Theodore Tang (313294)
theodore@frontierlawcenter.com
Manny Starr (319778)
manny@frontierlawcenter.com
Daniel Ginzburg (327338)
daniel@frontierlawcenter.com
FRONTIER LAW CENTER
23901 Calabasas Road, #2074
Calabasas, California 91302
Telephone: (818) 914-3433
Facsimile: (818) 914-3433

Attorneys for Plaintiff
Efrain Robles on behalf of himself and
all others similarly situated

SUPERIOR COURT OF CALIFORNIA

COUNTY OF IMPERIAL

EFRAIN ROBLES, for himself and all others similarly situated, Plaintiff, vs. GEO TRANSPORTATION, INC. and DOES 1 to 100, inclusive Defendants	Case No. ECU002464 **PLAINTIFF EFRAIN ROBLES' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF THEODORE TANG; PROPOSED ORDER** Date: October 23, 2024 Time: 8:30 a.m. Dept: 7

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 24, 2024 at 8:30 a.m. or as soon thereafter as the matter may be heard in Department 7 of the Imperial County Superior Court located at 939 West Main Street, El Centro, CA 92243, Plaintiff Efrain Robles will move the court pursuant to Rule of Court 3.769(c) and seek an order for the following:

(1) preliminarily approving the Class Action and PAGA Settlement;

(2) provisionally certifying the following class for settlement purposes only: all individuals

who were employed by Defendant in California as non-exempt employees at any time between July 5, 2018 and September 19, 2023;

(3) appointing Efrain Robles as the Class Representative and Frontier Law Center as Class Counsel;

(4) finding on a preliminary basis that the settlement appears to be within the range of reasonableness;

(5) approving the Notice of Proposed Class Action Settlement ("Notice Packet") for the Class Members and its concomitant distribution;

(6) appointing ILYM Group, Inc. as the Administrator; and

(7) setting the matter for a Final Approval hearing.

The Motion will be based on this notice, the Memorandum of Points and Authorities, the declaration of Theodore Tang which contains the Settlement Agreement and the proposed Notice Packet, pleadings on file, and arguments at the hearing.

Date: September 16, 2024

FRONTIER LAW CENTER

/s/
Theodore Tang
Attorney for Plaintiff
Efrain Robles

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<ins>**MEMORANDUM OF POINTS AND AUTHORITIES**</ins>

I. INTRODUCTION

This is a wage and hour class and PAGA action. Plaintiff Efrain Robles ("Plaintiff") worked as non-exempt employee for Defendant GTI Transport, Inc. ("GTI") as a transportation officer. Plaintiff alleges that Defendant violated the Labor Code by the following: (1) not providing off-duty meal and rest breaks; (2) not correctly paying overtime pay, (3) not paying minimum wages for all hours worked; and (4) not providing accurate and complete wage statements. In addition, Plaintiff alleged violations of the Unfair Competition Law and PAGA.

Prior to the mediated settlement, the Parties engaged in the exchange of formal and informal discovery and a study of the legal principles applicable to the claims asserted. Plaintiff obtained GTI's COVID screening procedures, company handbook, Meal and Rest break policies, Plaintiff's personnel file, time, and pay records, as well as a sampling of the payroll records of the class.

With the assistance of experienced employment law mediator Steve Pearl, the Parties reached a current settlement. The terms provide Defendant shall pay a gross amount of $750,000. This is non-reversionary, so the class members do not need to submit claim forms.

II. BACKGROUND OF THE SETTLMENT.

A. Procedural History and Summary of the Allegations

On April 26, 2022 Plaintiff uploaded a PAGA letter to the LWDA website and sent the letter by certified mail to GTI. Then on July 5, 2022, Plaintiff filed the complaint containing the following causes of action: Failure to Pay Hourly and Overtime Wages, rest break violations, meal break violations, wage statement penalties, violation of the Unfair Competition Law, and for PAGA Penalties. Thereafter, on October 12, 2022 Plaintiff filed a First Amended Complaint adding class allegations.

B. The Parties Agree to Private Mediate

Plaintiff then propounded written discovery. Rather than engage in formal discovery at that time, the Parties then agreed to provide information informally with the goal of settling the case at mediation.

Plaintiff sent an informal request, and in response, GTI produced Plaintiff's personnel file, written company policies, procedures, and handbooks, and a sampling of time and payroll records. There are approximately 85 class members and 77 aggrieved employees who worked 12,400 workweeks during the class period and 2,975 pay periods during the PAGA period. Experienced employment law mediator Steve Pearl mediated the case on March 2, 2023. After a full day, case did not settle. However, the parties continued settlement negotiations and reached an agreement on September 13, 2023. The settlement was reduced to a long form settlement agreement, and it was fully signed on August 29, 2024 after further negotiations.

C. The Terms of the Settlement.

1. Settlement and Allocation of the Claims

The Class consists of the following: "All persons employed by [GTI] in California and classified as a non-exempt employee who worked for [GTI] during the Class Period." The Class Period is from July 5, 2018, to September 19, 2023 (inclusive). Based upon GTI's records, the number of Class Members is approximately 85.

The payments to each Class Member will depend on the number of workweeks worked by during the Class Period. Additionally, $50,000 is allocated to PAGA. Subsequently, $250,000 (1/3 of the gross settlement) is attributed to attorney fees, $20,000 is attributed to costs, and $5,950 for settlement administration.

This means that of the $750,000 gross settlement, after the deductions above, the net settlement amount is $424,050.

III. OVERVIEW OF THE APPROVAL PROCESS

A. Two-Step Approval Process

A settlement of a class action lawsuit must be reviewed and approved by the Court. This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to the class members for their comment or objections. The Manual for Complex Litigation (Third) § 30.41 states:

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice … be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg commented, "The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002).

B. Conditional Certification is Appropriate

The parties also may, at the preliminary approval stage, request that the court provisionally certify class—conditional upon final approval of the settlement. "Pre-certification settlements are routinely approved if found to be fair and reasonable." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 240; accord *Dunk v. Ford Motor Co*. (1996) 48 Cal. App. 4th 1794, 1803 (although the settlement was reached before any adversary certification, the court was satisfied that it was fair, adequate and reasonable).

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL

A. The Settlement is Fair, Reasonable, and Adequate, and Not the Result of Fraud or Collusion

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. (*Priddy v. Edelman* (6^{th} Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co*. (7^{th} Cir. 1987) 834 F.2d 677, 682. Courts do not substitute their judgment for that of the proponents, particularly where a settlement was reached with the participation of experienced counsel familiar with the litigation. (*Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc*. (C.D. Cal. 2004) 221 F.R.D. 523, 528 (C.D. Cal. 2004).

While the recommendations of counsel proposing the settlement are not conclusive, the Court can take them into account, particularly where they were involved in discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged evidence from the opposing party. *See Newberg on Class Actions*, *supra*, at § 11.47; *Nat'l Rural Telecomms. Coop*., *supra*, 221 F.R.D. at p. 528 (quoting *In re Paine Webber Ltd. P'ships Litig*. (S.D.N.Y. 1997) 171 F.R.D. 104, 125 ("So long as the integrity of the arm's length negotiation process is preserved [] a strong initial presumption of fairness attaches to the proposed settlement…[citations] and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation")).

Here, both Plaintiffs' counsel and GTI's counsel have a great deal of experience in wage and hour class action litigation, as demonstrated in the attached declaration. Moreover, Plaintiff's counsel investigated the allegations and consulted with an expert to formulate a damages model. This information was incorporated into the arms-length negotiations.

The settlement for each Class Member is fair, reasonable, and adequate, given the inherent risks of litigation, including the substantial risks relative to class certification, and the costs of pursuing such litigation, discussed further below. Of course, class members may still opt out of the settlement, and the class members will be apprised of their right to attend the fairness hearing, and submit objections to the proposed settlement.

B. The Proposed Settlement Meets the *Kullar* Factors.

As explained in *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal. App. 4th 116, 130, 133, a class action settlement should be approved when the plaintiff has conducted discovery and the settlement is reasonable in light of the strengths and weaknesses of the claims.

1. Strengths and Weaknesses of the Claims.

Although Plaintiff's counsel believes the claims are meritorious, they are experienced and realistic, and understand the possibility of non-certification on one or more of the theories alleged. Plaintiffs' counsel further recognizes that the outcome of a trial, any appeal that could follow, are inherently uncertain. These risks on are compounded by the Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1 (use of statistical evidence regarding certification).

a. Meal and Rest Break Claims

Employers must allow their employees to take 30-minute meal periods after every five hours of work. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1037-1038. Such meal periods must be unfettered — *i.e.*, when taking such meal periods, the employee must be relieved of all duty during the entire 30-minute meal period. IWC Wage Order No. 4 § 11(A) (emphasis added). Indeed, this has been well settled since being affirmed by the California Supreme Court in *Brinker*, supra, 53 Cal. 4th at 1040-41 n. 19 ("The employer that refuses to relinquish control over employees during an owed meal period violates the duty to provide the meal period and owes compensation"). Similarly, employees' rest break must be taken off-duty and unfettered by the employer; Labor Code section 226.7 provides for an additional hour of pay at the regular rate for each meal period missed and/or day in which a rest break was denied.

Plaintiff alleges that GTI required class members to go through a COVID screening any time they entered or left the facility. Plaintiff alleges that these screenings took so long as to act as a prohibition against leaving the facility during breaks. While the records indicated that GTI at least sometimes paid missed break premiums to the employees, it did not do so each time a break was so discouraged. Further, even if the Screenings were not required, Plaintiff alleges that GTI's policy as written was not complaint with California law, as it stated that employees may be restricted to the premises during meal breaks but did not obtain on-duty meal period agreements.

Defendant denies any liability or wrongdoing of any kind. Further, Plaintiff's records indicate that he was paid meal and rest break premium pay 41 times (out of the 51 break violations alleged in the same period), from which one could infer that GTI paid for missed breaks it was aware of. Furthermore, Defendant would likely argue that regardless of what the written policy says GTI *may* do, a violation could only occur if GTI *did in fact* restrict employees to the premises, which would require an individual analysis into each and every individual instance where that happened.

The facts above comprised risks for certification, since there could be a possibility that only individual questions would predominate, and no method of proof would show a uniform lack of breaks at all locations.

b. Wage and Hour Violations

Plaintiff alleges GTI required class members to perform work-related functions before and after their shifts without pay. In addition, Plaintiff alleges that GTI did not correctly calculate overtime pay, and as a result underpaid class members.

i. Pre-Shift COVID Screenings

As explained above, Plaintiff alleges that GTI required each employee to go through a COVID screening before entering the facility. While employees were allowed to clock in prior to the screening, they were *not* allowed to clock in prior to entering the lobby of the facility. Due to the COVID restrictions, only 4 employees were allowed in the lobby at a time, meaning that most of the employees had to wait outside before they could clock in. This caused extensive wait times for which the employees were not compensated.

Yet, even if this is so, the test for whether or not this time is compensable hinges on the level of control GTI held over its employees waiting in line. Defendant would likely argue that while there were delays entering the facility, these delays would be no different from traffic caused by coworkers arriving at the same time, which would clearly not be compensable. Further, the level of control GTI exercised over its employees while waiting for screening is disputed.

ii. Post-Shift Weapon Checkout Process

Plaintiff alleges that, up until GTI changed its policy in September 2021, employees were required to clock out and then go through an extensive disarming process. The disarming process involved returning their weapons and signing out with their supervisor at the end of each shift. In September 2021, presumably realizing that their employees should be getting paid for this time, GTI changed its policy such that they were permitted to undergo the disarming process prior to clocking out.

As stated above, this policy was changed in 2021. Further, not all employees in the class had to undergo this process. Finally, GTI would likely argue that the disarming process is not "integral and indispensable" to the employees' performance of their daily tasks.

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iii. <u>Regular Rate Violations</u>

Plaintiff alleges that the employees received "Health & Wel" pay every pay period. This pay, which was a non-discretionary, cash payment to the employees, is generally considered a "cash-in-lieu of benefits payment." However, because this "cash-in-lieu" payment was paid directly to the Aggrieved Employees, and not "irrevocably made by an employer to a trustee or third person", it should have been included in their regular rate of pay. (*See Flores v. City of San Gabriel*, (9th Cir. 2016) 824 F.3d 890, 901).

c. Wage Statement Violations

The wage statement violations are derivative of the unpaid time and meal and rest break violations. Thus, GTI could counter that any alleged omission of information from the wage statements was not knowing and intentional, which could negate wage statement penalties. (See *Harris v. Vector Mktg. Corp.* (N.D. Cal. 2009) 656 F. Supp. 2d 1128, 1145-46 (summary adjudication warranted on Section 226(e) claim where dispute existed as to whether plaintiff was independent contractor, and record lacked evidence that conduct was knowing or willful).

d. PAGA Penalties.

The trial court has the discretion to reduce PAGA penalties if, based on the facts and circumstances of the case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory. (Lab. Code, § 2699(e)(2); see also *Delgado v. New Albertson's, Inc.,* 2010 WL 11507599 at *7 (C.D. Cal. March 15, 2010) (explaining that court's discretion to reduce penalties under PAGA protects defendants from unconstitutionally excessive penalties).

PAGA penalties could potentially be reduced based on the above. The following are some examples of PAGA awards which were awarded after an actual trial - in the matter of *Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F.Supp.3d 1058*,* while the trial court imposed substantial, PAGA penalties, it still represented reductions of 67% and 80% of the potential PAGA penalties.

Likewise, in the matter of *Parr v. Golden State Overnight*, Judge Carville of the Alameda Superior Court assessed PAGA penalties upon the defendant of approximately 7% of the total maximum penalties—again, this was only after plaintiff had prevailed at trial. (*Parr v. Golden State Overnight Delivery Service, Inc.*, No. RG12-618103, 2014 WL 11199453 (July 10, 2014).)

2.Maximum Damages and Penalties at Issue.

Based on the data provided for mediation, Plaintiffs' counsel estimated maximum total damages and penalties (including PAGA) to be approximately $7,697,994. Thus, the settlement of $750,000 is about 9.7% of the total estimated liability, which is consistent with other class settlements and within the range of reasonableness.

Numerous courts have held that gross settlements approximating between only 8 and 25% of the defendant's potential exposure are fair and reasonable. (*See*, *e.g.*, *In re Mego Fin. Corp. Secs. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 holding that class action settlement recovering 16% of potential exposure was fair and reasonable; "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.

Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment"; *Bellinghausen v. Tractor Supply Co*., No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc*., U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour class settlement which obtained 9.1% of projected damages, given the risks of continued litigation.)

C. An Analysis of the Terms of the Settlement

1. Estimate of Class Members' Recovery

The amount allocated to each Class Member is based on the number of workweeks worked during the Class Period. Based on the Net Settlement Amount of $424,050, and a total of 85 class members, the average recovery per class member is $4,988.82,[1] an outstanding result for the class members.

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[1] Found by dividing the net settlement amount by the number of class members. The final distribution will be calculated pro rata based on the number of workweeks worked by each class member, which may change the average. This number also does not include the Aggrieved Employee's portion of the PAGA penalties.

2. Uncashed Checks

Any individual settlement payments that remain uncashed within 180 days of the mailing of settlement payment checks by the settlement administrator will have the funds represented by such checks to the Unclaimed Property Fund of the California State Controller's office (after notice to the State Controller and holding the funds for 1 year as required by law).

3. Scope of the Release

The scope of the release, as listed below, is identified in the Settlement at section 5. *et seq*, as well as in the Notice Packet that will be sent to Class Members and is limited to the claims in the first amended complaint:

> 5.2 Release by Participating Class Members Who Are Not Aggrieved Employees:
>
> All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have
>
> been alleged, based on the Class Period facts stated in the Operative Complaint and ascertained in the course of the Action including, 1) any and all claims for alleged failure to provide meal periods; 2) any and all claims for alleged failure to provide rest periods; 3) any and all claims for alleged failure to pay overtime wages; 4) any and all claims for alleged failure to pay minimum wage; 5) any and all claims for wage statement penalties; and 6) any and all claims for violation of the Unfair Competition law based on numbers 1) through 5). Except as set forth in Section 5.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation or claims based on facts occurring outside the Class Period.
>
> 5.3 Release by Non-Participating Class Members Who Are Aggrieved Employees: All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, and the PAGA Notice.

4. Notice to Class Members

Within 15 days of preliminary approval, GTI will transmit to the Settlement Administrator the following: each Class Members Member's full name; most recent mailing address; social security number; the number of workweeks each Class Member worked during the Class and PAGA Periods and number of PAGA Pay Periods. (See Settlement, at §§ 1.8, 4.2.)

Within 14 days after receiving the Class List and Data, the Settlement Administrator shall mail Notice Packets to all Class Members via regular First-Class U.S. Mail, using the most current, known mailing addresses. (See Settlement, at § 7.4.2.) With respect to any returned envelopes, the Settlement Administrator shall re-mail to the forwarding address affixed thereto. If no forwarding address is provided, the Settlement Administrator shall promptly attempt to determine a correct address by use of skip-tracing, or other search using the name, address and/or social security number of the respective Class Member, and shall then perform a re-mailing, if another mailing address is identified by the Settlement Administrator.

Class Members will be provided 45 days to opt out, challenge the number of workweeks, or object to the settlement. (See Settlement, at §§7.5.1, 7.6., 7.7.1.) Further, Class Members will be notified of the time, date, and place of the final approval hearing and of their right to appear at the fairness hearing.

5. Tax Treatment of Settlement Amounts

The Settlement provides that 25% of each Individual Settlement Payment shall be allocated as payment for alleged unpaid wages, and 75% shall be allocated as alleged penalties and interest. The Settlement Administrator will distribute appropriate IRS tax forms.

6. No Proposed Enhancement Payment to Class Representative

Plaintiff does not request an Enhancement payment or service award.

7. Attorneys' Fees and Costs

The attorney fees and costs will be discussed in detail in the motion for final approval.

8. Class Administration Costs

Similarly, reimbursement of the settlement administrator's costs will be discussed in the final approval motion. However, a declaration from the administrator including their "not-to-exceed" bid has been submitted in support of this motion.

V. THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS

A. The Class is Ascertainable and Sufficiently Numerous.

The Class that Plaintiff seeks to conditionally certify is ascertainable. "Class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records." (*Lee v. Dynamex, Inc.* (2008) 166 Cal. App. 4th 1325, 1334.) GTI determined that there are 1,172 class members. (See Settlement, ¶ 4.1.)

Furthermore, the Class is sufficiently numerous. Courts generally find that numerosity is satisfied if the class includes forty or more members. (*See Villalpando v. Excel Direct Inc*. (N.D. Cal. 2014) 303 F.R.D. 588, 605-606.)

B. There Are Common Questions of Law and the Claims Are Typical

The commonality requirement is met when there are questions of law and fact common to the class. *(Hanlon v. Chrysler Corp*. (1998) 150 F.3d 1011, 1019 ("The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate legal remedies within the class"). Commonality requires only that some common legal or factual questions exist; the plaintiff need not show that all issues in the litigation are identical. (*See Richmond v. Dart Industries, Inc*. (1981) 29 Cal. 3d 462, 473 (1981) Where the employer's conduct is uniformly directed at a class of employees, as it is here, the classwide impact of the policies satisfies the commonality requirement. (See *Stephens v. Montgomery Ward & Co*. (1987) 193 Cal. App. 3d 411, 421.)

The claims outlined above were arguably common to all class members, and Plaintiff was subjected to the violations, satisfying the typicality requirement.

C. Plaintiff and Plaintiff's Counsel Adequately Represent the Class

The adequacy requirement is also met. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450.) Correspondingly, Plaintiff does not have any interests adverse to the class.

As detailed in the attached declaration, Plaintiff's counsel are experienced and well-qualified class action attorneys who have settled a variety wage and hour matters. The work done to prepare for the mediation was fastidious and methodical, which yielded the successful result.

VI. LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION

The settlement will be uploaded the LWDA website on the same day the motion is filed.

VII. CONCLUSION AND ACTION REQUESTED

Plaintiff submits that the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members and the PAGA portion of the settlement will also benefit the State of California.

The settlement was reached after informed, extensive, and arms' length negotiations conducted by counsel for respective parties who are experienced in wage and hour class action litigation, who were able to research the issues and develop a convincing damages model.

Out of the gross settlement of $750,000 after the deductions for attorney fees, costs, settlement administration, the PAGA allocation, and Plaintiff's enhancement payment, a net settlement amount of $416,350 will be provided for the class members; a definite benefit.

Plaintiff respectfully requests the Court to grant the motion for preliminary approval, approve and authorize mailing of the Notice Packet, set a date for the final approval hearing.

Date: September 16, 2024

FRONTIER LAW CENTER

Theodore Tang
Attorney for Plaintiff
Efrain Robles