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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF LOS ANGELES**

14 ANTHONY KING, on behalf of himself, all
15 others similarly situated, and the general public,

16 *Plaintiff,*

17 vs.

18 CUSTOM AIR TRUCKING, INC., a California
19 corporation; and DOES 1-50, inclusive,

20 *Defendants.*

Case No. BC620732

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

Hearing Information

Date: TBD
Time: TBD
Department: 308
Judge: Hon. Ann Jones

Submitted Under Separate Cover

1. Declaration of Shaun Setareh;
2. [Proposed] Order

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on a date and time to be set by the Court, in Department 308 of the Superior Court of the State of California, County of Los Angeles, located at 600 South Commonwealth Street, Los Angeles, California 90005, Plaintiff Anthony King ("Plaintiff") will, and hereby does, move this Court for an order:

- (1) Granting certification of the Settlement Class for settlement purposes pursuant to California Code of Civil Procedure § 382;
- (2) Preliminarily approving the Settlement Agreement submitted concurrently herewith;
- (3) Appointing Plaintiff as Class Representative for the Settlement Class;
- (4) Appointing Setareh Law Group as Class Counsel for the Settlement Class;
- (5) Approving the form and content of the proposed Notice of Settlement, submitted concurrently herewith;
- (6) Approving the notice procedure set forth in the Settlement Agreement and directing that notice be given to class members consistent therewith;
- (7) Approving Rust Consulting as the Settlement Administrator; and
- (8) Scheduling a final fairness and approval hearing.

Per the Settlement Agreement, the Settlement Class consists of all drivers who drove trucks provided by Defendant during the period April 18, 2014, to June 5, 2017.

This Court should grant this Motion because:

- a. The Settlement Class meets all the requirements for class certification for settlement purposes under Code of Civil Procedure § 382;
- b. The Settlement Agreement is a fair, adequate, and reasonable compromise of the disputed wage claims based on Defendants' allegedly unlawful policies which Plaintiff asserts misclassified truck drivers who are employees as independent .
- c. Plaintiff and Class Counsel are adequate to represent the Settlement Class;
- d. The proposed notice procedures and related forms comply with California Rules of Court 3.766(d) and (e), and adequately apprise Class Members of their rights and fully

1 comport with due process; and

2 e. Based on the foregoing, notice should be directed to the Class Members and a final
3 fairness hearing should be scheduled.

4
5 This Motion is based on this Notice of Motion and Motion, the attached Memorandum
6 of Points and Authorities, the Declaration of Shaun Setareh and all exhibits thereto, all papers
7 and pleadings on file with the Court in this action, all matters judicially noticeable, and on such
8 oral and documentary evidence as may be presented at the hearing.

9
10 Dated: January 31, 2018

Respectfully submitted,
SETAREH LAW GROUP

11
12 BY

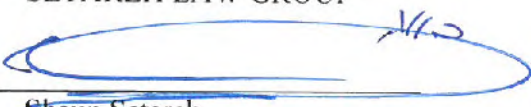

Shaun Setareh
Attorneys for Plaintiff
Christian Christenson

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The parties to this case have reached a settlement which provides for a non-revisionary fund of \$250,000 to settle claims that the putative class of truck drivers were misclassified as independent contractors.¹ No class member will have to make a claim in order to recover; instead class members will be mailed their share of the settlement directly. No money will revert to the Defendant; instead any uncashed checks will go to the State of California unclaimed wages fund.

The settlement is an excellent one in light of the risks of litigation, and the risk that the Defendant would be unable to pay a judgment. After reviewing the Defendant's tax return, Plaintiff's counsel concluded that Defendant would not be able to pay the judgment that would be awarded if the class members prevailed. As such, this settlement guarantees a recovery for the class and avoids the expense and uncertainty of litigation. The Court should grant preliminary approval so that notice can go out to the class.

II. OVERVIEW OF THE LITIGATION

Plaintiff Anthony King worked as a driver for Defendant Custom Air Trucking from September 2014 to January 15, 2016. He and his fellow drivers were classified as independent contractors. The lawsuit alleges that they should have been classified as employees and were therefore entitled to, *inter alia*, overtime compensation and meal and rest breaks.

A. PROCEDURAL HISTORY

This lawsuit was filed on May 19, 2016 asserting claims under the Labor Code and derivative claims under Business & Professions Code section 17200. On June 24, 2016 Plaintiff filed a First Amended Complaint adding claims for civil penalties under Labor Code § 2698 *et seq.* On June 5, 2017, the parties attended mediation with mediator Steven Rottman, Esq. which resulted in a resolution of the case.

//

//

¹ A true and correct copy of the Settlement Agreement is attached to the Declaration of Shaun Setareh as Exhibit I.

1 **B. SUMMARY OF CLAIMS**

2 **1. Misclassification Claims**

3 The gravamen of the action is that the class members, who drive trucks for Defendant,
4 were misclassified as independent contractors rather than employees. The California Supreme
5 Court is currently considering what test applies under California law for independent contractor
6 misclassification claims where the employer is alleged to have violated an Industrial Wage
7 Commission Wage Order. *Dynamex Operations West v. S.C.*, S222732 The two alternative tests
8 are the common law test announced in *S.G. Borello & Sons v. Dep't of Industrial Relations*, 48
9 Cal.3d 341 (1998) and the Industrial Welfare Commission Wage Order test set forth in *Martinez*
10 *v. Combs*, 49 Cal.4th 35 (2010.)

11 Under the common law test the most significant factor is the right that the employer has
12 to control work details. *Borello supra* at 350. A court will also look at other secondary factors.
13 “Strong evidence in support of an employment relationship is the right to discharge at will
14 without cause.” *Id.* Additional factors include 1) whether the worker is engaged in a distinct
15 occupation or business; 2) whether the work is usually done under the direction of the principal
16 or by a specialist without supervision; 3) the skill required in the particular occupation; 4)
17 whether the principal or the worker supplies the instrumentalities, tools, and the place of work
18 for the person doing the work; 5) the length of time for which the services are to be performed;
19 6) the method of payment whether by the time or by the job; 6) whether or not the work is part of
20 the regular business of the principal; and (7) whether or not the parties believe they are creating
21 an employer/ employee relationship.”

22 Once the worker comes forward with evidence that he provided services to the employer,
23 he has established “a prima facie case that the relationship was one of employer/ employee.”
24 *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010.) At that point the employer has the
25 burden of proving that the worker was an independent contractor not an employee. *Id.*
26

1 Under the IWC Wage Order test set forth in *Martinez*, the inquiry is simple. A worker is an
2 employee if the employer “suffers or permits [them] to work” or “exercises control over [their]
3 wages, hours, or working conditions.” *Id.* at 69.

4 **III. OVERVIEW OF THE SETTLEMENT**

5 The complete terms of the Settlement are set forth in Exhibit 1 to the Declaration of
6 Shaun Setareh, filed concurrently herewith. The Settlement provides for a Settlement Amount
7 of \$250,000 paid by Defendant on behalf of the defined Settlement Class. The essential terms
8 are summarized below.

9 **A. Settlement Class Definition**

10 The “Settlement Class” is defined as follows:

11 All drivers who drove trucks provided by Defendant during the period of April 18, 2014,
12 to June 5, 2017, Settlement Agreement ¶ 2.1.25.

13 **B. Allocation of Settlement Funds**

14 The “Net Settlement Amount” is the Settlement Amount after deductions for
15 Administrative Costs, Attorneys’ Fees and Costs, payment to the Labor and Workforce
16 Development Agency and a Service Award (all subject to court approval. Settlement
17 Agreement ¶ 2.1.13.²

18 Class members who do not request exclusion will receive an equal share of the Net
19 Settlement Amount Settlement Agreement ¶ 2.5.6(a).

20 **C. Release of Claims**

21 The “Released Claims” include all claims:

22 [A]rising out of or related to all wage and hour claims based on the factual
23 allegations in Plaintiff’s Complaint and First Amended Complaint, including
24 without limitation claims related to meal periods, rest periods, failure to pay
25 hourly wages, failure to pay piece rate wages, failure to provide accurate wage
26 statements, delay or wages or compensation, waiting time penalties, unreimbursed
27 expenses, classification of drivers as independent contractors and any and all
28 claims associated therewith. Released Claims include any unknown claims that
the Participating Settlement Class Members do not know or suspect to exist in his

² Plaintiff will concurrently submit this motion and the Settlement Agreement to the Labor and Workforce Development Agency on the same date it is filed in court.

1 or her favor, which if known by him or her, might have affected this Settlement
2 Agreement with Defendant and the release of the Released Parties.

3 Id. ¶ 2.1.22.

4 **D. Notice Procedures**

5 Within 14 days after entry of an order preliminarily approving the settlement, Defendant
6 will provide the settlement administrator Rust Consulting with the names, last known addresses,
7 and social security numbers of the Settlement Class Members. Settlement Agreement ¶ 2.10.1.
8 Within 14 calendar days from receipt of this information Rust will mail notice to the class by
9 First Class Mail. Settlement Agreement ¶ 2.10.2. Rust will perform a National Change of
10 Address Search on the entire class list. Id. ¶ 2.10.3.

11 **IV. ARGUMENT**

12 **A. The Court Should Conditionally Certify the Settlement Class Because It Meets
13 All the Requirements for Class Certification for Settlement Purposes Only under
14 CCP § 382**

15 Under Code of Civil Procedure § 382, class certification is warranted so long as there is
16 “a numerous and ascertainable class with a well-defined community of interest among its
17 members” and a “class action proceeding is superior to other means for a fair and efficient
18 adjudication of the litigation.” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th
19 319, 326, 332.) “The certification question is ‘essentially a procedural one that does not ask
20 whether an action is legally or factually meritorious.’” (*Id.* at 326 (quoting *Linder v. Thrifty Oil
21 Co.* (2000) 23 Cal.4th 429, 439-440).) Indeed, the certification question simply asks whether
22 the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment.
23 (*E.g., Jaimez, supra*, 181 Cal.App.4th at 1298.) In ruling on a certification motion, a trial
24 court’s task is to determine “whether...the issues which may be jointly tried, when compared
25 with those requiring separate adjudication, are so numerous or substantial that the maintenance
26 of a class action would be advantageous to the judicial process and to the litigants.” (*Id.*)

27 “[I]t is also well established that trial courts should use different standards to determine
28 the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a
lesser standard of scrutiny is used for settlement cases.” (*Global Minerals & Metals Corp. v.
Superior Court* (2003) 113 Cal.App.4th 836, 859 (*citing Dunk v. Ford Motor Co.* (1996) 48

1 Cal.App.4th 1794, 1807 n.19 ("*Dunk*").) As the court noted in *Dunk*, although certification
2 requirements are intended "to protect the interests of the non-representative class members,"
3 that concern is "protected by the trial court's fairness review of the settlement." (*Id.*)

4 Indeed, numerous courts have certified settlement classes. For example, *In re Drexel*
5 *Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 506 U.S. 1088,
6 122 L. Ed. 497, 113 S. Ct 1070 (1993), the parties entered into a tentative settlement before a
7 class was certified. After a hearing, the "district court issued an order certifying the class and
8 approving the settlement agreement." (*Id.* at 289; see also, *Alaniz v. California Processors,*
9 *Inc.*, 73 F.R.D. 269, 278 (N.D. Cal. 1976) ("the use of the tentative settlement class procedure
10 was appropriate in this case"), aff'd, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978).)
11 Certification of a settlement class is a regular feature of class action litigation and an approved
12 procedure which ought to be followed in this case. (See *Newberg on Class Actions* (3d ed. 1991)
13 § 11.27, pp. 11-40 to 11-56; and *Manual for Complex Litigation*, 2d (1993) § 30.45.)

14 As shown below, this Settlement and the Settlement Class easily meet all of the
15 requirements for certification for settlement purposes.

16 **1. Objectively Ascertainable and Sufficiently Numerous Class**

17 A class is ascertainable when it may be readily identified via an objectively stated
18 definition without unreasonable expense or time by reference to official records. (*Rose v. City of*
19 *Hayward* (1981) 126 Cal.App.3d 926, 932.) No set number of class members is required to
20 maintain a class action (*Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030), and the
21 California Supreme Court has upheld a class of as few as ten members (*Bowles v. Super. Ct.*
22 *(Nickel, Jr.)* (1955) 44 Cal.2d 574, 577-81.) Here, the Settlement Class is made up of about 200
23 individuals, all of whom may be readily ascertained by reference to Defendant's personnel
24 records. (Setareh Decl., ¶ 9.) Thus, the Settlement Class is not only ascertainable, but also
25 sufficiently numerous.

26 **2. Predominance of Common Questions**

27 A question of law or fact is common to the members of a class if it y be resolved
28 through common proof. (See *Jaimez, supra*, 181 Cal.App.4th at 1305.) As for predominance, it
"is a comparative concept, and 'the necessity for class members to individually establish

1 eligibility and damages does not mean individual fact questions predominate.” (*Sav-on, supra*,
2 34 Cal.4th at 334 (quoting *Reyes v. San Diego Cty. Bd. of Supervisors* (1979) 196 Cal.App.3d
3 1263, 1278).) Thus, “[i]ndividual issues do not render class certification inappropriate so long
4 as such issues may effectively be managed.” (*Id.*) This is especially so where the key difference
5 between class members solely concerns their respective amounts of damages. (*See id.*) As a
6 general rule, if a defendant’s liability can be determined by facts common to all members, a
7 class will be certified even if the members must individually prove their damages. (*See Hicks*
8 *v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.)

9 In this case, the Settlement Class meets these requirements. Plaintiff submits that
10 Defendant’s liability arises from the same set of facts and legal questions that apply to and are
11 answered equally as to all Class Members. Class Members who all work as drivers for
12 Defendant in trucks provided by Defendant were classified as independent contractors. The
13 overarching question is whether given Defendant’s policies the drivers were in fact independent
14 contractors or were employees.

15 The Court accordingly should certify the Settlement Class for purposes of settlement
16 under C.C.P. § 382 and Rule of Court 3.769(c).

17 3. Typicality of Plaintiff’s Claims

18 Typicality “requires a showing that the class representative has claims or defenses
19 typical of the class.” (*See e.g., Fireside Bank v. Super. Ct. (Gonzalez)* (2007) 40 Cal.4th 1069,
20 1090.) This focuses on “the nature of the claim or defense of the class representative, and not to
21 the specific facts from which it arose or the relief sought.” (*Hanon v. Dataproducts Corp.* (9th
22 Cir. 1992) 976 F.2d 497, 508 (internal citations omitted).) “The test of typicality ‘is whether
23 other members have the same or similar injury, whether the action is based on conduct which is
24 not unique to the named plaintiffs, and whether other class members have been injured by the
25 same course of conduct.’” (*Id.* (quoting *Schwartz v. Harp* (C.D. Cal. 1985) 108 F.R.D. 279, 282;
26 accord *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46 (“it has never been the law in California
27 that the class representative must have *identical* interest with the class members.”).)
28

1 Under these standards, Plaintiff's claims are typical of those of the class members. Like
2 Settlement Class Members, Plaintiff drove a truck for Defendant that was provided by
3 Defendant and was classified as an independent contractor. Setareh Decl. ¶ 10. (*See Classen*,
4 *supra*, 145 Cal. App. 3d at 46 (representative plaintiffs need not have all claims or identical
5 interests with class members; they need only have claims that are "typical of the class"); *see*
6 *also B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1347
7 (representative plaintiffs need not suffer all of the exact same damages as every class member).)
8 Accordingly, Plaintiff pursues claims typical of the class he seeks to represent.

9 **4. Adequacy of Plaintiff and Class Counsel to Represent the Class**

10 The adequacy requirement is met where the named plaintiffs are represented by counsel
11 qualified to conduct the litigation and the plaintiffs' interest in the litigation is not antagonistic
12 to the class's interests. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51.) In
13 other words, where the named plaintiffs have adequate counsel, the plaintiffs may represent the
14 entire class absent any disabling conflicts of interest that might hinder the named plaintiffs'
15 ability to represent the class. (*Id.*)

16 In this case, Plaintiff has no conflict of interest with absent Settlement Class Members
17 and has agreed to place the class's interests above his own. (Setareh Decl., ¶ 12.) (*See Global*
18 *Minerals, supra* 113 Cal.App.4th at 851 (the inquiry into the adequacy of a class representative
19 is intended to uncover any conflicts between the plaintiff and the class he or she seeks to
20 represent).) Plaintiff's counsel, Setareh Law Group, is experienced in wage and hour class
21 action litigation and has no conflicts of interest with absent Settlement Class Members.
22 (Setareh Decl., ¶¶ 6, 12). Thus, this Court should appoint Plaintiff as Class Representative for
23 the Settlement Class and appoint his counsel as Class Counsel.

24 **B. The Court Should Preliminarily Approve the Settlement Because It Is a Fair,** 25 **Adequate, and Reasonable Compromise of Disputed Wage Claims in View of** 26 **Defendant's Potential Liability Exposure and the Risks of Continued Litigation**

27 California courts favor settlement. (*See, e.g., Stambaugh v. Superior Court* (1976) 62
28 Cal.App.3d 231, 236.) Unlike most settlements, however, class action settlements involve
Court approval. Specifically, Civil Code § 1781(f), which applies to California class action

proceedings, provides: "A class action shall not be dismissed, settled, or compromised without the approval of the Court, and notice of the proposed dismissal, settlement or compromise shall be given as the Court directs..." Additionally, California Rule of Court 3.769 sets forth the procedures to be followed for settlement of class actions.

The decision to approve or reject a proposed settlement is committed to the Court's discretion. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35.) Accordingly, a court's decision to approve a class action settlement may be reversed only upon a strong showing of "clear abuse of discretion." (*Id* at 235 (citing *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1145); *Dunk, supra*, 48 Cal.App.4th at 1802.) For the reasons discussed below, this Court should preliminarily approve the settlement, allow the parties to give notice to the Settlement Class, and schedule a final fairness and final approval hearing.

1. The Settlement Was Reached Via Arm's-Length Negotiations of Experienced Counsel and an Experienced Mediator with Sufficient Information to Intelligently Negotiate a Fair Settlement

A settlement is presumptively fair where it is reached through arm's-length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is experienced in similar litigation, and the percentage of objectors is small. (*Dunk, supra*, Cal.App.4th at 1802.) In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the settlement is fair under the circumstances of the case. (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438.) In exercising these powers, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." (*Dunk*, 48 Cal.App.4th at p. 1801 [internal quotations omitted].) Relevant factors for that determination, include, but are not limited to:

[T]he complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

1 (*Id.*) These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor
2 the factors consider to each case and give due regard to “what is otherwise a private consensual
3 agreement between the parties.” (*Id.*)

4 “In the context of a settlement agreement, the test is not the maximum amount plaintiffs
5 might have obtained at trial on the complaint, but rather whether the settlement is reasonable
6 under all of the circumstances.” (*Wershba, supra*, 91 Cal.App.4th at 250.) Because settlements
7 inherently involve compromise, even settlements providing for substantially narrower relief
8 than likely would be obtained if the suit were successfully litigated can be reasonable because
9 “the public interest may indeed be served by a voluntary settlement in which each side gives
10 ground in the interest of avoiding litigation.” (*Id.* (quoting *Air Line Stewards, etc., Local 550 v.*
11 *Am. Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109).) In addition, courts review the discovery
12 process and information received through it to aid them in assessing whether the parties
13 sufficiently developed the claims and their supporting factual bases before reaching settlement.
14 (*See Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 129-131.) Information is
15 sufficient where it allows the parties and the court to form “an understanding of the amount that
16 is in controversy and the realistic range of outcomes of the litigation.” (*Clark v. Am. Residential*
17 *Servs. LLC* (2009) 175 Cal.App.4th 785, 801.) This requirement exists so that the parties can
18 provide the court with “a meaningful and substantiated explanation of the manner in which the
19 factual and legal issues have been evaluated.” (*Kullar, supra*, 168 Cal.App.4th at p. 118.)

20 Here, the Settlement resulted from thorough, arm’s-length negotiations between
21 experienced counsel, with the assistance of a highly regarded mediator, after sufficient
22 information was exchanged to assess the relative strengths and weaknesses of Plaintiff’s claims,
23 both on their merits and for purposes of class certification, and Defendant’s estimated exposure.
24 (Setareh Decl., ¶¶8-11) Plaintiff’s counsel has reviewed Defendant’s 2016 tax return to
25 determine whether Defendant could pay a larger settlement amount. (Setareh Decl. ¶ 11).
26 Plaintiff’s counsel and Defendant’s counsel are experienced in handling class action wage-and-
27 hour litigation and have represented many classes and clients in similar class actions. (*Id.* ¶6.)

28 //

1 **a. Defendant' Estimated Liability Exposure**

2 As noted above, Plaintiff's counsel has reviewed the tax return for Defendant and
3 determined that Defendant would not be able to pay a multi-million dollar judgment. Plaintiff's
4 counsel estimates that the maximum potential recovery in this case is \$3,394,080 in unpaid
5 overtime, \$848,520 for meal period premiums, \$848,520 in rest period premiums, \$743,040 in
6 Labor Code § 203 penalties, \$288,000 in Labor Code§ 226 penalties, \$1,980,000 in penalties
7 under the Private Attorney General Act, and up to \$1.8 million in penalties for willful
8 misclassification under Labor Code § 226.8 (Setareh Decl. ¶ 11.)

9 Courts regularly approve settlements where the recovery is less than one quarter of the
10 maximum potential realistic recovery. *E.g., Bravo v. Gale Triangle*, 2017 WL 708766 *9 (C.D.
11 Cal. 2017)(approving settlement where recovery was 7.5% of projected maximum recovery
12 amount); *Officers for Justice v. Civil Service Com'n of City & County of S.F.*, 688 F.2d 615, 628
13 (9th Cir. 1982).

14 **b. Risks in Going Forward with Litigation**

15 This is a case which had considerable risks. There was a risk that summary judgment
16 would be granted on whether the class members were independent contractors, or that a trier of
17 fact would ultimately conclude that the class members were independent contractors. There was
18 a risk that the Court would decline to certify a class because of purported individualized issues
19 on the independent contractor issue. And, there was a significant risk that the Defendant would
20 have been unable to pay a judgment in the case.

21 In light of these risks, as well as the hazards and expenses of carrying the case through
22 trial, Plaintiff's counsel is of the opinion that the Settlement represents an excellent bargain for
23 the class. (See, *Rodriguez v. West Publ. Corp.* (C.D. Cal. 2007) 2007 WL 2827379 at *9
24 (explaining that "the trial court is entitled to, and should, rely upon the judgment of experienced
25 counsel for the parties") (aff'd in relevant part at 563 F.3d 948 (9th Cir. 2009).) At this
26 juncture, the Settlement would entitle each Settlement Class Member to a significant recovery.
27 In contrast, if the case would continue in litigation, even if Plaintiff prevailed on a class
28 certification motion, any appeal by Defendant would prolong already protracted litigation and
delay remedies to the Class.

1 To review, although Plaintiff feels strongly he would have prevailed had litigation
2 continued through class certification and ultimately trial, considerable risks, delays and
3 uncertainties nevertheless exist with continued litigation. The parties have achieved a fair
4 Settlement that reflects a meaningful recovery on behalf of Settlement Class Members and that
5 merits the Court's preliminary approval.

6 **1. The Proposed Method of Allocating the Settlement Fund Among**
7 **Settlement Class Members Is Fair, Adequate, and Reasonable**

8 The proposed method of allocating the Settlement Fund to Settlement Class Members
9 also is fair and reasonable. Class members will receive an equal share of the Net Settlement
10 Fund . Settlement Agreement ¶ 2.5.6(a). Furthermore, this formula ensures that the entire net
11 settlement amount is distributed to participating class members.

12 **2. The Proposed Enhancement Award to Plaintiff Is Fair, Adequate, and**
13 **Reasonable**

14 Courts routinely approve incentive awards to compensate named plaintiffs for the
15 services they provide and the risks they incur during class action litigation, often in much higher
16 amounts than that sought here. (*See, e.g. Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.
17 4th 715, 726 (upholding "service payments" to named plaintiffs for their efforts in the case);
18 *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) F. Supp. 295 (approving \$50,000
19 enhancement award).)

20 Here, under the Settlement Plaintiff may seek an enhancement award of up to
21 \$10,000.00. Settlement Agreement ¶ 2.5.3. This is entirely reasonable given Plaintiff's efforts in
22 this case and the risks he undertook on behalf of the class. Plaintiff spent considerable time
23 speaking with his counsel, gathering documents, and reviewing the Settlement, among other
24 things, and his assistance was instrumental in achieving a settlement amount that is significant
25 to the similarly situated individuals he sought to represent. (Setareh Decl., ¶ 10.) Further,
26 Plaintiff took on the personal risk of facing intrusive discovery demanded by his former
27 employer, of making his future employment prospects uncertain, and exposed himself to a
28 possible cost award if the litigation were lost. (*Id.*) Thus, the enhancement award requested is
appropriate and justified as part of the overall Settlement secured on behalf of the Class. In any

event, any Settlement Class Member who feels the requested amounts are not warranted will have an opportunity to object under the terms of the Settlement.

3. The Proposed Award of Attorneys' Fees and Costs Is Fair, Adequate, and Reasonable

"The primary basis of the fee award remains the percentage method." (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1050.) "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 47 fn. 11.) This is also consistent with Class Counsel's experience in these types of cases. (Setareh Decl., ¶ 17.) In the present case, Class Counsel intends to request attorneys' fees of up to \$83,333.33 (33 ⅓% of the Settlement Amount) and actual costs not to exceed \$22,500. Settlement Agreement ¶ 2.5.2. In view of Class Counsel's efforts and risks in pursuing this case, and the expenses incurred in litigating these claims, these amounts are well within the range of reasonableness, and thus warrant preliminary approval. (*Id.*) In any event, any Settlement Class Member who feels that the attorneys' fees or costs awards are unfair will have an opportunity to object under the terms of the Settlement.

4. The Proposed Payment to the Claims Administrator Is Fair, Adequate, and Reasonable

In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the proposed settlement is fair under the circumstances of the case. (*Mallick, supra*, 89 Cal.App.3d at 438.) In exercising these powers, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." (*Dunk*, 48 Cal.App.4th at 1801 (internal quotations omitted).) The parties have estimated that Rust Consulting will perform the services set forth in the Settlement Agreement for no more than \$10,000.

5. The Proposed Settlement Administration Plan Complies with Rule of Court 3.766(e)

In determining the manner of the notice, the court must consider: the interests of the class; the type of relief requested; the stake of the individual class members; the cost of notifying class members; the resources of the parties; the possible prejudice to class members

1 who do not receive notice; and the *res judicata* effect on class members. (C.R.C. Rule 3.766(e).)

2 Plaintiff requests that the Court approve the proposed plan for giving notice to the class
3 and administering the Settlement. The notice process is set forth in the Settlement at ¶ 10. The
4 standard for determining the adequacy of notice is whether the notice has “a reasonable chance
5 of reaching a substantial percentage of the class members.” (*Curll v. Sup. Ct.* (1975) 50
6 Cal.App.3d 960, 974.) For class claims “for money damages or similar relief at law, notice sent
7 by first class mail to the last known address of each member of the plaintiff class is sufficient.”
8 (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811.) Here, the proposed notice process
9 includes multiple measures to ensure that as many Settlement Class members as practicable
10 receive actual notice of the Settlement and have sufficient time to exercise their rights.

11 The proposed Settlement Administrator Rust Consulting is an experienced administrator.
12 (Setareh Decl. ¶ 14).

13 **6. The Proposed Class Notice Complies with Rule 3.766(d) and (e)**

14 Rule 3.766(d) provides that the Court must approve class notice. If class members are
15 given the right to exclude themselves – which the parties here agree is appropriate – the notice
16 must include: (1) a brief explanation of the case, including the basic contentions or denials of
17 the parties; (2) a statement that the Court will exclude the members from the Class, if the
18 member so requests by a specific date; (3) a procedure for the member to follow in requesting
19 exclusion from the Class; (4) a statement that the judgment, whether favorable or not, will bind
20 all members who do not request exclusion; and (5) a statement that any member who does not
21 request exclusion may, if the member so desires, enter an appearance through counsel.

22 Whether notice is adequate is determined by whether the notice has a reasonable chance
23 of reaching a substantial percentage of the class members. (*Wershba, supra*, 91 Cal.App.4th at
24 251.) The purpose of the notice is to give class members sufficient information to decide
25 whether they should accept the benefits offered, opt out and pursue their own remedies, or
26 object to the settlement. (*Id.*) Here, the Class Notice, attached as Exhibit 2 to the Declaration of
27 Shaun Setareh), provides Settlement Class Members with all pertinent information they need to
28 fully evaluate their options and exercise their rights under the Settlement. It clearly and
concisely explains, among other things: (1) what the Settlement is about; (2) who is a

1 Settlement Class Member; (3) how class members will receive payment (4) how to opt-out of
2 the Settlement; (5) how to object to the Settlement; (6) how the Settlement amount will be
3 allocated; (7) how Settlement payments to Class Members will be calculated; (8) how Class
4 Counsel will be paid; (10) the scope of the Released Claims; and (11) a statement that the
5 judgment, whether favorable or not, will bind all members who do not request exclusion.
6 Accordingly, the Notice should be approved because it describes the Settlement with sufficient
7 clarity and specificity to explain to Settlement Class Members what this case is about, their
8 rights under the Settlement, and how to exercise those rights.

9 **III. CONCLUSION**

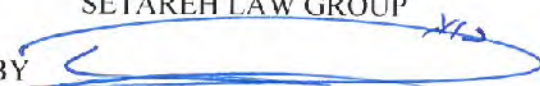
10 For all the foregoing reasons, because the Class meets the requirements for certification
11 under CCP § 382, because the Settlement bears all requisite indicia of fairness, reasonableness,
12 and adequacy, and because the proposed notice procedure and related forms comport with Rule
13 3.766 and principles of due process, this Court should grant this Motion for Preliminary
14 Approval in its entirety, adopt the [Proposed] Order Granting Preliminary Approval of Class
15 Action Settlement submitted herewith, and schedule a Final Fairness Hearing.

16 Respectfully submitted,

17 SETAREH LAW GROUP

18 Dated: January 31, 2018

19 BY

20 
21 SHAUN SETAREH
22 Attorneys for Plaintiff
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24
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26
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28

1
2 **PROOF OF SERVICE**

3 State of California,
4 County of Los Angeles

5 1. I am a citizen of the United States and am employed in the County of Los
6 Angeles, State of California. I am over the age of 18 years, and not a party to the within action.
7 My business address is 9454 Wilshire Boulevard, Ste. 907, Beverly Hills, CA 90212.

8 2. On the Wednesday, January 31, 2018, I served the foregoing document described
9 as:

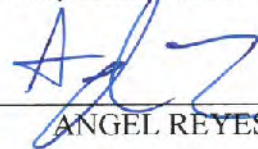
10 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS
11 ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN
12 SUPPORT THEREOF**

13 **[X] BY ELECTRONIC SERVICE**

14 Pursuant to the Court's September 01, 2016 Order authorizing Electronic Service, the
15 above-named documents have been electronically served on counsel of record by transmission
16 on Case Anywhere system on the date below. The transmission of these documents to Case
17 Anywhere system was reported complete and a copy of the Case Anywhere transaction receipt
18 will be maintained along with the original document(s) and proof of service in our office..

19 I declare under penalty of perjury under the laws of the State of California that the above
20 is true and correct.

21 Executed on Wednesday, January 31, 2018, at Beverly Hills, California.

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ANGEL REYES