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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF HUMBOLDT

Erick Grumm, individually and on behalf of all others similarly situated,

Plaintiff,

v.

T.J.S. Leasing & Holding, Co., Inc. a California Company, and Does 1-10,

Defendants.

Case No. DR160492

PLAINTIFF'S NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION, FOR:

(1) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT;

(2) APPROVAL OF NOTICE TO CLASS MEMBERS AND RELATED MATERIALS;

(3) APPROVAL OF SETTLEMENT ADMINISTRATOR; AND

(4) SETTING HEARING FOR FINAL APPROVAL OF SETTLEMENT

Date: October 23, 2017
Time: 1:45 p.m.
Dept.: 3
Hon. Timothy P. Cissna

Filing Date: September 28, 2016
Trial Date: None

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 23, 2017, at 1:45 p.m., or as soon thereafter as the matter may be heard, in Department 3 of the Humboldt County Superior Court, located at 825 Fifth Street, Eureka, California 95501, Plaintiff, Erick Grumm, on behalf of himself and all others similarly situated, will move this Court, pursuant to § 382 of the California *Code of Civil Procedure*, for an order:

1. Conditionally certifying the class for purposes of settlement;

2. Preliminarily appointing Plaintiff as Class Representative for purposes of settlement only;

3. Appointing Craig J. Ackermann, Esq. of Ackermann & Tilajef, P.C. and Jonathan Melmed of Melmed Law Group P.C., as Class Counsel for purposes of settlement;

4. Preliminarily approving the class action settlement as fair, adequate, and reasonable, based upon the terms set forth in the Settlement Agreement, including payment by T.J.S. Leasing & Holding Co., Inc. ("Defendant" or TJS Leasing) of the Gross Maximum Settlement Amount of $200,000.00;

5. Preliminarily approving an Enhancement Award of $5,000.00 to Plaintiff Erick Grumm in recognition of his service to the Settlement Class;

6. Preliminarily approving Plaintiff's Counsels' request for up to $66,666.67 for attorney's fees, plus reimbursement of litigation costs up to $8,000;

7. Appointing CPT Group, Inc. as the third-party Settlement Administrator for mailing notices and for claims administration, and approving an estimated $9,000.00 deduction from the Gross Settlement Amount for the Settlement Administrator's fees and expenses in mailing notices and claims administration; and

8. Approving the proposed Class Notice and Claim Form, and ordering they be disseminated to the Class as provided in the Settlement Agreement.

This motion is based upon this Notice, the Memorandum of Points and Authorities attached hereto; the declarations of Craig J. Ackermann and Erick Grumm filed herewith; the Settlement

Agreement, the proposed Class Notice and Claim Form attached thereto; the Proposed Order Granting Preliminary Approval of Class Action Settlement; and all other records, pleadings, and other papers filed in this action; and upon such other documentary and verbal evidence or argument as may be presented to the Court at the hearing of this motion.

ACKERMANN & TILAJEF, P.C.
MELMED LAW GROUP P.C.

By: _____

Dated: September 28, 2017

Craig J. Ackermann
Attorneys for Plaintiff Erick Grumm
and the Proposed Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion seeks preliminary approval of a wage-and-hour class action settlement in the Gross Maximum Settlement Amount of $200,000.00 between plaintiff Erick Grumm ("Plaintiff") and defendant T.J.S. Leasing & Holding, Co., Inc. ("Defendant" or "TJS Leasing"). Plaintiff seeks to represent a settlement Class of approximately 79 persons defined as: all truck drivers who have been employed by Defendant in California and who were paid on a per mile basis anytime from September 28, 2012 through the date of an order preliminarily certifying the class (the "Class" or "Settlement Class").

The settlement was reached after an exchange of informal discovery and several months of arm's-length, non-collusive bargaining between counsel, including an all-day mediation with an experienced mediator, Alan Berkowitz, Esq. culminating in a long-form class action settlement agreement between the Parties. Since the settlement is fair and reasonable, was negotiated at arm's length between counsel, the settlement should be preliminarily approved.

If the Court approves the Settlement, the Settlement Administrator shall pay a Settlement Share pro rata to each Participating Class Member (i.e., those who submit timely and valid Claim Forms and do not opt out of the Settlement), based on each Class Member's weeks worked within the Class Period as a percentage of all Class Members' weeks worked within the Class Period from the Net Settlement Amount (i.e., the amount left over after deductions for attorneys' fees, litigation costs, administration costs, and the enhancement award to the named Plaintiff). Regardless of the actual amount claimed by Class Members, at least 70% of the Net Settlement Amount shall be distributed to the participating Class Members who submit timely and valid Claim Forms. If more than 70% of the Net Settlement Amount is claimed, then Defendant shall pay the actual amount claimed. Any amount unclaimed from the Net Settlement Amount shall remain with Defendant. Any funds associated with uncashed checks will be paid to the State of California's Department of Industrial Relations, in the name of the Class Member who did not cash the check.

Plaintiff now requests that the Court enter an order: (1) conditionally certifying the Class

under California *Code of Civil Procedure* § 382 for settlement purposes only and preliminarily approving the settlement; (2) approving the proposed Notice of Proposed Class Action Settlement and Claim Form to be disseminated to Class Members pursuant to the Settlement Agreement[1], (3) appointing CPT Group, Inc. ("CPT Group") as the Settlement Administrator; and (4) scheduling a hearing for final approval of the Settlement Agreement.

II. BACKGROUND

A. Truck Drivers' Duties and Compensation

Defendant is a California corporation with its headquarters in Ferndale, California in Humboldt County. (CJA Decl., ¶17). Defendant transports milk, juice and other liquids to various locations throughout California. *Id*. In order to provide these services, Defendant employs approximately 47 truck drivers at any one time. *Id.* The total number of Class Members employed by Defendant during the Class Period is approximately 79. *Id.,* at ¶17, 26.

Defendant compensated its drivers based on a per mile, piece-rate pay structure. *Id.,* at ¶18. Defendant paid its drivers on this "per mile" basis with no additional and separate pay on an hourly basis for time spent on rest breaks, inspections, loading and unloading, cleaning/fueling and/or paperwork/check-in and check-out time ("Non-Driving Tasks"). *Id.* There was no separate and hourly pay for the Non-Driving Tasks. *Id.*

B. Plaintiff's Allegations.

Erick Grumm filed a Class Action Complaint with this Court on September 28, 2016. *Id.,* at ¶19. In the Complaint Plaintiff alleged, on behalf of himself and a class of similarly situated truck drivers, that Defendant violated California's minimum wage law by not separately paying its truck drivers at hourly rates for certain work-related tasks that were not specified in Defendant's compensation plan, and for their spent on their statutory rest breaks. See, *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864, 872-73 (2013) ("[A] piece-rate compensation formula that does not compensate formula that does not compensate separately for rest periods does not comply with

[1] The proposed Notice of Class Action Settlement ("Class Notice") and Claim Form are attached to the Settlement Agreement as **Exhibits 1** and **2**, respectively. (*See,* Declaration of Craig J. Ackermann in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("CJA Decl."), ¶3, **Exhibit A**.)

California minimum wage law."); *see, also, Labor Code* § 226.2 (Codifying *Bluford* and creating a safe harbor defense pursuant to which employers could wipe out liability for all piece-rate related claims prior to December 31, 2015 by paying either 4% of the W2 wages paid to all Class Members during the period from July 1, 2012 to December 31, 2015 or 3% of the same amount if some non-productive time was paid for separately and hourly). *Id*.

Specifically Plaintiff alleged: (1) Defendant failed to pay separately and on an hourly for time spent by driver on rest breaks, pre- and post-trip inspection time, loading/unloading time, cleaning, fueling, and paperwork time (Cal. Labor Code §§ 1194, 1194.2 and 226.2); (2) Defendant failed to provide paid rest periods to drivers and pay missed rest break premiums (Cal. Labor § 226.7 and IWC Wage Order No. 9); (3) Defendant is liable for waiting time penalties (Cal. Labor Code §§ 201-203); and (4) Defendant is liable for unfair business practices based on the foregoing (Cal. Bus. & Prof. Code §§ 17200-17204). *Id*., at ¶20.

C. The Parties' Informal Discovery Investigation and Settlement.

To avoid the expense of protracted litigation, the parties agreed to engage in in robust formal discovery and attempt to resolve the matter through arms-length negotiations between counsel with the assistance of an experienced wage-and-hour mediator. *Id., at* ¶24. Counsel agreed to engage in extensive informal discovery to enable Plaintiff and his counsel to evaluate thoroughly the potential strengths and weaknesses of the claims and defenses in the action, and Defendant's ability to pay. *Id., at* ¶24.

Accordingly, Defendant provided Plaintiff's counsel with Plaintiff's personnel file and payroll records, including, an employment agreement between Plaintiff and Defendant; Defendant's company policy regarding rest breaks and meal periods; and records showing piece rate driving logs. *Id.* Defendant further provided (1) information about the putative class, including the total number of class members and the number of full time equivalent employees ("FTEs"), as well as each class member's dates of employment with Defendant; (2) the average hourly rates of pay for the members of the putative class when they were paid, if at all, separately and hourly for non-productive work; (3) relevant rest break policy and compensation policy related documents; (4) confirmation of pay

changes as of January 1, 2016 to pay all truck drivers on an hourly basis; and (5) information in connection with the gross W-2 wage paid out to the Class Members during the Class Period for purposes of calculating the 3% cure pursuant to Labor Code Section 226.2. *Id.*, ¶25.

In addition, Defendant produced pay codes, compensation policies, pay schedules, relevant compensation and wage information for the class members, and compensation guidelines for its truck drivers. *Id.* Plaintiff and his counsel analyzed the electronic data, and prepared detailed models of the claims and potential exposure. *Id.*, ¶27.

As described below, the pre-mediation discovery confirmed that Plaintiff's minimum wage class claims for time spent on inspections, paperwork, and rest breaks (and his derivative claims) were somewhat uncertain. *Id.* After a series of discussions between Plaintiff and his counsel, and after we and Plaintiff thoroughly reviewed the materials produced by Defendant, and during mediation, the parties agreed that the statutory cure of at least 4% provided for both a fair and reasonable settlement benchmark. The gross W-2 wages paid out to the class during the class period was approximately $4,579,134; 4% of $4,579,134 is $ $183,165.36; 3% of $4,579,134 is $137,374.02. After weeks of negotiations and after a full day mediation session with experienced wage-and-hour mediator Alan Berkowitz, Esq., and after reviewing the mediator's proposal, the parties decided to settle the matter for the Gross Maximum Settlement Amount of $200,000, which was the statutory safe harbor amount at the 4% level, plus a reasonable amount for attorneys' fees and costs minus appropriate deductions for all of Defendant's Defenses. The parties further agreed that the Gross Settlement Amount would be paid by Defendant in three installments and that the Class Period would run from September 28, 2012 through Preliminary Approval. *Id.*

C. Defendant's Defenses

Defendant has denied and continues to deny generally the claims and contentions alleged in the Complaint. (CJA Decl., ¶¶ 21-23, 33-42). Defendant contended, among other things, that it complies with and has complied at all times with the California *Labor Code*, the *Business & Professions Code*, and all applicable California laws. *Id.* Defendant also denied that, for any purpose other than settling this lawsuit, this Action is appropriate for class treatment. *Id.*

As a preliminary matter, Defendant contended that drivers have no legal or contractual right to receive hourly pay higher than minimum wage for inspection time, cleaning/fueling time, work-related paperwork or rest breaks, prior to December 31, 2015. CJA Decl., ¶34.

In addition, Defendant contended that its piece rate compensation system pays drivers at hourly rates well above minimum wage for all hours worked. (CJA Decl., at ¶35). Thus, at issue is whether Defendant owes minimum wage ($9/hour prior to 2016 and $10/hour after January 1, 2016) to its truck drivers for Non-Driving Tasks and rest periods. *Id.* Defendant contended that it does not, for several reasons. (CJA Decl., at ¶36).

First, all of Defendant's truck drivers agreed to Defendant's piece-rate compensation system, and Defendant contended that such agreements are valid under California law.[2] *Id.* Second, Defendant maintained that its piece-rate pay structure lawfully includes statutory rest breaks. Although Plaintiff cites *Bluford* and *Labor Code* § 226.2 in support of his contention that piece-rate employees must receive separate hourly pay for rest breaks, Defendant contended that *Bluford* did not address important provisions of Industrial Welfare Commission ("IWC") Wage Order No. 9 that conflict with *Bluford*.[3] *Id*. Recently, one federal court granted a Defendant's motion for summary judgment approving a piece-rate system of pay with respect to claims for unpaid inspection time, detention time and meal/rest break violations, thus demonstrating risk to Plaintiff on the merits.[4]

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[2] Defendant contends that the drivers experienced no minimum wage violations because the piece-rate pay structure lawfully compensated them for all tasks associated with their trips (including loading and unloading time, vehicle inspections mandated by the Department of Transportation ("DOT"), and completing paperwork to document a trip). The Division of Labor Standards Enforcement ("DLSE") has explained that employers with incentive compensations systems may run afoul of California minimum wage law "if, as a result of the directions of the employer, the compensation received by piece rate…workers is reduced because they are precluded, by such directions of the employer, from earning…piece rate compensation during a period of time…" 2002 Update of the DLSE Enforcement Policies and Interpretations Manual ("DLSE Manual"), § 47.7. Therefore, Defendant contended that the mileage rate lawfully compensated drivers for activities other than delivering loads that are essential to completing their trips. The cases cited by Plaintiff were, in Defendant's view, not applicable because they did not have an agreement whereby the employees agree that tasks such as those referenced above would be included in the piece-rate and help to generate the piece. *Id.* For this reason, Defendant questioned whether *Labor Code* § 226.2 applied to its compensation system at all.

[3] The Wage Orders prohibit deductions from wages for rest breaks and permit employers not to record rest breaks. (*See* Industrial Welfare Commission, Wage Order No. 9-2001, § 12 (eff. July 1, 2002) ("Authorized rest period time shall be counted as hours worked for which there shall be no deductions from wages").)

[4] See https://www.law360.com/articles/908415/calif-judge-ends-crst-truck-driver-meal-break-suit. Of course, a number of federal courts have decided the issue in favor of drivers as well. See, e.g., *Cardenas v. McClane Trucking*, 796 F.Supp. 2d 1246 (C.D.Cal. 2011) (granting summary judgment to plaintiff-drivers on claims for unpaid non-productive time where they were paid in a piece-rate basis); *Ridgeway v. Wal-Mart Stores, Inc*., 107 F.Supp.3d 1044 (N.D.Cal. 2015) (holding that employer's piece-rate system of pay was not lawful and did not compensate for rest periods and other non-productive time).

Third, Defendant asserted that all drivers had the opportunity to take all of their rest breaks and, thus, no missed rest break premiums would be payable since Defendant substantially complied with its obligation to authorize rest breaks. (CJA Decl., at ¶37). Defendant claimed that Plaintiff would not be able to recover on his claim for rest break premiums under § 226.7 of the *Labor Code*, even if the rest periods were unpaid, since the rest breaks were provided and taken. Defendant also denied that Plaintiff and the putative Class could "double-dip" and recover both rest break premiums and pay for rest breaks. *Id.* Defendant argued that, at most, Plaintiff and the putative class could recover unpaid wages for non-paid rest breaks, but not both unpaid wages and missed rest break premiums. *Id.*

Fourth, Defendant could have asserted a federal preemption defense to Plaintiff's claims that Plaintiff's rest break and wage/hour claims are subject to federal preemption based on the Federal Aviation Authorization Administration Act of 1994 ("FAAAA").[5] (CJA Decl., at ¶38). The trucking industry has repeatedly introduced legislation to retroactively preempt state meal and rest break claims by clarifying the FAAAA. Passage of such legislation would result in the class claims being wiped out entirely and the class members obtaining no recovery. Issues related to retroactive preemption first appeared in the 2015 Highway bill called the Denham Amendment; however, the amendment did not make it through the Senate. After the Denham amendment failed, the American Trucking Association, the 50 ATA-affiliated state trucking associations, the National Private Truck Council, the Truckload Carriers Association, and the Truck Renting and Leasing Association placed pressure on the House Committee on Transportation and Infrastructure to include the Denham language in the FAA Reauthorization bill. In addition, on May 17, 2016, the House Appropriations Subcommittee on Transportation, Housing, and Urban Development, and Related Agencies approved the 2017 Transportation, Housing, and Urban Development funding bill which included an amendment of the FAAAA that would preempt state rest and meal break laws retroactive to 1994.

[5] The FAAAA provides that a state "may not enact or enforce a law…related to a price, route, or service of any motor carrier…with respect to the transportation of property." (49 USC § 14501(c)(1).) Although the 9th Circuit, in *Dilts v Defendant Logistics LLC et al.,* 819 F.Supp.2d 1109 (2011), has rejected FAAA preemption of California wage and hour claims, there are legislative initiatives in Congress seeking to overturn *Dilts* through a retroactive expansion of FAAAA preemption. CJA Decl., at ¶38.

Congress recently combined the THUD FAAAA amendment as Section 134 H.R. 5394, which is an omnibus federal budget bill to fund the federal government through most of 2017.[6] *See, Id.*

Congress may vote on H.R. 5394 sometime in 2017. The trucking industry has indicated that this is their top legislative agenda item for the coming year.[7] The proposed legislation, if it ever passes, will retroactively clarify that the 1994 Federal Aviation Authorization Act was intended to nullify state laws like Labor Code section 226.2 and 226.7, and, therefore, would preempt all claims at issue in our case, perhaps even retroactively.[8] Senator Barbara Boxer, who retired in January 2017, spearheaded the effort to deny the inclusion of retroactive preemption in the reconciled FAA bill.[9] However, given the legislative agenda of the new Trump administration and its stated objective to eliminate regulations on business, House Republicans and Republican Senators will continue their efforts to pass retro preemption in the coming year(s). Accordingly, this is a risk factor that Plaintiff's counsel took into account in agreeing to this proposed settlement. *Id*.

Finally, Defendant maintained that individual issues would predominate among putative class members in that Defendant did not maintain rest break records (which were not required until *Labor Code* § 226.2 became effective in January 2016), and some truck drivers took rest breaks, while others did not. (CJA Decl., at ¶40). As a result, there would no simple way to ascertain who was part of the class, either for liability or damages purposes. *Id.* Moreover, the Court may have to examine whether drivers agreed to have the piece-rate include non-driving time, which may raise further individualized contract issues.[10] *Id.*

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[6] *See, e.g.,* https://www.congress.gov/amendment/114th-congress/house-amendment/794/text. Although the legislation passed the House of Representatives in November 2015, it failed to survive the Senate Conference. CJA Decl., at ¶40. Congressional Republicans continue to attempt to include preemption in various pieces of new legislation, including THUD, and such efforts are ongoing. *Id.*

[7] See, http://www.ccjdigital.com/to-protect-carriers-from-big-payouts-congress-may-stamp-out-state-efforts-to-reform-driver-pay/ ("Major proponents include the American Trucking Association and the Western States Trucking Association, both of whom have said legislation to assert federal authority over break and pay laws for truckers is a top-level agenda item in the coming years. "This actually is our No. 1 priority," says Western States' head of government affairs Joe Rajkovacz.").

[8] See, https://www.congress.gov/amendment/114th-congress/house-amendment/794/text

[9] http://thehill.com/policy/transportation/270740-dem-senator-slams-trucking-poison-pill-in-faa-bill

[10] At least one state court decertified a class of piece-rate drivers based on Defendant's argument that individualized issues predominate where there is evidence that drivers may have agreed to have the piece-rate be all-inclusive. (*See Carson v. Knight Transportation, Inc*., No, VCU234186 (Sept. 12, 2012, Tulare County Superior Court) (Judge Lloyd

Based on these arguments, evidence and defenses, Defendant argued that (1) it could defeat class certification; (2) it could win on the merits either on summary judgment or at trial; (3) Defendant could implement the safe-harbor defense in *Labor Code* § 226.2; and/or (4) litigation, trial and appeals would all take several more years to litigate. (*See,* CJA Decl., ¶41.)

Nonetheless, Defendant concluded that further litigation of the Action would be protracted and expensive, and that it is desirable that the Action be fully and finally settled in order to limit further expense, inconvenience and distraction, to dispose of burdensome and protracted litigation, and to permit the operation of Defendant's business without further expensive litigation and the distraction and diversion of its personnel with respect to matters in issue in the Action. (CJA Decl., ¶42). Defendant also took into account the uncertainty and risks inherent in any litigation, especially in complex cases such as this Action. *Id.* Defendant has, therefore, determined that it is desirable and beneficial to it that the Action be settled. *Id.*

D. *Labor Code* Section 226.2

In October 2015, Governor Jerry Brown signed into law AB 1513, now *Labor Code* § 226.2, which became effective January 1, 2016, and which codified existing law providing that, *inter alia*, truck drivers paid on a piece-rate basis must be paid separately and hourly for rest periods and other non-productive time. *Labor Code* § 226.2 also created a new affirmative defense to such claims if an employer paid out either (a) the amount it owes plus interest or (b) pays 4% of the W-2 reported wages of the worker from July 1, 2012 through December 31, 2015. Furthermore, the amount paid

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Hicks) (decertifying a class of California truck drivers who alleged that it is illegal to have a combined "piece-rate" that covers both driving and non-driving duties when compensation for the piece is generally on the number of miles driven).) Ackermann & Tilajef, PC were co-counsel for the plaintiff class in *Carson*. In another similar case, however, the California Court of Appeal reversed a denial of class certification, holding that whether the piece-rate was intended to cover non-driving time is irrelevant. (*See, Bluford,* 216 Cal. App. 4th at 872-73 ("The trial court's denial of the rest period certification class is not supported by substantial evidence. Issues common to all drivers and Safeway pre-dominate plaintiff's claim for rest period compensation. Indeed, the common proof demonstrates Safeway did not separately compensate drivers for their rest periods in the manner required by California law."); *see also Anderson v. Andrus Transportation*, San Bernardino County Superior Court, Case No. CIV DS 915878, August 16, 2011 Order (class certification granted following contested motion to class of over 550 truck drivers with claims for unpaid minimum wages and derivative claims).) Ackermann & Tilajef, PC were co-counsel for the plaintiff class in *Anderson.* Two federal district courts have recently denied certification of similar unpaid non-productive time claims on contested motions. (*See, Burnell v. Swift Transportation Co of Arizona, LLC*, No. ED-CV-10809-VAP(SPX), 2016 WL 2621616, at *1 (C.D. Cal. May 4, 2016), leave to appeal denied (July 18, 2016) ("*Burnell*") and *Ayala v. U.S Xpress Enterprises, Inc*., No. EDCV 16-137-GW(KKX), 2016 WL 7638165 (C.D. Cal. Dec. 27, 2016) ("*Ayala*").

to each employee may be reduced for amounts already paid for other unproductive time by up to one (1) percent (of the previously mentioned 4 percent) of the employee's gross earnings during this time period. Accordingly, pursuant to the new statute, an employer that paid its employees on a piece rate, and paid for *some* non-productive time (*e.g.* Non-Driving Tasks) could raise an affirmative defense and *cure* by paying 3% or 4% of the total W-2 reported wages paid to the employees during the statutory cure period.[11]

III. SUMMARY OF THE PROPOSED SETTLEMENT

The principal terms of the settlement are described below.

A. Class Definition.

For purposes of the settlement only, the parties have agreed to certify the following class:

All truck drivers who have been employed by T.J.S. Leasing & Holding, Co., Inc., in California and who were paid on a per mile basis anytime from September 28, 2012 through the date of an order preliminarily certifying the class.

CJA Decl., **Exhibit A** (Settlement Agreement, referred to herein as "S.A."), (S.A., §I ¶4). Defendant's counsel has advised that the Class consists of approximately 79 current and former drivers. (CJA Decl., at ¶17, 26).

B. Gross Settlement Amount.

The Gross Maximum Settlement Amount of $200,000 (S.A., § I ¶35) to be paid in three installments, includes: (1) the fees and expenses of the Settlement Administrator, not to exceed $9,000 (S.A., § I ¶2,); (2) Plaintiff's class representative payment of $5,000 (S.A., § IV ¶2); (3) attorneys' fees of up to $66,666.67 (one-third of the Gross Maximum Settlement Amount) to compensate Plaintiff's counsel for all work performed and all work remaining to document and administer the settlement, secure Court approval and shepherd the Settlement through the notice period, final approval, funding and disbursement;[12] (S.A., § IV ¶6); and (4) litigation expenses and

[11] Although Defendant did not timely elect the safe-harbor, the safe-harbor amount still arguably represents the amount that the Legislature believed was fair and reasonable compensation for unpaid rest breaks and derivative claims. It is possible that the 4% safe-harbor figure was calculated based on an 8 hour day, which represents 480 minutes, where rest break time of 20 minutes would constitute approximately 4 percent of the total minutes in the day.

[12] Plaintiff's counsel maintain that the attorneys' fees sought and litigation costs are reasonable and appropriate. CJA Decl., ¶¶48-51. Plaintiff's counsel will file a motion for attorneys' fees and costs as part of their final approval motion to be heard at the final approval and fairness hearing.

costs incurred of Plaintiff's counsel of no more than $8,000.00. *Id.* The first payment of $66,666.66 shall be paid within 180 days after entry of final approval. Within 180 days of the payment of the first installment, Defendant shall be obligated to deposit with the Settlement Administrator the second installment of the Gross Settlement Amount and within 180 days of the second payment, Defendant shall be obligated to deposit with the Settlement Administrator the third installment of the Gross Settlement Amount to pay the remaining portion of the class attorney fees and costs as approved by the Court. (S.A. § I ¶38). The Settlement Administrator shall make every effort to pay the Employee's Taxes and Required Withholding associated with each Class Participant's Individual Settlement Amount to each Class Participant, by first-class U.S. mail, to the last known address no later than five days after the Second Payment has been made in accordance with the Payment Plan. (S.A., § VII ¶5). Regardless of the actual amount claimed by Class Members, at least 70% of the Net Settlement Amount shall be distributed to the participating Class Members who submit timely and valid Claim Forms. (S.A., § IV ¶1). If more than 70% of the Net Settlement Amount is claimed, then Defendant shall pay the actual amount claimed. *Id.* However, any amount unclaimed from the Net Settlement Amount above the 70% floor shall remain with Defendant. *Id.*

C. Settlement Allocation Formula for Settlement Shares

Individual Settlement Amounts to be paid to Class Participants shall be paid from the Net Settlement Amount. The portion of the Net Settlement Amount payable to each Class Participant will be calculated as follows:

The Settlement Administrator shall divide the Net Settlement Amount by the total number of workweeks Settlement Class Members were employed during the Class Period, in order to determine the amount each Settlement Class Member is entitled to for each workweek s/he was employed by Defendant (the "Weekly Amount"). (S.A., § VII ¶2). The Settlement Administrator will multiply the Weekly Amount by the total number of workweeks that each Settlement Class Member was employed and deduct all Employee's Taxes and Required Withholding attributable to wages to arrive at the Individual Settlement Amount for that Class Member. (S.A., § VII ¶2). Defendant will provide the Settlement Administrator with any information reasonably necessary to

perform the calculation of number of pay periods for each Settlement Class Member, and any other reasonably required information the Settlement Administrator requests to perform the calculations required under this Settlement Agreement. (S.A., § VII ¶2). Defendant shall have no responsibility for deciding the validity of the Individual Settlement Amounts or any other payments made pursuant to this Stipulation, shall have no involvement in or responsibility for the determination or payment of Employee's Taxes and Required Withholding, and shall have no liability for any errors made with respect to such Employee's Taxes and Required Withholding. (S.A., § VII ¶2). Although the Settlement Administrator will calculate and pay the standard Employee's Taxes and Required Withholding on the portion of the Individual Settlement Amounts constituting wages on their behalf, Plaintiff and Class Participants represent and understand that they shall be solely responsible for any and all tax obligation associated with their respective Individual Settlement Amounts and Incentive Awards. (S.A., § VII ¶2).

D. Opting Out of the Settlement and Objecting to the Settlement

For those Class Members who do not wish to participate in the Settlement, such Class Members may exclude themselves by submitting a timely, written request to the Settlement Administrator. (S.A., § VI ¶3). In order to Opt-Out of the Settlement, a Class Member must submit a signed, written election not to participate in the Settlement to the Settlement Administrator, postmarked no later than 45 days after the Settlement Administrator mails the Class Notices. ("Response Deadline"). *Id.* The Opt-Out request must state the Class Member's name, address, telephone number and signature along with a written statement that the Class Member wishes to be excluded from the settlement. *Id.* Any Opt-Out request that is not postmarked by the Response Deadline will be invalid. *Id.* In the event that, prior to the Response Deadline, any Class Notice mailed to a Class Member is returned as having been undelivered by the U.S. Postal Service, the Settlement Administrator shall perform a skip trace search and seek an address correction for such Class Member(s), and a second Class Notice will be sent to any new or different address obtained. (S.A., § VI ¶3). Such Settlement Class Members shall have an additional 14 days in which to opt out. *Id.* Those Class Members who do not timely Opt-Out will be bound by the Release of Claims

set forth in the Settlement Agreement. (S.A., § VI ¶3).

E. Distribution of Uncashed Checks

Each Class Participant must cash his or her Individual Settlement Amount check within 90 days after it is mailed to him or her. (S.A., § VII ¶6). If any Class Participant's Individual Settlement Amount check is not cashed within 90 days, then the funds associated with that check will be paid to the State of California's Department of Industrial Relations in the name of the class member who did not cash their check. (S.A., § VII ¶6). In such event, the Class Participant will nevertheless remain bound by the Settlement, including the release of the Released Claims. (S.A., § VI ¶3).

F. Tax Treatment of Settlement Shares

The parties have agreed, based on the allegations in the Action, that individual Settlement Awards payable to eligible Class Members will be allocated from the Net Settlement Amount and paid as follows: 1/3 will be allocated alleged unpaid wages got which IRS Forms W-2 will be issued; 1/3 will be allocated to alleged owed interest for which IRS Form 1099 will be issued; and 1/3 shall constitute penalties and other non-wage payments for which an IRS Form 1099 will be issued. (S.A., § IV ¶4).

G. Participating Class Members' Release of Claims

Class Members will release T.J.S. Leasing and Holding, Co., Inc., and all of its affiliated entities and all of their shareholders, owners, officers, directors, agents, managing agents, employees, insurers, and attorneys (the "Released Parties") (S.A., § I ¶30) from all claims in the Operative Class Action Complaint ("Complaint"), under Cal. Labor Codes §§ 201-203, 226, 226.2, 226.7, 1194, 1194.2, IWC Wage Order No. 9, section 12, and claims under Section 17200-17204 of the California Business and Professions Codes based on the foregoing. "Released Claims" also includes causes of action or legal theories that could have been asserted based on the same facts, and from any and all claims, causes of action, damages, wages, benefits, expenses, penalties, interest, debts, liabilities, demands, obligations, attorney's fees, costs, and any other form of relief or remedy of law, equity, or whatever kind or nature that were asserted or could have been asserted based on the facts alleged in the Complaint. The period of the Release shall extend to the limits of the Class

Period. (S.A., § I ¶29).

The Settlement Agreement does not release Peoplease LLC and all of its affiliated entities, and all of their shareholders, owners, officers, directors, agents, managing agents, employees, insurers and attorneys. The Settlement Agreement does not release any person, party or entity from claims, if any, by Class Members for workers compensation, unemployment, or disability benefits of any nature, nor does it release any claims, actions, or causes of action which may be possessed by Class Members under state or federal discrimination statutes including, without limitation, the Cal. Fair Employment and Housing Act, the Cal. *Government Code* Section 12940, *et seq.*; the Unruh Civil Rights Act, the Cal. *Civil Code* Section 51, *et seq.*; the California Constitution; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*; the Americans with Disabilities Act, as amended, 42 U.S.C. § 12101, *et seq*.; the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.*; and all of their implementing regulations and interpretive guidelines. (S.A., § I, ¶ 29-30).

H. Notice Procedures

Within 14 days after an order granting preliminary approval of the Settlement is entered, Defendant will provide to the Settlement Administrator an electronic database containing each Class Member's Class Data. (S.A., § VI ¶2). Within 14 days of receiving the Class Data, the Settlement Administrator will mail the Class Notices and Claim Forms to all Class Members via first-class, United States mail. *Id.*

The Class Notice will inform the Class Members of their rights and the manner and deadline: (1) to object to the settlement and to appear at the final approval hearing; (2) to elect not to participate in the settlement; and (3) to challenge the weeks worked information upon which their Settlement Share will be determined, and (4) to submit a Claim Form. S.A., **Exhibit 1**. The Class Notice also will inform them of the claims to be released. *Id.* The Class Notice further contains a link to a website through which Class Members can access pertinent Court documents, including the Settlement Agreement, and any orders and judgment entered in this matter. *Id*.

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I. Defendant's Right to Reject the Settlement

If 10 percent or more of the Class timely Opts-Out, Defendant shall have the exclusive right to void the Class Settlement. (S.A., § VIII ¶2). If Defendant decides to void the Settlement, then the Settlement and conditional class certification shall be considered void, and neither the Settlement, conditional class certification, nor any of the related negotiations or proceedings, shall be of any force or effect, and the Parties shall stand in the same position, without prejudice, as if the Settlement had been neither entered into nor filed with the Court, except that Defendant shall be responsible for all Settlement Administrator costs incurred up to that time. *Id.*

J. Plaintiff and His Counsel Request the Class Representative Payment, Class Counsel Fees Payment, and Class Counsel Litigation Expenses Payment.

Plaintiff will request a Class Representative Payment in an amount of $5,000 (S.A., § IV ¶2) reflecting the time and effort he expended on behalf of the Class, including time spent in discussions with Class Counsel, his acceptance of the financial risk in pursuing this litigation and his agreement to a general release of all claims against Defendant, which is significantly broader that the release to be given by the Class Participants. (CJA Decl., ¶¶45-48).

In addition, Plaintiff's counsel will request a Class Counsel Fees Payment of not more than $66,666.67 (one-third of the Gross Maximum Settlement Amount). (S.A., §IV ¶6). Plaintiff's counsel also will seek no more than $8,000 for the out-of-pocket costs and expenses that they incurred in pursuing this litigation. *Id.* For the purposes of the settlement only, Defendant does not oppose the requests for these two payments. *Id.* The attorney's fees shall be paid last, after the Class Members have been paid (i.e. only after the third and final installment payment).

K. Timing of Settlement Disbursements.

The "Payment Plan" shall be Defendant's series of three payments to the Settlement Administrator encompassing the Gross Settlement Amount. Within 180 days after the Effective Date, Defendant shall deposit with the Settlement Administrator the "First Payment" of $66,666.67 shall be made within 180 days of the court's granting final approval. (S.A., § I ¶38). The "Second Payment" of $66,666.67 shall be made by Defendant within 180 days of the First Payment. *Id*. The "Third Payment" of up to $66,666.66 for attorney's fees and costs shall be made by Defendant within days of the second payment. Payments to Class Participants and to Class Representative for

Incentive Award shall made after the Second Payment under the Payment Plan. (S.A., § IV ¶3).

L. Notice to the Class of Final Judgement

The Settlement Administrator shall post the final approval order and final judgement on the settlement website. The Class Notice refers Class Members to a website which will be posted by the Settlement Administrator, on which Class Members can access pertinent court documents relating to this case, including, but not limited to, notice of final judgement, if entered. S.A., **Exhibit 1.**

M. The Class Notice Meets the Requirements of Cal. Rule of Court 3.776(d)

The content and manner of the Class Notice complies with California Rules of Court 3.776(d) and (e). The Notice contains, among other things, a brief explanation for the case, including the basic contentions and denials of the parties; a statement that the court will exclude the member from the class if the member so requests by a specified date; the procedures for class members to follow in requesting exclusion from the class; a statement that the judgement, whether favorable or not, will bind all members that do not request exclusion; and a statement that any member who does not request exclusion may enter an appearance through counsel. S.A., **Exhibit 1.**

IV. THE COURT SHOULD APPROVE THE SETTLEMENT

A. Class Action Settlements Are Subject to Judicial Review and Approval Under the California Rules of Court.

The law favors settlements. *Bush v. Superior Court*, 10 Cal. App. 4th 1374, 1382 (1992). This is particularly true in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. However, a class action may not be dismissed, compromised, or settled without the Court's approval. (Cal. R. Ct. 3.769(a).) The California Rules of Court set forth the procedures for court approval of a class action settlement: (1) the Court preliminarily approves the settlement; (2) class members receive notice as directed by the Court; and (3) the Court conducts a final approval hearing to inquire into the fairness of the proposed settlement. (*See,* Cal. R. Ct. 3.769(c), (e)-(g).)

The decision to approve or reject a proposed settlement lies within the Court's sound discretion. (*See, Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-35 (2001).)

Nevertheless, in considering a potential settlement for approval, a court is not to turn the approval hearing "into a trial or rehearsal for trial on the merits…[or] to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." (*Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir., 1982).)

The Court's ultimate duty is to determine whether the settlement is fair, adequate, and reasonable. (*See, Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (setting forth the "fair, adequate, and reasonable" standard) (citing *Officers for Justice*, 688 F.2d at 625); *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742 43 (2009) (a trial court must approve a class action settlement agreement, but only after determining that it is "'fair, adequate and reasonable,'" considering factors such as the "'risk, expense, [and] complexity'" of continued litigation) (citations omitted).) The Court enjoys broad discretion in making its fairness determination, and should consider factors including, but not limited to:

> [T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel . . . and the reaction of the class members to the proposed settlement.

(Dunk, *supra*, 48 Cal. App. 4th at 1801, setting forth a non-exhaustive list of factors for the court's consideration at final approval.) The above factors are not exclusive, ". . . and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, 91 Cal. App. 4th at 245.) However, in doing so, the Court must give "[due] regard to what is otherwise a private consensual agreement between the parties." *Id.* The inquiry must be limited "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Id*. (citation and internal quotation marks omitted.

At the preliminary approval stage, the Court need only determine that the settlement falls within the "range of possible judicial approval," so that notice to the class and the scheduling of the fairness hearing are worthwhile. (*See,* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") § 11:25 (4th ed. 2002).) Indeed, the Court should grant preliminary approval if there are no "grounds to doubt its fairness or other obvious deficiencies…and [the settlement]

appears to fall within the range of possible approval." (*Manual For Complex Litigation* (Third) § 30.41 (1995); *see Dunk*, 48 Cal. App. 4th at 1802.) A "presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Dunk*, *supra*, 48 Cal. App. 4th at 1802 (citing *Newberg* § 11:41).)

As shown below, the settlement falls well within the range of approval because there are no grounds to doubt its fairness.

B. <u>The Settlement Is Fair, Adequate, and Reasonable.</u>

1. The settlement is the result of serious, informed, non-collusive negotiations.

The settlement was the product of extensive arm's length negotiations between counsel who are very experienced wage-and-hour class action practitioners. (CJA Decl., ¶¶ 1–14, 30). Though cordial and professional, the settlement negotiations were adversarial and non-collusive in nature. *Id*. ¶ 30. The settlement reached is the product of substantial effort by the parties and their counsel. *Id.* ¶ 3, 15-28, 29-43. Although Plaintiff and his counsel believed that there was a possibility of certifying the claims, they recognized the potential risk, expense, and complexity posed by litigation, such as class certification, summary judgment, at trial and/or on the damages awarded, and/or on an appeal that can take several more years to litigate, as well as potential collectability issues. *Id.*

2. The extent of the pre-litigation discovery was more than sufficient to permit preliminary approval of the settlement.

The parties thoroughly investigated and evaluated the factual and legal strengths and weaknesses of this case before reaching the settlement. As described above, the settlement was reached after extensive investigation and research, substantial exchanges of documents, and a thorough evaluation of class-wide payroll and other data and materials produced in electronic form. The settlement came only after the case was thoroughly investigated by Plaintiff's counsel.

3. The settlement is a reasonable compromise of claims.

Defendant maintains that its compensation of its truck drivers fully complied with applicable law – even the newer cases discussed below addressing the lawful scope of activities covered by

piece rates. Therefore, the dispute between the parties involved small amounts of time that ranged from zero minutes, in Defendant's view, to approximately 50 minutes per day, in Plaintiff's view.

As described above, after a series of discussions between Plaintiff and his counsel, and after a thorough review of the materials produced by Defendant, the parties agreed that the statutory cure range of 3% to 4% of the W-2 wages paid out to the Class members during the Class Period provided for reasonable and fair statutory floor to the settlement value. The gross W-2 wages paid out to the class during the class period was approximately $4,579,134; 4% of $4,579,134 is $183,165.36; 3% of 4,579,134 is $137,374.02. However, in addition to Defendant's financial situation, there was also the prospect of potential retroactive preemption eliminating the value of the case entirely. After a productive arms-length non-collusive mediation, the parties finally agreed to settle the matter for the Gross Maximum Settlement Amount of $200,000.00. (CJA Decl., ¶27).

As stated, the success of Plaintiff's claims was uncertain in light of Defendant's defenses and compensation system. Plaintiff's claims are based on recent cases that have held that incentive compensation systems that pay nothing for tasks that preclude an employee from earning piece rates or commissions violate California's minimum wage law, based on a decision involving hourly workers, *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005).

In *Armenta*, the employer refused to pay hourly telephone pole technicians anything for time it deemed "non-productive" (*i.e.*, time spent not repairing a telephone pole). *Id., at* 317. It thus instructed employees not to record time spent performing a variety of compensable tasks, including travel, loading equipment and supplies, completing paperwork, and maintaining company vehicles. *Id., at* 317-19. The employer defended against a minimum-wage claim by arguing that — averaging everything out — the employees still earned more than the minimum wage.

Armenta held that the employer's practice violated California minimum-wage law.[13] Several recent decisions have applied *Armenta* to piece rate compensation, under the theory that employees must receive separate pay at minimum wage for ancillary work activities that do not generate a piece

[13] The court also held that any waiting time penalties had to be calculated at minimum wage and not at the employee's hourly rate. *Armenta*, thus, supports Defendant's argument that if back pay were due, it would be calculated at minimum wage. *Armenta*, 135 Cal. App. 4th at 326.

rate. (*See, e.g., Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36, 40-41(2013) (piece rates did not compensate for non-repair tasks because car mechanics could not earn any piece rate compensation); *Quezada v. Con-Way Freight, Inc.*, 2012 WL 2847609, at *6 (N.D. Cal. July 11, 2012) (piece rates for miles driven did not compensate for ancillary tasks); *Bluford v. v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864, 872 (2013) (piece rate did not compensate for statutory rest breaks).) *Labor Code* § 226.2 codifies this case law.

However, Defendant argued that consistent with the principles in *Armenta* and the DLSE's enforcement position, truck drivers earn their mileage rate when performing inspections and other Non-Driving Tasks because each activity furthers the making or completion of a truck delivery. For these reasons, Defendant contended that Plaintiff and the putative class were due nothing. There were also some risks of non-certification of the Class as evidenced by several such court rulings, including two recent rulings from federal court judges in the Central District denying class certification in similar cases. (*See, Burnell v. Swift Transportation Co of Arizona, LLC*, No. ED-CV-10809-VAP(SPX), 2016 WL 2621616, at *1 (C.D. Cal. May 4, 2016), leave to appeal denied (July 18, 2016) ("*Burnell*") and *Ayala v. U.S Xpress Enterprises, Inc*., No. EDCV 16-137-GW(KKX), 2016 WL 7638165 (C.D. Cal. Dec. 27, 2016) ("*Ayala*"); *see also Carson v. Knight Transportation, Inc*., No, VCU234186 (Sept. 12, 2012, Tulare County Superior Court) (Judge Lloyd Hicks) (decertifying piece-rate unpaid wage claims based on too many individualized issues).

Moreover, Defendant argued that *Labor Code* §226.2 created a safe-harbor affirmative defense that would have allowed Defendant to escape liability for virtually all of Plaintiff's claims by paying either (1) actual unpaid wages, plus interest; or (2) 4% (or 3% with the offset) of all the W2 wages earned by the Class Members from July 1, 2012 to December 31, 2015. *See,* Labor Code Section 226.2.[14] In light of Defendant's legal arguments and affirmative defenses, the ultimate success of either party's arguments was uncertain. Additionally, as noted, the safe-harbor affirmative defense could wipe out all of Plaintiff's claims for unpaid wages, premiums, penalties and interest under all of the statutes alleged in the Complaint, as could the passage of retro preemption or the

[14] All claims other than the meal break claim would be wiped out. Defendant kept meal break records showing compliant meal breaks for the majority of days in the Class Period, however.

financial difficulties facing Defendant.

Moreover, Plaintiff's claims for liquidated damages under *Labor Code* § 1194.2 and pay stub penalties pursuant to *Labor Code* § 226, are not stand-alone – they are derivative of his other claims. CJA Decl., ¶23. Because the claims are derivative, they entail the same risks as the claims outlined above and rise or fall on their success. *Id.*

Finally, even if the minimum wage claim could survive or be certified as a class, the claims for liquidated damages and penalties might fail if Defendant prevailed on its defenses that it acted in good faith and with the reasonable belief that its conduct was lawful. *Id*. ¶23; *see* Cal. *Lab. Code* § 226(e); *Id.* § 1194.2(b); § 1194.2(b); § 2699(e)(2). For example, in *Gonzalez*, the plaintiff prevailed on his minimum wage claims. However, the trial court denied liquidated damages and the court of appeal held that imposition of waiting time penalties for "willful" failure to pay wages only was appropriate because the employer knew that some employees received, on average, less than $8 per hour (which would be unlawful even if *Armenta* did not apply to piece rate compensation). *Gonzalez*, *supra*, 215 Cal. App. 4th at 54-55.

Taking all of the foregoing arguments and defenses into account, the Gross Maximum Settlement Amount of $200,000 reflects the realistic and fair value of the class claims at issue in light of all of Defendant's potential defenses. (CJA Decl., ¶¶42-43).

4. The risks inherent in continued litigation are significant.

To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court also should consider "[t]he strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, [and] the risk of maintaining class action status." (*See Dunk*, *supra*, 48 Cal. App. 4th at 1801.

As described above, Defendant has strong defenses to Plaintiff's claims, and those defenses create a real possibility that the claims might not be certified and/or might fail on the merits. (CJA Decl., ¶¶ 33-40). Whereas proceeding with litigation would impose significant risk of no recovery as well as ongoing, substantial additional expenditures of time and resources, the settlement achieved confers a benefit on Plaintiff and Class Members. *Id., at* ¶43. If settlement were not achieved,

continued litigation of the claims would take substantial time and possibly confer no benefit on Class Members. *Id.* By contrast, the settlement will yield a prompt, certain, and substantial recovery for Class Members, which also benefits the parties and the Court.

5. Plaintiff's counsel are experienced in similar wage-and-hour litigation.

Plaintiff's counsel are experienced in wage-and-hour class actions, including similar cases. Numerous state and federal courts have certified them as adequate and competent class counsel in such class actions, including many cases involving truck drivers. *Id.*, ¶¶5-13.

The parties' counsel jointly share the view that this is a fair and reasonable settlement in light of the complexities of the case, the state of the law, and uncertainties of class certification and litigation. Given the risks inherent in litigation and the defenses asserted, this settlement is fair, adequate, and reasonable and in the best interests of Class Members, and should be preliminarily approved. *Id.*, ¶¶43.

Indeed, the amounts obtained here are comparable or better than the results obtained in several similar cases that have received court approval and were handled by Class Counsel. Here, the average payout per Class Member is estimated to be $1,409.28 ($111,333.34 Net Settlement Amount / 79 Class Members = 1,409.28) and the maximum payout per class member is $2,368.79 ($111,333.34/47 FTEs = $2,368.79). These results are comparable or better to the results in other trucker piece rate class actions approved in California courts. *See e.g., Anderson v. Andrus Transportation, Inc*., Case No. CIV DS 915878, a trucker meal and rest break case challenging a piece-rate compensation system, where the Hon. Brian McCarville of the San Bernardino Superior Court approved a $275,000 class settlement for 550 drivers where 189 claimants submitted claims, the average recovery was $356.91. Similarly, in the matter of *Velasco v. Knight Port Services, LLC, et al,* San Bernardino Superior Court Case No. CIVS DS 1513403, the Hon. Donna G. Garza approved settlement in the amount of $289,500 for a settlement class of 750 members where 228 class members submitted claims, the average recovery was $462.72.

Finally, experienced counsel, operating at arm's length, have weighed the strengths and risks of the case, and endorse the proposed settlement. (CJA Decl., ¶29,30). The view of the attorneys

actively conducting the litigation is entitled to significant weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (court must account for "the experience and view of counsel") (internal quotation and citation omitted).

V. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS UNDER THE LESSER STANDARD OF SCRUTINY FOR SETTLEMENT-ONLY CERTIFICATION IS APPROPRIATE FOR THE PURPOSES OF THIS SETTLEMENT ONLY

California Rule of Court 3.769(d) provides that the Court may make an order approving certification of a provisional settlement class at the preliminary approval stage. It is well-established that trial courts should use a "lesser standard of scrutiny" for determining the propriety of certifying a settlement class, as opposed to a litigation class. (*Dunk*, *supra,* 48 Cal. App. 4th at 1807 n.19.) The reasons include that no trial is anticipated in a settlement class, so the case management issues inherent in determining if the class should be certified need not be confronted; and the trial court's fairness review of the settlement protects the interests of the non-representative class members. *Id.*; *see also Officers for Justice*, 688 F.2d at 633 ("Th[e] relationship between the certification determination and the merits of the case is further attenuated within the context of the settlement evaluation process . . . . [C]ertification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1987) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").) As discussed below, for the purposes of this settlement only, the parties ask this Court to provisionally certify the Class under § 382 of the *Code of Civil Procedure*.[15]

A. Numerosity and Ascertainability

Numerosity is met if a proposed class is so large that joinder of all members would be impracticable. *See* Cal. Code Civ. Proc. § 382. A proposed settlement class is ascertainable if the

[15] Defendant denies that certification would be appropriate if the parties continued to litigate, but it supports certification for settlement purposes only, under the more lenient standards applicable to class settlements.

class members can be objectively identified and given notice of the litigation without unreasonable time or expense. *See Medrazo v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 101 (2008). Here, Plaintiff alleges, and Defendant does not dispute for the purposes of this settlement only, that the proposed Class consists of approximately 79 current and former truck drivers who can be easily identified through Defendant's records.

B. Well-Defined Community of Interest

1. Commonality and Superiority.

To justify certification, the class proponent must show that questions of law or fact common to the class predominate over the questions affecting the individual members. (*See Arenas v. El Torito Rests., Inc*., 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913 (2001).) While the parties dispute whether a class would be appropriate if the litigation were to continue, they agree, for the purposes of this settlement only, that the Class is subject to common compensation policies. Given these common policies, and the large number of potential plaintiffs if this case were not tried as a class action, each with relatively small amounts of damages, trying the case as a class action would be superior to each plaintiff having to file his or her own lawsuit.

2. Typicality.

Typicality "focuses on whether there exists a relationship between the plaintiff's claims and the claims alleged on behalf of the class." (*Newberg, supra,* § 3:13.) Again, the parties dispute whether Plaintiff's claims are typical of the Class for the purposes of any continued litigation of the Action, but agree for the purposes of this settlement only, that Plaintiff asserts claims regarding Defendant's compensation practices that are at the core of the Action.

3. Adequacy of representation.

The proposed class representative must establish that he or she will adequately represent the proposed class. *See Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540, 546 (2009). Adequacy may be established by the fact that counsel are experienced practitioners. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir.

2001). Here, Plaintiff alleges, and Defendant does not dispute for the purposes of this settlement only, that Plaintiff and the Class are represented by counsel with extensive experience in wage-and-hour litigation. CJA Decl., ¶¶5-13.

VI. THE COURT SHOULD APPOINT CPT GROUP AS SETTLEMENT ADMINISTRATOR

The parties propose that the Court appoint CPT Group to serve as the Settlement Administrator. (S.A., § I ¶34; CJA Decl., ¶52). CPT Group has extensive experience administering class action settlements[16], and has estimated its fees and costs for this settlement at no greater than $9,000. (CJA Decl., ¶52).

VII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

The last step in the approval process is the formal fairness hearing, whereby proponents of the settlement may explain and describe its terms and conditions and offer argument in support of approval, and Class Members or their counsel may be heard in support of or in opposition to the settlement. The parties propose that the Court schedule a hearing for final approval of the settlement at the earliest available date in February, 2018. The parties further propose that Plaintiff's motion for attorneys' fees and costs (which will be filed as part of the final approval motion) shall also be heard at the final approval and fairness hearing.

VIII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his motion for preliminary approval of the parties' settlement.

ACKERMANN & TILAJEF, P.C.
MELMED LAW GROUP P.C.

By: _____
Craig J. Ackermann
Attorneys for Plaintiff Erick Grumm
and the Proposed Class

Dated: September 28, 2017

[16] *See,* www.cptgroup.com.

Superior Court of California
County of Humboldt
Operations Division
825 5th Street
Eureka, CA 95501

Number: 402994 09-28-17 1:22 pm
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E. Grumm
VS.
TJ.S. Leasing & Holding, Co., Inc.

Motion-Civil	60.00
Court Reporter Fee-< 1 hour	30.00
File Total:	90.00
Total Due:	90.00
Amount Paid:	90.00
SHAYLAB Change:	0.00

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