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8 individually and on behalf of all others similarly
9 situated

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**

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

14 Plaintiff,

15 v.

16 DIGBY SOUTHWEST, INC. an Arizona
17 Corporation; and DOES 1 through 100,
18 inclusive

19 Defendants.

Case No. 19STCV27901

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

Complex Class Action

**NOTICE OF MOTION AND UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL
OF CLASS AND PAGA REPRESENTATIVE
ACTION SETTLEMENT**

20 Date: April 20, 2023
21 Time: 10:30 AM
22 Dept: 1

23 [Filed concurrently with Declaration of Greg
24 Taylor; Declaration of Albert Lizarraga; Declaration
25 of Eric Springer; Declaration of Richard Rahm;
26 Declaration of Bob McGill]

27 Complaint filed: August 9, 2019
28 Trial date: None set

PLEASE TAKE NOTICE that on **April 20, 2023, at 10:30 a.m.** in Department 1 of the Spring Street Courthouse located at 312 N. Spring Street, Los Angeles, CA 90012, proposed class representative Albert Lizarraga (“Plaintiff”) will and hereby does move the Court for an order:

1. Conditionally certifying the Class for purposes of settlement;
2. Preliminarily approving the proposed class action settlement between Plaintiff and Defendant Digby Southwest, Inc., an Arizona corporation (“Defendant”), as fair, adequate, and reasonable, based upon the terms set forth in the Parties’ Class Action and PAGA Settlement Agreement (“Settlement” or “SA”), including payment by Defendant of the non-reversionary Gross Settlement Amount (“GSA”) of \$300,000.00 for the Settlement “Class”, and the following estimated allocations therefrom:

Attorneys' Fees (1/3 of the GSA) (maximum)	(\$100,000.00)
Litigation Costs (maximum)	(\$30,000.00)
Settlement Administration Costs (maximum)	(\$17,326.00)
Service Payment to Class Representative	(\$10,000.00)
PAGA Payment (75% to LWDA)	(\$10,000.00)

3. Preliminarily appointing Plaintiff as the Class Representative and The Kick Law Firm, APC as Class Counsel for purposes of settlement;
4. Appointing Simpluris, Inc. as the third-party Settlement Administrator for mailing notices and for settlement administration; and
5. Approving the proposed Class Notice and ordering it be disseminated to the Class as provided in the Settlement.

The motion is based on this Notice, the attached memorandum of points and authorities, the attached declarations, all matters of which this Court may take judicial notice, all pleadings in this matter, and such evidence and argument as may be presented at the hearing or the Court may allow.

Dated: March 28, 2023

THE KICK LAW FIRM, APC

By: /s/ Taras Kick
 Taras Kick
 Greg Taylor
 Attorneys for Plaintiff Albert Lizarraga and
 all others similarly situated

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. INTRODUCTORY INFORMATION**

3 **a. Introduction**

4 This is an Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement. It
5 asks this Court to take the first step in the approval process after parties in a class action have reached a
6 proposed class action settlement, by deeming that the proposed settlement preliminarily meets the criteria
7 to allow notice to go out to class members, certifying the Settlement Class, appointing Class Counsel and
8 a class representative, and setting the timing and procedures for the future Motion for Final Approval.

9 The underlying putative class action is a trucker wage-and-hour lawsuit. Plaintiff Albert Lizarraga
10 brings the action on behalf of himself and a class of 1,637 similarly situated commercial truck drivers in
11 California. Plaintiff alleges that he and his fellow Class Members and aggrieved employees were deprived
12 of certain rights afforded to them by the Labor Code and their agreements with Defendant during their
13 employment with Defendant.

14 After two mediation sessions with experienced wage and hour mediator, David Phillips, Esq., the
15 parties reached a proposed settlement, subject to this Court's review and approval. A true and correct copy
16 of the fully executed Class Action and PAGA Settlement Agreement ("Settlement" or "SA") is attached as
17 Exhibit 1 to the concurrently filed Declaration of Greg Taylor ("Taylor Decl."). The proposed Notice of
18 Class Action Settlement ("Class Notice") is attached to the Settlement as Exhibit A. Both the Settlement
19 and Class Notice are based on the Model Class Action and PAGA Settlement Agreement and Class Notice
20 (LACIV296), provided by the LA County Superior Court for optional use in June 2022.

21 This memorandum follows the format of the Checklist for Preliminary Approval of Class Action
22 Settlement provided by the LA Superior Court Complex Civil Department. As shown below, all of the
23 criteria for preliminary approval are met. Plaintiff respectfully requests that the Court preliminarily approve
24 the Settlement so that notice of a final approval hearing may be disseminated.

25 **b. Identity of the Parties**

26 From approximately August 2017 through November 2018, Plaintiff Albert Lizarraga ("Plaintiff")
27 worked as a commercial truck driver for Defendant Digby Southwest, Inc. ("Defendant" or "DSW").
28 (Declaration of Albert Lizarraga ["Lizarraga Decl."], ¶ 4.)¹ DSW is a transportation company based in
29 Arizona, which regularly assigns interstate routes to its drivers, including in California. (*Id.*)

30 _____
¹ References to all concurrently filed declarations will be made in this format: "[Declarant's last name] Decl., ¶ ____."

1 **c. Summary of the Litigation**

2 **i. Brief Procedural History**

3 On August 9, 2019, Plaintiff filed the initial complaint on behalf of himself and others similarly
4 situated to recover damages and penalties for the Labor Code violations alleged against Defendant (the
5 “Action”). Plaintiff alleged further that Defendant’s violations constituted breach of contract and the implied
6 covenant of good faith and fair dealing as well as unfair and unlawful business practices under the Unfair
7 Competition Law (“UCL”), Bus. & Prof. Code § 17200, *et seq.* (Taylor Decl., ¶ 7.)

8 On October 4, 2022, pursuant to Labor Code § 2699.3, Plaintiff submitted notice to the Labor and
9 Workforce Development Agency (“LWDA”) and to Defendant DSW, LWDA Case No. LWDA-CM-
10 911842-22, of his intention to litigate various alleged Labor Code violations. (Taylor Decl., ¶ 8, Ex. 3.)

11 Both before and after initiating the Action on behalf of the putative class, Plaintiff and Class Counsel
12 diligently investigated the claims alleged and conducted legal research regarding Defendant’s potential
13 liability and defenses. (*Id.*, ¶ 9.) Based on consistent good faith meet and confer efforts, the parties agreed
14 to proceed to private mediation with experienced wage-and-hour mediator, David Phillips, Esq. (*Id.*) Prior
15 to mediation, the Parties also engaged in informal discovery pertaining to policies and payroll records. (*Id.*)

16 On August 27, 2020, the Parties participated in a private mediation with highly regarded mediator
17 Mr. Phillips. (*Id.*, ¶ 10.) At that time, arm’s-length negotiations between the Parties did not result in a
18 settlement. (*Id.*) Thereafter, Plaintiff resumed formal discovery efforts. Class Counsel prepared and
19 propounded interrogatories, production demands, and requests for admissions on Defendant. (*Id.*)
20 Ultimately, Defendant produced thousands of additional documents, including driver logs, pay statements,
21 employment policies and compensation policies, and contractor agreements containing an arbitration
22 provision. (*Id.*) After the parties agreed to engage in a second mediation, Defendant also produced
23 substantial informal discovery, including a sampling of driver trip records. (*Id.*) Further, Defendant turned
24 over records to demonstrate its limited financial resources, including documents showing Defendant was
25 running at a loss in 2018 and 2019, with a slight profit in 2020. (*Id.*, ¶ 11; McGill Decl., ¶ 4.)

26 On July 6, 2022, the Parties participated in a second mediation with mediator David Phillips, Esq.,
27 which resulted in the Parties’ acceptance of a mediator’s proposal. (*Id.*, ¶¶ 12-13.) Based on the parties’
28 substantial investigation and discovery as well as an understanding of Defendant’s financial condition, Class
29 Counsel was able to act intelligently and effectively in negotiating at arm’s-length and evaluating the
30 mediator’s recommendation. (*Id.*) Thereafter, counsel for the Parties negotiated the terms of the long form

1 Settlement. (*Id.*) Plaintiff now seeks preliminary approval of the Settlement. (*Id.*, Ex. 1)

2 **ii. Claims Asserted and General Factual Basis for the Claims**

3 This is a wage-and-hour class and PAGA action. Plaintiff Albert Lizarraga (“Plaintiff”) brings
4 twelve (12) causes of action on behalf of himself and a class of 1,637 similarly situated commercial truck
5 drivers based in Arizona, who also drive in California. (*Id.*, ¶ 5.) Plaintiff alleges that he and his fellow Class
6 Members and aggrieved employees were deprived of certain rights afforded to them by the Labor Code
7 during their employment with Defendant. (*Id.*, ¶ 7.) For instance, Plaintiff alleges that throughout the Class
8 Period, DSW maintained a policy and practice of failing to reimburse its drivers for necessary business
9 expenses such as truck maintenance and failing to pay its drivers minimum wage for all time worked in
10 California. (*Id.*) Plaintiff alleges that Defendant misclassified many of its drivers as independent contractors
11 or non-employees to avoid complying with labor laws. (*Id.*) Defendant denies these allegations. (*Id.*)

12 The Complaint alleges the following causes of action: 1-2) failure to provide meal and rest periods;
13 3) failure to pay overtime wages; 4) failure to pay minimum wage; 5) failure to timely to pay all wages due
14 at separation; 6) failure to maintain required records; 7) failure to provide accurate itemized wage
15 statements; 8) failure to indemnify employees for necessary business expenses; 9) unlawful deductions from
16 wages; 10-11) breach of contract; 11) breach of covenant of good faith and fair dealing; and 12) unlawful
17 and unfair business practices in violation of Bus & Prof. Code § 17200, *et seq.* (*See Complaint.*)

18 **B. DUNK/KULLAR ANALYSIS**

19 **a. Summary of the Case, Including the Legal and Factual Basis for Each Claim**

20 Plaintiff’s claims are summarized as follows:

21 **1. Failure to Pay Meal Period Premiums**

22 Labor Code § 512 and Wage Order 9 require employers to provide duty-free meal periods of not
23 less than 30 minutes within the employee’s first 5 hours of work or pay a meal break premium of an hour
24 of additional pay at the employee’s regulate rate in lieu thereof. 8 Cal. Code Regs. § 11090 (11); *see also*
25 *Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1036-37. Here, the Complaint alleges that
26 Plaintiff and Class Members were required and/or permitted to take meal periods of less than 30 minutes
27 and/or were required to perform work during their meal breaks, without additional compensation.
28 (Complaint, ¶¶ 20-21.) However, after Plaintiff filed his Complaint, Defendant argues the law changed due
29 to the Ninth Circuit affirming California’s meal and rest break requirements are preempted by the Federal
30 Motor Carrier Safety Administration’s (“FMCSA”) December 28, 2018 Order. *See Int’l Bhd. of Teamsters,*

1 *Local 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021). (Taylor Decl., ¶ 18(b).)

2 2. Failure to Pay Rest Period Premiums

3 Labor Code § 226.7 and Wage Order 9 require employers to provide employees timely, duty-free
4 rest periods of not less than ten (10) minutes for every major fraction of four hours worked or pay an
5 additional hour of pay at the employee's regulate rate in lieu thereof. 8 Cal. Code Regs. § 11090 (12). The
6 Complaint alleges that Plaintiff and Class Members were denied timely, uninterrupted rest periods without
7 compensation with a rest break premium. (Complaint, ¶¶ 25-26.) However, as noted, Defendant argues
8 California's meal and rest break laws are preempted by the FMCSA, both retroactively and prospectively.
9 *See Int'l Bhd. of Teamsters*, 986 F.3d at 841; *Valiente v. Swift Transportation Co.*, 54 F.4th 581 (2022).

10 3. Failure to Pay Minimum Wages

11 The Labor Code requires employers to pay employees at least minimum wage for each hour worked.
12 Cal. Labor Code §§ 1194, 1197. Plaintiff's Complaint alleges DSW failed to pay at least minimum wages
13 for all hours worked, by for example, requiring drivers to perform off the clock work and inaccurately
14 recording time worked by drivers. (*See* Complaint, ¶¶ 34-35, 62.) Plaintiff further alleges DSW's
15 compensation formula resulted in paying less than minimum wage for all hours driven in California. (Taylor
16 Decl., 18(d).) Defendant denies these allegations and argues DSW's drivers are lawfully paid by the trip,
17 based on a formula using mileage, drops, and other factors, which is intended to cover all time worked. (*Id.*)

18 Plaintiff filed his Complaint prior to the Supreme Court's decision in *Oman v. Delta Air Lines* (2020)
19 9 Cal.5th 762, 781 (holding that Delta's contracted formula for paying its flight attendants for flight-hours
20 only complied with California law). Prior to *Oman*, courts held that an employer's compensation scheme
21 cannot "borrow" compensation contractually owed for one set of hours or tasks to offset paying below the
22 minimum wage for a second set of hours or tasks. *See, e.g., Gonzalez v. Downtown LA Motors* (2013) 215
23 Cal.App.4th 36, 47 ("[T]he obligation to pay minimum wages attaches to each and every separate hour
24 worked during the payroll period..."). However, Defendant argues that in *Oman*, the California Supreme
25 Court clarified that one must look to the contract—while an employer cannot promise rates of pay for certain
26 activities and then "borrow" from the payment of those activities to comply with minimum wage, Defendant
27 argues the *Oman* Court held that employers and employees may enter into contracts where they agree that
28 all of the activities will be compensated by a formula, provided that the formula yields, on average, at least
29 minimum wage. (*Id.*) Defendant denies paying less than minimum wage and stresses that its compensation
30 formula is lawful under the Supreme Court's decision in *Oman* as well as the Ninth Circuit's decisions in

1 *Bernstein and Ayala. See Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021) (fact that employer
2 did not attach specific amount of pay to each hour a flight attendant worked did not mean that employer
3 violated requirement for a minimum wage and payment for all hours worked); *see also Ayala v. US Xpress*,
4 851 Fed.Appx. 53 (9th Cir. 2021) (applying the *Oman* decision to truck driver pay on a piece-rate basis).

5 4. Failure to Pay Overtime Wages

6 California Labor Code §§ 510, 1194, and IWC Wage Order No. 9-2001, § 3 require that employers
7 pay one and one-half (1½) times the regular rate of pay for all hours worked in excess of eight (8) hours per
8 day and/or forty (40) hours per week. Plaintiff alleged DSW failed to compensate Plaintiff and the Class for
9 overtime wages at the applicable rate, by for example, requiring drivers to perform off the clock work.
10 (Complaint, ¶ 30.) Defendant argued, however, that as an interstate carrier, DSW’s drivers are governed by
11 the DOT’s Hours of Service regulations and that California Wage Order 9 provides those drivers subject to
12 such regulations are exempt from overtime. *See* 8 Cal. Code Regs. § 11090(3)(L)(1). (Taylor Decl., ¶ 18(b).)

13 5. Failure to Pay All Wages Due Upon Discharge of Employment

14 Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who
15 is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days.
16 Labor Code § 203; *Mamika v. Barca*, 68 Cal. App. 4th 487, 492 (1998). Plaintiff alleges DSW failed to pay
17 drivers all wages due upon separation, and that Defendant is subject to waiting time penalties for allegedly
18 failing to pay Class Members all meal and rest period penalties and minimum wages due during their
19 employment. (Complaint, ¶¶ 37-43). However, Defendant denies any willful failure to pay wages. (Answer,
20 ¶ 16.) Moreover, Defendant argues this claim is gutted by the Ninth Circuit’s confirmation that California’s
21 meal and rest break laws are preempted by the FMCSA. *See Int’l Bhd. Of Teamsters*, 986 F.3d at 841.

22 6. Failure to Maintain Required Records and Furnish Accurate Wage Statements

23 Labor Code § 226(a) requires employers to provide accurate itemized wage statements, including:
24 (1) gross wages earned; (2) total hours worked; (3) the number of piece-rate units earned and any applicable
25 piece rate; . . . (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly
26 rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. *See*
27 *also* 8 Cal. Code Regs. § 11090, Sec. 7 (A-C). Furthermore, section 1174(d) requires employers to keep
28 employee time and wage records for at least three years. Plaintiff contended that DSW failed to maintain
29 such records and that its wage statements do not provide accurate and complete information, including the
30 correct amount of gross or net wages, total hours worked, and the number of hours worked at each rate, in

violation of Labor Code § 226(a). (See Complaint, ¶ 48.) Defendant denies liability and argues Plaintiff and the Class did not principally work in California, and thus, were not entitled to California-compliant wage statements under the California Supreme Court’s decision in *Ward v. United Airlines*, 9 Cal.5th 732, 760-61 (2020). Defendant contends that based on *Ward*, DSW would be, at most, liable only for those pay periods where the driver spent a majority of his or her time driving in California. (Taylor Decl., ¶ 18(g).)

7. Breach of Contract and Covenant of Good Faith and Fair Dealing

The Complaint alleges that Plaintiff and the class members performed work for Defendant under agreements in which Defendant promised to pay drivers for each mile driven, yet Defendant intentionally misconstrued the miles driven by, for example, only paying for miles between the departure and destination zip codes, irrespective of necessary routes taken, leading to substantial underpayment. (Complaint, ¶¶ 65-66.) Defendant disputes liability and argues its drivers agreed to the compensation formula and that its compensation formula is lawful. *Oman*, 9 Cal.5th at 781. (Taylor Decl., ¶ 18(d).)

8. Unlawful Deductions from Wages and Failure to Reimburse Necessary Business Expenses

The Labor Code forbids employers from withholding or deducting from the compensation of any employee, with limited exceptions. Cal. Labor Code § 221. Additionally, Labor Code § 2802(a) requires an employer to indemnify an employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. Plaintiff alleged that Defendant violated Labor Code § 221 and § 2802 by deducting employment-related expenses from wages and by failing to reimburse class members for such out of pocket expenses. (Complaint, ¶ 53.) Defendant denies liability and argues its drivers do not principally work in California, again citing the *Ward* decision. (Taylor Decl., ¶ 18(g).)

9. Unfair Business Practices

The Labor Code and Wage Orders violations are actionable under Bus. and Prof. Code § 17200. Plaintiff’s unfair business practices claim requires only the showing of an unfair, unlawful, or fraudulent business practice by Defendant, which is satisfied by the above-described claims. *See Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal. 4th 163, 178-179 (“We recognize that any business act or practice that violates the Labor Code through failure to pay wages is, by definition, an unfair business practice”). Here, DSW’s alleged practice of Labor Code and Wage Order violations is, in and of itself, a violation of section 17200. Once a showing has been made, Plaintiff is entitled to restitution going back four years from the filing of the lawsuit, per the four-year statute of limitations. Thus, Plaintiff sought restitution of unpaid wages from August 9, 2015, to the end of each Class Member’s employment. However, Defendant argues

the *Oman*, *Ward*, *Bernstein*, *Int'l Bhd. Of Teamsters*, and *Valiente* decisions have left very little to pursue.

10. PAGA Penalties

The Private Attorneys General Act (PAGA) permits aggrieved employees to recover civil penalties specified by the Labor Code that previously only the Labor Commissioner could recover. Labor Code § 2699(e)(1). Under PAGA, a successful employee acting as a private attorney general keeps 25% of the penalties collected, while 75% goes to the state. For instance, California Labor Code § 1197.1 imposes civil penalties of \$100 per violation on employers who pay their employees less than the minimum wage. Here, Plaintiff contended Defendant's Labor Code violations could give rise to substantial PAGA penalties, if proven. (Taylor Decl., ¶ 18(k).) Defendant strongly disputes liability. (*Id.*)

b. Summary of the Investigation and Discovery Conducted, Including the Specific Documents Reviewed Prior to Agreeing to Settle the Case

The parties exchanged substantial formal and informal discovery to gather facts and data necessary to reach a fair and reasonable settlement. Prior to the first mediation, which was not successful, Defendant informally produced limited documents and information pertaining to policies and payroll. (Taylor Decl., ¶¶ 9-12.) 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 sampling of driver trip records. (*Id.*) Class Counsel carefully considered the class claims at issue and its analysis of Defendant's trip and pay data. (*Id.*)

Defendant produced records documenting its financial difficulties in recent years, including substantial losses in 2018 and 2019 and only a slight profit in 2020, and Class Counsel considered the impact of Defendant's financial condition at the time of mediation. (*Id.*) Defendant also produced contractor agreements containing arbitration provisions, which it represented were signed by all drivers classified as independent contractors. (*Id.*) The investigation and discovery conducted in this matter have been adequate to give 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. (*Id.*, ¶¶ 9-14.) The discovery conducted and information exchanged allowed Class counsel to reliably assess the merits of each side's position and compromise the issues on a fair and equitable basis. (*Id.*) Based on their own independent investigation, discovery, and evaluation, and considering Defendant's limited financial resources, Class Counsel has determined that the settlement terms and conditions are in the best interests

1 of Plaintiff and the members of the Class. (*Id.*)

2 **c. Summary of Settlement Negotiations, Including When the Settlement Was Reached, and**
3 **Whether the Parties Were Assisted by a Mediator**

4 The Settlement was reached with the assistance of highly regarded mediator David Phillips, Esq.,
5 who considers himself fully versed in all aspects of wage and hour class actions. (*Id.*, ¶ 12.) The parties
6 participated in this second mediation on July 6, 2022, and Mr. Phillips made a mediator's proposal which
7 the parties accepted. (*Id.*) This second mediation took place only after substantial additional formal and
8 informal discovery had been conducted. (*Id.*) Negotiations at all times were arm's-length and adverse. (*Id.*)

9 **d. Summary of the Risks, Expenses, Complexity, and Duration of Further Litigation if the**
10 **Settlement is Not Approved**

11 Were litigation to proceed, there is a strong likelihood it would be protracted and contentious, as
12 Defendant disputes all aspects of Plaintiff's claims. Plaintiff would have to prepare and file a motion for
13 class certification, which outcome is uncertain based on Defendant's anticipated contentions, *inter alia*, that
14 individual questions of fact predominate, that all drivers whom Defendant classified as independent
15 contractors had signed arbitration agreements containing class action waivers, and that Plaintiff cannot show
16 the "willfulness" requirement for Section 203 penalties. (*Id.*, ¶ 16; *See Answer*, ¶ 16.) If the motion were
17 granted, Defendant would likely move for decertification, appeal certification, or move for Summary
18 Judgment. (*Id.*) Plaintiff believes he would prevail on certification, but the risks to absent Class Members
19 are significant. (*Id.*)

20 To succeed on the merits, Plaintiff would have to prove Defendant actually engaged in the practices
21 and policies alleged and that those practices and policies violated the law in the limited time that DSW's
22 drivers drove in California. (*Id.*, ¶ 17.) As discussed above, after Plaintiff filed his complaint, some of
23 Plaintiff's strongest claims either went away altogether (meal and rest break claims) or were severely limited
24 (minimum-wage and wage-statement claims) due to preemption and changes in law. *See Oman, supra*, 9
25 Cal.5th 762 (2020); *Ward v. United Airlines*, 9 Cal.5th 732 (2020). (Taylor Decl., ¶ 17.) While Class
26 Counsel believe strong evidence exists showing Defendant's limited liability on certain claims, there
27 remains a risk that the trier of fact might find otherwise. (*Id.*) If the case were to proceed to trial, additional
28 discovery would be needed and the Parties would thus incur significant additional expenses, which money
29 could go instead to fund a settlement for the benefit of the Class as a whole. (*Id.*) Moreover, discovery
30 disputes would have certainly arisen, which would have cost the Parties additional time and money. (*Id.*)
Further, regardless of which Party prevailed, appellate practice would no doubt ensue, further delaying any

possible recovery by Class Members. (*Id.*) In other words, both Parties would likely incur substantial attorneys' fees and costs from continued litigation, likely approaching hundreds of thousands of dollars. (*Id.*) Plaintiff also faced a significant risk of inability to collect due to Defendant's financial condition. (*Id.*)

e. Summary of the Risks of Achieving and Maintaining Class Action Status

As stated above, the risks of achieving and maintaining class action status include, among others, facing challenges to class certification and liability, the outcome of which is uncertain. Moreover, even though Class Counsel believe strong evidence exists showing Defendant's liability, the costs of continued discovery, law and motion, and trial preparation would be substantial for all parties. (*Id.*, ¶ 15.)

f. Specific Information Sufficient for the Court to Independently Determine that the Settlement Is Reasonable

Plaintiff hereby provides specific information sufficient for the court to make an independent determination that the consideration being received for the release of Class Members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. *Kullar v. Footlocker* (2008) 168 Cal.App.4th 116, 129. Below, Plaintiff sets forth the maximum potential recovery of Plaintiff's claims as calculated in consultation with Plaintiff's experts and based on data provided by Defendant. Thereafter, Plaintiff weighs the defenses asserted by Defendant and other relevant factors.

<i>Figures used for calculations</i>	
Class Period	8/9/2015 - 11/1/2022
Days in Class Period	2,641 days
Days in data set period (provided by Defendant)	1,464 days
Average minimum wage in data set period	\$11.30
Average minimum wage in Class Period	\$11.81
UNPAID COMPENSATION	
Unpaid Minimum Wage for California Origin Only Trips	
Minimum Wage Shortfall in data	\$26,617.23
2641-day class period/1464-day data period	1.804
\$11.81 avg. minimum wage/\$11.30 avg. minimum wage	1.045
Estimated Minimum Wage Shortfall for Partial CA Trips	\$50,183.57
Unpaid Minimum Wage for California Destination Only Trips	
Minimum Wage Shortfall in data	\$69,281.54
2641-day class period/1464-day data period	1.804
\$11.81 avg. minimum wage/\$11.30 avg. minimum wage	1.045
Estimated Minimum Wage Shortfall for CA Only Trips	\$130,621.99
Unpaid Minimum Wage for California Only Trips	
Minimum Wage Shortfall in data	\$339,709.95
2641-day class period/1464-day data period	1.804
\$11.81 avg. minimum wage/\$11.30 avg. minimum wage	1.045
Estimated Minimum Wage Shortfall for CA Only Trips	\$640,414.40

Unpaid Reimbursements and Deductions	
Total workweeks (provided by Defendant)	55,981.00
Unreimbursed expenses per workweek (based on Plaintiff's \$75/month estimate)	\$18.75
Percentage of expenses allocated to CA trips (based on percentage of CA trips in data)	0.31
Total Unpaid Reimbursements	\$323,256.87
Total Unpaid Compensation	\$1,144,476.84
PENALTIES	
Labor Code Section 226(e) Penalties	
"Majority California" workweeks (based on 6% estimate)	3,358.86
Penalty per workweek	\$50.00
Total penalties under 226(e)	\$167,943.00
PAGA Penalties	
PAGA Pay Periods	4,943
PAGA Penalty per violation (Cal. Lab. Code §§ 226(a), 2699(f)(2), 1197.1)	\$100
Max. Est. PAGA Penalties for Minimum Wage Violations	\$494,300
Max. Est. PAGA Penalties for Wage Statement Violations	\$29,658.00
Max. Est. PAGA Penalties for Failure to Maintain Records	\$29,658.00
Max. Est. PAGA Penalties for Failure to Reimburse Business Expenses	\$494,300.00
Total PAGA penalties	\$1,047,916.00
Total Penalties	\$1,215,859.00
Total Liability	\$2,360,335.84

Accordingly, if Plaintiff were to prevail on all liability related to unpaid compensation, these compensatory damages total \$1,144,476.84, meaning the proposed \$300,000 equals about 26.2% of that. Further, if one were also to include all possible PAGA penalties, without discretionary reduction by this Court, and add them to the unpaid compensation, together these equal an estimated maximum total exposure of \$2,360,335.84.² (Taylor Decl., ¶ 19.) However, this maximum exposure calculation fails to account for arbitration agreements and other risks and defenses. (*Id.*) As discussed below, the proposed settlement of \$300,000 represents approximately **97.5%** of the *realistic* maximum value after accounting for real litigation risks, relative strengths and weaknesses of Plaintiff's claims, and other factors. (*Id.*)

1. Risks and Defenses.

There were numerous risks to continuing to litigate, including potentially viable defenses that Defendant asserted or could have asserted as outlined below:

Risk of Non-Collection. Plaintiff faced the risk of inability to collect on a trial judgment due to Defendant's limited financial resources. Prior to mediation, Defendant disclosed it suffered from significant financial difficulties in the years prior to reaching the proposed settlement, including a loss of \$108,000 in

² This maximum exposure calculation excludes claims preempted by FMCSA and waiting time penalties assuming Plaintiff cannot establish Defendant's willfulness as required for liability under Labor Code § 203.

2018, a loss of \$343,500 in 2019 and a profit of just \$285,000 in 2020, which is less than the gross settlement amount. (McGill Decl., ¶ 4.) Defendant also produced documents corroborating its financial condition. (Taylor Decl., ¶ 18(a).) In negotiations and evaluating the mediator’s proposal, Class Counsel considered the impact of Defendant’s financial condition and the realistic risk of non-collection on a judgment. (*Id.*)

Federal Preemption. Defendant contends its drivers are subject to DOT regulations and therefore Plaintiff’s meal and rest break claims are entirely preempted. Defendant points to the FMCSA’s 2018 preemption decision (83 Fed. Reg. 67470, 67470 (Dec. 28, 2018)) and the Ninth Circuit’s 2021 decision in *Int’l Bhd. Of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021). Similarly, Defendant contends California Wage Order 9 provides drivers subject to DOT HOS regulations are exempt from overtime. *See* 8 Cal. Code Regs. § 11090 (3)(L)(1). (Taylor Decl., ¶ 18(b).)

Arbitration Agreements. Defendant argued that its independent contractors all signed arbitration agreements and that this would not only prevent class certification, but also allow DSW to compel to arbitration any independent contractor who becomes a party to the action under Arizona law. Defendant also argued that under Arizona law, DSW’s independent contractor operating agreements (ICOAs) meet the prima facie elements of Arizona law, which provides a presumption that the driver is not an employee, which the driver has the burden to overcome. *See* A.R.S. § 23-160(B). (Taylor Decl., ¶ 18(c).) Though Plaintiff strongly disputes the enforceability of such arbitration agreements, Plaintiff faces the risk that the Court would agree with Defendant’s arguments that arbitration agreements could preclude certification or substantially reduce the potential recoverable damages. (*Id.*)

Legality of Defendant’s Compensation Policy. Defendant argues its “trip pay” compensation formula is lawful under the Supreme Court’s decision in *Oman v. Delta Air Lines, Inc.*, (2020) 9 Cal.5th 762, because its drivers are paid by the trip and its pay formula is intended to compensate drivers for all time worked. The *Oman* Court held that “[f]or purposes of evaluating whether an employee has received at least the hourly minimum wage for tasks or periods compensated under the contract, it is generally permissible to translate the contractual compensation—whether it be done by task, work period, or other reasonable basis—into an hourly rate by averaging pay across those tasks or periods.” Plaintiff argues that Defendant’s “trip pay” compensation policy unlawfully fails to pay California minimum wage for all hours worked, such as unproductive time, and results in a minimum wage shortfall. (Taylor Decl., ¶ 18(d).) However, Plaintiff acknowledges its argument rests on certain assumptions regarding time worked in California which may be difficult to establish, such as an average of 6-hours worked in state per California-

1 origin or destination trip. (*Id.*) Plaintiff's calculations also assume shifts averaging 11-hours during all multi-
2 day trips within California. (*Id.*) Plaintiff faces significant risk that a Court would agree with Defendant's
3 position that payment per trip is permissible where the parties agreed that payment would be based on
4 mileage and other factors. *See, e.g., Ayala v. US Xpress*, 851 Fed.Appx. 53 (9th Cir. 2021) (applying the
5 *Oman* decision to compensation of truck drivers on a piece-rate basis).

6 **Non-Certification and Liability.** Had the Action not settled, Defendant would have challenged
7 class certification and liability, as Defendant vigorously disputes all of Plaintiff's contentions. Plaintiff also
8 faced the risk Defendant would successfully argue that individualized questions of fact predominate over
9 any common issues, and that such issues would preclude certification. (*Id.*, ¶ 18(e).) Defendant could argue
10 that the Class is uncertifiable due to hundreds of individual inquiries as to each Class Member's experience
11 with supposedly working off the clock and logging time worked. (*Id.*)

12 **No Derivative Penalties.** Defendant could also argue Plaintiff's claims for wage statement and
13 waiting time penalties claims are entirely derivative of Plaintiff's rest period and wage claims, and therefore
14 suffered from not only the same litigation risks as the rest break claims, but also additional risks unique to
15 these claims. With respect to Plaintiff's waiting time penalty claim, Plaintiff would also be required to
16 establish Defendant's *willfulness*. However, Defendant denies any willful failure to pay any alleged
17 compensation. (*Id.*, ¶ 18(f).) Moreover, "an employer's reasonable, good faith belief that wages are not
18 owed may negate a finding of willfulness." *Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468.

19 With respect to Plaintiff's wage statement, wage timing, and records maintenance claims, even if
20 non-certification was not a bar to recovery, Defendant argues Plaintiff and the Class did not principally
21 work in California, and thus, were not entitled to these benefits of California law under the Supreme Court's
22 decisions in *Oman, supra*, 9 Cal.5th at 776, and *Ward v. United Airlines*, 9 Cal.5th 732, 760-61 (2020).
23 Though Plaintiff argues Class Members were entitled to these protections at least during California majority
24 pay periods, the effect of *Oman* and *Ward* significantly reduce recoverable penalties. (Taylor Decl., ¶ 18(g).)

25 Plaintiff also faced the risk Defendant could rely on *Maldonado, et al. v. Epsilon Plastics, Inc.*, 22
26 Cal.App.5th 1308, 1334-37 (April 18, 2018) where the Court reversed an award for penalties for inaccurate
27 wage statements because the Court found that inaccurate wage statements alone based on derivative Labor
28 Code violations do not justify penalties, and that the plaintiff arguably might need to establish injury from
29 the inaccuracy and independent inaccuracies different from underpayments or derivative claims. This
30 defense could call into question whether the Class could recover derivative penalties under Labor Code §§

201-203 and 226 based on underlying claims. While Plaintiff remains prepared to zealously pursue the claims, he recognizes the risks of losing on the merits. (Taylor Decl., ¶ 18(h).)

Other Risk Factors. Plaintiff also had to take into account other risks, including, the risks of losing on appeal, the possibility of law changing, and the time value of money, among other things. (*Id.*, ¶ 18(i).)

Costs. The Action clearly involves complex legal issues, including class certification. With regard to expected duration, litigating Plaintiff's claims through trial could last two or more years if the proposed settlement is not approved. This would be expensive for all parties and delay or jeopardize what is now a certain recovery for the putative class. (*Id.*, ¶ 18(j).)

Discretionary PAGA Penalties. Under Labor Code § 2699(e)(2), a court may award a lesser amount than the maximum civil penalty specified under PAGA, if based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive or confiscatory. Courts have exercised their discretion to reduce the amount of PAGA penalties awarded to as little as \$5.00 per pay period. *See e.g., Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at *4 (reducing PAGA penalties by 82%).

2. Discounts Applied

Plaintiff believes it is reasonable when assessing the value of the settlement to consider applying the following discounts: 30% discount for the risk of non-certification; 50% for the risk of Defendant prevailing on *Oman* and *Ward* defenses; 20% discount based on Defendant's representation that its independent contractor drivers are all bound by arbitration agreements; 30% discount on penalty claims under *Maldonado*; 50% discount on PAGA claims for the Court's discretion to reduce penalties and underlying risks; and a 50% discount for the risk of inability to collect a judgment. (Taylor Decl., ¶ 19.) Applying these discounts reduces the maximum possible damages and penalties to \$307,674.67, as summarized below.

Claim	Max. Exposure	Discounts					Risk-Adjusted
Maximum Total Damages	\$1,144,476.84	30%	50%	20%	-	50%	\$160,226.76
Maximum Total Statutory Penalties	\$167,943.00	30%	50%	20%	30%	50%	\$16,458.41
Maximum Total PAGA Penalties	\$1,047,916	-	50%	-	50%	50%	\$130,989.50
Total							\$307,674.67

The negotiated gross settlement amount ("GSA") of **\$300,000.00** thus represents about **97.5%** of the realistic risk adjusted exposure. Considering the potential risks and rewards inherent in any case and, in particular, in this matter, this Settlement represents a considerable recovery. (*Id.*, ¶ 19.)

1 3. Defendant's Financial Condition

2 In settlement negotiations, Plaintiff considered Defendant's representation of financial difficulties.
3 (See concurrently filed Declaration of Bob McGill ["McGill Decl.,"] ¶ 4.) Defendant produced, at Plaintiff's
4 request, its financial records showing it lost \$108,000 in 2018, lost \$343,500 in 2019, and made a slight
5 profit of \$285,000 in 2020. (Taylor Decl., ¶ 11.) Further, according to Defendant's 2020 income statement,
6 Defendant's total assets were valued at \$2,207,499. (*Id.*) Thus, the gross settlement amount of \$300,000
7 exceeds Defendant's net income and amounts to more than 13.5% total assets in 2020, as represented by
8 Defendant in its financial records. (*Id.*)

9 **g. If Approval of the Settlement of Class Claims is Requested Together with Approval of**
10 **PAGA Claims, Discuss Why the Amount Allocated to the Non-Class Claims is Fair.**

11 When PAGA claims are settled, the trial court must "review and approve" the settlement. Labor
12 Code § 2699 (l). In so doing, the court must consider whether the proposed "PAGA settlement is fair and
13 adequate in view of the purposes and policies of the statute." *O'Connor v. Uber Techs., Inc.*, 201 F. Supp.
14 3d 1110, 1135 (N.D. Cal. 2016). The \$10,000.00 amount allocated towards PAGA penalties here is fair and
15 reasonable given the nature of the PAGA claims, which has a limited 1-year statute of limitations. Further,
16 as discussed above, the availability of PAGA penalties here rely on contested factual issues. Moreover, the
17 PAGA statute provides the Court with broad discretion to adjust and reduce the amount of penalties
18 awarded, if any. Courts "repeatedly approve[] PAGA allocations of both smaller amounts and that
19 comprised a smaller portion of the total settlement consideration in the agreements at issue." *See Davis v.*
20 *Cox Commc'ns California, LLC*, No. 16cv989 BAS (BLM), 2017 WL 1496407, at *1 (S.D. Cal. Apr. 26,
21 2017 (preliminarily approving \$4,000 PAGA allocation in \$275,000 settlement); *Moore v. Fitness Int'l,*
22 *LLC*, No. 12cv1551 LAB (NLS), 2014 WL 12571448, at *5 (S.D. Cal. Jan. 22, 2014) (approving \$2,500
23 PAGA allocation when attorneys' fees award alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*,
24 No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving \$3,000 PAGA
25 allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, No. 08cv821 IEG (BLM), 2010
26 WL 2196104, at *2 (S.D. Cal. June 1, 2010) (approving \$3,000 PAGA allocation in \$1,000,000 settlement).
27 The proposed PAGA allocation is well within a fair and reasonable range.

28 **C. CLASS CERTIFICATION**

29 California Rule of Court 3.769(d) provides that the Court may make an order approving certification
30 of a provisional settlement class at the preliminary approval stage. It is well-established that trial courts
should use a "lesser standard of scrutiny" for determining the propriety of certifying a settlement class, as

opposed to a litigation class. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) at 1807 n.19. The reasons include that no trial is anticipated in a settlement class, so the case management issues inherent in determining if the class should be certified need not be confronted; and the trial court's fairness review of the settlement protects the interests of the non-representative class members. (*Id.*); see also *Officers for Justice*, 690 F.2d at 633 ("Th[e] relationship between the certification determination and the merits of the case is further attenuated within the context of the settlement evaluation process ... [C]ertification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1987)("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems...") As discussed below, for the purposes of this settlement only, the parties ask this Court to provisionally certify the Class, as defined above, under Cal. Civ. Proc. Code § 382.

a. Numerosity

Numerosity is met if a proposed class is so large that joinder of all members would be impracticable. Code Civ. Proc. § 382. Numerosity is readily satisfied here because there are 1,637 Class Members. (Taylor Decl., ¶ 5.) See, *Vasquez v. Superior Court*, 4 Cal.App.3d 800, 811 (1971); *Newberg on Class Actions*, § 3.5 (4th Ed. 2004) (40 class members is sufficient to satisfy numerosity).

b. Ascertainability

A test for ascertainability is whether the class definition "identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828; *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 541-42. Here, this is satisfied, as the Settlement Class can be identified from Defendant's records. (Taylor Decl., ¶ 6.)

c. Community of Interest

The community of interest requirement has three essential elements: "(1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Linder v. Thrifty Oil Co.*, 23 Cal.App.4th 429, 435 (2000). As shown below, these elements are met.

1. Commonality

To justify certification, the class proponent must show that questions of law or fact common to the class predominate over the questions affecting the individual members. See *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913

(2001)). Here, all Class Members were subject to common policies and practices. (Lizarraga Decl., ¶¶ 5, 8.)

2. Plaintiff's Claims Are Typical of the Class

Typicality “focuses on whether there exists a relationship between the plaintiff’s claims and the claims alleged on behalf of the class.” *Newberg and Rubenstein on Class Actions*, § 3:29. Here, this is satisfied as Plaintiff is a member of the proposed class, and was subject to the same employment policies and practices as all other Class Members. (Lizarraga Decl., ¶¶ 5, 8.)

3. Plaintiff Adequately Represents the Class

Class representatives must establish that they will adequately represent the proposed class. *See, Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540, 546 (2009). This adequacy analysis focuses on any conflicts that would appear between the named Plaintiff and putative class members. *Richmond v. Dart Industries*, 29 Cal.App.3d 462, 470 (1981). The Court must also consider the competency of Plaintiff’s counsel in determining whether to certify a class. *Cal. Pak Delivery v. United Parcel Service, Inc.* 52 Cal.App.4th 1, 12 (1997); *General Tel. Co. v. Falcon*, 457 U.S. 147, 157-8, n. 13 (1982). Class counsel and the class representative meet the adequacy requirement.

Here, the claims of Plaintiff and the Class Members are coextensive and there is no conflict between Plaintiff and his counsel, on the one hand, and any other Class Member. (Taylor Decl., ¶ 20.) In this case, not only is there not any conflict, but Plaintiff’s interests are essentially identical, if not entirely identical, to the interests of all the members of the Settlement Class. (*Id.*) Therefore, Plaintiff is adequate.

4. Superiority

Certification of the Class for settlement purposes also is superior here because there will be a global resolution of all claims at once, which fosters judicial economy. Class certification is also vastly superior to litigation of numerous individual claims because most of the claims are too small to litigate outside of the class context. *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, 469. Thus, the superiority of proceeding through the class action mechanism is demonstrable in this case because, through the class action device, Plaintiff’s counsel was able to negotiate a global Settlement with Defendant that, if approved, will provide a sizeable Class with immediate monetary relief.

d. Adequacy

To satisfy the requirement that a class representative and his or her counsel fairly and adequately represent absent class members, the named plaintiff must be represented by counsel experienced and qualified to conduct the pending litigation, and the named plaintiff’s interests cannot be antagonistic to those

of the class. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450. The adequacy requirement is clearly satisfied on both counts. Class Counsel, The Kick Law Firm, APC, has significant experience in complex litigation, including wage and hour class actions, and has been diligent in representing the putative Settlement Class. (Taylor Decl., ¶¶ 20-21.) The significant formal and informal discovery, two mediations, and the Settlement itself speaks to Class Counsel's adequacy, evidencing Class Counsel ability to secure a favorable proposed settlement that provides substantial benefits to absent Class Members without incurring unnecessary costs or risking the delays and uncertainty of further, protracted litigation.

Plaintiff Albert Lizarraga, the proposed Class Representative, has participated actively at all stages of the litigation, and his interests are not in conflict with the absent class members. (Taylor Decl., ¶¶ 20-21; Lizarraga Decl., ¶¶ 7-8.) Plaintiff agreed to act as Class Representative and understands his responsibility to assist Class Counsel in prosecuting the action on behalf of the Class. (*Id.*)

D. CLAIM REQUIREMENT (IF APPLICABLE)

Not applicable. Class Members will not be required to submit a claim to receive compensation.

E. MISCELLANEOUS

a. If Appropriate, Explain Why the Settlement Includes Terms That Are Outside the Scope of the Operative Complaint. (*Trotsky v. Los Angeles Fed. Savings & Loan Assn.* (1975) 48 Cal.App.3d 134, 148.) If Approval of Settlement of a PAGA Claim is Requested Provide a Copy of Plaintiff's Notice Letter to the LWDA.

The Settlement does not include terms that are outside the scope of the operative complaint. A copy of the Notice Letter to the LWDA is attached as **Exhibit 3** to the Taylor Declaration.

b. If Notice Will Be Given in English Only, Explain Why this is Sufficient

English is sufficient as the Class is comprised of interstate commercial drivers, who are subject to DOT Regulations (49 CFR 391.11) requiring commercial drivers to read and speak in English. (SA, ¶ 1.5.)

c. A Statement of Any Affirmative Obligations to Be Undertaken by the Class Member or Class Counsel and the Reason for Such Obligations

Other than fulfilling their duties as Class representative and Class Counsel, the Settlement does not create any affirmative obligations to be undertaken by them.

d. Provide Information Regarding Any Fee Splitting Agreement and Whether the Client Has Given Written Approval. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219; Rules Prof. Conduct, rule 1.5.1; Cal. Rules of Court, rule 3.769.)

No fee splitting agreement is at issue here. (Taylor Decl., ¶ 23.) Pursuant to the Settlement, Class Counsel will request, and Defendant will not oppose, attorneys' fees of \$100,000, or one-third (1/3) of the GSA, and reimbursement of necessary litigation costs not to exceed \$30,000. (*Id.*; SA, ¶ 3.2.2.)

1 e. **Any Agreement That Has Injunctive Relief Against a Class Representative or Absent**
2 **Class Member Generally Is Not Appropriate in a Class Action Case. Provide the**
3 **Authority and Factual Reasons Why this Case is an Exception**

4 Not applicable, as the Settlement does not provide for any such injunctive relief.

5 f. **Explain Why Any Proposed Class Representative Award is Reasonable, Including What**
6 **the Class Representative Did Beyond the Expected Services of Any Class Representative**

7 The Settlement provides a proposed service award of \$10,000 to Plaintiff, (SA, ¶ 3.2.1), which is
8 intended to recognize the time, effort, and risk that Plaintiff undertook in bringing this case and helping to
9 secure the relief obtained for the members of the Class. *See Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th
10 715, 726 (2004) (upholding “service payment” to named plaintiff for his efforts in bringing class
11 case); *Rodriguez v. West Publishing*, 563 F.3d 948, 959 (9th Cir. 2009) (stating that incentive awards are
12 “intended to compensate class representatives for work done on behalf of the class, to make up for financial
13 or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act
14 as a private attorney general.”) To determine the propriety of a service award, courts consider the actions
15 protecting class interests, the benefit provided to the class based on those actions, and the amount of time
16 and effort expended by the plaintiff. *Staton v. Boeing Co.*, 327 F.3d 938, 976-7 (9th Cir. 1993).

17 Here, Plaintiff should be compensated for the significant contributions provided to the Class, the
18 reputational risks he undertook, the time and efforts expended on behalf of the Class, Plaintiff’s entering
19 into a broader waiver of claims outside of the scope of the Class claims released by the Class in the
20 Settlement (SA, ¶ 5.2), and the significant accomplishments of this case. (Taylor Decl., ¶¶ 20-21.) Among
21 other things, Plaintiff stepped forward with willingness to serve the Class, provided essential information
22 for the prosecution of this action, was available during two mediations, and reviewed the settlement
23 documents. (*Id.*) At no time did Plaintiff ever have a guarantee of any personal benefit as a result of this
24 case. (*Id.*) The proposed service award also falls well within the range of reasonable payments awarded to
25 Class Representatives in similar class actions. Other courts in California also regularly award service awards
26 higher than those requested here. *See e.g. Ross v. US Bank National Association*, No. C 07-02951 SI, 2010
27 WL 3833922, at *2 (N.D. Cal. Sept. 29, 2010) (approving **\$20,000** enhancement award to Class
28 Representative in California wage-and-hour class action settlement); *Louie v. Kaiser Found. Health Plan,*
29 *Inc.*, CASE NO. 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008)
30 (approving “**\$25,000** incentive award for each Class Representative” in wage and hour settlement); *Garner*
 v. State Farm Mut. Auto. Ins. Co., No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8 (N.D. Cal.
 Apr. 22, 2010) (“Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of

1 **\$20,000** or more where . . . the class representative has demonstrated a strong commitment to the class”).

2 Finally, at the time of the filing of the Motion for Final Approval, Plaintiff intends to file further
3 detail for this Court’s consideration regarding the time and effort he expended on behalf of the class.

4 **F. THE SETTLEMENT AGREEMENT**

5 The second half of the Checklist indicates a number of items that the Settlement Agreement itself
6 should address. (*See* Checklist II, pp. 4-8.) Class Counsel has gone through all items in the Checklist and
7 confirmed that each exist in the proposed Settlement and Notice, including the Class definition (SA, ¶¶ 1.5,
8 1.9), Class Period (SA, ¶ 1.12), release terms (SA, ¶¶ 1.41, 5.1-5.4), monetary terms (SA, ¶ 3), notice
9 administration terms (SA, ¶¶ 7.1-7.8), and *cy pres* terms (SA, ¶ 4.4.3). (Taylor Decl., ¶ 25.)

10 **G. ATTORNEYS’ FEES AND COSTS**

11 Pursuant to Labor Code section 1194 and Code of Civil Procedure section 1021.5, Class Counsel
12 will request, and Defendant will not oppose, attorneys’ fees in the amount of \$100,000, or one-third (1/3)
13 of the GSA, and reimbursement of necessary litigation costs not to exceed \$30,000. (SA, ¶ 3.2.2.) Although
14 applying pursuant to the percentage of benefit approach rather than a lodestar approach, Class Counsel can
15 represent that the lodestar to date actually already far exceeds the requested fees. (Taylor Decl., ¶ 23.)
16 Considering both the risks and the potential value of the litigation, the request, calculated as a percentage of
17 the common fund, is reasonable, as the amounts are well-within the range of fees generally sought and
18 approved in similar class action cases. *Chavez v. Netflix* (2008) 162 Cal.App.4th 43, 66 (“Empirical studies
19 show that, regardless whether the percentage method or the lodestar method is used fee awards in class
20 actions average around one-third of the recovery.”)

21 “[T]he court may determine the amount of a reasonable fee by choosing an appropriate percentage
22 of the fund created.” *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal. 5th 480, 503. In *Laffitte*, a \$19
23 million employment class action case involving an objection to a one-third percent-based recovery, the
24 California Supreme Court held that “the trial courts have discretion to conduct a lodestar cross-check on a
25 percentage fee . . . [and] also ***retain the discretion to forego a lodestar cross-check*** and use other means to
26 evaluate the reasonableness of a requested percentage fee.” *Id.* at 506 (emphasis added). The percentage
27 approach is preferable to the lodestar calculation approach because it “more accurately reflects the results
28 achieved.” *Id.* at 504 (quoting *Rawlings v. Prudential-Bach Properties* (1993) 9 F.3d 513, 516). In fact, “[a]
29 task force commissioned by the Third Circuit concluded that the lodestar approach ... is a cumbersome,
30 enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the

Bench and Bar and recommended a return to the percentage of the recovery fee formula in cases involving a settlement fund.” *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 29 (citations and quotation marks omitted). Regardless, should this Court wish to perform a lodestar cross-check, Class Counsel will also provide its lodestar and detail of the work constituting the lodestar at the time of final approval. Although this was a contingent case with much risk, deserving of a substantial lodestar multiplier, the lodestar multiplier required to get to the one-third fee request is actually a negative multiplier.

H. EXHIBITS TO THE DECLARATION OF GREG TAYLOR

- **Exhibit 1** is the Settlement, and **Exhibit A** to the Settlement is the Class Notice.
- **Exhibit 2** is a redlined copy of the Settlement, showing changes to LASC Model.
- **Exhibit 3** is a copy of the PAGA Notice Letter to the LWDA.
- **Exhibit 4** is a Proposed Judgment not including a dismissal pursuant to CRC 3.769.
- **Exhibit 5** to the Taylor Decl. is proof of submission of the Settlement to the LWDA.

I. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

The last step in the approval process is the formal hearing, whereby proponents of the settlement may explain and describe its terms and conditions and offer argument in support of approval, and Class Members or their counsel may be heard in support of or in opposition to the Settlement. Plaintiff proposes the following schedule, subject to the convenience of the Court’s calendar:

Last day for Defendant to deliver Class Data to the Settlement Administrator	June 5, 2023
Last day for Settlement Administrator to send Notice by First-Class Mail	June 19, 2023
Last day for Plaintiff to file Motion for Final Approval / Fee Motion	August 8, 2023
Last day for Class Members to submit objections, challenges to Workweeks and/or Pay Periods, and requests for exclusion (“Response Deadline”)	August 18, 2023
Last day for Parties to respond to objections	August 23, 2023
Hearing on Motion for Final Approval / Fee Motion	August 30, 2023, at _____ a.m./p.m.
Last day to file Final Accounting	April 5, 2024

J. CONCLUSION

For the stated reasons, Plaintiff’s unopposed motion for preliminary approval should be granted.

1
2 Dated: March 28, 2023

Respectfully submitted,
THE KICK LAW FIRM, APC

3 By: /s/ Taras Kick
4 Taras Kick
5 Greg Taylor
6 Attorneys for Plaintiff Albert Lizarraga
7 and all others similarly situated
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to this action. My business address is 815 Moraga Drive, Los Angeles, California 90049. On the date of execution below, I served the following document or documents:

- **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT;**
- **DECLARATION OF GREG TAYLOR IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL; EXHIBITS**
- **DECLARATION OF ALBERT LIZARRAGA IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL;**
- **DECLARATION OF ERIC SPRINGER ON BEHALF OF SIMPLURIS, INC. (PROPOSED SETTLEMENT ADMINISTRATOR);**
- **DECLARATION OF RICHARD RAHM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT AGREEMENT; and**
- **DECLARATION OF BOB MCGILL IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT AGREEMENT.**

☒ **By electronic service (via electronic filing service provider.)** I caused the documents to be electronically transmitted to Case Anywhere, an electronic filing service provider, at www.caseanywhere.com pursuant to the Court's Electronic Case Management Order governing the matter and mandating electronic service to person(s) at the address(es) listed below. The transmission was reported as complete and without error to the addressees as stated below.

Richard Rahm richard.rahm@us.dlapiper.com DLA Piper LLP (US) 555 Mission Street Suite 2400 San Francisco, CA 94105 T: (415) 836-2524 F: (415) 659-7324	Attorneys for Defendant DIGBY SOUTHWEST, INC.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **March 28, 2023**.

/s/ Dariane Rose
Dariane Rose