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6 ESCAMILLA, on behalf of themselves, all others
similarly situated and on behalf of the general public.
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN BERNARDINO**

10 Plaintiffs EDDIE ESCAMILLA and
11 GUSTAVO ESCAMILLA, on behalf of
themselves, all others similarly situated, and
12 on behalf of the general public,

13 Plaintiffs,

14 v.

15 KEYSTONE FREIGHT CORP.;
16 NATIONAL RETAIL
TRANSPORTATION, INC.; and DOES 2
17 through 100,

18 Defendant.
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Case No. CIVDS1931366

**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: April 13, 2022

Time: 10:00 a.m.

Judge: Hon. David S. Cohn

Dept.: S26

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1 **I. INTRODUCTION**

2 Plaintiffs Ashley Caballero, America Caballero, and Luis Venegas (“Plaintiffs”), on behalf of
3 themselves and the approximately 230-member putative class, respectfully request that this Court
4 preliminarily approve the Joint Stipulation of Class Action and PAGA Settlement and Release¹
5 (“Settlement”) entered into between Plaintiffs and Defendants National Retail Transportation, Inc. and
6 Keystone Freight Corp. (“Defendant”) (Plaintiffs and Defendant are collectively referred to as the
7 “Parties”). The Parties’ Settlement seeks to resolve claims raised against Defendant in this matter in
8 exchange for a non-reversionary \$1,500,000 Maximum Settlement Amount (“MSA”). The proposed
9 class is comprised of all individuals that performed work for Defendant in California pursuant to
10 owner-operator agreements (“Direct Contractors”) and/or pursuant to being hired by Direct
11 Contractors to perform the work under the owner-operator agreements without being a party to the
12 agreements (“Secondaries”) (collectively “Class Members” or “Settlement Class”). The Class Period
13 is the time period beginning on October 18, 2015, through April 11, 2022.²

14 It is requested that the Court grant preliminary approval, as, when analyzing the strengths and
15 vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this proposed
16 settlement of \$1,500,000 – **which is estimated to pay class members an average settlement share**
17 **of approximately \$3,333.54**³ – is well within the range of reasonableness. Moreover, the proposed
18 Agreement satisfies all of the criteria for preliminary approval under Rule 3.769 of the California
19 Rules of Court.

20 As the following sections show, Class Counsel are convinced that the proposed settlement is in
21 the best interests of the Class based on the negotiations and a detailed knowledge of the issues present
22 in this action. The length and risks of trial and perils of litigation that affect the value of the claims
23 were all carefully weighed. In addition, the defenses asserted by Defendant, the uncertainty of class
24 certification, the difficulties of complex litigation, the lengthy process of establishing specific damages
25 and various possible delays and appeals, were also carefully considered by Class Counsel in arriving
26

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

28 ² April 11, 2022 is sixty (60) days after the execution of the memorandum of understanding.

³ \$865,000 estimated Net Settlement Amount (“NSA”) / 230 class members = \$3,760.86 average
payout per Class Member.

1 at the proposed settlement. The Settlement was the product of an all-day mediation with well-regarded
2 and experienced mediator Jeff Ross and was the product of non-collusive, arm's-length negotiations
3 by informed counsel and parties. The settlement is fair, reasonable, and adequate to all. Accordingly,
4 Plaintiffs seek: (1) preliminary approval of the terms contained in the Settlement; (2) provisional
5 certification of the Class; (3) appointment of Plaintiffs as Class Representatives; (4) appointment of
6 Mara Law Firm, PC as Class Counsel; (5) approval of the Parties' proposed notice of class action
7 settlement⁴ (referred to herein as the "Class Notice" or "Notice") and method of notifying the Class
8 about the settlement; and (6) set a hearing date for final approval.

9 II. FACTUAL/PROCEDURAL BACKGROUND

10 Defendant is in the business of transporting freight for their customers. In order to transport its
11 customers' freight, Defendant both contracts directly with entities or individuals to provide these
12 freight delivery services ("Direct Contractors"), as well as utilizes other individuals who work for a
13 Contract Carrier to either drive a truck and delivered freight for Defendant or assisted a Driver on his
14 or her route in the delivery of freight ("Secondaries"). Plaintiffs Eddie Escamilla and Gustavo
15 Escamilla contracted directly with Defendant as Direct Contractors, and Plaintiff Arturo Escamilla
16 worked as a Secondary. Mara Dec. ¶ 9.

17 Plaintiffs filed this class action against Defendant on October 18, 2019. Claiming that they and
18 others were misclassified by Defendant as independent contractors, they alleged causes of action on
19 behalf of themselves and other Direct Contractors and Secondaries for: (1) Failure to Pay Straight
20 Time Wages; (2) Failure to Pay Overtime; (3) Failure to Provide Meal Periods; (4) Failure to Authorize
21 and Permit Rest Periods; (5) Failure to Provide Accurate Wage Statements; (6) Failure to Pay Wages
22 Due at Termination; (7) Failure to Reimburse Business Expenses; and (8) Violation of Unfair
23 Competition Law. On November 27, 2019, Plaintiffs filed a First Amended Complaint, removing
24 Arturo Escamilla as a Plaintiff, and removing causes of action for Failure to Pay Overtime, Failure to
25 Provide Accurate Wage Statements and Failure to Pay Wages Due at Termination. Mara Dec. ¶ 10.

26 In response, Defendant answered the complaint and filed a cross-complaint against J&G Bros,
27 LLC and Eddie Escamilla Trucking, Inc., the entities Plaintiffs Gustavo and Eddie Escamilla operated
28

⁴ The Class Notice is attached to the Settlement as **Exhibit 1**.

1 when contracting with Defendant, in an attempt to hold Plaintiffs liable for the violations alleged
2 within the complaint. Plaintiffs demurred to Defendant’s cross-complaint, which the Court sustained
3 without leave to amend on December 18, 2020. Mara Dec. ¶ 11.

4 As part of the settlement process, the Parties agreed to file a Second Amended Complaint in
5 this matter in order to re-allege claims for Failure to Provide Accurate Wage Statements and Failure
6 to Pay Wages Due at Termination, allege claims under the Private Attorneys General Act of 2004
7 (“PAGA”), and re-add Arturo Escamilla as a Plaintiff. In compliance with Labor Code § 2699.3(a)(1),
8 Plaintiffs submitted written notice via online filing to the LWDA, setting forth the facts and theories
9 of the violations alleged against Defendant, claiming that he and others were misclassified by
10 Defendant as independent contractors on February 16, 2022. The agreed upon Second Amended
11 Complaint is attached to the Mara Dec. as **Exhibit 2**. Plaintiffs respectfully request that the Court
12 deem filed the Second Amended Complaint and deem it answered with the answer currently on file in
13 this action. Mara Dec. ¶ 12.

14 Defendant denies the allegations of the action in its entirety, deny any liability or wrongdoing
15 of any kind associated with the claims alleged in this action, and further deny that, for any purpose
16 other than settling this action, this matter is appropriate for class treatment. Defendant further contends
17 that it has complied with all applicable California laws, the California Labor Code, the applicable
18 California Wage Order(s), and the Unfair Competition Law. Defendant finally contends that, if this
19 matter were to be litigated further, it would have strong defenses to oppose class certification and
20 succeed on the merits of Plaintiffs’ causes of action. Mara Dec. ¶ 13.

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

22 **a. Discovery and Investigation**

23 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data that
24 were needed to evaluate the case. These documents included the contracts entered into between
25 Defendant and Direct Contractors, records detailing all of the routes driven by Class Members for
26 Defendant during the Claims Period, policies and practices in place during the class period, detailing
27 requirements and expectations for Class Members when delivering freight for Defendant’s customers,
28 as well as data surrounding the number of current and former employees. Mara Dec. ¶ 14.

1 To obtain these documents and data, the Parties engaged in extensive discovery. Plaintiffs
2 propounded three sets of special interrogatories and requests for production of documents on
3 Defendant, and Defendant propounded two sets of special interrogatories, form interrogatories,
4 requests for admission, and requests for production of documents on Plaintiffs. This discovery, in
5 conjunction with the Parties' meet and confer efforts, resulted in the production of nearly 4,000
6 documents and thousands of lines of data. Using the records detailing the routes driven by Class
7 Members and the data surrounding the number of current and former Class Members, Plaintiffs' expert
8 was able to provide numerous data points used in establishing a potential exposure model in
9 preparation for mediation. Mara Dec. ¶ 15.

10 **b. The Parties' Staunchly Conflicting Positions**

11 **i. The Issue of Misclassification**

12 Based upon the discovery conducted, Plaintiffs contend – and Defendant denies – that
13 Defendant misclassified Plaintiffs, and other Direct Contractors and Secondaries, as independent
14 contractors, denying them the protections provided to employees under California law. Based on
15 documents and data produced in this matter, Plaintiffs contend that Defendant substantially controls
16 the Class Members and would meet the factors delineated in the *Borello* test in *S. G. Borello & Sons,*
17 *Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, as well as the “ABC test” outlined in
18 the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4
19 Cal.5th 903.

20 Plaintiffs contend that Defendant can terminate Class Members with or without cause, which
21 is “the strongest evidence of the right to control...” *Ayala v. Antelope Valley Newspapers, Inc.* (2014)
22 59 Cal.4th 522, 531. Defendant does not enter contractual agreements for any set duration, instead
23 entering into an agreement that acknowledges that Defendant can terminate their “employment at any
24 time, with or without cause and with or without prior notice.” Defendant, in its sole discretion, obtains
25 the customers and enters into agreements to deliver their freight, negotiates and sets the rates the
26 customers are to pay, and assigns and dispatches the Class Members directly to transport the freight.
27 Additionally, Defendant exerts a tremendous amount of control over Class Members in other aspects
28 as well, as they must preplan their routes, are required to avoid high crime areas, are not allowed to go

1 off route, make stops that are not authorized by Defendant, or leave a loaded trailer unattended, and
2 they must remain in constant contact with dispatch. Mara Dec. ¶ 16.

3 Defendant contends that Plaintiffs and putative class members are not its employees, and that
4 it does not control Class Members' hiring, firing, schedules, and/or pay. Defendant argues that that
5 Class Members have independence on how to perform their jobs. Defendant contends that it does not
6 control what Class Members do or how they perform their jobs. Defendant argues that it cannot simply
7 unilaterally decide to "terminate" Class Members at will. Defendant claims they can merely terminate
8 the agreement entered into with Direct Contractors through the very terms of the agreement itself,
9 severely limiting their ability to "terminate" Direct Contractors at will. Furthermore, Defendant states
10 they have absolutely zero control over the hiring or firing of Secondaries, as those tasks are clearly
11 delegated to the Direct Contractors as a part of the agreements. Defendant also points out that the
12 various "controls" exerted on Class Members and "requirements" for how Class Members are to
13 deliver freight are set forth by the customers, not Defendant, and as such, these things cannot be
14 considered as actions undertaken by the Defendant. Mara Dec. ¶ 17.

15 While Plaintiffs believe in the strength of their arguments, they also recognize the risk that the
16 Court may determine Plaintiffs and the putative class were not employees of Defendant. **If the Court**
17 **ruled in favor of Defendant on this issue, all of Plaintiffs' claims below would be extinguished,**
18 **as they are all dependent upon the Court agreeing that Defendant is Plaintiffs' and Class**
19 **Members employer under California law.** Mara Dec. ¶ 18.

20 ii. Reimbursements and Deductions

21 Plaintiffs claim that because Defendant misclassifies Class Members as independent
22 contractors, Defendant forces Direct Contractors to pay for the costs of doing business in violation of
23 Labor Code § 2802. Labor Code § 2802 provides "[a]n employer shall indemnify his or her employee
24 for all necessary expenditures or losses incurred by the employee in direct consequence of the
25 discharge of his or her duties." Labor Code § 2802 "is designed to prevent employers from passing
26 their operating expenses on to their employees." *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42
27 Cal.4th 554, 562.

28 Defendant requires Direct Contractors to shoulder the costs of insuring their trucks, fueling

1 their trucks, amongst various other costs. Here, as Plaintiffs allege the Direct Contractors are
2 misclassified as independent contractors when, under California law, they should be classified as
3 employees. Just as Defendant could not charge its own employee drivers the cost of fuel and insurance
4 in the furtherance of Defendant's business, it cannot do so to the Direct Contractors, as they, too, are
5 Defendant's employees under California law. Mara Dec. ¶ 19.

6 Defendant argues that because Direct Contractors are not employees and properly classified as
7 independent contractors, it does not need to reimburse them for business expenses. Defendant argues
8 that California Labor Code § 2802 only obligates an employer to indemnify its employee for expenses
9 that the employee incurred while performing his or her job duties. As Defendant claims it is lawfully
10 contracting with the Direct Contractors to facilitate the delivery of the customer's freight, these
11 expenses are properly borne by the Direct Contractors pursuant to the terms of the agreements. Mara
12 Dec. ¶ 20.

13 **iii. Meal and Rest Periods**

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

21 Defendant has no evidence they provided Class Members with meal or rest periods. They have
22 no meal or rest period policies they communicate to Class Members. They also have no records of
23 meal or rest periods. Thus, it will be fairly simple to show Defendant failed to provide meal and rest
24 periods to Class Members, who will be owed a 226.7 premium on every qualifying shift. Mara Dec. ¶
25 21.

26 Defendant again argues that because Class Members are not employees and properly classified
27 as independent contractors, it is under no obligation to provide Class Members with meal or rest
28 periods, as California law only requires an "employer" to provide them to its "employees." Defendant

1 claims it is lawfully engaging with and utilizing Class Members to facilitate the delivery of the through
2 the use of the agreements it enters into with the Direct Contractors, and that the agreements clearly
3 state that all of that any Class Member performing work under the terms of the agreements are
4 independent contractors, not employees. Mara Dec. ¶ 22.

5 Defendant also points out that the Federal Motor Carrier Safety Administration's (FMCSA)
6 December 21, 2018, determination wherein the FMCSA found that California's meal and rest break
7 laws are preempted as applied to drivers of property-carrying commercial motor vehicles who are
8 subject to the FMCSA's own break regulations would similarly extinguish all of Plaintiffs' meal and
9 rest period claims. On January 15, 2021, the Ninth Circuit upheld the FMCSA's determination that
10 federal law preempted California's meal and rest break rules. *See Int'l Bhd. of Teamsters, Local 2785*
11 *v. Fed. Motor Carrier Safety Admin.* (2021) 986 F.3d 841. As such, Defendant argues that FMCSA's
12 December 21, 2018, determination provides affirmative preemption defenses to Plaintiffs' claims for
13 meal and rest break violations. Mara Dec. ¶ 23.

14 Plaintiffs argue that the FMCSA's determination does not apply retroactively. Federal agency
15 decisions and orders, like the FMCSA Order, are "subject to the presumption of prospectivity that
16 attends true exercises of legislative authority." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144 (10th
17 Cir. 2016) (citing *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015)). Hence, as the United
18 Supreme Court found over thirty years ago, administrative rules and orders are not retroactively
19 applied unless "the power to promulgate retroactive rules...is conveyed by Congress in express
20 terms." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Evaluating whether the
21 preemption decision is retroactive requires determining whether the decision explicitly states that it
22 applies retroactively, and if it does not, determining whether the decision would have a retroactive
23 effect on the rights of private individuals. *See In re ADC Telecoms., Inc. Sec. Litig.*, 409 F.3d 974, 976
24 (8th Cir. 2005). If the statute or regulation does not explicitly state that it applies retroactively, and its
25 application would have retroactive effect, the court may not apply it retroactively. *Id.* As neither the
26 decision nor its authorizing statute contain any explicit language on retroactivity, and because a
27 retroactive application of the decision would detrimentally effect the right of private individuals
28 (namely, extinguishing Plaintiffs' claims for meal and rest periods entirely), the preemption decision

cannot be applied retroactively. Mara Dec. ¶ 24.

iv. Unpaid Wages

Plaintiffs also allege that Defendant failed to pay all wages owed to Class Members. Regardless of how compensation is measured, California law mandates “[e]very employer shall pay to each employee on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.” Wage Order 9-2001; Cal. Code Regs., Title 8, section 11040, subd. (4)(B); Cal. Lab. Code, section 1194; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 44; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323. Further, Labor Code sections 221, 222, & 223 “require an employer to pay all employee hours at either the statutory or agreed rate and prohibit an employer from using any part of that rate as a credit against its minimum wage obligation.” *Gonzalez*, 135 Cal.App.4th at 47-48; *Armenta*, 135 Cal.App.4th at 323.

Direct Contractors are paid by the mile and by the delivery, they are not paid for time when “the wheels are not moving,” but they are not stopped for a delivery, such as fueling up, sitting in traffic, for breakdowns, etc. A piece-rate pay formula that does not “compensate for all time worked does not comply with the California Labor Code, even if, averaged out, it would pay at least minimum wage for all hours worked.” *Cardenas v. McLane Foodservices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d 1246, 1252; See also, *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 49; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 320; *Reinhardt v. Gemini Motor Transport* (E.D. Cal.2012) 869 F.Supp.2d 1158, 1168. Mara Dec. ¶ 25.

Secondaries are paid a daily flat rate. In California, wage structures that do not compensate by the hour, like a salary or a commission, are only said to compensate for *non-overtime hours*. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 565 (“[T]he flat sum compensates the worker for only non- overtime hours worked.”). Put differently, flat daily rates earned are only compensation for eight daily hours and forty weekly hours. For any work over 8 daily or 40 weekly, employees are receiving no compensation under the flat rate pay structure. To find otherwise, meaning piece-rate and flat rate pay structures also pay for hours in excess of eight daily or forty weekly, would mean employees paid via these compensation methods would be paid *less* money per hour for overtime

1 work, which is an interpretation that does not favor the protection of the employee’s interest or
2 discourage employers from imposing overtime work and cannot stand. *Id.* at 562 (“...[W]e are
3 obligated to prefer an interpretation that discourages employers from imposing overtime work that
4 favors the protection of the employee’s interests.”). Because these pay structures – like all non-hourly
5 pay systems – can only pay for non-overtime hours, Secondaries are paid nothing for any hours worked
6 in excess of eight in a single day. Mara Dec. ¶ 26.

7 Defendant contends that as Class Members are properly classified as independent contractors
8 under California law, none of the authorities relied upon by Plaintiffs renders Defendant liable for any
9 unpaid wages whatsoever. Defendant the only monetary compensation it is required to provide to the
10 Class Members at all at any point in time is solely based on the provisions of the agreements it enters
11 into with the Direct Contractors, which compensates them for all the hours and various tasks necessary
12 in furtherance of the freight deliveries. Furthermore, while Defendant acknowledges that the
13 agreements call for it to provide the Direct Contractors with certain forms of compensation pursuant
14 to the terms of the agreements, Defendant is under no duty to provide any form of compensation to
15 the Secondaries. Mara Dec. ¶ 27.

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

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

19 The Parties agreed to attend mediation with respected wage and hour mediator Jeff Ross on
20 August 12, 2021. The matter did not settle at mediation. Mr. Ross remained in regular contact with
21 the Parties to facilitate negotiations, culminating in Mr. Ross issuing a mediator’s proposal, which the
22 Parties accepted on January 7, 2022. Since then, the Parties have met and conferred regarding the
23 terms of the settlement and finalized their agreement in the Settlement. The Parties seek preliminary
24 approval of the Settlement in the instant motion. (Mara Dec. ¶ 28; **Exhibit 1**).

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

26 Under the terms of the proposed settlement, Defendants will create a settlement fund of
27 \$1,500,000.
28

1 **i. Deductions From the Settlement**

2 The Parties have agreed (subject to and contingent upon the Court’s approval) that this action
3 be settled and compromised for the non-reversionary total sum of \$1,500,000 (“Maximum Settlement
4 Amount” or “MSA”), which includes, subject to Court approval: (a) attorneys’ fees of up to \$500,000
5 (33 1/3 % of the MSA) to compensate Class Counsel for work already performed and all work
6 remaining to be performed in documenting the settlement, administrating the settlement, and securing
7 Court approval; (b) litigation expenses estimated not to exceed, \$20,000;⁵ (c) service awards to the
8 named class representatives, Eddie Escamilla and Gustavo Escamilla, in a sum not to exceed \$10,000
9 each, and Arturo Escamilla in a sum not to exceed \$5,000, in consideration for agreeing to a general
10 release of their claims against Defendant which is broader than that of other class members, and in
11 recognition of their efforts in prosecuting their actions; (d) claims administration fees and expenses to
12 Phoenix Class Action Administration Solutions (hereinafter “Phoenix”), estimated not to exceed
13 approximately \$15,000;⁶ and (e) \$75,000 allocated to Plaintiffs’ PAGA claims, which is to be
14 distributed only to “PAGA Employees:” Class Members who worked during the “PAGA Period”
15 (October 18, 2018 to April 11, 2022).

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

17 After all Court-approved deductions from the MSA, it is estimated that \$865,000 (“Net
18 Settlement Amount” or “NSA”), less all applicable employee payroll taxes⁷, will be distributed to
19 Participating Class Members.⁸ Subject to the terms and conditions of the settlement, the payment of
20 the Individual Class Settlement Payments will be calculated as follows: For each Participating Class
21

22 ⁵ These will be tabulated and presented to the Court at final approval. Plaintiffs will only seek the
23 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.

24 ⁶ Phoenix will present to the Court a declaration in conjunction with the final approval motion
25 outlining the costs of the settlement administration process. If the settlement administration costs are
lower than the amount allocated in the Settlement, the difference will be added to the NSA for
distribution to Participating Class Members.

26 ⁷ The employer’s share of payroll taxes due on the portion of the Individual Class Settlement Payments
27 that is allocated to wages shall be paid by Defendant separately and in addition to the MSA. **Exhibit**
1 attached to the Mara Dec. at Section VI, Paragraph 1.7.

28 ⁸ Participating Class Members 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 VI, Paragraph
1.24.

1 Member, the Participating Class Members Individual Class Workweeks will be divided by the total
2 number of Participating Class Member Workweeks. The resulting number will then be multiplied by
3 the Net Settlement Amount. **Exhibit 1** attached to the Mara Dec. at Section VI, Paragraph 2.6(b).
4 Participating Class Members who were Direct Contractors are credited with six times the actual
5 number of Workweeks worked for Defendant during the Class Period. *Id.* at Section VI, Paragraph
6 1.4.

7 Furthermore, the Settlement allocates \$75,000 in consideration for the settlement of Plaintiffs’
8 PAGA claims, which is to be distributed separately from the NSA. Settlement Class Members who
9 performed work for Defendant from October 18, 2018 to April 11, 2022 (“PAGA Period”) are also
10 deemed “PAGA Employees” and able to recover their share of the civil penalties under the settlement.
11 75% of this \$75,000, or \$56,250, will be paid to the LWDA, while the remaining 25%, or \$18,750,
12 will be distributed to the PAGA Employees. The Settlement Administrator will calculate and issue
13 Individual PAGA Settlement Payments based on the following formula: each PAGA Employees’
14 portion will be determined by dividing each PAGA Employees Individual PAGA Workweeks, by the
15 total amount of PAGA Workweeks, and then multiplying the result by \$18,750. **Exhibit 1** attached to
16 the Mara Dec. at Section VI, Paragraph 2.6(a). PAGA Employees who where Direct Contractors are
17 credited with six times the actual number of Workweeks worked for Defendant during the PAGA
18 Period. *Id.* at Section VI, Paragraph 1.23.

19 As explained in further detail below, these additional workweeks credited to the Direct
20 Contractors for the purposes of determining Individual Class Settlement Payments and Individual
21 PAGA Settlement Payments were determined due to the larger amount of potential exposure for the
22 claims of the Direct Contractors when compared to the claims of the Secondaries, most notably due to
23 the reimbursement exposure attributable to the Direct Contractors.

24 The precise number of compensable weeks worked per class member will not be known until
25 the administrator tabulates them, following preliminary approval. Under no circumstances will any
26 portion of the \$1,500,000 settlement revert to Defendant and one hundred percent (100%) of the NSA
27 is available for Class Members to claim.

28 The Individual Class Settlement Payments will be divided into a “wage portion” to compensate

1 Participating Class Members for alleged unpaid wages and a “non-wage portion” to compensate
2 Participating Class Members for alleged interest and penalties. Participating Class Members’
3 individual settlement shares will be apportioned as follows: twenty-five percent (25%) wages and
4 seventy-five percent (75%) interest and penalties. The Individual PAGA Settlement Payments will be
5 apportioned as one-hundred percent (100%) penalties.

6 **iii. Notice to the Class**

7 Upon the Court granting preliminary approval of this Settlement, Defendant shall provide the
8 Settlement Administrator, in electronic form, a list which sets forth the following information: the full
9 name, last known address, social security number, and dates of employment with Defendant during
10 the Class Period (“Class List”) within fourteen (14) calendar days.

11 Within twenty (20) days of Preliminary Approval of this Settlement, the Settlement
12 Administrator will send all Class Members by First Class Mail, at their current or last known address,
13 the Court-approved Class Notice. For Class Members who were not employed by Defendant as of the
14 Preliminary Approval Date prior to mailing the Class Notice, the Settlement Administrator will
15 undertake a Reasonable Address Verification to ascertain the accuracy of the Last Known Address of
16 the Class Member. The Settlement Administrator will use reasonable efforts, including tracing, to
17 identify the correct address and re-mail all returned, undelivered mail within three (3) business days
18 of receipt of the returned Class Notice. The Settlement Administrator will include a cover letter with
19 any re-mailing to inform the Class Member that the Class Notice was re-mailed and that he or she has
20 the later of the Response Deadline or ten (10) calendar days from the date on which the Class Notice
21 was re-mailed (which shall be the date the re-mailing of the Class Notice is postmarked) to Opt Out,
22 object to the Settlement, and/or dispute the number of Workweeks credited to him or her. The Parties
23 agree to cooperate with the Settlement Administrator to locate Class Members, if necessary.

24 Class Members shall have sixty (60) days after the Class Notices are mailed to respond by
25 submitting a challenge to the number of workweeks attributed to them, submitting an objection, or
26 requesting to be excluded from the Settlement.
27
28

1 **iv. Distribution of Funds**

2 Within forty-five (45) days after entry of the Effective Date,⁹ Defendant shall fund the
3 Settlement by wiring the MSA amount into an account established by the Settlement Administrator.
4 Within fifteen (15) days after wiring of the funds, the Settlement Administrator will distribute all
5 payments due under the Settlement.

6 To the extent that there are excess funds from uncashed checks for Class Members and PAGA
7 Employees who cannot be located, the parties agree that such funds shall be submitted to the State
8 Controller Unclaimed Property Fund in the name of the Class Member and/or PAGA Employee for
9 whom the funds are designated, 180 days after the checks have been mailed to the Class Members and
10 PAGA Employees.

11 **v. Release of Claims**

12 Under the terms of the Settlement, the Plaintiffs and the Settlement Class Members, release
13 any and all claims that are asserted in the Second Amended Complaint and which could have been
14 asserted based on the facts alleged in the complaint. A full recital of the released claims can be found
15 in **Exhibit 1** attached to the Declaration of David Mara, Esq., which is the Settlement, in Section VI,
16 Paragraphs 1.29 and 1.30.

17 In addition, Plaintiffs agreed to a general release of their claims against Defendant. (*See*
18 **Exhibit 1** to the Mara Dec., Section VI, Paragraph 3.5.3). At final approval, Class Counsel will seek
19 approval of these service rewards to Eddie Escamilla and Gustavo Escamilla in the sum of \$10,000
20 each, and Arturo Escamilla in the sum of \$5,000. As will be detailed at final approval, the requested
21 Class Representative Enhancement Payments are reasonable in light of the broad general release
22 Plaintiffs are giving to Defendant in exchange for the payments.

23 In addition, these payments are further supported by the fact that plaintiffs are often subjected
24

25 ⁹ “Effective Date” means the later of: (a) if no objections to the Settlement are submitted, the date on
26 which the Court issues the Final Approval Order and Judgment; (b) if any objections to the Settlement
27 are submitted, the date which is forty-five (45) calendar days after notice of entry of the Final Approval
28 Order and Judgment if no notice is filed within that time seeking appeal of the Final Approval Order
and Judgment and if no motion for extension to appeal is filed; or (c) if a notice of appeal is filed, the
date upon which all appellate and/or other proceedings resulting from the notice of appeal have been
terminated in such a manner as to permit the Final Approval Order and Judgment to take effect in
substantially the form described herein.

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

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

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

20 **IV. ARGUMENT**

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

23 Rule 3.769 requires court approval for class action settlements.¹⁰ “Before final approval, the
24 court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of Court,
25 Rule 3.769(g).) Rule 3.769 further requires a noticed motion for preliminary approval of class
26 settlements:

27 ¹⁰ 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.

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

...

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

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

b. The Settlement is Fair, Reasonable, and Adequate

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

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

The settlement was reached as a result of arm’s-length negotiations. Though cordial and professional, the settlement negotiations have been, at all times, adversarial and non-collusive in nature. At the mediation and the following negotiations through the mediator, Counsel for the Parties 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**.

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 Defendant’s 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 Defendant’s 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. Indeed, Mara Law Firm, PC was class
18 counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in the landmark
19 decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Mara Dec. ¶ 4. This
20 experience instructed Plaintiffs’ Counsel on the risks and uncertainties of further litigation and guided
21 their determination to endorse the proposed settlement. Defendant’s Counsel has extensive experience
22 representing companies and regularly deals with wage and hour litigation matters. Accordingly, both
23 Parties’ Counsel are experienced in wage and hour employment law and class actions.¹¹

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

25 An understanding of the amount in controversy is an important factor into whether the
26 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses of the
27 _____

28 ¹¹ 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.

claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.*

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

1. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff’s Case and the Risks and Costs of Further Litigation

The proposed settlement was only possible following significant discovery, an evaluation of Defendant’s relevant policies and procedures, and Plaintiffs’ independent investigation. This permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The discovery conducted resulted in Plaintiffs’ central theories of liability, which are predicated on Plaintiffs’ claims that Defendant misclassified Plaintiffs and Class Members as independent contractors, resulting in Defendant’s failure to provide Class Members with compliant meal and rest periods, failed to pay them for all time worked, and failed to reimburse them for business expenses. As explained above, Defendant maintains that the discovery produced demonstrates that it would succeed at both class certification and on the merits.

Although, Plaintiffs believe this case is suitable for certification on the claimed bases that the relevant contracts at issue are all uniform, and that there are company-wide policies and practices applicable to Class Members, both of which result in the requisite amount of control to render Class

1 Members as employees under California Law, Defendant's counter-arguments and affirmative
2 defenses raise uncertainties with respect to both class certification and success on the merits. As the
3 California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification
4 is always a matter of the trial court's sound discretion. Decisions following *Sav-On* have reached
5 different conclusions, with respect to certification of wage and hour claims.¹² While remaining
6 confident in the strengths of their claims, all of these factors led Plaintiffs to discount the following
7 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, of the approximately 230
12 Class Members, 180 are Direct Contractors and 50 are Secondaries. Mara Dec. ¶ 29.

13 **A. Reimbursement**

14 Plaintiffs allege that as a result of Defendant's misclassification of Class Members, Direct
15 Contractors are forced to shoulder the costs of fuel and insurance in the furtherance of Defendant's
16 business, costs which Defendant would not be permitted to pass off to employees under California
17 law. If Plaintiffs were to prevail on this theory of liability, Direct Contractors would be entitled to the
18 reimbursement of these costs. At the time of mediation, Plaintiffs were able to estimate that all Direct
19 Contractors combined had approximately \$7,714.46 per week deducted from their pay to cover costs
20 such as insurance, permits, and other necessary items, and incurred approximately \$7,126 per week in
21 fuel costs. Therefore, the *maximum potential exposure* under this theory of liability would be
22 **\$5,016,075** (\$7,714.46 per week in deductions x 52 weeks per year x 6.5 year Class Period =
23 \$2,607,487 in total deductions) + (\$7,126 per week in fuel costs x 52 weeks per year x 6.5 year Class
24 Period = \$2,408,588 in fuel costs) (\$2,607,487 + \$2,408,588 = \$5,016,075). Mara Dec. ¶ 30. This

25 ¹² 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 maximum potential exposure, however, had to be discounted considerably in light of Defendant's
2 arguments, which are outlined below.

3 Defendant argues that because Direct Contractors are not employees and properly classified as
4 independent contractors, it does not need to reimburse them for business expenses. Defendant argues
5 that California Labor Code § 2802 only obligates an employer to indemnify its employee for expenses
6 that the employee incurred while performing his or her job duties. As Defendant claims it is lawfully
7 contracting with the Direct Contractors to facilitate the delivery of the customer's freight, these
8 expenses are properly borne by the Direct Contractors pursuant to the terms of the agreements.
9 Furthermore, Defendant points out that Plaintiffs would be unable to obtain class certification on this
10 claim, claiming that Plaintiffs and Class Members would be unable to present adequate records of
11 these supposed costs not only making damages completely unmanageable, but also calling into
12 question the issue of liability, as Plaintiffs and Class Members would be unable to establish that they
13 actually suffered this harm on a classwide basis. Should litigation continue, Plaintiffs' risk the Court
14 siding with Defendant's view, which would extinguish any potential recovery on this cause of action.
15 Mara Dec. ¶ 31.

16 B. Meal and Rest Periods

17 Plaintiffs contend that because Defendant misclassifies Plaintiffs and Class Members as
18 independent contractors, they are not provided with meal or rest periods, as independent contractors
19 are not entitled to the protections California law provides for employees. If Plaintiffs were to prevail
20 on this theory of liability, Class Members would be entitled to a meal and rest period premium for
21 each shift worked. For Direct Contractors, the exposure under these causes of action is \$4,076,800
22 (70,000 shifts x \$29.12 average hourly rate¹³ x 2 meal/rest period premiums per shift = \$4,076,800).
23 For Secondaries, the exposure under these causes of action is \$1,430,000 (26,000 shifts x \$27.50
24 average hourly rate¹⁴ x 2 meal/rest period premiums per shift = \$1,430,000). Therefore, the **maximum**
25 **potential exposure** under this theory of liability would be **\$5,506,800** (\$4,076,800 + \$1,430,000 =

26 _____
27 ¹³ Plaintiffs estimate Direct Contractors were paid on average approximately \$1,747.65 per week.
28 Based on a 5 day workweek with a 12 hour average shift length, Plaintiffs estimate the hourly average
rate for Direct Contractors to be \$29.12 (\$1,747.65 / 5 / 12 = \$29.12).

¹⁴ Plaintiffs estimate that Secondaries were paid a flat daily rate of approximately \$220 on average
(\$220 / 8 hours = \$27.50).

1 \$5,506,800). Mara Dec. ¶ 32. This maximum potential exposure, however, had to be discounted
2 considerably in light of Defendant's arguments, which are outlined below.

3 Defendant again argues that because Class Members are not employees and properly classified
4 as independent contractors, it is under no obligation to provide Class Members with meal or rest
5 periods, as California law only requires an "employer" to provide them to its "employees." Defendant
6 claims it is lawfully engaging with and utilizing Class Members to facilitate the delivery of the through
7 the use of the agreements it enters into with the Direct Contractors, and that the agreements clearly
8 state that all of that any Class Member performing work under the terms of the agreements are
9 independent contractors, not employees. Additionally, Defendant again points out that the FMCSA
10 December 21, 2018, determination would similarly serve to completely extinguish these causes of action
11 as preempted under federal law. Should the Court agree with Defendant's arguments, Plaintiffs' and
12 Class Members would be entitled to no recovery under these causes of action. Mara Dec. ¶ 33.

13 C. Unpaid Wages

14 Plaintiffs further allege that Defendant has failed to pay Class Members for all hours worked,
15 as Defendant unlawfully misclassified them as independent contractors as opposed to employees.
16 Direct Contractors were paid by the mile and by the delivery, and therefore were not compensated for
17 any other time spent working. For Direct Contractors, the exposure under this cause of action is
18 \$4,076,800 (70,000 shifts x 2 average hours spent on other work tasks per day x \$29.12 = \$4,076,800).
19 Secondaries were paid a daily flat rate, and therefore were not paid for any hours worked after 8 hours
20 had been worked in a shift. For Secondaries, the exposure under this cause of action is \$1,430,000
21 (26,000 shifts x 2 additional hours worked per day x \$27.50 = \$1,430,000). Accordingly, Defendant's
22 **maximum** exposure under Plaintiffs' unpaid wages claim is **\$5,506,800** (\$4,076,800 + \$1,430,000 =
23 \$5,506,800). Mara Dec. ¶ 34.

24 Further, if Plaintiffs were to prevail on their unpaid wages claims, they may also be entitled to
25 waiting time penalties. For Direct Contractors, the exposure under this cause of action is \$985,420 (12
26 hour average day worked x \$29.12 average hourly rate x 30 days x 94 former Direct Contractors =
27 \$985,420). For Secondaries, the exposure under this cause of action is \$214,500 (10 hour average day
28 worked x \$27.50 average hourly rate x 30 days x 26 former Secondaries = \$214,500). Plaintiffs

1 calculate the potential *maximum* exposure under the waiting time penalties cause of action as
2 **\$1,199,920** ($\$985,420 + \$214,500 = \$1,199,920$). Mara Dec. ¶ 35.

3 Additionally, if Plaintiffs were to prevail on their unpaid wages claims, they may also be
4 entitled to wage statement penalties. For Direct Contractors, the exposure under this cause of action is
5 **\$324,000** (81 Direct Contractors in the statutory period x \$4,000 maximum penalties = \$324,000). For
6 Secondaries, the exposure under this cause of action is **\$168,000** (23 Secondaries in the statutory
7 period x \$4,000 maximum penalties = \$92,000). Plaintiffs calculate the potential *maximum* exposure
8 under the wage statement cause of action as **\$416,000** ($\$324,000 + \$92,000 = \$416,000$). Mara Dec. ¶
9 36.

10 As explained above, Defendant contends that as Class Members are properly classified as
11 independent contractors under California law, none of the authorities relied upon by Plaintiffs renders
12 Defendant liable for any unpaid wages whatsoever. Defendant argues the only monetary compensation
13 it is required to provide to the Class Members at all at any point in time is solely based on the provisions
14 of the agreements it enters into with the Direct Contractors, which compensates them for all the hours
15 and various tasks necessary in furtherance of the freight deliveries. Furthermore, while Defendant
16 acknowledges that the agreements call for it to provide the Direct Contractors with certain forms of
17 compensation pursuant to the terms of the agreements, Defendant is under no duty to provide any form
18 of compensation to the Secondaries. Furthermore, Defendant points out that Plaintiffs would be
19 unable to obtain class certification on this claim, claiming that Plaintiffs and Class Members would be
20 unable to present adequate records of these supposed unpaid wages not only making damages
21 completely unmanageable, but also calling into question the issue of liability, as Plaintiffs and Class
22 Members would be unable to establish that they actually suffered this harm on a classwide basis. Mara
23 Dec. ¶ 37.

24 As Plaintiffs' claims for waiting time and wage statement penalties are derivative of their wage
25 claims, Defendant argues that it would not be liable for these either. Plaintiffs had to consider that the
26 Court might disagree with their arguments and agree with the Defendant's position. If this were to
27 occur, this claim would fail. Mara Dec. ¶ 38.
28

1 **D. PAGA**

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

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

8 Plaintiffs allege that Defendant has six (6) violations – unlawful meal periods, unlawful rest periods,
9 failure to pay all time worked, failure to pay wages due at termination, failure to provide accurate,
10 itemized wage statements, and for the Direct Contractors, failure to reimburse business expenses – of
11 the Labor Code sections which give rise to PAGA penalties. The statute of limitations for PAGA
12 violations goes back one year. Plaintiffs calculated Defendants’ potential maximum exposure under
13 PAGA as follows:

14 $\$100 \times 6 \text{ PAGA violations} \times 2,153 \text{ pay periods during the one-year statutory period} = \$1,291,800 \text{ for}$

15 **Direct Contractors**

16 $\$100 \times 5 \text{ PAGA violations} \times 800 \text{ pay periods during the one-year statutory period} = \$400,000 \text{ for the}$

17 **Secondaries**

18 $\$1,291,800 + \$400,000 = \$1,691,800$

19 Mara Dec. ¶ 39.

20 Plaintiffs’ PAGA claims are subject to the same risks on the merits as Plaintiffs’ non-PAGA
21 claims. In addition, Labor Code § 2699, subdivision (e)(2) provides that “[i]n any action by an
22 aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court
23 may award a lesser amount than the maximum penalty amount specified by this part if, based on the
24 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
25 arbitrary, oppressive, or confiscatory.” In *Thurman v. Bayshore Transit Management, Inc.*
26 (“*Thurman*”) (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum
27 penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the
28 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

1 obligations to comply with the law seriously. *Id.* Defendant maintains that if the case were to continue
2 in litigation, they would be able to show that they took their obligations to comply with the law
3 seriously. As such, if Plaintiffs were able to prevail on the merits of their PAGA claims, it is likely
4 that the Court would reduce the maximum penalty allowed.

5 In addition, as the PAGA violations asserted by Plaintiffs are predicated on the same unlawful
6 conduct that Plaintiffs base their other claims, Plaintiffs' PAGA claims are subject to the same risks
7 on the merits as Plaintiffs' class claims. If Plaintiffs are ultimately unable to prevail on any one of
8 their class claims, their recovery under the PAGA as to that violation would also fail. The likelihood
9 of the Court reducing the PAGA damages awarded to Plaintiffs and the aggrieved employees –
10 assuming liability is proven as to each of Plaintiffs' claims – is also higher in this case where these
11 same individuals will also be receiving money for the same unlawful conduct under the class claims.
12 *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO,
13 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially
14 duplicative of penalties granted by the underlying Labor Code violations, *see, e.g.*, Cal. Lab. Code §§
15 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award
16 PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA
17 penalties are highly uncertain.”).

18 **3. The Settlement Amount of \$1,500,000 is Reasonable**

19 Not taking into account any of their defenses or arguments, Defendant's total exposure if
20 Plaintiffs were successful in their core claims would be approximately \$16,029,675 [\$5,016,075
21 (reimbursement exposure) + \$5,506,800 (meal and rest period exposure) + \$5,506,800 (unpaid wages
22 exposure) = \$11,504,080]. If Plaintiffs' are successful in their unpaid wages claims, they may also be
23 entitled to damages for waiting time penalties in the amount of \$1,199,920 and wage statement
24 penalties in the amount of \$416,000. If all of Plaintiffs' claims are successful, they may also be entitled
25 to PAGA penalties in the maximum amount of \$1,691,800. *Mara Dec.* ¶ 40.

26 Based upon the risks just discussed, Plaintiffs had to discount their maximum potential
27 exposure. Plaintiffs also had to consider that, should the Court agree with their theories and grant
28 certification as to each of their claims, they may not be awarded the full exposure at trial. This is
particularly true when dealing with matters regarding the misclassification of employees as

1 independent contractors. The only way Plaintiffs and the Class Members would be entitled to **any**
2 **recovery** hinges entirely on whether Defendant misclassified them as independent contractors. Should
3 the Court determine that Defendant did not misclassify Plaintiffs and Class Members, they would
4 recover **nothing**. Further, even if the Court determined that Defendant misclassified Plaintiffs and
5 Class Members, the Court could still deny certification or abstain from awarding any damages as to
6 the alleged causes of action pursuant to Defendant’s additional counter arguments and defenses. All
7 of these factors led Plaintiffs to reduce the realistic potential exposure in order to gain a definite
8 monetary recovery for the class.

9 In light of the risks Plaintiffs’ claims faced, Plaintiffs and their Counsel believe that the
10 settlement amount of \$1,500,000 – **with an average settlement share amount estimated at**
11 **\$3,760.86** – is a reasonable and fair settlement amount. Mara Dec. ¶ 41.

12 A settlement is not judged **solely** against what might have been recovered, had the plaintiffs
13 prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and
14 reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells*
15 *Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; “Compromise is inherent and necessary in the
16 settlement process...even if the relief afforded by the proposed settlement is substantially narrower
17 than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because
18 the public interest may indeed be served by a voluntary settlement in which each side gives ground in
19 the interest of avoiding litigation.” *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm’n*
20 (9th Cir. 1982) 688 F.2d 615, 628 (“It is well-settled law that a cash settlement amounting to only a
21 fraction of the potential recovery does not...render the settlement inadequate or unfair”).

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

23 Under California law, a class action is appropriate when the class is ascertainable and there is
24 “a well-defined community of interest in the questions of law and fact involved affecting the parties
25 to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code of Civil
26 Procedure § 382 for class certification follow federal law according to Rule 23 of the Federal Rule of
27 Civil Procedure: numerosity, typicality of the class representatives’ claims, adequacy of
28 representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also*

1 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court
2 must certify a class for settlement purposes if a class has not already been certified, “it is well
3 established that trial courts should use different standards to determine the propriety of a settlement
4 class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used
5 for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836,
6 859 citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

7 Plaintiffs contend, and Defendant does not dispute for settlement purposes only, each of these
8 elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 237-38.
9 Plaintiffs seek approval of the following Class for settlement purposes only: any and all persons that
10 performed work for Defendant in California pursuant to owner-operator agreements (“Direct
11 Contractors”) and/or pursuant to being hired by Direct Contractors to perform the work under the
12 owner-operator agreements without being a party to the agreements (“Secondaries”) during the time
13 period of October 18, 2015, through April 11, 2022.

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

15 Plaintiffs contend that the proposed Settlement Class is ascertainable because of all of the class
16 members have performed work for Defendant and have been identified through Defendant’s own
17 records. *See Rose v City of Hayward* (1981) 126 Cal.App.3d 926,932 (finding that “Class Members
18 are ‘ascertainable’ where they may be readily identified without unreasonable expense or time by
19 reference to official records.”); *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (“[c]lass
20 members are ‘ascertainable’ where they may be readily identified without unreasonable expense or
21 time by reference to official [or business] records.”). Thus, the ascertainability requirement is met.

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

23 The numerosity requirement is met if the class is so large that joinder of all members would be
24 impracticable. *Gay v. Waiters’ & Dairy Lunchmen’s Union* (N.D. Cal. 1980) 489 F. Supp. 282, *aff’d*
25 (9th Cir. 1982) 694 F.2d 531. “There is no set number required to maintain a class action, and the
26 statutory test is whether a class is so numerous that ‘it is impracticable to bring them all before the
27 court.’” *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223
28 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior Court* (1995)

1 44 Cal.2d 574 (upholding a class of ten members). “The numerosity requirement is more readily met
2 when a class contains employees suing their present employer . . . This is because class members may
3 be unwilling to sue their employer individually out of fear of retaliation.” *Romero v. Producers Dairy*
4 *Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the California Supreme Court, “fear of
5 retaliation for individual suits against an employer is a justification for class certification in the arena
6 of employment litigation, even when it is otherwise questionable that the numerosity requirements
7 were satisfied . . . It needs no argument to show that fear of economic retaliation might often operate
8 to induce aggrieved employees quietly to accept substandard conditions.” *Gentry v. Superior Court*
9 (2007) 42 Cal.4th 443, 460 (citation omitted), overruled on other grounds in *Iskanian v. CLS Transp.*
10 *Los Angeles, LLC* (2014) 59 Cal.4th 348.

11 Here, Defendant’s records show that the proposed Settlement Class has approximately two
12 hundred and thirty (230) members. Plaintiffs contend that joinder of all Settlement Class Members is
13 impracticable and, therefore, a class wide proceeding is preferable. *See Hebbard v. Colgrove* (1972)
14 28 Cal.App.3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite,
15 but that a class of as few as 28 is acceptable.). In fact, a class of ten (10) has been certified as a class
16 action. *Id.*, citing *Bowles v. Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue
17 have held that classes of over forty (40) individuals are numerous enough to meet the numerosity
18 requirement. *See Ikonen v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly,
19 the Class that is comprised of approximately two hundred and thirty (230) members is sufficient to
20 satisfy the numerosity requirement.

21 **iii. The Commonality Requirement is Met**

22 The commonality requirement is met if there are questions of law and fact common to the class.
23 *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual
24 predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies
25 within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members to
26 individually establish eligibility and damages does not mean individual fact questions predominate.’”
27 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. Commonality exists if there
28 is a predominant common legal question regarding how an employer’s policies impact its employees.

1 *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) (“[T]he common legal
2 question remains the overall impact of Diva’s policies on its drives.”). Whether Plaintiff is likely to
3 prevail on his theory of recovery is irrelevant at the certification stage since the question is “essentially
4 a procedural one that does not ask whether an action is legally or factually meritorious.” *Linder v.*
5 *Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-440.

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

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

12 The typicality requirement is met if the claims of the named representative are typical of those
13 of the class, though, “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at 1020;
14 *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiffs contend that their claims are typical of
15 the Class Members’ claims because they arise from the same factual basis and are based on the same
16 legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.* (N.D. Cal. 1987)
17 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and practices. Plaintiffs
18 allege that Defendant’s misclassification scheme uniformly applied to all Class Members. Factual
19 differences may exist between Plaintiffs and the Class Members so long as the claims arise from the
20 same events or course of conduct and are based on the same legal theories. *Hanlon, supra*, 150 F. 3d
21 at 1020; *see also Wehner, supra*, 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. § 3:15, p.335
22 [When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff
23 and the class sought to be represented, the typicality requirement is usually met irrespective of varying
24 fact patterns which underlie individual claims.] As such, the typicality requirement is satisfied.

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

26 The adequacy requirement is met if Plaintiffs have no interests adverse to the interests of the
27 proposed Class Members and is committed to vigorously prosecuting the case on behalf of the class.
28 *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51.

1 Plaintiffs contend those standards are met here. Plaintiffs do not have any conflicts of interest with the
2 Class. They have been and continue to be committed to vigorously prosecuting this case. If any Class
3 Member wishes to opt-out of the Settlement, he or she may do so. Therefore, there is no conflict of
4 interest between Plaintiffs and the Class Members.

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

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

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

11 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises
12 the class of their rights to participate in the settlement, how to and when to object to or request
13 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
14 proposed Class Notice is attached as **Exhibit 1** to the Settlement.

15 **V. CONCLUSION**

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

21
22 Respectfully Submitted,

23 **MARA LAW FIRM, PC**

24
25 Date: March 21, 2022

Signed: 

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