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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **IN AND FOR THE COUNTY OF SAN DIEGO**

13 WESLEY PHILLIPS, an individual, on  
14 behalf of himself and on behalf of all  
persons similarly situated,

15  
16 Plaintiff,

17 vs.

18 DI OVERNITE LLC, a Limited Liability  
Company; and Does 1 through 50,  
19 Inclusive,

20  
21 Defendants.

CASE No. 37-2016-00016800-CU-OE-CTL

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Hearing Date: December 15, 2017  
Hearing Time: 10:30 a.m.

Judge: Hon. Judith F. Hayes  
Department: 68

Action Filed: May 18, 2016  
Trial Date: None Set

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1     **I.     INTRODUCTION**

2             Plaintiffs Wesley Phillips, Thomas Harrington, Mario Lopez, and Insinia Lesa ("Plaintiffs")  
3     respectfully submit this memorandum in support of the unopposed motion for preliminary approval of  
4     the proposed class action settlement with Defendant DI Overnite LLC ("Defendant"), and seeks entry  
5     of an order: (1) preliminarily approving the proposed settlement of this class action with Defendant;  
6     (2) approving the form and method for providing class-wide notice; (3) directing that notice of the  
7     proposed settlement be given to the class; and, (4) scheduling a final approval hearing date to consider  
8     Plaintiffs' request for final approval of the class settlement and Plaintiffs' application for attorneys' fees  
9     and expenses.

10            Plaintiffs and Defendant have reached a full and final settlement of the above-captioned action  
11     and the ensuing arbitration were filed with the American Arbitration Association as Case No.  
12     01-17-0001-3718, which is embodied in the Class Action Settlement Agreement ("Agreement") filed  
13     concurrently with the Court. A copy of the fully executed Agreement is attached as Exhibit #1 to the  
14     Declaration of Norman Blumenthal ("Decl. Blumenthal"), filed herewith.

15            As consideration for this Settlement, the total amount to be paid by Defendant is Four Hundred  
16     Sixty Thousand Dollars (\$460,000.00) (the "Gross Settlement Amount"). This Gross Settlement  
17     Amount will settle all issues pending in the litigation and the arbitration between the Plaintiffs, on the  
18     one hand, and the Defendant, on the other hand, including: payments to Participating Class Members;  
19     the Class Representative Service Payments to the Plaintiffs; all attorneys' fees, costs and expenses of  
20     Class Counsel; all employee and employer tax withholdings; all payments allocated to the LWDA in  
21     connection with Private Attorney General Act ("PAGA"); and all costs of settlement administration.  
22     The Settlement is all-in with no reversion to Defendant. Decl. Blumenthal at ¶3.

23            On December 12, 2016, the parties participated in a full day of mediation before Hon. William  
24     C. Pate (Ret.), a respected jurist and now experienced mediator for class actions and wage and hour  
25     lawsuits. At the mediation, the parties were unable to reach a settlement. Thereafter, the Parties were  
26     ultimately able to reach a settlement after Judge Pate made a mediator's proposal, the principal terms  
27     of which were memorialized by the Parties in a signed Memorandum of Understanding The parties  
28     then prepared the Agreement which was signed by all counsel and by the parties and is now presented

1 to this Court for preliminary approval. Decl. Blumenthal at ¶5.

2 The Settlement is fair, reasonable and adequate, and should be preliminarily approved.  
3 Therefore, Plaintiffs respectfully request that this Court grant preliminary approval of the Agreement  
4 and enter the proposed order submitted herewith.

5 **II. DESCRIPTION OF THE SETTLEMENT**

6 The Gross Settlement Amount to be paid by Defendant is Four Hundred Sixty Thousand Dollars  
7 (\$460,000.00). Under the terms of the Settlement, the Gross Settlement Amount consists of the  
8 following elements: (1) payments to Participating Class Members; (2) Class Counsel's attorneys' fees  
9 and costs; (3) Settlement Administrator's expenses; (4) the Class Representative Service Payment; (5)  
10 a payment to the Labor Workforce Development Agency ("LWDA") in connection with the PAGA  
11 claim (i.e., the "LWDA Payment"); and (6) employer-side payroll taxes on the portion of the Settlement  
12 Shares allocated to wages. (Agreement at ¶ III(A)-(B).) The Gross Settlement Amount shall be all-in  
13 with no reversion to Defendant. (Agreement at ¶ III(A).) Decl. Blumenthal at ¶15.

14 Defendant will fund the Gross Settlement Amount by depositing the money with the Settlement  
15 Administrator. Defendant shall fund the Gross Settlement Amount according to the Payment Schedule.  
16 (Agreement at ¶ III(E)(9).) The Payment Schedule is as follows: (i) \$125,000 upon the later of 15 days  
17 after the Effective Settlement Date or July 1, 2018; (ii) \$330,000 in 33 monthly installments of \$10,000  
18 per month beginning one month after the \$125,000 is paid; and, (iii) \$5,000 in one installment of  
19 \$5,000 due one month after the last \$10,000 installment is paid. (Agreement at ¶ I(V).) After the  
20 Effective Date and receipt of sufficient funds from Defendant, the Settlement Administrator will make  
21 prorated distributions in four installments of \$115,000 each to Participating Class Members their  
22 Settlement Shares; to Plaintiffs their Class Representative Service Payments; to Class Counsel their  
23 Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment; to the LWDA their  
24 LWDA Payment; and to the Settlement Administrator, its reasonable fees and expenses. (Agreement  
25 at ¶ III(E)(9).) Decl. Blumenthal at ¶16.

26 The Net Settlement Amount shall equal the Gross Settlement Amount minus the Court-approved  
27 amounts for the Class Representative Service Payment, the Class Counsel Fees and Expenses Payment,  
28 the payment to the California Labor Workforce Development Agency, and the Settlement

1 Administrator's fees and expenses. (Agreement at ¶ I(S).) From the Net Settlement Amount, the  
2 Settlement Shares to the Participating Class Members shall be calculated as follows: (a) dividing the  
3 Net Settlement Amount by the total number of workweeks for all Participating Class Members that  
4 occurred during the class period and (b) multiplying the result by each individual Participating Class  
5 Member's workweeks that occurred during the Class Period. (Agreement at ¶ III(C)(2).) Only those  
6 Class Members who do not timely submit a valid Election Not to Participate in Settlement  
7 ("Participating Class Members") will be bound by the Settlement and will receive payment.  
8 (Agreement at ¶¶ I(U) and III(C)(1).) The entire Net Settlement Amount will be allocated among the  
9 Participating Class Members. Decl. Blumenthal at ¶17.

10 Class Members may choose to opt-out of the Settlement by following the directions in the Class  
11 Notice. (Agreement at ¶ III(E)(3).) Class Members may also dispute the number of workweeks  
12 allocated to them. (Id.) Finally, the Class Notice shall advise Class Members of their right to object  
13 to the Settlement. (Id.) Decl. Blumenthal at ¶18.

14 This is a non-reversionary settlement and it is the intention of the Parties that the entire Gross  
15 Settlement Amount will be paid out as described herein, leaving no residue. The expiration date of the  
16 settlement checks will be 180 days from the date the settlement checks are mailed. In the event that  
17 any checks mailed to Participating Class Members remain uncashed after the expiration of 180 days,  
18 then any such unclaimed funds shall be paid to the DIR Unpaid Wage Fund in the name of the  
19 Participating Class Member. (Agreement at ¶ III(E)(10).) Decl. Blumenthal at ¶19.

20 The parties have agreed to use Simpluris as the Settlement Administrator for the Settlement.  
21 (Agreement at ¶ III(D).) All costs and expenses due the Settlement Administrator in connection with  
22 its administration of the Settlement, including, but not limited to, mailing the Class Notice, locating  
23 Class Members, processing Elections Not to Participate in Settlement, and administering and  
24 distributing settlement payments to the Participating Class Members shall be paid from the Gross  
25 Settlement Amount. Settlement administration costs and expenses are estimated not to exceed  
26 \$15,000.00. (Agreement at ¶ III(B)(4).) Decl. Blumenthal at ¶20.

27 Subject to Court approval, Class Counsel shall be awarded a sum not to exceed twenty-five  
28 percent (25%) of the Gross Settlement Amount for reasonable attorneys' fees to compensate and

1 reimburse Class Counsel for all of the work already performed by Class Counsel in this case and all of  
2 the work remaining to be performed by Class Counsel in documenting the settlement, securing Court  
3 approval of the settlement, administering the settlement, and making sure that the settlement is fairly  
4 administered and implemented. (Agreement at ¶ III(B)(2).) Class Counsel will also be allowed to  
5 apply separately for reimbursement of their actual litigation costs as set forth on their billing statement  
6 in an amount not to exceed \$10,000. (Agreement at ¶ III(B)(2).) Subject to Court approval, the  
7 Settlement provides for a Class Representative Service Payment to the named Plaintiffs in an amount  
8 not to exceed \$5,000 each. (Agreement at ¶ III(B)(1).) Defendant will not oppose a motion for  
9 approval of attorneys' fees, costs and the service award consistent with the Agreement. Decl.  
10 Blumenthal at ¶21.

11 A payment of \$7,500 shall be made to the LWDA pursuant to California Labor Code § 2698 et  
12 seq. as the State of California's 75% share of the settlement apportioned to civil penalties. This LWDA  
13 Payment shall be paid by the Settlement Administrator from the Gross Settlement Amount. (Agreement  
14 at ¶ III(B)(3).) Decl. Blumenthal at ¶22.

### 15 **III. NATURE OF THE CASE**

16 On May 18, 2016 Plaintiff Phillips filed a Complaint against Defendant in the Superior Court  
17 of the State of California, County of San Diego. Plaintiff Phillips asserted claims that Defendant (I)  
18 violated the California Business and Professions Code §17200 et seq.; (ii) failed to pay overtime wages  
19 in violation of California Labor Codes §510 et seq, 1194 and 1198 et seq; (iii) failed to provide accurate  
20 itemized wage statements in violation of California Labor Code § 226; and, (iv) failed to provide wages  
21 when due in violation of California Labor Code §§ 201, 202 & 203. On June 29, 2016, Plaintiff  
22 Phillips filed a First Amended Complaint adding a claim under the Private Attorney General Act, Cal.  
23 Labor Code §§ 2698 et seq. ("PAGA") based upon the alleged violations of the Labor Code. Decl.  
24 Blumenthal at ¶7.

25 The Defendant moved to compel arbitration, to which Plaintiff Phillips responded. On January  
26 27, 2017, the Court granted the Defendant's motion to compel arbitration of all claims alleged in the  
27 Action. Decl. Blumenthal at ¶8.

28 On or around March 6, 2017, Plaintiffs Wesley Phillips, Thomas Harrington, Mario Lopez, and

1 Insinia Lesa filed Demands for Arbitration adding a claim for Defendant's failure to reimburse  
2 employees for required expenses in violation of California Labor Code § 2802. On April 20, 2017,  
3 Defendant filed an answer to claims asserting 30 affirmative defenses. Decl. Blumenthal at ¶9.

4 The Parties engaged in investigation and the exchange of documents and information in  
5 connection with the Action. Defendant provided to Plaintiffs and Class Counsel payroll and  
6 employment data and other information regarding the Class Members. Class Counsel received the  
7 necessary information to evaluate the strengths and weaknesses of the alleged claims. Decl.  
8 Blumenthal at ¶10.

9 The Action generally alleges that Plaintiffs and other employees were not properly paid for  
10 overtime wages, meal and rest period compensation and expense reimbursement in accordance with  
11 California law. The Action seeks unpaid wages, damages, penalties, civil penalties, restitution,  
12 reimbursement, interest, attorney fees, litigation costs, and any other equitable or legal relief allegedly  
13 due and owing to Plaintiffs and the other Class Members by virtue of the foregoing claims. Decl.  
14 Blumenthal at ¶11.

15 Prior to mediation, Plaintiffs analyzed the class claims, prepared a damage valuation and  
16 prepared a detailed mediation brief. On December 12, 2016, the Parties participated in an all-day  
17 mediation presided over by Judge William C. Pate (Ret.), a respected mediator of wage and hour class  
18 actions. During the mediation, each side, represented by its respective counsel, were unable to agree  
19 to settle the Action. As a result, the mediator made a mediator's proposal which was accepted by the  
20 Parties in the form of a Memorandum of Understanding. Based on those negotiations and arms-length  
21 settlement discussions between the Parties, the Parties agreed to settle the Action on the terms and  
22 conditions set forth in the Agreement now presented to this Court for preliminary approval. Decl.  
23 Blumenthal at ¶12.

24 Accordingly, for purposes of this Settlement, the "Class" is defined as "all individuals who  
25 worked for Defendant DI Overnite, LLC in California as a driver, messenger, or dispatcher during the  
26 time period of May 18, 2012 through October 10, 2017 or the date of preliminary approval, if earlier  
27 (the "Class Period"). (Agreement at § I(B).)

28 Although a settlement has been reached, Defendant denies any liability or wrongdoing of any

1 kind associated with the claims alleged in the Action and further denies that, for any purpose other than  
2 settlement, this action is appropriate for class treatment. Defendant contends, among other things, that  
3 it has correctly compensated the Class Members and complied at all times with the California Labor  
4 Code, applicable Wage Order, and all other laws and regulations. Further, Defendant contends that  
5 class certification would be inappropriate other than for a settlement class. Decl. Blumenthal, ¶ 13.

6 Plaintiffs contend that Defendant violated California wage and hour laws. Plaintiffs further  
7 contend that the Action is appropriate for class certification on the basis that the Plaintiffs' claims meet  
8 the requisites for class certification. Without admitting that class certification is proper, Defendant has  
9 stipulated that the above Class may be certified for settlement purposes only. (Agreement at § II(G).)  
10 The Parties agree that certification for settlement purposes is not an admission that class certification  
11 would be proper if the class certification issue were litigated. Further, the Agreement is not an  
12 admission that the Class could be certified absent a settlement. Solely for purposes of settling the  
13 Action, the Parties stipulate and agree that the requisites for establishing class certification with respect  
14 to the Class, as defined above, are satisfied. Decl. Blumenthal ¶ 13.

15 Class Counsel has conducted a thorough investigation into the facts of the class action. Class  
16 Counsel has diligently evaluated the Class Members' claims against Defendant. Prior to the mediation,  
17 counsel for Defendant provided Class Counsel with access to data and information for the Class,  
18 including payroll data and information concerning the Defendant's practices. In addition, Class  
19 Counsel previously negotiated settlements with other defendants in actions involving nearly identical  
20 issues and analogous defenses. Class Counsel is also aware of Defendant's financial situation which  
21 would not allow Defendant to pay any significant judgment. Based on the foregoing data and their own  
22 independent investigation, evaluation and experience, Class Counsel believes that the settlement with  
23 Defendant on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best  
24 interest of the Class in light of all known facts and circumstances, including the risk of significant  
25 delay, defenses asserted by Defendant, and potential appellate issues. Decl. Blumenthal at ¶ 14.

26 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO**  
27 **GRANT PRELIMINARY APPROVAL**

28 When a proposed class-wide settlement is reached, the settlement must be submitted to the

1 court for approval. 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-  
2 87. Preliminary approval is the first of three steps that comprise the approval procedure for settlements  
3 of class actions. The second step is the dissemination of notice of the settlement to all Class Members.  
4 The third step is a final settlement approval hearing, at which evidence and argument concerning the  
5 fairness, adequacy, and reasonableness of the settlement may be presented and Class Members may  
6 be heard regarding the settlement. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996);  
7 *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of Court, rule 3.769.

8 The primary question presented on an application for preliminary approval of a proposed class  
9 action settlement is whether the proposed settlement is “within the range of possible approval.”  
10 *Manual for Complex Litigation, Second* §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th  
11 Cir. 1982).<sup>1</sup> Preliminary approval is merely the prerequisite to giving notice so that “the proposed  
12 settlement... may be submitted to members of the prospective Class for their acceptance or rejection.”  
13 *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364,  
14 372 (E.D. Pa. 1970). There is an initial presumption of fairness when a proposed settlement, which was  
15 negotiated at arm's length by counsel for the Class, is presented for court approval. *Newberg*, 3d Ed.,  
16 §11.41, p.11-88. However, the ultimate question of whether the proposed settlement is fair, reasonable  
17 and adequate is made after notice of the settlement is given to the Class Members and a final settlement  
18 hearing is held by the Court.

19 **A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement**

20 The approval of a proposed settlement of a class action suit is a matter within the broad  
21 discretion of the trial court. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-235 (2001);  
22 *Dunk v. Ford Motor Co.* 48 Cal.App.4th 1794 (1996). Preliminary approval does not require the trial  
23 court to answer the ultimate question of whether a proposed settlement is fair, reasonable and adequate.  
24 That final determination is made only after notice of the settlement has been given to the class members

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26 <sup>1</sup> California courts look to federal authority on class actions. *Vasquez v. Superior Court*, 4 Cal.3d  
27 800, 821 (1971). “It is well established that in the absence of relevant state precedents trial courts are  
28 urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure for  
conducting class actions.” *Frazier v. City of Richmond*, 184 Cal. App.3d 1491, 1499 (1986), *citing*  
*Green v. Obledo*, 29 Cal.3d 126, 145-146 (1981).

1 and after they have been given an opportunity to voice their views of the settlement or to be excluded  
2 from the settlement. 3B J. Moore, *Moore's Federal Practice* §§23.80 - 23.85 (2003).

3 In considering a potential settlement for preliminary approval purposes, the trial court does not  
4 have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the  
5 dispute, and need not engage in a trial on the merits. *Wershba, supra*, 91 Cal.App.4th at 239-40; *Dunk,*  
6 *supra*, 48 Cal.App. 4<sup>th</sup> at 1807. The Ninth Circuit explains, “the very essence of a settlement is  
7 compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Officers for Justice v.*  
8 *Civil Service Com'n of City and County of S.F.*, 688 F.2d 615, 624 (9<sup>th</sup> Cir. 1982). The question  
9 whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and  
10 evaluation by the attorneys for the parties based upon a comparison of “‘the terms of the compromise  
11 with the likely rewards of litigation.’” *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), cert.  
12 denied 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry,*  
13 *Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). Thus, when analyzing the settlement, the amount is  
14 “not to be judged against a hypothetical or speculative measure of what might have been achieved by  
15 the negotiators.” *Officers for Justice*, 688 F.2d at 625, 628.

16 With regard to class action settlements, the opinions of counsel should be given considerable  
17 weight both because of counsel’s familiarity with this litigation and previous experience with cases  
18 such as these. *Officers for Justice*, 688 F.2d 615, 625 (9<sup>th</sup> Cir. 1982); *In re Wash. Public Power Supply*  
19 *System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451  
20 (N.D. Cal. 1988); *Weinberger*, 698 F.2d at 74. For example, in *Lyons v. Marrud, Inc.*, [1972-1973  
21 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court noted that  
22 “[e]xperienced and competent counsel have assessed these problems and the probability of success on  
23 the merits.... The parties’ decision regarding the respective merits of their position has an important  
24 bearing.” *Id.* at ¶ 92,520. “The recommendations of plaintiffs’ counsel should be given a presumption  
25 of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As a result, courts  
26 hold that the recommendation of counsel is entitled to significant weight. *Nat’l Rural Telecomms.*  
27 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

28 **B. Factors To Be Considered In Granting Preliminarily Approval**

1 A number of factors are to be considered in evaluating a settlement for purposes of preliminary  
2 approval. In determining whether to grant preliminary approval, the court considers whether the "(1)  
3 the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2)  
4 has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives  
5 or segments of the class, and (4) falls within the range of possible approval." *In re Tableware Antitrust*  
6 *Litig.*, 484 F.Supp. 2d 1078, 1079 (N.D. Cal. 2007). No one factor should be determinative, but rather  
7 all factors should be considered. The analysis has been summarized as follows:

8 If the proposed settlement appears to be the product of serious, informed, noncollusive  
9 negotiations, has no obvious deficiencies, does not improperly grant preferential  
10 treatment to class representatives or segments of the class, and falls within the range of  
11 possible approval, then the court should direct that notice be given to the class members  
12 of a formal fairness hearing, at which evidence may be presented in support of and in  
13 opposition to the settlement.

14 *Manual of Complex Litigation, Second* §30.44, at 229.

15 Here, the Settlement meets all of these criteria for preliminary approval.

16 **1. The Settlement is the Product of Serious, Informed and**  
17 **Noncollusive Negotiations**

18 This settlement is the result of extensive and hard fought negotiations before an experienced  
19 and well-respected mediator. Defendant has expressly denied and continues to deny any wrongdoing  
20 or legal liability arising out of the conduct alleged in the Action. Plaintiffs and Class Counsel have  
21 determined that it is desirable and beneficial to the Class to put to rest the Released Claims for the  
22 consideration to be paid under the Agreement.<sup>2</sup>

23 The Parties scheduled a private mediation to take place before an experienced mediator for class  
24 actions and wage and hour lawsuits. In preparation for the mediation, Defendant provided Class  
25 Counsel with necessary records and information for the members of the Class. Plaintiffs analyzed the  
26 data with the assistance of damages expert DM&A and prepared and submitted a mediation brief to  
27 Judge Pate (Ret.) After a full day of settlement negotiations, the Parties failed to reach a settlement.

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28 <sup>2</sup> Claims Released By Participating Class Members are defined as: any and all Claims (as that term  
is defined in Section II.C of the Stipulation) that have been asserted, or could have been asserted, up  
through and including the last day of the Class Period based upon the facts or allegations pled in any  
of the Complaints filed in the Action (which includes the arbitration). (Stipulation at § XXI(B).)

1 However, continued negotiations through the mediator resulted in an agreement to settle, based upon  
2 a mediator's proposal by Judge Pate (Ret.) which was accepted in light of the uncertainties of protracted  
3 litigation. As a result, the parties signed a Memorandum of Understanding, and the final settlement  
4 terms were then negotiated and set forth in the Agreement now presented for this Court's approval.  
5 Decl. Blumenthal ¶ 5. Importantly, Plaintiffs and Class Counsel believe that this Settlement is fair,  
6 reasonable and adequate.

7 As consideration for this Settlement, the total amount to be paid by Defendant is Four Hundred  
8 Sixty Thousand Dollars (\$460,000.00) (the "Gross Settlement Amount"). This Gross Settlement  
9 Amount will settle all issues pending in the litigation between the Plaintiffs, on the one hand, and the  
10 Defendant, on the other hand, including: payments to Participating Class Members; the Class  
11 Representative Service Payments to the Plaintiffs; all attorneys' fees, costs and expenses of Class  
12 Counsel; all employee and employer tax withholdings; all payments allocated to the LWDA in  
13 connection with Private Attorney General Act ("PAGA"); and all costs of settlement administration.  
14 The Settlement is all-in with no reversion to Defendant. Decl. Blumenthal at ¶3.

15 Class Counsel has conducted a thorough investigation into the facts of the class action. Class  
16 Counsel has diligently evaluated the Class Members' claims against Defendant. Prior to the mediation,  
17 counsel for Defendant provided Class Counsel with access to data and information for the Class,  
18 including payroll data and information concerning the Defendant's practices. In addition, Class  
19 Counsel previously negotiated settlements with other defendants in actions involving nearly identical  
20 issues and analogous defenses. Class Counsel is also aware of Defendant's financial situation which  
21 would not allow Defendant to pay any significant judgment. Based on the foregoing data and their own  
22 independent investigation, evaluation and experience, Class Counsel believes that the settlement with  
23 Defendant on the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best  
24 interest of the Class in light of all known facts and circumstances, including the risk of significant  
25 delay, defenses asserted by Defendant, and potential appellate issues. Decl. Blumenthal at ¶ 14.

26 Plaintiffs and Class Counsel recognize the expense and length of continuing to litigate and  
27 trying this Action against Defendant through possible appeals which could take several years. Class  
28 Counsel has also taken into account the uncertain outcome and risk of litigation, especially in complex

1 actions such as this Action, as well as the Defendant's financial ability to pay a judgment. Class  
2 Counsel is also mindful of and recognize the inherent problems of proof under, and alleged defenses  
3 to, the claims asserted in the Action. Based upon their evaluation, Plaintiffs and Class Counsel have  
4 determined that the settlement set forth in the Agreement is in the best interest of the Class Members.  
5 Decl. Blumenthal, ¶ 23.

6 Here, there can be no dispute that the litigation has been hard-fought with aggressive and  
7 capable advocacy on both sides. The Parties were represented by experienced and capable counsel who  
8 zealously advocated their respective positions. Accordingly, "[t]here is likewise every reason to  
9 conclude that settlement negotiations were vigorously conducted at arms' length and without any  
10 suggestion of undue influence." *In re Wash. Public Power*, 720 F. Supp. at 1392.

11 **2. The Settlement Has No "Obvious Deficiencies" and Falls Well Within**  
12 **the Range for Approval**

13 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of  
14 possible approval. All Class Members will receive an opportunity to participate in the Settlement and  
15 receive payment according to the same formula if the do not opt out. (Agreement at § III(C)(1)-(2).)

16 The calculations to compensate for the amount due for the nonpayment of wages at the time this  
17 Settlement was negotiated were calculated by DM&A, Plaintiffs' damage expert. Decl. Blumenthal,  
18 ¶6. For the employees whose claims are at issue in this Action, Plaintiffs used an expert (DM&A) to  
19 analyze the data and determine the potential unpaid wages for the employees. Plaintiffs calculated that  
20 the maximum potential damages were \$366,410 for off-the-clock/overtime work and \$1,465,640 for  
21 missed meal periods. These valuations were mitigated by the fact that employees were paid substantial  
22 amounts of overtime, so there was no off-the-clock work, and that employees signed an  
23 acknowledgment that they received all their breaks, which meant that the estimate of 1 hour of off-the-  
24 clock work and 4 missed meal periods likely overstated damages. This total damage valuation showed  
25 that Defendant was subject to a maximum damage claim in the amount of \$1,832,050 total.

26 Consequently, the settlement of \$460,000.00 represents more than 25% of the value of the  
27 potential damages at issue in this case at the time this Settlement was negotiated, assuming these  
28 amounts could be proven at trial. Given the amount of the settlement as compared to the potential value

1 of claims in this case, the settlement is fair and reasonable. Clearly, the goal of this litigation has been  
2 met. Decl. Blumenthal, ¶6.

3 In *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. 2007) the federal district  
4 court for the Northern District of California approved a settlement of an action claiming unpaid wages  
5 where the settlement amount constituted approximately 25% of the estimated actual loss to the class.  
6 Here, the settlement consideration compares favorably with the percentage approved in *Glass*. In  
7 *Glass*, the federal court ruled that the settlement which represented approximately 25% of the estimated  
8 loss to the class was fair, reasonable, and adequate. *Id.* at 28.<sup>3</sup> As a result, this settlement which is  
9 comparable to the percentage approved in *Glass* is most certainly entitled to preliminary approval.

10 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*  
11 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by  
12 Defendant presented serious threats to the claims of the Plaintiffs and the other Class Members.  
13 Defendant asserted that the employment practices complied with all applicable Labor laws. As to the  
14 overtime claim, Defendant contended that it paid employees for all hours worked and the expense  
15 reimbursement check was for expenses and not wages. Defendant also argued that the Supreme Court  
16 decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiffs' claims, on  
17 liability, value, and class certifiability as to the meal and rest period claims. If successful, Defendant's  
18 defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiffs believe that  
19 these defenses could be overcome, Defendant maintains these defenses have merit and therefore present  
20 a serious risk to recovery. Decl. Blumenthal, ¶ 24.

21 There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable  
22 to obtain class certification and thereby not recover on behalf of any employees other than themselves.  
23 Defendant contended that the arbitration agreements with the members of the class would preclude a  
24 class recovery in arbitration under *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010).

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25  
26 <sup>3</sup> See also *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9<sup>th</sup> Cir. 2000)  
27 approving settlement which represented "roughly one-sixth of the potential recovery"); *Stovall-Gusman*  
28 *v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at \*12 (N.D. Cal. 2015) (granting final approval  
where "the proposed Total Settlement Amount represents approximately 10% of what class might have  
been awarded had they succeeded at trial.")

1 Defendant also argued that variances between employees precluded class certification. While other  
2 cases have approved class certification in wage and hour claims, class certification in this action would  
3 have been hotly disputed and was by no means a foregone conclusion. Decl. Blumenthal, ¶ 25.

4 After arm's length negotiations between experienced and informed counsel, the parties  
5 recognized the potential risks and agreed on the settlement of \$460,000.00. As the federal court  
6 recently held in *Glass*, where the parties faced uncertainties similar to those here:

7 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,  
8 and likely duration of further litigation likewise favors the settlement. Regardless of  
9 how this Court might have ruled on the merits of the legal issues, the losing party likely  
10 would have appealed, and the parties would have faced the expense and uncertainty of  
11 litigating an appeal. "The expense and possible duration of the litigation should be  
12 considered in evaluating the reasonableness of [a] settlement." See *In re Mego*  
13 *Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000).

14 Here, the risk of further litigation is substantial.

15 **3. The Settlement Does Not Improperly Grant Preferential Treatment To Class**  
16 **Representatives or Segments Of The Class**

17 The relief provided in the settlement will benefit all members of the Class. The settlement does  
18 not grant preferential treatment to Plaintiffs or segments of the Class in any way. Payments to the  
19 Class Members are all determined under a neutral methodology. All Class Members will receive the  
20 same opportunity to participate in and receive payment through a neutral formula that is based upon  
21 the weeks worked for that individual. Decl. Blumenthal, ¶4.

22 Plaintiffs will apply to the Court for service awards in consideration for their service and for  
23 the risks undertaken on behalf of the class. (Agreement at ¶ III(B)(1).) Plaintiffs performed their duties  
24 admirably by working with Class Counsel. Decl. Blumenthal at ¶27. At this stage, the requested  
25 Plaintiffs' service award is well within the accepted range of awards for purposes of preliminary  
26 approval. See e.g. *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008 WL 4473183, \*7 (S.D.Cal. Oct.  
27 06, 2008) (awarding \$25,000 service award to each of six plaintiffs in overtime class action); *Glass v.*  
28 *UBS Fin. Servs.*, 2007 WL 221862, \*16-17 (N.D.Cal. Jan. 27 2007) (awarding \$25,000 service award  
in overtime class action and a pool of \$100,000.00 in enhancements ); *Van Vranken v. Atlantic*  
*Richfield Co.*, 901 F.Supp. 294, 299-300 (N.D. Cal. 1995) (awarding incentive award of \$50,000); *In*  
*re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373 (6<sup>th</sup> Cir. 2003); *Cook v.*

1 *Niedert*, 142 F.3d 1004, 1016 (7<sup>th</sup> Cir. 1998). As explained in *Glass*, service awards are routinely  
2 awarded to class representatives to compensate the employees for the time and effort expended on the  
3 case, for the risk of litigation, for the fear of suing an employer and retaliation there from, and to serve  
4 as an incentive to vindicate the statutory rights of all employees. 2007 WL 221862 at \*16-17.

5 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit Preliminary**  
6 **Approval Of The Settlement**

7 The stage of the proceedings at which this settlement was reached also militates in favor of  
8 preliminary approval and ultimately, final approval of the settlement. Class Counsel has conducted a  
9 thorough investigation into the facts of the class action. Class Counsel began investigating the Class  
10 Members' claims before this action was filed. Class Counsel engaged in a thorough review and  
11 analysis of the relevant documents and data with the assistance of an expert. Class Counsel was also  
12 experienced with the claims at issue here, as Class Counsel previously litigated and settled similar  
13 claims in numerous other actions. Accordingly, the agreement to settle did not occur until Class  
14 Counsel possessed sufficient information to make an informed judgment regarding the likelihood of  
15 success on the merits and the results that could be obtained through further litigation. Decl. Blumenthal  
16 at ¶28.

17 Based on the foregoing data and their own independent investigation and evaluation, Class  
18 Counsel is of the opinion that the settlement with Defendant for the consideration and on the terms set  
19 forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light  
20 of all known facts and circumstances, including the risk of significant delay, defenses asserted by  
21 Defendant, and numerous potential appellate issues. Defendant and Defendant's counsel also agree that  
22 the Agreement is fair and in the best interest of the Class Members. There can be no doubt that Counsel  
23 for both parties possessed sufficient information to make an informed judgment regarding the likelihood  
24 of success on the merits and the results that could be obtained through further litigation. Decl.  
25 Blumenthal ¶29.

26 In *Glass*, the Northern District of California granted final approval of an overtime wage action  
27 although in *Glass* no formal discovery had been conducted prior to the settlement:

28 Here, no formal discovery took place prior to settlement. As the Ninth Circuit has  
observed, however, "[i]n the context of class action settlements, 'formal discovery is not

1 a necessary ticket to the bargaining table' where the parties have sufficient information  
2 to make an informed decision about settlement." See *In re Mego Financial Corp.*  
*Securities Litigation*, 213 F.3d at 459.

3 *Glass*, 2007 U.S. Dist. LEXIS 8476 at \*14.

4 Here, Class Counsel was in a far stronger position to evaluate the fairness of this settlement  
5 because Class Counsel had the same sufficient information, as well as independent investigations and  
6 due diligence to confirm the accuracy of the information supplied by Defendant.

7 **V. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES**

8 Plaintiffs contend that the proposed settlement meets all of the requirements for class  
9 certification under California Code of Civil Procedure §382 as demonstrated below, and therefore, the  
10 Court may appropriately approve the Class as defined in the Agreement. This Court should  
11 conditionally certify the Class for settlement purposes only, defined as follows:

12 All individuals who worked for Defendant DI Overnite, LLC in California as a driver,  
13 messenger, or dispatcher during the time period of May 18, 2012 through October 10,  
2017.

14 (Agreement at ¶ I(B).)

15 The Class Period is the period of time from May 18, 2012 to October 10, 2017. (Agreement at ¶ I(H).)

16 The Parties currently estimate that there are about 567 Class Members who collectively worked 36,461  
17 workweeks . (Agreement at ¶ III(C)(5).)

18 **A. California Code of Civil Procedure §382**

19 Plaintiffs seek certification of this Class for settlement purposes under California Code of Civil  
20 Procedure § 382. The California Supreme Court has summarized the standard for determining whether  
21 class certification is appropriate as follows:

22 Code of Civil Procedure Section 382 authorizes class actions “when the question is one  
23 of a common or general interest, of many persons, or when the parties are numerous,  
24 and it is impracticable to bring them all before the court....” The party seeking  
25 certification has the burden to establish the existence of both an ascertainable class and  
26 a well-defined community of interest among class members. (*citations omitted*). The  
“community of interest” requirement embodies three factors: (1) predominant common  
questions of law or fact; (2) class representatives with claims or defenses typical of the  
class; and (3) class representatives who can adequately represent the class.

27 *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004).

28 While Defendant reserves all rights to dispute that the Plaintiffs can satisfy any of these

1 requirements, the Parties agree that Defendant will not dispute that these requirements may be satisfied  
2 in this case for purposes of settlement and therefore, the proposed Class should be certified for purposes  
3 of settlement. (Agreement at ¶ II(G).)

4 **B. The Proposed Class Is Ascertainable and Numerous**

5 Plaintiffs bring this action on behalf of a class of non-exempt employees during the applicable  
6 class period. All of these employees are ascertainable because the class members can readily be  
7 determined through examination of Defendant's employment files. Given that the class consists of  
8 approximately 567 members, Plaintiffs contend that numerosity is clearly satisfied. See *Bowles v.*  
9 *Superior Court*, 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of*  
10 *Hayward*, 126 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.)  
11 Here, the approximately 567 current and former employees that comprise the Class can be identified  
12 based on Defendant's records and are sufficiently numerous for class certification. (Decl. Blumenthal  
13 at ¶30.) Defendant disputes that numerosity exists, but will not oppose such a finding for purposes of  
14 this settlement only.

15 **C. Common Issues of Law and Fact Predominate**

16 Predominance of common issues of law or fact does not require that the common issues be  
17 dispositive of the entire controversy or even that they be dispositive of all liability issues. 1 *Newberg*  
18 *on Class Actions*, Section 4.25 at 4-82, 4-83 (1992). "Predominance is a comparative concept, and 'the  
19 necessity for class members to individually establish eligibility and damages does not mean individual  
20 fact questions predominate.'" *Sav-On*, 34 Cal. 4th at 334.

21 Commonality exists if there is a predominant common legal question regarding how an  
22 employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th  
23 1524, 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its  
24 drivers.") Whether Plaintiffs are likely to prevail on their theory of recovery is irrelevant at the  
25 certification stage since the question is "essentially a procedural one that does not ask whether an action  
26 is legally or factually meritorious." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

27 Here, Plaintiffs contend that common questions of law and fact are present, and specifically the  
28 common questions of whether Defendant's employment practices were lawful, whether Defendant

1 failed to pay for overtime hours worked, whether Defendant failed to properly provide and/or pay for  
2 meal, rest periods and expenses, and whether the Class is entitled to compensation and related penalties.  
3 Decl. Blumenthal, ¶30. Defendant disputes that common questions predominate, but will not oppose  
4 such a finding for purposes of this settlement only.

5 **D. The Claims of the Plaintiffs Are Typical of the Class Claims**

6 The typicality requirement requires Plaintiffs to demonstrate that the members of the class have  
7 the same or similar claims as Plaintiffs. “The typicality requirement is met when the claims of the  
8 Plaintiff[] arise from the same event or are based on the same legal theories.” *Tate v. Weyerhaeuser*  
9 *Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In *Hanlon v. Chrysler Co.*, 150 F.3d 1011 (9th Cir. 1998), the  
10 Ninth Circuit held that “[u]nder the rule’s permissive standards, representative claims are ‘typical’ if  
11 they are reasonably coextensive with those of absent class members; they need not be substantially  
12 identical.” 50 F.3d at 1020.

13 In the instant case, Plaintiffs contend that the typicality requirement is fully satisfied. The  
14 Plaintiffs, like every other member of the Class, was employed by Defendant as a driver, messenger,  
15 or dispatcher during the Class Period. The Plaintiffs, like every other member of the Class, was subject  
16 to the same employment practices concerning hours worked, expense payments, and meal periods.  
17 Thus, the claims of the Plaintiffs and the Class Members arise from the same course of conduct by the  
18 Defendant, involve the same employment policies, and are based on the same legal theories. Decl.  
19 Blumenthal at ¶30. For purposes of settlement, the typicality requirement is met as to the common  
20 issues presented in this case. Defendant disputes that the typicality requirement is satisfied, but does  
21 not oppose a finding of typicality for purposes of this settlement only.

22 **E. The Class Representative Fairly and Adequately Protected the Class**

23 Plaintiffs contend that the Class Members are adequately represented here because they and  
24 Class Counsel (a) do not have any conflicts of interest with other class members, and (b) will prosecute  
25 the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. First, Plaintiffs are well aware  
26 of their duties as the representatives of the Class and have actively participated in the prosecution of  
27 this case to date. They effectively communicated with counsel, provided documents to counsel and  
28 participated extensively in discovery, investigation and negotiations in the Action. Second, Plaintiffs

1 retained competent counsel who are experienced in employment class actions. (Decl. Blumenthal at  
2 ¶¶ 30 and 31.) Blumenthal, Nordrehaug & Bhowmik have extensive experience in class action  
3 litigation in California and throughout the country. Blumenthal, Nordrehaug & Bhowmik has been  
4 involved as class counsel in hundreds of action matters, including many wage and hour class actions.  
5 (See Resume, attached as Exhibit #2 to the Decl. Blumenthal.) Third, there is no antagonism between  
6 the interests of the Plaintiffs and the Class. Both the Plaintiffs and the Class Members seek monetary  
7 relief under the same set of facts and legal theories. Defendant disputes that the adequacy requirement  
8 is satisfied, but will not oppose such a finding for purposes of this settlement only.

9 **F. The Superiority Requirement Is Met**

10 To certify a class, the Court must also determine that a class action is superior to other available  
11 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of  
12 common issues will reduce litigation costs and promote greater efficiency, a class action may be  
13 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.  
14 1996). As courts have previously observed:

15 Absent class treatment, each individual plaintiff would present in separate, duplicative  
16 proceedings the same or essentially the same arguments and evidence, including expert  
17 testimony. The result would be a multiplicity of trials conducted at enormous expense  
to both the judicial system and the litigants. “It would be neither efficient nor fair to  
anyone, including defendants, to force multiple trials to hear the same evidence and  
decide the same issues.”

18 *Sav-On*, 34 Cal. 4th at 340, citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991).

19 Here, Plaintiffs contend that a class action is the superior mechanism for resolution of the claims  
20 as pled by the Plaintiffs. While Defendant disputes that the superiority requirement may be satisfied,  
21 it will not dispute such a finding for purposes of this settlement only.

22 **VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE**

23 The Court has broad discretion in approving a practical notice program. The parties have agreed  
24 upon procedures by which the Class Members will be provided with written notice of the Settlement  
25 similar to that approved and utilized in hundreds of class action settlements. In accordance with the  
26 Agreement, within 14 days after the Court enters its order granting Preliminary Approval of the  
27 Settlement, Defendant will provide to the Settlement Administrator an electronic database containing  
28 each Class Member's Class Data. (Agreement at ¶ III(E)(2)(a).) Within 14 days after receiving the

1 Class Data, the Settlement Administrator will mail the Class Notice Packets to all Class Members via  
2 first-class regular U.S. Mail at their last known addresses. (Agreement at ¶ III(E)(2)(b).)

3 The Notice, drafted jointly and agreed upon by the Parties through their respective counsel and  
4 to be approved by the Court, includes all relevant information. (See Exhibit "A" to the Agreement.)  
5 The Notice will include, among other information: (I) information regarding the Action; (ii) the impact  
6 on the rights of the Class Members if they do not opt out; (iii) information to the Class Members  
7 regarding how to opt out and how to object to the Settlement; (iv) the estimated settlement payment for  
8 each of the Class Members; (v) the amount of attorneys' fees and litigation expenses to be sought; (vi)  
9 the amounts of the Plaintiffs' service award requests; (vii) the amount being paid to the LWDA; and  
10 (viii) the administration fees to be paid to the Settlement Administrator. Decl. Blumenthal at ¶32.

11 The Notice documents will state that the Class members shall have forty-five (45) days from  
12 the date that the Notice is mailed to them to request exclusion or to submit an objection. (Agreement  
13 at ¶ III(E)(3).) The Class Members shall be given the opportunity to object to the terms of the  
14 Agreement and/or the request for attorneys' fees and costs and to participate at the final fairness and  
15 approval hearing, in accordance with the instructions set forth in the Notice. (Agreement at ¶ III(E)(3).)  
16 Class Members who do not opt out will automatically receive a settlement payment. (Agreement at ¶  
17 III(C)(1).) This notice program was designed to meaningfully reach the Class Members and advises  
18 them of all pertinent information concerning the settlement. Decl. Blumenthal at ¶32. The mailing and  
19 distribution of the Notice satisfies the requirements of due process, and is the best notice practicable  
20 under the circumstances and constitutes due and sufficient notice to all persons entitled thereto. The  
21 Notice provides information on the terms and provisions of the settlement; the benefits that settlement  
22 provides for Class Members; the date, time and place of the final settlement approval hearing; and the  
23 procedure and deadlines for submitting comments, objections and requests for exclusion and complies  
24 with Rules of Court 3.766 and 3.769(f).

## 25 **VII. CONCLUSION**

26 Plaintiffs respectfully request that the Court preliminarily approve the proposed settlement and  
27 sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final  
28 fairness hearing for a date that is one hundred (120) days from the date of Preliminary Approval.

1 Dated: November 20, 2017

**BLUMENTHAL, NORDREHAUG & BHOWMIK**

2 By: /s/ Norman Blumenthal  
3 Norman B. Blumenthal, Esq.  
4 Kyle R. Nordrehaug, Esq.  
5 Attorney for Plaintiffs

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