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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

WILLIAM CAMPOS; individually, and on
behalf of other members of the general public
similarly situated and on behalf of other
aggrieved employees pursuant to the
California Private Attorneys General Act;
JUANITA HERNANDEZ; individually, and
on behalf of other members of the general
public similarly situated and on behalf of
other aggrieved employees pursuant to the
California Private Attorneys General Act;

Plaintiffs,

vs.

MOTIVE ENERGY, INC., a California
corporation; MOTIVE ENERGY
TELECOMMUNICATIONS GROUP, INC.,
a California corporation; ADVANCED
CHARGING TECHNOLOGIES, INC., a
California corporation; and DOES 1 through
100, inclusive,

Defendants.

Case No.: 30-2016-00828352-CU-OE-CXC

Honorable William D. Cluster
Department CX104

CLASS ACTION

**JOINT SUPPLEMENTAL BRIEF IN
SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

[Supplemental Declaration of Edwin Aiwazian
In Support of Motion for Preliminary Approval
of Class Action Settlement and [Revised
Proposed] Order filed concurrently herewith]

Date: October 19, 2018
Time: 9:00 a.m.
Department: CX104

Complaint Filed: January 5, 2016
FAC Filed: September 22, 2016
SAC Filed: December 6, 2016
Trial Date: None Set

1 Plaintiffs William Campos and Juanita Hernandez ("Plaintiffs") and Defendants Motive
2 Energy, Inc., Motive Energy Telecommunications Group, Inc., and Advanced Charging
3 Technologies, Inc. ("Defendants") (collectively, "Parties") hereby submit the following joint
4 supplemental brief in support of Plaintiffs' Motion for Preliminary Approval of Class Action
5 Settlement ("Motion for Preliminary Approval"), in order to address the Court's points of inquiry
6 set forth in the Court's Minute Order which was filed on August 24, 2018 ("Minute Order").

7 **I. Introduction**

8 Based on the Court's guidance, the Parties negotiated and executed the Amendment No. 1 to
9 Joint Stipulation of Class Action Settlement ("Amendment No. 1"), a true and correct copy of
10 which is attached as "**EXHIBIT B**" to the concurrently-filed Supplemental Declaration of Edwin
11 Aiwasian in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement
12 ("Supplemental Declaration of Edwin Aiwasian" or "Aiwasian Suppl. Decl.").¹ Together, the Joint
13 Stipulation of Class Action Settlement ("Original Settlement Agreement") and Amendment No. 1
14 are referred to as "Settlement" or "Settlement Agreement."

15 The Parties have also prepared a [Revised Proposed] Order Granting Preliminary Approval
16 of Class Action Settlement ("Revised Proposed Preliminary Approval Order"), which is submitted
17 to the Court concurrently herewith.

18 Additionally, the Parties have prepared, and now present for the Court's consideration and
19 approval, a [Revised] Notice of Class Action Settlement ("Revised Class Notice"). The Parties have
20 also prepared, and now present for the Court's consideration and approval, an Opt Out Form. The
21 Revised Class Notice and Opt Out Form are attached as "**EXHIBIT A**" and "**EXHIBIT B**" to the
22 Revised Proposed Preliminary Approval Order and as "**EXHIBIT 1**" and "**EXHIBIT 2**
23 to Amendment No. 1."²

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26 ¹ A redline version of the Amendment No. 1 showing how the Original Settlement Agreement has been revised, is
27 attached as "**EXHIBIT C**" to the Supplemental Declaration of Edwin Aiwasian.

28 ² A redline version of the Revised Class Notice showing how it was revised, is attached as "**EXHIBIT D**" to the
Supplemental Declaration of Edwin Aiwasian.

1 The Court is respectfully requested to grant preliminary approval of the class action
2 settlement.

3 **II. Reasonable Estimate of the Nature and Value of the Claims**

4 The Court requested further briefing on the reasonable estimate of the value of the claims.
5 As set forth in the Declaration of Edwin Aiwasian in Support of Plaintiff's Motion for Preliminary
6 Approval of Class Action Settlement filed on July 27, 2018 ("Declaration of Edwin Aiwasian" or
7 "Aiwasian Decl."), and discussed in the Motion for Preliminary Approval, both sides had the
8 opportunity to interview witnesses, and conducted formal and informal discovery and investigation
9 into the facts of the case. (Aiwasian Decl., ¶ 12-13.) Class Counsel interviewed Plaintiffs and other
10 Class Members to gather facts and to identify potential witnesses. Class Counsel propounded
11 multiple sets of formal written discovery requests on Defendant and reviewed responses thereto.
12 Plaintiffs reviewed and worked with Class Counsel to respond to multiple sets of formal written
13 discovery request propounded by Defendant. (*Ibid.*) Class Counsel also took the depositions of
14 Defendants' Persons Most Knowledgeable designees and prepared for and defended the depositions
15 of Plaintiffs (including, with respect to Plaintiff Hernandez, two separate sessions of deposition).
16 The Parties also engaged in extensive motion practice in regards to the pleadings and discovery,
17 including but not limited to, multiple motions to compel, a motion for leave, and a demurrer.
18 Counsel for the Parties also met and conferred on numerous occasions, e.g., to discuss issues
19 relating to the pleadings, motion practice, discovery, and the production of documents and data
20 prior to the mediation. (*Ibid.*) The volume of data and documents that Class Counsel reviewed and
21 analyzed included and was not limited to: Plaintiffs and other Class Members' employment
22 records, a detailed sampling of Class Members' time and pay data (including but not limited to,
23 timecards, payroll records, and wage statements), Defendants' Employee Handbooks, agreements
24 (including but not limited to the Employee Handbook Acknowledgement and Agreement), internal
25 memoranda, job descriptions, and Defendants' operations and employment practices, forms,
26 procedures, and policies (including but not limited to Defendants' Recording Time and Meal Period
27 Policy and Travel Time Policy), among other information and documents. (*Ibid.*) Based on this
28 investigation and analysis, Class Counsel prepared the models and calculations of the value of the

1 claims ("damages/valuation models") for mediation. (*Ibid.*)

2 Plaintiffs' quantification of the potential value of the claims and *Kullar* analysis are set forth
3 in the concurrently-filed Supplemental Declaration of Edwin Aiwasian. (Aiwasian Supp. Decl., ¶¶
4 7-65.) As discussed therein, Plaintiffs' estimates of what could potentially be recovered warranted
5 further discounting based on the risks involved, including, and not limited to, overcoming
6 Defendants' arguments in its defense, overcoming Defendants' arguments that it properly provided
7 meal and rest breaks, employees were subject to arbitration agreements, it paid for all hours of work
8 at the properly calculated rates of pay, and it properly reimbursed business expenses, satisfying
9 class certification requirements, proving all of the elements of each cause of action, the derivative
10 nature of many of the claims, the costs and expenses of further litigation, and the real possibility of
11 no recovery after years of litigation. (*Id.*, ¶¶ 14, 19, 24, 33, 37, 40, 45, & 51.)

12 Within the context of mediation, Defendants argued that the estimates of the value of the
13 claims were overly ambitious and significantly inflated, asserting that there were multiple
14 challenges to certification and the merits of the claims, including and not limited to, the key claims
15 for overtime and minimum wages and non-compliant meal and rest periods. (*Id.*, ¶¶ 14, 19, & 24.)
16 For example, Defendants contended that employees were required to record all hours worked, that
17 its records accurately reflected all time worked, and that it was not aware that work had been
18 performed off-the-clock. (*Id.*, § 14.) Defendants also contended that it had a compliant overtime
19 policy and produced wage statements reflecting time-and-a-half and double-time overtime
20 compensation paid to many of the Class Members (including and not limited to Plaintiffs). (*Ibid.*)
21 Defendants further contended that Class Members, by and large, had no written records to prove
22 clear instances of time worked off-the-clock that was not compensated, and variation as to the
23 circumstances that could have caused the employees to work off-the-clock (with or without
24 Defendants' knowledge) presented potential challenges for certification with respect to
25 commonality. (*Ibid.*) Defendants further contended that it had properly included non-discretionary
26 bonuses, incentives, commissions, and shift differentials when calculating the regular rate for
27 purposes of paying overtime wages. (*Ibid.*) Also, Defendants contended that it was its policy to
28

1 provide a paid thirty-minute lunch break so there were no written records to prove non-compliant
2 meal periods. (*Ibid.*)

3 Defendants also contended that the non-compliant meal and rest period claims were
4 meritless and unlikely to be certified because it contended that it had compliant meal and rest break
5 policies and that Class Members were afforded the opportunity and did take duty-free meal and/or
6 rest periods. (*Id.*, ¶¶ 19 & 24.) Defendants further contended that any allegation that Class
7 Members were forced to miss meal and rest periods, or take late, short, or interrupted ones, would
8 require highly individualized questions of fact. (*Ibid.*)

9 Defendants further contended that putative class members were employed by business
10 entities, each with their own practices, policies, procedures, and schedules. (*Id.*, ¶ 14.) Defendants
11 also contended that putative class members were employed in approximately 64 different job
12 positions, each having different and distinct job duties. (*Ibid.*)

13 Plaintiffs and Class Counsel have conducted adequate investigation and discovery to be
14 sufficiently informed of the nature and extent of Class Members' claims, and to enable both sides to
15 fully evaluate the Settlement for its fairness, adequacy, and reasonableness. (*Id.*, ¶¶ 10, 15, 20, &
16 25.) The Parties have agreed that this case is well-suited for settlement given the legal issues
17 relating to Plaintiffs' principle claims, as well as the costs and risks to both sides that would attend
18 further litigation. (*Id.*, ¶ 52-53.) The Settlement takes into account the strengths and weaknesses of
19 each side's position, the uncertainty of how the case might have concluded at certification, trial,
20 and/or appeal, and the risks to recovery. (*Ibid.*)

21 Having the benefit of discovery, pre-lawsuit filing investigation, interviews of Plaintiffs and
22 other Class Members, and data and information produced by Defendants in advance of and during
23 mediation and settlement negotiations, Plaintiffs recognized that if the litigation had continued,
24 legal and factual hurdles might have been encountered that would pose significant risks to recovery
25 on behalf of the Class Members. (Aiwazian Decl., ¶ 12.)

26 Defendants contended that, in the context of a PAGA claim that is premised on the violation
27 of multiple provisions of the California Labor Code, a court would not assess cumulative penalties,
28 but that instead, if any penalty were assessed, only an initial violation penalty, rather than a

1 heightened, subsequent violation penalty would likely be applied. (Aiwazian Supp. Decl., ¶ 53.)
2 Defendants also contended that, if penalties are assessed, a penalty would only be assessed once per
3 pay period, rather than cumulatively per violation during a pay period. (*Id.*, ¶ 54.) Defendants also
4 contended that an important feature of the PAGA statute is that the Court has discretion to reduce
5 the penalties to be assessed against the employer.³ (*Id.*, ¶ 54.)

6 There were also multiple additional risks to recovery, including, and not limited to, the risk
7 of possible bifurcation of discovery and/or trial of the PAGA claim—at the time, multiple courts had
8 taken such an approach.⁴ Given the derivative nature of the PAGA claim, Defendants contended
9 that the underlying California Labor Code provisions would not only have to be proven, but that it
10 would also have to be demonstrated that the aggrieved employees actually suffered from said
11 violations, and that in doing so, a court would also have to be satisfied that Defendants’ right to due
12 process would not be abridged. (*Id.*, ¶ 59.) While class certification requirements, strictly speaking,
13 do not need to be satisfied with respect to the PAGA claim, there was a risk that the Court would
14 determine that the PAGA claim was not sufficiently “manageable” and that representative
15 adjudication would interfere with Defendants’ right to due process.⁵

17 ³ Cal. Lab. Code § 2699(e)(2)(“[A] court may award a lesser amount than the maximum civil penalty amount specified
18 by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that
19 is unjust, arbitrary and oppressive, or confiscatory.”); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
Cal.App.4th 1112, 1136 (holding that a court may reduce the amount of PAGA penalties awarded to an employee based
upon discretionary factors other than the employer’s ability to pay.)

20 ⁴ See *Amalgamated Transit Union, Local 1756 v. Superior Court* (2009) 46 Cal.4th 993, 1001 (Noting that PAGA
21 “require[s] a plaintiff to have suffered an injury resulting from an unlawful action”); *Stafford v. Dollar Tree Stores, Inc.*
(E.D. Cal. Nov. 21, 2014) 2014 WL 6633396, *4 (Court found that judicial economy supported bifurcation because of
22 the difficulties and inherent uncertainties of being able to establish liability with respect to a large number of
23 potentially aggrieved employees and noted that “PAGA’s public purpose would be ill—served if the court finds [the
plaintiff] has not been aggrieved by a Labor Code violation”); *Grappo v. Coventry Fin. Corp.* (1991) 235 Cal.App.3d
496, 504 (Trial courts have “broad discretion to determine the order of proof in the interest of judicial economy”); see
24 also Cal. Code Civ. Proc. § 598 (The court may “when the convenience of witnesses, the ends of justice, or the
economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and
25 hearing, make an order. . . that the trial of any issue or any part thereof shall precede the trial of any other issue or any
part thereof in the case[.]”); Cal. Code Civ. Proc. § 1048(b) (Court can separate trial of any cause of action or of any
26 separate issue in the interest of convenience or to avoid prejudice); Cal. Code Civ. Proc. § 2019.020(b) (Courts have
the power to “establish the sequence and timing of discovery for the convenience of parties and witnesses and in the
27 interests of justice”); see *Horton v. Jones* (1972) 26 Cal.App.3d 952, 955 (Bifurcation and sequencing of litigation is
allowed to avoid waste of time and money on trial and litigation of issue s could be rendered made moot.)

28 ⁵ See, e.g., *Litty v. Merrill Lynch & Co.*, No. CV-14-0425-PA, WL 5904904 at *3 (C.D. Cal. Nov. 10, 2014); *Ortiz v.*
CVS Caremark Corp., No. C-12-05859, 2014 WL 1117614 (N.D. Cal. March, 18, 2014); see also *Duran v. US. Bank*
(footnote continued)

1 Taking into account the risks of litigating the PAGA claim, Plaintiffs' estimate of the value
2 of the PAGA claim was conservative, and this estimate warranted further discounting based on
3 multiple additional risks relating to representative adjudication of the PAGA claim.

4 Based on the risks involved and the costs and expenses of protracted litigation, and with the
5 help of the mediator, Plaintiffs and Class Counsel concluded that it was in the best interests of the
6 Class Members to reach a settlement. (Aiwazian Supp. Decl., ¶ 63.) Class Counsel submits that,
7 based on all of the available information reviewed, the Settlement presented for preliminary
8 approval is within a reasonable range of outcomes in light of all of the strengths and weaknesses of
9 the claims at issue between the Parties. (*Ibid.*)

10 Neither class certification, liability, damages, nor entitlement to monetary recovery is clear-
11 cut, which is why the Parties elected to settle this matter. Class Counsel applied appropriate
12 discounts in light of the defenses asserted, developments in the law, and circumstances in this case,
13 which posed risks to certification and monetary recovery. The risks included, and were not limited
14 to, the costs and uncertainty of further litigating this case through trial and additional appeals, as
15 well as consideration of the issues of, *inter alia*, whether each Class Member worked off-the-clock,
16 whether each Class Member worked in excess of 8 hours in a day or 40 hours in a week, whether
17 each Class Member was not provided with compliant meal and rest periods, whether each Class
18 Member incurred reimbursable expenses which were not reimbursed, whether Defendant knew or
19 should have known about uncompensated work, and the derivative nature of the other claims
20 asserted in this case. This Settlement, like most others, resolves disputed claims and is the product
21 of compromise.

22 In sum, for the aforementioned reasons, as well as the reasons and quantification set forth in
23 the concurrently filed Supplemental Declaration of Edwin Aiwazian, the settlement of this matter is
24 fair, reasonable, and adequate in light of the strengths and weaknesses of Plaintiffs' claims.

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26 *National Association* (2014) 59 Cal.4th 1, 25,29, 31, and 34-35 (Plaintiff needs to be able to demonstrate the illegal
27 effects of the policy or de facto practice efficiently and manageably, and in litigating representative actions the
28 procedures utilized by the court "may not be used to abridge a party's substantive rights," including "abridge[ing] [the
defendant's] presentation of [a defense] simply because that defense was cumbersome to litigate," because of
"principles of due process"); see also *Knight v. Cashcall, Inc.* (2014) 231 Cal. App. 4th 112, 131 (noting "due process
principles" require that defendants have the opportunity "to fairly litigate individual liability questions").

1 **III. Sufficiency of the Class Notice**

2 Amendment No. 1 replaces the Notice of Class Action Settlement with the Revised Class
3 Notice. (Amendment No. 1, § F replacing Exh. A.) Based on information provided by Defendants,
4 and Plaintiffs' and Class Counsel's experience and investigations, Defendants use English in the
5 operation their businesses, and Class Members were required to be able to read and write English
6 proficiently in connection with their employment with Defendants. (Declaration of Larry Sengg, ¶¶
7 3-8; Aiwazian Supp. Decl., ¶ 7.) Only three employees of Defendants are known to have
8 designated a language other than English as their primary language (having designated Spanish as
9 their primary language). (Sengg Decl., ¶ 3). As such, the parties have amended the Original
10 Settlement Agreement to provide that the Revised Class Notice will be sent to Class Members in
11 English and Spanish. (Amendment No. 1, § B amending Original Settlement Agreement, § 33.)
12 The Revised Class Notice satisfies all due process requirements and complies with standards of
13 fairness, completeness, and neutrality.

14 **IV. Amendment and Clarification of the Settlement Documents**

15 Based on the Court's guidance, the Parties have revised the Settlement Agreement, by way
16 of Amendment No. 1 and prepared a Revised Class Notice and Opt Out Form. The Court is
17 respectfully requested to approve these revised settlement documents.

18 ***A. Addition of an Opt Out Form***

19 To address the Court's request to include an opt out form, Amendment No. 1 now provides
20 for Class Members to request exclusion by submitting a fully completed Opt Out Form, which they
21 will receive with their Class Notice, to the Settlement Administrator postmarked on or before the
22 Response Deadline. (Amendment No. 1 § D amending Original Settlement Agreement, ¶ 36.) The
23 Opt Out Form is attached to the [Revised Proposed] Order Granting Preliminary Approval of Class
24 Action Settlement as "**EXHIBIT B**" and attached to Amendment No. 1 as "**EXHIBIT 2**".

25 ***B. Clarification of the Release of Claims by Settlement Class Members***

26 The Parties have clarified the release of claims by deleting the language flagged by the
27 Court, so that it is clear that the release is predicated on the facts alleged in the Second Amended
28 Class Action Complaint for Damages & Enforcement Under the Private Attorneys General Act,

1 California Labor Code § 2698, Et Seq. (Amendment No. 1, § E amending Original Settlement
2 Agreement, ¶ 60.) The Class Notice has also been revised so that the Revised Class Notice now
3 contains the clarified release language that is adopted by Amendment No.1.

4 ***C. Extension of the Response Deadline***

5 The Parties have extended the deadline to submit a Request for Exclusion (now, by way of
6 Opt Out Form), dispute regarding Workweeks, or objection to the Settlement (“Response
7 Deadline”), from thirty (30) calendar days to forty-five (45) calendar days after the Settlement
8 Administrator initially mails the Notice Packet (which will consist of the Class Notice and the Opt
9 Out Form) to the Class. (Amendment No. 1, § C amending Original Settlement Agreement, ¶ 35.)
10 The Response Deadline for a Class Member to whom a Notice Packet has been re-mailed will be
11 the later of the Response Deadline or fifteen (15) calendar days from the date on which the Notice
12 Packet is re-mailed (“Extended Response Deadline”). (Amendment No. 1, § B, amending Original
13 Settlement Agreement, ¶ 33).

14 ***D. Clarification of Calculation of Workweeks***

15 Amendment No. 1 clarifies how Workweeks will be calculated for Class Members so that
16 Class Members may better understand what qualifies as a Workweek and how their Individual
17 Settlement Share is calculated. (Amendment No. 1, § A amending Original Settlement Agreement,
18 ¶ 10.) The Revised Class Notice now contains an expanded explanation of how Workweeks and
19 Individual Settlement Shares are calculated, that comports with the Amendment No. 1. Also, the
20 Revised Class Notice now contains a worksheet/chart that will provide a breakdown of the dates of
21 employment and excluded time period(s) used to calculate the Class Member’s Workweeks based
22 on Defendants’ records.

23 ***E. Distribution of Uncashed Checks***

24 The Original Settlement Agreement provides that Individual Settlement Payments checks
25 which are not cashed or deposited within one hundred and eighty (180) days of issuance will be
26 cancelled and the funds associated with those checks will be distributed twenty-five percent (25%)
27 to the State Treasury for deposit in the Trial Court Improvement and Modernization Fund and
28 seventy-five percent (75%) to the State Treasury for deposit into the Equal Access Fund of the

Judicial Branch. (Original Settlement Agreement, ¶ 54.) On June 27, 2018, S.B. 847 became effective and amended California Code of Civil Procedure section 384 and introduced new requirements regarding disposition of unclaimed or abandoned class member funds in class action litigation. California Code of Civil Procedure section 384 no longer provides a “good cause” exception under which the Court can make a specific finding that an alternative distribution would better serve the public interest or the interest of the class (as was the case under the law amended effective as of June 27, 2017). Instead, California Code of Civil Procedure section 384 now provides:

[B]efore the entry of a judgment in a class action established pursuant to Section 382 that provides for the payment of money to members of the class, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent. The court shall ensure that the distribution of any unpaid residue or unclaimed or abandoned class member funds derived from multistate or national cases brought under California law shall provide substantial or commensurate benefit to California consumers.

As such, Amendment No. 1 modifies the Settlement Agreement so that funds associated with uncashed settlement checks are transmitted to the Dream Street Foundation, in compliance with California Code of Civil Procedure section 384, as amended and currently effective. (Amendment No. 1, § E amending Original Settlement Agreement, ¶ 54.)

F. Modifications to the Class Notice.

The Parties have revised the Class Notice as discussed above, and have updated the Court’s address and department number throughout the Revised Class Notice. (Amendment No. 1, § G replacing Exh. A. to the Original Settlement Agreement). Language that could be interpreted as prohibiting Class Members from appearing and being heard at the Final Approval Hearing has also been eliminated from the Class Notice.

1 **V. Conclusion**

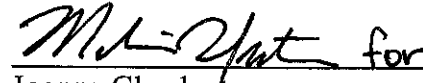
2 Having revised the Settlement Agreement and settlement-related documents and having
3 provided additional information addressing the Court's points of inquiry regarding the Settlement,
4 the Parties respectfully request that the Court grant preliminary approval of the Settlement.⁶

5 Respectfully submitted,

6 Dated: September 21, 2018

LAWYERS for JUSTICE, PC

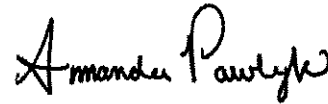
7
8 By:


Joanna Ghosh
Attorneys for Plaintiff

9
10 Dated: September 21, 2018

MICHELMAN & ROBINSON, LLP

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12
13 By:


Marc R. Jacobs
Amanda K. Pawlyk
Attorneys for Defendant

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27 ⁶ Assuming the Court enters an order granting preliminary approval of the Settlement on September 28, 2018, based on
28 the notice and administration deadlines and procedures provided for by the Settlement, a Final Approval Hearing in
March 2019 would be appropriate.