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situated, and on behalf of the general public

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**IN AND FOR THE COUNTY OF ALAMEDA**

ARNOLD GARCIA, on behalf of himself,  
all others similarly situated, and on behalf of  
the general public,

Plaintiffs,

v.

MCCOLLISTER'S TRANSPORTATION  
SYSTEMS, INC.; MCCOLLISTER'S  
GLOBAL SERVICES, INC.;  
MCCOLLISTER'S AUTO TRANSPORT,  
LLC; and DOES 1-100,

Defendants.

Case No. RG21112345

[Consolidated with Case No. RG21112189]

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

Date: April 11, 2023

Time: 9:15 a.m.

Reservation ID: 439395595321

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## I. INTRODUCTION

Plaintiff Arnold Garcia (“Plaintiff”), on behalf of himself and the approximately 30-member putative class, respectfully requests that this Court preliminarily approve the Joint Stipulation and Settlement Agreement<sup>1</sup> (“Settlement”) entered into between Plaintiff and Defendants McCollister’s Transportation Systems, Inc., McCollister’s Global Services, Inc., and McCollister’s Auto Transport, LLC. (“Defendants”) (Plaintiff and Defendants are collectively referred to as the “Parties”). The Parties’ Settlement seeks to resolve claims raised against Defendants in this matter in exchange for a non-reversionary \$400,000 Gross Settlement Amount (“GSA”). The proposed class is comprised of all persons who contracted with Defendants as an owner/operator to haul freight, who worked a majority of their time under the contract in California and/or had their base of operations in California, whom Defendants classified as independent contractors, and who drove in California. The Class Period is the time period beginning on September 10, 2017, through January 7, 2023.<sup>2</sup>

Plaintiff requests that the Court grant preliminary approval because, in given the strengths and vulnerabilities of the class claims alongside Defendants’ potential liability exposure, this proposed settlement— **which is estimated to pay class members an average settlement share of approximately \$6,638.89**<sup>3</sup> — is well within the range of reasonableness. Moreover, the proposed Settlement 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 their 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 Defendants, 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 proposed Settlement is the product of an all-day mediation with well-regarded and

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

<sup>2</sup> January 7, 2023 is sixty (60) days after the Parties acceptance of the mediator’s proposal.

<sup>3</sup> \$199,166.67 estimated Net Settlement Amount (“NSA”) / 30 class members = \$6,638.89 average payout per Class Member.

1 experienced mediator Mark Rudy and non-collusive, arm's-length negotiations by informed counsel  
2 and parties. The proposed Settlement is fair, reasonable, and adequate to all.

3 Accordingly, Plaintiffs seek: (1) preliminary approval of the terms contained in the proposed  
4 Settlement; (2) provisional certification of the Class; (3) appointment of Plaintiff as Class  
5 Representative; (4) appointment of Mara Law Firm, PC and Hunter Pyle Law as Class Counsel; (5)  
6 approval of the Parties' proposed notice of class action settlement<sup>4</sup> (referred to herein as the "Class  
7 Notice" or "Notice") and method of notifying the Class about the settlement; and (6) that the Court set  
8 a hearing date for final approval.

## 9 II. FACTUAL/PROCEDURAL BACKGROUND

10 Defendants are in the business of transporting freight for their customers. In order to  
11 accomplish this, Defendants contract with drivers who enter into independent contractor operating  
12 agreements with Defendants ("owner operators") to provide the trucks and equipment to facilitate  
13 transport. Plaintiff Arnold Garcia contracted with Defendants as an owner operator. Mara Dec. ¶ 9.

14 On July 1, 2021, in compliance with Labor Code § 2699.3(a)(1), Plaintiff submitted written  
15 notice via online filing to the LWDA, setting forth the facts and theories of the violations alleged  
16 against Defendants, claiming that he and others were misclassified by Defendants as independent  
17 contractors. Plaintiff then filed a PAGA action against Defendants on September 9, 2021, in Alameda  
18 Superior Court, Case No. RG21112189, entitled *Arnold Garcia v. McCollister's Transportation*  
19 *Systems, Inc., et al.* He alleged causes of action on behalf of himself and other owner operators seeking  
20 civil penalties under PAGA for: (1) Failure to Pay for All Time Worked; (2) Failure to Provide Meal  
21 Periods; (3) Failure to Authorize and Permit Rest Periods; (4) Failure to Pay All Wages Due at  
22 Termination; (5) Failure to Provide Itemized Wage Statements; (6) Failure to Pay All Wages Owed  
23 Twice Per Month; (7) Failure to Reimburse Business Expenses; and (8) Willful Misclassification.  
24 Mara Dec. ¶ 10.

25 Plaintiff also filed a class action against Defendants on September 10, 2021, in Alameda  
26 Superior Court, Case No. RG21112345, entitled *Arnold Garcia v. McCollister's Transportation*  
27 *Systems, Inc., et al.* Claiming that he and others were misclassified by Defendants as independent  
28

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<sup>4</sup> The Class Notice is attached to the Settlement as **Exhibit 1**.

1 contractors, he alleged causes of action on behalf of himself and other owner operators for: (1) Failure  
2 to Pay for All Time Worked; (2) Failure to Provide Meal Periods; (3) Failure to Authorize and Permit  
3 Rest Periods; (4) Failure to Provide Itemized Wage Statements; (5) Failure to Pay All Wages Due at  
4 Termination; (6) Failure to Reimburse Business Expenses; and (7) Violation of Unfair Competition  
5 Law.<sup>5</sup> Mara Dec. ¶ 11.

6 Defendants deny the allegations of the actions in their entirety, deny any liability or  
7 wrongdoing of any kind associated with the claims alleged in the actions, and further deny that, for  
8 any purpose other than settling this action, this matter is appropriate for class treatment. Defendants  
9 further contend that they have complied with all applicable California laws, the California Labor Code,  
10 the applicable California Wage Order(s), and the Unfair Competition Law. Defendants finally contend  
11 that, if this matter were to be litigated further, they would have strong defenses to oppose class  
12 certification and succeed on the merits of Plaintiff's causes of action. Mara Dec. ¶ 12.

### 13 **III. LITIGATION HISTORY/PARTIES CONTENTIONS**

#### 14 **a. Discovery and Investigation**

15 Through discovery, Plaintiff sought numerous documents and substantial amounts of data that  
16 were needed to evaluate the case. These documents included the contracts entered into between  
17 Defendants and owner operators, records reflecting freight hauled by Class Members for Defendant  
18 during the Class Period, as well as what they were paid for delivering the freight, including any  
19 deductions taken from payment by Defendants, policies and practices in place during the class period,  
20 detailing requirements and expectations for Class Members when delivering freight for Defendants'  
21 customers, as well as data surrounding the number of current and former employees. Mara Dec. ¶ 13.

22 This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the  
23 production of numerous documents and thousands of lines of data. Using the records reflecting the  
24 freight hauled by Class Members and the data surrounding the number of current and former Class  
25 Members, Plaintiff was able to extract numerous data points used in establishing a potential exposure  
26 model in preparation for mediation. Mara Dec. ¶ 14.

27  
28 \_\_\_\_\_  
<sup>5</sup> As part of the settlement process, the Parties have stipulated to consolidate these actions under the  
case number of the class action matter, RG21112345.

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

2                   **i. The Issue of Misclassification**

3                   Based upon the discovery conducted, Plaintiff contends – and Defendants deny – that  
4 Defendants misclassified Plaintiff, and other owner operators, as independent contractors, denying  
5 them the protections provided to employees under California law. Based on documents and data  
6 produced in this matter, Plaintiff contends that Defendants substantially control the Class Members  
7 and would meet the factors delineated in the *Borello* test in *S. G. Borello & Sons, Inc. v. Department*  
8 *of Industrial Relations* (1989) 48 Cal.3d 341, as well as the “ABC test” outlined in the California  
9 Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.

10                  Plaintiff contends that Defendants can terminate Class Members with or without cause, which  
11 is “the strongest evidence of the right to control...” *Ayala v. Antelope Valley Newspapers, Inc.* (2014)  
12 59 Cal.4th 522, 531. For example, under the Independent Contractor Operating Agreement (“ICOA”),  
13 the owner operators are subject to disqualification if Defendants deem them to be “unsafe” under  
14 Defendants’ safety policies. Defendants, in their sole discretion, obtain the customers and enter into  
15 agreements to deliver their freight, negotiate and set the rates the customers are to pay, and assign and  
16 dispatch the Class Members directly to transport the freight. Owner operators are also forbidden from  
17 subcontracting with anyone else to perform its deliveries, denying owner operators the opportunity to  
18 independently manage their “businesses.” Mara Dec. ¶ 15.

19                  Furthermore, Defendants exert control over many other aspects of the owner operator’s job  
20 performance. Defendants require owner operators to maintain certain wireless cell phone plans that  
21 contains certain specifications mandated by Defendants. Owner operators must paint their trailers  
22 white and place Defendants’ identifying information to their trailers, as well as wear Defendants’  
23 uniforms. Additionally, owner operators are required by Defendants to follow any and all instructions  
24 they receive from Defendants’ (not the owner operators’) customers and must submit their trucks and  
25 equipment for inspection with Defendants whenever Defendants so choose, with any costs associated  
26 with these inspections to be borne by the owner operators. Mara Dec. ¶ 16.

27                  Defendants contend that Plaintiff and putative class members are not their employees, and that  
28 they do not control Class Members’ hiring, firing, schedules, and/or pay. Defendants argue that Class

1 Members have independence in how to perform their jobs. Defendants contend that they do not control  
2 what Class Members do or how they perform their jobs. Defendants argue that they cannot simply  
3 unilaterally decide to “terminate” Class Members at will. Defendants claim they can merely terminate  
4 the agreement entered into with owner operators through the very terms of the agreement itself,  
5 severely limiting their ability to “terminate” owner operators at will. Mara Dec. ¶ 17.

6 Additionally, Defendants state that the various “controls” exerted on Class Members and  
7 “requirements” for how Class Members are to deliver freight are set forth either by the customers or  
8 pursuant to various federal laws and regulations, and not from Defendants. As such, these things  
9 cannot be considered as actions undertaken and/or controls asserted by the Defendants, and as a result,  
10 Plaintiff would fail to satisfy any of the factors required under the *Borello* test. Mara Dec. ¶ 18.

11 While Plaintiff believes in the strength of his arguments, he also recognizes the risk that the  
12 Court may determine Plaintiff and the putative class were not employees of Defendants. **If the Court**  
13 **ruled in favor of Defendants on this issue, all of Plaintiff’s claims below would be extinguished,**  
14 **as they are all dependent upon the Court agreeing that Defendants are Plaintiff’s and Class**  
15 **Members’ employer under California law.** Mara Dec. ¶ 19.

## 16 ii. Reimbursements and Deductions

17 Plaintiff claims that because Defendants misclassify Class Members as independent  
18 contractors, Defendants force owner operators to pay for the costs of doing business in violation of  
19 Labor Code § 2802. Labor Code § 2802 provides “[a]n employer shall indemnify his or her employee  
20 for all necessary expenditures or losses incurred by the employee in direct consequence of the  
21 discharge of his or her duties.” Labor Code § 2802 “is designed to prevent employers from passing  
22 their operating expenses on to their employees.” *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42  
23 Cal.4th 554, 562.

24 Defendants require owner operators to shoulder the costs of insuring their trucks, fueling their  
25 trucks, amongst various other costs. Here, Plaintiffs allege the Direct Contractors are misclassified as  
26 independent contractors when, under California law, they should be classified as employees. Just as  
27 Defendants could not charge their own employee drivers the cost of fuel, insurance, and taxes in the  
28 furtherance of Defendants’ business, it cannot do so to the owner operators, as they, too, are

1 Defendants' employees under California law. Mara Dec. ¶ 20.

2 Defendants argue that because owner operators are not employees and properly classified as  
3 independent contractors, they do not need to reimburse them for business expenses. Defendants argue  
4 that California Labor Code § 2802 only obligates an employer to indemnify its employee for expenses  
5 that the employee incurred while performing his or her job duties. As Defendants claim they are  
6 lawfully contracting with the owner operators to facilitate the delivery of the customer's freight, these  
7 expenses are properly borne by the owner operators pursuant to the terms of the agreements. Mara  
8 Dec. ¶ 21.

9 **iii. Meal and Rest Periods**

10 Plaintiff further contends that Defendants, as a result of their misclassification scheme,  
11 completely fail to provide Class Members with meal and rest periods. Under California Labor Code  
12 section 512, no employer shall employ any person for a work period of more than five hours without  
13 providing a meal period of not less than thirty minutes. *See also Brinker Rest. Corp. v. Superior Court*  
14 (2012) 53 Cal.4th 1004, 1037. Further, the IWC Wage Orders mandate that every employer authorize  
15 and permit all employees to take rest periods at the minimum rate of a net ten consecutive minutes for  
16 each four hour work period, or major fraction thereof.

17 Defendants have no evidence they provided Class Members with meal or rest periods. They  
18 have no meal or rest period policies they communicate to Class Members. They also have no records  
19 of meal or rest periods. Thus, it will be fairly simple to show Defendants failed to provide meal and  
20 rest periods to Class Members, who will be owed a 226.7 premium on every qualifying shift. Mara  
21 Dec. ¶ 22.

22 Defendants again argue that because Class Members are not employees and, instead, are  
23 properly classified as independent contractors, they are under no obligation to provide Class Members  
24 with meal or rest periods, as California law only requires an "employer" to provide them to its  
25 "employees." Defendants claim they are lawfully engaging with and utilizing Class Members to  
26 facilitate the delivery of the through the use of the agreements they enter into with the owner operators,  
27 and that the agreements clearly state that all of that any Class Member performing work under the  
28 terms of the agreements are independent contractors, not employees. Mara Dec. ¶ 23.

1 Defendants also point out that the Federal Motor Carrier Safety Administration’s (FMCSA)  
2 December 21, 2018, determination wherein the FMCSA found that California’s meal and rest break  
3 laws are preempted as applied to drivers of property-carrying commercial motor vehicles who are  
4 subject to the FMCSA’s own break regulations would similarly extinguish all of Plaintiff’s meal and  
5 rest period claims. On January 15, 2021, the Ninth Circuit upheld the FMCSA’s determination that  
6 federal law preempted California’s meal and rest break rules. *See Int’l Bhd. of Teamsters, Local 2785*  
7 *v. Fed. Motor Carrier Safety Admin.* (2021) 986 F.3d 841. As such, Defendants argues that FMCSA’s  
8 December 21, 2018, determination provides affirmative preemption defenses to Plaintiff’s claims for  
9 meal and rest break violations. Mara Dec. ¶ 24.

10 Plaintiff counters that the FMCSA’s determination does not apply retroactively. In *Garcia v.*  
11 *Superior Court* (2022) 80 Cal.App.5th 63, the Court of Appeal found the very language of the  
12 preemption decision suggested prospective application only and did not bar claims arising from  
13 conduct prior to the decision. In its ruling, the Court of Appeal held that “although the FMCSA had  
14 the authority to provide that ‘[a] State *may not enforce*’ its own laws (§ 31141(a)), the Preemption  
15 Decision elected to use more limited language, by providing that ‘California *may no longer enforce* the  
16 [meal and rest break rules] with respect to drivers of property-carrying [commercial motor vehicles]  
17 subject to FMCSA’s [hours of service] rules.’” *Garcia v. Superior Court* (2022) 80 Cal.App.5th 63,  
18 69 (citing Preemption Decision, 83 FR 67470, 67480) (italics added). “We presume the FMCSA was  
19 aware of the statute’s language and intentionally chose different language.” *Id.* “That language—‘may  
20 no longer enforce’—‘strongly suggests prospective, not retroactive, application.’” *Id.* (citing *North v.*  
21 *Superior Hauling & Fast Transit, Inc.* (C.D.Cal. May 31, 2019, No. EDCV 18-2564 JGB (KKx)) 2019  
22 U.S.Dist.LEXIS 217010 at \*9). Mara Dec. ¶ 25.

#### 23 **iv. Unpaid Wages**

24 Plaintiff also alleges that Defendants failed to pay all wages owed to Class Members. Regardless  
25 of how compensation is measured, California law mandates “[e]very employer shall pay to each  
26 employee on the established payday for the period involved, not less than the applicable minimum  
27 wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece,  
28 commission, or otherwise.” Wage Order 9-2001; Cal. Code Regs., Title 8, section 11040, subd. (4)(B);

1 Cal. Lab. Code, section 1194; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 44;  
2 *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323. Further, Labor Code sections 221, 222, &  
3 223 “require an employer to pay all employee hours at either the statutory or agreed rate and prohibit  
4 an employer from using any part of that rate as a credit against its minimum wage obligation.”  
5 *Gonzalez*, 135 Cal.App.4th at 47-48; *Armenta*, 135 Cal.App.4th at 323.

6 Owner operators are paid by the load, they are not paid for time when “the wheels are not  
7 moving,” but they are not stopped for a delivery, such as fueling up, sitting in traffic, for breakdowns,  
8 etc. A piece-rate pay formula that does not “compensate for all time worked does not comply with the  
9 California Labor Code, even if, averaged out, it would pay at least minimum wage for all hours  
10 worked.” *Cardenas v. McLane Foodservices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d 1246, 1252; See  
11 also, *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 49; *Armenta v. Osmose, Inc.*  
12 (2005) 135 Cal.App.4th 314, 320; *Reinhardt v. Gemini Motor Transport* (E.D. Cal.2012) 869  
13 F.Supp.2d 1158, 1168. Mara Dec. ¶ 26.

14 Defendants contend that as Class Members are properly classified as independent contractors  
15 under California law, none of the authorities relied upon by Plaintiff renders Defendants liable for any  
16 unpaid wages whatsoever. Defendants claim the only monetary compensation they are required to  
17 provide to the Class Members at all at any point in time is solely based on the provisions of the  
18 agreements it enters into with the owner operators, which compensates them for all the hours and  
19 various tasks necessary in furtherance of the freight deliveries. Mara Dec. ¶ 27.

20 As evidenced above, the Parties took staunchly conflicting positions with respect to Plaintiff’s  
21 claims.

### 22 **c. The Parties Agreed to Attend Mediation**

23 The Parties agreed to attend mediation with respected wage and hour mediator Mark Rudy on  
24 August 16, 2022. The matter did not settle at mediation. Mr. Rudy remained in regular contact with  
25 the Parties to facilitate negotiations, culminating in Mr. Rudy issuing a mediator’s proposal, which the  
26 Parties accepted on November 8, 2022. Since then, the Parties have met and conferred regarding the  
27 terms of the settlement and finalized their agreement in the Settlement. The Parties seek preliminary  
28 approval of the Settlement in the instant motion. (Mara Dec. ¶ 28; **Exhibit 1**).

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

2                   Under the terms of the proposed settlement, Defendants will create a settlement fund of  
3                   \$400,000.

4                   **i. Deductions From the Settlement**

5                   The Parties have agreed (subject to and contingent upon the Court’s approval) that this action  
6                   be settled and compromised for the non-reversionary total sum of \$400,000 (“Gross Settlement  
7                   Amount” or “GSA”), which includes, subject to Court approval: (a) attorneys’ fees of up to  
8                   \$133,333.33 (33 1/3 % of the MSA) to compensate Class Counsel for work already performed and all  
9                   work remaining to be performed in documenting the settlement, administrating the settlement, and  
10                  securing Court approval; (b) litigation expenses estimated not to exceed, \$30,000;<sup>6</sup> (c) service award  
11                  to the named class representative, Arnold Garcia, in a sum not to exceed \$7,500, in consideration for  
12                  agreeing to a general release of their claims against Defendants which is broader than that of other  
13                  class members, and in recognition of their efforts in prosecuting their actions; (d) claims administration  
14                  fees and expenses to Phoenix Class Action Administration Solutions (hereinafter “Phoenix”),  
15                  estimated not to exceed approximately \$5,000;<sup>7</sup> and (e) \$25,000 allocated to Plaintiff’s PAGA claims,  
16                  which is to be distributed only to “Aggrieved Employees.” Class Members who worked during the  
17                  “PAGA Period” of July 1, 2020 to January 7, 2023.

18                  **ii. Calculation of the Settlement Payments**

19                  After all Court-approved deductions from the GSA, it is estimated that \$199,166.67 (“Net  
20                  Settlement Amount” or “NSA”), less all applicable employee payroll taxes<sup>8</sup>, will be distributed to  
21                  Participating Class Members.<sup>9</sup> Subject to the terms and conditions of the Settlement, the payment of  
22                  the Individual Class Settlement Shares will be calculated as follows:

23                  \_\_\_\_\_  
24                  <sup>6</sup> These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the  
25                  amount of actual expenses incurred during the litigation of this case. Should the actual expenses exceed  
26                  \$30,000, Plaintiff will only seek reimbursement of costs up to \$30,000.

27                  <sup>7</sup> Phoenix will present to the Court a declaration in conjunction with the final approval motion  
28                  outlining the costs of the settlement administration process. If the settlement administration costs are  
29                  lower than the amount allocated in the Settlement, the difference will be added to the NSA for  
30                  distribution to Participating Class Members.

31                  <sup>8</sup> The employer’s share of payroll taxes due on the portion of the Individual Class Settlement Payments  
32                  that is allocated to wages shall be paid by Defendants separately and in addition to the GSA. **Exhibit**  
33                  **1** attached to the Mara Dec. at Section I, Paragraph 19.

34                  <sup>9</sup> Participating Class Members are Class Members who do not submit a valid and timely request to  
35                  exclude themselves from this Settlement.

Each Participating Class Member will receive a proportionate share of the Net Settlement Amount that is equal to (i) the number of weeks he or she contracted with and drove for Defendants, based on the Class Data provided by Defendants, 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 Settlement 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 Settlement Share ties directly to the amount of weeks that he or she worked.

**Exhibit 1** attached to the Mara Dec. at Section III, Paragraph 56(A)(i).

Furthermore, the Settlement allocates \$25,000 in consideration for the settlement of Plaintiff's PAGA claims, which is to be distributed separately from the NSA. Settlement Class Members who performed work for Defendants from July 1, 2020 to January 7, 2023 ("PAGA Period") are also deemed "Aggrieved Employees" and able to recover their share of the civil penalties under the settlement. 75% of this \$25,000, or \$18,750, will be paid to the LWDA, while the remaining 25%, or \$6,250, will be distributed to the Aggrieved Employees. The Settlement Administrator will calculate and issue Individual PAGA Settlement Shares based on the following formula:

Each Aggrieved Employee will receive a proportionate share of the Net PAGA Settlement Amount that is equal to (i) the number of weeks he or she contracted with and drove for Defendants, based on the PAGA Data provided by Defendants, divided by (ii) the total number of weeks worked by all Aggrieved Employees based on the same PAGA data, which is then multiplied by the Net PAGA Settlement Amount. One day worked in a given week will be credited as a week for purposes of this calculation. Therefore, the value of each Aggrieved Employee's Individual PAGA Settlement Share ties directly to the amount of weeks that he or she worked during the PAGA Period.

**Exhibit 1** attached to the Mara Dec. at Section VI, Paragraph 2.6(a).

The precise number of compensable weeks worked per class member will not be known until the administrator tabulates them, following preliminary approval. Under no circumstances will any portion of the \$400,000 settlement revert to Defendants and one hundred percent (100%) of the NSA is available for Class Members to claim.

The Individual Class Settlement Shares will be divided into a "wage portion" to compensate Participating Class Members for alleged unpaid wages and a "non-wage portion" to compensate Participating Class Members for alleged interest and penalties. Participating Class Members' individual settlement shares will be apportioned as follows: one-third wages, one-third interest, and

one-third penalties. The Individual PAGA Settlement Shares will be apportioned as one-hundred percent (100%) penalties.

**iii. Notice to the Class**

Within ten (10) business days after entry of the Preliminary Approval Order, Defendants shall deliver to the Settlement Administrator an electronic database, or which will list the following information for each Class Member: (1) first and last name; (2) last known mailing address; (3) social security number; and (4) the total number of weeks during which the Class Member performed work during the Class Period. The Class Data shall be based on Defendants' payroll, personnel, and other business records.

Within ten (10) business days after the receipt of the Class Data from Defendants, the Settlement Administrator will send all Class Members by First Class Mail, at their current or last known address, the Court-approved Class Notice. Class Members shall have sixty (60) days after the Class Notices are mailed to respond by submitting a challenge to the number of workweeks attributed to them, submitting an objection, or requesting to be excluded from the Settlement.

**iv. Distribution of Funds**

Within ten (10) business days after entry of the Effective Date,<sup>10</sup> Defendants shall fund the Settlement by wiring the GSA amount into an account established by the Settlement Administrator. Within ten (10) business days after wiring of the funds, the Settlement Administrator will distribute all payments due under the Settlement.

All funds associated with the Individual Settlement Share checks returned as undeliverable and funds associated with those checks remaining un-cashed shall be tendered to Legal Aid at Work. Legal Aid at Work is a nonprofit legal services organization that has been assisting low-income, working families for more than 100 years. Legal Aid at Work's Wage Protection Program represents low wage workers who are the victims of wage violations. The wage claims made by Legal Aid at Work's clients are often the same type of claims made in wage-and-hour class actions brought by workers under the federal Fair Labor Standards Act and under California wage-and-hour laws.

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<sup>10</sup> The "Effective Date" is when the final approval of the settlement can no longer be appealed, or, if there are no objectors and no plaintiffs in intervention at the time the court grants final approval of the settlement, the date the court enters judgment granting final approval of the settlement.

1                                    **v.     Release of Claims**

2             Under the terms of the Settlement, the Plaintiff and the Settlement Class Members will  
3 release the “Released Class Claims” for the entire Class Period, which are defined as:

4             [A]ll claims made or that could have been made based on the facts and  
5 circumstances alleged in the Complaints, including claims under California Labor  
6 Code sections 201-204, 205.5, 210, 218, 218.5, 221-223, 224, 226, 226.7, 510, 512,  
7 558, 1174, 1175, 1194, 1194.2, 1197, 1197.1, 1199, 2810.5 and 2802; California  
8 Business and Professions Code section 17200, et seq., California Wage Order No.  
9 9-2001; California Code of Regulations Title 8, section 11090; and any claim for  
10 attorneys’ fees and costs related to the above-referenced released claims.

11     See **Exhibit 1** Mara Dec., Section I, Paragraph 37.

12             Further, the State of California, the LWDA, and Plaintiff (as representative of the State of  
13 California, the LWDA, and the general public) under the California Private Attorney General Act  
14 (“PAGA”), will release the “Released PAGA Claims” for the entire PAGA Period, which are defined  
15 as:

16             [A]ll claims belonging to the State of California, the LWDA, and Plaintiff (as  
17 representative of the State of California, the LWDA, and the general public) under  
18 the California Private Attorney General Act (“PAGA”), Cal. Lab. Code § 2698, et  
19 seq. to the extent such claims are predicated on claims made or that could have been  
20 made based on the facts and circumstances alleged in the Complaints and Plaintiff’s  
21 notice to the LWDA, including claims under California Labor Code sections 201-  
22 204, 205.5, 210, 218, 218.5, 221-223, 224, 226, 226.7, 510, 512, 558, 1174, 1175,  
23 1194, 1194.2, 1197, 1197.1, 1199, 2810.5 and 2802; California Business and  
24 Professions Code section 17200, et seq., California Wage Order No. 9-2001;  
25 California Code of Regulations Title 8, section 11090; and any claim for attorneys’  
26 fees and costs related to the above-referenced released claims.

27     See **Exhibit 1** Mara Dec., Section I, Paragraph 38.

28             In addition, Plaintiff agrees to a general release of his claims against Defendants. See **Exhibit**

1 1 to the Mara Dec., Section III, Paragraph 63. At final approval, Class Counsel will seek approval of  
2 this service reward to Arnold Garcia in the sum of \$7,500. As will be detailed at final approval, the  
3 requested Class Representative Enhancement Payment is reasonable in light of the broad general  
4 release Plaintiff is giving to Defendants in exchange for the payments.

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

11 Plaintiff took it upon himself to delay recovery of his individual wage and hour claims by  
12 proceeding with class and representative actions, with a full understanding of the risks involved.  
13 Plaintiff was fully aware that class action and representative litigation would cause Defendants to incur  
14 hefty costs throughout the litigation, and that if he was unsuccessful in these cases, he might be liable  
15 for some, or even all, of these costs. Despite this knowledge, Plaintiff pushed forward with the  
16 litigation; he was always readily available by phone and fully participated every step of the way  
17 throughout the entirety of this process.

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

#### 24 **IV. ARGUMENT**

##### 25 **a. Class Action Settlements are Subject to Court Review and Approval Under the** 26 **California Rules of Court**

27 Rule 3.769 requires court approval for class action settlements.<sup>11</sup> “Before final approval, the  
28

<sup>11</sup> The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23 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 court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of Court,  
2 Rule 3.769(g).) Rule 3.769 further requires a noticed motion for preliminary approval of class  
3 settlements:

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

6 (c) Any party to a settlement agreement may serve and file a written notice of  
7 motion for preliminary approval of the settlement. The settlement agreement  
8 and proposed notice to class members must be filed with the motion, and the  
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 which is attached to the Declaration of David Mara, Esq. as **Exhibit 1**.

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

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

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

Both Plaintiff’s Counsel and Defendant’s Counsel are particularly experienced in wage and hour employment law and class actions. Plaintiff’s Counsel has significant experience in litigating unpaid wages, unprovided meal and rest periods, misclassification, overtime, and expense reimbursement class actions. Plaintiff’s Counsel has prosecuted numerous wage and hour class action cases on behalf of employees for California Labor Code violations and thus are experienced and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses. Mara Dec. ¶¶ 2-8; Declaration of Hunter Pyle, Esq. (“Pyle Dec.”) ¶¶ 3-16.

Indeed, Mara Law Firm, PC was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Mara Dec. ¶ 4. This experience instructed Plaintiff’s Counsel on the risks and uncertainties of further litigation and guided their determination to endorse the proposed settlement. Defendants’ Counsel has extensive experience representing companies and regularly deals with wage and hour litigation matters. Accordingly, both Parties’ Counsel are experienced in wage and hour employment law and class actions.<sup>12</sup>

<sup>12</sup> 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

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 Plaintiff’s Case and the Risks and Costs of Further Litigation**

21           The proposed settlement was only possible following significant discovery, an evaluation of  
22 Defendants’ relevant policies and procedures, and Plaintiff’s independent investigation. This  
23 permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The  
24 discovery conducted resulted in Plaintiff’s central theories of liability, which are predicated on  
25 Plaintiff’s claims that Defendants misclassified Plaintiff and Class Members as independent  
26 contractors, resulting in Defendants’ failure to provide Class Members with compliant meal and rest  
27 periods, failed to pay them for all time worked, and failed to reimburse them for business expenses.  
28 As explained above, Defendants maintain that the discovery produced demonstrates that they would

\_\_\_\_\_ will be provided to the Court in conjunction with the final approval motion.

1 succeed at both class certification and on the merits.

2 Plaintiff believes this case is suitable for certification on the claimed bases that the relevant  
3 contracts at issue are all uniform, and that there are company-wide policies and practices applicable  
4 to Class Members, both of which result in the requisite amount of control to render Class Members as  
5 employees under California Law. However, Defendants' counter-arguments and affirmative defenses  
6 raise uncertainties with respect to both class certification and success on the merits. As the California  
7 Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always  
8 a matter of the trial court's sound discretion. Decisions following *Sav-On* have reached different  
9 conclusions with respect to certification of wage and hour claims.<sup>13</sup> While remaining confident in the  
10 strengths of their claims, all of these factors led Plaintiff to discount the following maximum potential  
11 damage claims.

## 12 2. Exposure and the Risks for Each Claim

13 In addition to being able to discover the strengths and vulnerabilities associated with Plaintiff's  
14 claims, Defendants provided Plaintiff with information and data points which Plaintiff used to  
15 establish a representative damage model. Mara Dec. ¶ 29.

### 16 A. Reimbursement

17 Plaintiff alleges that as a result of Defendants' misclassification of Class Members, owner  
18 operators are forced to shoulder the costs of fuel, insurance, taxes, and other surcharges in the  
19 furtherance of Defendants' business, costs which Defendants would not be permitted to pass off to  
20 employees under California law. If Plaintiff were to prevail on this theory of liability, owner operators  
21 would be entitled to the reimbursement of these costs. At the time of mediation, Plaintiff was able to  
22 estimate that owner operators had approximately \$3,552,198 in total deducted from their pay to cover  
23 costs such as insurance, permits, and other necessary items. Therefore, the ***maximum potential***  
24 ***exposure*** under this theory of liability would be **\$3,552,198**. Mara Dec. ¶ 30. This maximum potential  
25 exposure, however, had to be discounted considerably in light of Defendants' arguments, which are

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26 <sup>13</sup> See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class  
27 claiming misclassification and ordering summary adjudication in favor of employees), *review granted*,  
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 outlined below.

2 Defendants argue that because owner operators are not employees and properly classified as  
3 independent contractors, it does not need to reimburse them for business expenses. Defendants argue  
4 that California Labor Code § 2802 only obligates an employer to indemnify its employee for expenses  
5 that the employee incurred while performing his or her job duties. As Defendants claim it is lawfully  
6 contracting with the owner operators to facilitate the delivery of the customer's freight, these expenses  
7 are properly borne by the owner operators pursuant to the terms of the agreements. Mara Dec. ¶ 31.

8 Furthermore, Defendants points out that Plaintiff would be unable to obtain class certification  
9 on this claim, claiming that Plaintiff and Class Members would be unable to present adequate records  
10 of these supposed costs and how they were necessary to performing their job duties, calling into  
11 question the issue of liability, as Plaintiff and Class Members would be unable to establish that they  
12 actually suffered any harm on a classwide basis. Should litigation continue, Plaintiff's risk the Court  
13 siding with Defendants' view, which would extinguish any potential recovery on this cause of action.  
14 Mara Dec. ¶ 32.

## 15 **B. Meal and Rest Periods**

16 Plaintiff contends that because Defendants misclassifies Plaintiff and Class Members as  
17 independent contractors, they are not provided with meal or rest periods, as independent contractors  
18 are not entitled to the protections California law provides for employees. If Plaintiff was to prevail on  
19 this theory of liability, Class Members would be entitled to a meal and rest period premium for each  
20 shift worked. Therefore, the *maximum potential exposure* under this theory of liability would be  
21 **\$161,874** (2,645 shifts<sup>14</sup> x \$30.60 approximate average hourly rate x 2 (1 meal period and 1 rest period  
22 premium per shift) = \$161,874). Mara Dec. ¶ 33. This maximum potential exposure, however, had to  
23 be discounted in light of Defendants' arguments, which are outlined below.

24 Defendants again argue that because Class Members are not employees and properly classified  
25 as independent contractors, it is under no obligation to provide Class Members with meal or rest

26 \_\_\_\_\_  
27 <sup>14</sup> Of the approximately 9,981 shifts worked by Class Members at the time of mediation,  
28 approximately 26.5%, or 2,645 shifts, occurred prior to the Federal Motor Carrier Safety  
Administration's (FMCSA) December 21, 2018, order, ruling that California's meal and rest break  
laws are preempted by FMCSA regulations. *See Garcia v. Superior Court* (2022) 80 Cal.App.5th 63,  
69 (holding that the very language of the FMCSA order suggested prospective application only and  
did not bar claims arising from conduct prior to the decision).

1 periods, as California law only requires an “employer” to provide them to its “employees.” Defendants  
2 claims it is lawfully engaging with and utilizing Class Members to facilitate the delivery of the through  
3 the use of the agreements it enters into with the owner operators, and that the agreements clearly state  
4 that all of that any Class Member performing work under the terms of the agreements are independent  
5 contractors, not employees. Should the Court agree with Defendants’ arguments, Plaintiff and Class  
6 Members would be entitled to no recovery under these causes of action. Mara Dec. ¶ 34.

### 7 **C. Unpaid Wages**

8 Plaintiff further alleges that Defendants have failed to pay Class Members for all hours worked,  
9 as Defendants unlawfully misclassified them as independent contractors as opposed to employees.  
10 Owner operators were paid by the load, and therefore were not compensated for any other time spent  
11 working. Accordingly, Defendants’ *maximum* exposure under Plaintiff’s unpaid wages claim is  
12 **\$610,837** (9,981 shifts x 2 hours of unpaid time per shift x \$30.60 = \$610,837). Mara Dec. ¶ 35.

13 As explained above, Defendants contends that as Class Members are properly classified as  
14 independent contractors under California law, none of the authorities relied upon by Plaintiff renders  
15 Defendants liable for any unpaid wages whatsoever. Defendants argue the only monetary  
16 compensation it is required to provide to the Class Members at all at any point in time is solely based  
17 on the provisions of the agreements it enters into with the owner operators, which compensates them  
18 for all the hours and various tasks necessary in furtherance of the freight deliveries. Furthermore,  
19 Defendants point out that Plaintiff would be unable to obtain class certification on this claim, claiming  
20 that Plaintiff and Class Members would be unable to present adequate records of these supposed  
21 unpaid wages not only making damages completely unmanageable, but also calling into question the  
22 issue of liability, as Plaintiff and Class Members would be unable to establish that they actually  
23 suffered this harm on a classwide basis. Mara Dec. ¶ 36.

### 24 **D. PAGA**

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

28 [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

1 employee per pay period for each subsequent violation.

2 Plaintiff alleges that Defendants have at least three (3) violations – failure to pay all time worked,  
3 failure to reimburse business expenses, and willful misclassification – of the Labor Code sections  
4 which give rise to PAGA penalties. The statute of limitations for PAGA violations goes back one year.  
5 Plaintiff calculated Defendants’ potential maximum exposure under PAGA as follows:

6 \$100 x 2 PAGA violations x 1,162 pay periods during the one-year statutory period = \$232,400

7 \$10,000<sup>15</sup> x 19 misclassified owner operators = \$190,000

8 \$232,400 + \$190,000 = \$422,400

9 Mara Dec. ¶ 37.

10 Plaintiff’s PAGA claims are subject to the same risks on the merits as Plaintiff’s non-PAGA  
11 claims. In addition, Labor Code § 2699, subdivision (e)(2) provides that “[i]n any action by an  
12 aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court  
13 may award a lesser amount than the maximum penalty amount specified by this part if, based on the  
14 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,  
15 arbitrary, oppressive, or confiscatory.” In *Thurman v. Bayshore Transit Management, Inc.*  
16 (“*Thurman*”) (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum  
17 penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the  
18 maximum amount. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112,  
19 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has taken its  
20 obligations to comply with the law seriously. *Id.* Defendants maintain that if the case were to continue  
21 in litigation, they would be able to show that they took their obligations to comply with the law  
22 seriously. As such, if Plaintiff were able to prevail on the merits of his PAGA claims, it is likely that  
23 the Court would reduce the maximum penalty allowed.

24 In addition, as the PAGA violations asserted by Plaintiff are predicated on the same unlawful  
25 conduct that Plaintiff bases his other claims, Plaintiff’s PAGA claims are subject to the same risks on  
26 the merits as Plaintiff’s class claims. If Plaintiff is ultimately unable to prevail on any one of his class  
27 claims, his recovery under the PAGA as to that violation would also fail. The likelihood of the Court  
28

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<sup>15</sup> Violations of § 226.8(c) for willful misclassification are \$10,000 per violation.

1 reducing the PAGA damages awarded to Plaintiff and the aggrieved employees – assuming liability  
2 is proven as to each of Plaintiff’s claims – is also higher in this case where these same individuals will  
3 also be receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold*  
4 *Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist.  
5 LEXIS 6142 \*17 (“Because the PAGA penalties sought are at least partially duplicative of penalties  
6 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 \$400,000 is Reasonable

11 Not taking into account any of their defenses or arguments, Defendants’ total exposure if  
12 Plaintiff is successful in his core claims would be approximately \$4,324,909 [\$3,552,198  
13 (reimbursement exposure) + \$161,874 (meal and rest period exposure) + \$610,837 (unpaid wages  
14 exposure) = \$4,324,909]. If his underlying core claims are successful, he may also be entitled to PAGA  
15 penalties in the amount of \$422,400. *Mara Dec.* ¶ 38.

16 Based upon the risks just discussed, Plaintiff had to discount his maximum potential exposure.  
17 Plaintiff also had to consider that, should the Court agree with his theories and grant certification as  
18 to each of the claims, he may not be awarded the full exposure at trial. This is particularly true when  
19 dealing with matters regarding the misclassification of employees as independent contractors. The  
20 only way Plaintiff and the Class Members would be entitled to **any recovery** hinges entirely on  
21 whether Defendants misclassified them as independent contractors. Should the Court determine that  
22 Defendants did not misclassify Plaintiff and Class Members, they would recover **nothing**. Further,  
23 even if the Court determined that Defendants misclassified Plaintiff and Class Members, the Court  
24 could still deny certification or abstain from awarding any damages as to the alleged causes of action  
25 pursuant to Defendants’ additional counter arguments and defenses. All of these factors led Plaintiff  
26 to reduce the realistic potential exposure in order to gain a definite monetary recovery for the class.

27 In light of the risks Plaintiff’s claims faced, Plaintiff and his Counsel believe that the settlement  
28 amount of \$400,000 – **with an average settlement share amount estimated at \$6,638.89** – is a

1 reasonable and fair settlement amount. Mara Dec. ¶ 39.

2 A settlement is not judged **solely** against what might have been recovered, had the plaintiffs  
3 prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and  
4 reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells*  
5 *Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; “Compromise is inherent and necessary in the  
6 settlement process...even if the relief afforded by the proposed settlement is substantially narrower  
7 than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because  
8 the public interest may indeed be served by a voluntary settlement in which each side gives ground in  
9 the interest of avoiding litigation.” *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm’n*  
10 (9th Cir. 1982) 688 F.2d 615, 628 (“It is well-settled law that a cash settlement amounting to only a  
11 fraction of the potential recovery does not...render the settlement inadequate or unfair”).

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

13 Under California law, a class action is appropriate when the class is ascertainable and there is  
14 “a well-defined community of interest in the questions of law and fact involved affecting the parties  
15 to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code of Civil  
16 Procedure § 382 for class certification follow federal law according to Rule 23 of the Federal Rule of  
17 Civil Procedure: numerosity, typicality of the class representatives’ claims, adequacy of  
18 representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also*  
19 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019.

20 It should be noted that while a court must certify a class for settlement purposes if a class has  
21 not already been certified, “it is well established that trial courts should use different standards to  
22 determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically,  
23 a lesser standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior*  
24 *Court* (2013) 113 Cal.App.4th 836, 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794,  
25 1807, fn. 19.

26 Plaintiff seeks approval of the following Class for settlement purposes only: all persons who  
27 contracted with Defendants as an owner/operator to haul freight, who worked a majority of their time  
28 under the contract in California and/or had their base of operations in California, whom Defendants

1 classified as independent contractors, and who drove in California from September 10, 2017, through  
2 January 7, 2023.

3 Plaintiff contends, and Defendants do not dispute for settlement purposes only, that each of the  
4 elements necessary for class certification is present, as follows. *See Wershba v. Apple Computer*  
5 (2001) 91 Cal. App. 4th 224, 237-38.

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

7 Plaintiff contends that the proposed Settlement Class is ascertainable because of all of the class  
8 members have performed work for Defendants and have been identified through Defendants' own  
9 records. *See Rose v City of Hayward* (1981) 126 Cal.App.3d 926,932 (finding that "Class Members  
10 are 'ascertainable' where they may be readily identified without unreasonable expense or time by  
11 reference to official records."); *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 ("[c]lass  
12 members are 'ascertainable' where they may be readily identified without unreasonable expense or  
13 time by reference to official [or business] records."). Thus, the ascertainability requirement is met.

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

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

(2007) 42 Cal.4th 443, 460 (citation omitted), overruled on other grounds in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.

Here, Defendants’ records show that the proposed Settlement Class has approximately thirty (30) members. Plaintiff contends that joinder of all Settlement 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. Accordingly, the Class that is comprised of approximately thirty (30) 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, Plaintiff contends that the proposed Class Members’ claims all stem from the same allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff seeks the same legal remedies under state law on behalf of himself and all Class Members. As liability as to all Class Members is predicated on the same policies and practices, which Plaintiff alleges violate California law, the commonality requirement has been satisfied.

### **iv. The Typicality Requirement is Met**

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

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

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

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

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

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

The proposed Class Notice meets all of these requirements. The proposed Class Notice advises  
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 1** to the Settlement.

3 **V. CONCLUSION**

4 Plaintiff respectfully submits 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: March 17, 2023

Signed: 

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