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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

JEREMIAH VILLARREAL and RICARDO GASCA, on behalf of themselves, all others similarly situated, and on behalf of the general public,

Plaintiff,

v.

WILDWOOD EXPRESS; and DOES 1-100, inclusive,

Defendants.

Case No. 18CECG00417

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION, APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING DATE

Date: October 7, 2020
Time: 3:30 p.m.
Dept.: 501
Judge: Hon. D. Tyler Tharpe

Complaint Filed: January 13, 2017
Trial Date: None Set

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I. INTRODUCTION

Plaintiffs Jeremiah Villarreal and Ricardo Gasca (hereinafter "Plaintiffs"), on behalf of themselves and the approximately 200-member putative class[1] respectfully request that this Court preliminarily approve the proposed Joint Stipulation and Settlement Agreement (hereinafter "Joint Stipulation"),[2] entered into between Plaintiffs and Defendant Wildwood Express (hereinafter "Defendant" or "Wildwood") (collectively Plaintiffs and Defendant are referred to as the "Parties"), which seeks to resolve claims in the above-captioned matter in exchange for a non-reversionary settlement amount of $390,000. The proposed Settlement Class is comprised of all current and former truck drivers who performed services for Defendant at any time from January 13, 2013, to the date the Court grants preliminary approval of the settlement.

It is requested this Court grant preliminary approval, as, when analyzing the strengths and vulnerabilities of the class claims along-side Defendant's potential liability exposure, this proposed settlement of $390,000 – **which is estimated to pay class members an average settlement share amount of approximately $937.56[3]** – is well within the range of reasonableness. Further, the proposed settlement satisfies the criteria for preliminary approval under California Rule of Court 3.769.

The Joint Stipulation and Notice distribution plan were the products of non-collusive, arm's-length negotiations by informed counsel and parties. The settlement is fair, reasonable, and adequate to all. Accordingly, Plaintiffs seek: (1) preliminary approval of the settlement; (2) provisional certification of the Settlement Class; (3) appointment of Plaintiffs as Class Representatives; (4) appointment of Mara Law Firm, PC, as Class Counsel; (5) approval of the Parties' proposed notice of class action settlement; (6) an order scheduling the hearing date for final approval; and (7) an

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[1] *See* Declaration of Mark Anthony Woods, Jr. ("Woods Dec.") ¶ 6.

[2] The Joint Stipulation is attached to the Declaration of David Mara, Esq. ("Mara Dec.") as **Exhibit 1**. The Joint Stipulation was amended to address the concerns raised by the Court in its January 21, 2020 Court Order Denying Preliminary Approval ("Order"); a redline version of the Joint Stipulation reflecting these changes is attached to the Mara Dec. as **Exhibit 2**.

[3] The Net Settlement Amount is projected to be approximately $187,513. There are approximately 200 Settlement Class Members. $187,513 divided by 200 Settlement Class Members equals approximately $937.56 on average per Settlement Class Member. Participating Class Members will receive an individual settlement payment based upon the number of workweeks they worked for Defendant. Mara Dec. ¶ 19.

entry of a preliminary approval Order.

II. BACKGROUND

Defendant Wildwood Express is a trucking company that provides hauling services to the farm community in Central California. Defendant employs drivers to haul its customers' loads throughout California. Plaintiffs Jeremiah Villareal and Ricardo Gasca are formerly employed drivers for Defendant. Mara Dec. ¶ 20; *see also* Declaration of Jeremiah Villarreal ("Villarreal Dec.") ¶ 3; Declaration of Ricardo Gasca ("Gasca Dec.") ¶ 3.

Plaintiff Villarreal filed a putative class action complaint in the Alameda County Superior Court against Defendant on January 13, 2017. The complaint sought damages, restitution, statutory penalties, interests, and other relief based on the following alleged causes of action: 1) failure to pay straight time wages; 2) failure to pay overtime; 3) failure to provide meal periods; 4) failure to authorize and permit rest periods; 5) knowing and intentional failure to comply with itemized employee wage statement provisions; 6) failure to pay all wages due at termination; and 7) violations of Unfair Competition Law ("UCL"). Per the Parties' stipulation, on January 19, 2018, the case was transferred to Fresno Superior Court. On January 14, 2020, Plaintiffs filed a First Amended Complaint adding Plaintiff Ricardo Gasca and claims for violation of the Private Attorneys General Act ("PAGA"), which allege the same violations as the class claims but seek additional civil penalties, costs, attorney's fees, and other relief under the PAGA. On February 27, 2020, Plaintiffs filed a Second Amended Complaint to address the Court's concerns regarding the PAGA cause of action.[4] Mara Dec. ¶ 21.

Defendant denies the allegations of the action in their entirety, denies any liability or wrongdoing of any kind associated with the claims alleged in this action, and further denies that, for any purpose other than settling this action, this matter is appropriate for class treatment or that Plaintiffs' PAGA claims would be manageable. Defendant further contends that it has complied with all applicable California laws, the California Labor Code, the applicable California Wage Order(s), and the Unfair Competition Law. Defendant finally contends that, if this matter were to

[4] *See* Order at Page 1.

be litigated further, they would have strong defenses to oppose class certification and succeed on the merits of Plaintiffs' causes of action. Mara Dec. ¶ 22.

III. INVESTIGATION AND MEDIATION

A. Discovery And Investigation

Through discovery, Plaintiffs sought numerous documents and substantial amounts of data that were needed to evaluate the case. These documents included requests for time and wage records for the Class, employee handbooks in place during the class period, any policies regarding meal breaks, rest breaks, the payment of wages, and employee training in place during the class period. Plaintiffs also requested data surrounding the number of current and former employees, as well as the number of shifts worked by Class Members and the average hourly rate of pay for Class Members during the relevant time period, to establish a potential exposure model in preparation for mediation. Mara Dec. ¶ 23.

This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the production of nearly thirty thousand documents, including Defendant's employee handbook containing the wage and hour policies at issue, payroll summaries, paystubs and time records for Plaintiffs and Class Members, and additional relevant policies. The data requests yielded information regarding numbers of current and former employees, number of shifts, and the average rate of pay for drivers during the class period. Plaintiffs also took the deposition of Defendant's Person Most Qualified, Mark Woods Jr., Defendant's Vice President. Mara Dec. ¶ 24.

B. The Parties' Disputed Positions

i. Federal Preemption

This bulk of this case hinges on whether Plaintiffs' and Class Members' claims for Defendant's failure to provide compliant meal and rest periods under California law are preempted by federal law. On December 28, 2018, the Federal Motor Carrier Safety Administration ("FMCSA") issued an opinion ("the FMCSA Opinion") determining that the California meal and rest break provisions are more stringent than the Agency's hours of service regulations, that they have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, that they are incompatible with the Federal hours of service regulations, and

that they cause an unreasonable burden on interstate commerce. Thus, California meal and rest break laws for property-carrying commercial motor vehicle drivers covered by the FMCSA's hours of service regulations, therefore, are preempted under 49 U.S.C. 31141(c). Mara Dec. ¶ 25; *see* "Order; Grant of Petition for Determination of Preemption" attached to the Declaration of Matthew Crawford in Support of Plaintiffs' Request for Judicial Notice ("Crawford Dec.") and attached to the Mara Dec. as **Exhibit 3**.

Plaintiffs' argument is twofold: 1) the FMCSA Opinion is not entitled to a level of deference that gives it the effect of law; and 2) the FMCSA Opinion cannot and does not apply retroactively. First, under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), or *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) ("*Skidmore*"), the court must determine the Congressional authority granted to the agency interpreting the statues at issue to determine if the interpretation must be treated binding authority. "The question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its authority." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). Plaintiffs claim the FMCSA Opinion is entitled to no deference under either *Chevron* or *Skidmore*, because the Opinion interprets not only Section 31141, but also the interplay of that statute with other statutes, the California meal and rest break laws, that the Secretary *does not administer*, a sweeping overextension by the Agency of which Congress clearly had no intent on permitting. Mara Dec. ¶ 26.

The United States Supreme Court recently opined on an analogous situation in *Epic Sys. Corp. v. Lewis*, ___ U.S. ___, 138 S. Ct. 1612, 1629 (2018) ("*Epic*"). In *Epic*, the Supreme Court decidedly and unequivocally addressed the issue at hand here in refusing to give *Chevron* deference to a National Labor Relations Board opinion that the National Labor Relations Act displaces the Federal Arbitration Act:

> The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation to an agency to interpret a "statute which it administers." . . . Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a

> second statute it does not administer. One of Chevron's essential premises is simply missing here. . . [¶] It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies . . . An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'bootstrap[ping] itself into an area in which it has no jurisdiction.'" . . . All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment . . .

(Citations omitted.) Plaintiffs contend this supports their claim that whether California's meal and rest break laws are "on commercial motor vehicle safety" is a question for the independent interpretive judgment of the courts. It is not a question for the FMCSA, which seeks to expand the scope of its own regulations at the expense of the protections afforded by California's wage and hour laws. Mara Dec. ¶ 27.

Skidmore affords a second form of deference to an agency's interpretation of a federal statute—an agency interpretation is entitled to "respect according to its persuasiveness." *United States v. Mead Corp.* (2001) 533 U.S. 218, 221. However, *Skidmore*, like *Chevron*, is applicable only "when an agency with rulemaking power interprets *its governing statute* without invoking such authority." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (citing *Mead*; emphasis added*)*; *Stephenson v. Office of Pers. Mgmt.*, 705 F.3d 1323, 1331 (Fed. Cir. 2013) ("*Skidmore* deference applies to 'an agency administering its own statute'"). The FMCSA Opinion interprets not only Section 31141, but also the California meal and rest break laws that the Secretary does not administer. The Secretary, through the FMCSA, thereby, "bootstrap[s] itself into an area over which it has no jurisdiction or expertise," undoing legislative intentions and overstepping the agency's bounds. *Epic*, 138 S. Ct. at 1629. Thus, Plaintiffs believe that the FMCSA Opinion cannot be given the effect of law, and therefore cannot be said to preempt any of the class members meal and rest period claims. Mara Dec. ¶ 28.

Second, even if the Court held that the FMCSA opinion was entitled to *Chevron* or *Skidmore* deference, Plaintiffs claim that Defendant is still liable for violating California law for nearly the entirety of the Class Period prior to December 28, 2018, as the FMCSA Opinion would only apply prospectively. Federal agency decisions and orders, like FMCSA's December 21, 2018 Decision,

are "subject to the presumption of prospectivity that attends true exercises of legislative authority." *Gutierrez-Brizuela v. Lynch* (10th Cir. 2016) 834 F.3d 1142, 1144, citing *De Niz Robles v. Lynch* (10th Cir. 2015) 803 F.3d 1165. Consistent with this, as the United Supreme Court found over thirty years ago, administrative rules and orders are not retroactively applied *unless "the power to promulgate retroactive rules…is conveyed by Congress in express terms.*" *Bowen v. Georgetown University Hospital* (1988) 488 U.S. 204, 208. The *Bowen* Court explained:

> It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress…Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, ***a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.***

Id. (emphasis added). Mara Dec. ¶ 29.

Plaintiffs argue that the FMCSA Opinion is subject to the presumption of prospectivity and because the statutory grant of authority (49 U.S.C. 31141) does not *expressly* permit it to issue retroactive preemptive determinations, it cannot be applied retroactively. Section 31141 simply grants the Agency authority to issue preemption determinations and does not state that it's determinations will apply retroactively. Subsection (a) of section 31141 reads: "Preemption after decision. A state may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced." There is no *express* congressional permission granted the Agency in section 31141 to issue preemption determinations retroactively and therefore no basis to find Plaintiffs' meal and rest break claims – which arose exclusively during the time when the Agency did not find for preemption - impacted by the determination. Mara Dec. ¶ 30.

Plaintiffs point to two decisions reached the same conclusion regarding retroactivity. In *Ryan v. JBS Carriers, Inc.* (LASC Sup. Case No. BC624401), Judge Buckley ruled against retroactivity on the ground that 31141 does not visage an express intent to permit the agency with retroactive

rule making authority. *See* "Order Denying in Part Defendant JBS Carriers, Inc.'s Motion for Summary Adjudication" attached to the Crawford Dec. as **Exhibit C** and attached to the Mara Dec. as **Exhibit 5**. In ruling that the FMCSA Opinion does not preclude recovery on claims that accrued before December 21, 2018, the Court was guided by three fundamental principles of law: (1) Administrative agencies are creatures of statute that have no independent 'constitutional or common law existence or authority, but only those authorities conferred upon [them] by Congress.;' (2) Legislative enactments – as well as administrative acts are presumed to apply only prospectively, and courts will only apply them retroactively when 'their language requires this result;' and (3) Judicial decisions – on the other hand – are presumed to apply retroactively, and courts will only deny 'retroactive effect to 'a new principle of law' if such a limitation would avoid 'injustice or hardship' without unduly undermining the 'purpose and effect' of the new rule. These principles led Judge Buckley to a finding against retroactive application:

> Here, the Court cannot say with any level of certainty that section 31141 authorizes the Agency to issue a determination that applies retroactively and restricts recovery for the already accrued claims and vested rights of Plaintiffs…Indeed, as Plaintiffs note section 31141(a) is titled 'preemption after decision.' Though weak, this language is – at best – indicative of some Congressional intent for a prospective-only temporal effect, and – at worst – sufficiently ambiguous to be able to overcome the presumption that Congress did not intend to grant the Agency the authority to extend its decisions retroactively.

See Mara Dec., **Exhibit 5**, pg. 7-8, citations omitted. Judge Bernal in the Central District reached a similar conclusion, finding no evidence granting the Secretary of Transportation the power to issue "retroactive preemption determinations," and identifying the language of the FMCSA Opinion itself as "strongly suggest[ing] prospective, not retroactive, application." *North v. Superior Hauling & Fast Transit, Inc.* (C.D.Cal. May 31, 2019, No. EDCV 18-2564 JGB (KKx)) 2019 U.S.Dist.LEXIS 217010, at *9. Mara Dec. ¶ 31.

Defendant contends that the FMCSA Opinion is fully enforceable and extinguishes Plaintiffs' and the Class Members' claims for meal and rest period violations in their entirety (not only for purported violations after the opinion was issued), as the truck drivers who are included in the class are the individuals encompassed by this binding federal precedent. Indeed, Wildwood

Express provides transportation of packaging and farming supplies throughout California and Arizona, including trans-loading of reusable plastic containers originating in Chicago, Texas, and Georgia. *See* Woods Dec. ¶ 3. All of the trucks used by Wildwood Express are licensed as commercial motor vehicles as required by state and federal law. *See* Woods Dec. ¶ 4-5. As Wildwood Express is engaged in interstate commerce operating commercial motor vehicles, Wildwood Express is subject to both state and federal hours of service requirements and is registered with both the California and federal Departments of Transportation ("DOT"). *Id*. All drivers who performed services for Wildwood Express from January 13, 2013 through the present drove Wildwood Express' trucks to transport those farming supplies and plastic containers were and are subject to FMCSA's Hours of Service rules. *Id*. In fact, all drivers who drive for Wildwood are hired to be "long-haul" drivers and can at any point be called upon to drive interstate routes, depending on the needs of the customer. *See* "Deposition of Mark Woods, Jr." Transcript Excerpts attached to the Mara Dec. as **Exhibit 11,** 10:20 – 11:7. Thus, as the FMCSA Opinion applies specifically to property-carrying commercial motor vehicle drivers covered by the FMCSA's hours of service regulations, any purported claims for violations of California's meal and rest period laws are entire preempted and unenforceable. Further, Defendant argues that the agency has already issued its legal opinion in response to an inquiry on the issue of retroactive application of the FMCSA Opinion, wherein the agency stated it intended the decision to retroactively apply, and precluding court's from providing any relief inconsistent with the FMCSA Opinion, regardless when the harms alleged occurred before or after the opinion was issued; *see* "FMCSA Legal Opinion of the Office of the Chief Counsel" attached to the Crawford Dec. as **Exhibit B** and attached to the Mara Dec. as **Exhibit 4**.

Defendant can point to numerous state and federal decisions enforcing the FMCSA opinion and granting summary judgment as to meal and rest period claims for truck drivers subject to the Federal Hours of Service requirements, to which Plaintiff and Class Members were indisputably beholden. Specifically, in cases like *Ayala v. U.S Xpress Enterprises, Inc.*, 2019 U.S. Dist. LEXIS 77089, 2019 WL 1986760, at *3 (C.D. Cal. May 2, 2019), courts have applied the FMCSA opinion to enter summary judgment on claims like those made here, finding both that "retroactivity" was not

at issue because the courts lack authority to enforce the preempted laws, and that any challenge to the opinion must be brought in United States Courts of Appeal. Indeed, these were the very issues raised in Defendant's Motion for Summary Adjudication that was pending prior to the Parties reaching this settlement, and numerous decisions that have been issued after *Ayala* have reached the same conclusion. *See* "Order Granting Defendant's Motion for Judgment on the Pleadings" in *Garda Wage and Hour Cases* (LASC Sup. Case No. JCCP4828), attached to the Crawford Dec. as **Exhibit D** and attached to the Mara Dec. as **Exhibit 6**; *Robinson v. Chefs' Warehouse, Inc.*, No. 15-CV-05421-RS, 2019 WL 4278926, at *4 (N.D. Cal. Sept. 10, 2019) (finding the reasoning of *Ayala* persuasive and holding the court had no authority to enforce the preempted law at all, including retroactively); *Henry v. Cent. Freight Lines, Inc.*, No. 2:16-CV-00280-JAM (EFB), 2019 U.S. Dist. LEXIS 99594, 2019 WL 2465330, at *4 (E.D. Cal. June 13, 2019) (granting summary judgment to all California meal and rest break claims as preempted); *Connell v. Heartland Express*, No. 2:19-CV-09584-RGK-JC, 2020 U.S.Dist.LEXIS 29235, at *8 (C.D.Cal. Feb. 6, 2020) ("[T]his Court concurs with the line of cases that have found that the FMCSA order applies retroactively by necessity because the FMCSA order forecloses present enforcement of the preempted laws.").

Plaintiffs believe their meal and rest period claims are the strongest claims in this case, not only in the evidence they have obtained, but also in terms of obtaining class certification and Defendant's potential exposure. As discussed at length above, numerous different state and federal courts have reached complete opposite conclusions when faced with this very issue. Therefore, Plaintiff's arguments, as outlined below, are only relevant if the Court were to find that the FMCSA opinion has no, or only a limited, effect on Plaintiffs' case. Because of this, Plaintiffs had to take into consideration the possibility that Defendant's position could prevail and had to discount their damage exposure significantly. Mara Dec. ¶ 32.

ii. Meal And Rest Periods

Based upon the discovery and litigation conducted, Plaintiffs contend – and Defendant disputes – that Class Members are always subject to Defendant's control and command, including during meal and rest breaks. Plaintiffs allege that Defendant has uniform policies which: 1) require

Class Members to guard and protect Defendant's trucks and the customers' load from damage and/or theft throughout the entirety of their shift; and 2) require Class Members to respond to messages from Defendant throughout the entirety of their shift. Plaintiffs claim that the duties for class members to guard and protect their trucks and its cargo, as well as the duty to respond to messages from Defendant, applies even during meal and rest periods. As a result, Class Members are not provided with meal and rest periods in which they are free to use the time for their own purposes. Mara Dec. ¶ 33.

Plaintiffs argue that the cases *Brinker Restaurant Corp. v. Superior Court* ("*Brinker*"), (2012) 53 Cal.4th 1004, and *Augustus v. ABM Security Services, Inc.* ("*Augustus*"), (2016) 2 Cal. 5th 257, provide that employers are required to relinquish any control over how employees spend their break time, and relieve their employees of all duties. Plaintiffs contend that when an employer requires drivers to guard and protect their truck and trailers during meal and rest periods, or to respond to messages during meal and rest periods, the employer has impermissibly imposed a restraint not inherent in the meal and rest period requirements itself, and places drivers on-duty for meal and rest periods. Under California Labor Code § 226.7(b), "[a]n employer shall not require an employee to work during a meal or rest . . . period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission . . . ." If an employer does not provide a duty-free meal or rest period, i.e., one that is free of employer control, the 226.7 premium is triggered. Mara Dec. ¶ 34.

In support of these claims, Plaintiffs point to Defendant's Employee Handbook and the testimony obtained when deposing Defendant's Person Most Qualified, Mark Woods Jr., Defendant's Vice President. As to Plaintiffs' claim that Class Members were expected to guard and protect Defendant's trucks and their loads, Plaintiffs point to Defendant's Employee Handbook, which contains a section entitled "Prohibited Conduct," containing "a list conduct that is prohibited and will not be tolerated by Wildwood Express." *See* "Prohibited Conduct" Policy attached to the Mara Dec. as **Exhibit 9**. Plaintiffs point to Number 3 on this list of prohibited conduct, which forbids "[t]heft, deliberate, or careless damage of any Company property or the property of any employee or customer." *Id*. Plaintiffs allege that under this uniform policy, Class Members would face potential discipline should their trucks be damaged and/or stolen, or should the customer's load be

damaged and/or stolen, when in the custody of the class member, and that they could face this discipline regardless of whether they were on a meal or rest period when the event occurred. Mara Dec. ¶ 35; Villarreal Dec. ¶ 10; Gasca Dec. ¶ 7.

For Plaintiffs' claim that Class Members were expected to respond to messages at all times throughout their shifts, Plaintiffs point to the testimony of Defendant's Person Most Qualified, Mark Woods Jr., Defendant's Vice President. In his deposition, Mr. Woods explained that when Defendant needs to reach a driver when they are out on their route, they send a message to that driver's tablet. *See* Mara Dec., **Exhibit 11,** 20:14 – 23:5. Mr. Woods confirmed that Defendant expects drivers to read these messages and respond. *Id*. Should a driver not respond to the message promptly, Mr. Woods explained that Defendant would continue to reach out to the driver until they responded, even through alternative methods, if necessary. *Id*. Plaintiffs allege that this uniform practice of messaging drivers until they respond occurs throughout the entirety of the workday, even during meal and rest periods, constantly interrupting Class Members during break time and denying them their right to duty-free meal and rest periods. Mara Dec. ¶ 36; Villarreal Dec. ¶ 11-12; Gasca Dec. ¶ 8-9.

As addressed above, Defendant asserts that Plaintiffs' claims for failure to provide meal and rest periods are completely preempted by federal law. Further, Defendant claims that despite Plaintiffs' contentions, it has, at all times during the Class Period, complied with California law, and that its meal and rest period policies are entirely compliant with the requirements set forth in *Brinker* and *Augustus*. Defendant contends that Plaintiffs' theories of liability alleged above are in direct contradiction to these meal and rest period policies contained within its employee handbook. *See* "Time Records; Rest Breaks and Meal Periods" Policies attached to the Mara Dec. as **Exhibit 8**. Defendant's meal and rest period policies explicitly state that Class Members are provided with "a reasonable opportunity" to take meal and/or rest periods, that Class Members will be "relieved of all duty" during their meal and/or rest periods, and that Class Members will be afforded the ability to "leave the premises" during their meal and rest periods. *Id*. Defendant further points out, that both Defendant's meal period and rest period policies, in clear and bolded text, contain the following provision:

> **If for any reason employee is not provided a [meal period or rest break] in accordance with [these policies], or if the employee is in any way discouraged or impeded from taking a [meal period or rest break], or from taking the full amount of time allotted to employee, the employee is required to note this on the employee's weekly timesheet and immediately notify the Vice President or the Operations Manager.**

Id. As such, Defendant notes that even in the rare situation in which a Class Member was somehow unable to take a meal or rest period, they are able to report this to management and be compensated as *Brinker* and *Augustus* require.

In light of these policies, Defendant claims it is clear that Plaintiffs' claims lack any merit. Defendant contends that Plaintiffs' argument that Class Members are required to guard and protect their trucks and its cargo during meal and rest periods completely twists a singular line in the employee handbook simply meant to remind Class Members to act responsibly, not to put them on duty in direct violation of Defendant's own meal and rest period policy. Further, Defendant argues that its meal and rest period policies clearly state the Class Member is free to leave the premises: in this instance, their trucks. Additionally, Defendant asserts that Mr. Woods *never* testified Class Members are required to respond to messages while on a meal or rest period, nor did he even infer it; this contention is similarly refuted by Defendant's robust meal and rest period policies. Lastly, Defendant argues that California law only requires employers to make duty-free meal and rest periods available. Defendant is not required to police drivers to take their meal and rest periods. Any choice the driver makes to take a meal or rest period while staying with the truck, or to respond to a message during a meal or rest period, was solely the choice of each individual Class Member, not the result of any purported mandate from Defendant.

iii. Unpaid Wages

Furthermore, Plaintiffs contend that Defendant has a uniform policy that results in a failure to pay Class Members for all hours worked. Under California law, employees must be paid for all hours worked. Hours worked is defined in Wage Order 9-2001[5] as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered

[5] This is the Wage Order that governs the driver class members in this case.

or permitted to work, whether or not required to do so." Wage Order 9-2001, Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015). Under this standard, "it is only necessary that the worker be subject to the control of the employer in order to be entitled to compensation." *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000). The *Morillion* Court reasoned that an employee is under the employer's control and entitled to compensation when the employer '"directs, commands or restrains' an employee." *Morillion,* 22 Cal. 4th at 583, *quoting Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal. App. 4th 968, 975. Mara Dec. ¶ 37.

At the onset of this matter, Plaintiffs had alleged that Defendant "had a continuous and widespread policy of only paying for the task of driving and not paying Plaintiffs and the class of drivers for all other non-driving duties, including, but not limited to, filling out paperwork, loading, unloading, securing, communicating with customers and dispatch," and that Defendant had "a policy of "clocking-out" Plaintiffs and those similarly situated for thirty (30) minute meal periods (referred to as "auto-meal deduct" or "meal deduct"), even though Plaintiffs and those similarly situated were suffered and/or permitted to work during these deduction periods, thereby deducting thirty (30) minutes of paid time, including straight time and overtime." *See* Order at Page 3. While Plaintiffs *had* contended that Class Members were not paid for work tasks other than driving and forced to work through unpaid meal periods, which was allegedly then deducted from the Class Members' time records, this was not the case. Defendant does not use timeclocks but requires Class Members to log their own time on the tablets that are provided for them. *See* Mara Dec., **Exhibit 11,** 24:17 – 26:7. After conducting discovery on Defendant's timekeeping procedures and records, Plaintiffs confirmed that Defendant pays Class Members for all time logged in their time records, *even when the Class Member is not driving*, and that Defendant *does not automatically deduct time* from Class Members' time logs. Mara Dec. ¶ 38. Samples of records from Plaintiffs and Class Members confirming this are attached to the Mara Dec. as **Exhibits 14-18**.

Rather, Plaintiffs contend, based upon the discovery and litigation conducted, Defendant requires Class Members to perform post-shift work activities, the time for which is not reflected on their time logs. Plaintiffs point to a policy document detailing rules and regulations Defendant expects Class Members to understand and follow when driving for Defendant. *See* "Wildwood Express Drivers Rules & Regulations" attached to the Mara Dec. as **Exhibit 10**. Rule No. 22 states:

"LOGOUT, THEN CHECK YOUR EQUIPMENT BEFORE LEAVING THE YARD." *Id*. Rule No. 23 states: "CHECK IN WITH THE DISPATCH FOR THE YOUR DEPARTURE AND DESTINATION FOR THE NEXT DAY." *Id*. Rule No. 24 states: "TURN IN YOUR PAPER WORK BEFORE YOU GO HOME." *Id*. Plaintiffs allege that under this uniform policy, Class Members are forced to perform these work duties while off the clock (logged out). Plaintiffs argue that this claim is further supported by the testimony obtained from Mr. Woods, in which he attested that Class Members are expected to stop logging their time after their post-trip inspection. *See* Mara Dec., **Exhibit 11,** 26:1-7. Post-trip inspections consist of Class Members examining their respective trucks at the end of the day for defects or any maintenance issues that need to be addressed. However, Plaintiffs assert that these post-trip inspections *do not* encompass the work duties listed in Rule Nos. 22-24. Plaintiffs state that these tasks take approximately fifteen (15) minutes in total to perform; thus, because these tasks are performed off the clock, Class Members are not compensated for this time. Mara Dec. ¶ 39; Villarreal Dec. ¶ 6; Gasca Dec. ¶ 10-11.

Defendant counters that beyond the limited accusations of Plaintiffs, there is no evidence that Class Members performed *any* work-related tasks for which Class Members were not compensated. Defendant further contends that there is no evidence of any kind of uniform practice or policy for drivers to perform work off the clock, and, in fact, Defendant has uniform practices and policies *forbidding* Class Members from working off the clock. Defendant points to its "Time Records" Policy contained in its employee handbook, which not only clearly expresses that working off the clock violates company policy, but that Class Members must also accurately record their time and certify their accuracy, or face disciplinary action, up to and including termination. *See* Mara Dec., **Exhibit 7**. Further, Defendant explains that Mr. Woods *never* testified that these work tasks were to be performed off the clock, and that the term "post-trip inspection" does not possess a singular definition. In fact, Mr. Woods testified that class members have significant freedom when it comes to logging their time on their tablets, permitting Class Members to log in for the day as soon as they arrive in the parking lot, and by that extension, would not be unreasonable to believe that Class Members could simply log out for the day when get in their cars *after* performing the work tasks at issue. *See* Mara Dec., **Exhibit 11**, 24:17 – 25:25. In light of this clear and explicit policy, Defendant argues that it is ridiculous to think a Class Member would purposely clock out

early, perform work for which they are not compensated, and risk their job in the process. Additionally, Defendant contends that the Court would have to ask each and every single Class Member what they believed was the actual company policy was, devolving into individualized issues that would be unsuitable for class certification.

As evidenced above, the Parties took staunchly conflicting positions with respect to Plaintiffs' claims.

C. The Parties Agreed To Engage In Settlement Discussions

The Parties participated in mediation with experienced mediator and former Fresno Superior Court Judge, Associate Justice for the California Court of Appeal, Fifth District, and Associate Justice for the California Supreme Court, Hon. Steven M. Vartabedian (Ret.) on August, 2019. The Parties were able to reach a settlement in principal after a full-day mediation. Thereafter, the Parties met and conferred regarding all the terms of the settlement and finalized their agreement in the Joint Stipulation and Addendum (which has since been in amended as per the Court's request) that the Parties now seek to preliminarily approve. Mara Dec. ¶ 40; **Exhibit 1**.

IV. TERMS OF THE PROPOSED SETTLEMENT

The Parties have agreed (subject to and contingent upon the Court's approval) that this action be settled and compromised for the non-reversionary total sum of $390,000 ("Gross Settlement Amount" or "GSA").

A. Amendments To The Settlement

Pursuant to the Court's January 21, 2020 Order, the Parties have amended the Settlement Agreement as follows:

- Revised the "Released Claims" to be based on the identical factual predicate of the operative pleading.[6]
- Extended the "Response Deadline" for opt-outs and objections to sixty (60) days.[7]
- Revised the requirements for a Class Member to object to the settlement by adding language explaining that objections need to be filed with the Court and removing the demand for discovery as part of the objection process.[8]
- Revised the requirements for a Class Member to request exclusion or opt-out of the settlement and removed the language regarding "Confirmation of Authenticity."[9]

[6] *See* Mara Dec., **Exhibit 1** at Section I(BB); Order at 9, 11.
[7] *See* Mara Dec., **Exhibit 1** at Section I(DD); Order at 11.
[8] *See* Mara Dec., **Exhibit 1** at Section III(I)(3) and (3)(a); Order at 11.
[9] *See* Mara Dec., **Exhibit 1** at Section III(I)(4) and (4)(a); Order at 11.

- Removed the provision entitled "Waiver of Right to Appeal."[10]
- Removed the second sentence from the provision entitled "Release of Claims."[11]
- Revised the provision entitled "No Admission of Liability."[12]

It is unclear what the Court meant in its previous Order when it mentioned a "provision which bars the class representatives from objecting to the settlement."[13] The Parties are unaware of any such language in the Joint Stipulation. To the extent the Court is referring to Section III(I)(5) of the Joint Stipulation, this provision does not bar such an objection, it merely prohibits the Parties from soliciting or encouraging Class Members to object, request exclusion, or file appeals.[14]

B. Deductions From The Settlement

The Parties have agreed that the following deductions will be made from the GSA, subject to Court approval: (a) attorneys' fees of up to $129,987 (33.33% of the GSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement, and securing Court approval; (b) litigation costs estimated at approximately, and not to exceed, $20,000;[15] (c) Class Representative General Release Payments to the named class representatives, Jeremiah Villarreal and Ricardo Gasca, in a sum not to exceed $10,000 each in consideration for agreeing to a general release of claims, initiating and prosecuting this class action, serving as Class Representatives, work performed, and risks undertaken for the payment of attorneys' fees and costs in the event he had been unsuccessful in the matter; (d) settlement administration fees and expenses to ILYM Group, Inc. (hereinafter "ILYM"), estimated not to exceed approximately $10,000; and (e) Labor and Workforce Development Agency ("LWDA") payment of $22,500 (which is 75% of $30,000 allocated to Plaintiffs' claims under PAGA.[16] Mara Dec. ¶ 41.

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[10] *See* Mara Dec., **Exhibit 1** at Section III(I)(7); Order at 11.
[11] *See* Mara Dec., **Exhibit 1** at Section III(J); Order at 12.
[12] *See* Mara Dec., **Exhibit 1** at Section III(L)(1); Order at 12.
[13] *See* Order at 11.
[14] *See* Mara Dec., **Exhibit 1** at Section III(I)(5).
[15] These will be tabulated and presented to the Court at final approval. Plaintiffs will only seek the amount of actual costs incurred during the litigation of this case. If the amount requested is less than the amount actually incurred, the remainder will be added to the NSA for distribution to Participating Class Members.
[16] Settlements that include PAGA penalties must be approved by the Superior Court and submitted to the LWDA. Pursuant to California Labor Code § 2699(l)(2), "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." *See* **Exhibits 25-26** attached to the Mara Dec.

C. Calculation Of The Settlement Payments To Class Members

After all Court-approved deductions from the GSA, it is estimated that $187,513 ("Net Settlement Amount" or "NSA"), less all applicable employee taxes, will be distributed to Class Members. Subject to the terms and conditions of the Joint Stipulation, the Settlement Administrator will calculate, and issue individual settlement payments based on the following formula:

> Each Participating Class Member will receive a proportionate share of the Net Settlement Amount that is equal to (i) the number of weeks he or she performed services for Defendant in California based on the Class data provided by Defendant, divided by (ii) the total number of weeks in which all Participating Class Members performed services for Defendant based on the same Class data, which is then multiplied by the Net Settlement Amount. One day in which services were performed in a given week will be credited as a week for purposes of this calculation. Therefore, the value of each Class Member's Individual Settlement Share ties directly to the amount of weeks that he or she performed services for Defendant. *See* Mara Dec., **Exhibit 1** at Section III, Paragraph F(1)(a).

The precise number of compensable weeks worked per Class Member will not be known until Defendant has tabulated them, following preliminary approval. Under no circumstances will any portion of the settlement revert to Defendant. Mara Dec. ¶ 42.

D. Notice To The Class

Within seven (7) business days after the entry of the Preliminary Approval Order,[17] Defendant shall deliver to the Settlement Administrator an electronic database, which will list for each Class Member: (1) first and last name; (2) last known mailing address; (3) social security number; (4) hire and termination dates; and (5) the total number of weeks during which the Class Member performed any actual services during the Class Period as a member of the Class ("Database"). If any or all of this information is unavailable to Defendant, Defendant will so inform Class Counsel and the Parties will make their best efforts to reconstruct or otherwise agree upon how to deal with the unavailable information. The Settlement Administrator will conduct a skip trace for the address of all former Defendant employee Class Members. The Database shall be based on Defendant's payroll, personnel, and other business records. The Settlement Administrator shall maintain the Database and all data

[17] The Court's order preliminarily approving the proposed Settlement. (*See* **Exhibit 1** attached to the Mara Dec. at Section I(AA).

contained within the Database as private and confidential. Mara Dec. ¶ 43.

Within fourteen (14) business days after entry of the Preliminary Approval Order, the Settlement Administrator will mail the Class Notice to all identified Class Members via first-class regular U.S. Mail, using the mailing address information provided by Defendant and the results of the skip trace performed on all former Defendant employee Class Members. Class Members will have sixty (60) days from the initial mailing of the Notice to respond to the settlement.[18] Mara Dec. ¶ 44.

E. Distribution Of Funds

Fifteen (15) business days after the Effective Final Settlement Date,[19] the Settlement Administrator shall disburse: (1) the Net Settlement Amount to be paid to Participating Class Members; (2) the Attorney Fee Award and Cost Award to Class Counsel for attorneys' fees and costs, as approved by the Court; (3) the Class Representative General Release Payments paid to the Class Representatives, as approved by the Court; (4) the Administration Costs, as approved by the Court; and (5) the PAGA Payment to the LWDA and to Participating Class Members, as approved by the Court. Mara Dec. ¶ 45.

Class Members must cash or deposit their Individual Settlement Payment checks within one hundred and eighty (180) days after the checks are mailed to them. If any checks are not redeemed or depositing within ninety (90) calendar days after mailing, the Settlement Administrator will send a reminder postcard indicating that unless the check is redeemed or deposited in the next ninety (90) days, it will expire and become non-negotiable, and offer to replace the check if it was lost or misplaced. If any checks remain uncashed or not deposited by the expiration of the ninety (90) day period after mailing the reminder notice, the Settlement Administrator will, within two hundred (200) calendar days after the checks are mailed, tender the remaining funds to Legal Aid at Work, in conformity with California Code of Civil Procedure section 384 ("the court…shall direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to nonprofit organizations or foundations to support projects that will benefit the class…" *See* Cal. Code Civil. Proc. § 384(b); Mara Dec., **Exhibit 1** at Section III(I)(9).

[18] *See* Order at 11.

[19] The effective date of this Settlement will be the date the court enters judgment granting final approval of the settlement. *See* Mara Dec., **Exhibit 1** at Section I(P).

F. Release Of Claims

In exchange for a Settlement Payment, Class Members are informed that, by accepting the payment, they release all known and unknown claims state law claims that ***for any and all claims that were or could have been asserted arising out of the identical factual predicate of the complaint***[20] filed in the matter. Released Claims include failure to pay all straight-time and overtime wages, failure to provide meal and rest periods, failure to itemize wage statements, failure to pay all wages owed at the time of termination, for violations of California's Unfair Competition Law, and PAGA. The release will be as to the Released Parties, which shall include Defendant, its current or former parents or subsidiaries, and all stockholders, officers, employees, directors, principles and agents thereof. *See* Mara Dec., **Exhibit 1** at Section I, Paragraph BB-CC. The Released Claims are limited to the Class Period which runs from January 13, 2013, to the date the Court grants preliminary approval of the settlement. *See* Mara Dec., **Exhibit 1** at Section I, Paragraph I.

i. Class Representative General Release Payments

In addition, Plaintiffs agreed to a general release of his claims against Defendant in exchange for $10,000 Class Representative General Release Payments. Courts routinely approve service payments, or incentive awards, to compensate a named plaintiff for the services he or she provides and the risks he or she incurs during class litigation. *See In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393; *see also Bell v. Farmers Ins. Exch.* (2004) 11 Cal.App.4th 715, 725-26 (upholding services payments to class representatives); *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (upholding incentive awards to plaintiffs that, when added to their individual recoveries, amounted to more than twice as much as the average payment to class members). Courts have regularly and routinely granted approval of settlements containing such enhancements. *See*, *e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003).[21] In Class Counsel's experience, the typical enhancement award in wage and hour class action settlements ranges from

[20] *See* Order at 9, 11.

[21] *See*, e.g., *Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) ("present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril, a substantial enhancement award is justified"); *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) ("We also think there is something to be said for rewarding those drivers who protect and help to bring rights to a group of employees who have been the victims of discrimination.").

$5,000 to $75,000. Very commonly there is more than one class representative who receives an award in the above range. Mara Dec. ¶ 46.

The requested enhancement is appropriate and reasonable and unopposed by Defendant. This payment is made, in part, in exchange for Plaintiffs providing Defendant with a general release of their claims. This general release is far greater than the release signed by class members. In addition, in to support of their enhancement request, Plaintiffs submitted declarations detailing the efforts they expended on behalf of the class in order to advance this case to its successful conclusion. *See generally* Villarreal Dec.; Gasca Dec. There is no question that this case would not have reached the same result but for Plaintiffs' involvement and input at all stages of the litigation.

As representative for the absent class members, Plaintiffs risked a potential judgment taken against themselves for attorneys' fees and costs if this matter had not been successfully concluded. *See Early v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000) (losing party is liable for the prevailing party's costs); California Labor Code § 218.5 (prevailing party is entitled to attorneys' fees). Plaintiffs risked having a cost bill entered against them leaving him ultimately liable for potentially hundreds of thousands of dollars in the unexpected possibility that Plaintiffs' counsel did not meet their obligation to cover those costs.

Unfortunately, there have been several judgments entered against class representatives, e.g. *Koehl v. Verio, Inc*. 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for the Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.,* 2007 U.S. Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost on summary judgment, after the case was certified, the named Plaintiff was assessed costs in the sum of $56,788.). The risk of payment of Defendant's costs, in itself alone, is a sufficient basis for an award of the requested enhancement sum. Few individuals are willing to take this risk, and it is clear that the appointed Class Representatives here championed a cause on behalf of others with potentially huge monetary risks.

Additionally, it is common knowledge that the modern-day work force is quite mobile, with employees holding several jobs in a career during their lifetime. It is also true that prospective employers in this computer, high-tech age "Google" and/or do extensive background checks and have

access to Court databases to see if applicants have ever filed a lawsuit or have ever been sued. Here, Plaintiffs litigated against Defendant for a substantial sum of money by their courage to step forward to vindicate not only their own rights but also, those of the similarly situated individuals, all of whom will now receive substantial payments due to the initiation of this action. This matter took place in an industry where everyone knows everyone. Such conduct will not be lost on a prospective employer who has to choose between an applicant who has never sued an employer and one who has done so. The requested enhancement far from compensates Plaintiffs for opportunities they may lose in the future because of the exercise of a Constitutional right to petition the courts for redress of a grievance.

The enhancement request is modest for the work performed, risks undertaken for payment of fees and costs if this case had not been successfully concluded, stigma on future employment opportunities, and the benefits all members of the class as well as all current and future class members will enjoy as a result of Plaintiffs' efforts. Thus, the Court should preliminarily approve the request.

V. ARGUMENT

A. Class Action Settlements Are Subject To Court Review And Approval Under The California Rules Of Court

Rule 3.769 requires court approval for class action settlements.[22] "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (California Rules of Court, Rule 3.769(g).) Rule 3.769 further requires a noticed motion for preliminary approval of class settlements:

> (a) A settlement or compromise of an entire class action, or a cause of action in a class action, or as to a party, requires the approval of the court after hearing.
>
> . . .
>
> (c) Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion.

Courts act within their discretion in approving settlements that are fair, not collusive, and take into account "all the normal perils of litigation as well as the additional uncertainties inherent in complex

[22] The California Supreme Court also has authorized California's trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

class actions." *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n* (1981) 452 U.S. 905.

B. The Settlement Is Fair, Reasonable, And Adequate

In deciding whether to approve a proposed class action settlement under Code of Civil Procedure § 382, the Court must find that a proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-length negotiations; (2) investigation and discovery were 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. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these elements – with the exception of the percentage of objectors, which cannot be anticipated at this stage of the litigation – bearing on the fairness of the proposed settlement are present here and the Court's grant of preliminary approval is therefore requested.

i. The Settlement Was Reached Through Arm's-Length Negotiations

The Settlement was reached as a result of arm's-length negotiations. Though cordial and professional, the settlement negotiations have been, at all times, adversarial and non-collusive in nature. Counsel for the Parties conducted arm's length settlement negotiations through a neutral mediator until the settlement was reached. While Plaintiffs believe in the merits of their case, they also recognizes the inherent risks of litigation and understands the benefit of the Class receiving significant settlement funds immediately as opposed to risking continued litigation in achieving class certification, the merits of the case before and after trial, the damages awarded, and/or an appeal that can take several more years to litigate.

ii. The Settlement Resulted From Thorough Investigation And Discovery

The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before reaching the proposed Settlement, and engaged in sufficient investigation, research and discovery to support the Settlement. The Settlement was only possible following discovery and evaluation of Defendant's policies and procedures, time and pay records, all of which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. This litigation has reached the

stage where "the Parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the Settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

iii. Counsel For Both Parties Are Experienced In Similar Litigation

Both Plaintiffs' counsel and Defendant's counsel are particularly experienced in wage and hour employment law and class actions. Plaintiffs' counsel has significant experience in litigating unpaid wages, unprovided meal and rest periods, misclassification, overtime, and expense reimbursement class actions. Indeed, Plaintiffs' counsel was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.,* which is the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Mara Dec. ¶¶ 1-14.

Plaintiffs' counsel has prosecuted numerous cases on behalf of employees for California Labor Code violations and thus are experienced and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses. This experience instructed Plaintiffs' counsel on the risks and uncertainties of further litigation and guided their determination to endorse the proposed settlement.[23] Mara Dec. ¶¶ 1-14. Defendant's Counsel is likewise well respected in defending wage and hour class actions. Accordingly, both parties are experienced in wage and hour employment law and class actions.

iv. The Proposed Settlement Is A Reasonable Compromise Of Claims

An understanding of the amount in controversy is an important factor into whether the settlement "of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Id.*

In weighing the strength of the plaintiff's case, *Kullar* instructs that the court is not to "decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the

[23] The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Notice of Class Action Settlement has been provided to the Class and they have had an opportunity to respond. This information will be provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

attorneys." *Kullar, supra,* 168 Cal.App.4th at 133. Finally, *Kullar* does not require an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims, provided there is a record which allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at 409. Put differently, "as the court does when it approves a settlement as in good faith under *Code of Civil Procedure* section 877.6, the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness." *Kullar*, *supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500. As the following subsections show, the Parties' investigation and discovery revealed plenty of reasons to discount claims and agree to this settlement.

1. The Settlement Is Fair And Reasonable Based On The Strengths Of Plaintiff's Case And The Risks And Costs Of Further Litigation

The proposed settlement was only possible following discovery, an evaluation of Defendant's policies and practices, time and pay records, which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. Plaintiffs' investigation and discovery resulted in Plaintiffs' contentions that Defendant failed to provide Class Members with duty-free meal and rest periods in compliance with California law and failed to pay all wages to Class Members.

Although, Plaintiffs believe this case is suitable for certification on the claimed bases that there are company-wide policies that Plaintiffs contend show that Class Members were not provided with duty-free meal and rest breaks and not paid all wages, Defendant's counter-arguments raise uncertainties with respect to both class certification and success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court's sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims.[24] Although remaining confident in the strengths of their claims, all of these factors led Plaintiffs to discount the following calculations of potential damage claims.

[24] (*See, e.g.*, *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson's Inc*. (2006) 141 Cal. App. 4th 1422 (affirming denial of certification).

2. Maximum Potential Exposure

In addition to being able to discover the strengths and vulnerabilities associated with Plaintiffs' claims, Defendant provided Plaintiff with statistical information regarding the putative class. At the mediation, Defendant indicated that there are approximately 33 current Class Members working for Defendant and approximately 167 former class members who have terminated their employment at some time during the Class Period. Defendant informed Plaintiffs that these Class Members have worked approximately 48,153[25] shifts during the Class Period with an average hourly rate of $17.00.[26] Mara Dec. ¶ 47; Woods Dec. ¶¶ 6-7.

As discussed above, Plaintiffs contend that Defendant does not provide Class Members with duty-free meal and rest breaks as required under *Brinker* and *Augustus*. Based on these allegations, for each and every shift worked, Class Members would be entitled to two premiums under California Labor Code § 226.7 per shift. Accordingly, Defendant's ***maximum*** exposure under Plaintiffs' meal and rest period claims is $1,637,202 [48,153 (approximate total shifts) x $17.00 (average hourly rate) x 2 violations per shift (one meal and one rest period violation)]. Mara Dec. ¶ 49.

Plaintiff also alleges that Defendant failed to pay all wages because Plaintiffs contend that Defendant's uniform policy requires class members to perform additional work tasks after clocking out at the end of their shifts, which Plaintiffs have estimated took them approximately fifteen (15) minutes. As such, Defendant's ***maximum*** exposure is $204,650.25 for Plaintiffs' unpaid wages claim (48,153 shifts x $17.00 per hour x 0.25 hours). Mara Dec. ¶ 50.

Any unpaid time the Class Members would be entitled to recover through this action would be compensated at the regular rate of pay, not the overtime rate, because Class Members are exempt from overtime under federal law. *See* Order at Page 9. Plaintiffs had contended that because Class Members regularly worked over eight (8) hours per day and over forty (40) hours per week, that Class Members were entitled to overtime under California law. *See* Order at Pages 5-6. However, this was not the case; after conducting discovery and further investigation into Defendant's business, the materials being transported, and the routes driven by Class Members, Plaintiffs

[25] Approximately 10,422 workweeks x approximately 4.62 shifts per week = 48,153 shifts. *See* Woods Dec. ¶ 7; Mara Dec. ¶ 48; *see also* Mara Dec., **Exhibits 14-18**.

[26] Per Defendant's response to Special Interrogatory No. 20. *See* Mara Dec., **Exhibit 12** at Page 11.

confirmed that Class Members are exempt from overtime compensation pursuant to the motor carrier exemption. Mara Decl. ¶ 51.

Industrial Welfare Commission Wage Order 9-2001, which applies to "all persons employed in the transportation industry," is the Wage Order that governs the driver class members in this case. *See* Wage Order No. 9-2001(1). "[T]he courts have shown the IWC's wage orders extraordinary deference, both in upholding their validity and in enforcing their specific terms." *Martinez v. Combs* (2010) 49 Cal.4th 35, 61. Wage Order No. 9-2001(3) provides for the payment of overtime for individuals covered under this wage order. However, Wage Order No. 9-2001(3)(L)(1) provides an exemption for an employer from paying drivers overtime: "The provisions of this section are not applicable to employees whose hours of service are regulated by The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers." *See* Wage Order No. 9-2001(3)(L)(1). This is known as the motor carrier exemption:

> The motor carrier exemption applies to individual employees only if (1) their employer is a carrier subject to the jurisdiction of the Secretary of Transportation under title 49 United States Code section 31502(b) and (2) the individual employees are engaged in activities directly affecting the safety of operation of motor vehicles in interstate or foreign commerce.

Bell v. H.F. Cox, Inc. (2012) 209 Cal.App.4th 62, 77. "Intrastate deliveries of goods are considered to be part of interstate commerce if the deliveries are merely a continuation of an interstate journey," and "[e]ven drivers who do not transport goods in interstate commerce are subject to the jurisdiction of the Secretary of Transportation if, as part of their regular duties, they reasonably could be expected to be called on to make interstate runs. *Id*. at 77-78.

As discussed at length above, all of Defendant's trucks are licensed as commercial motor vehicles. *See* Woods Dec. ¶ 3-5. Defendant is engaged in interstate commerce operating commercial motor vehicles and is subject to federal hours of service requirements, satisfying the first element of the exemption. *See* Woods Dec. ¶ 3-5. As to the second element, with goods such as plastic containers coming from other cities and states in the United States, Class Members are certainly participants in interstate commerce by delivering these containers at the end of an "interstate journey". *See* Woods Dec. ¶ 3-5. Furthermore, all Class Members were and are subject to FMCSA's Hours of Service rules under 49 U.S.C. 395.1, et seq., and could be "reasonably expected" to be

called on to drive an interstate route at any time. *See* Woods Dec. ¶ 3-5; Villarreal Dec. ¶ 4-5; Gasca Dec. ¶ 4-5; Mara Dec., **Exhibit 11,** 10:20 – 11:7. Thus, it was clear to Plaintiffs that the motor carrier exemption would be applicable to Class Members, and that they would be unable to recover any overtime wages. Mara Decl. ¶ 52.

Additionally, if Plaintiffs were to prevail on their unpaid wages claims, they and the Class Members may also be entitled to waiting time penalties and wage statement damages. Plaintiffs calculate the potential ***maximum*** exposure under their waiting time penalties cause of action as $1,005,006 (167 former employees within the three-year statute of limitations x 30 days x 11.8 hour average shift length x $17.00 per hour = $239,769). In addition, Plaintiffs calculate the potential maximum exposure under his wage statement claims as $348,000.[27] As these damages are derivative of Plaintiffs' unpaid wages claims, if Plaintiffs' unpaid wages claims fail, these claims also would fail. Mara Dec. ¶ 53.

PAGA allows the private enforcement of certain California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2) reads, in part, as follows:

> [T]he civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

Plaintiffs allege that Defendant has five (5) violations – unlawful meal periods, unlawful rest periods, unpaid wages, unpaid waiting time penalties, and inaccurate wage statements – of the Labor Code sections which give rise to PAGA penalties.[28] These alleged violations are based upon the same conduct as Plaintiffs' class claims. Based off the data provided to Plaintiffs, there have been approximately 4,191 pay periods[29] during the PAGA statutory period. Plaintiffs calculate Defendant's

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[27] There were 87 Class Members who received a wage statement within the one-year statute of limitations. *See* Defendant's response to Special Interrogatory No. 14 (Mara Dec., **Exhibit 12** at Page 9). 87 Class Members x $4,000 maximum penalty (maximum damages per employee under California Labor Code § 226) = $348,000.

[28] Class Members could potentially to be entitled to greater civil penalties for wage statements under Labor Code §226.3 ($250 for initial violations).

[29] There were 127 "pay periods" (which Defendant initially interpreted to mean how many weeks in which payroll was issued) within the one-year statute of limitations. *See* Defendant's response to Special Interrogatory No. 19 (Mara Dec., **Exhibit 12** at Page 11). 127 weeks of payroll x 33 current Class Members (estimating that Defendant has consistently had approximately 33 drivers at all times) = 4,191.

exposure under PAGA to be a ***maximum*** of approximately $2,724,150.[30] Mara Dec. ¶ 54.

Any PAGA penalty awarded for these violations would need to be calculated at the $100 rate for initial violations, and not the $200 rate for subsequent violations, as Defendant was never on notice of these Labor Code violations prior to the initiation of this lawsuit. "[U]nder California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code. *Vieyara-Flores v. Sika Corp.* (C.D.Cal. June 10, 2019, No. EDCV 19-606 JVS (KKx)) 2019 U.S.Dist.LEXIS 98081, at *13; *see Trang v. Turbine Engine Components Techs. Corp.*, No. CV 12-07658 DDP RZX, 2012 U.S. Dist. LEXIS 179710, 2012 WL 6618854, at *5 (C.D. Cal. Dec. 19, 2012) (citing *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157). Mara Decl. ¶ 55.

For example, in *Chen v. Morgan Stanley Smith Barney, LLC*, the court agreed that a subsequent PAGA penalty is not available without notice:

> "Subsequent" takes on a different meaning under the California Labor Code. *Patel v. Nike Retail Servs., Inc.,* 14–CV–00851–JST, 2014 WL 3611096 (N.D.Cal. July 21, 2014). Under the Labor Code, if an employer does not have notice that they are committing a violation, they are not subject to the heightened penalties. *Amaral v. Cintas Corp. No. 2,* 163 Cal.App.4th 1157, 1209, 78 Cal.Rptr.3d 572 (2008). [Defendant] did not assert that they were on notice of their Labor Code Violations, nor does the single use of the term "deliberate" in [Plaintiff's] complaint amount to her claiming that [Defendant's] violations were willful and intentional. … Therefore, [Defendant's] inclusion of the heightened penalty … is incorrect.

Chen, No. 8:14-CV-01077ODW, 2014 WL 4961182, at *2 (C.D. Cal. Oct. 2, 2014).

In other words, *Amaral* stands for the proposition that employer must have notice that an initial violation must occurred before penalties for subsequent violations can be assessed. *See Amaral*, 163 Cal.App.4th at 1210. Put differently, "subsequent" has a special meaning within the California Labor Code that triggers heightened statutory penalties only after an employer has learned that its conduct violates the Labor Code—that is, pursuant to *Amaral,* courts may reject a purely chronological understanding of the term "subsequent" and interpret its use in California Labor Code

[30] PAGA penalties are $100 for the initial pay period violation: $100 x 4 PAGA violations x 4,191 pay periods + $250 x 1 x 4,191 for wage statements. *See* Labor Code § 226.3.

to require that "the employer has been notified that it is violated a Labor Code provision" before higher penalties are triggered. *Amaral*, 163 Cal.App.4th at 1157, 1207–09. Mara Decl. ¶ 56.

Here, Plaintiffs' investigation has given no indication that Defendant was on notice of their Labor Code violations prior to the initiation of this lawsuit, neither by a court nor the California Labor Commissioner. *See* Defendant's response to Request for Production No. 42 (Mara Dec., **Exhibit 13** at Page 18-19) Although *Amaral* dealt with different statutes (*e.g.*, Cal. Lab. Code §§ 210 and 225.5), the same interpretation applies to the Labor Code generally such as through the application of *Amaral* to Cal. Lab. Code § 2699(f)(2). *See, e.g., Chen,* 2014 WL 4961182, at *2; *see also Perez v. WinnCompanies, Inc.,* Civ. No. 1:14–01497 LJO, 2014 WL 5823064, at *7 (E.D.Cal. Nov. 10, 2014) (finding that a defendant faced only $50 penalties for each failure to provide an accurate wage statement under Cal. Lab. Code § 226(e)). Mara Decl. ¶ 57.

Thus, not taking into account any of Defendant's defenses or arguments, Defendant's total exposure if Plaintiffs were successful in their core claims would be approximately $1,841,852.25 [$1,637,202 (meal and rest period exposure) + $204,650.25 (unpaid wage exposure)]. If Plaintiffs are successful in their unpaid wages claim, they may also be entitled to damages for waiting time penalties and wage statements in the amount of $1,353,006 [$1,005,006 (waiting time penalties) + $348,000 (wage statements)]. If all of Plaintiffs' claims are successful, they may also be entitled to PAGA penalties in the maximum amount of $2,724,150. Accordingly, the maximum potential damages for all of Plaintiff's claims is $5,919,008 [$1,637,202 (meal and rest period exposure) + $204,650.25 (unpaid wage exposure) + $1,005,006 (waiting time penalties exposure) + $348,000 (wage statements exposure) + $2,724,150 (PAGA exposure)]. Mara Dec. ¶ 58.

3. Risks To Plaintiff's Claims

a. Plaintiff's Meal And Rest Periods Claims Are Subject To Risks At Class Certification And On The Merits

Plaintiffs' meal and rest period claims are subject to risks of obtaining certification and on the merits. In terms of class certification, because there is a dispute about whether Defendant's policies tell Class Members that they are responsible for their trucks at all times and have to respond to messages from Defendant immediately, including during meal and rest periods, Defendant argues

that the Court would have to ask each Class Member what they thought Defendant's policy was and whether they believed they could leave their trucks during meal and rest periods. Further, Defendant points to its facially lawful meal and rest period policies contained within its employee handbook, claiming that they completely negate Plaintiffs' theories of liability, which are not based on any uniform policy or practice. Defendant argues that these circumstances would defeat class certification and would make any potential trial unmanageable. Mara Dec. ¶ 59.

In addition, there are risks on the merits of these claims. As noted above, the Parties have two merits-based disagreements. First, the Parties disagree about whether the FMSCA's December 21, 2018 decision is valid. Second, if the decision is found to be valid, the Parties' disagree about whether the decision applies retroactively. Defendant argues that FMCSA's December 21, 2018 decision provides it affirmative preemption defenses to Plaintiffs' claims for meal and rest break violations. Defendant contends that these defenses apply retroactively, wiping out Plaintiffs' meal and rest period claims in their entirety. Plaintiffs argue that the FMCSA exceeded its authority when it issued the decision and, therefore, the decision is invalid and not entitled to deference by the Court. In addition, if the decision is found to be valid, Plaintiffs argue that the decision only applies prospectively. Accordingly, Plaintiffs argue that Plaintiffs' meal and rest period claims prior to December 21, 2018, would remain intact. Mara Dec. ¶ 60.

Plaintiffs had to take into consideration the fact that many superior and district courts have sided with Defendant's arguments and found that drivers' meal and rest period claims are preempted and this preemption is retroactive. *See* "Order Granting Defendant's Motion for Judgment on the Pleadings" in *Garda Wage and Hour Cases* (LASC Sup. Case No. JCCP4828) (Mara Dec., **Exhibit 6)**; *Ayala*, 2019 U.S. Dist. LEXIS 77089, 2019 WL 1986760, at *3 (C.D. Cal. May 2, 2019); *Robinson*, No. 15-CV-05421-RS, 2019 WL 4278926, at *4 (N.D. Cal. Sept. 10, 2019); *Henry*, No. 2:16-CV-00280-JAM (EFB), 2019 U.S. Dist. LEXIS 99594, 2019 WL 2465330, at *4 (E.D. Cal. June 13, 2019); *Connell*, No. 2:19-CV-09584-RGK-JC, 2020 U.S.Dist.LEXIS 29235, at *8 (C.D.Cal. Feb. 6, 2020). Mara Dec. ¶ 61.

The cases that have come out in favor of the employees have found that the FMCSA's December 21, 2018 opinion applies but is not retroactive. *See* "Order Denying in Part Defendant

JBS Carriers, Inc.'s Motion for Summary Adjudication" in *Ryan v. JBS Carriers, Inc.* (LASC Sup. Case No. BC624401) (Mara Dec., **Exhibit 5)**; *North*, No. EDCV 18-2564 JGB (KKx), 2019 U.S.Dist.LEXIS 217010, at *9 (C.D. Cal. May 31, 2019). Therefore, if the Court were to agree with Plaintiffs and determine that the opinion is not retractive, Plaintiffs and the Class Members would be entitled to damages from January 13, 2013 to December 20, 2018. Mara Dec. ¶ 62.

Due to the risks Plaintiffs' meal and rest period claims face at certification and on the merits, Plaintiffs had to discount the maximum potential exposure of these claims. Based on the risks these claims face, and considering Plaintiffs' Counsel's experience, Plaintiffs believes a realistic potential exposure for these claims is $163,720 which is ten percent (10%) of the maximum potential exposure. Mara Dec. ¶ 63.

b. Plaintiff's Unpaid Wages Claim Are Subject To Risks At Class Certification And On The Merits

Plaintiffs' unpaid wages claim is subject to risks of obtaining certification and on the merits. In terms of class certification, because there is a dispute about whether Defendant's policies tell Class Members to clock out at the end of their shift before performing certain work related tasks, such as inspecting equipment, checking in with dispatch to check schedules, and turning in paperwork, Defendant argues that the Court would have to ask each Class Member what they thought Defendant's policy was and whether they believed Defendant deliberately required them to perform work off the clock. Further, Defendant points to its policies contained within its employee handbook which explicitly forbid class members from working off the clock, asserting that it completely undercuts Plaintiffs' theory of liability, which is not based on any uniform policy or practice, but a blatant overreach on a singular ambiguous sentence. Defendant argues that these circumstances would defeat class certification and would make any potential trial unmanageable. Mara Dec. ¶ 64.

In addition, there are risks on the merits of these claims. Plaintiffs contend that despite not having records of the time worked, as the work was performed off the clock, once Plaintiffs are able to establish a uniform unlawful policy and or practice supporting this failure to pay wages, the burden then falls on Defendant, and not the Plaintiffs, to show that Class Members are not entitled

to this unpaid time, as Class Members cannot be punished for Defendant's failure to possess adequate time records. Defendant claims that even should Plaintiffs manage to obtain class certification, they will be successful on the merits by showing the fact-finder, evidenced through their own lawful policies regarding the payment of wages and time keeping, the time and wage records of Class Members, and the testimony of Class Members, that Plaintiffs claims are baseless and wholly untrue. Mara Dec. ¶ 65.

Due to the risks Plaintiffs' unpaid wages claim faces at certification and on the merits, Plaintiff had to discount the maximum potential exposure of this claim. Taking the risks this claim faces, as well as Plaintiff's Counsel's experience into consideration, Plaintiff believes a realistic potential exposure for this claim is $102,325 which is fifty percent (50%) of the maximum potential exposure. Mara Dec. ¶ 66.

c. Plaintiff's Wage Statement And Waiting Time Penalties Claims Are Subject To Risks At Class Certification And On The Merits

Plaintiffs also pursued claims for failure to provide accurate itemized wage statements and waiting time penalty claims. These claims are derivative of Plaintiffs unpaid wages claim. Based upon information and belief, Plaintiffs had originally contended that Class Members were not provided with accurate itemized wage statements in compliance with all the elements required by Labor Code § 226(a).[31] *See* Order at Page 10. After conducting discovery on Defendant's wage statements, Plaintiffs confirmed that Defendant's wage statements are facially compliant with § 226(a), and that they have been throughout the Class Period. *See* Mara Dec., **Exhibits 14-20**. Therefore, Plaintiffs wage statement cause of action was based entirely on Defendant's failure to accurately itemized Class Members' hours worked, gross, and net wages based on the failure to pay

[31] § 226(a) reads, in part: "An employer . . . shall furnish to his or her employee . . . an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee . . . ."

for all time worked. Should Plaintiffs' unpaid wages claim fail or not be certified, these claims would also fail. As noted above, Plaintiffs' unpaid wages claim is subject to risks at certification and on the merits. These claims are subject to those same risks. Mara Dec. ¶ 67.

Further, these claims are also subject to their own risks on the merits independent of the risks on the merits of Plaintiffs' unpaid wages claim. Both of these claims have a "willful" component. "Some statutory penalties are imposed only if an employers' violation was 'willful' or 'knowing.' . . . [*S*]*ection 203* penalizes an employer that 'wilfully' fails to pay wages due under *section 201* or *202*, and *section 226, subdivision (e)* penalizes an employer's 'knowing and intentional' failure to provide itemized wage statements under *section 226, subdivision (a)*[.]" *Amaral*, 163 Cal.App.4th 1157, 1195. Mara Dec. ¶ 68.

Defendant contends that even if Plaintiffs were successful in their unpaid wages claim, they would have to prove Defendant "willfully" failed to pay Class Members appropriate wages due upon separation of employment. "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due." Cal. Code Regs. Tit. 8 § 13520; *see also Amaral*, *supra*, 163 Cal.App.4th at 1201 ("The settled meaning of 'willful,' as used in *section 203*, is that an employer has intentionally failed or refused to perform an act which was required to be done."). "However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code Regs. Tit. 8 § 13520. "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact, which would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." *Id.*

Defendant contends that any failure to pay wages due at the separate of employment was not willful. Defendant argues that it would not be liable for waiting time penalties because a "good faith dispute" exists over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral*, *supra*, 163 Cal.App.4th at 1201. As outlined above, Defendant contends that that it paid Class Members for all time worked in accordance with California law. Defendant contends that even if the Court were to ultimately determine that Class Members were clocking out prior to completing the

aforementioned work related tasks and were entitled to be paid for that time, Defendant's failure to do so was not willful, as it has always been Defendant's policy to forbid Class Members from working off the clock, and Defendant had no reason to believe this was occurring. This shows that Defendant has not attempted to withhold wages from Class Members in any way. Mara Dec. ¶ 69.

Defendant also argues that Plaintiffs' unpaid wage claims cannot form the basis of their wage statement claim. Defendant relies on the case *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, for the position that employees do not suffer injury under California Labor Code § 226(a) so long as the wage statements correctly reflected the hours worked and the pay received even if the pay is later determined to be inaccurate. In addition, Defendant argues that Plaintiffs cannot show that any potential failure to pay all wages owed was willful. Defendant relies on the same arguments made with regard to the waiting time penalties claim. Mara Dec. ¶ 70.

Considering the risks Plaintiffs' unpaid wages claims faced on the merits, as well as the additional risks these claims faced on the merits, Plaintiff had to discount the maximum potential exposure of his waiting time penalty and wage statement claims. Based on these factors, and based upon Plaintiff's Counsel's experience, a realistic value of these claims is $202,950 which represents fifteen percent (15%) of the maximum potential exposure. Mara Dec. ¶ 71.

d. Plaintiff's Claim For PAGA Penalties Is Subject To Risks On The Merits And The PAGA Exposure Would Likely Be Reduced By The Court

As Plaintiffs' PAGA claims are based on the same alleged unlawful conduct as their class claims, Plaintiffs' PAGA claims are subject to the same risks on the merits as Plaintiffs' class claims. Therefore, PAGA penalties can only be awarded if the factfinder agrees with Plaintiffs' meal and rest period and unpaid wages claims. While Plaintiffs' PAGA claims do not need to be certified, Plaintiff must still show that they are manageable. As such, the same manageability concerns outlined above as to Plaintiffs' meal and rest period and unpaid wages claims are present as to Plaintiffs' PAGA claims. Mara Dec. ¶ 72.

Furthermore, Plaintiffs allege Defendant has five violations - unlawful meal and rest breaks, failure to pay all wages, failure to provide accurate wage statements, and failure to pay wages due at termination – of Labor Code sections which give rise to PAGA penalties. Defendant argues that

Plaintiffs would not be able to stack violations for each alleged Labor Code violation and would only be entitled to one penalty for all violations per pay period – assuming Plaintiffs prevailed on the merits of the underlying Labor Code violations. *See Salazar v. PODS Enters., LLC* (C.D.Cal. May 8, 2019, No. EDCV 19-260-MWF (KKx)) 2019 U.S.Dist.LEXIS 78001) (finding it "highly unlikely" that the plaintiff could recover PAGA penalties for each separate type of Labor Code violation). Plaintiffs argue the opposite and claim that they would be able to recover five penalties per pay period based on the alleged violations. *See Schiller v. David's Bridal, Inc.* (E.D.Cal. July 14, 2010, No. 1:10-cv-00616 AWI SKO) 2010 U.S.Dist.LEXIS 81128) (finding it "conceivable that Plaintiff could recover PAGA penalties for each separate type of Labor Code violation"). Mara Dec. ¶ 73.

Additionally, Defendant argues *if* the Court found Defendant was liable for wage statement violations, Plaintiffs *are not* entitled to heightened civil penalties for wage statement violations under Labor Code § 226.3 ($250), and that Plaintiffs are limited only to the penalties provided under PAGA in Labor Code § 2699(f)(2) ($100). First, Defendant contends that a plain reading of § 226.3 indicates that these penalties are only available when the employer "fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226." As Plaintiffs' wage statement cause of action is not premised on Defendant's failure to provide wage statements at all nor for a failure to maintain records, Defendant claims that § 226.3 does not apply. *See York v. Starbucks Corp.* (C.D.Cal. Nov. 1, 2012, No. CV 08-07919 GAF (PJWx)) 2012 U.S.Dist.LEXIS 190239) ("In this case, Plaintiff alleges only that relevant information was missing from her wage statements, not that Defendants failed entirely to furnish wage statements. As such, section 226.3 does not provide penalties for the violations alleged in this case and PAGA's fallback provision set forth in section 2699(f) is applicable."). Mara Dec. ¶ 74.

Second, Defendant argues that even if Labor Code § 226.3 *did* apply to the wage statement violations at issue here, Plaintiffs would only be able to collect the heightened $250 penalty once per employee, and would then be limited to the "fallback" penalties of Labor Code § 2699(f)(2). Defendant again points to the plain language of the statute, showing that the penalty only applies to an "per employee per violation in an initial citation" under § 226.3. This language differs from § 2699(f)(2), which provides penalties on a "per pay period" basis. Defendant contends that the

absence of the "per pay period" language in § 226.3 indicates that Plaintiffs would only be able to collect the $250 penalty once per employee as an "initial citation." As discussed above, Defendant has never been warned and/or cited by the LWDA or any court for *any* Labor Code violations, so any order by this Court finding Defendant liable for wage statement violations would be an "initial citation." Mara Dec. ¶ 75.

Plaintiffs contend that the penalty provided under Labor Code § 226.3 is available to all wage statement violations, not just for failure to furnish wage statements or maintain records. *See Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667 ("We find more persuasive a decision that found section 226.3 sets out a civil penalty for *all* violations of section 226."). Further, Plaintiffs believe that the language of § 226.3 stating that the penalties to be assessed an "per employee per violation" holds the same meaning as the language in § 2699(f)(2) regarding pay periods. Generally speaking, a wage statement violation can only occur when one is to be furnished to the employee, i.e. once per pay period. As such, "per employee per violation" can reasonably be interpreted to mean that an employee could recover the $250 penalty under § 226.3 every pay period. Mara Dec. ¶ 76.

But perhaps the most critical factor to consider when exploring the settlement of any PAGA claim is that the Court is permitted discretion to award a "lesser amount than the maximum penalty amount" must be heavily taken into consideration. *Lab. Code.* § 2699(e)(2). Unlike the underlying violations upon which the Plaintiffs seek to impose PAGA civil penalties, there is no set amount the Court must levy on an employer Defendant it finds to have violated the underlying claims. Under "the facts and circumstances of the particular case," the Court is permitted wide discretion to slash civil penalty amounts. This discretion and how a particular court will exercise it is always an unknown variable in predicting the dollar outcome of any PAGA action when evaluating settlement. Under its wide discretion to award lesser amounts, a Court could side with the PAGA Plaintiffs' claim and proof that the underlying Labor Code rights were violated but decide to substantially moderate the imposition of PAGA penalties for those violations. Mara Dec. ¶ 77.

Courts have used this discretion to massively discount PAGA penalties imposed where it found the Defendant employer took its Labor Code obligations seriously, even if the employer fell

short of complying with them. In *Thurman v. Bayshore Transit Management, Inc*. ("*Thurman*") (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the maximum amount. *Thurman v. Bayshore Transit Management, Inc*. (2012) 203 Cal. App. 4th 1112, 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has taken its obligations to comply with the law seriously. *Id.* In *Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778, 788 & 809, the Court of Appeals took no issue with the trial court exercising its discretion in slashing PAGA civil penalties for violations of Labor Code section 512 to 13% of the total recoverable penalties. In *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504*,* the plaintiff requested penalties in excess of $70 million, based on a $25 to $75 penalty per violation. The court reduced the award, stating that awarding the maximum penalty would be unjust, arbitrary, and oppressive based on Starbuck's good faith attempts to comply with the law. The lower court's reduced award of $150,000 was affirmed on appeal, which reflects .2% of the total recoverable penalties sought.[32] Mara Dec. ¶ 78.

Thus, the projected value of PAGA claims is a variable value of two predictive indexes: 1) the likelihood that Plaintiffs will succeed in proving the underlying claims were violated, and 2) the extent to which the Court will impose Civil Penalties permitted under PAGA. This is to be distinguished from the projected values of class claims of Labor Code and Wage Order violations. For instance, and relevant to the underlying claims in this action, class claims alleging California's meal break, rest break, and wage laws were violated, the predictive value for purposes of determining whether settlement values are fair and reasonable rests only on the likelihood of prevailing on the merits and the exposure related thereto, as there is no judicial discretion to award lesser amounts owed for adjudged violations. It is for these reasons that, in assessing and judging the reasonableness of PAGA settlements, the touchstone feature is the "remedial purpose" achieved

[32] These instances of judicial discretion imposing massive reductions in recoverable penalties is to be contrasted with *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019) 365 F.Supp. 3d 980, 992, where the trial court reduced the recoverable PAGA penalties by only 25%. *Bernstein*, however, only amplifies the predictive blind spot of how a court can exercise its wide-discretion to reduce full PAGA exposure.

in the settlement amount, which takes into account the defendant employer's "good faith" belief that it complied with the laws claimed to be violated. *Bernstein,* 365 F.Supp. 3d at 991. Mara Dec. ¶ 79.

Based on this blind spot of how the Court would exercise its discretion in addition to the likelihood the Court would side with Plaintiff on the underlying Labor Code violations, Plaintiffs' necessarily and substantially had to discount the settlement value off of the full PAGA penalty amounts. As discussed earlier, Defendant argues that if this case were to continue in litigation, it would be able to show that it took its obligations to comply with the law seriously and that awarding the maximum penalty award would, likewise, be unjust. Defendant argues that this is especially true given the following facts: (1) it maintains uniform facially lawful meal and rest period policies; (2) Defendant pays Class Members for all time recorded in their time logs, and any alleged work performed that was not compensated was not commanded by Defendant, nor was Defendant aware of it; and (3) Defendant provides Class Members with facially lawful wage statements. Thus, even if Defendant was proven wrong on these fronts and ultimately found to have violated underlying meal/rest break, wage, and wage statement claims, the court could find a good faith reliance on *Hernandez* and *Brinker* justifiably instructed Defendant's actions and thereby impose a massive reduction of PAGA penalties akin to the Courts in *Kaanaana* and *Carrington*. Mara Dec. ¶ 80.

Further, the likelihood of the Court reducing the PAGA penalties awarded to Plaintiffs and the aggrieved employees – assuming liability is proven as to each of Plaintiffs' claims – is higher in this case where these same individuals may also be receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 ("Because the PAGA penalties sought are at least partially duplicative of penalties granted by the underlying Labor Code violations, *see*, *e.g.*, Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA penalties are highly uncertain."). Plaintiffs must take into consideration the risks their underlying claims faced, as well as the risk that the Court would likely reduce the amount of PAGA penalties awarded because drivers would be receiving two recoveries – one under the class allegations and one under the PAGA allegations – for the same conduct. Mara Dec. ¶ 81.

Plaintiffs also had to consider that the Court could reduce any PAGA penalties awarded because the PAGA penalties may be greater than the non-PAGA damages sought for a claim. Courts have found PAGA penalties to be unjust and oppressive when they exceed the amount of the statutory penalty a plaintiff can obtain. *See Magadia v. Wal-Mart Assocs.*, Case No. 17-cv-00062-LHK, (N.D. Cal., May 31, 2019) 384 F.Supp.3d 1058, 1100 ("The Court has not found any case that awards such a disproportionate PAGA penalty relative to statutory damages. The amount of PAGA penalties awarded and the amount of statutory penalties awarded for the underlying Labor Code violation should not be too disparate."). Here, for example, the maximum PAGA penalties for Plaintiffs' unpaid wages cause of action is $419,100 and $1,047,750 for Plaintiffs' wage statement cause of action. These numbers are greater than the maximum potential damages under Plaintiffs' unpaid wages and wage statement claims. On this basis, the Court could reduce any potential PAGA penalties awarded to Plaintiffs and the aggrieved employees. Mara Dec. ¶ 82.

Taking the risks Plaintiff's claims face on the merits, the potential manageability issues, and the fact that the Court may reduce any PAGA penalties awarded, Plaintiff had to discount the maximum potential exposure of this PAGA claims. Based on these considerations, and based upon Plaintiff's Counsel's experience, a realistic value of these claims is $136,207 which represents five percent (5%) of the maximum potential exposure. This amount fits squarely within the "remedial purpose" of PAGA of enforcing compliance with important employee protections in the Labor Code and Wage Order.[33]

4. The Settlement Amount of $390,000 Is Reasonable

Based upon the risks just discussed, Plaintiffs had to discount his maximum potential exposure. Plaintiffs had to consider the risk that their theories of liability would not be certified or that, if successful, that they could not maintain certification through the remainder of the litigation. Plaintiffs also had to consider that the Court could find Defendant's arguments on the merits persuasive – including the affirmative defense under FMCSA. Should the Court agree with any of Defendant's

[33] Mara Dec. ¶ 83. In addition, it should be noted that the LWDA has been provided with a copy of the Parties' Settlement Agreement, both upon the filing of the first motion for preliminary approval as well as this motion. To date, the LWDA has not expressed concern about the amount of the settlement.

arguments, Plaintiffs potentially risked a loss on summary judgment or at trial. If this were the case, Plaintiffs and the Class would not be entitled to any recovery for these theories of liability. In addition, Plaintiffs also had to consider that, should the Court agree with their theories and grant certification as to each of their claims, he and the Class may not be awarded the full exposure at trial. Based upon the realistic potential exposures of each of Plaintiffs' claims, the total realistic potential exposure is $605,202 [$163,720 (realistic meal and rest period exposure) + $102,325 (realistic unpaid wage exposure) + $202,950 (realistic waiting time penalties and wage statement exposure) + $136,207 (realistic PAGA exposure)]. Mara Dec. ¶ 84.

In light of Defendant's defenses, supporting evidence, and position that the action is not suitable for class treatment, the settlement amount of $390,000 which is approximately sixty-four percent (64%) of the realistic exposure – with an average individual settlement share estimated at $937.56 – is a reasonable and fair settlement. Mara Dec. ¶ 85.

A settlement is not judged **solely** against what might have been recovered, had the plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; "Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this 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 litigation." *Wershba*, *supra*, at 250; *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not…render the settlement inadequate or unfair"); *see also In re Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 95616, at 21, noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorneys' fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2002 through 2006).

C. Provisional Class Certification Should Be Granted

Under California law, a class action is appropriate when the class is ascertainable and there is

"a well defined community of interest in the questions of law and fact involved affecting the parties to be represented." Cal. Civ. P. Code § 382. State law requirements under California Code of Civil Procedure section 382 for class certification follow federal law according to Rule 23 of the Federal Rule of Civil Procedure: numerosity, typicality of the class representatives' claims, adequacy of representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); see also *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court must certify a class for settlement purposes if a class has not already been certified, "it is well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases." *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836, 859 citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

Plaintiffs contend, and Defendant does not dispute for settlement purposes only, each of these elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 237-38. Plaintiffs seeks approval of the following Class for settlement purposes only: All current and former truck drivers who performed services for Defendant at any time from January 13, 2013, to the date the Court grants preliminary approval of the settlement.

i. The Proposed Settlement Class Is Ascertainable

Plaintiffs contend that the proposed Settlement Class is ascertainable because all of the Class Members have worked for Defendant and have been identified through Defendant's own records, such as employee and payroll files. *See Rose v City of Hayward* (1981) 126 Cal.App.3d 926,932 (finding that "Class Members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records."); *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 ("[c]lass members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official [or business] records."). Thus, the ascertainability requirement is met.

ii. The Proposed Settlement Class Is Sufficiently Numerous

The numerosity requirement is met if the class is so large that joinder of all members would be impracticable. *Gay v. Waiters' & Dairy Lunchmen's Union* (N.D. Cal. 1980) 489 F. Supp. 282, aff'd

(9th Cir. 1982) 694 F.2d 531. "There is no set number required to maintain a class action, and the statutory test is whether a class is so numerous that 'it is impracticable to bring them all before the court.'" *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior Court* (1995) 44 Cal.2d 574 (upholding a class of ten members). "The numerosity requirement is more readily met when a class contains employees suing their present employer . . . This is because class members may be unwilling to sue their employer individually out of fear of retaliation." *Romero v. Producers Dairy Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the California Supreme Court, "fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation, even when it is otherwise questionable that the numerosity requirements were satisfied . . . It needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460 (citation omitted), overruled on other grounds in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.

Here, Defendant's records show that the proposed Settlement Class has approximately 200 members. *See* Woods Dec. ¶ 6. Plaintiffs contend that joinder of all Settlement Class Members is impracticable and, therefore, a class wide proceeding is preferable. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is acceptable.). In fact, a class of ten (10) has been certified as a class action. *Id.*, citing *Bowles v. Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue have held that classes of over forty (40) individuals are numerous enough to meet the numerosity requirement. *See Ikonen v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly, the Settlement Class has approximately 190 members is sufficient to satisfy the numerosity requirement.

iii. The Commonality Requirement Is Met

The commonality requirement is met if there are questions of law and fact common to the class. *Hanlon*, supra, 150 F.3d at 1019 ("The existence of shared legal issues with divergent factual predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies within the class."). "Predominance is a comparative concept, and 'the necessity for class members to individually

establish eligibility and damages does not mean individual fact questions predominate.'" Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 334. Commonality exists if there is a predominant common legal question regarding how an employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its drives."). Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the certification stage since the question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." *Linder v. Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-440. Here, Plaintiffs contend that the proposed Settlement Class Members' claims all stem from the same allegedly unlawful policies and practices, which were addressed previously in this motion. *See* Villarreal Dec. ¶ 13-15; Gasca Dec. ¶ 14-16. Plaintiffs seeks the same legal remedies on behalf of themselves and all Settlement Class Members. *Id*. As liability as to all Settlement Class Members is predicated on the same policies and practices, which Plaintiffs allege violate California law, the commonality requirement has been satisfied.

iv. The Typicality Requirement Is Met

The typicality requirement is met if the claims of the named representative are typical of those of the class, though, "they need not be substantially identical." *Hanlon*, *supra*, 150 F.3d at 1020; *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiffs contend that his claims are typical of the Settlement Class Members' claims because they arise from the same factual basis and are based on the same legal theory as those applicable to the Settlement Class Members. *See Wehner v. Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641, 644. Each Settlement Class Member is challenging the same policies and practices. Plaintiffs allege that Defendant's policies applied to all Settlement Class Members. *See* Villarreal Dec. ¶ 13-15; Gasca Dec. ¶ 14-16. Factual differences may exist between Plaintiffs' and the Settlement Class Members so long as the claims arise from the same events or course of conduct and are based on the same legal theories. *Hanlon*, *supra*, 150 F. 3d at 1020; *see also Wehner*, *supra*, 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. § 3:15, p.335 [When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.] As such, the typicality requirement is satisfied.

v. The Adequacy Requirement Is Met

The adequacy requirement is met if Plaintiff has no interests adverse to the interests of the proposed Settlement Class Members and is committed to vigorously prosecuting the case on behalf of the class. *Hanlon*, *supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51. Plaintiffs contend those standards are met here. Plaintiffs does not have any conflicts of interest with the Settlement Class. They have been and continue to be committed to vigorously prosecuting this case. If any Settlement Class Member wishes to opt-out of the Settlement, he or she may do so. Therefore, there is no conflict of interest between Plaintiffs and the Settlement Class Members.

D. Notice To Class Members Complies With California Rule Of Court 3.769(f)

California Rule of Court, No. 3.769(f), provides:

> If the court has certified the action as a class action, notice of the final approval hearing must be given to class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.

Pursuant to the Court's January 21, 2020 Order, the Parties have amended the proposed Notice as follows:

- Added the word "truck" in front of the word "driver."[34]
- Added instructions on how to access case documents through the Court's website.[35]
- Revised the Released Claims under Section 9, "How Does This Settlement Affect My Rights? What are the Released Claims?"[36]
- Revised the first paragraph under Section 8, "How Do I Object To The Settlement?"[37]
- Revised the first paragraph under Section 7, "How Do I Opt Out Or Exclude Myself From This Settlement?"[38]

The proposed Notice meets all of these requirements. The proposed Notice advises the Class of their rights to participate in the Settlement, how to and when to object to or request exclusion from the Settlement, and the date, time, and location of the final approval hearing. The proposed Notice is attached as **Exhibit A** to the Joint Stipulation.

[34] *See* **Exhibit A** attached to **Exhibit 1** of the Mara Dec. at Sections 3-4; Order at 12.
[35] *See* **Exhibit A** attached to **Exhibit 1** of the Mara Dec. at Section 11; Order at 12.
[36] *See* **Exhibit A** attached to **Exhibit 1** of the Mara Dec. at Section 9; Order at 9, 11, 13.
[37] *See* **Exhibit A** attached to **Exhibit 1** of the Mara Dec. at Section 8; Order at 11, 13.
[38] *See* **Exhibit A** attached to **Exhibit 1** of the Mara Dec. at Section 7; Order at 11, 13.

VI. ATTORNEY FEES ARE FAIR AND REASONABLE CALCULATED AS A PERCENTAGE OF THE COMMON FUND

At Final Approval, Plaintiffs' Counsel will apply for an award of attorneys' fees *in an amount not to exceed* $129,987 (which is 33.33% of the GSA). Plaintiffs' counsel has worked 333 hours to the date of this filing and has calculated its current lodestar at $186,150, which would not require any lodestar multiplier. Mara Dec. ¶¶ 89-90, 92-93, 98-99, 101-102; **Exhibit 21** (Summary of Time and Costs).

California courts have recognized an appropriate method for determining an award of attorneys' fees is based on a percentage of the total value of benefits to Class Members by the settlement, also known as the "common fund" method. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (*Serrano III*) 34 ("when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund."); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts within its equitable power to prevent the other parties' unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating attorney's fees more accurately reflects the results achieved for the putative class than the lodestar method and "establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation."); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) ("The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.").

The purpose of the common fund/percentage approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F.2d at 769. In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California

Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." The reasons for applying the common fund doctrine include: "…fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful." *Id*.

Indeed, the California Supreme Court confirmed in *Laffitte v. Robert Half Int'l, Inc.* that using the percentage method has many advantages:

> The recognized advantages of the percentage method - including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts.

Id. at 503 (internal citation omitted).[39] Because there is a defined and traceable benefit to the Class, the Court can base an award of attorneys' fees using a 'common fund' approach.

A. Requested Fee Is Within The Range Of Fees Approved In Comparable Cases

Several studies of class action fee awards have found that the median common fund fee award is approximately one-third of the total settlement fund.[40] The requested fee falls in the mid-range of percentage class fee awards, which generally range from 20% to 50% of a common fund, and it constitutes fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis and compensates Class Counsel for their efforts, as well as the result

[39] *Laffitte* also held trial courts have discretion to assess reasonableness of fee awards with tools such as the lodestar cross-check, although they need not do so. *Laffitte*, 1 Cal.5th at 506 ("We hold further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee . . . they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee").

[40] *See*, e.g., *Chavez v. Netflix, Inc*. (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have shown that "fee awards in class actions average around one-third of the recovery."); Reagan W. Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 546 ; T. Willging, L. Hooper and R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 90 (1996) (finding that attorneys' fees in class litigation "were generally in the traditional range of approximately one-third of the total settlement").

achieved for the benefit of the Class. Numerous state and federal courts in California routinely approve fee requests equal to or greater than 33% of the common fund. Indeed, courts have found that an award of 33% of the common fund represents the "benchmark" in California.[41] In short, Plaintiff counsels' fee request of $129,987 (33.33% of the GSA) is in line with awards in similar cases in California and nationwide and demonstrates that Plaintiffs' counsels' fee request is consistent with market rates and is reasonable

B. A Lodestar Cross-Check Confirms The Reasonableness Of The Requested Fee

Class Counsel's fee request is reasonable when calculated using the lodestar method. Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977) 20 Cal. 3d 25, 48. The court then enhances this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of success achieved. *Id*., at 49; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096; *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 834, ("[t] there is no … rule limiting the factors that may justify an exercise of judicial discretion to [adjust the] lodestar").

Class Counsel has worked 333 hours to date on this case, and has calculated the lodestar fee on those hours at $186,150 at rates reflecting those currently earned in the market place. Mara Dec. ¶ 86, **Exhibit 21**, Summary of Time and Costs. All of the work and tasks performed by Class Counsel were reasonable and necessary to the prosecution of this case and are reflected in the result achieved. Mara Dec. ¶ 87. As Class Counsel's lodestar fee is in excess of their fee request, a multiplier on their lodestar fee is not sought herein. Mara Dec. ¶ 88. In fact, the requested fee results in a so-called "negative multiplier" which suggests the percentage of the fund amount is reasonable and fair. *See Chun-Hoon v. McKee Foods Corp*. (N.D. Cal. 2010) 716 F.Supp.2d 848, 854; *In re*

[41] *Smith v. CRST Van Expedited, Inc*. (S.D. Cal. Jan. 14, 2013) 10-CV-1116- IEG WMC, 2013 WL 163293, *5 ("These percentages compare favorably with both California (33%) and federal (25%) benchmarks."); *Dennis v. Kellogg Co*. (S.D. Cal. Nov. 14, 2013) 09-CV-1786-L WMC, 2013 WL 6055326, at *7 ("This percentage compares favorably with both California (33%) and federal (25%) benchmarks and the requested fee compares well with a lodestar cross-check as well.").

Portal Software, Inc. Securities Litigation (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 88886, 2007 WL 4171201, at *16

i. Class Counsel's Hourly Rates Are Reasonable

Plaintiffs' counsels' hourly rates are between $400 and $750 and are in line with rates typically approved in wage and hour class action litigation and which rates have been approved by Courts in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San Diego County Superior Courts.[42] A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc v. Drexler* (2000) 22 Cal. 4th 1084, 1095. When determining a reasonable hourly rate, courts may consider factors such as skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632.

Plaintiffs' counsels' skill and experience support their hourly rates. Their practice is limited exclusively to litigation, focusing on the representation of employees in wage and hour and consumer class action matters. Mara Dec. ¶¶ 1-14, 91, 94-95, 97, 101. As prominent attorneys in the field of wage and hour class action litigation, Plaintiffs' counsel continually monitors the prevailing market rates charged by both defense and plaintiff law firms and set the billing rates of their attorneys and paralegals to be consistent with the prevailing market rates in the private sector for attorneys and staff of comparable skill, qualifications and experience. Other wage and hour attorneys working as class counsel before California courts charge comparable if not higher rates.[43] Therefore, as they are in line with those of the relevant community, Class Counsels' hourly rates are reasonable

[42] Mara Dec. ¶¶ 1-15, 89-102; **Exhibit 22**, Westlaw Court Express's Legal Billing Report, Volume 14, Number 3, California Region for December 2012; **Exhibit 23**, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Exhibit 24**, 2012 National Law Journal Survey of Hourly Billing Rates for Partners and Associates.

[43] Mara Dec. ¶¶ 90, 93, 98, 102, **Exhibit 22**, Westlaw Court Express's Legal Billing Report, Volume 14, Number 3, California Region for December 2012; **Exhibit 23**, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Exhibit 24**, 2012 National Law Journal Survey of Hourly Billing Rates for Partners and Associates.

ii. Class Counsel's Total Hours Are Reasonable

In determining a lodestar fee, reasonable hours include, in addition to time spent during litigation, the time spent before the action was filed, including time spent interviewing clients, investigating the facts and the law, and preparing the initial pleadings. *See New York Gaslight Club, Inc. v. Carey* (1980) 447 U.S. 54, 62. The fee award should include fees incurred to establish and defend the attorneys' fee claim. *Serrano v. Priest* (1982) 32 Cal.3d 621, 639.

To date, Plaintiffs' Counsel has expended a total of 333 hours litigating this case. The work performed to achieve a settlement that will provide valuable consideration to the Class**, averaging an estimated payment of $937.56**[44], is summarized by Class Counsel in the declarations submitted herewith. Mara Dec. ¶¶ 89-90, 92-93, 98-99, 101-102; **Exhibit 21**. Counsel's many tasks, in summary form, included the following: pre-filing investigation and legal research; communicating with the class representatives; interviewing and meeting with putative Class Members; research and investigation of California's ever evolving wage and hour laws; investigation into Defendant's pay-structures and policies for its hourly employees; drafting and filing pleadings; numerous conferences with Defendant's counsel regarding a variety of issues throughout the litigation, mediation and settlement process; numerous interoffice discussions about litigation strategy and theories of liability; analyze records produced by Defendant relating to its policies, pay-structures, driver logs, and timekeeping and payroll; appearing at hearings; preparing for and deposing Defendant's designated PMQ witness; extensive research into the ever changing legal landscape surrounding wage and hour litigation; preparing for and attending mediation; preparing exposure models and damage analysis for mediation; drafting, negotiating and revising the settlement agreement and the Notice to the Class; discussions with settlement administrator regarding its duties; draft preliminary approval motion and supporting papers; draft renewed preliminary approval briefing; draft a PAGA letter notifying the LWDA. After preliminary approval, Plaintiffs' counsel further anticipates: reviewing, revising, and proofing Notice papers from the settlement administrator; reviewing weekly status reports from the settlement administrator regarding Class participation; reviewing and

[44] $441,525 NSA / 143 class members = $3,087.59.

revising settlement administrator's declaration; drafting and revising the final approval of the settlement and fee motion; and appearing at the preliminary and final approval hearings. All tasks and work performed (and still to be performed) were reasonable and necessary to the prosecution of this case. The work performed was justified in light of the result achieved. Mara Dec. ¶¶ 89-90, 92-93, 98-99, 101-102.

iii. Actual Costs Incurred To Prosecute The Litigation Are Reasonable

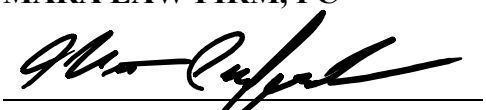
To date, Plaintiffs' counsel has incurred litigation costs totaling $14,283.98. These costs were reasonable and necessary to prosecute this case and the results achieved and are fair, and reasonable. Counsel requests preliminary approval of an amount *not to exceed* $20,000. At final approval, Counsel will provide the Court with a final accounting which will certainly fall below $20,000. Any amount not awarded as costs will then become part of the NSA and be available for distribution to Participating Class Members. Mara Dec. ¶ 103, **Exhibit 21**.

VII. CONCLUSION

Plaintiffs respectfully submit that the proposed Settlement is in the best interests of the class and Class Members, as it is fair, adequate, and reasonable, and one that should ultimately be granted final approval. Under the applicable class action criteria and guidelines, the proposed settlement should be preliminarily approved by the Court, the class should be conditionally certified for purposes of settlement only, and the Notice of Class Action Settlement should be approved.

Dated: August 11, 2020

MARA LAW FIRM, PC



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