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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF VENTURA

MARK FLACH, on behalf of himself and all
others similarly situated,

Plaintiff,

v.

WHISK LOGISTICS, LLC and DOES 1
through 100,

Defendants.

Case No.: 56-2022-00573024-CU-OE-VTA

**PLAINTIFF'S NOTICE OF MOTION
AND UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT AND APPROVAL OF
CLASS NOTICE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

Date: February 16, 2023
Time: 8:30 a.m.
Dept.: 42
Res. ID: R-2702669
Judge: Hon. Henry Walsh

1 **NOTICE OF MOTION AND MOTION**

2 TO THE ABOVE-CAPTIONED COURT AND TO ALL PARTIES AND THEIR
3 COUNSEL OF RECORD:

4 PLEASE TAKE NOTICE that Plaintiff Mark Flach ("Plaintiff"), individually and on behalf
5 of all similarly situated and aggrieved individuals, hereby moves the Court to grant Plaintiff's
6 Unopposed Motion for Preliminary Approval of Class Action Settlement ("Motion"). Defendant
7 Whisk Logistics, LLC ("Defendant" or "Whisk") does not oppose this motion. Hearing on this
8 motion will be held on February 16, 2023, in Department 42 of the above-entitled Court, located at
9 at 800 South Victoria Ave., Ventura, CA 93009.

10 Plaintiff moves the Court for an Order that:

- 11 1) Grants class certification of the proposed settlement class under California
12 Code of Civil Procedure section 382;
13 2) Preliminarily approves the proposed settlement;
14 3) Directs notice to be disseminated to Class Members in the form and manner
15 proposed by the parties as set forth in the Settlement Agreement and
16 Exhibits thereto;
17 4) Appoints Plaintiff as the Class Representative and Olivier & Schreiber LLP
18 and Fineman Poliner LLP as Class Counsel;
19 5) Appoints ILYM Group, Inc. to serve as the Settlement Administrator; and
20 6) Sets deadlines for Class Notice to be sent, objection and opt-out deadlines,
21 and a hearing date and schedule for final approval of the Settlement and
22 consideration of Plaintiff's counsel's fee and cost application.

23 This motion is based on this Notice of Motion and Motion; the below Memorandum of Points
24 and Authorities; the Declarations of Rachel Bien and Phillip Poliner, and supporting exhibits; the
25 pleadings, records, and papers on file in this action; and all other matter properly before this Court.

26 Dated: January 12, 2023

OLIVIER & SCHREIBER LLP

27 By: 
Rachel Bien

28 *Attorneys for Plaintiff and the Proposed Class*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Mark Flach (“Plaintiff”) alleges that Defendant Whisk Logistics, LLC (“Defendant”
4 or “Whisk”) misclassified him and similarly situated truck drivers as independent contractors rather
5 than employees and, consequently, had improper deductions taken from their wages, were not paid
6 overtime, were not paid at least the minimum wage for all hours worked, were not provided with
7 sick leave pay, were not provided legally compliant wage statements, were not provided
8 reimbursement for business expenses, and were not provided with compliant meal and rest breaks.

9 Defendant asserts that Plaintiff and similarly situated truck drivers were properly classified
10 as independent contractors. As set forth in more detail below, prior to filing of the lawsuit, Plaintiff
11 invited Defendant to engage in pre-litigation class wide negotiations, including the exchange of
12 necessary information and data to analyze the case, and a mediation. The parties, following the
13 mediation, were able to reach a class wide settlement, for which the parties now seek preliminary
14 approval.

15 Plaintiff, individually, on behalf of the proposed Class, and as a Private Attorneys General
16 Act (“PAGA”) representative, seeks preliminary approval of a \$755,000.00 non-reversionary, class
17 action settlement (“Settlement”) of this wage and hour case against Defendant.

18 The Settlement, which was achieved after extensive review and analysis of Defendant’s
19 payroll and other records and arm’s-length negotiations, will provide substantial monetary payments
20 to approximately 115 current and former Whisk truck drivers working in California. As set forth
21 below, the Settlement satisfies all the criteria for class certification and settlement approval under
22 section 382 of the California Code of Civil Procedure. Accordingly, Plaintiff requests that the Court
23 provisionally certify the Class, appoint Class Counsel, preliminarily approve the Settlement, and
24 order distribution of the Class Notice.

25 **II. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS**

26 On December 12, 2022, Plaintiff filed a class action complaint against Defendant pleading
27 causes of action under the California Labor Code and Unfair Competition Law for (1) failure to pay
28

1 the minimum wage; (2) failure to pay overtime; (3) failure to pay wages for missed meal and rest
2 periods; (4) failure to reimburse business expenses; (5) failure to provide accurate itemized wage
3 statements; (6) waiting time penalties; (7) unlawful deductions; (8) unpaid sick leave; (9) failure to
4 provide written notice upon hire; and (10) PAGA penalties.

5 Prior to filing the lawsuit, Plaintiff filed a notice of the PAGA claim with the Labor
6 Workforce Development Agency (“LWDA”), served a copy on Defendant, and invited Defendant to
7 engage in pre-litigation classwide negotiations with respect to the claims. Decl. of Rachel Bien in
8 Supp. of Mot. for Preliminary Approval (“Bien Decl.”) ¶ 4. The parties agreed to attempt to resolve
9 the claims through mediation with a private mediator. In advance of mediation, at Plaintiff’s
10 counsel’s request, Defendant produced relevant records for Class Members, including records
11 reflecting their hours, mileage, payroll deductions, and pay reports. *Id.* ¶ 5. Plaintiff’s counsel
12 engaged an expert, David Breshears of Hemmings Morse, LLP, to assist them in analyzing the
13 records and determining Class Members’ potential damages and penalties. *Id.* ¶ 6. In addition,
14 Plaintiff’s counsel interviewed drivers, including Plaintiff, and reviewed publicly available
15 information about Defendant in order to assess Defendant’s independent contractor affirmative
16 defense, and engaged in extensive back and forth with Defendant’s counsel to understand and
17 evaluate Defendant’s pay policies and driver records. *Id.*

18 On November 9, 2022, the parties participated in a mediation conducted by Steve Pearl, an
19 experienced employment law mediator. *Id.* ¶ 7. The mediation did not end with a resolution,
20 however the parties continued to work with Mr. Pearl over the following weeks and on November
21 17, 2022, resolved this matter through a mediator’s proposal accepted by both parties. *Id.* The parties
22 then negotiated the terms of a long-form settlement agreement, which is attached to the Bien Decl.
23 as Exhibit A.

24 **III. SUMMARY OF SETTLEMENT TERMS**

25 Plaintiff requests, by this motion, that the Court certify the proposed Class for settlement
26 purposes, preliminarily approve the Settlement, and enter the Proposed Order Granting Preliminary
27 Approval. *See* Bien Decl. Ex. C (Proposed Order Granting Preliminary Approval, also being lodged
28

1 and served with these papers pursuant to California Rules of Court). The key settlement terms are
2 as follows.

3 **A. Class Definition**

4 The Settlement Class is defined as: any and all persons that performed work for Defendant
5 in California pursuant to owner-operator agreements during the time period of June 23, 2018 through
6 July 2, 2022. Bien Decl. Ex. A (Settlement Agreement) ¶ 1.1.¹ Based on Defendant's records, there
7 are 115 Class members. *Id.* ¶ 3.6.2.

8 **B. Class Relief**

9 Whisk has agreed to pay a non-reversionary Maximum Settlement Amount of \$755,000. *Id.*
10 ¶ 1.9. The Maximum Settlement Amount will be used to pay: Attorneys' Fees and Costs, Settlement
11 Administration Costs, a Service Payment, PAGA Penalties, and the Net Settlement Amount. *Id.* The
12 Net Settlement Amount will divided among Plaintiff and Class Members based on their workdays
13 reflected in Defendant's records. *Id.* ¶ 2.6. The Net Settlement Amount is currently estimated to be
14 approximately \$438,333.33. *Id.* ¶ 1.16.

15 On December 21, 2022, Defendant paid the Maximum Settlement Amount into a Qualified
16 Settlement Fund ("QSF") administered by ILYM Group, Inc., the parties' chosen Settlement
17 Administrator. Bien Decl. ¶ 8. Distributions will be made from the QSF within 30 days of the
18 Effective Date, which is the later of: (a) if no objections to the Settlement are submitted, the date on
19 which the Court issues the Final Approval Order and Judgment; (b) if any objections to the
20 Settlement are submitted, the date which is forty-five (45) calendar days after notice of entry of the
21 Final Approval Order and Judgment if no notice is filed within that time seeking appeal of the Final
22 Approval Order and Judgment and if no motion for extension to appeal is filed; or (c) if a notice of
23 appeal is filed, the date upon which all appellate and/or other proceedings resulting from the notice
24 of appeal have been terminated in such a manner as to permit the Final Approval Order and Judgment
25 to take effect in substantially the form described herein. Bien Decl. Ex. A (Settlement Agreement)
26 ¶¶ 1.6, 2.5.

27
28 ¹ All subsequent citations to Exhibits shall refer to the Exhibits attached to the Bien Declaration.

1 From the Maximum Settlement Amount, the parties propose allocating \$10,000 to PAGA
2 Penalties. *Id.* ¶ 1.21. The penalties will be divided seventy-five percent (75%) to the LWDA (i.e.,
3 the “LWDA Payment”) and twenty-five percent (25%) to PAGA Employees who consist of Class
4 Members who worked during the PAGA Period. *Id.* ¶¶ 1.20-1.22. PAGA Employees will each
5 receive a proportionate share of penalties based on his or her workdays as reflected in Defendant’s
6 records. *Id.* ¶ 2.6(a).

7 Each Class Member is expected to receive at least \$27.70 per work day. Assuming a Class
8 Member worked 5 days a week, approximately 36 weeks a year, his or her expected payout is
9 approximately \$6,925 for each year worked during the class period. Bien Decl. ¶ 10. Class Members
10 will have 180 days from the date of issuance to cash their settlement checks. Bien Decl. Ex. A
11 (Settlement Agreement) ¶ 2.8. Uncashed checks will be submitted to the State Controller Unclaimed
12 Property Fund in the name of the Class Member and/or PAGA Employee for whom the funds are
13 designated. *Id.*

14 **C. Opportunity to Object or Opt Out**

15 Class Members may object to or opt out of the Settlement. The Class Notice will provide
16 instructions and requirements for Class Members to object to the Settlement or to opt out of the
17 Settlement Class. Bien Decl. Ex. A (Settlement Agreement) ¶¶ 3.3.3-3.3.4; Ex. B (Class Notice) ¶¶
18 7-8.

19 **D. Released Claims**

20 Upon approval, Class members who do not opt-out will release all claims brought in the
21 lawsuit or that could have been brought based on the facts alleged in the lawsuit through July 2,
22 2022. Ex. A (Settlement Agreement) ¶¶ 1.29-1.30. Plaintiff has also agreed to a general release of
23 all claims through July 2, 2022 in exchange for a Service Payment. *Id.* ¶ 3.5.3.

24 **E. Settlement Administration and Dissemination of Notice to the Class**

25 The parties have agreed to ILYM Group as the Settlement Administrator. ILYM is an
26 experienced class action administrator and provided the most cost-effective bid to administer the
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1 settlement. ILYM has agreed that its administration of the Settlement will not exceed \$10,000. Bien
2 Decl. ¶ 11.

3 ILYM will distribute the Class Notice, maintain a toll-free telephone number through which
4 Class Members can ask settlement-related questions, and administer and distribute all settlement
5 payments. *See* Ex. A (Settlement Agreement) ¶ 3.2; *see* Ex. B (Class Notice).

6 Notice will be sent via first-class mail within 20 days of the Court’s preliminary approval
7 order. Ex. A (Settlement Agreement) ¶ 3.2.1. Whisk will provide the Settlement Administrator with
8 mailing addresses for Class Members, their social security numbers, and workdays. *Id.* ¶ 3.2.2. The
9 Settlement Administrator will conduct a skip-trace for any notices that are returned underliverable
10 and will promptly re-mail any notices for which it locates an updated address. *Id.* ¶ 3.2.5.

11 **F. Attorneys’ Fees, Costs, and Service Payment**

12 Plaintiff will file a separate motion for an award of attorneys’ fees of up to one-third of the
13 Maximum Settlement Amount (*i.e.*, \$251,666.67), and for reimbursement of reasonable costs and
14 expenses, which are anticipated not to exceed \$30,000 and consist of Plaintiff’s share of the
15 mediator’s fee, expert fees, filing fees, and other similar case-related costs. Ex. A (Settlement
16 Agreement) ¶ 1.16; Bien Decl. ¶ 14.

17 The motion will also seek a \$15,000 Service Payment for the Plaintiff in recognition of his
18 services to the Class and agreement to enter into a general release of claims. At time of final
19 approval, Plaintiff will provide a declaration outlining Plaintiff’s risk, time, and efforts in assisting
20 with this case. Ex. A (Settlement Agreement) ¶ 1.16; Bien Decl. ¶ 15.

21 **IV. ARGUMENT**

22 **A. Certification of the Settlement Class Is Appropriate.**

23 The Court should provisionally certify the Settlement Class for purposes of settlement
24 because it is ascertainable and sufficiently numerous, there exists a well-defined community of
25 interest, and a class is superior to alternative proceedings. *See Brinker Rest. Corp. v. Super. Ct.*, 53
26 Cal. 4th 1004, 1021 (2012); *see also* Code Civ. Proc. § 382. A well-defined community of interest
27 exists when there are “(1) predominant common questions of law or fact; (2) class representatives
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1 with claims or defenses typical of the class; and (3) class representatives who can adequately
2 represent the class.” *Brinker Rest. Corp.*, 53 Cal. 4th at 1021 (quoting *Fireside Bank v. Super. Ct.*,
3 40 Cal. 4th 1069, 1089 (2006)).

4 **1. The Settlement Class Is Ascertainable.**

5 A class is ascertainable when its members may be identified by reference to official records.
6 *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981), *disapproved of on other grounds by*
7 *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955 (2019). Here, the Settlement Class is ascertainable
8 because Class Members contracted with Whisk to perform deliveries and their identities can be
9 identified from company records.

10 **2. The Settlement Class Is Numerous.**

11 The numerosity requirement is satisfied because the Settlement Class is of such a size that is
12 “it is impracticable to bring them all before the court.” Code Civ. Proc. § 382. Here, there are 115
13 Class Members. Bien Decl. Ex. A (Settlement Agreement) ¶ 3.6.2.

14 **3. Common Questions of Law and Fact Predominate.**

15 Common questions predominate where the legal theory is “likely to prove amenable to class
16 treatment,” such that the resolution of claims “in a single class proceeding would be both desirable
17 and feasible.” *Brinker*, 53 Cal. 4th at 1021-22 (internal quotation marks omitted). “As a general rule
18 if the defendant’s liability can be determined by facts common to all members of the class, a class
19 will be certified even if the members must individually prove their damages.” *Id.* at 1022 (internal
20 quotation marks omitted).

21 Here, common questions of fact and law exist that predominate over individual issues. The
22 central question presented is whether Plaintiff and Whisk drivers were misclassified as independent
23 contractors rather than employees and, consequently, have had improper deductions taken from their
24 wages, have not been paid for any overtime worked, have not been paid at least the minimum wage
25 for all hours worked, have not been provided with sick leave pay, have not received legally compliant
26 wage statements, have not received reimbursement for business expenses that an employer must
27 bear, and have not been provided with compliant meal breaks. Plaintiff’s claims are the same as
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1 those of the proposed Class, and will be resolved in the same way. All similarly aggrieved
2 individuals are subject to the same policies, practices, and procedures with respect to pay, signed the
3 same form contracts, performed the same or very similar duties, and all are alleged to have suffered
4 the same type of wage loss.

5 There are no claims or defenses individual to Plaintiff that would predominate over common
6 questions of fact and law. Commonality and predominance are thus satisfied here.

7 **4. Plaintiff's Claims Are Typical of the Class Claims.**

8 Where plaintiffs' injuries are of the same nature as those of other class members and arise
9 from the same general course of conduct, the typicality requirement is satisfied. *See, e.g., Seastrom*
10 *v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007).

11 Here, Plaintiff's claims are typical of all other Class Members. Like all other Class Members,
12 Plaintiff signed an owner-operator agreement classifying him as an independent contractor,
13 performed delivery services for Whisk's customers, and alleges that he was subjected to the uniform
14 pay policies and practices. Plaintiff's claims therefore are typical for purposes of section 382.

15 **5. Plaintiff and Class Counsel Adequately Represent the Class.**

16 The adequacy requirement is met if the named plaintiffs and their counsel have no interests
17 adverse to the proposed class and are committed to vigorously prosecuting the case on behalf of the
18 class. *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450-51 (1976).

19 Here, Plaintiff has provided fair and adequate representation for the Settlement Class.
20 Plaintiff has no conflicts of interest with other Class Members, has experienced the same alleged
21 legal violations, and has vigorously prosecuted the class claims by actively participating in the
22 investigation and settlement of the claims. Bien Decl. ¶ 15.

23 Class Counsel have considerable experience litigating complex class actions, including wage
24 and hour class actions, are familiar with the legal and factual issues involved, and are highly
25 qualified. Bien Decl. ¶¶ 17-22; Decl. of Phillip Poliner in Supp. of Mot. for Preliminary Approval
26 ("Poliner Decl.") ¶¶ 4-6. The work performed by Plaintiff's counsel in this matter, as well as their
27 substantial experience, provides an ample basis for appointing them as Class Counsel.

1 **6. Class Treatment Is Superior.**

2 Class treatment is superior to individual adjudication of class members' claims when it would
3 prevent repetitious litigation and provide "a method of obtaining redress for claims which would
4 otherwise be too small to warrant individual litigation." *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d
5 462, 469 (1981) (internal quotation marks omitted).

6 Here, a class action is superior to any other available method for litigating Class Members'
7 claims against Whisk. It would be inefficient and a waste of judicial resources to resolve these
8 relatively small, but highly similar claims in separate trials. *See Bufile v. Dollar Fin. Grp., Inc.*, 162
9 Cal. App. 4th 1193, 1208 (2008), *disapproved of on another grounds by Noel*, 7 Cal. 5th at 986 n.15.
10 Counsel is not aware of any pending litigation of these claims by any Class Member. Bien Decl. ¶

11 16. Any Class Member who wishes to pursue a separate action can opt out of the Settlement.

12 Because the class mechanism will achieve economies of scale, conserve judicial resources,
13 and avoid repetitive proceedings, superiority is met.

14 **B. The Settlement Meets the Requirements for Preliminary Approval.**

15 Settlement of class actions is favored by public policy. *See Ferguson v. Lieff, Cabraser,*
16 *Heimann & Bernstein*, 30 Cal. 4th 1037, 1054 (2003) ("Settlement of class actions is encouraged . . .
17 because they consume substantial judicial resources and present unusually large risks for the
18 litigants." (citation and quotation marks omitted)). A class settlement is reviewed and approved by
19 a court in two steps: (1) an early (preliminary) review, and (2) a final review at a fairness hearing
20 after notice has been distributed to the class members. Cal. Rules of Court, rule 3.769(c)-(g). At the
21 preliminary approval stage, the court assesses whether the proposed settlement is within the range of
22 possible approval and "fair, adequate, and reasonable." *7-Eleven Owners for Fair Franchising v.*
23 *The Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000); *see also Palacios v. Penny Newman*
24 *Grain, Inc.*, No. 14 Civ. 01804, 2015 WL 4078135, at *7 (E.D. Cal. July 6, 2015) ("At this
25 preliminary approval stage, the court need only determine whether the proposed settlement is within
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1 the range of possible approval, such that there is a reason to notify the class members of the proposed
2 settlement and to proceed with a fairness hearing.” (citations and internal quotation marks omitted).²

3 “The well-recognized factors that the trial court should consider in evaluating the
4 reasonableness of a class action settlement agreement include ‘the strength of plaintiffs’ case, the
5 risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action
6 status through trial, the amount offered in settlement, the extent of discovery completed and stage of
7 the proceedings, and the experience and views of counsel.’”³ *Kullar v. Foot Locker Retail, Inc.*, 168
8 Cal. App. 4th 116, 128 (2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801
9 (1996)). “[A] presumption of fairness exists where: (1) the settlement is reached through arm’s-
10 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
11 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
12 small.” *Dunk*, 48 Cal. App. 4th at 1802.

13 The settlement of the PAGA claim also requires court approval. Lab. Code § 2699(1)(2); *see*
14 *also Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 615 (2019). “[W]hile PAGA does not
15 require the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review
16 for settlements that prevents ‘fraud, collusion or unfairness,’ and protects the interests of the public
17 and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors
18 used to evaluate class action settlements bear on a settlement’s fairness—including the strength of
19 the plaintiff’s case, the risk, the stage of the proceeding, the complexity and likely duration of further
20 litigation, and the settlement amount—these factors can be useful in evaluating the fairness of a
21 PAGA settlement.” *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 77 (2021). However, “[u]nlike

22 ² The California Supreme Court has authorized California’s trial courts to use Rule 23 of the
23 Federal Rules of Civil Procedure and cases applying it for guidance in considering class issues.
24 *See Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 821 (1971).

25 ³ *Kullar* also lists as factors “the presence of a governmental participant, and the reaction of the
26 class members to the proposed settlement.” 168 Cal. App. 4th at 128. These factors are not
27 relevant because there is no government participant and Class Members have not yet been notified
28 of the proposed Settlement so the Court cannot evaluate Class Members’ reaction at this stage of
the case. The Court can evaluate Class Members’ reaction at the final approval stage, after notice
has issued to Class Members, and after the Court has had an opportunity to review any objections
and the number of exclusion requests.

1 a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to
2 incentivize private parties to recover civil penalties for the government that otherwise may not have
3 been assessed and collected by overburdened state enforcement agencies.” *Ochoa-Hernandez v.*
4 *CJADER Foods, Inc.*, No. C 08-2073 MHP, 2010 WL 1340777, at *4 (N.D. Cal. Apr. 2, 2010).

5 Here, all relevant factors weigh in favor of preliminary approval of the proposed Settlement.

6 **1. The Settlement Was Negotiated at Arm’s Length by Experienced Counsel**
7 **and Facilitated by a Mediator.**

8 The Settlement represents the culmination of intensive arm’s-length negotiations, assisted by
9 a mediator. Bien Decl. ¶¶ 5-7. Plaintiff and the interests of the Class were represented in settlement
10 negotiations by attorneys who have considerable experience in class actions and wage and hour
11 litigation, and who are, therefore, well-versed in the legal and factual issues. Bien Decl. ¶¶ 17-22;
12 Poliner Decl. ¶¶ 4-6. Whisk was similarly represented by counsel with extensive experience
13 defending complex litigation, including wage and hour class actions. The settlement negotiations
14 were contested and conducted in good faith. Bien Decl. ¶¶ 5-7.

15 Steve Pearl, who assisted the parties in negotiating the settlement, is an experienced and well-
16 respected mediator with years of complex class employment experience. *Id.* ¶ 7. The participation
17 of a well-respected neutral is entitled to weight in assessing the legitimacy of the negotiation process.
18 *See Kullar*, 168 Cal. App. 4th at 129 (“The court . . . should give considerable weight to the
19 competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that
20 a settlement agreement represents an arm’s length transaction entered without self-dealing or other
21 potential misconduct.”); *see also Bower v. Cycle Gear, Inc.*, No. 14-cv-02712-HSG, 2016 WL
22 4439875, at *5 (N.D. Cal. Aug. 23, 2016) (“[T]he parties reached their settlement after two full-day
23 mediation sessions before impartial and experienced mediators, which strongly suggests the absence
24 of collusion or bad faith by the parties or counsel.”). Plaintiff’s counsel consider this Settlement,
25 which, as discussed below, recovers a substantial amount of the Class’s damages and compares
26 favorably to previous settlements that courts have approved, to be an excellent result. *See* Bien Decl.
27 ¶¶ 21-22.

1 **2. Plaintiff and the Proposed Class Face Risk in the Absence of Settlement.**

2 The parties did not come to this Settlement lightly, but with the knowledge that certifying the
3 class and obtaining a judgment would require years of hard-fought litigation with wins and losses on
4 both sides. The parties would be required to expend significant time and incur substantial expenses
5 if this case continued. Whisk denies Plaintiff’s allegations, and further denies any and all liability to
6 anyone, including, but not limited to, Plaintiff, the Class, or any Class Member. Whisk maintains
7 that it complied with all applicable wage laws and believes that it has strong legal defenses that could
8 wipe out all, or nearly all potential liability.

9 While Plaintiff and his counsel believe Plaintiff would ultimately succeed in obtaining
10 certification of the proposed Class and overcoming Defendant’s independent contractor defense at
11 trial, they acknowledge that they face significant risk.

12 First, Defendant has argued that Plaintiff must meet the more factually intensive independent
13 contractor test under *S.G. Borello & Sons, Inc. v. Dep’t of Industrial Relations* (“*Borello*”), 48 Cal.
14 3d 341 (1989), in order to recover unpaid expenses under Labor Code § 2802 for the period prior to
15 January 1, 2020, when the California Legislature codified the “ABC” test for all Labor Code claims
16 in Assembly Bill (“AB”) 5. These unpaid expenses, particularly mileage, comprise a large
17 proportion of the Class’s damages. Bien Decl. ¶ 26. In addition, Whisk argues that it did not exercise
18 the requisite control over its drivers under *Borello* because, among other reasons, it allowed drivers
19 to hire subcontractors, did not require them to work on a set schedule, and contracted with drivers
20 who owned their own trucks and, in some cases, their own LLCs. *Id.* ¶ 27. Although Plaintiff
21 believes that other indicia of control would have overcome these facts, he acknowledges the risk
22 inherent in any fact intensive analysis. *Id.* Finally, Whisk provided Plaintiff’s counsel with
23 information showing that it paid drivers a fuel surcharge during the relevant period due to the high
24 price of fuel which substantially offset the unreimbursed mileage owed to Class Members. *Id.* ¶ 28.

25 Second, Defendant has argued that truck drivers are not entitled to overtime or meal and rest
26 break premiums, a sizable share of the Class’s damages, because California law is preempted by
27 federal law in this area. *See* Wage Order 9, § 4(L)(1)-(2) (exempting from overtime requirements
28

1 employees whose hours of service are regulated by U.S. Department of Transportation or California
2 regulations governing the hours of drivers); *Garcia v. Super. Ct. of Los Angeles Cnty.*, 80 Cal. App.
3 5th 63, 65 (2022) (holding that federal law preempts meal break requirements prospectively from
4 when federal regulators issued their preemption determination on December 28, 2018). If Defendant
5 is able to establish this defense, it would preclude Plaintiff from recovering any damages for these
6 claims. *Id.* ¶ 29.

7 Third, Defendant is likely to argue that Plaintiff cannot certify a Class under *Borello* due to
8 the fact intensive nature of the analysis and because Class Members are differently situated with
9 respect to whether they hired subcontractors and owned their own businesses or LLCs. Although
10 Plaintiff believes that the streamlined ABC test applies—not *Borello*—even if *Borello* did apply,
11 Plaintiff believes he could ultimately certify a class due to the relatively small size of the group, their
12 common duties, the standard form contracts they signed, and the rules and requirements that applied
13 classwide. *Id.* ¶ 30.

14 However, all of these issues would entail significant discovery and motion practice to resolve
15 and give rise to great risk for both parties. The Settlement provides substantial benefits to the Class
16 notwithstanding these risks.

17 **3. The Value of the Settlement Is Significant.**

18 The Settlement comprises a substantial portion of Class members' damages. Without
19 penalties, Plaintiff's counsel estimates that the Settlement represents approximately 38% percent of
20 the potential damages that could be obtained if the case proceeded to trial. With penalties, the
21 Settlement represents approximately 20% of the maximum potential recovery. *Bien Decl.* ¶¶ 33-36.
22 "The reasonableness of a settlement is not dependent upon it approaching the potential recovery
23 plaintiffs might receive if successful at trial." *Edwards v. City of Long Beach*, No. 05 Civ. 8990,
24 2011 WL 13180208, at *3, n.5 (C.D. Cal. Oct. 31, 2011). "It is well-settled law that a cash settlement
25 amounting to only a fraction of the potential recovery does not per se render the settlement inadequate
26 or unfair. Plaintiff has agreed to accept a smaller certain award rather than seek the full recovery but
27
28

1 risk getting nothing.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008)
2 (internal quotation marks omitted).

3 The recovery here is reasonable in light of the risks discussed above and compared to other
4 approved wage and hour class settlements. *See, e.g., Thomas v. Cognizant Tech. Sols. U.S. Corp.*,
5 No. 11 Civ. 1123, 2013 WL 12371622, at *6 (C.D. Cal. June 24, 2013) (granting final approval in
6 wage and hour action where settlement encompassed between 4.4% and 5% of the maximum
7 estimated liability figure); *Ma v. Covidien Holding, Inc.*, No. 12 Civ. 02161, 2014 WL 360196, at *5
8 (C.D. Cal. Jan. 31, 2014) (granting preliminary approval of wage and hour settlement where class
9 payment represented 9.1% of the total value of the action); *see also Singh v. Roadrunner Intermodal*
10 *Servs., LLC*, No. 15 Civ. 01497, 2018 WL 2412325, at *7 (E.D. Cal. May 29, 2018) (granting
11 preliminary approval of wage and hour settlement representing approximately 12% of the estimated
12 maximum damages), *modified by* 2018 WL 4382202, *2-3 (E.D. Cal. Sept. 13, 2018) (maintaining
13 grant of preliminary approval “[d]espite the increase in class size and the resulting anticipated
14 decrease in average recovery for class members”); *Destefano v. Zynga, Inc.*, No. 12 Civ. 04007, 2016
15 WL 537946, at *11 (N.D. Cal. Feb. 11, 2016) (approving class settlement representing “14 percent
16 of likely recoverable aggregate damages at trial,” and “9.5 percent of those” damages after
17 “deductions for attorneys’ fees and costs and administration costs”); *Gaudin v. Saxon Mortg. Servs.,*
18 *LLC*, No. 11 Civ. 01663, 2015 WL 7454183, at *6 (N.D. Cal. Nov. 23, 2015) (“The Court concludes
19 that the approximately 13.6% recovery provided for by the proposed settlement weighs in favor of
20 approval, especially in light of the difficulties that Plaintiff would face should this case proceed to
21 trial.”); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1042 (granting final approval of settlement where
22 gross class recovery was 9 percent of maximum potential recovery).

23 The Settlement allocates \$10,000 to PAGA Penalties. The PAGA Period runs from May 10,
24 2021 to July 2, 2022. Only 29 of the 115 Class Members have PAGA claims. Bien Decl. ¶ 37. The
25 estimated maximum PAGA penalties are approximately \$585,400. *Id.* ¶ 35. Given the Court’s broad
26 discretion to reduce penalty amounts under PAGA at trial, and given that the majority of the
27 Settlement Amount will directly compensate injured Class Members, the amount allocated to PAGA
28

1 Penalties is fair, adequate and reasonable. *See Vicerol v. Mistras Grp., Inc.*, No. 15-CV-02198-EMC,
2 2016 WL 5907869, at *9 (N.D. Cal. Oct. 11, 2016) (applying sliding scale and approving settlement
3 of PAGA claim that was “substantially reduced below its standalone settlement value without
4 sacrificing its statutory purposes because the non-PAGA settlement is relatively substantial”). It is
5 also well within the range that courts routinely approve. *See, e.g., Ruch v. AM Retail Grp., Inc.*, No.
6 14 Civ. 05352, 2016 WL 5462451, at *7 (N.D. Cal. Sept. 28, 2016) (approving PAGA recovery that
7 represented less than 2% of maximum potential recovery); *McLeod v. Bank of Am., N.A.*, No. 16 Civ.
8 03294, 2018 WL 5982863, at *2, *4 (N.D. Cal. Nov. 14, 2018) (same); *Nordstrom Comm’n Cases*,
9 186 Cal. App. 4th 576, 589 (2010) (settlement approved where \$0 out of nearly \$9 million settlement
10 allocated to PAGA penalties); *see also Franco v. Ruiz Food Prods., Inc.*, No. 1:10-cv-02354-SKO,
11 2012 WL 5941801, at *14 (E.D. Cal. Nov. 27, 2012) (“Defendant has agreed to pay \$10,000 as civil
12 penalties pursuant to the PAGA Of the \$10,000, 75 percent (\$7,500) will be paid to the State of
13 California, and the remainder (\$2,500) will benefit the class The Court finds that the PAGA
14 payment is set at a reasonable amount, and it shall be approved.”); *Schiller v. David’s Bridal, Inc.*,
15 No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *14 (E.D. Cal. June 11, 2012) (“Pursuant to
16 the Settlement Agreement, the parties have agreed to pay \$7,500 to the California Labor and
17 Workforce Development Agency The Court finds that the PAGA Payment is set at a reasonable
18 amount, and recommends that it be approved.”).

19 Class Members will not need to submit a claim form to be eligible to receive a payment and
20 the entire amount will be disbursed within 30 days of the Effective Date. *See* Bien Decl. Ex. A
21 (Settlement Agreement) ¶ 2.5. Class Members will thus readily and easily receive the benefits of the
22 Settlement. The proposed distribution plan is also straightforward and fair to all Class Members.
23 The Net Settlement Amount will be divided among Class Members based on their workdays as
24 reflected in Defendant’s records and whether they worked during the PAGA Period and are therefore
25 entitled to a portion of the penalties. *Id.* ¶ 2.6.

26 In light of the foregoing, the uncertainty of trial and the difficulty of attaining maximum
27 damages even with a successful result support approval of the Settlement. A certain—and
28

substantial—result for Class Members now, rather than a possibly larger, but contingent one at some indefinite time years in the future, favors preliminary approval of the Settlement.

C. The Court Should Approve the Proposed Class Notice.

The parties also seek the Court’s approval of the proposed Class Notice. *See* Bien Decl. Ex. B (Class Notice). Constitutional due process requires that the notice provide sufficient information to class members to make an informed decision to accept or object to a proposed settlement and an opportunity to be heard in the proceedings. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 251-52 (2001), *disapproved of on another ground in Hernandez*, 4 Cal. 5th 260. The proposed Class Notice satisfies these requirements.

The proposed Class Notice provides sufficient information for Class Members to decide whether to participate in, object to, or opt out of the Settlement and meets all of the requirements of California Rule of Court 3.766(d). The Notice provides: (1) a brief explanation of the case, (2) the material terms of the settlement, (3) the requested amounts of fees and costs sought by Plaintiff’s Counsel, (4) the proposed Service Payment, (5) the process for opting out and objecting, (6) the scope of the release and that Class Members will be bound by the judgment if they do not opt out, (7) the date and time of the final approval hearing, (8) that Class Members may engage their own counsel, and (9) contact information for counsel and the Settlement Administrator. *See* Bien Decl. Ex. B (Class Notice).

The proposed notice plan also complies with Rule 3.766(e) and due process. The Notice will be sent via First Class U.S. mail to the last known address of each Class Member. Bien Decl. Ex. A (Settlement Agreement) ¶ 3.2.1. The Settlement Administrator will attempt to obtain the correct address for each Class Member by undertaking a Reasonable Address Verification to ascertain the accuracy of the addresses provided by Defendant and then conducting a skip trace if notices are returned undeliverable without a forwarding address. *Id.* ¶¶ 3.2.3, 3.2.5.

1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court: (1) certify the
3 proposed Settlement Class; (2) preliminarily approve the Settlement; (3) direct the Class Notice to
4 be disseminated to Class Members; (4) appoint Plaintiff as the Class Representative and Olivier &
5 Schreiber LLP and Fineman Poliner LLP as Class Counsel; (5) appoint ILYM Group to serve as the
6 Settlement Administrator; and (6) enter the proposed Preliminary Approval Order.

7
8 Dated: January 12, 2023

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