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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF FRESNO

DANNY L. DRAKE and MARIO PIZANA,
individually and on behalf of all similarly
situated employees, and DANNY DRAKE on
behalf of all other aggrieved employees of
DEFENDANTS in the State of California,

Plaintiffs,

v.

MID VALLEY DISPOSAL, LLC, MID
VALLEY DISPOSAL, INC; and DOES 1
THROUGH 50, inclusive,

Defendants.

Case No.: 16CECG01653

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PLAINTIFF
DANNY DRAKE'S UNOPPOSED MOTION
FOR: (1) PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT; (2)
PROVISIONAL CERTIFICATION OF THE
SETTLEMENT CLASS; (3) APPROVAL OF
CLASS NOTICE AND NOTICE PLAN; (4)
APPOINTMENT OF CLASS COUNSEL AND
CLASS REPRESENTATIVE; (5)
APPOINTMENT OF CLAIMS
ADMINISTRATOR; AND (6) SETTING A
FINAL APPROVAL HEARING**

Date: September 24, 2019
Time: 3:30 p.m.
Judge: Hon. Rosemary T. McGuire
Dept.: 403

Complaint Filed: May 20, 2016

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I. INTRODUCTION

Plaintiff Danny Drake (“Plaintiff”) submits this brief in support of preliminary approval of a proposed Class Action Settlement (“Settlement”) with Defendants Mid Valley Disposal Inc. and Mid Valley LLC (“Defendants”). Plaintiff’s motion for preliminary approval came before the Court on July 3, 2019 and was denied. Since the Court issued its previous order denying approval of the class action settlement, Plaintiff has worked to address the issues raised by Court in its previous order. In the interests of avoiding duplication, Plaintiff will incorporate his previous motion by reference and focus this brief on addressing the issues raised by the Court in its previous denial of the parties’ proposed class action settlement. Specifically, Plaintiff provides the Court with evidence showing that provisional certification of the class is appropriate for settlement purposes, including evidence that common questions of law and fact predominate, that Plaintiff is an adequate class representative, and that his claims are typical of the class he seeks to represent. Plaintiff further addresses the Court’s concerns regarding the terms of the Joint Stipulation for Class Action Settlement (“Settlement Agreement” or “SA”) and Notice of Class Action Settlement (“Class Notice”). Plaintiff also provides additional analysis sought by the Court in its prior order. For the reasons set forth herein, the proposed Settlement satisfies all of the criteria for preliminary settlement approval under California law.

II. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE FOR SETTLEMENT

Provisional certification is appropriate at the preliminary approval stage where, as here, the Court has not yet certified the class and the requirements for certification are met. *Newberg on Class Actions* §§ 13:16-13:18 (5th ed. 2011-2017). “[I]t is well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859, 7 Cal. Rptr. 3d 28, 47 (2003), citing *Dunk v. Ford Motor Co.* 48 Cal.App.4th 1794 (1996). *See also Officers for Justice v. Civil Service Com’n*, 688 F. 2d 615, 633 (9th Cir. 1996) (“[C]ertification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light.”)

To certify a settlement class, the Court must find an ascertainable class and be a well-defined

community of interest in the questions of law and fact involving the parties represented. *Vasquez v. Superior Court*, 4 Cal.3d 800, 809-811 (1971). In its order denying Plaintiff's July 3, 2019 motion for preliminary approval, the Court noted that Plaintiff had not provided satisfactory evidence supporting the community of interest test to establish a class for settlement purposes. Therefore, Plaintiff has addressed the Court's concerns here.

A. The Evidence Shows That Common Issues Of Law And Fact Predominate.

The predominance test concerns whether the proposed classes are sufficiently cohesive to warrant adjudication by representation. *See, e.g., Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605 (1987); *Lazar v. Hertz Corp.*, 143 Cal. App. 3d 128 (1983). To the extent any individual questions exist that concern the amount of wages that were unpaid, these issues go to Class Member damages, not liability, which does not preclude the maintenance of the suit as a class action. *Vasquez*, 4 Cal.3d at 815.

As noted by the Court in its order denying Plaintiff's July 3, 2019 motion for preliminary approval, handbooks and manuals or other written evidence of employer policies are commonly used to determine employer practices, typicality, and possible predominant issues of fact and law. *See, e.g., Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.* 311 F.R.D. 590, 595 and 603 (C.D. Cal. 2015); *Clausnitzer v. Federal Exp. Corp.* 248 F.R.D. 647, 649 and 656 (S.D. Fla. 2008); *Butler v. DirectSAT USA, LLC* 47 F. Supp. 3d 300, 308 (D. Md. 2014); *Romulus v. CVS Pharmacy, Inc.* 321 F.R.D. 464, 469 (D. Mass. 2017).

Here, Defendants' written policies are sufficient to show a common policy or practice giving rise to Plaintiff's claims, and that common issues of law and fact predominate. According to Defendants' written policies, Defendants assumed that class members were taking meal breaks and automatically recorded meal breaks for class members. Drake Decl., ¶ 3-11; Hollis Decl. ¶ 7-9. According to one of Plaintiff's theories of the case, by Defendants assuming that class members were taking meal breaks, Defendants fell short of their responsibility to provide meal breaks. *Id.* This common policy is a violation of the Industrial Welfare Commission Wage Order's requirement that an employer maintain accurate information with respect to each employees' meal period. Cal. Code Regs. tit. 8, §11090, subd. (7). The written policies further do not provide for a second meal period for shifts over ten hours long or the payment of meal or rest period premiums. In addition, Plaintiff claims that he was not compensated for all hours worked, because Defendants' uniform meal break auto-deduct policy denied him and class

1 members compensation for all hours worked. Because class members' claims for unpaid minimum,
2 regular, and overtime wages rest on whether class members had 30 minutes deducted from their hour
3 worked, these claims too stem from the same common policy.

4 Thus, Defendants' common written policies gives rise to several of Plaintiff's claims. Common
5 issues of law and fact predominate as whether Defendants' common policies and practices failed to
6 provide Class Members with compliant meal and rest periods and failed to pay Class Members for all
7 hours worked. Plaintiff's wage statement and waiting time penalties claims are derivative of Plaintiff's
8 meal and rest break claims and claims for unpaid minimum, regular, and overtime wages. Therefore, the
9 issues of whether Defendants failed to timely pay Class Members all wages owed upon separation of
10 employment and failed to provide accurate wage statements also stems from the same policy that applies
11 uniformly to all Class Members. These issues are united in their required proof, and the resolution of these
12 over-arching questions will determine liability for the Class as a whole.

13 **B. Plaintiff's Claims Are Typical Of The Class And Plaintiff Is An Adequate Class**
14 **Representative.**

15 "The test of typicality 'is whether other members have the same or similar injury, whether the
16 action is based on conduct which is not unique to the named plaintiffs, and whether other class members
17 have been injured by the same course of conduct.'" *Johnson v. GlaxoSmithKline, Inc.*, 166 Cal. App. 4th
18 1497, 1509, 83 Cal. Rptr. 3d 607, 617 (2008), as modified on denial of reh'g (Oct. 14, 2008).

19 Here, Plaintiff suffered the same injury as other Class Members stemming from the same common
20 policy or course of conduct. In denying Plaintiff's prior motion, the Court noted that Plaintiff had not
21 shown that a particular policy or procedure was used for the class. The Court also noted that Plaintiff had
22 not demonstrated that any policy continued after his employment ended. Defendants' handbooks and
23 written policies, however, are evidence that the meal break auto-deduct policy was applied to all class
24 members. Plaintiff identified that Defendants maintained a common policy of automatically recording a
25 30-minute meal break from class members' hours worked throughout the entirety of his employment and
26 applied uniformly to all class members. Drake Decl., ¶ 3-11. The deposition of Defendants' person most
27 knowledgeable identified that Defendants maintained the same common policy giving rise to Plaintiff's
28 claims throughout the remaining part of class period. Hollis Decl., ¶ 9, Ex. 6. Although Plaintiff is a former

1 employee of Defendants, he meets the requirements of typicality because the policies giving rise to his
2 injuries continued after his employment with Defendants ended, which is evident from the fact that the
3 same written policies continued in future versions of Defendants' employee handbook and onboarding
4 documents after Plaintiff left his position. *Id.*

5 The central component of class representative adequacy is the absence of conflicts of interest
6 between the proposed representatives and the class. 1 Newberg on Class Actions § 3:54 (5th ed.), citing
7 to *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997). The adequacy-of-representation
8 requirement tends to merge “with the commonality and typicality ... and whether the named plaintiff's
9 claim and the class claims are so interrelated that the interests of the class members will be fairly and
10 adequately protected in their absence.” *Amchem* 521 U.S. at 626, citing to *General Telephone Co. of*
11 *Southwest v. Falcon*, 457 U.S. 147, 157, n. 13, (1982). Here, there are no apparent conflicts of interest
12 with other class members. Drake Decl., ¶19; Hollis Decl, ¶9, Ex. 4, ¶140. Furthermore, as previously
13 addressed, Plaintiff's claims are typical of the class because they stem from common policies that applied
14 to Plaintiff and the class. As such, the interests of class members will be fairly and adequately protected
15 by Plaintiff in their absence.

16 A secondary component of class representative adequacy is whether the proposed representative
17 is properly qualified to assume the role of class representative. Some courts refer to this inquiry as
18 examining whether the proposed representative has the proper “motivation” or “desire” to “vigorously
19 pursue” the interests of absent class members. 1 Newberg on Class Actions § 3:54 (5th ed.); see also
20 *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1305 (D. Nev. 2014)

21 As addressed in Plaintiff's previous motion for class certification, Plaintiff has vigorously pursued
22 this litigation and spent over 100 hours over the past three years in this litigation. Drake Decl., ¶33.
23 Plaintiff has spent hours reviewing extensive documents produced by Defendants, spent considerable
24 amounts of time meeting and conferring with counsel and responding to written discovery, reviewing and
25 producing extensive documents in response to Defendants' document requests. *Id.*, ¶¶21-23, 27, 33.
26 Plaintiff spent hours meeting and conferring with counsel in preparation for being deposed, he drove from
27 Fresno to Defendants' counsels' office in Sacramento to be deposed, he sat for two full days of deposition
28 testimony, he drove from Fresno to San Francisco to participate in a full day of mediation, attended an all-

1 day mediation in San Francisco, and he has always been readily available and helpful throughout this
2 litigation to assist counsel in preparing this case. Drake Decl., ¶24-28.

3 **C. Other Courts Have Found That An Employer’s Meal Break Auto-Deduct Policies**
4 **Are Appropriate For Class-Wide Treatment**

5 A survey of California state and federal courts decisions on whether meal break autodeduct policies
6 give rise to certification of a class demonstrates that class-wide settlement is proper. See *ABM Indus.*
7 *Overtime Cases*, 19 Cal. App. 5th 277, 310, 227 Cal. Rptr. 3d 445, 473 (Ct. App. 2017), as modified (Jan.
8 10, 2018) (“[T]he legality of ABM's autodeduct policy for meal breaks in light of the recordkeeping
9 requirements for California employers is also an issue amenable to classwide resolution.”); see also *Rojas-*
10 *Cifuentes v. ACX Pac. Nw. Inc.*, No. 214CV00697JAMCKD, 2018 WL 2264264 (E.D. Cal. May 17, 2018)
11 (granting certification of a class action as a result of the employer’s policy of automatically deducting 30-
12 minute meal breaks from employees’ time); see also *Morales v. Leggett & Platt Inc.*, No.
13 215CV01911JAMEFB, 2018 WL 1638887, at *7 (E.D. Cal. Apr. 5, 2018) (granting certification of a class
14 action as a result of the employer’s policy of automatically deducting 30-minute meal breaks from
15 employees’ time); see also *Wilson v. TE Connectivity Networks, Inc.*, No. 14-cv-04872, 2017 WL
16 1758048, at *7–11 (N.D. Cal. Feb. 9, 2017) (granting class-wide certification stemming from an
17 employer’s meal break autodeduct policy); see also *Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286,
18 1304, 105 Cal. Rptr. 3d 443, 458 (2010) (reversing a denial of class certification and finding that the policy
19 of deducting 30 minutes per shift for each employee, regardless of whether meal breaks were taken, raises
20 common legal and factual issues.)

21 **III. THE SETTLEMENT TERMS**

22 Plaintiff and Defendants have revised the Settlement Agreement since Plaintiff’s July 3, 2019
23 motion for preliminary approval. These revisions address the Court’s concerns as follows:

24 1. Released Claims. The parties removed the language in Settlement Agreement regarding
25 Defendants’ release of claims under the Fair Labor Standards Act (“FLSA”). In addition, the parties
26 changed the language in the release from “the Actions” to this “the lawsuit.” (SA, ¶1.7.) The parties also
27 removed the language in the Class Notice regarding the release of claims under FLSA. (Hollis Decl., ¶
28 25(a) Exs. 2,9, p. 5.)

2. Class Member Opt-Out Period. The parties changed the period in which Class Members can opt out of the settlement from 45 to 60 days. (SA, ¶1.20, 4.6, 4.18.)

3. Released Parties. The parties removed Mid Valley Recycling and Crown Transportation LLC as “Released Parties.” (SA, ¶1.26.)

4. Requests for Exclusions. The parties removed the requirement that requests for exclusion include the last four digits of class members social security numbers. (SA, ¶1.28, Hollis Decl., ¶24, Ex. 8, p. 6.)

5. Admissibility of the Settlement Agreement. The parties removed the language that the settlement agreement would not be admissible in court. (SA, ¶2.9.; ¶10.1.)

6. Defendants’ Ability to Revoke the Settlement. The parties removed the language in the Settlement Agreement that permitted Defendants to revoke the settlement if Danny Drake or Mario Pizana submit a Request for Exclusion. (SA, ¶4.11.)

7. Release of Claims Against Counsel and the Settlement Administrator. The parties removed the language in the Settlement Agreement stating that no party will have a claim against counsel for the parties or the settlement administrator. (Hollis Decl., ¶24, Ex. 8, ¶4.17.)

8. Uncashed Checks. The parties removed the language regarding the redistribution of uncashed checks being redistributed to class members. Instead the agreement names a cy pres beneficiary and states that the hearing would be held on this issue (SA, ¶4.17, 5.1(c).)

9. Duties of Settlement Administrator. The parties removed the language regarding the settlement administrator being responsible for providing a declaration regarding mailing and changed it to counsel providing a declaration regarding mailing. (SA, ¶4.17.) The parties removed the language in the Class Notice advising class members that they can contact the Settlement Administrator for a copy of the pleadings and case file. Instead, the parties added language stating that parties may access the Court’s website, where they can view and download court documents at no cost. A link to website was also provided. (Hollis Decl., ¶24, Ex. 9 p. 11.)

10. Covenant Not to Sue. The parties removed the language stating that Danny Drake promises not to participate in a lawsuit against the Defendants and instead addressed in greater detail that Plaintiff expressly acknowledges the consequences of executing a waiver under California Civil Code § 1542. (SA,

¶5.1(d)(v).) The parties also removed the covenant of class members not to sue Defendants (SA, ¶6.1.)

11. Court Approval for Further Modification. The parties added language stating that modifications to the Settlement Agreement must be approved by the Court. (SA, ¶15.1.)

12. Objection to Settlement. The parties removed the language from the Class Notice that class members cannot ask the Court to order a larger Settlement. (Hollis Decl. ¶24, Ex. 9, p. 8.)

IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

Settlement of a class action requires court approval to prevent fraud, collusion or unfairness to the class. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-1801 (1996). The purpose of the preliminary evaluation of class action settlements is to determine whether the proposed settlement is within the range of possible approval, and whether notice to the class of the settlement terms and conditions and the scheduling of a formal fairness hearing are worthwhile. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001). Although California Rule of Court Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable range.” *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* 27 Cal.App.4th 1085, 1089-90 (1994). Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802. The presumption of fairness is consistent with California’s public policy goal of favoring settlements. *Stambaugh v. Super. Ct* 62 Cal.App.3d 231, 236 (1976) (“the law wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Ownes for Fair Franchising v. Southland Corp.* 85 Cal.App.4th 1135, 1151 (2000) (“voluntary conciliation and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class action litigation”).

Additionally, in reviewing the fairness of a class action settlement, due regard should be given to what is “otherwise a private consensual agreement between the parties.” *Cellphone Termination Fee Cases* 186 Cal.App.4th 1380, 1389 (2010). The inquiry “must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion

1 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate
2 to all concerned.” *Id.*

3 To determine whether a class settlement is fair, adequate and reasonable, a court must be provided
4 with “basic information about the nature and magnitude of the claims in question and the basis for
5 concluding that the consideration being paid for the release of those claims represents a reasonable
6 compromise.” *Clark v. American Residential Services LLC*, 175 Cal. App. 4th 785, 799 (2009). The trial
7 court must exercise its discretion through the application of several well-recognized factors when deciding
8 whether a class action settlement is fair. *Id.* at 799. The list of factors, which “is not exhaustive and should
9 be tailored to each case,” includes “the strength of plaintiff’s case, the risk, expense, complexity and likely
10 duration of further litigation, the risk of maintaining class action status through trial, the amount offered
11 in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views
12 of counsel, the presence of a governmental participant, and the reaction of the class members to the
13 proposed settlement.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (quoting
14 *Dunk*, 48 Cal. App. 4th at 1801). The most important factor the trial court should consider in determining
15 whether to approve a class action settlement is the strength of the case for plaintiff on the merits, balanced
16 against the amount offered in settlement. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.
17 App. 4th 399, 407-408 (2010); *Kullar*, 168 Cal. App. 4th at 130.

18 In sum, at the preliminary approval stage, the trial court must determine that the settlement was
19 not the product of fraud, overreaching or collusion, and that the settlement is fair, reasonable and adequate.
20 *Nordstrom Com’n Cases*, 186 Cal. App. 4th 576, 581 (2010).

21 In the Court’s prior order denying preliminary approval, the Court noted that there was not
22 sufficient evidence to demonstrate that the amount of the settlement was fair reasonable and adequate. As
23 such, Plaintiff will focus here on why the settlement, which represents a reduction of the total potential
24 damages, is fair, reasonable, and adequate.

25 **A. The Settlement Provides For Reasonable, Fair And Adequate Relief Taking In**
26 **Consideration The Significant Risks And Expenses Of Further Litigation.**

27 In reaching this settlement, Class Counsel carefully considered the strength of the case versus the
28 amount offered in settlement, the risk, expense, complexity and likely duration of litigation and of

maintaining class certification through trial, the present state of the law as it applies to wage and hour class actions, and the burdens of proof necessary to establish liability against Defendants. Hollis Decl., ¶¶40. Class Counsel analyzed the merits of the class claims, which presented significant hurdles. *Id.*, ¶¶38-51. Although Plaintiff maintains his claims are meritorious, Plaintiff acknowledges that Defendants possessed legitimate defenses to liability in the action. *Id.*, ¶¶40-43. Defendants maintain that they comply with all of their meal and rest period obligations under California law. *Id.*, ¶¶17, 41. Defendants vehemently deny that any class member were required to be on-duty or answer calls during their meal and rest periods and that, if any class member did so, it was voluntarily. *Id.*, ¶43. There are no written policies requiring class members to answer phone calls or to stay close to their trucks at all times during their shifts. *Id.*, ¶¶20, 41. Although Plaintiff has identified a common written policy giving rise to class-wide treatment, Defendants will likely argue that the policy does not necessarily give rise to the claims asserted by Plaintiff. For example, Defendants will likely argue that the auto-deduct policy demonstrates that Defendants provided meal breaks, and permitted them to assume that meal breaks were being taken, and that it does not prevent class members from taking meal breaks. Defendants will likely further argue that they were unable to monitor class members who operate outside of a traditional jobsite. Therefore, according to Defendants, class members have autonomy over their breaks, including the amount of time they spend on their breaks.

Furthermore, although Plaintiff contends that certification of the class is appropriate, it is in no way guaranteed. This Court may still find that the auto-deduct policy presents challenges for class certification. See *Villa v. United Site Servs. Of California, Inc.*, No. 5:12-cv-00318, 2012 WL 5503550 (N.D. Cal. Nov. 13, 2012) (denying certification of an auto-deduction class due to the plaintiff's failure to satisfy the commonality requirement).

In addition, Class Counsel is cognizant that there are issues of proof. Defendants contend that they required Plaintiff and Class Members to accurately record their hours worked, including meal breaks. *Id.*, ¶¶41-43. Defendants point to their time and pay records, which they claim reflect that Plaintiff and Class Members took meal periods, and that they were paid for all of their hours worked, including overtime. *Id.*, ¶42. Defendants argue that Class Members were able to take their meal periods and that the Class Members' route cover sheets reflect as much. Plaintiff's counsel's review of the route coversheets showed

1 that many of the route cover sheets contained clock in and clock out times for meal breaks, while others
2 did not, and others only had ambiguous markings, which Defendants claim meant meal breaks were taken.
3 Hollis Decl., ¶42. In interviews with class members, they reported that they were asked to record meal
4 breaks or place a mark on their route coversheet indicating a meal break was taken even when in actuality
5 they did not take a meal break. Therefore, Plaintiff believes that there is merit behind Plaintiff's meal
6 break claims. However, there are cognizable problems of proof. Plaintiff would also have faced challenges
7 proving that a common practice applied to all class members.

8 Plaintiff's waiting time penalties claims are further subject to Defendants' defense that its good-
9 faith belief in the use of its timekeeping and payroll practices precludes the imposition of any waiting time
10 penalties since Plaintiff's meal and rest break claims and claims for unpaid minimum, regular, and
11 overtime wages stem from recent case law. Specifically, Plaintiff claims that he was not provided with
12 meal and rest breaks, because he was required to monitor his radio and/or cell phone during breaks.
13 Defendants will likely argue case law addressing whether a requirement to monitor radios or cell phones
14 gives rise to meal and rest period violations was unclear until after Plaintiff filed his lawsuit. *See Augustus*
15 *v. ABM Security Services, Inc.*, 5 Cal.5th 257 (2016) (finding an employer's policy requiring security
16 guards to keep their radios and pagers on during rest breaks, to remain vigilant, and to respond when needs
17 arise may violate an employer's obligation to provide rest breaks). They will also likely argue that there
18 was no requirement to monitor radios and/or cell phones during breaks, as is evidenced by the lack of a
19 written policy to that effect.

20 Although the parties have engaged in a significant amount of discovery, the parties are far from
21 completing formal discovery. *Id.*, ¶45. Absent a settlement, the parties would likely spend considerable
22 additional, time, effort, and money on discovery, motion practice and trial. *Id.* There would be a
23 significant amount of motion practice including, motions for class certification, motions to decertify the
24 class, cross motions for summary judgment, and motions in limine, among others. *Id.*, ¶46. Even if
25 Plaintiff was successful in proving the merits of the class action claims, Defendants would likely submit
26 an appeal. *Id.*, ¶47. Thus, the parties will have to engage in expensive and protracted appellate practice.
27 *Id.* This settlement avoids all of those risks, and the accompanying expense, and instead provides
28 immediate and substantial monetary relief. The Settlement here commits Defendants to create a Settlement

1 Fund of \$150,00.00 to compensate class members for their alleged damages, and compensate counsel for
2 their fees and costs in the litigation. Hollis Decl., ¶49. In contrast, continued litigation would be costly
3 and time consuming, and appeal from the class certification decision and appeal from any judgment would
4 likely occur.

5 **B. The Amount Offered In Settlement Given The Estimated Value Of The Claims**
6 **Similarly Favors Preliminary Approval Of The Settlement**

7 The Settlement provides a real and substantial monetary benefit to the approximately 311 Class
8 Members considering the highly disputed nature of the claims. *Id.*, ¶ 47. After reviewing the records,
9 conducting interviews, and revising the damage calculations to address the Court's reason for denying
10 Plaintiff's July 3, 2019 motion for preliminary approval, Plaintiff calculated the maximum possible
11 exposure for all of the class claims alleged in the FAC. *Id.* ¶¶ 26-33. Specifically, Plaintiff assumed a 68%
12 violation rate for meal and rest break violations, unpaid overtime, unpaid wage statements, and waiting
13 time penalties. *Id.*, ¶ 28. The 68% violation rate was based on class member interviews, where 68% stated
14 that believed they were responsible for monitoring the vehicles, radios, and/or cell phones during meal
15 and rest breaks. *Id.*, ¶¶28-31. For the unpaid reimbursement of expenses, Plaintiff determined a violation
16 rate of 80%, which was also based on class member interviews. *Id.*, ¶ 32.

17 Thus, Plaintiff calculated the total maximum possible exposure in for the class claims to be
18 \$5,521,979. *Id.*, ¶33. Plaintiff then discounted the value of the class claims by 40% to account for the
19 likelihood of obtaining and maintaining class certification of Plaintiff's claims through trial, which
20 reduces the value from \$5,521,979 to \$3,313,187. *Id.*, ¶ 43. Plaintiff further discounted the total value of
21 the class claims by 40% to account for Defendants' strong defenses to liability and the chance that Plaintiff
22 will prevail on all the class claims at trial and obtain a 100% of the damages he claims the class suffered,
23 which further reduces the value of the claims to approximately from \$3,313,187to \$1,987,912. *Id.*, ¶ 35.

24 The \$150,000.00 Settlement (which excludes payroll taxes) negotiated here is reasonable
25 considering the substantial and significant risks that Plaintiff and class members faced in this litigation.
26 Class Counsel's estimate assumed that Plaintiff would prevail in obtaining class certification, be able to
27 establish liability on all claims alleged, and that Plaintiff's estimated damages would be awarded in their
28 entirety. *Id.*, ¶ 57. However, the possibility of recovering such a large amount is remote, particularly in

light of the relative strength of Defendants’ defenses and the existence of potential variations among Class Members – which would have reduced the overall value of the claims. Defendants again contend that they followed all applicable law and provided Plaintiff and Class Members with all required meal and rest periods and payment of for all hours worked. Again, Defendants rely on their time and pay records, which they claim reflect that Plaintiff and Class Members took all of their meal and rest periods. *Id.* at ¶ 18.

Plaintiff also considered that the maximum potential amount of civil penalties recoverable under PAGA of \$9,669,768 would be subject to the Court’s discretion to reduce an award in part or completely, and that only 25% of the civil penalties would go to the Class Members. Plaintiff is further aware that Defendants will potentially argue that the amount of PAGA penalties are grossly exaggerated due to Plaintiff’s use of “stacking” in determining the maximum amount of damages. Here, it should be noted that California appellate courts have yet to rule on whether PAGA penalties can be stacked— that is, whether multiple civil penalties can be recovered in the same pay period for different Labor Code violations. Given these multiple uncertainties, the amount of Plaintiff’s potential PAGA penalties is highly uncertain.

The Settlement Sum of \$150,000 is a fair, adequate and reasonable result for the approximately 311 class members given the parties’ conflicting evidence, which may have resulted in a jury substantially undercutting the projected value of the claims. It is well established that settlement offers that constitute only a fraction of the potential recovery do not preclude a court from finding that the settlement offer is fair. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir.1998); *Officers of Justice v. Civil Service Com’n of City of and County of San Francisco*, 688 F.2d 615, 628 (N.D. Cal. 1982). “The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir.1998) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n. 2 (2d Cir.1974)). “Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years).” *In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014).

Accordingly, the reasonableness of the proposed settlement is underscored by the fact that

Defendants have potentially viable grounds for not only challenging their liability, but also Plaintiff's estimate of the potential value of each claim. Hollis Decl. at ¶¶41-47. By contrast, the Individual Settlement Payments, which Plaintiff currently estimates will average approximately \$290.41, will provide fair and reasonable recovery to the entire Class without further delay. Hollis Decl., ¶ 6, Ex. 4 ¶ 79. While the amount paid to Class Members represents a discount on Plaintiff's estimate of the overall exposure to Defendants, this reduction in the amount of recovery represents a reasonable compromise considering the substantial risks Plaintiff would face. *Id.*, ¶ 39.

C. The Settlement Is Support By The Fact That It Was Reached Through Arms-Length Negotiations With The Assistance Of A Well-Respected Third Party Mediator.

This settlement was the product of truly adversarial bargaining process, with the assistance of a well-respected third-party mediator, which demonstrates that the interests of the class were protected. At the preliminary approval phase of litigation, courts look to "the procedural posture of the case at settlement for indications that the agreement was the product of legitimate, arms-length negotiations. Where the proposed settlement was preceded by a lengthy period of adversarial litigation involving substantial discovery, a court was likely to conclude that settlement negotiations occurred at arms-length." 4 *Newberg on Class Actions* § 13:14 (5th ed.).

The Ninth Circuit has held that where settlement terms are reached through formal mediation, the Court may rely upon the mediation proceedings as independent confirmation that the settlement was not the result of collusion or a sacrifice of the interests of the class. *Hanlon*, 150 F.3d at 1029; see also *Milliron v. T-Mobile USA, Inc.*, 2009 WL 3345762, at *5 (D.N.J. Sept. 14, 2009) (holding that "the participation of an independent mediator in settlement negotiation virtually insures that the negotiations were conducted at arm's length and without collusion between the parties"); *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, 2010 WL 2486346, at *6 (C.D. Cal. June 15, 2010) (holding that "the assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive"); *Dennis v. Kellogg Co.*, 2010 WL 4285011, at *4 (S.D. Cal. Oct. 14, 2010) (holding that the parties engaged in a "full-day mediation session," which helped to establish that the proposed settlement was noncollusive); 2 *McLaughlin on Class Actions*, § 6:7 (8th ed.) ("A settlement reached after a supervised mediation receives

1 a presumption of reasonableness and the absence of collusion”).

2 In this case, the settlement resulted from extensive arm's length negotiations. Specifically, the
3 parties initially participated in a full-day mediation with the Robert J. Kaplan, Esq., a well-respected,
4 neutral third-party mediator well-versed and experienced in wage and hour class actions. Hollis Decl.,
5 ¶51. After the mediation was unsuccessful, the parties engaged in substantial discovery in order to better
6 investigate the claims and prepare the matter for class certification. *Id.* Roughly 18 months after the
7 parties' initial mediation and after substantial discovery, the parties then again sought the assistance of
8 Mr. Kaplan to find a resolution to the litigation. *Id.* At all times, the parties' negotiations were hard-fought
9 and conducted at arm's length between attorneys with substantial wage and hour class action experience,
10 which fully informed the Parties of the relative strengths of the claims and the benefits of the proposed
11 Settlement, prompting each side to compromise. *Id.* Given these circumstances, the Court should give
12 deference to the mediation proceedings and the judgment of the parties in finding that the interests of the
13 class were protected.

14 **V. THE COSTS OF LITIGATION ARE REASONABLY INCURRED**

15 Plaintiff's costs of litigating this case were reasonable incurred. *Id.*, ¶52, 54. In the Court's prior
16 order denying Plaintiff's July 3, 2019 motion for preliminary approval, the Court noted that Plaintiff had
17 not provided proof of the costs for which Plaintiff's counsel sought reimbursement. Therefore, Plaintiff's
18 counsel has submitted proof of costs, including copies of receipts of expenses incurred in the course of
19 litigating this matter. *Id.*, ¶ 52, Ex. 10-11. It should be noted that Plaintiff's counsel's actual costs are in
20 excess of \$42,000; however, Plaintiff's counsel has only requested reimbursement of costs not to exceed
21 \$27,000. *Id.*, ¶ 53.

22 The costs of the settlement administrator are necessary to distribute the settlement checks to class
23 members. Declaration of Julie Green (Green Decl.), ¶ 6-7. In its order denying Plaintiff's July 3, 2019
24 motion for preliminary approval, the Court questioned the amount of the settlement administrator's costs.
25 A declaration of the Settlement Administrator details the services and costs of Settlement Administration,
26 which includes items customarily charged in the administration of class action settlements. Declaration of
27 *Id.* In addition, the Settlement Administrator will translate the Class Notice into Spanish, because several
28 class members are Spanish-only speakers. Hollis Decl., ¶ 6, Ex. 4 ¶ 94; Green Decl., ¶7, Ex. B. In choosing

1 a Settlement Administrator, Plaintiff's counsel requested bids from multiple settlement administrators and
2 selected a bid that was equally competitive to that of other potential settlement administrators. Hollis
3 Decl., ¶ 6, Ex. 4 ¶ 97.

4 **VI. CONCLUSION**

5 For the foregoing reasons, Plaintiff respectfully requests that this Court enter the concurrently filed
6 [Proposed] Order granting preliminary approval of the Class Action Settlement, and approval of the Class
7 Notice and notice plan.

8
9 Dated: August 30, 2019

GRAHAMHOLLIS APC

10
11
12 By: 

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