

1 Taras Kick (SBN 143379)
Taras@kicklawfirm.com
2 Greg Taylor (SBN 315128)
Greg@kicklawfirm.com
3 THE KICK LAW FIRM, APC
815 Moraga Drive
4 Los Angeles, California 90049
Telephone: (310) 395-2988
5 Facsimile: (310) 395-2088

6 Attorneys for Plaintiff Albert Lizarraga,
individually, and on behalf of all others
7 similarly situated and aggrieved

8
9 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**
10 **CENTRAL DISTRICT — SPRING STREET COURTHOUSE**

11 ALBERT LIZARRAGA, individually, and on
behalf of all others similarly situated and
12 aggrieved,

13 Plaintiff,

14 vs.

15 DIGBY SOUTHWEST, INC., an Arizona
corporation; and DOES 1 through 100,
16 inclusive,

17 Defendants.

Case No.: 19STCV27901

*[Assigned for all purposes to the Hon. Stuart M.
Rice, Dept. 1]*

COMPLEX CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS AND PAGA
ACTION SETTLEMENT;**

PROOF OF SERVICE

Date: November 13, 2023

Time: 10:30 a.m.

Dept: 1

[Filed concurrently with Declaration of Greg
Taylor in Support of Plaintiff's Motion for Final
Approval; Declaration of Mary Butler Regarding
Notice and Settlement Administration]

Complaint filed: August 9, 2019

Trial date: None set

1 **TO THE HONORABLE COURT AND ALL PARTIES AND THEIR ATTORNEYS:**

2 **PLEASE TAKE NOTICE** that on November 13, 2023, at 10:30 a.m. in Department 1 of this
3 Court, or as soon thereafter as the matter as the matter may be heard, Plaintiff Albert Lizarraga
4 (“Plaintiff”) respectfully moves this Court for an order that:

5 1. Finally approves of the proposed class action settlement described herein and as set forth
6 in the parties’ Settlement and Release Agreement (“Settlement,” “Settlement Agreement,” or “SA”),
7 on the grounds that the Settlement is fair, reasonable and adequate for all Class Members;

8 2. Finally certifies and binds the Class for settlement purposes only;

9 3. Finds that the Court-approved Class Notice distributed to the Settlement Class pursuant
10 to the Court’s April 20, 2023, Order granting preliminary approval constituted the best notice
11 practicable under the circumstances;

12 4. Orders Defendant Digby Southwest, Inc. to remit payment of \$300,000.00 to the
13 Settlement Administrator;

14 5. Orders the Settlement Administrator to distribute \$7,500.00 to the California Labor and
15 Workforce Development Agency (“LWDA”) for penalties pursuant to the Labor Code Private
16 Attorneys General Act of 2004 (“PAGA”), and to distribute \$2,500.00 in PAGA penalties to Aggrieved
17 Employees;

18 6. Approves Class Counsel’s Attorneys’ Fees Award in the amount of \$100,000 or one-third
19 (33-1/3%) of the total recovery and \$17,517.01 for reimbursement of costs incurred by Class Counsel
20 in connection with the prosecution of this action, and to distribute \$17,326.00 in Settlement
21 Administration Costs to itself, Simpluris, Inc., and,
22

23 7. Approves the award of \$10,000.00 to Plaintiff Albert Lizarraga as a Class Representative
24 Service Award for his time and effort in representing the Class and orders the Settlement Administrator
25 to distribute the award to Plaintiff Lizarraga.

26 Plaintiff shall also request that this Court enter a Final Judgment, which includes a provision
27 for this Court’s retention of jurisdiction over the parties to enforce the terms of the judgment.

28 This Motion is made pursuant to Rules of Court, Rules 3.764, 3.766, and 3.769, and Code of
29 Civil Procedure section 382, and is based on this Notice, the attached Memorandum of Points and

1 Authorities, the accompanying Declaration of Greg Taylor (“Taylor Decl.”) and exhibits thereto, the
2 Declaration of Mary Butler Regarding Notice and Settlement Administration (“Butler Decl.”), the
3 complete files and records of this case, and any other evidence or oral argument which may be
4 considered by the court at the time of the hearing.

5 Dated: October 19, 2023

Respectfully submitted,
THE KICK LAW FIRM, APC

8 By: /s/ Greg Taylor
9 Taras Kick
10 Greg Taylor
11 Attorneys for Plaintiff
12 Albert Lizarraga and the Class
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

TABLE OF AUTHORITIES

CASES

<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i> (2000) 85 Cal.App.4th 1135	- 8 -
<i>American Bank, N.A. v. Gorman</i> (2006) 147 Cal.App.4th 1	- 17 -
<i>Arenas v. El Torito Rests., Inc.</i> , 183 Cal. App. 4th 723 (2010)	- 20 -
<i>Ayala v. US Xpress</i> , 851 Fed.Appx. 53 (9th Cir. 2021)	- 10 -
<i>Banas v. Volcano Corp.</i> (N.D. Cal. 2014) 47 F.Supp.3d 957	- 18 -
<i>Bartold v. Glendale Federal Bank</i> (2000) 81 Cal.App.4th 816	- 20 -
<i>Beasley v. Wells Fargo Bank</i> (1991) 235 Cal.App.3d 1407	- 16 -
<i>Behrens v. Wometco Enters., Inc.</i> (S.D. Fla. 1988) 118 F.R.D. 534	- 13 -
<i>Behrens v. Wometco Enters., Inc.</i> (S.D. Fla. 1988) 118 F.R.D. 534, <i>aff'd</i> , (11th Cir. 1990) 899 F.2d 21	- 13 -
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	- 8, 14, 15, 17 -
<i>City of Detroit v. Grinnell Corp.</i> (S.D.N.Y. 1972) 356 F. Supp. 1380	- 14 -
<i>City of Detroit v. Grinnell Corp.</i> (S.D.N.Y. 1972) 356 F. Supp. 1380, <i>aff'd in part, rev'd on other grounds</i> , (2d Cir. 1974) 495 F.2d 448	- 14 -
<i>Concepcion v. Amscan Holdings</i> (2014) 223 Cal.App.4th 1309	- 17 -
<i>Consumer Cause v. Mrs. Gooch's Natural Food Markets</i> (2005) 127 Cal.App.4th 387	- 15 -
<i>Craft v. County of San Bernardino</i> (C.D. Cal. 2008) 624 F.Supp.2d 1113	- 17 -
<i>Diaz v. Grill Concepts Services, Inc.</i> (2018) 23 Cal. App. 5th 859	- 12 -
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	- 8 -
<i>Glendora Community Redevelopment Agency v. Demeter</i> , (1984) 155 Cal.App.3d 465	- 17 -
<i>In re Activision Securities Litigation</i> , (N.D. Cal. 1989) 723 F.Supp. 1373	- 16 -
<i>In re American Bank Note Holographics, Inc., Securities Litigation</i> (S.D.N.Y. 2001) 127 F.Supp.2d 418	- 14 -
<i>In re Amgen Inc. Sec. Litig.</i> , Case No. CV 07-2536 PSG (PLAx), 2016 WL 10571773 (C.D. Cal. Oct 25, 2016)	- 17 -
<i>In re Amgen Inc. Sec. Litig.</i> , Case No. CV 07-2536 PSG (PLAx), 2016 WL 10571773 (C.D. Cal. Oct 25, 2016)	- 17 -
<i>In re Cellphone Fee Termination Cases</i> (2010) 186 Cal.App.4th 1380	- 12 -
<i>In re High Tech Emple. Antitrust Litig.</i> , (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 118052	- 18 -
<i>In re Microsoft I-V Cases</i> (2006) 135 Cal.App.4th 706	- 8 -

1	<i>In re Portal Software, Inc. Sec. Litig.</i> , No. C- 03-5138 VRW, 2007 WL 4171201 (N.D. Cal. Nov. 26, 2007).....	- 17 -
2	<i>In re Toyota Motor</i> (C.D. Cal. 2013) 2013 U.S. Dist.Lexis 123298	- 18 -
3	<i>In re Toys R US FACTA Litig.</i> (C.D. Cal. 2014) 295 F.R.D. 438	- 14 -
4	<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116	- 12 -
5	<i>Laffitte v. Robert Half Intern, Inc.</i> (2016) 1 Cal.5th 480	- 15 -
6	<i>Lealao v. Beneficial California, Inc.</i> , (2000) 82 Cal.App.4th 19	- 16 -
7	<i>Linder v. Thrifty Oil Co.</i> (2000) 23 Cal.4th 429	- 11 -
8	<i>Martel v. Valderamma</i> (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 49830.....	- 13, 14 -
9	<i>MBNA American Bank, N.A. v. Gorman</i> , (2006) 147 Cal.App.4th 1.....	- 17 -
10	<i>McKnight, et al., v. Uber Technologies, Inc., et al.</i> 3:14-CV-05615-JST, Docket No. 148, [December 8, 2017	- 17 -
11	<i>Munoz v. BCI Coca-Cola Bottling Company of Los Angeles</i> (2010) 186 Cal.App.4th 399	- 18 -
12	<i>Nordstrom Com. Cases</i> (2010) 186 Cal.App.4th 576	- 7 -
13	<i>Oman v. DeltaAir Lines, Inc.</i> (2020) 9 Cal.5th 762	- 10 -
14	<i>Parkinson v. Hyundai Motor America</i> , (C.D. Cal. 2010) 796 F.Supp.2d 1160	- 17 -
15	<i>PLCM Group, Inc. v. Drexler</i> , (2000) 22 Cal.4th 1084	- 17 -
16	<i>Raining Data v. Barrenceha</i> (2009) 175 Cal.App.4th 1363	- 17 -
17	<i>Richmond v. Dart Industries</i> , 29 Cal.App.3d 462 (1981)	- 20 -
18	<i>San Bernardino Valley Audubon Soc. v. County of San Bernardino</i> , (1985) 155 Cal.App.3d 738	- 18 -
19	<i>Serrano v. Priest</i> , (1977) 20 Cal.3d 25	- 16, 18 -
20	<i>Van Vranken v. Atlantic Richfield Co.</i> , (N.D. Cal. 1995) 901 F.Supp. 294	- 17, 19 -
21	<i>Vasquez v. Superior Court</i> , 4 Cal.App.3d 800 (1971)	- 20 -
22	<i>Vizcaino v. Microsoft Corp.</i> (9th Cir. 2002), 290 F.3d 1043	- 17 -
23	<i>Wash. Mut. Bank v. Superior Court</i> , 24 Cal. 4th 906 (2001)).....	- 20 -
24	<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224	- 7, 8, 15, 16, 18 -
25		
26	STATUTES	
27	49 U.S.C. § 14501	- 9 -
28	Code of Civil Procedure section 382	ii
29	Lab. Code § 2698.....	- 3 -
	Labor Code § 203.....	- 10, 12 -
	Labor Code § 2699.3.....	- 3 -
	Rules 3.764, 3.766, and 3.769.....	ii

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

TREATISES

Newberg and Rubenstein on Class Actions (“Newberg”) (6th ed.) § - 15 -
Newberg § 23:23 (6th ed.). - 20 -
Newberg, § 3:13..... - 20 -

TABLE OF CONTENTS

TABLE OF CONTENTS.....	iv
I. INTRODUCTION AND SUMMARY	- 1 -
II. FACTUAL AND PROCEDURAL BACKGROUND	- 3 -
A. Factual Background.....	- 3 -
B. Procedural History.....	- 3 -
C. Investigation and Discovery, Settlement Negotiations, and Preliminary Approval	- 3 -
III. SUMMARY OF PROPOSED SETTLEMENT AGREEMENT	- 5 -
A. Settlement Amount and Funding after Final Judgment.	- 5 -
B. Release.	- 5 -
C. Net Settlement Amount and Settlement Payments to Participating Class Members.	- 5 -
D. PAGA Payment to the LWDA and Aggrieved Employees.....	- 6 -
E. Settlement Checks Void at 180 Days.....	- 6 -
IV. THE SETTLEMENT ADMINISTRATION PROCESS	- 7 -
V. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT.....	- 7 -
A. The Settlement Resulted from Arm's-Length Bargaining Based Upon Extensive Investigation and Discovery	- 8 -
B. The Risks Inherent in Continued Litigation and Individual Settlement Favor Final Approval of the Settlement	- 9 -
C. The Proposed Settlement is Fair and Reasonable.	- 12 -
VI. PLAINTIFF'S REQUEST FOR ATTORNEYS' FEES AND COSTS IS REASONABLE-	15 -
A. Plaintiff Requests a One-Third Percentage-Based Fee Award	- 15 -
B. Analysis Pursuant to the Lodestar Methodology.	- 16 -
VII. THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARD IS REASONABLE...	18 -
VIII. REASONABLE SETTLEMENT ADMINISTRATION COSTS TO BE APPROVED.....	- 19 -
IX. THE PROPOSED SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED	- 20 -
X. CONCLUSION.....	- 21 -
PROOF OF SERVICE	- 22 -

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY**

3 This Motion seeks final approval of a proposed wage-and-hour class and representative action
4 Settlement involving truck drivers. Plaintiff Albert Lizarraga (“Plaintiff”) brought this action, on behalf
5 of himself and all others similarly situated, against Defendant Digby Southwest, Inc. (“Defendant”).
6 Plaintiff alleges that he and his fellow Class Members and Aggrieved Employees were deprived of
7 certain rights afforded to them by the Labor Code during their employment. Defendant denies any
8 wrongdoing.

9 After a second mediation session with experienced wage and hour mediator, David Phillips,
10 Esq., the Parties ultimately reached the proposed Settlement. (See, concurrently filed Declaration of
11 Greg Taylor [“Taylor Declaration”], ¶ 17.) A true and correct copy of the fully executed Settlement
12 and Release Agreement (“Settlement,” “Settlement Agreement,” or “SA”) is attached as **Exhibit 1** to
13 the Taylor Declaration. Both the Settlement and Class Notice are based on the Model Class Action and
14 PAGA Settlement Agreement and Class Notice (LACIV296), provided by the LA County Superior
15 Court for optional use in June 2022.

16 On March 28, 2023, Plaintiff filed his Motion for Preliminary Approval. (*Id.*, ¶¶ 19-20.) On
17 April 14, 2022, this Court issued a checklist requesting certain additional information from Plaintiff
18 prior to the preliminary approval hearing. (*Id.*) Plaintiff filed supplemental briefing on April 19, 2023,
19 as requested by the Court, including additional information demonstrating the statistical significance
20 of the data sample analysis and support for Plaintiff’s request for service award. (*Id.*) As requested,
21 Plaintiff also filed the First Amended Complaint as a standalone document on April 19, 2023. (*Id.*)

22 This Court then granted preliminary approval in an Order dated April 20, 2023, finding the
23 terms of the Settlement to be “within the range of fairness, adequacy, and reasonableness of a settlement
24 that ultimately could be granted final approval.” (See Order Granting Preliminary Approval of Class
25 and PAGA Representative Action Settlement [“Preliminary Approval Order”], ¶ 1.)

26 The Court also found that, for purposes of settlement, “the proposed Class is ascertainable and
27 presents a sufficiently well-defined community of interest in questions of law and fact.” (*Id.*)
28 Accordingly, the Court conditionally certified the following Settlement Class: “All current and former
29 drivers, including but not limited to those misclassified as independent contractors or “owner

1 operators,” who performed work for Defendant in the State of California at any time during the Class
2 Period from August 9, 2015, through November 1, 2022.” (*Id.*)

3 In its Order, the Court appointed Simpluris, Inc. (“Simpluris”) as the Settlement Administrator
4 under the terms of the Settlement Agreement (*Id.*, ¶ 4); approved the proposed Class Notice as to form
5 and content (*Id.*, ¶ 8); found that the methods of giving notice prescribed in the Settlement Agreement
6 meet the requirements of due process, are the best notice practicable under the circumstances, and
7 constitute valid, due and sufficient notice to all members of the Class (*Id.*); approved the procedures
8 set forth in the Settlement Agreement and Class Notice for Class Members to opt out or object to the
9 Settlement (*Id.*, ¶ 9); and directed the Parties to carry out the proposed Settlement and Administrative
10 Duties as set forth in the Settlement and the Preliminary Approval Order. (*Id.*, ¶ 10.)

11 Plaintiff can now report that the notice program ordered by this Court has been very successful,
12 and Plaintiff therefore presents the matter for final approval. As evidenced by the concurrently filed
13 Declaration of Mary Butler of the settlement administrator Simpluris, Inc., there was a successful
14 deliverable rate of 97.6%. (Declaration of Mary Butler Regarding Notice and Settlement
15 Administration, dated October 19, 2023 [“Butler Decl.”], ¶¶ 8-9.)

16 Not a single Class Member has objected to any aspect of the proposed Settlement, and no
17 challenges to the calculation of the number of class workweeks and PAGA pay periods were received.
18 (*Id.*, ¶¶ 11-14.) Further, only one Class Member has elected to opt out of the proposed Settlement. (*Id.*)
19 Therefore, if this Court approves the proposed Settlement in full, the 1,534 Settlement Class Members
20 will be paid their portion of the Net Settlement Amount averaging \$94.63 per Class Member, including
21 a highest estimated payment of \$900.86. (*Id.*, ¶¶ 15-16.) This is in addition to 247 Aggrieved Employees
22 receiving their proportionate share of \$2,500.00 in PAGA penalties, with an estimated average
23 Individual PAGA Payments of \$10.12 and the highest estimated award of \$24.44. (*Id.*, ¶ 17.)

24 In sum, the proposed settlement of this class action is a fair result, and Class Members’ reaction
25 to it to date has been overwhelmingly positive. For these reasons, and per the below, Plaintiff
26 respectfully requests this Court enter a Final Approval Order and an accompanying Final Judgment
27 that: (1) finally approves the Settlement; (2) finally certifies and binds the Class to the Settlement; (3)
28 directs payments to Participating Class Members and Aggrieved Employees; (4) directs payments to
29 the Settlement Administrator; (5) directs payment to Plaintiff; and (6) directs payments to Class

1 Counsel in accordance with the Settlement terms.

2 **II. FACTUAL AND PROCEDURAL BACKGROUND**

3 **A. Factual Background**

4 This is a misclassification wage-and-hour lawsuit involving truck drivers. Plaintiff Albert
5 Lizarraga is a truck driver who drove for Defendant DSW within the State of California. (See
6 Declaration of Albert Lizarraga in Support of Motion for Final Approval [“Lizarraga Decl.”], ¶ 3-5.)
7 DSW is a commercial transportation company based in Arizona, which regularly assigns interstate
8 routes to its drivers, including in California. (*Id.*) Plaintiff brings this action on behalf of himself and a
9 class of 1,534 similarly situated non-exempt commercial truck drivers, alleging that Defendant
10 deprived him and his fellow Class Members and aggrieved employees of certain rights afforded to them
11 by the Labor Code.

12 **B. Procedural History**

13 On August 9, 2019, Plaintiff filed this putative class action on behalf of himself and others
14 similarly situated, alleging the following: (1) Failure to Provide Required Meal Periods; (2) Failure to
15 Provide Required Rest Periods; (3) Failure to Pay Overtime Wages; (4) Failure to Pay Minimum Wage;
16 (5) Failure to Pay All Wages Due to Discharged or Quitting Employees; (6) Failure to Maintain
17 Required Records; (7) Failure to Provide Accurate Itemized Statements; (8) Failure to Indemnify
18 Employees for Necessary Expenditures Incurred in Discharge of Duties; (9) Unlawful Deductions from
19 Wages; (10) Breach of Contract; (11) Breach of Covenant of Good Faith and Fair Dealing; and (12)
20 Unfair and Unlawful Business Practices in violation of Bus & Prof. Code § 17200, et seq.

21 On October 4, 2022, pursuant to Labor Code § 2699.3, Plaintiff submitted notice to the Labor
22 and Workforce Development Agency (“LWDA”) and to Defendant Digby Southwest, Inc., LWDA
23 Case No. LWDA-CM-911842-22, of his intention to litigate various alleged Labor Code violations
24 under the Private Attorneys General Act (“PAGA”). (Taylor Decl., ¶ 11, Ex. 2.)

25 On April 19, 2023, Plaintiff filed the First Amended Complaint (“FAC”), pursuant to the
26 Settlement and as instructed by the Court in its checklist issued on April 14, 2023. (*Id.*, ¶ 20.) Plaintiff’s
27 FAC added a thirteenth cause of action for violation of PAGA, Lab. Code § 2698, et seq.

28 **C. Investigation and Discovery, Settlement Negotiations, and Preliminary Approval**

29 Both before and after initiating the Action on behalf of the putative class, Plaintiff and Class

1 Counsel diligently investigated the claims alleged and conducted legal research regarding Defendant’s
2 potential liability and defenses. (*Id.*, ¶ 12.) Based on consistent good faith meet and confer efforts, the
3 parties agreed to proceed to private mediation with experienced wage-and-hour mediator, David
4 Phillips, Esq. (*Id.*) Prior to mediation, the Parties also engaged in informal discovery pertaining to
5 policies and payroll records. (*Id.*, ¶ 13.)

6 On August 27, 2020, the Parties participated in a private mediation with Mr. Phillips. (*Id.*) At
7 that time, arm’s-length negotiations between the Parties did not result in a settlement. (*Id.*) Thereafter,
8 Plaintiff resumed formal discovery efforts. Class Counsel prepared and propounded interrogatories,
9 production demands, and requests for admissions on Defendant. (*Id.*, ¶ 14.) Ultimately, Defendant
10 produced thousands of additional documents, including driver logs, pay statements, employment
11 policies and compensation policies, and contractor agreements containing an arbitration provision. (*Id.*)
12 After the parties agreed to engage in a second mediation, Defendant also produced substantial informal
13 discovery, including a sampling of driver trip records. (*Id.*, ¶ 15.) Further, Defendant turned over records
14 to demonstrate its limited financial resources, including documents showing Defendant was running at
15 a loss in 2018 and 2019, with a slight profit in 2020. (*Id.*, ¶ 16; *see also* Declaration of Bob McGill filed
16 in support of Plaintiff’s Motion for Preliminary Approval [“McGill MPA Decl.”], ¶ 4.)

17 On July 6, 2022, the Parties participated in a second mediation with Mr. Phillips, which resulted
18 in the Parties’ acceptance of a mediator’s proposal. (*Id.*, ¶¶ 17-18.) Based on the parties’ substantial
19 investigation and discovery as well as an understanding of Defendant’s financial condition, Class
20 Counsel was able to act intelligently and effectively in negotiating at arm’s-length and evaluating the
21 mediator’s recommendation. (*Id.*) Thereafter, counsel for the Parties negotiated the terms of the long
22 form Settlement. (*Id.*, Ex. 1)

23 On March 28, 2023, Plaintiff filed a Motion for Preliminary Approval of Class and PAGA
24 Action Settlement and supporting documents. (*Id.*, ¶ 19.) On April 14, 2023, the Court issued a
25 checklist to the parties, requesting that Plaintiff file supplemental papers to provide the Court with
26 additional information regarding Plaintiff’s data analysis and request for a service award. (*Id.*) On April
27 19, 2023, Plaintiff filed supplemental briefing addresses the Court’s requests in detail. (*Id.*)

28 On April 20, 2023, the Court entered the Order Granting Preliminary Approval of Class and
29 PAGA Representative Action Settlement (“Preliminary Approval Order”), preliminarily approving the

1 terms of the Settlement Agreement, the Class Notice, and the proposed administration procedures and
2 associated deadlines. (*Id.*, ¶ 21.)

3 Plaintiff now moves for final approval of the Settlement Agreement.

4 **III. SUMMARY OF PROPOSED SETTLEMENT AGREEMENT**

5 **A. Settlement Amount and Funding after Final Judgment.**

6 Defendants have agreed to pay a gross settlement amount of \$300,000 to fund all payments
7 pursuant to the Settlement, including: Individual Settlement Payments for wages, penalties, and
8 interest; a proposed Class Representative Service Award, subject to Court approval; Attorneys' Fees
9 and Costs to Class Counsel, as approved by this Court; Settlement Administration Costs; and an
10 allocation for penalties under PAGA (the "PAGA Penalties"). (SA, ¶¶ 1.22, 3.1.) Furthermore, Class
11 Members are not required to submit a claim form, and there is no reversion of any residual funds to
12 Defendants. (*Id.*) Defendants will deposit the GSA with the Settlement Administrator within 30 days
13 of the Effective Date. (SA, ¶ 4.3.) Defendants will separately pay the employer's payroll tax obligations
14 on the wage portion of Individual Settlement Payments in addition to the GSA. (*Id.*)

15 **B. Release.**

16 Upon the date on which Defendants fully fund the Settlement, Plaintiff and Participating Class
17 Members shall be deemed to have settled and released the Released Parties of all Released Claims (SA,
18 ¶ 5.) The Release agreed to by the Parties does not contain any terms outside the scope of the Action
19 and are limited to those claims arising during the Class Period. (SA, ¶¶ 5.1-5.4.) The PAGA release
20 covers both Participating and Non-Participating Class Members who are Aggrieved Employees and
21 releases all claims for penalties pursuant to PAGA based on the Released Class Claims as alleged in
22 the PAGA Notice and operative complaint. (SA, ¶¶ 5.3-5.4.)

23 **C. Net Settlement Amount and Settlement Payments to Participating Class Members.**

24 The Net Settlement Amount ("NSA") shall be calculated by deducting from the Gross
25 Settlement Amount the following: (i) Class Counsel's attorneys' fees and costs, (ii) the Class
26 Representative Service Award, (iii) the PAGA Penalties, and (iv) the Settlement Administration Costs.
27 (SA, ¶ 1.28.) Each Participating Class Member will be entitled to payment of a pro rata portion of the
28 NSA based on the total number of workweeks each drove during the Class Period. (SA, ¶ 1.23.)

29 The amount to be paid to each Class Member who does not opt out ("Participating Class

Member”) will be calculated by dividing the NSA by the total number of miles driven by all Participating Class Members in California during the Class Period and then multiplying the result by each Participating Class Member’s miles. (SA, ¶ 3.2.4.) As stated in the concurrently filed Declaration of Mary Butler, the Settlement Administrator has calculated the average estimated Individual Settlement Payment to be \$94.63, and the highest estimated Individual Settlement Payment to be \$900.86, after taking into account all proposed disbursements. (Butler Decl., ¶ 16.) Each Individual Settlement Payment will be allocated as 20% wages and 80% penalties. (*Id.*, ¶ 3.2.4.1.)

D. PAGA Payment to the LWDA and Aggrieved Employees.

The PAGA allocation is \$10,000, with \$7,500, or 75%, payable to the Labor and Workforce Development Agency (“LWDA”), and the remaining \$2,500, or 25%, to be distributed to Aggrieved Employees on a pro rata basis, based on the number of miles that each Aggrieved Employee drove between October 4, 2021, and March 28, 2023 (“the PAGA Period”). (SA, ¶ 1.24, 1.31, 3.2.5.1.) Defendant’s records will be presumed accurate, subject to disputes regarding the number of pay periods, as determined by the Administrator. (*Id.*, ¶ 7.6.) PAGA Payments will be characterized as only penalties and shall be paid without deductions. (*Id.*, ¶ 3.2.5.2.) All PAGA Employees will be paid a pro rata PAGA Payment even if not participating in the Class Settlement. (*Id.*, ¶ 7.5.4.)

E. Settlement Checks Void at 180 Days.

No money will revert to Defendant under any circumstances. (*Id.*, ¶ 3.1.) If any Individual Settlement Payment check remains uncashed after one hundred eighty (180) days from the date the check is issued, such check(s) will be voided. (*Id.*, ¶ 4.4.1.)

Thereafter, subject to this Court’s approval, the funds represented by any uncashed checks shall be distributed to Public Citizen Foundation, a 501(c)(3) consumer advocacy organization that works to protect workers’ and consumer rights through education and litigation. (SA, ¶ 4.4.3.) Such distribution is appropriate and fulfills the purposes of this wage and hour class action because Public Citizen is an organization that substantially advocates on behalf of workers and consumers such as those at issue in this case. (*See* concurrently filed Decl. of Robert Weissman, the President of Public Citizen.) This firm has proposed Public Citizen as a *cy pres* recipient in other class actions and it has been approved by courts upon such proposal as an appropriate *cy pres* recipient. (Taylor Decl., ¶ 38.) Neither the parties nor their counsel have any financial interest or involvement in the governance of the organization. (*Id.*)

1 **IV. THE SETTLEMENT ADMINISTRATION PROCESS**

2 On April 27, 2023, Simpluris, Inc. (“Simpluris” or “Settlement Administrator”) received the
3 Court-approved Notice of Class Action Settlement (“Class Notice”). (Butler Decl., ¶ 5.)

4 On July 5, 2023, Defense Counsel provided Simpluris with a mailing list (“Class List”)
5 containing all Class Members’ contact information and dates of employment. The Class List contained
6 data for 1,534 Class Members. (*Id.*, ¶ 6.) From the Class List, 247 individuals were identified as
7 Aggrieved Employees who performed work for Defendants during the PAGA Period. (*Id.*, ¶ 17.)

8 The mailing addresses contained in the Class List were processed and updated utilizing the
9 National Change of Address Database (“NCOA”) maintained by the U.S. Postal Service. (*Id.*, ¶ 7.)

10 On July 19, 2023, Class Notice was mailed to 1,534 Class Members with addresses contained
11 in the Class List via First Class mail or updated via the NCOA search. (*Id.*, ¶ 8.) A total of 329 Class
12 Notices were returned as undeliverable. (*Id.*, ¶ 9.) For those without a forwarding address, Simpluris
13 performed an advanced address search (i.e. skip trace) and 293 Notices were re-mailed. (*Id.*) Simpluris
14 promptly mailed a Class Notice to those updated addresses. (*Id.*) Ultimately, there are three (3) Class
15 Notices that remain undeliverable, resulting in a highly successful delivery rate of 97.6%. (*Id.*)

16 The deadline for Class Members to opt out, submit written objections, or dispute miles was
17 September 18, 2023. (*Id.*, ¶¶ 11-14.) Simpluris has received no objections to the Settlement and no pay
18 period/workweek disputes. (*Id.*) Simpluris received just one request to opt out of the Settlement. (*Id.*)

19 **V. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

20 “The trial court has broad discretion to determine whether the settlement is fair.” (*Nordstrom*
21 *Com. Cases* (2010) 186 Cal.App.4th 576, 581.)¹ The proponent of the settlement has the burden to
22 show that it is fair and reasonable. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245.)
23 “‘Ultimately, the [trial] court’s determination is nothing more than an ‘amalgam of delicate balancing,

24
25 ¹ “It should consider relevant factors, such as the strength of plaintiffs’ case, the risk, expense,
26 complexity and likely duration of further litigation, the risk of maintaining class action status through
27 trial, the amount offered in settlement, the extent of discovery completed and the stage of the
28 proceedings, the experience and views of counsel, the presence of a governmental participant, and the
29 reaction of the class members to the proposed settlement ... Due regard should be given to what is
otherwise a private consensual agreement between the parties. The inquiry ‘must be limited to the
extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,
is fair, reasonable and adequate to all concerned.’” (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th
576, 581.)

gross approximations and rough justice.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) A presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723; *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1146.)

In reviewing a class settlement, the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute. (*7-Eleven, supra*, 85 Cal.App.4th at 1146.) The inquiry is not whether the settlement agreement is the best one that class members could have possibly obtained, but whether the settlement, taken as a whole, is “fair, adequate, and reasonable.” (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 55.) A settlement need not obtain 100 percent of the damages sought in order to be fair, reasonable, and ultimately, meaningful. (*Wershba, supra*, 91 Cal.App.4th at 251.) Even if the proposed settlement affords relief that is substantially narrower than it would be if the case were to be successfully litigated, that is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding prolonged litigation. (*Id.*)

A. The Settlement Resulted from Arm’s-Length Bargaining Based Upon Extensive Investigation and Discovery

The investigation and discovery conducted in this matter have been adequate to give the Plaintiff and Class Counsel a sound understanding of the merits of their position, Defendant’s defenses, and to evaluate the reasonable value range of the claims of the Class. (Taylor Decl., ¶¶ 12-17.) Prior to the first mediation, which was not successful, Defendant informally produced limited documents and information pertaining to policies and payroll. (*Id.*) Thereafter, Class Counsel propounded interrogatories, production demands, and requests for admissions on Defendant. (*Id.*) Ultimately, Defendant produced thousands of additional documents, including driver logs, pay statements, employment policies and compensation policies. (*Id.*) After the parties agreed to engage in a second mediation, Defendant also produced substantial informal discovery, including a statistically significant sampling of driver trip records, covering 69.5% of the Class Period. (*Id.*) Class Counsel carefully considered the class claims at issue and analyzed Defendant’s trip and pay data, in consultation with

1 Plaintiff's expert economists at Berger Consulting Group. (*Id.*)

2 Defendant also produced records documenting its financial difficulties in recent years, including
3 substantial losses in 2018 and 2019 and only a slight profit in 2020, and Class Counsel considered the
4 impact of Defendant's financial condition at the time of mediation. (*Id.*) Defendant also produced
5 contractor agreements containing arbitration provisions, which it represented were signed by all drivers
6 classified as independent contractors. (*Id.*)

7 The second mediation session with mediator David Phillips, Esq. took place only after
8 substantial additional formal and informal discovery had been conducted. (*Id.*, ¶¶ 17-18.) Plaintiff and
9 Class Counsel vigorously prosecuted this case, and Defendant vigorously contested liability. (*Id.*)
10 Negotiations at all times were arm's-length and adverse. (*Id.*) At the parties' second mediation on July
11 6, 2022, Mr. Phillips made a mediator's proposal which the parties accepted. (*Id.*) A memorandum of
12 understanding was drafted by counsel, and later, a long form agreement was drafted and negotiated
13 based on the Model Class Action and PAGA Settlement Agreement (LACIV296), provided by the LA
14 County Superior Court. (*Id.*)

15 **B. The Risks Inherent in Continued Litigation and Individual Settlement Favor Final**
16 **Approval of the Settlement**

17 Had the Action not settled, Defendant would have challenged class certification and liability,
18 as Defendant has vigorously asserted multiple defenses. Defendant contends, *inter alia*, that its
19 independent contractors all signed arbitration agreements and that this would not only prevent class
20 certification, but also allow DSW to compel to arbitration any independent contractor who becomes a
21 party to the action under Arizona law. (*Id.*, ¶ 27.) Though Plaintiff disputes the enforceability of such
22 agreements in this field, Plaintiff recognizes the risk that if Defendant were to prevail on this threshold
23 defense, Plaintiff's recoverable damages could be substantially reduced. (*Id.*)

24 Plaintiff also recognizes that, due to preemption and changes in law that occurred after Plaintiff
25 filed his complaint, some of Plaintiff's strongest claims either arguably went away altogether or were
26 severely limited. Indeed, Defendant has contended that Plaintiff's claims for meal and rest periods are
27 entirely preempted by the Federal Motor Carrier Safety Administration ("FMCSA"). Plaintiff
28 acknowledges that, in light of the FMCSA's 2018 preemption decision (83 Fed. Reg. 67470, 67470
29 (Dec. 28, 2018)) and the Ninth Circuit's 2021 decision in *Int'l Bhd. Of Teamsters, Local 2785 v. Fed.*

1 *Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021), courts would likely find these claims
2 preempted. (*Id.*, ¶ 28.) Defendant could also argue Plaintiff’s claims for wage statement and waiting
3 time penalties claims are entirely derivative of Plaintiff’s unpaid wages claims, and therefore suffered
4 from not only the same litigation risks as the wage claims, but also additional unique risks. (*Id.*)

5 Furthermore, Plaintiff faced the significant risk Defendant could successfully argue that its per-
6 trip driver compensation scheme was lawful under *Oman v. DeltaAir Lines, Inc.* (2020) 9 Cal.5th 762,
7 which permitted translating contractual compensation for tasks into an average hourly rate to meet
8 minimum wage. (*Id.*, ¶ 29; *See, e.g., Ayala v. US Xpress*, 851 Fed.Appx. 53 (9th Cir. 2021) (applying
9 the *Oman* decision to compensation of truck drivers on a piece-rate basis).)

10 Plaintiff also faced the risk of inability to collect on a trial judgment due to Defendant’s
11 representation of limited financial resources. As noted, Defendant disclosed it suffered from significant
12 financial difficulties in the years prior to reaching the proposed settlement and produced documents
13 corroborating its financial condition. (*See* McGill MPA Decl., ¶ 4.). In negotiations and evaluating the
14 mediator’s proposal, Class Counsel considered the realistic risk of non-collection on a judgment. (Taylor
15 Decl., ¶ 30.)

16 Additionally, Defendant contended that individualized questions of fact predominate over any
17 common issues, and these issues would pose challenges to certification. (*Id.*, ¶ 31.) Defendant could
18 argue that drivers spent different amounts of time in California and that the determination of whether
19 California law applied to each driver would give rise to hundreds of individual inquiries. (*Id.*)
20 Defendant further argued that variations in non-productive time spent by each Class Member could
21 result manageability issues, with individual issues predominating. (*Id.*)

22 It is preferable to reach an early resolution of a dispute because such resolutions save time and
23 money that would otherwise go to litigation. Were litigation to proceed, there is a strong likelihood it
24 would be protracted and contentious, as Defendant disputes all aspects of Plaintiff’s claims. Plaintiff
25 would have to prepare and file a motion for class certification, which outcome is uncertain based on
26 Defendant’s anticipated contentions, *inter alia*, that individual questions of fact predominate, that all
27 drivers whom Defendant classified as independent contractors had signed arbitration agreements
28 containing class action waivers, and that Plaintiff cannot show the “willfulness” requirement for
29 Section 203 penalties. (*Id.*, ¶¶ 31-32; *See* Answer, ¶ 16.) If the motion were granted, Defendant would

1 likely move for decertification, file a petition for a writ of mandate of the certification, and move for
2 summary judgment. (*Id.*) Plaintiff believes he would prevail on the question of certification, but the
3 risks to absent Class Members are significant. (*Id.*)

4 To succeed on the merits, Plaintiff would have to prove Defendant actually engaged in the
5 practices and policies alleged and that those practices and policies violated the law in the limited time
6 that DSW's drivers drove in California. While Class Counsel believe strong evidence exists showing
7 Defendant's liability, there remains a risk that the trier of fact might find otherwise. (*Id.*, ¶ 33.) If the
8 case were to proceed to trial, additional discovery would be needed and the Parties would thus incur
9 significant additional expenses, which money could go instead to fund a settlement for the benefit of
10 the Class as a whole. (*Id.*) Moreover, discovery disputes would have certainly arisen, which would have
11 cost the Parties additional time and money. (*Id.*) Further, regardless of which Party prevailed, appellate
12 practice would no doubt ensue, further delaying any possible recovery by Class Members. (*Id.*, ¶ 34.)
13 In other words, both Parties would likely incur substantial attorneys' fees and costs from continued
14 litigation. (*Id.*) Plaintiff also faced a significant risk of inability to collect due to Defendant's financial
15 condition. (*Id.*)

16 Along with determining a well-defined community of interest, courts may also evaluate "the
17 probability that each class member will come forward ultimately to prove his or her separate claim to
18 a portion of the total recovery and whether the class approach would actually serve to deter and redress
19 alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434.) Here, if absent Class
20 Members wished to seek individual legal redress from Defendant for their wage and hour claims by
21 filing suit on their own, they could have opted out of the Settlement. Only one Class Member did so.
22 (Butler Decl., ¶ 12.) Moreover, Settlement fund created may deter and redress the wage-and-hour
23 violations that Defendant is alleged to have committed.

24 It would be inefficient for such a large class of current and former employees to bring individual
25 actions to recover from Defendant for the alleged violations of wage-and-hour laws. Moreover, the
26 potential individual recovery that could be obtained by a Class Member would not be significant enough
27 to provide him or her with the incentive to sue. By granting final approval of the Settlement, the Court
28 can approve a resolution that provides a certain recovery for Class Members.

1 **C. The Proposed Settlement is Fair and Reasonable.**

2 A trial court has “broad discretion” to determine “whether a settlement [is] fair and reasonable.”
3 (*Wershba, supra*, 91 Cal.App.4th at 234-235; *In re Cellphone Fee Termination Cases* (2010) 186
4 Cal.App.4th 1380, 1389.) A trial court should consider relevant factors, which may include the strength
5 of a plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of
6 maintaining class action status through trial, the amount offered in settlement, the extent of discovery
7 completed and the stage of the proceedings, the experience and views of counsel, the presence of a
8 governmental participant, and the reaction of the class members to the proposed settlement. (*Kullar v.*
9 *Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) The court must satisfy itself that the
10 settlement is within the “ballpark” of reasonableness. (*Id.*, at p. 133.)

11 Here, the Settlement, which provides for a gross settlement amount of \$300,000.00, is fair,
12 adequate, and reasonable to Class Members. The Settlement was calculated using information and data
13 uncovered through extensive case investigation, formal and informal discovery, expert analysis, and
14 the exchange of information in the context of mediation. (Taylor Decl., ¶¶ 12-17, 35.) The Settlement
15 takes into account the potential risks and rewards inherent in any case and, in particular, in this matter.
16 (*Id.*, ¶¶ 35-37.) Considering the risks posed by Defendant’s financial condition, and the changes of law
17 and preemption that occurred since filing the complaint, the Settlement represents a successful recovery
18 for the Class. (*Id.*)

19 As discussed above, Defendant would argue, *inter alia*, that Plaintiff’s meal and rest break
20 claims are entirely preempted by the FMSCA, and Plaintiff has acknowledged it is very possible that
21 the Court would agree. (*Id.*, ¶¶ 28-29.) Defendants would also argue they maintained and implemented
22 a lawful compensation scheme that drivers agreed to and compliant wage and hour policies. (*Id.*)
23 Plaintiff contends otherwise, but faces substantial risk that the Court will disagree. (*Id.*)

24 In addition, with respect to the additional statutory “waiting time penalties” available for unpaid
25 wages pursuant to Labor Code § 203, Defendant denies any willful failure to pay any alleged
26 compensation and could reasonably contend that individual questions of fact predominate as to the
27 predicate “willfulness,” as there are numerous authorities on which Defendant could rely on to
28 demonstrate good faith. This would, if successful, preclude any recovery. *See, e.g., Diaz v. Grill*
29 *Concepts Services, Inc.* (2018) 23 Cal. App. 5th 859, 868. Moreover, Class Counsel believe it would

1 be difficult to show that the defense is “unsupported by any evidence, [is] unreasonable, or [is]
2 presented in bad faith,” as required. (Taylor Decl., ¶ 32.)

3 Throughout negotiations, Class Counsel carefully considered the viability of Plaintiff’s claims
4 and other case risks. (*Id.*, ¶¶ 12-17, 35.) The information gathered, including Plaintiff’s expert’s
5 calculations based on analysis of Defendant’s sample of time and pay data, resulted in estimates of
6 Defendant’s exposure and the potential recovery for the putative Class, if Plaintiff were to prevail on
7 all theories of liability at trial. (*Id.*) Had this case gone to trial and Plaintiff prevailed on all liability
8 related to unpaid compensation, Defendant’s maximum exposure for underpayment of wages, as
9 calculated in consultation with Plaintiff’s experts, is approximately \$1,144,476.84, without PAGA
10 penalties. (*Id.*, ¶ 35.) This means that the proposed settlement of \$300,000.00 is approximately 26.2%
11 of the total possible recovery for unpaid wages, excluding PAGA penalties.

12 As discussed in detail in Plaintiff’s Motion for Preliminary Approval, the proposed settlement
13 of \$300,000 represents approximately 97.5% of the *realistic* maximum value after accounting for real
14 litigation risks, relative strengths and weaknesses of Plaintiff’s claims, and other factors. To account
15 for these factors, Plaintiff considered the following discounts: 30% discount for the risk of non-
16 certification; 50% for the risk of Defendant prevailing on *Oman* and *Ward* defenses; 20% discount
17 based on Defendant’s representation that its independent contractor drivers are all bound by arbitration
18 agreements; 30% discount on penalty claims under *Maldonado*; 50% discount on PAGA claims for the
19 Court’s discretion to reduce penalties and underlying risks; and a 50% discount for the risk of inability
20 to collect a judgment. (Taylor Decl., ¶ 35.) Applying these discounts reduces the maximum possible
21 damages and penalties to \$307,674.67. (*Id.*) The negotiated GSA of \$300,000.00 thus represents about
22 97.5% of the realistic risk adjusted exposure. Considering the potential risks and rewards inherent in
23 any case and, in particular, in this matter, this Settlement represents a considerable recovery.

24 Courts have determined that settlements are, of course, reasonable even where plaintiffs recover
25 only a portion of their actual losses. *See, e.g., Behrens v. Wometco Enters., Inc.* (S.D. Fla. 1988) 118
26 F.R.D. 534, 542, *aff’d*, (11th Cir. 1990) 899 F.2d 21 (“[T]he fact that a proposed settlement amounts
27 to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate.”)
28 Indeed, “[a] settlement can be satisfying even if it amounts to a hundredth or even—a thousandth of a
29 single percent of the potential recovery.” (*Id.*; *see also Martel v. Valderamma* (C.D. Cal. 2015) 2015

1 U.S. Dist. LEXIS 49830 * 17 (approving a settlement of \$75,000 when potential damages were \$1.2
2 million, or about 6%); *In re Toys R US FACTA Litig.* (C.D. Cal. 2014) 295 F.R.D. 438, 453 (approving
3 settlement with vouchers, not cash, potentially worth a maximum of 3% if all possible claims were
4 actually made, or \$391.5 million aggregate voucher potential where the class could have recovered
5 \$13.05 billion); *City of Detroit v. Grinnell Corp.* (S.D.N.Y. 1972) 356 F. Supp. 1380, 1386, *aff'd in*
6 *part, rev'd on other grounds*, (2d Cir. 1974) 495 F.2d 448 (a recovery of 3.2% to 3.7% of the amount
7 sought is “well within the ball park.”)

8 As this Court knows, the inquiry is not whether the settlement agreement is the best one that
9 class members could have possibly obtained, but whether the settlement, taken as a whole, is “fair,
10 adequate, and reasonable.” (*Chavez*, 162 Cal.App.4th at 55.) The Action involves multiple complex
11 legal issues, including Defendant’s disputed liability for alleged Labor Code violations, federal
12 preemption, arbitration agreements, and class certification. If the proposed Agreement is not approved,
13 the litigation could go on for several years, which would be extremely expensive for both sides and an
14 inefficient use of judicial resources. (Taylor Decl., ¶¶ 34-35.)

15 Accordingly, Class Counsel believes that \$300,000.00 represents a victory on multiple theories.
16 (*Id.*, ¶¶ 36-37.) Given the risks inherent in continuing to litigate, including: 1) the possibility of an
17 unfavorable, or less favorable, result at trial, 2) the likely possibility that post-trial motions may
18 similarly result in a less favorable result than at trial, and 3) the possibility of a less favorable result on
19 appeal, with the certainty that the appeal process would be lengthy, the Settlement is a fair, adequate,
20 and reasonable resolution for the Class as a whole. (*Id.*)

21 At the final approval stage, “[a]n allocation formula need only have a reasonable, rational basis
22 [to warrant approval], particularly if recommended by experienced and competent class counsel.” (*In*
23 *re American Bank Note Holographics, Inc., Securities Litigation* (S.D.N.Y. 2001) 127 F.Supp.2d 418,
24 429-30.) Here, the *pro rata* allocation is a fair and reasonable way to distribute the Net Settlement
25 Amount. Moreover, in light of the above considerations, Class Counsel believes that the Settlement as
26 a whole is fair, reasonable, and adequate, and in the best interest of the Class Members. (Taylor Decl.,
27 ¶¶ 36-37.) Although the recommendations of Class Counsel are not conclusive, the Court can properly
28 take the recommendations into account, particularly if Class Counsel appears to be competent, has
29 experience with this type of litigation, and significant discovery and investigation have been completed,

1 as is the case here. (4 *Newberg and Rubenstein on Class Actions* (“Newberg”) (6th ed.) § 13.59.) As
2 such, the Court should grant final approval of the Settlement.

3 **VI. PLAINTIFF’S REQUEST FOR ATTORNEYS’ FEES AND COSTS IS REASONABLE**

4 Class Counsel’s lodestar in this matter is \$220,655, and this far exceeds the requested award of
5 attorneys’ fees of one-third of the GSA of \$100,000. (Taylor Decl., ¶ 6.) Although Class Counsel apply
6 pursuant to the percentage-of-the-benefit methodology, the requested fee award is appropriate under
7 both a percentage-of-the-benefit methodology, as well as under a lodestar cross-check. Defendant does
8 not oppose this request.

9 **A. Plaintiff Requests a One-Third Percentage-Based Fee Award**

10 California law allows the award of attorneys’ fees in class actions based on the percentage-of-
11 the-fund method. (*Laffitte v. Robert Half Intern, Inc.* (2016) 1 Cal.5th 480, 486; *Chavez v. Netflix*
12 (2008) 162 Cal.App.4th 43, 63 [“fees based on a percentage of the benefits are in fact appropriate in
13 large class actions when the benefit per class member is relatively low”]; *Wershba v. Apple Computer,*
14 *Inc.* (2001) 91 Cal.App.4th 224, 255; *Consumer Cause v. Mrs. Gooch's Natural Food Markets* (2005)
15 127 Cal.App.4th 387, 397 [the common fund doctrine is “frequently applied in class actions when the
16 efforts of the attorney for the named class representatives produce monetary benefits for the entire
17 class”].) There is substantial authority for determining the fee award based on a percentage of the total
18 value of the recovery. The requested fees fall well within an appropriate range under the common fund
19 approach as it is common to award attorney’s fees to class counsel of one-third (33-1/3%) of the
20 settlement amount or higher. (*Chavez, at 66*: “[e]mpirical studies show that, regardless whether the
21 percentage method or the lodestar method is used, fee awards in class actions average around one-third
22 of the recovery.”)

23
24 In *Laffitte*, the Supreme Court of California, in a case involving an objection to a one-third
25 percentage based recovery in a \$19 million employment class action lawsuit, stated: “We hold further
26 that the trial courts have discretion to conduct a lodestar cross-check on a percentage fee ... [and] *also*
27 *retain the discretion to forego a lodestar cross-check* and use other means to evaluate the
28 reasonableness of a requested percentage fee.” (*Laffitte*, 1 Cal.5th at 506, emphasis added.) Several
29 courts have expressed frustration with the alternative “lodestar” approach, which usually involves

1 wading through voluminous and often indecipherable time records. (See, e.g., *In re Activision*
2 *Securities Litigation* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375.) The percentage approach is preferable
3 to the lodestar because: (1) it provides predictability to class counsel and class members; (2) encourages
4 efficient resolution by providing an incentive for early, yet reasonable, settlement; and (3) reduces the
5 demands on judicial records. (*Id.*, at 1378-79.) In fact, “[a] task force commissioned by the Third Circuit
6 concluded that the lodestar approach... is a cumbersome, enervating, and often surrealistic process of
7 preparing and evaluating fee petitions that now plagues the Bench and Bar and recommended a return
8 to the percentage of the recovery fee formula in cases involving a settlement fund.” (*Lealao v.*
9 *Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 28, citations and quotation marks omitted.) In
10 *Lealao*, the Court of Appeal considered counsel’s efficiency and skill in bringing the case to an early
11 resolution.

12 [T]he promptness of settlement cannot be used to justify the refusal to apply a multiplier
13 to reflect the size of the class recovery without exacerbating the disincentive to settle
14 promptly inherent in the lodestar methodology. Considering that our Supreme Court has
15 placed an extraordinarily high value on settlement . . . it would seem counsel should be
rewarded, not punished, for helping to achieve that goal....
16 (*Id.*, at 52, citations omitted, emphasis added.) Newberg notes that the percentage methodology aligns
17 class counsel’s interests with those of the class, rewards efficiency, and thus, decreases the social costs
18 of litigation. (5 Newberg, § 15:65 (6th ed.) Courts should not only consider the size of the class or the
19 amount of the recovery; instead, it should also examine the size of the settlement amount of each class
20 member as an indication of counsel’s contribution. (*Lealao*, 82 Cal.App.4th at 53.)

21 Here, there been no objections to any aspect of this proposed Settlement, and only one request
22 for exclusion. In light of the facts of this case and Defendant’s financial condition, Class Counsel
23 obtained an excellent result for the Class.

24 **B. Analysis Pursuant to the Lodestar Methodology.**

25 As stated, Class Counsel’s lodestar in this matter totals \$220,655, and this is after substantial
26 voluntary deductions based on business judgment. (Taylor Decl., ¶¶ 6-7.) A lodestar is calculated by
27 multiplying the reasonable hours expended by a reasonable hourly rate. (*Wershba v. Apple Computer*
28 (2001) 91 Cal.App.4th 224, 254.) A lodestar amount may be increased by a multiplier. (*Serrano*, 20
29 Cal.3d at 49; *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407.) “Multipliers can range from

2 to 4 or even higher.”² (*Wershba*, at 255.)³ Therefore, although this is the sort of case which would certainly merit a “positive multiplier” on the lodestar, nonetheless, if this Court grants the fee request of \$100,000 made by Class Counsel, Class Counsel instead will be receiving a substantial “negative multiplier, a reduction of more than 50%.⁴

Courts have noted that a percentage fee that falls *below* counsel’s lodestar supports the reasonableness of the award. (*See, e.g., In re Portal Software, Inc. Sec. Litig.*, No. C- 03-5138 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (“negative multiplier suggests that the percentage-based amount is reasonable and fair”); *In re Amgen Inc. Sec. Litig.*, Case No. CV 07-2536 PSG (PLAx), 2016 WL 10571773, at *9 (C.D. Cal. Oct 25, 2016) (same).) Moreover, a negative multiplier, like the negative multiplier here, means that Class Counsel is seeking to be paid “for only a portion of the hours that they expended on the action.” (*Amgen*, at *9.)

The reasonable hourly rate is that prevailing in the community for similar work. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095). “[I]n assessing a reasonable hourly rate, the trial court is allowed to consider the attorneys’ skill as reflected in the quality of work, as well as the attorneys’ reputation and status.” (*MBNA American Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th 1, 3.) The trial court may also “find hourly rates reasonable based on evidence of other courts approving similar rates.” (*Parkinson v. Hyundai Motor America* (C.D. Cal. 2010) 796 F.Supp.2d 1160, 1172.) The current prevailing billing or “market” rates in the Los Angeles and Southern California area range from over \$300.00 to over \$1,000.00 per hour.⁵ As can be seen in the Taylor Declaration at Paragraph 5, the rate

² See also *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 (upholding 2.5 multiplier); *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal.App.3d 465 (affirming a fee award that included a 12.0 multiplier); *Craft v. County of San Bernardino* (C.D. Cal. 2008) 624 F.Supp.2d 1113, 1125 (awarding a common fund fee award that amounted to a 5.2 multiplier); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 (approving a 3.65 multiplier); *Van Vranken*, 901 F.Supp. at 298-299 (approving multiplier of 3.6).

³ Under California law, this Court may award the attorneys’ fees without the attorneys’ timesheets *Concepcion v. Amscan Holdings* (2014) 223 Cal.App.4th 1309, 1324; *Raining Data v. Barrenchea* (2009) 175 Cal.App.4th 1363, 1375-76 (“[t]he law is clear, however, that an award of attorney fees may be based on counsel’s declarations, without production of detailed time records”). The concurrently filed declaration by Greg Taylor of The Kick Law Firm, APC describes the attorney time expended on this case. Class Counsel can also provide time sheets and make them available for *in camera* review by this Honorable Court if the Court so wishes.

⁴ Were this Court for some reason not to accept all of the hours or rates specified in the concurrently filed Taylor Declaration, Class Counsel respectfully request a multiplier which will allow the awarded attorneys’ fees to reach the one-third of the \$300,000 recovery, meaning \$100,000. Further, if the Court for some reason were not inclined to award one-third, Class Counsel respectfully request an award based on the lodestar equal to \$100,000.

⁵ See, e.g., *McKnight, et al., v. Uber Technologies, Inc., et al.* 3:14-CV-05615-JST, Docket No. 148, [December 8, 2017 attorney fee declaration citing *In re High-Tech Employee Antitrust Litig.* (N.D. Cal. Sept. 2, 2015) 2015

sought here has been approved by numerous courts across the country, including in this Los Angeles County Complex Court. (Taylor Decl., ¶ 5.) Further, the rates are well within the range of rates awarded in class action litigation in Southern California. (*In re Toyota Motor* (C.D. Cal. 2013) 2013 U.S. Dist.Lexis 123298 [approving rate of \$950]; *Banas v. Volcano Corp.* (N.D. Cal. 2014) 47 F.Supp.3d 957 [approving 2014 rate of \$1,095; *In re High Tech Emple. Antitrust Litig.*, (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 118052 *33 [approving rates of \$975 an hour].)

The goal is “to entice competent counsel to undertake difficult public interest cases.” (*San Bernardino Valley Audubon Soc. v. County of San Bernardino* (1985) 155 Cal.App.3d 738, 755.) But here, as stated, the multiplier will actually wind up being negative if the full one-third fee requested is granted.

Class Counsel seek reimbursement of necessary litigation costs in the amount of \$17,517.01, which is the amount that has been advanced on behalf of the Class Members to date and is less than the amount represented in the notice to Class Members as “up to \$30,000.” (*Id.*, ¶ 25, Ex. 1, SA.) The cost reimbursement is justified, as those who incur expenses to secure a favorable outcome and create a fund from which others benefit “may require those passive beneficiaries to bear a fair share of the litigation costs.” *Serrano v. Priest* (1977) 20 Cal.3d 25, 35. These costs include already incurred costs of filing fees, expert consultant fees, legal research, mediation fees for both sessions, and others. (*Id.*) These costs are itemized in Paragraph 25 of the concurrently filed Declaration of Greg Taylor.

VII. THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARD IS REASONABLE

Named plaintiffs in class action lawsuits are eligible for reasonable incentive payments as compensation “for the expense or risk they have incurred in conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Company of Los Angeles* (2010) 186 Cal.App.4th 399,

WL 5158730, at *9 (finding reasonable “billing rates for partners [that] range from about \$490 to \$975 ... billing rates for non-partner attorneys, including senior counsel, counsel, senior associates, associates, and staff attorneys, [that] range from about \$310 to \$800...”); *Bickley v. CenturyLink, Inc.* (C.D. Cal. Nov. 29, 2016) No. CV 15-1014-JGB (ASX), 2016 WL 9046911, at *3-4 [finding six years ago attorneys’ fee requests of up to \$750 per hour reasonable and in line with the prevailing rate in the District].). In *Bickley*, a billing survey was submitted from 2013 listing the rates for partners and associates from large law firms, noting that those rates ranged from a low of \$515/per hour for associates to \$1,220/per hour for partners. (*Id.*, at ¶ 4.) The majority of the rates for partners were between \$700 and \$1000 per hour. (*Ibid.*)

1 412.) It is within a court's discretion to award payment to a class representative for their efforts and
2 work. (*Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299 [approving \$50,000
3 participation award to a single class representative].)

4 The criteria courts may consider in determining whether to make an incentive award
5 include: 1) the risk to the class representative in commencing suit, both financial and
6 otherwise; 2) the notoriety and personal difficulties encountered by the class
7 representative; 3) the amount of time and effort spent by the class representative; 4) the
8 duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the
9 class representative as a result of the litigation. [Citations.] (*Ibid.*)

10 Here, Plaintiff Albert Lizarraga has requested a Class Representative Service Award of
11 \$10,000.00, and Defendant does not oppose this request. (SA, ¶ 3.2.1.) Further, the Class was notified,
12 and no Class Member objected to this request. (Butler Decl., ¶ 13; Ex. A.) This Service Award request
13 is fair and appropriate given: (1) the substantial time and effort Mr. Lizarraga expended; (2) the risks
14 he faced and continue to face as a result of bringing the Action; (3) the fact he put Class Members'
15 interests ahead of his own; and (4) the substantial benefit conferred upon the Class in reaching this
16 Settlement. (Taylor Decl., ¶ 26; Lizarraga Decl., ¶¶ 6-9.) As detailed in his concurrently filed
17 declaration, Mr. Lizarraga spent a substantial amount of time and effort in producing relevant
18 documents and providing the facts and evidence necessary to attempt to prove the allegations. (*Id.*) Mr.
19 Lizarraga assisted actively in the investigation of the claims alleged, conferred regularly with counsel,
20 aided in preparation for the Parties' mediations, made himself available throughout both mediation
21 sessions, and provided all information requested by counsel to benefit the Class. (*Id.*) Accordingly, it
22 is appropriate and just for Plaintiff to receive a Class Representative Service Award for his service on
23 behalf of the Class, in addition to his Individual Settlement Payment as a Class Member. (*Id.*)
24 Accordingly, it is appropriate and just for Plaintiff to receive a Service Award for his services on behalf
25 of the Class, in addition to his individual payment as a Class Member.

26 **VIII. REASONABLE SETTLEMENT ADMINISTRATION COSTS TO BE APPROVED**

27 As set forth in the accompanying Declaration of Mary Butler from Simpluris, Inc., the total
28 costs incurred and to be incurred by Simpluris for the notice and settlement administration process is
29 \$17,326.00. (Butler Decl., ¶ 18, Ex. B.) The costs incurred and to be incurred include, but are not
limited to, expenses for printing and mailing the Notice of Class Action Settlement to Class Members;
establishing and maintaining a means to receive and validate opt out requests, objections, or disputes

1 of mileage submitted by Class Members, including a toll-free telephone number; establishing and
2 maintaining a settlement fund account; processing and mailing payments to the Plaintiff, Class Counsel
3 and Class Members; calculating employer-side taxes; providing appropriate forms and calculations
4 to Defendant; providing counsel with weekly reports; and mailing settlement checks. (*Id.*, ¶¶ 3-4.) As
5 such, the Court should grant final approval of payment to Simpluris in the amount of \$17,326.00.

6 **IX. THE PROPOSED SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED**

7 In granting preliminary approval, this Court already determined that the proposed settlement
8 class is ascertainable and presents a sufficiently well-defined community of interest in questions of law
9 and fact. (Preliminary Approval Order, ¶ 1.) None of the factors have changed with respect to fulfilling
10 the criteria of California Code of Civil Procedure section 382, and applicable case law, and thus, the
11 proposed settlement class is appropriate for certification.

12 Numerosity is readily satisfied because there are 1,534 members in the settlement Class. *See*,
13 *Vasquez v. Superior Court*, 4 Cal.App.3d 800, 811 (1971). (Butler Decl., ¶ 8.) Common questions of
14 law and fact predominate because all Class Members were subject to a common policies and practices
15 and paid according to uniform formulae. *See Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723,
16 732 (2010) (citing *Wash. Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913 (2001)). Typicality and
17 adequacy of representation are also satisfied as Plaintiff was also subject to the same compensation and
18 employment policies and practices. Plaintiff's experience was typical of Defendant's employees in
19 California. *See* 7 Newberg § 23:23 (6th ed.). (Lizarraga Decl., ¶ 5.)

20 Further, ascertainability also is met as Class Members, who all worked for Defendant during
21 the Class Period, share "a set of common characteristics sufficient to allow a member of that group to
22 identify himself or herself as having a right to recover based on the description," (*See Bartold v.*
23 *Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828), and in addition, Defendant's records readily
24 identified the Class Members based on their dates of employment. (Butler Decl., ¶ 6.) Indeed, notice
25 was successfully accomplished to the Class Members as ordered by the Court. (*Id.*, ¶ 9.) Lastly, in this
26 matter, where global resolution is achieved for 1,534 Class Members whose claims which would
27 otherwise be too small to warrant individual litigation, a class action is demonstrably superior to other
28 methods of adjudication. *Richmond, supra*, 29 Cal.3d 462, 469. (Butler Decl., ¶ 15.)

29 With each of these factors satisfied, it is appropriate now to grant final certification.

1 **X. CONCLUSION**

2 Plaintiff, hence, respectfully requests that this Court enter a Final Approval Order and an
3 accompanying Judgment as set forth above.

4 DATED: October 19, 2023

Respectfully submitted,
THE KICK LAW FIRM, APC

6 By: /s/ Greg Taylor
7 Taras Kick
8 Greg Taylor
9 Attorneys for Plaintiff Albert Lizarraga and
the Class

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. My business address is The Kick Law Firm, APC, 815 Moraga Drive, Los Angeles, CA 90049.

- **PLAINTIFF’S NOTICE OF MOTION AND UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS AND PAGA ACTION SETTLEMENT;**
- **DECLARATION OF GREG TAYLOR IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS AND PAGA REPRESENTATIVE ACTION SETTLEMENT;**
- **DECLARATION OF ALBERT LIZARRAGA IN SUPPORT OF PLAINTIFF’S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT;**
- **DECLARATION OF MARY BUTLER REGARDING NOTICE AND SETTLEMENT ADMINISTRATION; and**
- **DECLARATION OF ROBERT WEISSMAN OF PUBLIC CITIZEN FOUNDATION (PROPOSED CY PRES RECIPIENT).**

14	Richard Rahm	Attorneys for Defendant,
	richard.rahm@us.dlapiper.com	DIGBY SOUTHWEST, INC.
15	DLA Piper LLP (US)	
	555 Mission Street Suite 2400	
16	San Francisco, CA 94105	
	T: (415) 836-2524	
17	F: (415) 659-7324	

21 I declare under the penalty of perjury under the laws of the State of California that the foregoing is
22 true and correct.

24 /s/ Alina Muresan
25 Alina Muresan