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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE

CHRISTIAN BRINK and DAVID MAIER on behalf of themselves and all others similarly situated, and on behalf of the general public,

Plaintiffs,

v.

CENTRAL VALLEY AUTO TRANSPORT, INC.; and DOES 1-100;

Defendants.

Case No. VCU274266

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: January 20, 2022
Time: 8:30 a.m.
Judge: Hon. David Mathias
Dept.: 1

Complaint Filed: June 6, 2018
Trial Date: None Set

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I. INTRODUCTION

Plaintiffs Christian Brink and David Maier (hereinafter "Plaintiffs"), on behalf of themselves and the approximately 221-member putative class, respectfully request that this Court preliminarily approve the Joint Stipulation and Settlement Agreement (hereinafter "Agreement"[1]) entered into between Plaintiffs and Defendant Central Valley Auto Transport, Inc. (hereinafter "Defendant" or "CVAT") (hereinafter Plaintiffs and Defendant are collectively referred to as the "Parties"). The Parties' Agreement seeks to resolve claims raised against Defendant in this matter in exchange for a non-reversionary $1,250,000 Gross Settlement Amount. The proposed Class is comprised of two subclasses: The Independent Contractor Class and the Company Driver Class. The Independent Contractor Class is comprised of all drivers who directly signed a contract with Central Valley Auto Transport, Inc. and have performed services for Central Valley Auto Transport, Inc. in service of that contract within the State of California at any time from June 6, 2014 to April 1, 2021.[2] There are approximately 105 individuals included in the Independent Contractor Class.[3] The Company Driver Class is comprised of all non-exempt truck drivers who are or were employed by Central Valley Auto Transport, Inc. in the State of California at any time from June 6, 2014 to April 1, 2021.[4] There are approximately 139 individuals included in the Company Driver Class.[5]

It is requested that the 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 $1,250,000 is well within the range of reasonableness. This settlement is estimated to pay Independent Contractor Class Members an average payment of approximately $5,244.76 and Company Driver Class Members an average payment of approximately $990.47. It should be noted that some Class Members may be included in both subclasses. Moreover, the

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[1] The Parties' Agreement is attached to the Declaration of David Mara, Esq. ("Mara Dec.") as Exhibit 1. "Exhibit 1" herein refers to the Parties' Agreement.
[2] Exhibit 1 at Section I, Paragraph 6(A), Page 2.
[3] Exhibit 1 at Section III, Paragraph 64(A)(ii)(a), Page 12.
[4] Exhibit 1 at Section I, Paragraph 6(B), Page 2.
[5] Exhibit 1 at Section III, Paragraph 64(A)(ii)(c), Page 12.

proposed Agreement satisfies all of the criteria for preliminary approval under Rule 3.769 of the California Rules of Court.

As the following sections show, Class Counsel are convinced that the proposed settlement is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues presented in this action. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the uncertainty of class certification, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, and the very real possibility that Defendant would be financially insolvent before a judgment could be collected on were also carefully considered by Class Counsel in arriving at the proposed settlement. The Agreement was the product of two all-day mediations with mediators Jeff Krivis and Justice Steven M. Vartabedian (Ret.) and was the product 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 terms contained in the Agreement; (2) provisional certification of the Class; (3) appointment of Plaintiffs as Class Representatives; (4) appointment of Mara Law Firm, PC, as Class Counsel; (5) approval of the Parties' proposed notices of class action settlement[6] (referred to herein as the "Class Notices" or "Notices") and method of notifying the Class about the settlement; and (6) a hearing date for final approval on May 20, 2022 or later.

II. BACKGROUND

This case was filed by Plaintiff Christian Brink in the Tulare County Superior Court on or about June 6, 2018. On or about December 13, 2018, Plaintiff Christian Brink filed a First Amended Complaint adding Plaintiff David Maier as a Plaintiff in this action and adding a cause of action pursuant to the Private Attorneys General Act of 2004. On or about August 22, 2019, the Parties entered into and filed a stipulation to allow Plaintiffs to file a proposed Second Amended Complaint in Tulare County Superior Court adding, among other things, a "Misclassification Class," and dismissing claims for overtime and recovery periods. (Mara Dec. ¶ 9).

[6] The Class Notices are attached to the Agreement as Exhibits A and B.

On August 30, 2019, Defendant removed this action to the Eastern District of California under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332 et seq., alleging, among other things, that the majority of the newly alleged Misclassification Class are residents of states other than California. Pursuant to the Parties' stipulation and the United States Magistrate Judge's subsequent order, on January 30, 2020, Plaintiffs filed their Second Amended Complaint in the Eastern District of California. Defendant filed its Answer to the Second Amended Complaint on February 28, 2020. The operative complaint alleges causes of action for: 1) Failure to Pay All Straight Time Wages; 2) Failure to Provide Meal Periods; 3) Failure to Authorize and Permit Rest Periods; 4) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; 5) Failure to Pay All Wages Due at the Time of Termination of Employment; 6) Violation of Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.); 7) Failure to Reimburse/Illegal Deductions; and 8) Violations of the private Attorneys General Act, Labor Code §2699, et seq. ("PAGA"). (Mara Dec. ¶ 10).

The Parties agreed to conduct informal discovery on the issue of federal court jurisdiction and agreed on a *Belaire West* notice to be sent to Class Members. In determining who to send the *Belaire West* notice to, the Parties met and conferred further regarding the scope of the proposed Misclassification Class. During these meet and confer efforts, Plaintiffs agreed that the putative Misclassification Class is limited to individuals, as opposed to entities, who directly signed a contract with Defendant and have driven for Defendant within the State of California, excluding those subhaulers who contracted with Defendant through a dispatch service. As such, the Parties agreed to remand the case back to the Tulare County Superior Court. (Mara Dec. ¶ 11).

III. INVESTIGATION/ LITIGATION HISTORY

A. Discovery and Investigation

After filing, the Parties engaged in extensive discovery and investigation. Plaintiffs propounded three sets of requests for production of documents and two sets of special interrogatories on Defendant. The responses to this discovery led to extensive meet and confer efforts. The discovery and resultant meet and confer efforts led to Defendant producing over 4,000

pages of documents. These documents included, but are not limited to, Plaintiffs' personnel files, driving logs for employees and independent contractors, agreements entered into between independent contractors and Defendant, payroll summaries, wage statements, and Defendant's wage and hour policies. Plaintiffs also took the deposition of Defendant's Person Most Qualified witness on August 5, 2020. (Mara Dec. ¶ 12).

B. The Parties Agreed to Attend Two Mediations

On February 19, 2019, the Parties attended an all-day mediation with mediator Jeff Krivis. On August 11, 2020, the Parties attended a second all-day mediation with mediator Justice Steven M. Vartabedian (Ret.). Both of these mediations were unsuccessful. Thereafter, the Parties continued their settlement discussions. As a result of these continued settlement discussions, the Parties agreed to resolve the claims asserted by Plaintiffs. The Parties executed a Memorandum of Understanding, dated April 2, 2021. Defendant then provided financial documents to Plaintiffs for Plaintiffs' financial expert to review and analyze. After Plaintiffs' expert's analysis was complete, the Parties then met and conferred over all the terms of the settlement and finalized their agreement in the Parties' Agreement. The Parties seek preliminary approval of the Agreement in the instant motion. (Mara Dec. ¶ 13; *see also* Exhibit 1 attached thereto).

C. The Parties' Staunchly Conflicting Positions

i. Independent Contractor Class

1. Employer Status

All of the claims alleged in this matter on behalf of the Independent Contractor Class are based on Defendant's alleged failure to classify Plaintiff Maier and the Independent Contractor Class Members as employees. Based on deposition testimony and documents produced in this matter, Plaintiffs contend that Defendant substantially controls the Independent Contractor Class Members and would meet the factors delineated in the *Borello* test in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, as well as the "ABC test" outlined in the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. Plaintiffs contend that Defendant can terminate without cause and, for

underperforming drivers, with cause. Plaintiffs also assert that Defendant sets the rates for deliveries and it—not Independent Contractor Class Members—preapprove and secure the customers for whom drivers make deliveries. Plaintiffs also argue that Defendant mandates that drivers follow customer instructions and expectations as to when and where to pick up automobiles and/or when the delivery will occur. Plaintiffs assert that if a driver fails to meet these expectations, Defendant retains the right to charge them money. Thus, Plaintiffs contend that Defendant ensures compliance with customer expectations and instructions by charging drivers money for failures to comply with these expectations. In addition, Plaintiffs allege that contract drivers do the same work as company drivers.

Defendant contends that Plaintiff Maier and putative class members are not its employees, and that it does not control Independent Contractor Class Members' hiring, firing, schedules, and/or pay. Defendant argues that that Independent Contractor Class Members have independence on how to perform their jobs. Defendant contends that it does not control what Independent Contractor Class Members do or how they perform their jobs.

While Plaintiffs believe in the strength of their arguments, they also recognize the risk that the Court may determine Plaintiff Maier and the putative class were not employees of Defendant. If the Court ruled in favor of Defendant on this issue, all of Plaintiffs' claims for the Independent Contractor Class would be extinguished, as they are all dependent upon the Court agreeing that Defendant is Plaintiff Maier and Independent Contractor Class Members' lawful employer.

2. Failure to Reimburse for Business Expenses

Plaintiffs contend that Defendant pays Independent Contractor Class Members 80% of the load revenue, meaning 80% of what Defendant's customers pay for the load. Plaintiffs assert that Defendant then makes unlawful deductions from this amount. Plaintiffs argue that Defendant makes deductions for expenses such as truck lease payments, fuel, insurance, surcharges, registration payments, and reserves a portion of the payment to cover any damage incurred to customer vehicles hauled. Under California Labor Code § 2802, employers cannot force employees to pay for the costs of doing business. Plaintiff contends that this is exactly what

Defendant is doing and that Defendant cannot force independent contractors to bear these operating expenses.

Defendant argues that because Independent Contractor Class Members are not employees, it does not need to reimburse them for business expenses. Defendant argues that California Labor Code § 2802 only obligates an employer to indemnify its employee for expenses that the employee incurred while performing his or her job duties.

3. Wage Statements

Plaintiffs allege that Independent Contractor Class Members are not provided with lawful wage statements. California Labor Code § 226(a) provides that employers must furnish an accurate itemized statement in writing showing: (1) gross wages earned; (2) total hours worked by the employee; (3) the number of piece rate units earned and applicable piece rate if the employee is paid on a piece rate basis; (4) all deductions; (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 employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and corresponding number of hours worked at each hourly rate by the employee. Plaintiffs allege that the settlement summaries Defendant furnished to Independent Contractor Class Members do not conform with California Labor Code § 226(a).

Defendant contends that because Independent Contractor Class Members are not employees, it does not need to provide them with accurate, itemized wage statements under California Labor Code § 226.

ii. Company Driver Class

1. Unpaid Wages

Plaintiffs allege that Defendant does not pay for all hours worked. Regardless of how compensation is measured, California law mandates "[e]very employer shall pay to each employee on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece,

commission, or otherwise." Wage Order 9-2004; Cal. Code Regs., Title 8, section 11040, subd. (4)(B); Cal. Lab. Code, section 1194; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 44; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323. Plaintiffs contend that Defendant does not pay employees for all hours Company Driver Class Members work. Plaintiffs assert that Company Driver Class Members are paid a commission of the profits realized by the loads drivers haul, not compensation based on the hours they work. Plaintiffs contend that wage structures that do not compensate by the hour, like a salary or a commission, are only said to compensate for non-overtime hours. Put differently, Plaintiffs assert that the commission earned per day is only compensation for eight daily hours and forty weekly hours. For any work over eight hours daily or forty hours weekly, Plaintiffs assert that employees are receiving no compensation under the commission pay structure. Thus, Plaintiffs alleges that Company Driver Class Members are owed unpaid wages for hours worked in addition to eight in a shift and forty in a week.

Defendant counters that Plaintiffs and the Company Driver Class Members are exempt from overtime as motor carriers and properly paid commissions and/or hourly wages for all hours worked. Defendant contends that the amounts paid to Company Driver Class Members in commissions and hourly wages significantly exceed the minimum wage for all hours worked and, therefore, are lawful.

2. Wage Statements

Plaintiffs allege that employees are not provided with lawful wage statements. Plaintiffs allege that Defendant fails to provide employees with accurate itemized wage statements because Defendant's wage statements do not list the total hours worked by the employee. Defendant argues that employees can ascertain the required information, such as hours worked, using simple math. Defendant relies on cases which hold that "[w]age statements comply with § 226(a) when a plaintiff employee can ascertain the required information by performing simple math, using figures on the face of the wage statement." *Hernandez v. BCI Coca-Cola Bottling Co.* (9th Cir. 2014) 554 Fed. Appx. 661, 662 (citing *Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136). Defendant further argues that Plaintiffs cannot show that any potential failure to comply with

California Labor Code § 226 was "knowing and intentional." *See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195.

3. Waiting Time Penalties

Plaintiffs also pursued waiting time penalties. This claim is derivative of Plaintiffs' unpaid wages claim. Should Plaintiffs' unpaid wages claim fail, this claim would also fail. In addition, Defendant contends that even if Plaintiffs were successful in their unpaid wage claim, they would have to prove Defendant "willfully" failed to pay employees the 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. 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 separation 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 v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.

iii. Meal and Rest Period Claims

Defendant relies heavily on the Federal Motor Carrier Safety Administration's (FMCSA) December 21, 2018, determination wherein the FMCSA found that California's meal and rest break laws are preempted as applied to drivers of property-carrying commercial motor vehicles who are subject to the FMCSA's own break regulations. On January 15, 2021, the Ninth Circuit upheld the FMCSA's determination that federal law preempted California's meal and rest break rules. *See Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.* (2021) 986 F.3d 841. As such, Defendant argues that FMCSA's December 21, 2018 determination provides affirmative preemption defenses to Plaintiffs' claims for meal and rest break violations. Plaintiffs

argue that the FMCSA's determination does not apply retroactively. Defendant counters that these defenses apply retroactively, wiping out Plaintiffs' meal and rest period claims in their entirety. Plaintiffs had to take into consideration the fact that many superior courts have sided with Defendant's arguments and found that drivers' meal and rest period claims are preempted and this preemption is retroactive. *See Ayala v. U.S Xpress Enterprises, Inc.*, 2019 U.S. Dist. LEXIS 77089, (C.D. Cal. May 2, 2019) 2019 WL 1986760 at *3; *Garda Wage and Hour Cases*, LASC Sup. Case No. JCCP4828; *Robinson v. Chefs' Warehouse, Inc.*, No. 15-CV-05421-RS, (N.D. Cal. Sept. 10, 2019) 2019 WL 4278926 at *4; *Henry v. Cent. Freight Lines, Inc.*, No. 2:16-CV-00280-JAM (EFB), (E.D. Cal. June 13, 2019) 2019 U.S. Dist. LEXIS 99594 at *4; *Connell v. Heartland Express*, No. 2:19-CV-09584-RGK-JC, (C.D. Cal. Feb. 6, 2020) 2020 U.S. Dist. LEXIS 29235 at *8. Defendant contends that if litigation were to continue, it would file a motion for summary judgment and ask the Court to rule in its favor on this issue.

IV. TERMS OF THE PROPOSED SETTLEMENT

Under the terms of the settlement, Defendant will create a settlement fund of $1,250,000.

A. Deductions from the 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 $1,250,000 ("Gross Settlement Amount" or "GSA"), which includes, subject to Court approval: (a) attorneys' fees of up to $416,625 (33 1/3% 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, $50,000; [7] (c) Class Representative Enhancement Payments to the named class representatives, Christian Brink and David Maier, in a sum not to exceed $10,000 each in consideration for prosecuting this class action, serving as Class Representatives, work performed,

[7] 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. Should the actual costs exceed $50,000, Plaintiffs will only seek reimbursement of costs up to $50,000. Should the actual costs be lower than $50,000, the difference will be added to the Net Settlement Amount for disbursement to Participating Class Members.

and risks undertaken for the payment of attorneys' fees and costs in the event they had been unsuccessful in the matter; (d) claims administration fees and expenses to Phoenix Settlement Administrators (hereinafter "Phoenix"), estimated not to exceed approximately $25,000;[8] and (e) PAGA payment of $50,000, 75% of which will be sent to the Labor and Workforce Development Agency ("LWDA") and 25% of which will be distributed to Aggrieved Employees.[9]

B. Calculation of the Settlement Payments to Class Members

After all Court-approved deductions from the GSA, it is estimated that $688,375 ("Net Settlement Amount" or "NSA"), less employee taxes, will be distributed to Participating Class Members.[10] The Net Settlement Amount will be divided into two payout funds: an Independent Contractor Payout Fund and a Company Driver Payout Fund.

The Independent Contractor Payout Fund is comprised of eight-tenths (8/10) of the NSA and is distributable to the Independent Contactor Class. (Exhibit 1 at Section I, Paragraph 27, Page 4). The Independent Contractor Payout Fund is approximately $550,700. Each Participating Independent Contractor Class Member will receive a proportionate share of the Independent Contractor Fund that is equal to (i) the number of weeks he or she worked at least one (1) day of the week for Defendant in California based on the Class data provided by Defendant, divided by (ii) the total number of weeks worked by all Participating Independent Contractor Class Members based on the same Class data, which is then multiplied by the Independent Contractor Fund. (Exhibit 1 at Section III, Paragraph 64(A)(i)(a), Page 11).

The Company Driver Payout Fund is comprised of two-tenths (2/10) of the NSA and is distributable to the Company Driver Class. (Exhibit 1 at Section I, Paragraph 14, Page 3). The Company Driver Payout Fund is approximately $137,675. Each Participating Company Driver

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[8] Phoenix will present to the Court a declaration in conjunction with the final approval motion outlining the costs of the settlement administration process. If the settlement administration costs are lower than the amount allocated in the Agreement, the difference will be added to the Net Settlement Amount for distribution to Participating Class Members.

[9] An Aggrieved Employees is anyone who was a Class Member, as defined in the Agreement, and worked for Defendant at any time from June 6, 2017 to April 1, 2021. (Exhibit 1 at Section I, Paragraph 3, Page 1).

[10] Participating Class Members are Class Members who do not submit a valid and timely request to exclude themselves from this Settlement. (Exhibit 1 at Section I, Paragraph 37, Page 6).

Class Member will receive a proportionate share of the Company Driver Fund that is equal to (i) the number of weeks he or she worked at least one (1) day of the week for Defendant in California based on the Class data provided by Defendant, divided by (ii) the total number of weeks worked by all Participating Company Driver Class Members based on the same Class data, which is then multiplied by the Company Driver Fund. (Exhibit 1 at Section III, Paragraph 64(A)(i)(b), Page 11).

In addition, Aggrieved Employees will receive a portion of the PAGA Fund. The PAGA Fund is comprised of 25% of the of the PAGA Payment and is available for distribution to Aggrieved Employees. (Exhibit 1 at Section I, Paragraph 33, Page 5). Each Aggrieved Employee will receive a proportionate share of the PAGA Fund that is allocated for distribution to Aggrieved Employees (i.e., 25% of the PAGA Payment), equal to (i) the number of weeks he or she worked at least one (1) day of the week for Defendant in California during the PAGA Period based on the Class data provided by Defendant, divided by (ii) the total number of weeks worked by all Aggrieved Employees during the PAGA Period based on the same Class data, which is then multiplied by the PAGA Payment allocated for distribution to Aggrieved Employees. (Exhibit 1 at Section III, Paragraph 64(A)(i)(c), Page 11).

Therefore, the value of each Class Member's Individual Settlement Share ties directly to the amount of workweeks that the Class Member performed services for Defendant during the Class Period. Under no circumstances will any portion of the $1,250,000 settlement revert to Defendant and 100% of the NSA will be paid out to Participating Class Members. In addition, the employer's share of taxes will be paid in addition to and outside of the GSA. (Exhibit 1 at Section I, Paragraph 23, Page 4).

The individual settlement payments will be divided into a "wage portion" to compensate Participating Class Members for alleged unpaid wages and a "non-wage portion" to compensate Participating Class Members for alleged interest and penalties. Each Class Member's Individual Settlement Share will be apportioned as 1/5 wages and 4/5 penalties and interest. Each Aggrieved Employee's PAGA Payment will be apportioned as 100% penalties. (*See* Exhibit 1 at Section III,

Paragraph 64(B), Page 12).

C. Notice to the Class

Within twenty (20) calendar days after entry of the Preliminary Approval Order, Defendant shall deliver to the Settlement Administrator an electronic database, which will list the following information for each Class Member, to the extent Defendant maintains such information in the normal course of business: (1) first and last name; (2) last known mailing address; (3) last known telephone number; (4) social security number; (5) hire and termination dates; (6) the total number of weeks during which the Class Member performed actual work during the Class Period; (7) the total number of weeks during which the Aggrieved Employee performed actual work during the PAGA Period, if any such weeks exist; and (8) e-mail addresses (the "Class Data"). (Exhibit 1 at Section III, Paragraph 67(B)(i), Page 16).

Within seven (7) calendar days after receipt of the Class Data, the Settlement Administrator will mail via first-class regular U.S. Mail the Class Notices to all identified Class Members using the mailing address information provided by Defendant and the results of the skip trace performed on all Class Members who are not currently performing services for Defendant. (Exhibit 1 at Section III, Paragraph 67(B)(iv), Pages 17-18).

At the same time the Class Notices are mailed, the Settlement Administrator will post a copy of the Class Notice on a settlement website for at least 60 days. (Exhibit 1 at Section III, Paragraph 67(B)(v), Page 18).

After notices are mailed, Class Members have 60 days to respond to the settlement. (Exhibit 1 at Section I, Paragraph 42, Page 6). This deadline is referred to as the "Response Deadline." Class Members may respond to the settlement by requesting to be excluded from it or objecting to it. Class Members can request to be excluded from the settlement by mailing a written request for exclusion to the Settlement Administrator. The written request for exclusion must: (a) state the Class Member's name, address, telephone number, and the last four digits of the Class Member's social security number or driver's license number; (b) state the Class Member's intention to exclude themselves from or opt-out of the Settlement; (c) be addressed to the

Settlement Administrator; (d) be signed by the Class Member or his or her lawful representative; and (e) be postmarked no later than the Response Deadline. A request to Opt Out of the settlement shall not serve to exclude Aggrieved Employees from participation in the settlement of PAGA claims. (Exhibit 1 at Section III, Paragraph 67(D), Pages 20-21).

Class Members who wish to object to the settlement may appear at the final approval hearing, either in person or through an attorney at the Class Member's own expense, provided the Class Member notified the Court of his or her intention to do so. Class Members can object to the settlement by mailing a written objection to the Settlement Administrator. Any Objections shall state: (a) the objecting person's full name, address, and telephone number; (b) the words "Notice of Objection" or "Formal Objection;" (c) describe, in clear and concise terms, the legal and factual arguments supporting the objection; (d) list identifying witness(es) the objector may call to testify at the Final Approval hearing; and (e) provide true and correct copies of any exhibit(s) the objector intends to offer at the Final Approval hearing. (Exhibit 1 at Section III, Paragraph 67(C)(a), Page 20).

If a Class Notice is returned because of an incorrect address, within five (5) business days from receipt of the returned notice, the Settlement Administrator will conduct a search for a more current address for the Class Member and re-mail the Class Notice to the Class Member. The Settlement Administrator will use the National Change of Address Database and skip traces to attempt to find the current address. The Settlement Administrator will be responsible for taking reasonable steps to trace the mailing address of any Class Member for whom a Class Notice is returned by U.S. Postal Service as undeliverable. These reasonable steps shall include, at a minimum, the tracking of all undelivered mail, performing address searches for all mail returned without a forwarding address, and promptly re-mailing to Class Members for whom new addresses are found. (Exhibit 1 at Section III, Paragraph 67(B)(vii), Pages 18-19).

If the Settlement Administrator is unable to locate a better address through a database search or skip trace, the Settlement Administrator shall call the last known phone number provided by Defendant to attempt to obtain an accurate address. If an address is obtained, the Settlement

Administrator shall promptly re-mail the Class Notice to the updated address. If the Class Notice is re-mailed, the Settlement Administrator will note for its own records the date and address of each remailing. If the Settlement Administrator is unable to locate an accurate address for the Class Member by telephone, the Settlement Administrator will promptly inform Defense Counsel who will determine whether Defendant has any additional way to locate or contact the Class Member. The Settlement Administrator will attempt to use any additional information provided by Defendant to locate an accurate address for the Class Member. If these efforts do not result in locating an accurate address for the Class Member, the Settlement Administrator will inform counsel for the Parties and, at their direction, perform a TLOxp search using the available contact information. The TLOxp search performs a "deep skiptrace" of the Class Member and will have a greater chance of locating a better address to provide the Class Member with Notice. (Exhibit 1 at Section III, Paragraph 67(B)(viii), Page 19). The timeframe to submit an objection will be extended by ten (10) days for those Class Members whose Class Notice is returned to the Settlement Administrator.

D. Submission of Social Security Numbers

Defendant does not have Social Security Numbers for five (5) Class Members. In order to receive settlement payments, these five (5) Class Members will have to submit their Social Security Number to the Settlement Administrator. These Class Members must submit their Social Security Numbers within 180 days of the date the settlement funds are disbursed by the Settlement Administrator. (Exhibit 1 at Section I, Paragraph 46, Page 7).

For Participating Class Members for whom a social security number is not received by the Effective Final Settlement Date,[11] the Settlement Administrator will provide Class Counsel with the contact information for Class Members with missing Social Security Numbers so Class

[11] The effective date of the Settlement will be the date when the final approval of the settlement can no longer be appealed. The Effective Final Settlement Date will be the expiration of the period for filing any appeal, writ, or other appellate proceeding opposing the Class Settlement based on the later of the Court's ruling or order on any timely filed motion to set aside judgment or to intervene or entry of final order and judgment certifying the Class and approving the settlement agreement. (Section I, Paragraph 22, Pages 3-4).

Counsel can attempt to collect Social Security Numbers for these individuals. (Exhibit 1 at Section III, Paragraph 67(B)(iv), Pages 17-18).

Sixty (60) days after the Class Notice is mailed, the Settlement Administrator shall send a reminder postcard to those Participating Class Members for whom the Settlement Administrator has not received a Social Security Number. Ninety (90) days after the Class Notice is mailed, the Settlement Administrator shall send a second reminder postcard to those Participating Class Members for whom the Settlement Administrator has not received a Social Security Number. One hundred and twenty (120) days after the Class Notice is mailed, the Settlement Administrator shall send a third reminder postcard to those Participating Class Members for whom the Settlement Administrator has not received a Social Security Number. The third reminder postcard will disclose the amount due to the Participating Class Member, make a follow-up request for the Participating Class Member's Social Security Number, and explain that the Participating Class Member risks forfeiture of their Individual Settlement Share to the Cy Pres Beneficiary if their Social Security Number is not provided to the Settlement Administrator within 180 days after the Settlement Disbursement Date. At the same time the reminder postcards are mailed, the Settlement Administrator will call and e-mail Participating Class Members without Social Security Numbers on file in an effort to obtain Social Security Numbers, to the extent phone numbers and/or e-mail addresses are available. (Exhibit 1 at Section III, Paragraph 67(B)(vi), Page 18).

D. Distribution of Funds

Defendant shall wire to the Settlement Administrator the Gross Settlement Amount no later than thirty (30) days after the Effective Final Settlement Date. (Exhibit 1 at Section I, Paragraph 25, Page 4). Within ten (10) calendar days of Defendant funding the Gross Settlement Amount, the Settlement Administrator shall disburse: (1) the Net Settlement Amount to be paid to Participating Class Members; (2) the Attorneys Fee Award and Cost Award to Class Counsel for attorneys' fees and costs, as approved by the Court; (3) the Class Representative Enhancement 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 Aggrieved Employees, as approved by the Court. (Exhibit 1 at Section I, Paragraph 21, Page 3).

Participating Class Members must cash or deposit their Individual Settlement Share checks within one hundred and eighty (180) calendar days after the Settlement Disbursement Date. If any checks are not redeemed or deposited within ninety (90) calendar days after the Settlement Disbursement Date, 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, unclaimed, or not deposited by the expiration of the 90-day period after mailing the reminder notice, the Settlement Administrator will, within two hundred (200) calendar days after the checks are mailed, cancel the checks. All funds associated with the Individual Settlement Share checks returned as undeliverable and funds associated with those Individual Settlement Share checks remaining un-cashed or unclaimed, shall be transmitted by the Settlement Administrator to a cy pres beneficiary. The cy pres beneficiary selected by the Parties is The Boys and Girls Club of Tulare County. The Boys and Girls Club of Tulare County is a non-profit organization that supports projects that enables young people to reach their full potential as productive, caring, responsible citizens. Likewise, if the Settlement Administrator has not received the requested outstanding Social Security Numbers from Participating Class Members, the Settlement Administrator will, within two hundred (200) calendar days of mailing the Individual Settlement Share checks to Participating Class Members, deposit the settlement amounts attributed to these Class Members with The Boys and Girls Club of Tulare County. (Exhibit 1 at Section III, Paragraph 67(N), Pages 25-26).

E. Release of Claims

The claims that Plaintiffs and other Participating Class Members are releasing in exchange for an Individual Settlement Share payment are based on the facts and claims asserted in the case. In exchange for an Individual Settlement Share, Plaintiffs and Participating Class Members will

release and discharge the Released Parties[12] from any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorney's fees, damages, action or causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, that are alleged, or that reasonably could have arisen out of the same facts alleged in the Action against Defendant (including any and all unnamed Does). The Released Claims include, but are not limited to, 1) Failure to Pay All Straight Time Wages; 2) Failure to Provide Meal Periods (Lab. Code §§ 226.7, 512, IWC Wage Order No. 9- 2001(11); Cal. Code Regs., tit. 8 § 11090); 3) Failure to Authorize and Permit Rest Periods (Lab. Code § 226.7; IWC Wage Order No. 9-2001(12); Cal. Code Regs. tit. 8 § 11090); 4) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions (Lab. Code §§ 226, 1174, 1175); 5) Failure to Pay All Wages Due at the Time of Termination of Employment (Lab. Code §§ 201-203); 6) Violation of Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.); 7) Failure to Reimburse/Illegal Deductions (Lab. Code §§ 221, 2802, Cal. Regs., tit. 8, § 11090(8)); and 8) improper classification of independent contractors based on the underlying facts alleged in the Action. The release shall be for the Class Period. (Exhibit 1 at Section I, Paragraph 40, Page 6).

In exchange for a portion of the PAGA Fund, each of the Aggrieved Employees, including each Plaintiff, shall fully release and forever discharge the Released Parties from all claims under the California Private Attorney General Act ("PAGA"), Cal. Lab. Code § 2698, *et seq*. to the extent such claims are predicated on any of the Released Claims. The release shall be for the PAGA Period. (Exhibit 1 at Section I, Paragraph 36, Page 5).

In addition, Plaintiffs agree to a general release of their claims against Defendant. (Exhibit 1 at Section III, Paragraph 69, Pages 26-27).

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[12] The Released Parties are t and its past, present and/or future, direct and/or indirect, officers, directors, employees, representatives, administrators, attorneys, agents, parent companies, subsidiaries and affiliated corporations and entities, consultants, shareholders, joint ventures, predecessors, successors, assigns, and any individual or entity which could be liable for any of the Released Claims. (Exhibit 1 at Section I, Paragraph 41, Page 6).

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.[13] "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 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

[13] 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.

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 as a Result of 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. Prior to, at, and after the mediations, Counsel for the Parties conducted extensive arm's length settlement negotiations until the settlement was reached. The terms of the settlement are memorialized in the Agreement which is attached to the Declaration of David Mara, Esq. as Exhibit 1. While Plaintiffs believe in the merits of their case, they also recognize the inherent risks of litigation and understand 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 is the Result of 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 investigation, discovery, and evaluation of Defendant's policies and procedures, as well as the data produced for the putative class, 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 experienced in wage and hour employment law and class actions. Plaintiffs' Counsel has significant experience in litigating unpaid wages, unprovided meal and rest periods, and overtime 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. ¶¶ 2-8). Plaintiffs' Counsel has prosecuted numerous wage and hour class action 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. (Mara Dec. ¶ 8). This experience instructed Plaintiffs' Counsel on the risks and uncertainties of further litigation and guided their determination to endorse the proposed settlement.[14] Defendant's Counsel practices labor and employment law and have represented numerous employers in similar types of litigation. Accordingly, both Parties' Counsel 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 a 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 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 § 877.6, the court must at least satisfy itself that the class settlement is within the 'ballpark' of

[14] The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Class Notice 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 final approval motion.

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 Proposed Settlement is a Reasonable Compromise of Claims

The proposed settlement was only possible following significant discovery and an evaluation of Defendant's relevant policies and procedures, as well as the data that Defendant produced for the putative class as referenced above, and a review of Defendant's financial documents by Plaintiffs' financial expert. This permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages as well as the risks of continued litigation. The discovery conducted allowed Plaintiffs to evaluate the strengths and weaknesses of their central theories of liability, which are predicated on Plaintiffs' claims that Defendant misclassified independent contractors, failed to reimburse independent contractors for business expenses, failed to pay all wages owed to company drivers, failed to provide accurate itemized wage statements, and failed to pay all wages owed at the termination of employment. As explained herein, Defendant maintains that the discovery produced demonstrates that it would succeed at both class certification and on the merits.

Although, Plaintiffs believe this case is suitable for certification on the claimed bases that there are company-wide policies that Plaintiffs contend violate California law and uniformly affect the Class Members, 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.[15] While remaining confident in the strengths of their claims, all of these factors led Plaintiffs to discount the following maximum potential damage exposure.

[15] *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);

2. Maximum Potential Exposure[16]

a. Independent Contractor Class

Based on the data provided by Defendant, Plaintiffs have determined that approximately 105 Independent Contractor Class Members worked approximately 8,862 workweeks during the Class Period. (Mara Dec. ¶ 14).

Plaintiffs allege that Defendant failed to reimburse Independent Contractor Class Members for all business expenses. Based upon the settlement sheets provided by Defendant, Plaintiffs estimate that Independent Contractor Class Members are owed approximately $19,351 per month in reimbursements. This equates to approximately $4,837.75 per week owed in reimbursements. As such, if Plaintiffs were to prevail on this claim, Plaintiffs and the Independent Contractor Class Members would be entitled to the following maximum potential damages: $42,872,140 ($4,837.75 per week x $8,862 workweeks = $42,872,140.50). (Mara Dec. ¶ 15).

Plaintiffs also allege that Defendant failed to provide accurate itemized wage statements. The statute of limitations for Plaintiffs' wage statement claim is one year. Under California Labor Code § 226(e)(1), the damages for breach of this section are fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000). If Plaintiffs were to prevail on this claim and assume that each employee who worked within the statute of limitations was entitled to the maximum penalty, Plaintiffs and the Independent Contractor Class Members would be entitled to the following maximum potential damages: $76,000 ($4,000 maximum penalty x approximately 19 drivers in the statute of limitations = $76,000). (Mara Dec. ¶ 16).

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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).

[16] Based upon the Ninth Circuit's opinion upholding the FMCSA's determination and the California courts that have ruled in favor of Defendant's position, Plaintiffs do not attribute value to the meal and rest period claims herein.

b. Company Driver Class

Based on the data provided by Defendant, Plaintiffs have determined that approximately 139 Company Driver Class Members worked approximately 14,058 workweeks during the Class Period. This equates to approximately 56,232 shifts worked by Company Driver Class Members. (Mara Dec. ¶ 17).

Plaintiffs allege that Defendant failed to pay for all time worked, namely, hours in excess of eight in a shift or forty in a week. If Plaintiffs were to prevail on this claim for the entire class period, Plaintiffs and the Company Driver Class Members would be entitled to the following maximum potential damages: $5,617,576 (56,232 shifts x 3.33 hours of unpaid time per shift x $30 per hour = $5,617,576.80). (Mara Dec. ¶ 18).

Plaintiffs also allege that Defendant failed to provide accurate itemized wage statements. If Plaintiffs were to prevail on this claim and assume that each employee who worked within the statute of limitations was entitled to the maximum penalty, Plaintiffs and the Company Driver Class Members would be entitled to the following maximum potential damages: $160,000 ($4,000 x approximately 40 employees in the statute of limitations = $160,000). (Mara Dec. ¶ 19).

Plaintiffs and the Company Driver Class Members may also be entitled to waiting time penalties. Plaintiffs calculate the potential maximum exposure under their waiting time penalties cause of action as $917,730 (approximately 90 former employees within the three-year statute of limitations x 30 days x 11.33 hours average shift length x $30 per hour = $917,730). (Mara Dec. ¶ 20).

c. Aggrieved Employees

Plaintiffs also seek PAGA penalties. 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 four (4) violations – failure to reimburse for business expenses,

failure to pay all wages owed, inaccurate wage statements, and waiting time penalties – of the California Labor Code sections which give rise to PAGA penalties. The statute of limitations for PAGA violations go back one year. There are approximately 59 Aggrieved Employees. Plaintiffs calculate Defendant's exposure under PAGA as follows: $2,360,000 (59 Aggrieved Employees x $100 x 4 PAGA violations x 100 pay periods = $2,360,000). (Mara Dec. ¶ 21).

d. Total Exposure

Thus, not taking into account any of its defenses or arguments, Defendant's total exposure if Plaintiffs were successful in their core claims as to the Independent Contractor Class Members would be approximately $42,948,140 [$42,872,140 (failure to reimburse for business expenses exposure) + $76,000 (wage statement exposure) = $42,948,140]. In addition, not taking into account any of its defenses or arguments, Defendant's total exposure if Plaintiffs were successful in their core claims as to the Company Driver Class Members would be approximately $6,695,306 [$5,617,576 (unpaid wages exposure) + $160,000 (wage statement exposure) + $917,730 (waiting time penalties exposure) = $6,695,306]. If all of Plaintiffs' claims are successful, they may also be entitled to PAGA penalties in the maximum amount of $2,360,000. (Mara Dec. ¶ 22).

3. Risks to Plaintiff's Claims

a. Plaintiffs' Independent Contractor Claims Face Risks at Class Certification and on the Merits

Plaintiffs' claims for Independent Contractor Class Members face risks at class certification and on the merits. The biggest dispute between the Parties as to this claim is whether Independent Contractor Class Members should be classified as employees under California law. Defendant vehemently believes that it did not misclassify these individuals and that these individuals were properly classified as independent contractors. Defendant argues that if litigation were to continue, it would provide declarations at class certification showing that independent contractors were not under Defendant's control and that independent contractors had discretion in how to perform their duties. Defendant argues that these declarations would defeat class certification because the Court would have to look at whether each independent contractor felt like it was under Defendant's control and whether each independent contractor exercised his or her

own discretion over how to perform their job duties.

In addition, Defendant argues that class certification is improper because there are various different types of independent contractors. For example, some independent contractors leased trucks from Defendant while some owned their own trucks that they used to perform services for Defendant. Defendant also argues that many independent contractors provided delivery services for Defendant while simultaneously providing services to third parties. On the basis of these differences, Defendant argues that the Court cannot make a class wide determination on whether independent contractors were misclassified.

Further, even if class certification was granted, Defendant argues that it would file a motion for summary judgment on the employment issue. Defendant argues that it would be able to show that it did not exercise sufficient control over independent contractors to make them its employees. If Defendant were to win this motion, Plaintiffs would not be entitled to any recovery for these claims.

As to potential damages, Defendant argues that during the Class Period it stopped taking any deductions at all from Independent Class Members' pay. As such, any potential recovery that Plaintiffs could obtain would be cut off as of this date and would not rise to the level Plaintiffs estimate herein.

When taking these arguments into consideration, Plaintiffs had to discount the maximum potential exposure of their claims for Independent Contractor Class Members.

b. Plaintiffs' Company Driver Claims Face Risks on the Merits

Plaintiffs' claims for Company Driver Class Members face risks on the merits. Plaintiffs argue that Defendant owes company drivers additional wages. Plaintiffs contend that Defendant's commission pay structure can only compensate company drivers for eight hours in a day and forty hours in a week. Defendant counters that that overtime hours and compensation do not apply to drivers. Thus, Defendant argues a commission-based pay, coupled with hourly wages during part of the class period, pays for all hours worked and significantly exceeds minimum wage for all hours worked. If litigation continued, the Parties would file cross motions for summary judgment

on this issue. Plaintiffs had to take into consideration that the Court could agree with Defendant's position.

As Plaintiffs' waiting time penalties claim is derivative of their unpaid wages claims, if the Court were to agree with Defendant's argument, such a ruling would also eliminate Plaintiffs' potential exposure under their waiting time penalties claim. Further, this claim is also subject to its own risks on the merits independent of the risks of Plaintiffs' unpaid wages claim. This is because this claim has 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*[.]" *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195. Defendant contends that even if Plaintiffs were successful in their unpaid wages claim, they would have to prove Defendant "willfully" failed to pay company drivers 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 separation 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.

Plaintiffs' wage statement claim is also subject to risks on the merits. Plaintiffs allege that Defendant failed to provide accurate itemized wage statements because Defendant's wage

statements fail to itemize the total hours worked. Defendant disputes this claim and relies on cases which hold that "[w]age statements comply with § 226(a) when a plaintiff employee can ascertain the required information by performing simple math, using figures on the face of the wage statement." *Hernandez v. BCI Coca-Cola Bottling Co.* (9th Cir. 2014) 554 Fed. Appx. 661, 662. (*citing Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136). In *Hernandez*, the court granted summary judgment in the defendant employer's favor. Should litigation continue, the Parties would file cross motions for summary judgment on this issue. There is a risk that the Court could agree with Defendant, which would eliminate all exposure under this claim.

In addition, 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 reflect the hours worked and the pay received even if the pay is later determined to be inaccurate. Further, Defendant argues that Plaintiffs cannot show that any potential failure to pay all wages owed was knowing and intentional. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195 ("Some statutory penalties are imposed only if an employers' violation was 'willful' or 'knowing.' . . . [*S*]*ection 226, subdivision (e)* penalizes an employer's 'knowing and intentional' failure to provide itemized wage statements under *section 226, subdivision (a)*[.]").

Based on these arguments, Plaintiff had to reduce the maximum potential exposure for the claims asserted on behalf of Company Driver Class Members.

c. PAGA Claims

Plaintiffs' PAGA claims are subject to the same risks on the merits as Plaintiffs' non-PAGA claims. Section 2699, subdivision (e)(2) provides that "[i]n any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary, oppressive, or confiscatory." 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.* Defendant argues that if the case were to continue in litigation, it would be able to show that it took its obligations to comply with the law seriously. As such, if Plaintiffs were able to prevail on the merits of their PAGA claims, it is likely that the Court would reduce the maximum penalty allowed.

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' allegations.* 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.

d. Risks of Further Litigation

Plaintiffs' claims also face risks in going forward with litigation. If litigation continues, there is a risk that Defendant could go out of business. If this occurs, employees would not receive any compensation for the wage and hour violations Plaintiffs allege against Defendant. As part of the settlement, Defendant provided Plaintiffs' financial expert with financial documents. Plaintiffs' expert analyzed these documents and determined that Defendant would not be able to

pay a higher settlement amount. Should litigation continue, there is a risk that Defendant may no longer be in business, meaning even if Plaintiffs were to prevail on the merits of their claims, Plaintiffs and Class Members would not be able enforce a judgment in their favor.

4. The Settlement Amount of $1,250,000 is Reasonable

Based upon the risks just discussed, Plaintiffs had to discount their maximum potential exposure. Plaintiffs also had to consider that, should the Court agree with their theories and grant certification as to each of their claims, they may not be awarded the full exposure at trial. Plaintiffs also had to consider that the Court could agree with Defendant's arguments or that Defendant could go out of business before a judgment could be collected on. All of these factors, and the ones discussed above, led Plaintiffs to reduce the realistic potential exposure in order to gain a definite monetary recovery for the class.

In light of the risks Plaintiffs' claims faced, Plaintiffs and their Counsel believe that the settlement amount of $1,250,000 – **with an average settlement share amount to Independent Contractor Class Members estimated at approximately $5,244.76 and an average settlement share amount to Company Driver Class Members estimated at approximately $990.47** – is a reasonable and fair settlement amount. (Mara Dec. ¶ 23).

It should be noted that 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).

E. 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. Plaintiff seeks approval of the following Classes for settlement purposes only:

> **Independent Contractor Class:** All drivers who directly signed a contract with Central Valley Auto Transport, Inc. and have performed services for Central Valley Auto Transport, Inc. in service of that contract within the State of California at any time from June 6, 2014 to April 1, 2021.
>
> **Company Driver Class:** All non-exempt truck drivers who are or were employed by Central Valley Auto Transport, Inc. in the State of California at any time from June 6, 2014 to April 1, 2021.

i. The Proposed Settlement Class is Ascertainable

Plaintiffs contend that the proposed Classes are ascertainable because of all of the Class

Members have performed services for Defendant and have been identified through Defendant's own records. *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 they proposed Class has approximately 221 members. Defendant's records show that there are approximately 105 Independent Contractor Class Members and approximately 105 Company Driver Class Members. Plaintiffs contend that joinder

of all 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 Class is comprised of approximately 221 members and 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 Class Members' claims all stem from the same allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiffs seek the same legal remedies under state law on behalf of themselves and all Class Members. As liability as to all Class Members is predicated on the same policies and practices, which Plaintiffs allege violate California law, the commonality requirement has been satisfied.

v. 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 their claims are typical of the Class Members' claims because they arise from the same factual basis and are based on the same legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D. 641, 644. Each Independent Contractor Class Member is challenging the same policies and practices. In addition, each Company Driver Class Member is challenging the same policies and practices. Factual differences may exist between Plaintiffs' and the 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.

iv. The Adequacy Requirement is Met

The adequacy requirement is met if Plaintiffs have no interests adverse to the interests of the proposed Class Members and are 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 do not have any conflicts of interest with the Class. They have been and continue to be committed to vigorously prosecuting this case. If any 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 Class Members.

F. Notices to Class Members Comply with California Rule of Court 3.769(f)

California Rule of Court 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.

The proposed Class Notices meet all of these requirements. The proposed Class Notices advise the Class Members 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 Class Notices are attached as Exhibits A and B to the Agreement.

VI. 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 Class Notice should be approved. Plaintiffs also respectfully request the Court set a final approval hearing date of May 20, 2022 or later.

Dated: January 6, 2022

MARA LAW FIRM, PC

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Representing Plaintiffs CHRISTIAN BRINK and DAVID MAIER on behalf of themselves and all others similarly situated, and on behalf of the general public