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data that
20 were needed to evaluate the case. These documents included requests for time and wage records for
21 the Class, policies and practices in place during the class period, employee training in place during the
22 class period, as well as data surrounding the number of current and former employees. Mara Dec. ¶
23 14.

24 This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the
25 production of over 10,000 documents and thousands of lines of data, including Defendant's employee
26 policies and practices, and paystubs and time records for Plaintiffs and Class Members. Using the time
27 and wage records for the Class provided and the data surrounding the number of current and former
28 employees, Plaintiffs were able to establish a potential exposure model in preparation for mediation.

1 Mara Dec. ¶ 15.

2 **b. The Parties’ Staunchly Conflicting Positions**

3 **i. Unpaid Wages**

4 Based upon the discovery conducted, Plaintiffs contend – and Defendant denies – that
5 Defendant failed to pay all wages owed to Class Members. Employees must be paid for all “hours
6 worked,” as that phrase is defined in the Wage Orders and interpreted by California courts. Hours
7 worked is defined as “the time during which an employee is subject to the control of an employer, and
8 includes all the time the employee is suffered or permitted to work, whether or not required to do so.”
9 Wage Order 1-2001, Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833
10 (2015).

11 Under this standard, “it is only necessary that the worker be subject to the control of the
12 employer in order to be entitled to compensation.” *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575,
13 584 (2000). The *Morillion* Court reasoned that an employee is under the employer’s control and
14 entitled to compensation when the employer “‘directs, commands or restrains’ an employee.”
15 *Morillion*, 22 Cal. 4th at 583 (*quoting Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 975
16 (1995)). The California Supreme Court further found that “[a]n employer that requires its employees
17 to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the
18 obligation to compensate the employee for that time by invoking the de minimis doctrine.” *Troester*
19 *v. Starbucks Corp.*, 5 Cal. 5th 829, 847 (2018). Off-the-clock claims are governed by a known or
20 should have known standard. *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1051
21 (“liability is contingent on proof [the employer] knew or should have known off-the-clock work was
22 occurring”) (citing *Morillion*, 22 Cal. 4th at 585).

23 Here, Plaintiffs contend that Class Members were required to perform safety training without
24 compensation from Defendant. The safety training included topics such as transportation of dangerous
25 chemicals, air pollution and other topics related to the transportation industry. Defendant’s regular
26 course of business required the drivers to load and distribute dangerous gases (oxygen, chlorine,
27 propane) to businesses throughout their service area. As part of their business model, each driver was
28 required to maintain their safety readiness in order to keep their products moving. As drivers could

1 not perform the tablet training while they were driving for Defendant, they had to complete the training
2 on their own time, after they were already off the clock, which would take several hours to complete
3 each month. Mara Dec. ¶ 16.

4 Defendants argue that beyond the limited accusations of Plaintiffs, there is no evidence that
5 Class Members performed *any* work-related tasks for which they were not compensated, and that
6 Defendants have uniform practices and policies *forbidding* employees from working off the clock.
7 Defendants claim that Plaintiffs’ “investigation” is wholly inaccurate, and that the time spent engaging
8 in the above training is grossly inflated by Plaintiffs. Defendants argue that they have tablets and
9 computers at all of their locations where a driver can complete his training, and that they are instructed
10 to accurately log how long it took them so they can be paid for that time. Mara Dec. ¶ 17.

11 **ii. Overtime**

12 Pursuant to Labor Code section 510, “[a]ny work in excess of eight hours in one workday and
13 any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh
14 day of work in any one workweek shall be compensated at the rate of no less than one and one-half
15 times the regular rate of pay for an employee.” Under Wage Order 9-2001, Subd. 3(L), however,
16 because it is undisputed that Class Members are subject to the Hours of Service requirements of the
17 United States Department of Transportation Code of Federal Regulations, they are properly exempt
18 from receiving overtime under the Labor Code and Wage Orders.

19 Despite this, Plaintiffs contend that Defendant has established an implied contract with Class
20 Members to pay them overtime. Civil Code section 1621 defines
21 an implied contract: “An implied contract is one, the existence and terms of which are manifested by
22 conduct.” “An implied contract ... in no less degree than an express contract, must be founded upon
23 an ascertained agreement of the parties to perform it, the substantial difference between the two being
24 the mere mode of proof by which they are to be respectively established.” *Gorlach v. Sports Club*
25 *Co.* (2012) 209 Cal.App.4th 1497, 1507 Although an implied in fact contract may be inferred from the
26 “conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is
27 an *intent* to promise.” *Id.* at 1507-1508 (citing *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 887,
28 *italics added*).

1
2 Plaintiffs argue that Defendant tells its drivers that they will receive overtime pay anyway when
3 they work over 8 hours in a day or 40 hours in a week, essentially creating an implied contract: “You
4 work for us, we will pay you more than we have to by law.” Based on the record sampling produced,
5 Plaintiffs point out that Defendant does, in fact, regularly pay its drivers overtime when they work
6 over 40 hours in a week, and creates clear evidence of an implied contract, or “promise,” to pay the
7 drivers overtime. Thus, for all the instances where a driver did work over 8 hours in a day or 40 hours
8 in a week and was not paid overtime, Defendant would be liable for this amount. Mara Dec. ¶ 18.

9 Defendant disputes the entirety of Plaintiffs’ argument and denies that it is liable for any
10 overtime at all. First, Defendant argues that there is no contract with drivers to pay them overtime at
11 all, and that Plaintiffs cannot point to any written agreement or policy that conveys any such message,
12 nor is there any evidence that this purported “promise” was ever conveyed by Defendant to drivers.
13 Second, simply because Defendant decides in certain limited circumstances to pay its drivers overtime
14 on occasion does not result in the formation of any kind of implied contract. Defendant is not legally
15 obligated to pay its drivers overtime, and it is completely up to Defendant if it decides to do so on
16 occasion. As such, Defendant claims that drivers are being paid *more* than they are legally entitled to,
17 not less. Mara Dec. ¶ 19.

18 **iii. Wage Statements**

19 Plaintiffs further contend that Defendant’s wage statements fail to properly itemize the overtime
20 rate and hours worked, making it impossible to promptly and easily determine the correct pay rate
21 with the corresponding hours and pay. Thus, if a Class Member were to add together the hours listed
22 in the line items on their wage statements, the total is incorrect because it exceeds the total number of
23 hours actually worked by the employee during the pay period. Mara Dec. ¶ 20.

24 In *McKenzie v. Federal Express Corporation* (2011) 765 F. Supp. 2d 1222 (“*McKenzie*”), the
25 court granted summary judgment in favor of the plaintiff. Under *McKenzie*, the court concluded that
26 “[the defendant]’s wage statement does not comply with Labor Code Section 226(a)(9) which requires
27 an itemized statement to show ‘all applicable hourly rates in effect during the pay period and the
28 corresponding number of hours worked at each hourly rate by the employee.’” *McKenzie v. Fed.*

1 *Express Corp.*, supra, 765 F. Supp. 2d at 1231 (citing Cal. Lab. Code § 226(a)(9). In *McKenzie*, the
2 court held that the employer’s wage statements violated Labor Code § 226(a)(2), which requires wage
3 statements to list the “total hours worked by the employee” in the pay period, because the idiosyncratic
4 statements provided three categories of hours worked, the total of which did not amount to the correct
5 number of total hours worked. *Id.*

6 Defendant argues that the holding in *Hernandez v. BCI Coca-Cola Bottling Co.* (9th Cir. 2014)
7 554 Fed. Appx. 661, 662 refutes this argument and is more applicable to the wage statements at issue.
8 In *Hernandez*, the court granted summary judgment in the defendant employer’s favor. Defendants
9 point out that, unlike *McKenzie*, the actual correct number total hours worked are itemized on the wage
10 statements. The *Hernandez* court found that that the plaintiff employee only needed to “subtract his
11 regular hours from total hours to determine overtime hours worked during the pay period.” *Hernandez*,
12 supra, 554 Fed. App. at 662. Just as in *Hernandez*, Defendant contends that Class Members can do
13 the same. Mara Dec. ¶ 21.

14 As evidenced above, the Parties took staunchly conflicting positions with respect to Plaintiffs’
15 claims.

16 **c. The Parties Agreed to Attend Mediation**

17 The Parties agreed to attend mediation with mediator Jeff Ross, Esq. on July 28, 2022. Shortly
18 thereafter, Mr. Ross issued a mediator’s proposal, which the Parties accepted on August 4, 2022. Since
19 then, the Parties have met and conferred regarding all the terms of the settlement and finalized their
20 agreement in the Parties’ Settlement Agreement. The Parties seek preliminary approval of the
21 Settlement Agreement in the instant motion. Mara Dec. ¶ 22; **Exhibit 1**.

22 **d. The Terms of the Proposed Settlement**

23 Under the terms of the proposed settlement, Defendant will create a settlement fund of
24 \$750,000.

25 **i. Deductions From the Settlement**

26 The Parties have agreed (subject to and contingent upon the Court’s approval) that this action
27 be settled and compromised for the non-reversionary total sum of \$750,000 (“Gross Fund Value
28 Amount” or “GFVA”), which includes, subject to Court approval: (a) attorneys’ fees of up to \$250,000

(one-third of the GFVA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement, and securing Court approval; (b) litigation expenses estimated not to exceed, \$20,000;⁴ (c) Service Awards to the named class representatives, Abel Escobedo and Christopher Carver in a sum not to exceed \$10,000 each in consideration for agreeing to a general release of their claims against Defendant which is broader than that of other class members, and in recognition of their efforts in prosecuting their actions; (d) claims administration fees and expenses to Phoenix Class Action Settlement Administration Solutions (hereinafter “Phoenix”), estimated not to exceed approximately \$10,000;⁵ and (e) PAGA payment to the LWDA in the amount of \$18,750 (which represents seventy-five percent (75%) of \$25,000 allocated to PAGA).

ii. Calculation of the Settlement Payments to Participating Class Members

After all Court-approved deductions from the GFVA, it is estimated that \$431,250 (“Net Fund Value Amount” or “NFVA”), less all applicable employee payroll taxes⁶, will be distributed to each Class Member of the Final Settlement Class.⁷ Subject to the terms and conditions of the settlement, the Settlement Administrator will calculate and issue individual settlement payments based on the following formula:

Each Class Member of the Final Settlement Class shall be allocated a payment that is equal to (i) the number of weeks he or she worked for Defendant in California, as a Class Member in an hourly or non-exempt position, based on the Class Data provided by Defendant, divided by (ii) the total number of weeks worked by all Participating Class Members based on the same Class Data, which is then multiplied by the Net Fund Value Amount. One day worked in a given week will be credited as a work week for purposes of this calculation. Therefore, the value of each Class Member’s Individual

⁴ These will be tabulated and presented to the Court at final approval. Plaintiffs will only seek the amount of actual expenses incurred during the litigation of this case. Should the actual expenses exceed \$20,000, Plaintiffs will only seek reimbursement of costs up to \$20,000.

⁵ Phoenix will present to the Court a declaration in conjunction with the final approval motion outlining the costs of the settlement administration process. If the settlement administration costs are lower than the amount allocated in the Settlement Agreement, the difference will be added to the Net Fund Value Amount for distribution to Participating Class Members.

⁶ The employer’s share of payroll taxes due on the portion of the Individual Settlement Payments that is allocated to wages shall be paid by Defendant separately and in addition to the GFVA. **Exhibit 1** attached to the Mara Dec. at Sections 3(q) and 5.06(a).

⁷ Class Members of the Final Settlement Class are Class Members who do not submit a valid and timely request to exclude themselves from this Settlement. **Exhibit 1** attached to the Mara Dec. at Section 3(p).

1 Settlement Payment ties directly to the amount of weeks that he or she worked. **Exhibit**
2 **1** attached to the Mara Dec. at Section 5.06(c)(1).

3 The precise number of compensable weeks worked per class member will not be known until the
4 administrator tabulates them, following preliminary approval. Under no circumstances will any
5 portion of the \$750,000 settlement revert to Defendant and one hundred percent (100%) of the NFVA
6 is available for Class Members to claim.

7 The individual settlement payments will be divided into a “wage portion” to compensate Class
8 Members for alleged unpaid wages and a “non-wage portion” to compensate Class Members for
9 alleged interest and penalties. Class Members’ individual settlement shares will be apportioned as
10 follows: one-third wages, one-third penalties, and one-third interest.

11 **iii. Notice to the Class**

12 Upon entry of the order of the Court granting preliminary approval of this Agreement,
13 Defendant shall provide the Settlement Administrator with a list in Excel spreadsheet format
14 containing the name and last known address, telephone number, and social security number of each
15 Class Member within seven (7) business days for purposes of mailing the Notice of Class Action
16 Settlement to the Settlement Class members. Upon receipt of the class data, the Settlement
17 Administrator will perform a search based on the National Change of Address Database to update and
18 correct any known or identifiable address changes. Within fourteen (14) days of receipt of the class
19 data, the Settlement Administrator shall mail copies of the Notice of Class Action Settlement to all
20 Class Members via regular First-Class U.S. Mail. Class Members shall have thirty (30) days after the
21 Class Notices are mailed to respond by submitting a challenge to the number of workweeks attributed
22 to them, submitting an objection, or requesting to be excluded from the Settlement Agreement.

23 **iv. Distribution of Funds**

24 No later than twenty (20) days after the Final Effective Date⁸, Defendant shall provide the

25 _____
26 ⁸ “Effective Date” of the Settlement means the date on which the Settlement is approved and the
27 Court’s Final Order and Judgment becomes Final. The Court’s Final Order and Judgment becomes
28 final upon the later of: (i) if an intervention is granted, but no appeal is filed, the expiration date of the
time for the filing or noticing of any appeal from, or other challenge to, the Court’s Judgment (this
time period shall not be less than 60 calendar days after the Court’s Judgment is entered); (ii) if an
appeal is filed, the date affirmance of an appeal of the Judgment becomes final under the California
Rules; (iii) if an appeal is filed, the date of final dismissal of any appeal from the Judgment or the final

1 GFVA to the Settlement Administrator to fund the Settlement and the employer's share of payroll
2 taxes due on the portion of the Individual Settlement Payments that is allocated to wages. Not later
3 than twenty-five (25) days after the Final Effective Date, the Settlement Administrator shall disburse:
4 (1) the Individual Settlement Payments to each Class Member; (2) the Attorney Fee Award and Cost
5 Award to Class Counsel for attorneys' fees and costs, as approved by the Court; (3) the Service Awards
6 paid to the Class Representatives, as approved by the Court; (4) the Administration Costs, as approved
7 by the Court; and (5) the PAGA Payment to the LWDA and to Class Members, as approved by the
8 Court.

9 Class Members must cash or deposit their Individual Settlement Payment checks within one
10 hundred and eighty (180) calendar days after the checks are mailed to them. If any checks are not
11 redeemed or deposited within one hundred and eighty (180) calendar days after mailing, the Settlement
12 Administrator will transmit the funds to the State of California Office of the Controller Unclaimed
13 Property Fund in the name of the Class Members.

14 v. Release of Claims

15 Upon cashing their checks for their Individual Settlement Payments, the Class Representatives
16 and the Class Members, release any and all claims that are asserted in the operative complaint and
17 which could have been asserted based on the facts alleged in the complaint. A full recital of the released
18 claims can be found in **Exhibit 1** attached to the Declaration of David Mara, Esq., which is the
19 Settlement Agreement, in Section 3(e).

20 In addition, Plaintiffs agreed to a general release of their claims against Defendant. *See Exhibit*
21 **1** to the Mara Dec., Section 3(j). At final approval, Class Counsel will seek approval of these Service
22 Awards to each named Plaintiff in the sum of \$10,000. As will be detailed at final approval, the
23 requested Service Awards are reasonable in light of the broad general release Plaintiffs are giving to
24 Defendant in exchange for the \$10,000 payment.

25 _____
26 dismissal of any proceeding on review of any court of appeal decision relating to the Judgment; (iv) if
27 objections are filed and overruled, and no appeal is taken of the final approval order, then the Effective
28 Date of final approval will be sixty-five (65) days after the trial court enters final approval; or (v) if
no intervention is granted and no objections are filed, the date on which the Court grants final approval
of this Agreement on substantially the terms provided herein as the same may be modified by
subsequent written agreement of the Parties and signs the Final Order granting final approval of this
Agreement.

1 In addition, these payments are further supported by the fact that plaintiffs are often subjected
2 to the stigma associated with bringing these types of lawsuits. In this age of technology, employers
3 engage in thorough background checks on their employees. As these case filings are all public record,
4 a simple “Google” search is all it would take for Plaintiffs’ names to appear associated with these
5 pending lawsuits against their former employers. This could be a significant factor in any employer’s
6 decision to hire Plaintiffs in the future.

7 Plaintiffs took it upon themselves to delay recovery of their individual wage and hour claims
8 by proceeding with class and representative actions, with a full understanding of the risks involved.
9 Plaintiffs were fully aware that class action and representative litigation would cause Defendant to
10 incur hefty costs throughout the litigation, and that if they were unsuccessful in these cases, may be
11 liable for some, or even all, of these costs. Despite this knowledge, Plaintiffs pushed forward with the
12 litigation; they were always readily available by phone and fully participated every step of the way
13 throughout the entirety of this process.

14 Courts routinely approve service payments, or incentive awards, to compensate named
15 plaintiffs for the services they provide and the risks they incur during class litigation. See *In re*
16 *Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393; see also *Bell v. Farmers Ins.*
17 *Exch.* (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class representatives);
18 Manual § 21.62 n.971 (noting that service payments are warranted). Based on the foregoing, the
19 \$10,000 payment to each named Class Representative is fair, appropriate and justified as part of the
20 overall settlement.

21 **IV. ARGUMENT**

22 **a. Class Action Settlements are Subject to Court Review and Approval Under the** 23 **California Rules of Court**

24 Rule 3.769 requires court approval for class action settlements.⁹ “Before final approval, the
25 court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of Court,
26 Rule 3.769(g).) Rule 3.769 further requires a noticed motion for preliminary approval of class

27 ⁹ The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23
28 and cases applying it for guidance in considering class issues. See *Vasquez v. Superior Court* (1971)
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the
Parties cite Federal Rule 23 and federal case law in addition to California law.

1 settlements:

2 (a) A settlement or compromise of an entire class action, or a cause of action in a
3 class action, or as to a party, requires the approval of the court after hearing.

4 ...
5 (c) Any party to a settlement agreement may serve and file a written notice of
6 motion for preliminary approval of the settlement. The settlement agreement
7 and proposed notice to class members must be filed with the motion, and the
8 proposed order must be lodged with the motion.

9 Courts act within their discretion in approving settlements that are fair, not collusive, and take into
10 account “all the normal perils of litigation as well as the additional uncertainties inherent in complex
11 class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179, cert. den.
12 sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452 U.S. 905.

13 **b. The Settlement is Fair, Reasonable, and Adequate**

14 In deciding whether to approve a proposed class action settlement under Code of Civil
15 Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.”
16 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is
17 **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-length
18 negotiations; (2) investigation and discovery were sufficient to allow counsel and the court to act
19 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
20 small. *Dunk v. Ford Motor Co., supra*, at 1802. As the following shows, all of these elements – with
21 the exception of the percentage of objectors, which cannot be anticipated at this stage of the litigation
22 – bearing on the fairness of the proposed settlement are present here and the Court’s grant of
23 preliminary approval is therefore requested.

24 **i. The Settlement was Reached as a Result of Arm’s Length Negotiations**

25 The settlement was reached as a result of arm’s-length negotiations. Though cordial and
26 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
27 nature. At the mediation and the following negotiations through the mediator, Counsel for the Parties
28 conducted extensive arm’s length settlement negotiations until the settlement was reached. The terms
of the settlement are memorialized in the Settlement Agreement which is attached to the Declaration
of David Mara, Esq. as **Exhibit 1**.

1 **ii. The Settlement is the Result of Thorough Investigation and Discovery**

2 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before
3 reaching the proposed settlement, and engaged in sufficient investigation, research and discovery to
4 support the settlement. The settlement was only possible following discovery and evaluation of
5 Defendants’ policies and procedures, as well as the data produced for the putative class, which
6 permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages.
7 This litigation has reached the stage where “the Parties certainly have a clear view of the strengths and
8 weaknesses of their cases” sufficient to support the settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979)
9 485 F. Supp. 610, 617.

10 **iii. Counsel for Both Parties are Experienced in Similar Litigation**

11 Both Plaintiffs’ Counsel and Defendants’ Counsel are particularly experienced in wage and
12 hour employment law and class actions. Plaintiffs’ Counsel has significant experience in litigating
13 unpaid wages, unprovided meal and rest periods, misclassification, overtime, and expense
14 reimbursement class actions. Plaintiffs’ Counsel has prosecuted numerous wage and hour class action
15 cases on behalf of employees for California Labor Code violations and thus are experienced and
16 qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis,
17 and to evaluate the viability of the defenses. Mara Dec. ¶¶ 2-8; Declaration of Arthur R. Botham, Jr.,
18 Esq. (“Botham Declaration”) ¶¶ 5-8; Declaration of Zachary T. Tyson, Esq. (“Tyson Declaration”) ¶¶
19 3-7. Indeed, Mara Law Firm, PC was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et*
20 *al.*, which is the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court*
21 (2012) 53 Cal.4th 1004. Mara Dec. ¶ 4. This experience instructed Plaintiffs’ Counsel on the risks and
22 uncertainties of further litigation and guided their determination to endorse the proposed settlement.
23 Defendant’s Counsel has extensive experience representing companies and regularly deals with wage
24 and hour litigation matters. Accordingly, both Parties’ Counsel are experienced in wage and hour
25 employment law and class actions.¹⁰

26
27
28 ¹⁰ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Class
Notice has been provided to the class and they have had an opportunity to respond. This information
will be provided to the Court in conjunction with the final approval motion.

1 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

2 An understanding of the amount in controversy is an important factor into whether the
3 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses of the
4 claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168
5 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
6 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case for plaintiffs
7 on the merits, balanced against the amount offered in settlement.” *Id.*

8 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to “decide
9 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the
10 attorneys.” *Kullar, supra*, 168 Cal.App.4th at 133. Finally, *Kullar* does not require an explicit
11 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,
12 provided there is a record which allows “an understanding of the amount that is in controversy and the
13 realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409. Put differently, “as the
14 court does when it approves a settlement as in good faith under Code of Civil Procedure § 877.6, the
15 court must at least satisfy itself that the class settlement is within the ‘ballpark’ of reasonableness.”
16 *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38
17 Cal.3d 488, 499-500. As the following subsections show, the Parties’ investigation and discovery
18 revealed plenty of reasons to discount claims and agree to this settlement.

19 **1. The Settlement is Fair and Reasonable Based on the Strengths of**
20 **Plaintiffs’ Case and the Risks and Costs of Further Litigation**

21 The proposed settlement was only possible following significant discovery, an evaluation of
22 Defendant’s relevant policies and procedures, and Plaintiffs’ independent investigation. This
23 permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The
24 discovery conducted resulted in Plaintiffs’ central theories of liability, which are predicated on
25 Plaintiffs’ claims that Defendant failed to pay hourly driver employees for all time worked, failed to
26 pay them contractually promised overtime, and failed to provide them with itemized wage statements.
27 As explained above, Defendant maintains that the discovery produced demonstrates that it would
28 succeed at both class certification and on the merits.

 Although, Plaintiffs believe this case is suitable for certification on the claimed bases that there

1 are company-wide policies and practices that Plaintiffs contend violate California law and uniformly
2 affect the class members, Defendant's counter-arguments and affirmative defenses raise uncertainties
3 with respect to both class certification and success on the merits. As the California Supreme Court
4 ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the
5 trial court's sound discretion. Decisions following *Sav-On* have reached different conclusions, with
6 respect to certification of wage and hour claims.¹¹ While remaining confident in the strengths of their
7 claims, all of these factors led Plaintiffs to discount the following maximum potential damage claims.

8 **2. Exposure and the Risks for Each Claim**

9 In addition to being able to discover the strengths and vulnerabilities associated with Plaintiffs'
10 claims, Defendant provided Plaintiffs with information and data points which Plaintiffs submitted to
11 an expert to establish a representative damage model, as explained below. Mara Dec. ¶ 23.

12 **A. Unpaid Wages**

13 Plaintiffs contend that Defendant has failed to pay Class Members for all hours worked.
14 Defendant required its drivers to undergo monthly safety training. Plaintiffs allege that drivers were
15 subjected to approximately eight (8) hours of training each month. All of this training was done off-
16 the-clock and was uncompensated. Accordingly, Defendant's *maximum* exposure under Plaintiffs'
17 unpaid wages claim is **\$1,270,080** (Approximately 67.5 months during the Class Period x
18 Approximately 84 drivers employed at any given time x \$28 average hourly rate x 8 hours per month
19 = \$1,270,080). Mara Dec. ¶ 24. This maximum potential exposure, however, had to be discounted
20 considerably in light of Defendants' arguments, which are outlined below.

21 Further, if Plaintiffs were to prevail on their unpaid wages claims, they may also be entitled to
22 waiting time penalties. Plaintiffs calculates the potential *maximum* exposure under the waiting time
23 penalties cause of action as **\$735,840** (73 former employees during the three-year statutory period x
24 \$28.00 average rate of pay x 12-hour average shift length x 30 days = \$735,840). Mara Dec. ¶ 25.

25 ¹¹ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class
26 claiming misclassification and ordering summary adjudication in favor of employees), *review granted*,
27 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON*
28 *Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class claiming
misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of
certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422 (affirming denial of
certification).

1 Defendant argues that beyond the limited accusations of Plaintiffs, there is no evidence that
2 Class Members performed *any* work-related tasks for which they were not compensated, and that
3 Defendant has uniform practices and policies *forbidding* employees from working off the clock.
4 Defendant claims that Plaintiff’s “investigation” is wholly inaccurate, and that the time spent engaging
5 in the safety training takes approximately one (1) hour per month, not eight. Defendants claim that
6 they have tablets and computers at all of their locations where a driver can complete his training, and
7 that they are instructed to accurately log how long it took them so they can be paid for that time.
8 Defendant also contends that individualized issues would predominate because the Court would have
9 to ask each and every class member how long they spent on safety training each month and whether
10 they accurately logged the time it took to complete the training. As Plaintiffs’ claims for waiting time
11 penalties are derivative of their wage claims, Defendant argues that it would not be liable for these
12 either. Should the Court agree with Defendant’s arguments, Plaintiffs’ and class members would be
13 entitled to no recovery under this cause of action. Mara Dec. ¶ 26.

14 **B. Overtime**

15 Further, Plaintiffs claim that Defendant has entered into an implied contract with Class
16 Members that requires them to pay Class Members overtime when they work over eight (8) hours in
17 a day or forty (40) hours in a week, despite being exempt from overtime under California law. If
18 Plaintiffs were to prevail on their overtime cause of action, employees would be entitled to the
19 overtime premium pay for each hour worked over eight (8) hours in a day or forty (40) hours in a week
20 that was not compensated as overtime. Therefore, the *maximum potential exposure* under this theory
21 of liability would be **\$630,631** (Approximately 25,888 workweeks in the Class Period x
22 Approximately 1.74 hours per workweek compensated at the regular rate that Plaintiffs contend should
23 have been compensated as overtime x \$14 average overtime premium wage = \$630,631). Mara Dec.
24 ¶ 27.

25 Plaintiffs’ overtime claim is also subject to risks of obtaining certification and on the merits.
26 Defendant asserts that there is no contract with drivers to pay them overtime at all, and that Plaintiffs
27 cannot point to any written agreement or policy that conveys any such message, nor is there any
28 evidence that this purported “promise” was ever conveyed by Defendant to drivers. Further, simply

1 because Defendant decides in certain limited circumstances to pay its drivers overtime on occasion
2 does not result in the formation of any kind of implied contract. Defendant is not legally obligated to
3 pay its drivers overtime, and it is completely up to Defendant if it decides to do so at any given point
4 in time. As such, Defendant claims that drivers are being paid *more* than they are legally entitled to,
5 not less. Defendant also argues that Plaintiffs' would have to ask each driver what purported promises
6 were relayed to them by Defendant in terms of compensation policies and what their understanding
7 was in terms of their rights to be paid overtime. Because each driver would have to testify as to their
8 understanding of Defendant's compensation policies, class certification would be denied for lack of
9 predominance. Mara Dec. ¶ 28.

10 C. Wage Statements

11 Plaintiffs contend that throughout the liability period, Defendant's wage statements did not
12 contain accurate information regarding hours worked, which could not be easily determined from the
13 wage statements. Given approximately the 6,135 pay periods at issue during the statutory period,
14 Plaintiffs calculate the potential *maximum* exposure under the wage statement cause of action as
15 **\$608,800** [(Approximately 94 drivers received a wage statement during the statutory period x \$50
16 initial penalty) + (6,041 remaining pay periods x \$100 subsequent penalty = \$608,800). Mara Dec. ¶
17 29.

18 As noted previously, Defendant argues that its wage statements are complaint under *Hernandez*
19 *v. BCI Coca-Cola Bottling Co.* (9th Cir. 2014) 554 Fed. Appx. 661, as the actual correct number total
20 hours worked are itemized on the wage statement, permitting Class Members to easily determine the
21 number of hours they worked. If the Court were to agree with Defendant that the analysis from
22 *Hernandez* applies to the wage statements at issue as opposed to the rationale of *McKenzie v. Federal*
23 *Express Corporation* (2011) 765 F. Supp. 2d 1222, Plaintiffs would be unable to recovery any wage
24 statement penalties. Mara Dec. ¶ 30.

25 D. PAGA

26 Plaintiffs are also seeking PAGA penalties. PAGA allows the private enforcement of certain
27 California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2)
28 provides for a standard penalty amount where a civil penalty is not otherwise specified by statute:

[T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

Plaintiffs allege that Defendant has four (4) violations –failure to pay all time worked, failure to wages at the agreed upon rate, failure to provide accurate, itemized wage statements, and failure to pay all wages twice per month – of the Labor Code sections which give rise to PAGA penalties. The statute of limitations for PAGA violations goes back one year. As there were 7,301 pay periods in the statutory period at the time of mediation, Plaintiffs calculated Defendant’s potential maximum exposure under PAGA as follows:

$$\$100 \times 4 \text{ PAGA violations} \times 7,301 \text{ pay periods} = \mathbf{\$2,920,400}$$

Mara Dec. ¶ 31.

Plaintiffs’ PAGA claims are subject to the same risks on the merits as Plaintiffs’ non-PAGA claims. In addition, Labor Code § 2699, subdivision (e)(2) provides that “[i]n any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary, oppressive, or confiscatory.” In *Thurman v. Bayshore Transit Management, Inc.* (“*Thurman*”) (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the maximum amount. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has taken its obligations to comply with the law seriously. *Id.* Defendant maintains that if the case were to continue in litigation, they would be able to show that they took their obligations to comply with the law seriously. As such, if Plaintiffs were able to prevail on the merits of their PAGA claims, it is likely that the Court would reduce the maximum penalty allowed.

In addition, as the PAGA violations asserted by Plaintiffs are predicated on the same unlawful conduct that Plaintiffs base their other claims, Plaintiffs’ PAGA claims are subject to the same risks on the merits as Plaintiffs’ class claims. If Plaintiffs are ultimately unable to prevail on any one of their class claims, their recovery under the PAGA as to that violation would also fail. The likelihood

1 of the Court reducing the PAGA damages awarded to Plaintiffs and the aggrieved employees –
2 assuming liability is proven as to each of Plaintiffs’ claims – is also higher in this case where these
3 same individuals will also be receiving money for the same unlawful conduct under the class claims.
4 *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO,
5 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially
6 duplicative of penalties granted by the underlying Labor Code violations, *see, e.g.*, Cal. Lab. Code §§
7 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award
8 PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA
9 penalties are highly uncertain.”).

10 3. The Settlement Amount of \$750,000 is Reasonable

11 Not taking into account any of their defenses or arguments, Defendant’s total exposure if
12 Plaintiffs were successful in their core claims would be approximately \$2,509,511 [\$1,270,080
13 (unpaid wages exposure) + \$630,631 (overtime exposure) + \$608,800 (wage statement exposure) =
14 \$2,509,511]. If Plaintiffs’ are successful in their unpaid wages claims, they may also be entitled to
15 damages for waiting time penalties in the amount of \$735,840. If all of Plaintiffs’ claims are
16 successful, they may also be entitled to PAGA penalties in the maximum amount of \$2,920,400. Mara
17 Dec. ¶ 32.

18 Based upon the risks just discussed, Plaintiffs had to discount their maximum potential
19 exposure. Plaintiffs also had to consider that, should the Court agree with their theories and grant
20 certification as to each of their claims, they may not be awarded the full exposure at trial. Plaintiffs
21 also had to consider that the Court could agree with Defendant’s arguments. If their unpaid wage
22 claims failed, their claims for waiting time penalties would also fail. Their claims for PAGA penalties
23 would similarly be reduced. All of these factors led Plaintiffs to reduce the realistic potential exposure
24 in order to gain a definite monetary recovery for the class.

25 In light of the risks Plaintiffs’ claims faced, Plaintiffs and their Counsel believe that the
26 settlement amount of \$750,000 – **with an average settlement share amount estimated at \$2,382.59**
27 – is a reasonable and fair settlement amount. Mara Dec. ¶ 33.

28 A settlement is not judged **solely** against what might have been recovered, had the plaintiffs
prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and

1 reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells*
2 *Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; “Compromise is inherent and necessary in the
3 settlement process...even if the relief afforded by the proposed settlement is substantially narrower
4 than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because
5 the public interest may indeed be served by a voluntary settlement in which each side gives ground in
6 the interest of avoiding litigation.” *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm’n*
7 (9th Cir. 1982) 688 F.2d 615, 628 (“It is well-settled law that a cash settlement amounting to only a
8 fraction of the potential recovery does not...render the settlement inadequate or unfair”).

9 **c. Provisional Class Certification Should be Granted**

10 Under California law, a class action is appropriate when the class is ascertainable and there is
11 “a well-defined community of interest in the questions of law and fact involved affecting the parties
12 to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code of Civil
13 Procedure § 382 for class certification follow federal law according to Rule 23 of the Federal Rule of
14 Civil Procedure: numerosity, typicality of the class representatives’ claims, adequacy of
15 representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also*
16 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court
17 must certify a class for settlement purposes if a class has not already been certified, “it is well
18 established that trial courts should use different standards to determine the propriety of a settlement
19 class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used
20 for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836,
21 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

22 Plaintiffs contend, and Defendants do not dispute for settlement purposes only, each of these
23 elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 237-38.
24 Plaintiffs seek approval of the following Class for settlement purposes only: All persons who are
25 employed or have been employed by Defendant as non-exempt drivers, truck drivers, truck workers,
26 or similar job designations and titles, and all other similarly situated non-exempt employees in the
27 State of California at any time from December 4, 2016 through the date of mediation, July 28, 2022.
28

1 **i. The Proposed Settlement Class is Ascertainable**

2 Plaintiffs contend that the proposed Settlement Class is ascertainable because of all of the class
3 members have worked for Defendant as hourly drivers and have been identified through Defendant’s
4 own records, such as employee and payroll files. *See Rose v City of Hayward* (1981) 126 Cal.App.3d
5 926,932 (finding that “Class Members are ‘ascertainable’ where they may be readily identified without
6 unreasonable expense or time by reference to official records.”); *Sevidal v. Target Corp.* (2010) 189
7 Cal.App.4th 905, 919 (“[c]lass members are ‘ascertainable’ where they may be readily identified
8 without unreasonable expense or time by reference to official [or business] records.”). Thus, the
9 ascertainability requirement is met.

10 **ii. The Proposed Settlement Class is Sufficiently Numerous**

11 The numerosity requirement is met if the class is so large that joinder of all members would be
12 impracticable. *Gay v. Waiters’ & Dairy Lunchmen’s Union* (N.D. Cal. 1980) 489 F. Supp. 282, *aff’d*
13 (9th Cir. 1982) 694 F.2d 531. “There is no set number required to maintain a class action, and the
14 statutory test is whether a class is so numerous that ‘it is impracticable to bring them all before the
15 court.’” *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223
16 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior Court* (1995)
17 44 Cal.2d 574 (upholding a class of ten members). “The numerosity requirement is more readily met
18 when a class contains employees suing their present employer . . . This is because class members may
19 be unwilling to sue their employer individually out of fear of retaliation.” *Romero v. Producers Dairy*
20 *Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the California Supreme Court, “fear of
21 retaliation for individual suits against an employer is a justification for class certification in the arena
22 of employment litigation, even when it is otherwise questionable that the numerosity requirements
23 were satisfied . . . It needs no argument to show that fear of economic retaliation might often operate
24 to induce aggrieved employees quietly to accept substandard conditions.” *Gentry v. Superior Court*
25 (2007) 42 Cal.4th 443, 460 (citation omitted), overruled on other grounds in *Iskanian v. CLS Transp.*
26 *Los Angeles, LLC* (2014) 59 Cal.4th 348.

27 Here, Defendant’s records show that the proposed Settlement Class has approximately one
28 thousand, one hundred and eighty-one (181) members. Plaintiffs contend that joinder of all Class

Members is impracticable and, therefore, a class wide proceeding is preferable. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is acceptable.). In fact, a class of ten (10) has been certified as a class action. *Id.*, citing *Bowles v. Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue have held that classes of over forty (40) individuals are numerous enough to meet the numerosity requirement. *See Ikonen v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly, the Class that is comprised of approximately one hundred and eighty-one (181) members is sufficient to satisfy the numerosity requirement.

iii. The Commonality Requirement is Met

The commonality requirement is met if there are questions of law and fact common to the class. *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.’” *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. Commonality exists if there is a predominant common legal question regarding how an employer’s policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) (“[T]he common legal question remains the overall impact of Diva’s policies on its drives.”). Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the certification stage since the question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” *Linder v. Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-440.

Here, Plaintiffs contend that the proposed Class Members’ claims all stem from the same allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiffs seek the same legal remedies under state law on behalf of themselves and all Class Members. As liability as to all Class Members is predicated on the same policies and practices, which Plaintiffs allege violates California law, the commonality requirement has been satisfied.

iv. The Typicality Requirement is Met

The typicality requirement is met if the claims of the named representative are typical of those

1 of the class, though, “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at 1020;
2 *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiffs contend that their claims are typical of
3 the Class Members’ claims because they arise from the same factual basis and are based on the same
4 legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.* (N.D. Cal. 1987)
5 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and practices. Plaintiffs
6 allege that Defendant’s policies applied to all Class Members. Factual differences may exist between
7 Plaintiffs’ and the Class Members so long as the claims arise from the same events or course of conduct
8 and are based on the same legal theories. *Hanlon, supra*, 150 F. 3d at 1020; *see also Wehner, supra*,
9 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. § 3:15, p.335 [When it is alleged that the same
10 unlawful conduct was directed at or affected both the named plaintiff and the class sought to be
11 represented, the typicality requirement is usually met irrespective of varying fact patterns which
12 underlie individual claims.] As such, the typicality requirement is satisfied.

13 **v. The Adequacy Requirement is Met**

14 The adequacy requirement is met if Plaintiffs have no interests adverse to the interests of the
15 proposed Class Members and is committed to vigorously prosecuting the case on behalf of the class.
16 *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51.
17 Plaintiffs contend those standards are met here. Plaintiffs do not have any conflicts of interest with the
18 Class. They have been and continue to be committed to vigorously prosecuting this case. If any Class
19 Member wishes to opt-out of the Settlement, he or she may do so. Therefore, there is no conflict of
20 interest between Plaintiffs and the Class Members.

21 **vi. Notice to Class Members Complies with California Rule of Court 3.769(f)**

22 California Rule of Court 3.769(f), provides:

23 If the court has certified the action as a class action, notice of the final approval hearing
24 must be given to class members in the manner specified by the court. The notice must
25 contain an explanation of the proposed settlement and procedures for class members to
26 follow in filing written objections to it and in arranging to appear at the settlement
hearing and state any objections to the proposed settlement.

27 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises
28 the class of their rights to participate in the settlement, how to and when to object to or request

1 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
2 proposed Class Notice is attached as **Exhibit A** to the Settlement Agreement.

3 **V. CONCLUSION**

4 Plaintiffs respectfully submit that the proposed settlement is in the best interests of the class
5 and class members, as it is fair, adequate, and reasonable, and one that should ultimately be granted
6 final approval. Under the applicable class action criteria and guidelines, the proposed settlement
7 should be preliminarily approved by the Court, the class should be conditionally certified for purposes
8 of settlement only, and the Notice of Class Action Settlement should be approved.

9 Respectfully Submitted,

10 **MARA LAW FIRM, PC**

11
12 Date: February 7, 2023

Signed: 

David Mara, Esq.
Matthew Crawford, Esq.
Attorneys for Plaintiffs