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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GABRIEL CILLUFFO, KEVIN SHIRE, and BRYAN RATTERREE individually and behalf of all other similarly situated persons,

Plaintiffs,

vs.

CENTRAL REFRIGERATED SERVICES, INC., CENTRAL LEASING, INC., JON ISAACSON, and JERRY MOYES,

Defendants.

Case No. ED CV 12-00886 VAP (OPx)
Honorable Virginia A. Phillips

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY SETTLEMENT APPROVAL

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

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INTRODUCTION

Plaintiffs are long-haul truck drivers who leased trucks from Defendant Central Leasing, Inc. in order to haul freight for Defendant Central Refrigerated Service, Inc.'s customers. Plaintiffs hereby move for preliminary approval of the Settlement Agreement, Exhibit 1 hereto, and for an Order approving the form and method of notices to be sent to Settlement Class members, attached as exhibits to the Settlement Agreement. The proposed preliminary approval order is attached to the Notice of Motion. The Settlement, which is the product of arms-length negotiation between the parties, provides for a Gross Settlement Amount of [redacted] for the settlement of the Settlement Class's pending claims against Defendants in the instant action as well as the related Collective Action and Individual Arbitrations pending before the American Arbitration Association ("AAA"). The proposed notices provide a fair and accurate description of the settlement and provide Class members with an adequate opportunity to evaluate the settlement in order to decide whether to participate. This case was filed in 2012 and has been vigorously litigated for more than five years. As discussed below, the Settlement achieved is fair, reasonable and an excellent result. Accordingly, the Court should grant Plaintiffs' Unopposed Motion for Preliminary Settlement Approval**.**

CASE HISTORY AND SETTLEMENT NEGOTIATIONS

On June 1, 2012, Named Plaintiffs Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree (together with all others who have opted into this case and the related collective arbitration referred to as "Plaintiffs") filed a Collective & Class Action Complaint ("Complaint") against corporate Defendants Central Refrigerated Service, Inc. ("Central Refrigerated") and Central Leasing, Inc. ("Central Leasing"), and individual Defendants Jerry Moyes and Jon Isaacson in the instant proceeding (the "Action"). *See* Doc. 1. In the Complaint, Plaintiffs alleged Central Refrigerated

misclassified its lease operator drivers[1] as independent contractors and failed to pay them the legally required minimum wage for each hour worked per week in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206 *et seq.* Plaintiffs also alleged that Defendants violated the federal forced labor statutes, 18 U.S.C. §§ 1589, 1595. On July 16, 2012, Defendants moved to compel arbitration of the claims under the Federal Arbitration Act (FAA) and the Utah Uniform Arbitration Act (UUAA) pursuant to an arbitration clause in the Contractor Agreements that Plaintiffs had entered into with Central Refrigerated and the Equipment Leasing Agreements they had entered into with Central Leasing. *See* Docs. 25-28. Plaintiffs opposed the motion arguing that they were exempt from arbitration pursuant to § 1 of the FAA (9 U.S.C. § 1) which excludes arbitration agreements contained in "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the FAA. *See* Doc. 40. In an Order entered on September 24, 2012, Doc. 53, the Court held that, despite the fact that the Agreements labeled the Lease Operators as "independent contractors," the drivers were alleged to be employees of Central Refrigerated, *see id.* Accordingly, based on the allegations of the Complaint, the Court concluded that arbitration could not be compelled under the FAA. *See id.* at p. 9. Nevertheless, because the Utah Uniform Arbitration Act contains no similar exclusion for contracts of employment, the Court ordered arbitration pursuant to the UUAA and stayed the proceedings pending arbitration. *See id.* at p. 14. The Court later clarified on November 8, 2012 that arbitration of the FLSA cause of action could proceed on a collective basis, but arbitration of Plaintiffs' forced labor claims must occur individually. Doc. 61 at p. 4. In this same order, the Court held that the statute of limitations on Plaintiffs' FLSA claims was tolled. *See id.* at pp. 4-5.

[1] Defendants referred to lease operator drivers as owner operators.

On November 26, 2012, Plaintiffs filed a demand for collective arbitration before the AAA, Case No. 77 160 00126 13 PLT. Arbitrator Patrick Irvine (the "Arbitrator" overseeing the Collective Arbitration) conditionally certified the FLSA Collective Action on March 10, 2014 and created a process for Plaintiffs' counsel to provide notice of the Collective Action to putative class members. Plaintiffs' counsel distributed approximately 3,400 notices of the Collective Action to "all truckers who leased a truck from Central Leasing, Inc. to drive for Central Refrigerated Service, Inc. on and after June 1, 2009." Approximately 1,350 individuals from across the country filed opt-in forms and joined the Collective Action pending before the AAA by the close of the opt-in period established by the Arbitrator (which originally was August 5, 2014 but was subsequently extended by the Arbitrator to February 27, 2015). On July 6, 2015, Swift Transportation Company and Swift Transportation Co., LLC[2] were added as Respondents in the Collective Action but only for purposes of satisfying a judgment, if any. The Arbitrator denied Defendants' Motion to Decertify the Conditionally-Certified Class on October 26, 2016. On the same day, the Arbitrator dismissed approximately 26 members of the Collective Action but simultaneously ruled that the approximately 1350 Plaintiffs in the Collective Action were employees under the FLSA and that Defendants had misclassified Plaintiffs as independent contractors. While Defendants vigorously dispute the Arbitrator's classification decision and have made clear they intend to challenge it,[3] a trial was scheduled to begin in the Collective Action in Salt Lake City in early May 2017.

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[2] In August of 2013, Swift Transportation acquired Central Refrigerated and Central Leasing.

[3] In the event the Settlement Agreement does not become final, Defendants reserve their right to challenge the Arbitrator's October 26, 2016 rulings and any other aspects of the District Court and Arbitrator Irvine's rulings, including, but not limited to, the Arbitrator's ruling that Plaintiffs are employees under the FLSA and that a collective arbitration is permissible under the parties' contracts and applicable law.

In addition, beginning in November 2012 and over the next several years, 328 drivers represented by Plaintiffs' counsel submitted demands to the AAA for individual arbitration against Central Refrigerated, Central Leasing, and the two Individual Respondents for relief arising out of the same alleged working relationship.[4] The individual drivers asserted claims for "federal common law fraud," Utah common law fraud and negligent misrepresentation, "unconscionability," Utah common law unjust enrichment, as well as claims for violation of federal forced labor statutes and "state wage and hour law" (i.e., they alleged violations of state minimum wage and unlawful deduction statutes). Twenty nine arbitrators were assigned to hear the claims of the first 300 individual arbitrations. In July 2016, the parties agreed to fast-track eight "bellwether" arbitrations in front of four arbitrators. In March 2017, the parties filed motions for summary judgment in all bellwether cases. Four-day trials for each of the bellwethers were scheduled to start in July 2017.

Over the course of the litigation, Plaintiffs conducted an extensive investigation into the facts concerning the Action, Collective Action, and Individual Arbitrations, including through extensive formal discovery, informal disclosures between the Parties, and other investigations undertaken by Plaintiffs. The parties have exchanged an abundance of documents and data. The parties have also taken numerous depositions – 10 depositions per side in the collective arbitration, including the 30(b)(6) depositions of Defendants Central Refrigerated and Central Leasing, the depositions of individual Defendants Jerry Moyes and Jon Isaacson, and the depositions of approximately 190 Plaintiffs in the individual arbitrations. Each side also commissioned at least three expert reports.

Starting on June 23, 2016 and occurring simultaneously with litigation, the parties engaged in extensive negotiations; exchanges of data, documents, and

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[4] Two drivers subsequently withdrew their arbitration demands, leaving 326 individual arbitrations pending before the AAA.

information; and mediation with private mediator Hunter Hughes, a well-known experienced mediator in the wage and hour and collective and class action field. The mediation process continued for many months of complex, difficult, arms-length negotiations by and through Mr. Hughes and ultimately between the Parties directly. These efforts culminated in a Memorandum of Understanding ("MOU"), reached on April 28, 2017, three days before the damages trial for the Collective Action was to begin and three days before summary judgment opposition briefs were due in the bellwether Individual Arbitrations. The parties then spent an additional three months negotiating the Settlement Agreement herein. Pursuant to the MOU, the parties exchanged drafts of the Settlement Agreement and settlement notices, met and conferred on areas of dispute and submitted any disputes that could not be resolved through the meet and confer process to one of the arbitrators from the AAA for ruling.[5] The designated arbitrator issued a ruling on the parties' disputes on July 12, 2017. The Settlement Agreement was executed by the parties on August 21, 2017. The parties now seek preliminary approval of the Settlement Agreement.

THE SETTLEMENT

The Settlement resolves this litigation and the related arbitrations by providing substantial monetary relief and benefits to the Settlement Class consisting of drivers who joined the Collective Action or filed an Individual Arbitration (referred to as Fund A Claimants) and drivers who were eligible to and did not previously join the Collective Action or file an Individual Arbitration, but who timely opt in to the settlement through the notice to be given (referred to as Fund B Claimants). There are approximately 1,356 Fund A Claimants and approximately 1,995 potential Fund B Claimants.

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[5] The MOU provided that in the event the parties could not agree on language for the settlement agreement, one of the arbitrators overseeing some of the Individual Arbitrations would be given authority to impose language to effectuate the terms of the MOU or due process.

The key provisions of the Settlement Agreement are as follows:

- A Gross Settlement Amount of no more than [redacted] for complete resolution of the federal lawsuit (i.e., the Action), the Collective Action pending before the AAA, and Individual Arbitrations pending before the AAA. *See* Ex. 1 at ¶ 2.3(A)(i).
- The Gross Settlement Amount will be divided into a [redacted] non-reversionary fund for Fund A Claimants and a [redacted] reversionary fund for no more than [redacted] participating Fund B Claimants. *See* Ex. 1 at ¶ 2.3(A)(ii) and (iii).
- Fund A, less the proportionate share of approved attorneys' fees and costs, administrative costs and service awards, will be allocated pro rata to Fund A Claimants who do not timely opt out of the settlement,[7] based on a formula created by Plaintiffs' counsel that takes the total number of hours worked multiplied by a damage recovery per hour which is variable based on their average hourly earnings. *See* Ex. 1 at ¶ 2.3(B)(i). Each Claimant will receive a minimum award of [redacted] All Claimants who filed individual arbitration claims will receive an additional [redacted]. The Fund A allocation is set forth in detail in Ex. F of the Settlement Agreement.[8]

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[6] However, if the total payments made under the Settlement Agreement (including payments made to participating settlement members, employee taxes, attorneys' fees and costs, administrative costs and service awards) exceed [redacted] Defendants Central Refrigerated and Central Leasing have the right to void the Settlement Agreement *ab initio* and the parties will be restored to the positions they held prior to the execution of the MOU. *See* Ex. 1 at ¶ 2.4(B) and (F).

[7] If the number of individuals who opt out of Fund A [redacted], Defendants have the right to void the Settlement Agreement *ab initio* and the parties will be restored to the positions they held prior to the execution of the MOU. *See* Ex. 1 at ¶ 2.4(C) and (F).

[8] As expressed in footnote 5 of the Settlement Agreement, Respondents take no position on the issue of whether the allocation formula as set forth in Exhibit F of the Settlement Agreement is fair, reasonable, adequate, or accurate. By not taking a

- Specifically, the allocation formula for Fund A Claimants uses the following inputs: weekly work hours [redacted] weekly wages [redacted] and average weekly wage rate (which is calculated by adding all weekly wages per hour and dividing by the total number of weeks driving as a lease operator/owner operator). *See* Ex. F of the Settlement Agreement.
- The damage recovery per hour for Fund A Claimants is based on Plaintiffs' counsel's privileged assessment of the Fair Settlement Value of claims in relation to the average hourly wages paid by Respondents.
- Fund A Claimants (i.e., individuals who have previously opted into the Collective Action and/or filed an Individual Arbitration) who do not wish to participate will have 90 days to opt out of the settlement. *See* Ex. 1 at ¶¶ 2.1(Y), 2.1(AA), 2.9(A).
- Unclaimed funds remaining in Fund A one (1) year after distribution from Fund A commences shall be paid to a *cy pres* recipient to be determined by this Court.[9] *See* Ex. 1 at ¶¶ 2.3(B)(i), 2.5(A) and 2.6(B)(i).

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position on the allocation for the purposes of this settlement, Respondents in no way concede that use of the allocation formula is an accurate reflection of any alleged damages in the Collective Action, Individual Arbitrations, or Lawsuit, or that such a formula would be proper or admissible at trial in the Collective Action, Individual Arbitrations, or Lawsuit.

[9] The parties were unable to agree on a *cy pres* recipient and thus, under the Settlement Agreement, the recipient will be chosen by the Court. *See* Ex. 1 at ¶¶ 2.5(A) and 2.6(B)(i). The parties have agreed to submit initial briefs and response briefs on the issue, concurrent with this motion for preliminary approval, with no reply briefs. The parties' initial briefs and respective response briefs are attached hereto as Exhibits 3a, 3b, 3c, and 3d.

- Fund B, less the proportionate share of approved attorneys' fees and costs, administrative costs and service awards, will be allocated to participating Fund B Claimants who timely opt in to the settlement, on a pro rata basis based on the number of months each participating Fund B Claimant worked for Central Refrigerated from June 1, 2009 to the date of the Settlement Agreement. *See* Ex. 1 at ¶ 2.3(B)(ii). Each participating Fund B Claimant will receive a minimum payment of [redacted]. *See id.*
- Potential Fund B Claimants will have 90 days to opt in to the settlement. *See* Ex. 1 at ¶¶ 2.1(Y), 2.1(BB), 2.3(D), 2.10(A).
- Unclaimed funds remaining in Fund B one (1) year after distribution from Fund B commences shall revert to Swift Transportation Company or other payor. *See* Ex. 1 at ¶¶ 2.3(A)(iii) and (C).
- For tax purposes, [redacted] of each individual settlement payment will be treated by the parties as wages, reported on IRS Form W-2. *See* Ex. 1 at ¶ 2.7(A)(i). The remaining [redacted] will be treated by the parties as additional, non-wage penalties and interest, reported on IRS Form 1099. *See id.*
- There are certain contingencies, (*see, e.g.*, footnotes 6 and 7 above), under which the parties' settlement may be declared void and the parties will then be restored to their prior litigation position and the pending arbitrations will resume.
- Certain confidentiality provisions shall govern the parties' conduct and treatment of various documents (including, but not limited to the Settlement Agreement) and other information. In addition, Defendants are permitted to move the Court for permission file the settlement papers under seal. The Settlement Agreement itself will be available to class members requesting it.
- Settlement Services, Inc. has been agreed upon as the settlement administrator and will mail notices (agreed upon by the parties and attached as

exhibits to the Settlement Agreement) to Settlement Class members by email and first class mail once approved by the Court. *See* Ex. 1 at ¶¶ 2.5(A), 2.9(A), 2.10(A), 2.12(A).

- Defendants will not pursue collections efforts against participating settlement members with respect to leases involving Central Leasing or in connection with Central Refrigerated's contracts. *See* Ex. 1 at ¶ 2.8(D).
- Upon the Court's approval of the Settlement Agreement becoming final and no longer subject to appeal, Central Refrigerated and Central Leasing will release and dismiss with prejudice any counterclaims they have filed, or ever could file based on any occurrences that took place prior to May 5, 2017, against Participating Settlement Members. *See id.*
- If a Participating Settlement Member requests by letter to HireRight[10] that records of a Central Leasing lease default be corrected, Defendants Central Refrigerated and Central Leasing will timely provide a letter to HireRight that defaults under the Central Leasing lease have been rescinded. *See* Ex 1 at ¶ 2.8(I).
- The three Named Plaintiffs release any and all claims against Defendants and all other Released Parties. *See* Ex. 1 at ¶ 2.8(F).
- Participating Settlement Members release all claims against Defendants and all other Released Parties that are based on, arise out of, or relate in any way to the services they provided to Defendant Central Refrigerated as "lease operators," also known as "owner operators," or based on leasing a vehicle from Defendant Central Leasing. *See* Ex. 1 at ¶ 2.8(A). Such released claims include any claims that were raised or could have been

[10] HireRight is a background screening company that provides trucking companies with "Drive-A-Check" ("DAC") reports, which are reports that trucking companies use to make hiring decisions.

raised in this lawsuit, the Collective Action or the Individual Arbitrations, based on the facts alleged in those proceedings against Defendants or any of the other Released Parties. *See id.*

- Plaintiffs' counsel will file a motion with the Court, at the time counsel moves for final approval of the settlement, for attorneys' fees, in an amount not to exceed [redacted] of the Gross Settlement Amount, and costs.[11] *See* Ex. 1 at ¶ 2.3(F). Defendants are free to oppose the fee application. Plaintiffs' counsel's attorneys' fees and costs shall be proportionally deducted from Fund A and Fund B. *See id.*

- At the time Plaintiffs' counsel moves for attorneys' fees, they will move for the payment of Service Awards of not more than [redacted] to each Named Plaintiff, not more than [redacted] for each Plaintiff who sat for a

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[11] Plaintiffs' counsel intends to petition the Court for an award of attorneys' fees of [redacted] of the Gross Settlement Amount plus costs and expenses incurred in prosecuting the litigation. This falls within the typical range of acceptable attorneys' fees in the Ninth Circuit. *See Franco v. Ruiz Food Prod., Inc.*, No. 1:10-CV-02354-SKO, 2012 WL 5941801, at *15 (E.D. Cal. Nov. 27, 2012), *citing Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir.2000) ("The typical range of acceptable attorneys' fees in the Ninth Circuit is 20 percent to 33.3 percent of the total settlement value, with 25 percent considered a benchmark percentage. The exact percentage awarded, however, varies depending on the facts of the case, and 'in most common fund cases, the award exceeds the benchmark' percentage.") (citations omitted). As Plaintiffs' counsel will establish in their motion for fees and costs, which will be filed 28 days before the Final Approval Hearing, the amount requested for attorneys' fees is reasonable given the facts and circumstances of this case including the significant results achieved, the extent of the efforts of Plaintiffs' counsel on very difficult, risky and complex claims and Plaintiffs' counsel's lodestar's cross-check and relevant comparable fee awards. *See Goodwin v. Citywide Home Loans, Inc.*, No. SACV14866JLSJCGX, 2015 WL 12868143, at *4 (C.D. Cal. Nov. 2, 2015) (awarding fees of one-third of the total settlement amount in FLSA and Cal. Lab. Code common fund case); *Lee v. JPMorgan Chase & Co.*, No. SACV13511JLSJPRX, 2015 WL 12711659, at *9 (C.D. Cal. Apr. 28, 2015) (same); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *9 (C.D. Cal. Nov. 18, 2014) (same).

deposition in the Collective Action, and not more than [redacted] for each Plaintiff who sat for a deposition in the Individual Arbitrations.[12] *See* Ex. 1 at ¶ 2.3(G). Service Awards will be deducted proportionally from Fund A and Fund B. The service awards, if ultimately approved shall constitute no more than [redacted] Gross Settlement Amount.

If the Court approves service awards of [redacted] of the Gross Settlement Amount and costs of [redacted],[13] the average recovery for Fund A Claimants will be approximately [redacted] and the average recovery for Fund B Claimants will be approximately [redacted].

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[12] Plaintiffs' counsel intends to petition the Court for Service Awards as part of the motion for final approval. As Plaintiffs' counsel will establish in their motion for final approval, which will be filed 28 days before the Final Approval Hearing, the amounts requested for Service Awards are reasonable given the actions each of the award recipients have taken to generate this common fund and to protect the interests of the class; the risks such individuals have borne to benefit the class, the degree to which the class has benefitted from these actions; the amount of time and effort the award recipients have expended in pursuing the litigation; and the small impact on each individual class member's recovery in order to set aside the Service Awards for the recipients. *See La Fleur v. Med. Mgmt. Int'l, Inc.*, No. EDCV 13-00398-VAP, 2014 WL 2967475, at *7-8 (C.D. Cal. June 25, 2014). Additionally, the Named Plaintiffs deserve an enhanced award as they faced potential retaliation not only from Defendants but from other companies in the trucking industry; they spent extraordinary amounts of time and effort assisting in the litigation for its entire five year duration and Plaintiffs' counsel relied heavily on the input of the Named Plaintiffs; they will release all claims against Defendants unlike the remainder of the class; they took on fiduciary responsibilities on behalf of the remainder of the class; and other class members may recover more than the Named Plaintiffs. *See id.* The amounts being requested are in line with awards approved in both this Circuit and throughout the country. *See, e.g.*, *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) ($50,000 to named plaintiff); *Wright v. Stern*, 553 F. Supp. 2d 337, 342 (S.D.N.Y. 2008) ($50,000 each to 11 class representatives); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 914 (S.D. Ohio 2001) ($50,000 to named plaintiff).

[13] These are approximate costs to date and include anticipated costs of settlement administration. This number is subject to change between now and final approval, but Plaintiffs' counsel expects the change to be marginal.

ARGUMENT

I. The Settlement Agreement is Fair, Reasonable and Adequate.

The Court is not bound to exercise the same oversight of a settlement of a collective action as it must exercise with a class action under Federal Rule of Civil Procedure 23(e). *Villalobos v. Calandri*, No. CV12-2615 PSG (JEMX), 2016 WL 6901695, at *4 (C.D. Cal. Mar. 14, 2016). Whereas the Court's role in supervising the settlement of a Rule 23 class action "protects unnamed class members 'from unjust or unfair settlements affecting their rights,'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), members of an FLSA collective action have opted-in affirmatively.[14] A court's involvement in the management of their action "has less to do with the due process rights" of those to be bound by the settlement, "and more to do with the named plaintiffs' interest in vigorously pursuing the litigation and the district court's interest in 'managing collective actions in an orderly fashion.'" *McElmurry v. U.S. Bank. Nat. Ass'n*, 495 F.3d 1136, 1139 (9th Cir. 2007).

"In reviewing the fairness of such a settlement, a court must determine whether the settlement is a fair and reasonable resolution of a bona fide dispute." *Lewis v. Vision Value, LLC*, No. 1:11-CV-01055-LJO, 2012 WL 2930867, at *2 (E.D. Cal. July 18, 2012), quoting *Yue Zhou v. Wang's Rest.*, 2007 WL 2298046 (N.D. Cal. Aug. 8, 2007); *see also Khait v. Whirlpool Corp.*, No. 06-6381 (ALC), 2010 WL 2025106, at *7 (E.D.N.Y. Jan. 20, 2010) ("courts approve FLSA settlements when they are reached as a result of contested litigation to resolve bona fide disputes"). If the

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[14] Here, Plaintiffs have either affirmatively opted in to the FLSA Collective Action, affirmatively filed an Individual Arbitration, both, or will affirmatively opt into the settlement. In no case will a Participating Settlement Member be a passive Rule 23 class member.

settlement reflects a reasonable compromise over FLSA issues, the court may approve the settlement "in order to promote the policy of encouraging settlement of litigation." *Villalobos*, 2016 WL 6901695 at *4, *quoting Lepinske v. Mercedes Homes, Inc.*, No. 6:07-cv-915-Orl-31 DAB, 2008 WL 2694111, at *1 (M.D. Fla. Jul. 7, 2008) (*quoting Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982)).

Because of the inherent differences between class actions and individual FLSA settlements, some of the Rule 23 "fairness" factors do not apply to FLSA collective action settlements. *Villalobos*, 2016 WL 6901695 at *4. "However, '[s]everal courts have regularly applied the Rule 23... factors when evaluating the fairness and reasonableness of an FLSA settlement.'" *Villalobos*, 2016 WL 6901695 at *4, *quoting Lewis*, 2012 WL 2930867, at *2. "These factors include (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Id.* (*citing Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). As set forth below, all the relevant factors favor settlement of the case.

A. <u>While Plaintiffs Believe Their Case is Strong, Plaintiffs Faced Litigation Risk.</u>

Plaintiffs obtained summary judgment on the issue of whether they were misclassified as independent contractors under the FLSA, making their Collective Action FLSA minimum wage claim strong. Defendants have indicated they intend to challenge that ruling as well as other decisions. In addition, Plaintiffs continued to face significant litigation risk regarding their damage calculations. While Plaintiffs' expert estimated, and Plaintiffs' testimony corroborated, that solo lease operators worked between [redacted], Defendants' expert estimated that solo lease operators worked an average of [redacted] and that Plaintiffs' purported damages are either non-existent or very small. Thus, there was a

risk that Plaintiffs would recover much less than they are recovering via this settlement. Moreover, the other claims in Plaintiffs' Individual Arbitrations (state minimum wage, federal forced labor, federal common law fraud, Utah common law fraud, Utah common law negligent misrepresentation, Utah Uniform Commercial Code contract unconscionability and Utah common law unjust enrichment) were facing dismissal through Defendants' motions for summary judgment. Class Counsel engaged in a highly complex litigation risk assessment process to determine if the settlement would pay all existing class members the fair settlement value of their claims (also including the entitlement to fees payable by the Defendants). Without disclosing the proprietary risk assessment, Class Counsel believe the settlement constitutes a fair settlement in light of litigation risks and the risk of further delay in payment. The proposed Settlement Agreement assures all Plaintiffs of an immediate and reasonable recovery and removes the risk of Defendants succeeding in their motions for summary judgment, at trial, and on appeal if such an appeal is available to them.

B. Continued Litigation Would Be Expensive, Complex and Lengthy, Making Settlement Favorable.

The parties settled this case on the eve of what was scheduled to be a two-week trial in the FLSA Collective Action. Had the parties not settled the case, the parties would have incurred significant expenses trying the case, including attorneys' fees, arbitrator fees, expert fees, and travel costs for the arbitrator, parties, counsel, experts and witnesses. The parties would then have incurred additional attorneys' fees and arbitrator fees, and potentially additional expert fees, for post-trial briefing. Defendants were also likely to challenge any judgment awarded against them.

Moreover, the parties also had eight bellwether trials scheduled throughout the summer in the Individual Arbitrations. Each of the eight trials would have lasted four days and would also have entailed the parties incurring significant attorneys' fees, arbitrator fees, expert fees, and travel costs for the arbitrator, parties, counsel, experts

and witnesses. After the eight bellwether trials, the parties would potentially have had to litigate the remaining 318 Individual Arbitrations, which would have taken years and would have necessitated the parties expending astronomical resources. Additionally, the litigation of 326 Individual Arbitrations in front of 29 arbitrators, with discovery available from each, would have been unbelievably complex, with each of the arbitrators potentially ruling in different and possibly conflicting ways on the same issues, with regard to liability and/or damages. The proposed Settlement Agreement immediately provides the parties with complete peace without the time and extraordinary expense of continued litigation. Very importantly, the proposed Settlement Agreement also provides the parties with straightforward and consistent resolution across all Plaintiffs.

C. Plaintiffs Faced Some Risk of Decertification, Weighing in Favor of Settlement.

While Arbitrator Irvine denied Respondents' motion to decertify the Collective Action prior to trial, it is possible that during the trial, the Arbitrator could have decided that damages could not be litigated on a collective basis and ordered individual litigation of damages, whether through questionnaires, mini-trials, use of a special master, etc. Decertification of the Collective Action for damages would make the litigation substantially more complex, expensive and time-consuming, as it would require the parties to individually determine damages for approximately 1,350 drivers. It would also undoubtedly preclude some Plaintiffs from recovering at all, as many of them would not be able or willing to go through whatever individual process was mandated by the Arbitrator to determine damages.

In addition, in the event any judgment were to be rendered against one or more of the Defendants, Defendants have made it clear that they would likely challenge any such ruling. Defendants could challenge the Arbitrator's classification ruling, whether a collective arbitration is permissible under the parties' arbitration agreement, and a host of other possible issues.

The proposed Settlement Agreement avoids all possible risk of decertification or reversal and thus weighs in favor of approval of the settlement. *See In re Toys R Us-Delaware, Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litigation*, 295 F.R.D. 438, 452-53 (C.D. Cal. 2014) ("Avoiding the risk of decertification … favors approval of [a] settlement); *McKenzie v. Federal Exp. Corp.*, No. CV 10–02420 GAF (PLAx), 2012 WL 2930201, *4 (C.D. Cal. July 2, 2012) ("[S]ettlement avoids all possible risk [of decertification]. This factor therefore weighs in favor of final approval of the settlement"); *Catala v. Resurgent Capital Services L.P.*, Civil No. 08cv2401 NLS, 2010 WL 2524158, *3 (S.D. Cal. June 22, 2010) ("The avoidance of risk of maintaining class action certification throughout trial favors settlement of this action").

D. The Amount Offered in the Settlement is an Excellent Result for Class Members, Which Favors Settlement.

The Ninth Circuit has previously noted that "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. [A] proposed settlement is [thus] not to be judged against a hypothetical or speculative measure of what *might* have been achieved[.]" *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "Estimates of a fair settlement figure are [to be] tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *In re Toys R Us-Delaware, Inc.*, 295 F.R.D. at 453.

Here, the proposed Settlement Agreement creates two settlement funds that together total [redacted] gross. Fund A ([redacted] gross), less the proportionate share of approved attorneys' fees and costs, administrative costs and service awards, will be allocated to the Fund A Claimants (i.e., those individuals who have already joined the Collective Action, filed an Individual Arbitration, or both, and who do not timely opt out of the settlement). The allocation is based on the total number of hours worked multiplied by a damage recovery per hour which is variable

based on their average hourly earnings. *See* Ex. 1 at ¶ 2.3(B)(i). Each Claimant will receive a minimum award of [redacted]. All Claimants who filed individual arbitration claims will receive an additional [redacted]. The Fund A allocation is set forth in detail in Ex. F of the Settlement Agreement.[15]

Fund B ([redacted] gross), less the proportionate share of approved attorneys' fees and costs, administrative costs and service awards, will be allocated to Claimants who have not joined the Collective Action or filed an Individual Arbitration, and who timely opt in to the settlement. Fund B will be allocated on a pro rata basis based on the number of months each participating Fund B Claimant worked for Central Refrigerated from June 1, 2009 to the date of the Settlement Agreement. *See* Ex. 1 at ¶ 2.3(B)(ii). Each participating Fund B Claimant will receive a minimum payment of [redacted]. *See id.*

If the Court approves service awards of [redacted] attorneys' fees of [redacted] of the Gross Settlement Amount and costs of [redacted], the average recovery for Fund A Claimants will be approximately [redacted] and the average recovery for Fund B Claimants will be approximately [redacted]. For tax purposes, [redacted] of each individual settlement payment will be treated by the parties as wages, reported on IRS Form W-2. *See* Ex. 1 at ¶ 2.7(A)(i). The remaining [redacted] will be treated by the parties as additional, non-wage penalties and interest, reported on IRS Form 1099. *See id.*[16]

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[15] As explained above in footnote 8 above, Respondents take no position on whether the allocation formula which was created by Claimants' counsel and set forth in Exhibit F to the settlement agreement is fair, reasonable, adequate, or accurate.

[16] The parties believe the tax breakdown of the settlement payments reasonably reflects the damages alleged in this litigation, as wage damages alleged pursuant to the FLSA and state minimum wage laws make up only a small part of the claims. Non-wage damages alleged, including liquidated damages under the FLSA and state minimum wage laws, punitive damages for forced labor, and disgorgement of profits for unjust enrichment, make up the majority of the claims.

In addition to monetary benefits, Settlement Class Members receive significant non-monetary benefits as part of the settlement that they might not have recovered through continued litigation. Defendants will not pursue collections efforts with respect to leases involving Central Leasing or in connection with Central Refrigerated's contracts, against participating settlement members. *See* Ex. 1 at ¶ 2.8(D). Additionally, upon the Court's approval of the Settlement Agreement becoming final and no longer subject to appeal, Central Refrigerated and Central Leasing will release and dismiss with prejudice any counterclaims they have filed, or ever could file based on any occurrences that took place prior to May 5, 2017, against Participating Settlement Members. *See id.* Finally, if a Participating Settlement Member requests by letter to HireRight that records of a Central Leasing lease default be corrected, Defendants Central Refrigerated and Central Leasing will timely provide a letter to HireRight that defaults under the Central Leasing lease have been rescinded. *See* Ex 1 at ¶ 2.8(I).

While Plaintiffs might have obtained a larger recovery after full litigation, it is also possible that they might have recovered significantly less, nothing at all, and/or that their recovery would have been significantly delayed. In this situation, compromise as "a yielding of absolutes and an abandoning of highest hopes" is appropriate. *Officers for Justice*, 688 F.2d at 625. Moreover, "the essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness." *In re Corregated Container Antitrust Litig.*, 659 F.2d 1322, 1325 (5th Cir. 1981). Thus, "[i]t is neither required, nor is it possible for a court to determine that the settlement is the fairest possible resolution of the claims of every individual class member; rather, the settlement, taken as a whole, must be fair, adequate, and reasonable." *Shy v. Navistar International Corp.*, No. C–3–92–333, 1993 WL 1318607, at *2 (S.D. Ohio May 27, 1993) (emphasis in original). The proposed Settlement Agreement was reached after years of hard-fought litigation, including extensive discovery by both parties, and Plaintiffs view it as a

fair, adequate and reasonable compromise between their "best day" and Defendants' "best day."

As described above, Class Counsel regularly engage in a highly sophisticated assessment of the fair settlement value of each and every claim in the case. This process entails examining every possible outcome, considering the percentage likelihood that the outcome will occur, multiplied times the value of the outcome. In simple terms, a thousand dollar claim with a 50% likelihood is equal to $500 subject to a discount for the time value of money given the weighted average of dates the money can be expected to be received. In this case, given the FLSA Collective Action and 329 separate Individual Arbitrations, the possible outcomes were exceedingly complex. Using this method, Class Counsel obtain a fair settlement value for the case as a whole, and have crafted the Fund A allocation to closely match the individual fair settlement value assessment.

For Fund A Claimants, the allocation based on total number of hours worked and a variable damage recovery per hour based on their average hourly earnings is the most equitable method of allocation in Class Counsel's estimation because it most accurately reflects the fair settlement value for these Claimants. For example, had Fund A simply been allocated based on the total number hours worked, it would overcompensate drivers who worked many hours but who were paid more per hour and thus who suffered a lesser degree of harm from minimum wage violations, forced labor, fraud, etc. Fund A Claimants who filed Individual Arbitrations receive additional compensation because Fund A Claimants who did not file Individual Arbitrations might not have ever brought them, might not have been able to bring them, and/or might have faced additional defenses against their claims (e.g., statute of limitations, etc.).

For participating Fund B Claimants, the allocation based on the number of months each participating Fund B Claimant worked is, in counsel's view, the most equitable method of allocation. Fund B Claimants have not previously been part of

this litigation. Because Fund B is being allocated to compensate individuals who did not opt-in to the Collective Action and who did not file an Individual Arbitration, Plaintiffs' counsel had no occasion to investigate individual facts relating to Fund B members. Given the statute of limitations and other potential affirmative defenses that exist with respect to these individuals, it is possible that Fund B members might never have any recovery at all but for this settlement. The settlement is fair for these Claimants because they had the opportunity to opt into the Collective Action, to file an Individual Arbitration or both and did not do so and because they continue to retain the option not to join the settlement and to bring their own litigation if they do not believe their settlement payment is reasonable and fair.

Considering the uncertainties and expense of trial, in both the Collective Action and Individual Arbitrations, the expected duration of litigation, particularly in the Individual Arbitrations, and potential challenges relating to damage calculations and rights to recovery, the amount offered in the Settlement Agreement is highly favorable and recommends approval of the settlement.

E. Extensive Discovery Was Completed and the Litigation Was in an Advanced Stage of the Proceedings, Weighing in Favor of Settlement.

The parties reached settlement after summary judgment in the FLSA Collective Action and mere days before the commencement of the damages trial in that case, and in the midst of summary judgment briefing in the eight bellwether Individual Arbitrations. As such, discovery was complete and litigation was in a very advanced stage in both the Collective Action and in the eight bellwether Individual Arbitrations. During the course of the litigation, the parties exchanged hundreds of thousands of pages of documents and dozens of gigabytes of data. The parties also took nearly 200 depositions, including the 30(b)(6) depositions of Defendants Central Refrigerated and Central Leasing, the depositions of individual Defendants Jerry Moyes and Jon Isaacson, and the depositions of approximately 170 Plaintiffs. Both sides also commissioned several expert reports each. The parties also engaged in extensive

motion practice including motions for summary judgment and a motion to decertify the Collective Action. Claimants had obtained summary judgment on the critical issue of misclassification in the FLSA Collective Action, but Respondents have made it clear they intend to challenge that ruling as well as the conclusion that the case could proceed on a collective action basis. Respondents also had obtained dismissals and certain limits to the class. Consequently, the parties had a good idea of the strengths and weaknesses of their cases and were in a good position to settle the litigation in a fair, reasonable and adequate way. *See In re Toys R Us-Delaware, Inc.*, 295 F.R.D. at 454 ("The more the discovery completed, the more likely it is that the Parties have a clear view of the strengths and weaknesses of their cases.") (internal citation and quotation omitted).

F. The Settlement Agreement Was Negotiated by Highly Experienced Counsel Who View the Settlement as Fair, Reasonable and Adequate, Favoring Settlement.

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (internal quotation marks and citation omitted). This reliance is predicated on the fact that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *Corson v. Toyota Motor Sales U.S.A., Inc.*, No. CV128499JGBVBKX, 2016 WL 1375838, at *7 (C.D. Cal. Apr. 4, 2016), quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Moreover, settlements are afforded a presumption of fairness if the negotiations occurred at arm's length. *Corson*, 2016 WL 1375838 at *7, *citing* 4 Newberg on Class Actions § 11.41 (4th ed.2013).

Plaintiffs' counsel includes partner Dan Getman of Getman, Sweeney & Dunn, PLLC in Kingston, New York and partner Susan Martin of Martin & Bonnett, PLLC in Phoenix, Arizona. Plaintiffs' counsel also includes prominent employment

attorney, Edward Tuddenham. Plaintiffs' counsel have extensive experience and expertise in prosecuting wage-and-hour collective- and class-action litigation cases on behalf plaintiffs, and have the necessary skill and experience to negotiate a fair settlement for the Settlement Class, as established in declarations submitted in support of this motion. *See* the Declarations of Dan Getman, Susan Martin and Edward Tuddenham, Exhibit 2 hereto. Plaintiffs' counsel vigorously and successfully prosecuted this case for five years. Plaintiffs' counsel have carefully analyzed the legal issues and evidence, the risks to the Settlement Class in continuing the litigation, the total potential damages and the benefits and detriments of the settlement reached with Defendants.

Plaintiffs' counsel also engaged in an extremely sophisticated assessment of the fair settlement value of the case. Based on an exhaustive review of the relevant factors in this case, Plaintiffs' counsel zealously negotiated the Settlement Agreement and are satisfied that the settlement is fair, reasonable, adequate and in the best interests of the Named Plaintiffs and the Settlement Class. Class Counsel's opinion deserves great weight both because of their familiarity with the litigation and because of their extensive experience in similar actions.

G. The Reaction of the Class Members to the Proposed Settlement is Highly Favorable, Weighing in Favor of Settlement

Although notice of the settlement and its details have not yet issued to the class, the Named Plaintiffs support the settlement and have signed the Settlement Agreement. *See Getman Decl.* at ¶ 40. Although the Court should more fully analyze this factor after notice issues and Settlement Class members are given the opportunity to opt-out or object, to date, this factor weighs in favor of preliminary approval.

II. The Proposed Forms and Method of Notice to Class Members Are Fair and Accurate.

"[N]otice under the FLSA must inform potential class members of the opt-in procedures and of the binding effect, on those who opt-in, of the judgment or

settlement. *Clesceri v. Beach City Investigations & Protective Servs., Inc.*, No. CV-10-3873-JST RZX, 2011 WL 320998, at *11 (C.D. Cal. Jan. 27, 2011), *citing* 29 U.S.C. § 216(b). Again, while this settlement does not involve a Rule 23 class with passive class members, it is useful to examine the Rule 23 standards for adequate notice. For a class certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Clesceri*, 2011 WL 320998 at *10, *citing* Fed. R. Civ. P. 23(c)(2)(B). However, actual notice is not required. *See Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir.1994). Plaintiffs must provide notice to class members that is "timely, accurate, and informative." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (1989). Likewise, claim forms must be informative and accurate. *Id.* at 172; *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004). Notice to class members must be "reasonably calculated, under all the circumstances, to apprise interested Parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The notice should generally describe the terms of the settlement "in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Torrisi*, 8 F.3d at 1374 (citing *In re Cement and Concrete Antitrust Lit.*, 817 F.2d 1435, 1440 (9th Cir. 1987)).

Here, the proposed notice forms for Fund A Claimants (Ex. B-1 to the Settlement Agreement) and potential Fund B Claimants (Ex. B-2 to the Settlement Agreement), as well as the proposed claim form for potential Fund B Claimants (Ex. C to the Settlement Agreement), have been agreed upon by all parties and are accurate and informative. Likewise, the method of notice, which has also been agreed upon by all parties, is the best notice that is practicable under the circumstances, and includes individual notice to all members who can be identified through reasonable effort.

The notices inform drivers of the pendency of the settlement and afford them an opportunity to present their views with respect to the settlement, including any favorable comments, opt outs, or objections. The notices fully inform the Claimant how much they will receive, and what claims they are releasing. They describe the fee arrangement and proposed service awards. They fully describe the rights and the procedures needed either to participate or not participate in the case. They describe the terms of the settlement in great detail, allowing those drivers who may have adverse viewpoints to investigate the settlement and opt-out, not opt-in or object. Specifically, the notice forms accurately inform drivers[17] in detail of the nature and history of the lawsuit; the terms of the settlement including any requested deductions from the gross settlement fund for attorneys' fees and service awards, and the claims they are releasing by remaining in the settlement; their estimated individual payment; their options including how to opt out of the settlement (for Fund A Claimants), opt in to the settlement (for potential Fund B Claimants) and/or object to the settlement; the date, time and location of the final fairness hearing; and how they can obtain further information, including a full copy of the Settlement Agreement. The claim form for potential Fund B Claimants accurately informs drivers that by submitting the claim form, they are consenting to sue Defendants in the FLSA Collective Action and to participate in the settlement; they are authorizing Plaintiffs' counsel to represent them for purposes of the settlement; they understand that attorneys' fees and costs, administrative costs, and service awards will be deducted pro rata from their settlement payment; and that they release Defendants from all of the claims as fully described in the Settlement Agreement and summarized on the back of the claim form.

The parties have agreed, subject to the Court's approval, that the settlement will be administered by a third-party settlement administrator, Settlement Services, Inc.

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[17] All forms will be sent in English. All forms will also be sent in Spanish to any driver with Spanish surnames. *See* Ex. 1 at ¶ 2.12(A).

See Ex. 1 at ¶ 2.5(A). The parties have agreed that the settlement administrator will distribute individual notice by email and First Class Mail to all class members who have been identified through Defendants' reasonable efforts. *See id.* at ¶¶ 2.5(A), 2.12(B). Lists of these class members are attached to the Settlement Agreement as Exhibits E (Fund A) and G (Fund B). The notices will be mailed to the last known addresses on file with Defendant Central Refrigerated, or such later addresses supplied by drivers or as determined by the United States Postal Service change of address registry. *See id*. The method of notice agreed to by the parties in the Settlement Agreement provides timely notice of the settlement to the drivers, requiring that the settlement administrator issue notices within ten days of preliminary approval of the Settlement Agreement by the Court. *See id.* at ¶ 2.12(A). The settlement administrator will also perform skip traces as necessary for notices that are returned. *See id.* ¶¶ 2.5(A), 2.12(B).

As the proposed notices and proposed method of notice to Settlement Class Members are fair and accurate, the Court should approve such notices and method.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' unopposed motion in its entirety and sign the proposed order submitted herewith:

(i) Preliminarily approving the proposed settlement as fair, reasonable, and adequate as to the Drivers Eligible To Participate;

(ii) Approving as to form and content the proposed Notices of Settlement;

(iii) Preliminarily approving the plan of allocation of the settlement funds;

(iv) Directing the mailing of the Notices of Settlement by First Class Mail and email to Drivers Eligible To Participate by the Settlement Administrator;

(v) Preliminarily approving a *cy pres* recipient to receive any unclaimed funds remaining in Fund A one (1) year after distribution from Fund A commences;

(vi) Appointing Settlement Services, Inc. as the Settlement Administrator; and

(vii) Scheduling a Final Fairness Hearing on the question of whether the proposed settlement should be finally approved.

DATED: August 21, 2017

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