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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

PHILLIP MORGAN and BRYON UNRUH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CORE-MARK INTERNATIONAL, INC., a Delaware Corporation, and DOES 1 through 100, inclusive,

Defendants.

CASE NO.: 34-2018-00228207-CU-OE-GDS
[Unlimited Jurisdiction]

UNOPPOSED

CLASS ACTION

RESERVATION #: 2505046

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: July 23, 2020
Time: 2:00 p.m.
Dept.: 53

Complaint Filed: March 1, 2018
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 23, 2020 at 2:00 p.m., or as soon thereafter as the matter can be heard, in Department 53 of the Sacramento County Superior Court, Plaintiffs PHILLIP MORGAN and BRYON UNRUH will move the Court for Preliminary Approval of Class Action Settlement, Conditional Certification, Appointment of Class Representative and Class Counsel, Approval of Notice Packet, and Setting of Final Approval Hearing Date.

This motion will be based on this Notice, the Memorandum of Points and Authorities in Support, the Declaration of David Mara, Esq., Declaration of Stanley Saltzman, Esq., and any supplemental declarations filed in support, any and all documents filed in this matter, and any oral argument that may be presented at the hearing, and upon such other matters as this Court may consider.

DATE: June 29, 2020

MARA LAW FIRM, PC
MARLIN & SALTZMAN, LLP

By: _____
JAMIE SERB
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiffs Phillip Morgan and Bryon Unruh ("Plaintiffs"), on behalf of themselves and the approximately 940-member putative class respectfully request that this Court preliminarily approve the proposed Settlement Agreement[1] entered into between Plaintiffs and Defendant Core-Mark International, Inc. ("Defendant"), which seeks to resolve claims raised against Defendant in the above-captioned matter in exchange for a non-reversionary $725,000.00 Maximum Settlement Amount ("MSA"). The proposed settlement class is comprised of all persons currently or formerly employed by Defendant as a driver, truck driver, driver helper, driver trainer, and/or hosteler, in the State of California during the Class Period ("Class" or "Class Members")[2]. The Class Period extends from March 1, 2014 through April 1, 2020.

It is requested this Court grant preliminary approval, as, when analyzing the strengths and vulnerabilities of the class claims along-side Defendant's potential liability exposure, this proposed settlement of $725,000.00 – which is estimated to pay class members an average settlement share amount estimated at approximately $447.69[3] – is well within the range of reasonableness. Moreover, the proposed settlement satisfies all of the criteria for preliminary approval under California Rule of Court 3.769.

As the following sections show, Plaintiffs' Counsel is convinced that the proposed settlement is in the best interest of the Class based on the negotiations and a detailed knowledge of the issues present in this action. Plaintiffs' Counsel carefully weighed the length and risks of trial, as well as, the perils of litigation that affect the value of the claims. 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

[1] The Settlement Agreement is attached to the Declaration of David Mara, Esq. ("Mara Dec."), as **Exhibit A**.

[2] This definition expressly excludes any "Class Member" whose employment with Defendant terminated on or before May 31, 2016 and who was included as a class member in the class action settlement in *Jonathan Upton and Keith Mills v. Core-Mark International, Inc.*, California Superior Court, County of San Francisco, case number CGC 15-549438.

[3] $420,833.36 NSA / 940 class members.

were also carefully considered by Plaintiffs' Counsel in arriving at the proposed settlement. 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 could take years to litigate.

The settlement was the product of non-collusive, arm's-length negotiations by informed counsel and parties. The settlement was also the product of an adversarial mediation conducted before a respected wage-and-hour class action mediator. The settlement is fair, reasonable, and adequate to all. Accordingly, Plaintiffs seek: (1) preliminary approval of the terms contained in the Settlement Agreement; (2) provisional certification of the Class; (3) appointment of Plaintiffs as Class Representatives; (4) appointment of David Mara and Jamie Serb of the Mara Law Firm, PC, Stan Saltzman of Marlin & Saltzman, LLP, and Walter Haines of United Employees Law Group, PC as Class Counsel; (5) approval of the Parties proposed Notice Packet[4] and method of notifying the members of the Class; and (6) a hearing date for final approval.

II. BACKGROUND, INVESTIGATION, LITIGATION HISTORY

Defendant provides fresh products to the convenience store industry. It has five divisions, two of which are unionized. Plaintiffs were formerly employed for Defendant in California as drivers, delivering products to convenience stores for Defendant. Plaintiff Morgan filed his class action lawsuit on March 1, 2018 and amended it on May 24, 2018. His complaint alleges claims for failure to provide meal and rest periods, failure to reimburse business expenses, wage statement violations, unfair competition and violations of the Private Attorneys General Act of 2004 ("PAGA"). Plaintiff Unruh filed his PAGA action on June 5, 2018 in Alameda County, alleging PAGA penalties for meal, rest break, and recovery period violations, failure to pay wages, failure to pay all wages due at termination, failure to pay employees twice per month, and

[4] The Notice of Class Action Settlement and Information Sheet ("Notice Packet") is attached to the Settlement Agreement as **Exhibit 1 and 2,** which is attached to the Declaration of David Mara as **Exhibit A**.

failure to reimburse business expenses. On February 26, 2020, Plaintiff Morgan amended his complaint, adding Plaintiff Unruh and his claims to the instant lawsuit. Mara Dec. ¶ 21.

Defendant denies the allegations in their entirety, denies any liability or wrongdoing of any kind associated with the claims alleged in this action, and further denies that, for any purposes other than settling this action, this matter is appropriate for class treatment. Defendant further contends that it has complied with all applicable California laws, the California Labor Code, the applicable Wage Order(s), PAGA, and the Unfair Competition Law. Defendant further contends that, if this matter were to be litigated further, it would have strong defenses to oppose class certification and succeed on the merits of Plaintiffs' causes of action. Mara Dec. ¶ 22.

a. Discovery and Investigation

Plaintiffs' analyzed information and documents concerning the class claims, such as Defendant's employee handbooks, including policies and procedures regarding the payment of wages, the provision of meal and rest breaks, timekeeping policies, thousands of trip sheets, wage statements, termination wages, as well as information regarding the number of putative class members, the average number of hours worked, the wages rates in effect, and length of employment for the average putative class member. From this information, Plaintiffs were able to analyze Defendant's liability in this action and prepare a realistic damage model. Mara Dec. ¶ 23.

b. The Parties' Conflicting Positions

The gravamen of Plaintiffs' claims is that Defendant failed to provide control-free meal and rest breaks to Class Members in violation of *Labor Code* sections 512 and 226.7, Wage Orders, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, and *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257. Based upon the discovery and litigation conducted, Plaintiffs contend Defendant pressures Class Members to complete their deliveries within assigned delivery windows. Plaintiffs contend these delivery windows are unrealistic and fail to account for delays caused by weather, traffic, and the re-delivery of products missing from prior delivery day. As a result, Plaintiffs argue Defendant's policies require drivers to keep their

cellphones with them at all times and be ready to answer calls from Defendant and customers regarding any delays throughout the day, regardless of whether or not the drivers are on a meal or rest break. As a result, Plaintiffs argue drivers are not relieved of all employer-control during meal and rest breaks. Furthermore, Plaintiffs allege that Defendant has uniform policies which require employees to protect and safeguard against damage to the trucks and the theft of product *at all times*, or face discipline, up to and including termination. As a result, Plaintiffs contend drivers are never relieved of all duties for meal and rest breaks and Defendant owes 30-minutes of unpaid wages to Class Members per shift for meal breaks that were not duty free, as well as Labor Code §226.7 premiums for unprovided meal and rest breaks. Furthermore, Plaintiffs argue drivers are not provided second meal periods in qualifying shifts. Plaintiffs also argue that if they prevail on their unpaid wages theory of liability, they would also prevail on their derivative waiting time penalties and wage statement claims. Mara Dec. ¶ 24.

Defendant vehemently denies Plaintiffs' theories of liability for unpaid wages during meal breaks, and meal and rest break violations. Defendant contends that meal and rest breaks were provided in compliance with California law. Pursuant to *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, Defendant argues it need not ensure meal and rest breaks are taken but is only obligated to make them available to drivers. Defendant further contends its meal and rest break policies were facially lawful and Defendant did not have a policy which refused duty-free meal and rest breaks to drivers. Defendant argues its meal and rest break policies comported with the flexibility the *Brinker* court held was integral to California's meal and rest break requirements. Furthermore, Defendant argued Plaintiffs' theory of liability was impractical, as drivers were required to leave their vehicle in order to make deliveries and were, therefore, under no such duty to protect and safeguard the truck and product at all times. To that end, Defendant argued it had statements from Class Members confirming that they were able to leave their vehicle and product unattended to perform work duties, as well as take meal and rest breaks. Mara Dec. ¶ 25.

Defendant further argues it relieved Class Members of all duties for meal breaks, and that

if Class Members chose to work through their meal breaks, it had no actual or constructive knowledge of any work being done, as Class Members marked they took their meal and rest breaks on their trip-sheets that were turned in to Defendant each day. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 586; *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1083 ("[t]o prevail on his off-the-clock claim, [plaintiff] must prove that Starbucks had actual or constructive knowledge of his off-the-clock work."). Therefore, it could not be held liable for these unpaid wages. Mara Dec. ¶ 26.

Additionally, Defendant contends it has affirmative preemption defenses to Plaintiffs' claims for meal and rest break violations, pursuant to the December 21, 2018 decision published by the Federal Motor Carrier and Safety Administration ("FMCSA"), which purports to preempt California's meal and rest break laws for motor carriers. The Parties disagreed as to whether or not this preemption determination, if valid, applied, and if so, disagreed that it applied retroactively. Defendant vigorously argued that the Court would follow FMCSA's following opinion, published in March 2019, which declared the decision to be retroactive. Moreover, several trial courts have since concluded that the FMCSA's decision bars all meal and rest break claims brought by drivers subject to the to the FMCSA's hours of service rules. *See, e.g., Ayala v. U.S Xpress Enterprises, Inc.*, Case No. 5:16-cv-00137, Dkt. No. 242 (C.D. Cal. May 2, 2019); *In re Garda Wage and Hour Cases*, Case No. JCCP4828 (L.A. Sup. Ct. 2019). Thus, if Defendant's arguments prevailed, Plaintiffs' meal and rest break claims would be preempted.[5] Mara Dec. ¶ 27.

Although Plaintiffs believe the case is suitable for certification on the claimed basis that there are company-wide uniform policies that Plaintiffs contend violate California law and uniformly affect the Class Members; uncertainties with respect to certification are always present. 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

[5] The validity of the preemption determination and the following opinion determining that it was retroactive is currently being appealed in the 9th Circuit.

following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims. Defendant would undoubtedly also assert that the California Supreme Court's decision in *Brinker Restaurant Corp.* and the U.S. Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, made it more difficult for Plaintiffs to certify this as a class action or prevail on the merits.

In considering the reasonableness of the settlement, Plaintiffs had to consider Defendant's counterarguments, which sharply contested Plaintiffs' claims. Although remaining confident, all of these factors led Plaintiffs to reasonably discount their exposure analysis.

c. Settlement Negotiations

The Parties agreed to attend mediation with respected mediator, Jeffrey Krivis. The mediation took place on March 27, 2019. After a full-day of mediation, the Parties were unable to reach a settlement. In the following months, and with the help of Mr. Krivis, the Parties continued their settlement negotiations. Through these efforts, the Parties eventually reached a resolution, the terms of which are set forth in the Settlement Agreement the Parties now request the Court to preliminarily approve. Mara Dec. ¶ 28; **Exh. 1**.

d. Terms of the Proposed Settlement

i. 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 $725,000.00 ("Maximum Settlement Amount" or "MSA"), which includes, subject to Court approval: (a) attorneys' fees of up to $214,666.64 (33 1/3 % of the MSA) 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) actual litigation expenses not to exceed $30,000.00[6], subject to court approval; (c) Class Representative Service Awards to the named class representatives, Phillip Morgan and Bryon Unruh, in a sum not to exceed $5,000.00 each in consideration for agreeing to a general release of their claims against Defendant which is

[6] Plaintiffs will provide a summary of actual litigation costs in support of final approval. Mara Dec. ¶ 29.

broader than that of other Class Members, and in recognition of their efforts in prosecuting the lawsuit; (d) settlement administration fees and expenses to CPT Group, Inc. (hereinafter "CPT"), estimated not to exceed approximately $15,000.00; and (e) $7,500.00 to the Labor and Workforce Development Agency ("LWDA") which is 75% of the $10,000.00 allocated to Plaintiffs' claims under the PAGA. Mara Dec., **Exh. 1**.

ii. Calculation of Settlement Payments to Participating Class Members

After all Court-approved deductions from the GSA, it is estimated that $420,833.36 ("Net Settlement Amount" or "NSA"), less all applicable employee payroll taxes, will be distributed to Participating Class Members.[7] Mara Dec. ¶ 30. Defendant shall provide the Compensable Workweeks[8] for all Class Members to CPT. CPT will divide the Compensable Workweeks worked by each Class Member by the total Compensable Workweeks worked by all Participating Class Members and multiply the result by the NSA. The precise number of Compensable Workweeks worked per Class Member will not be known until Defendant has tabulated them, following preliminary approval. Under no circumstances will any portion of the settlement revert to Defendant. See Mara Dec., **Exh. 1** at Section III, paragraph (G)(2).

The settlement payments for each Participating Class Member shall be allocated as 20% wages and 80% penalties and interest. *Id*. CPT will be responsible for issuing Participating Class Members a form W-2 for amounts deemed wages and an IRS Form 1099 for the portions allocated to penalties and interest. *Id.*

iii. Notice to the Class

Within 15 days after entry of the Preliminary Approval Date, Defendant will provide to CPT the Class Information, which will list each Class Member's full name, last known address, Social Security number, and Compensable Workweeks. Upon receipt of the Class Information,

[7] Participating Class Members are individuals who fall within the definition of the Class who do not timely and validly request exclusion from this Settlement.

[8] "Compensable Workweeks" means the total number of workweeks worked by Participating Class Members during the Class Period, based upon Defendant's records, less any workweeks for which a Participating Class Member received a settlement award in connection with *Jonathan Upon and Keith Mills v. Core-Mark International, Inc.*, San Francisco County Superior Court Case No. CGC-15-549438.

CPT will perform a National Change of Address search to update and correct any known or identifiable address changes. Within 15 days after CPT receives the Class Information, CPT will send each Class Member, via first class U.S. Mail, the Notice Packet. The Notice Packet contains the Notice of Proposed Class Action Settlement and Information Sheet. *See* Mara Dec., **Exh. A and B to Exh. 1.** Class Members shall have forty-five (45) days after the Notice Packet is mailed to respond by submitting a challenge to the number of workweeks attributed to them, submitting an objection, or requesting to be excluded from the settlement. *See* Mara Dec., **Exh. 1** at Section III, paragraph (F)(1).

iv. Funding and Distribution of the Settlement

No later than 10 days following the Effective Date[9], Defendant will provide CPT with the MSA. Within 14 days after receipt of the MSA, CPT will disburse all payments due under the Settlement, including: (1) Participating Class Members' Individual Settlement Payments; (2) Class Counsel's Award (which includes the Court approved attorneys' fees and costs); (3) the Class Representative Service Awards paid to the Class Representatives; (4) the Settlement Administration Costs paid to CPT; and (5) the PAGA payment to the LWDA and to Participating Class Members. Mara Dec., **Exh. 1**, Section III at paragraph (G).

Participating Class Members must cash or deposit their settlement checks within 180 days after the checks are mailed to them. In the event a Participating Class Member fails to cash his or her settlement check, such uncashed funds shall be distributed to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code Section 1500, *et seq*., for the benefit of those Settlement Class Members who did not cash their checks

[9] "Effective Date" means when the settlement is considered is "final." "Final" means (i) in the event that the Settlement has received final approval by the Court and there were no timely objections filed, or that any timely objections have been withdrawn then the date of entry of the final judgment in this Action by the Court; or, (ii) in the event that one or more timely objections has/have been filed and not withdrawn, then upon the passage of the applicable date for an objector to seek appellate review of the Court's order of final approval of the Settlement, without a timely appeal having been filed; or, (iii) in the event that a timely appeal of the court's order of final approval has been filed, then the Settlement Agreement shall be final when the applicable appellate court has rendered a final decision or opinion affirming the trial court's final approval without material modification, and the applicable date for seeking further appellate review has passed, or the date that any such Appeal has been either dismissed or withdrawn by the appellant.

until such time that they claim their property. Mara Dec., **Exh. 1**, Section III at paragraph (G)(2).

v. Release of Claims

As of the Effective Date, the Class Representatives will be bound by a general release and all other Participating Class Members shall release the Released Parties[10] from the Released Claims. "Released Claims" means any and all claims, demands, rights, liabilities, and/or causes of action that were pleaded or could have been pleaded based upon the factual allegations set forth in the operative complaints filed in the Action and arising at any time during the Class Period, including claims for (1) failure to provide meal breaks – Cal. Labor Code §§ 226.7 and 512, and IWC Wage Order(s); (2) failure to provide rest breaks – Cal. Labor Code §§ 226.7 and 512, and IWC Wage Order(s); (3) failure to reimburse for necessary business expenses – Cal. Labor Code § 2802; (4) failure to provide adequate wage statements – Cal. Labor Code §§ 226, 226.2 and 226.3; (5) unfair competition – Cal. Bus. And Prof. Code § 17200, et seq.; and (6) Private Attorneys General Act – Cal. Labor Code § 2698 et seq. *See* Mara Dec., **Exh. 1**, Section I, paragraph (BB).

III. 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.[11] "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.
>
> . . .

[10] "Released Parties" means Defendant Core-Mark International, Inc., and includes its respective present or former parent companies, subsidiary companies and affiliates, and officers, directors, board members, insurers, employees, partners, shareholders, attorneys, agents, and any other successors, assigs, or legal representatives.

[11] 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.

> (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 Litig.* (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 known at this stage of the litigation – bearing on the fairness of the proposed settlement are present here and the Court's grant of preliminary approval is therefore requested.

i. The Settlement was Reached 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. At and after mediation, Counsel for the Parties conducted extensive arm's length settlement negotiations until the settlement was finalized, the terms of which are memorialized in the Settlement Agreement.

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 discovery and evaluation of Defendant's policies and procedures, as well as the data produced for the putative class, which permitted Plaintiffs' Counsel to engage in a comprehensive analysis of liability and potential damages. This litigation has reached the stage where "the Parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

iii. Counsel for Both Parties are Experienced in Similar Litigation

Both Plaintiffs' Counsel and Defendant's Counsel are particularly experienced in wage and hour employment law and class actions. Plaintiffs' Counsel have significant experience in litigating unpaid wages, unprovided meal and rest periods, misclassification, overtime, and expense reimbursement class actions. Plaintiffs' Counsel have 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. ¶¶ 1-18; 31; Saltzman Dec. ¶¶ 7-14. This experience instructed Plaintiffs' Counsel on the risks and uncertainties of further litigation and guided their determination to endorse the proposed settlement.[12] Defendant's Counsel is likewise well respected in defending wage and hour class actions. Accordingly, both Plaintiffs' Counsel and Defendant's Counsel are experienced in wage and hour 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)

[12] The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Notice Packet 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.

168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Id.*

In weighing the strength of the plaintiffs' 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 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.

v. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiffs' Case and the Risks and Costs of Further Litigation

Although, Plaintiffs believe this case is suitable for certification on the claimed basis that there are company-wide policies and practices that Plaintiffs contend do not provide Class Members with duty-free meal and rest breaks or pay wages for time spent on duty during unpaid meal breaks, Defendant's counter-arguments raise uncertainties with respect to both class certification and success on the merits. As discussed above, Defendant asserts that, should litigation continue, they would show that the policy Plaintiffs allege requires employees to protect and safeguard against damage to the vehicle and loss of product at all times, does not apply during meal and rest periods, and that Defendant provides Class Members with duty-free meal and rest breaks as required under California law. Defendant also asserts that if this litigation were to continue, it would successfully demonstrate that Plaintiffs' meal and rest break claims are preempted under federal law. If Defendant was successful in its arguments, the Class

Members would not receive any recovery. While Plaintiffs believe that they would be able to obtain class certification in this case, class certification is always a matter of the trial court's sound discretion. Decisions following *Sav-On v. Superior Court*, (2004) 34 Cal.4th 319, have reached different conclusions with respect to certification of wage and hour claims.[13] Although remaining confident in the strengths of their claims, all of these factors led Plaintiffs to discount the following calculations of potential damage claims.

vi. The Settlement Amount of $725,000.00 is Reasonable

In addition to being able to discover the strengths and vulnerabilities associated with Plaintiffs' claims, prior to mediation, Defendant provided Plaintiffs with information and data to facilitate a damage exposure analysis. Based upon the data provided by Defendant, Plaintiffs determined that there are approximately 940 Class Members who worked approximately 198,796 shifts within the Class Period. The average hourly rate for Class Members is $23.00 per hour. Mara Dec. ¶ 32.

Plaintiffs contend that Defendant's meal and rest period policies do not comply with California law because they are not duty-free. Plaintiffs allege that during meal and rest periods drivers must protect the company's property and answer calls from the company and customers. Based on these allegations, Class Members would be entitled to a maximum of two premiums under California Labor Code § 226.7 for each shift worked, one for unlawful meal periods and one for unlawful rest periods. Accordingly, Defendant's ***maximum*** exposure under Plaintiffs' meal and rest period claims is $9,144,616[14]. Defendant maintains it would win its argument that drivers were exempt from California's meal and rest break requirements under FMCSA, and that Plaintiffs meal and rest break claims would be entirely defeated. Mara Dec. ¶ 33.

Stemming from the meal period theory of liability, is Plaintiffs' theory of liability for

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

[14] (198,796 shifts x $23 per hour = 4,572,308 each for both meals and rest).

unpaid wages for the unpaid time spent clocked out for a meal break, but not relieved of all employer control. Plaintiff alleged that, because drivers remain under Defendant's control during meal breaks – required to answer his/her cellphone when Defendant calls and guard/protect the truck/product from theft and damage - this time should be paid. Therefore, Plaintiffs assert that drivers are owed unpaid wages for the time spent clocked out for meal periods. Defendant's ***maximum*** exposure under Plaintiffs' unpaid wages theory of liability is $2,286,154.[15] However, Defendant maintains that it had no actual or constructive knowledge of any work being done during unpaid meal periods, as drivers filled out their driver logs, indicating all meal and rest breaks were taken in accordance with California law. Mara Dec. ¶ 34.

Plaintiffs further contend they would be entitled to waiting time penalties if successful with their unpaid wages claim. Defendant's ***maximum*** exposure for waiting time penalties is $3,525,900.[16] However, Defendant argues that if Plaintiffs prevailed on their unpaid wages claims, to also prevail on waiting time penalties, Plaintiffs would have to prove it "willfully" failed to pay Plaintiffs and Class Members appropriate wages due upon separation of employment, which Defendant contends was not willful. Cal. Lab. Code § 203(a). Defendant further contends it would not be liable for waiting time penalties because a "good faith dispute" exists over the payment of past wages. *See* Cal. Code Regs. Tit. 8 § 13520. Mara Dec. ¶ 35.

Plaintiffs also contend Defendant required its driver employees to use their own personal cellphones to remain in contact with Defendant, its customers, as well as for navigation purposes. Thus, Plaintiffs assert Defendant owes drivers reimbursement of the business use of their personal cellphones. Plaintiffs evaluated Defendant's ***maximum*** exposure under this theory at $657,000. Defendant argues this claim would also fail because Plaintiffs did not incur any unreimbursed necessary business expenses because it provided drivers with work phones and maps. Mara Dec. ¶ 36.

Plaintiffs contend that Defendant does not provide accurate, itemized wage statements,

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[15] 198,796 shifts x $23/hour x .5 hours = $2,286,154.

[16] These penalties are equal to 30 days' worth of wages: $23 per hour x 10 hours/day x 30 days = $6,900 per former employee Class Member. 511 formers x $6,900 = $3,525,900

as time spent working through meal breaks is not included on the wage statement. The statute of limitations for this cause of action is only one (1) year. Plaintiffs calculate Defendant's ***maximum*** exposure under this cause of action as $3,292,000.[17] Defendant argues that this claim would also fail because Plaintiffs would be unable to succeed on an unpaid wages theory of liability. Mara Dec. ¶ 37.

In addition, PAGA allows the private enforcement of certain California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2) provides a penalty of $100 per employee per pay period for an initial violation and $200 for each subsequent violation. However, California courts have interpreted this language to require notice to the employer that an initial violation occurred before penalties for subsequent violations could be assessed. *See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1210. Plaintiffs allege Defendant has four violations - unlawful meal and rest breaks, failure to pay all wages, and unreimbursed business expenses – of Labor Code sections which give rise to PAGA penalties. Defendant argues that Plaintiffs would not be able to stack violations for each alleged Labor Code violation and would only be entitled to one penalty for all violations per pay period – assuming Plaintiffs prevailed on the merits of the underlying Labor Code violations. The statute of limitations for PAGA penalties goes back one year. Based upon the data provided to Plaintiffs, Plaintiffs estimate Defendant employed approximately 300 employees within the statutory period and who would be eligible to receive PAGA penalties. Plaintiffs estimate Defendant's *maximum* exposure under PAGA is $1,620,000[18] – assuming Defendant is correct that it would not be possible to stack PAGA penalties in light of the *Amaral* decision. Mara Dec. ¶ 38.

As Plaintiffs' PAGA claims are based on the same alleged unlawful conduct as the class claims, Plaintiffs' PAGA claims are subject to the same risks on the merits as the class claims. Therefore, *PAGA penalties can only be awarded if the factfinder agrees with Plaintiffs' theories*

[17] [$4,000 (maximum damages per employee under California *Labor Code* § 226) x 823 employees employed during the statute of limitations].

[18] If Defendant prevails on its defense regarding stacking, then penalties would be assessed at 1 violation per pay period for all class members:
$100 for 1 initial violations x 16,200 pay periods.

of liability. Additionally, Section 2699, subdivision (e)(2) provides that in an action where an employee is seeking civil penalties under PAGA, "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." 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.").

Thus, not taking into account any of its defenses, Defendant's total exposure if Plaintiffs were successful in their core non-PAGA claims would be approximately $18,905,670. However, should the Court agree with Defendant's arguments, Plaintiffs and the class would not be entitled to any meal and rest period premiums, wages, or reimbursed business expenses and any associated PAGA penalties would be extinguished, as penalties can only be awarded if the Court agrees with Plaintiffs' underlying allegations. Thus, if the Court agreed with Defendant's arguments, the potential exposure would be reduced to zero as Plaintiffs' wage statement and waiting time penalties causes of action are derivative of Plaintiffs' meal period, rest period, unpaid wages and unreimbursed business expenses causes of action. Mara Dec. ¶ 39.

In addition, 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. In light of Defendant's defenses, supporting evidence, and position that the action is not suitable for class treatment, the settlement amount of $725,000.00 is a reasonable and fair settlement amount. Mara Dec. ¶ 40.

A settlement is not judged **solely** against what might have been recovered, had the plaintiffs 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").

c. Provisional Class Certification Should be Granted

Under California law, a class action is appropriate when the class is ascertainable and there is "a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented." California Code of Civil Procedure § 382. State law requirements under California Code of Civil Procedure § 382 for class certification follow federal law according to Rule 23 of the Federal Rules of Civil Procedure*:* numerosity, typicality of the class representatives' claims, adequacy of representation, predominance of common issues, and superiority. Federal Rules of Civil Procedure, Rule 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 are present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 237-

38. Plaintiffs seek approval of the following Class for settlement purposes only: all persons currently or formerly employed by Defendant as a driver, truck driver, driver helper, driver trainer, and/or hosteler, in the State of California during the Class Period.

i. The Proposed Settlement Class is Ascertainable

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

ii. The Proposed Settlement Class is Sufficiently Numerous

The numerosity requirement is met if the Class is so large that joinder of all members would be impracticable. *Gay v. Waiters' & Dairy Lunchmen's Union* (N.D. Cal. 1980) 489 F. Supp. 282, *aff'd* (9th Cir. 1982) 694 F.2d 531. "There is no set number required to maintain a class action, and the statutory test is whether a class is so numerous that 'it is impracticable to bring them all before the court.'" *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior Court* (1995) 44 Cal.2d 574 (upholding a class of ten members). "The numerosity requirement is more readily met when a class contains employees suing their present employer . . . This is because class members may be unwilling to sue their employer individually out of fear of retaliation." *Romero v. Producers Dairy Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the California Supreme Court, "fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation, even when it is otherwise questionable that the numerosity requirements were satisfied . . . It

needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460 (citation omitted), overruled on other grounds in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.

Here, Defendant's records show that the proposed Settlement Class had approximately 940 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, a Settlement Class that is comprised of nearly 940 members is sufficient to satisfy the numerosity requirement.

iii. The Commonality Requirement is Met

The commonality requirement is met if there are questions of law and fact common to the class. *Hanlon, supra*, 150 F.3d at 1019 ("The existence of shared legal issues with divergent factual predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies within the class."). "Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'" *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. Commonality exists if there is a predominant common legal question regarding how an employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its drives."). Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the certification stage since the question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." *Linder v. Thrifty Oil Co.* (2003) 23 Cal.4th 429,

439-440.

Here, Plaintiff contends that the proposed Class Members' claims all stem from the same allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff seeks the same legal remedies under state law on behalf of himself and all Class Members. As liability as to all Class Members is predicated on the same policies and practices, which Plaintiff alleges violate California law, the commonality requirement has been satisfied for purposes of settlement.

iv. The Typicality Requirement is Met

The typicality requirement is met if the claims of the named representatives 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 Class Member is challenging the same policies and practices. Plaintiff alleges that Defendant's policies applied to all Class Members. 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 for purposes of settlement.

v. 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 is committed to vigorously prosecuting the case on behalf of the Class. *Hanlon*, 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. Mara Dec. ¶ 41. 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.

d. Notice to Class Members Complies 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 Notice Packet meets all of these requirements. The proposed Notice Packet advises the Class of their rights to participate in the settlement, how to and when to object to or request exclusion from the settlement, and the date, time, and location of the final approval hearing. *See* Mara Dec., **Exhibit A to Exhibit 1**.

IV. CONCLUSION

Plaintiffs respectfully submit that the proposed settlement is in the best interests of the Class, as it is fair, adequate, and reasonable, and one that should ultimately be granted final approval. Under the applicable class action criteria and guidelines, the proposed settlement should be preliminarily approved by the Court, the Class should be conditionally certified for purposes of settlement only, and the Notice Packet should be approved. Additionally, Plaintiffs request the Court set a final approval hearing on or around November 9, 2020.

DATE: June 29, 2020

MARA LAW FIRM, PC
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By: _____
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