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and TED PORTILLO, on behalf of themselves
and all others similarly situated
10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER/ CIVIL COMPLEX
13

14 WILLIAM BAISLEY, an individual, and
15 TED PORTILLO, an individual, on
behalf of themselves and all others
16 similarly situated

17 Plaintiffs,

18 vs.

19 YOSEMITE WATERS COMPANY,
20 BASTANCHURY WATERS
COMPANY, INC., and DOES 1 through
21 25, inclusive,

22 Defendants.
23

CASE NO. 30-2009-00242694-CU-OE-CXC

**AMENDED NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES; [DECLARATIONS OF
THOMAS W. FALVEY AND J.D.
HENDERSON IN SUPPORT THEREOF
FILED CONCURRENTLY HEREWITH]**

Date: August 29, 2011

Time: 8:30 a.m.

Dept.: CX-105

Complaint Filed: February 5, 2009

Trial Date: None Set

24 PLEASE TAKE NOTICE that on August 29, 2011, or as soon thereafter as the matter
25 may be heard, in Department CX-105 of the Superior Court of California, County of Orange,
26 Central Justice Center/ Civil Complex, in Department CX-105, Plaintiffs WILLIAM BAISLEY
27 and TED PORTILLO, ("Plaintiffs"), will and hereby do move this Court for entry of the
28 proposed Order filed concurrently herewith:

- 1 1. Provisionally approving and certifying a settlement class;
- 2 2. Provisionally approving the Plaintiffs as Class Representatives;
- 3 3. Provisionally approving the Law Offices of Thomas W. Falvey and the Law Offices of
- 4 Janet M. Koehn as class counsel (“Class Counsel”);
- 5 4. Preliminarily approving a settlement of claims under the terms set forth in the
- 6 Settlement and Release Between Plaintiffs and Defendant (“Settlement Agreement”);¹
- 7 5. Approving the proposed Class Notice and Claim Form;²
- 8 6. Approving the method of Notice described in the Settlement Agreement and directing
- 9 distribution of the proposed Class Notice and Claim Form to the members of the proposed class;
- 10 7. Approving the appointment of CPT Group as Settlement Administrator and
- 11 preliminarily approving costs of administration for an amount estimated to be approximately
- 12 \$15,000, to be paid from the Maximum Payment Amount (“Maximum Payment”);
- 13 8. Preliminarily approving service payments of \$10,000 each to proposed Class
- 14 Representatives William Baisley and Ted Portillo, said payments to come from the Maximum
- 15 Payment;
- 16 9. Preliminarily approving payment of reasonable attorneys’ fees of up to thirty percent
- 17 (30%) of the Maximum Payment (or \$217,500) to proposed Class Counsel;
- 18 10. Preliminarily approving reimbursement of proposed Class Counsel’s costs of up to
- 19 \$10,000 for all past, present and future costs, from the Maximum Payment;
- 20 11. Preliminarily approving payment of \$5,000 to the State of California Labor and
- 21 Workforce Development Agency (“LWDA”) for civil penalties; and
- 22 12. Setting a schedule for implementation of the terms of the Settlement Agreement,
- 23 including a date for a hearing for Final Approval of the Class Action Settlement.

24 ///

26
27 ¹ Attached as Exhibit 1 to the Declaration of J.D. Henderson in Support of Amended Motion for
28 Preliminary Approval of Class Action Settlement (“Henderson Decl.”).

² Attached as Exhibits 2 and 3, respectively, to the Henderson Decl.

1 This Motion is based upon this Notice, the accompanying Memorandum of Points and
2 Authorities, the Settlement Agreement, the other exhibits attached to the Henderson Decl., the
3 declarations of Thomas W. Falvey and J.D. Henderson in support, all other records, pleadings,
4 and papers filed in this action, and upon such other documentary and oral evidence or argument
5 as may be presented to the Court at the hearing of this Motion.
6

7 Respectfully submitted:

8
9 Dated: August 24, 2011

LAW OFFICES OF THOMAS W. FALVEY

10
11 By: 

12 Daniel O'Neil-Ortiz

13 Attorneys for Plaintiffs WILLIAM BAISLEY and
14 TED PORTILLO Individually and on Behalf of All
15 Similarly Situated Individuals
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26
27
28

TABLE OF CONTENTS

1

2 **I. INTRODUCTION 1**

3 **II. PROCEDURAL HISTORY. 2**

4 **III. THE CLASS. 3**

5 **IV. PRINCIPAL TERMS OF THE SETTLEMENT 3**

6 A. Claims-Made Settlement With Minimum 50% Payout 3

7 B. Maximum Payment of \$725,000. 3

8 C. Settlement Payments. 3

9 D. Remainder. 3

10 1. Costs 3

11 2. Service Awards to Plaintiffs 4

12 3. Fees. 4

13 4. Claims Administration 4

14 5. Civil Penalties 4

15 E. Final Settlement Payments. 4

16 F. Distribution to Class Members. 4

17 1. Submission of Claim Forms 4

18 2. Compensable Workweeks 4

19 3. Distribution Formula 5

20 G. Allocation Of Settlement Payments 5

21 H. Settlement Payments Do Not Trigger Additional Benefits 5

22 I. Attorneys’ Fees 5

23 J. Class Representative Service Payments 6

24 K. Claims Administration 6

25 L. Contact Information for Class Members 7

26 M. Mailing of Notice and Claim Form 7

27 N. Claim Period 7

28 O. Deficiency Notices 8

 P. The Effective Date. 8

 Q. Due Diligence and Proof of Mailing 8

 R. Resolution of Claim Disputes 9

1	S. Final Settlement Payment Due Date.....	10
2	T. Mailing of Settlement Payments	10
3	U. Mailing of Other Court Approved Payments	10
4	V. Uncashed Checks: Expiration of Settlement Payments and Resulting Residue	10
5	W. Right of Class Members to Object to or Opt Out of the Settlement.....	10
6	1. Object.....	10
7	2. Opt Out/ Exclusion Process	11
8	X. Scope of Release Provisions	12
9	Y. Continuing Jurisdiction For Purposes of Enforcing Settlement.....	13
10	V. <u>STANDARDS FOR PRELIMINARY APPROVAL OF SETTLEMENT.</u>	13
11	A. Court Approval is Required.....	13
12	B. Procedure for Obtaining Court Approval.....	14
13	C. Preliminary Approval is Granted When the Proposed Settlement is Within the	
14	“Range of Reasonableness”.....	14
15	D. A Proposed Settlement is Presumed to Be Fair and Reached in Good Faith.....	15
16	VI. <u>THE PROPOSED SETTLEMENT MEETS THE STANDARDS FOR</u>	
17	<u>PRELIMINARY APPROVAL.</u>	16
18	A. The Settlement is the Result of Serious, Informed, Non-Collusive, Extensive	
19	Negotiations.....	16
20	B. The Settlement Followed Extensive Investigation, Discovery, and Analysis.	16
21	C. The Strengths and Weaknesses of Plaintiffs’ Case Were Balanced Against the Amount	
22	Offered In Settlement.....	17
23	D. Plaintiffs’ Counsel Are Experienced Wage and Hour Class Action Counsel.	19
24	VII. <u>THE PROPOSED ATTORNEYS’ FEES AND COSTS ARE REASONABLE.</u> ...	20
25	A. Percentage Method	20
26	B. Lodestar Method.	22
27	VIII. <u>THE SETTLEMENT AMOUNTS PAYABLE TO THE NAMED PLAINTIFFS</u>	
28	<u>ARE REASONABLE.</u>	23
	IX. <u>CONCLUSION.</u>	25

1 **TABLE OF AUTHORITIES**

2
3 **STATE CASES**

4

5 *7-Eleven Owners for Fair Franchising v. Southland Corp.*

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2	171 Cal.App.4th 495, 504-505 (2009).....	15
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5		
6	<u>FEDERAL CASES</u>	
7		
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19		
20	<u>STATE STATUTES, RULES AND REGULATIONS</u>	
21		
22	Cal. Bus. & Prof. Code §§ 17200 <i>et seq.</i>	1, 12
23	Cal. Civ. Code § 1542.	13
24	Cal. Industrial Welfare Commission Wage Orders.	1, 12
25	Cal. Lab. Code §§ 201-203, 226, 226.7, 510, 512, 515, 551-552, 1194, 1198, 2698- 2699... ..	1, 12
26	Cal. Rule of Court Rule 3.76 (c) - (d).	14
27		
28		

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13
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs William Baisley and Ted Portillo seek preliminary approval of a proposed class
4 action settlement (the “Settlement”) of wage and hour claims made against Defendant
5 Bastanchury Waters Company, Inc., previously doing business as Yosemite Waters Company,
6 (“Defendant”) which could be liable to any of the members of the proposed Settlement Class of
7 Route Drivers (“Route Drivers” or “Class Members”) for any of the Released Claims as defined
8 below. The Settlement will resolve numerous claims and avoid multiple individual actions
9 concerning the same issues of law and fact common to all Route Drivers.

10 Plaintiffs alleged, among other things, that Defendant misclassified the Route Drivers as
11 “exempt” and thus failed to pay them wages for all hours worked; failed to pay overtime wages;
12 failed to provide timely and accurate wage statements; failed to pay compensation in a timely
13 manner following termination or resignation; failed to maintain complete and accurate payroll
14 records; wrongfully withheld wages and compensation; and committed unfair business practices
15 in an effort to increase profits and to gain an unfair business advantage at the expense of Route
16 Drivers and the public.

17 Plaintiffs contend Defendant violated provisions of the California Labor Code, including
18 sections 201, 202, 203, 226, 226.7, 510, 512, 515, 1194, and 1198 (collectively, “Employment
19 Laws”), violated the applicable Wage Orders issued by California’s Industrial Welfare
20 Commission, including Wage Order 9-2001 (“Regulations”), violated California’s Unfair
21 Business Practices Act, Business & Professions Code sections 17200 *et seq.*, violated
22 California’s Private Attorneys General Act, Labor Code sections 2698 *et seq.*, and violated
23 Plaintiffs’ and all other Route Drivers’ rights. Defendant denies all allegations and maintains
24 that the Route Drivers were properly classified as “exempt” employees.

25 After extensive discovery and multiple efforts to resolve their dispute, the parties finally
26 reached a settlement. Defendant does not oppose this Amended Motion for Preliminary
27 Approval of Class Action Settlement (henceforth, “Motion”). The Settlement is fair and
28 reasonable.

1 Accordingly, Plaintiffs request that the Court grant preliminary approval of the
2 Settlement, provisionally approve and certify a Settlement Class, schedule a Final Approval
3 Hearing, and approve the proposed Implementation Schedule of relevant dates and deadlines
4 regarding the administration of the Settlement Payments attached as Exhibit 5 to Henderson
5 Decl.

6 **II. PROCEDURAL HISTORY**

7 1. On February 5, 2009, Plaintiffs William Baisley and Ted Portillo filed a putative class
8 action wage and hour lawsuit alleging they were misclassified as exempt commissioned sales
9 employees rather than as non-exempt delivery drivers.

10 2. On April 1, 2009, Defendant filed a demurrer and motion to strike portions of the
11 Complaint, and Plaintiffs filed a First Amended Complaint on April 21, 2009.

12 3. Defendant filed a Demurrer and Motion to Strike Portions of the First Amended
13 Complaint. The Court granted the motions in part and Defendant filed its Answer on July 6,
14 2009. There have been no cross-complaints filed.

15 4. Plaintiffs' counsel conducted extensive and significant discovery and legal analysis
16 during the prosecution of this action. Both parties propounded requests for production of
17 documents, interrogatories, and requests for admission. Plaintiffs' counsel analyzed Defendant's
18 written responses and documents produced pursuant to those requests, and this led to further
19 discovery requests. Defendants engaged in lengthy depositions of both named Plaintiffs.
20 Motions to compel were filed by both parties, but these were taken off calendar when the parties
21 were able to resolve their multiple discovery disputes without the need for Court intervention.

22 5. On February 23, 2010, Defendant sold the business and ceased to operate.

23 6. A year later, following extensive discovery, the parties engaged in mediation on
24 February 7, 2011 before a well-known and respected mediator, Joel Grossman. The dispute was
25 not fully resolved at that time, although much progress was made. Henderson Decl., ¶ 8.

26 7. Following the mediation the parties continued to engage in settlement discussions.
27 Eventually, after much effort, the parties finally agreed to a Maximum Payment of \$725,000 and
28 to the terms of the proposed Settlement Agreement. Henderson Decl., ¶ 13.

1 **III. THE CLASS**

2 The proposed class is comprised of 192 Route Drivers (also known as “Route Sales
3 Representatives”) who were employed by Defendant in the State of California at any time during
4 the time period from February 5, 2005 through the date of preliminary approval of this
5 Settlement.³

6 **IV. PRINCIPAL TERMS OF THE SETTLEMENT**

7 The Settlement is set out in detail in the Joint Stipulation of Settlement and Release
8 (“Settlement Agreement”) (Henderson Decl., Exh. 1). The principal terms are:

9 **A. Claims-Made Settlement With Minimum 50% Payout.** This will be a claims-
10 made settlement which requires at least fifty percent (50%) of the “Remainder” to be distributed
11 to the class members, but does not establish a fund from which claims will be paid.

12 **B. Maximum Payment of \$725,000.** Defendants have agreed to a Maximum Payment
13 of Seven Hundred and Twenty-Five Thousand Dollars (\$725,000). The maximum total payment
14 under the Settlement, if all Class Members file valid claims, including all attorneys’ fees and
15 costs, service payments to the Named Plaintiffs, payment of civil penalties, costs of claims
16 administration, the employer’s customary share of payroll taxes, and any other payments
17 provided by the Settlement, is \$725,000 (the “Maximum Payment”).

18 **C. Settlement Payments.** Payments to Class Members who file valid and timely claims
19 will be calculated by the Claims Administrator and paid out of the “Remainder” as set forth
20 below (“Settlement Payments”).

21 **D. Remainder.** The “Remainder” is estimated to be \$472,500, and shall be calculated
22 by deducting from the Maximum Payment the sums set forth below. At a minimum, 50% of the
23 “Remainder” will be paid to Class Members who file valid and timely claims. Plaintiffs request,
24 and Defendant does not oppose, deductions for:

25 ///

26 ///

27 _____
28 ³ Defendant ceased operations and laid off all Route Drivers in early 2010.

1 1. Costs. Reimbursement of up to \$10,000 for all past, present and future
2 attorneys' costs incurred that are associated with the prosecution of this matter and
3 implementation of the terms of the Settlement.

4 2. Service Awards to Plaintiffs. A service award of \$10,000 each for Plaintiffs
5 William Baisley and Ted Portillo in consideration of the risks they each took and their extensive
6 efforts on behalf of their fellow Route Drivers, together totaling \$20,000.

7 3. Fees. Attorneys' fees of thirty percent of the Maximum Payment (\$217,500).

8 4. Claims Administration. Claims Administration costs not to exceed \$15,000.

9 5. Civil Penalties. A payment to the LWDA of \$5,000 for civil penalties.

10 **E. Final Settlement Payment**. The "Final Settlement Payment" shall consist of the total
11 sum of the following, subject to Court approval: (1) up to 30% (\$217,500.00) in attorneys' fees
12 to Class Counsel, plus reasonable litigation costs (not to exceed \$10,000.00); (2) up to
13 \$10,000.00 in service payments to each of the two Class Representatives; (3) the reasonable costs
14 incurred by the Claims Administrator to administer the Settlement, up to \$15,000.00; (4) \$5,000
15 to the LWDA; and (5) the amounts to be distributed by the Claims Administrator to the Class
16 Members from the "Remainder," using the distribution method described herein.

17 **F. Distribution to Class Members**.

18 1. Submission of Claim Forms. Defendant states there are 192 Class
19 Members, and agrees to furnish to Class Counsel a declaration from a corporate officer, signed
20 under penalty of perjury, verifying that number is accurate. Only Class Members who submit
21 timely and valid Claim Forms shall be paid. To be timely, the Claim Forms must be returned to
22 the Claims Administrator by the deadline indicated on the Notice and Claim Forms. To be valid,
23 Claim Forms must be completed in full and signed under penalty of perjury.

24 2. Compensable Workweeks. Compensable Workweeks shall mean all
25 workweeks during which Class Members received pay for work performed (e.g., were not on
26 leave of absence) while employed by Defendant during the Class Period running from February
27 5, 2005 through the preliminary approval of this Settlement. Defendant estimates there are
28 10,447 Compensable Workweeks, and agrees to furnish to Class Counsel a declaration from a

1 corporate officer, signed under penalty of perjury, verifying that number is accurate and
2 explaining the process by which the number of Compensable Workweeks was determined.

3 3. Distribution Formula. At least fifty percent (50%) of the Remainder
4 shall be distributed to Class Members who make valid and timely claims (“Participating Class
5 Members”). One of two methods will be used to calculate distribution amounts:

- 6 a. (I) dividing the Remainder by the total number of Compensable
7 Workweeks, revealing the value per Compensable Workweek
8 (estimated to be over \$40 per Compensable Workweek); and
9 (ii) multiplying that amount by the number of Compensable
10 Workweeks worked by each Participating Class Member. If the total
11 of all distribution amounts made using this formula shown is less than
12 fifty percent (50%) of the Remainder, then
13 b. the distribution amounts shall be recalculated by dividing fifty percent
14 (50%) of the Remainder by the number of Compensable Workweeks
15 worked by each Participating Class Member.

16 **G. Allocation Of Settlement Payments.** Defendants’ share of payroll taxes shall be paid
17 from the Remainder. Settlement payments shall be allocated as 50% wages, 50% penalties and
18 interest. The Participating Class Members will be responsible for correctly characterizing this
19 compensation for tax purposes and paying any taxes owed on said amounts.

20 **H. Settlement Payments Do Not Trigger Additional Benefits.** The settlement payments
21 shall not have any effect on the eligibility or calculation of any employee benefits. The Parties agree
22 the settlement payments do not represent any modification of any employee’s previously-credited
23 hours of service or other eligibility criteria under any employee pension benefit plan, employee
24 welfare benefit plan, or other program or policy sponsored by Defendant or any of its affiliates.
25 Further, the settlement payments shall not be considered wages, compensation, or annual earnings for
26 benefits in any year for purposes of determining eligibility for, or benefit accrual within, an employee
27 pension benefit plan, employee welfare benefit plan, or other program or policy sponsored by
28 Defendant or any of its affiliates.

1 **I. Attorneys' Fees.** Plaintiffs request, and Defendant does not oppose, an award of
2 attorneys' fees of up to thirty percent (30%) of the Maximum Payment (or \$217,500) to compensate
3 Class Counsel for their extensive work already performed, as well as all work remaining to be
4 performed in documenting the Settlement, securing Court approval of the Settlement, administering
5 the Settlement, ensuring that the Settlement is fairly administered and implemented, and obtaining
6 dismissal of the Action. The parties agree that any reduction by the Court of attorneys' fees is not a
7 basis for rendering the entire Settlement void or unenforceable. The parties further agree that any
8 amount of the \$217,500 subtracted from the Maximum Settlement Amount which is not approved as
9 attorneys' fees by the Court will revert to Defendant, is not part of the Remainder and will not be paid
10 out as part of the Settlement.

11 **J. Class Representative Service Payments.** In exchange for each Plaintiff executing a
12 general release of all claims, Defendant has agreed to pay Plaintiffs William Baisley and Ted Portillo
13 a Service Payment of \$10,000 each for their services as Class Representatives unless the Court orders
14 otherwise. These payments are in addition to Plaintiffs' claims under the Settlement which are paid
15 from the Remainder. The Service Payments shall be paid out of the Maximum Payment, not the
16 Remainder. The parties further agree that any amount not approved as Service Payments by the Court
17 will revert to Defendant, is not part of the Remainder and will not be paid out as part of the
18 Settlement.

19 **K. Claims Administration.** Defendants have agreed to pay the costs of the Claims
20 Administrator associated with the administration of the Settlement, estimated not to exceed \$15,000.
21 The parties agree to the appointment of CPT Group to perform the customary duties of Claims
22 Administrator. The Claims Administrator will perform the duties of: (i) using the data provided by
23 Defendant to prepare Claim Forms with the number of Compensable Workweeks for each Class
24 Member; (ii) mailing the Notice, Claim Forms and Exclusion Forms to Class Members; (iii) tracking
25 returned Claim and Exclusion Forms; (iv) sending out cure letters to Class Members as necessary; (v)
26 notifying the parties of timely and untimely claims; (vi) calculating amounts due to each Participating
27 Class Member; (vii) notifying the parties of and resolving any disputes regarding claims by the Class
28 Members; (viii) providing settlement payments, along with IRS Forms 1099, to Participating Class

1 Members and to the taxing authorities; and (ix) performing such other duties as are described in the
2 Settlement Agreement. All disputes relating to the Claims Administrator's performance of its duties
3 shall be referred to the Court, if necessary, which will have continuing jurisdiction over the terms and
4 conditions of the Settlement until all payments and obligations have been fully carried out.

5 **L. Contact Information for Class Members.** Within seven (7) calendar days following the
6 Court's entry of an Order Granting Preliminary Approval, to the extent practicable, Defendant will
7 provide to the Claims Administrator the names, last known addresses, last known telephone numbers,
8 and Social Security numbers of the Class Members, along with data indicating their Compensable
9 Workweeks. This data shall be based on Defendant's payroll and other business records and shall be
10 provided in a format acceptable to the Claims Administrator. Defendant will consult with the Claims
11 Administrator prior to the production date to ensure the format will be acceptable to the Claims
12 Administrator. Contact information will not be shared with or provided to Class Counsel.

13 **M. Mailing of Notice and Claim Form.** Within ten (10) calendar days after receipt of the
14 Class Member information from Defendant, to the extent practicable, the Claims Administrator will
15 mail to all Class Members, by regular first-class U.S. mail, the Notice, the Claim Form and
16 instructions, the Exclusion Form, and a pre-addressed, postage-paid envelope ("the Notice Packet").⁴
17 The Claims Administrator will perform a National Change of Address ("NCOA") search at the outset.
18 The Claims Administrator will use all standard skip tracing devices to obtain forwarding addresses
19 and will forward returned mail to ensure that the Notice Packets are sent to all Class Members. With
20 respect to any returned Notice Packets, the Claims Administrator will use reasonable diligence to
21 obtain a current address and then re-mail the envelope to such address within ten (10) calendar days
22 of the receipt of the returned envelope.

23 **N. Claim Period.** Class Members will have sixty (60) calendar days from the mailing of the
24 Notice Packet to submit their Claim Form, except for deceased Class Members. Claim Forms may be
25 submitted to the Claims Administrator via U.S. mail, fax, and/or email. The Claims Administrator
26

27 _____
28 ⁴ The proposed Notice, Claim Form and instructions, and Exclusion Form are attached to
the Henderson Decl., as Exhibits 2, 3 and 4, respectively.

1 will provide written notification to each claimant and Class Counsel (name only) of receipt for each
2 Claim Form submitted. For any notices returned with an indication of “Moved - No Forwarding
3 Address” or words to that effect, Class Counsel shall immediately be informed of the identity of such
4 individuals (name only) by the Claims Administrator. No Claim Forms or Exclusion Forms will be
5 honored if submitted after the deadline to submit claims. In the case of mailed Claim Forms, the
6 postmark date will be deemed the date of submission. Claim Forms will not be honored if
7 postmarked after the expiration of the 60-day Claims Period.

8 If a Class Member is deceased, the 60-day deadline shall be extended by thirty (30) days for
9 the successor or estate to submit a claim on behalf of the deceased Class Member.

10 By submitting a Claim Form, a Class Member will be giving consent to “opt in” as a party
11 plaintiff in this action pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b) (“FLSA”).

12 **O. Deficiency Notices.** If a Class Member submits a timely Claim Form that is rejected by
13 the Claims Administrator as deficient in some material respect (for example, the Class Member failed
14 to sign it), the Claims Administrator will notify the claimant in writing of the basis for the deficiency
15 and give the claimant a reasonable opportunity to cure the deficiency, including a follow-up telephone
16 call if necessary. The Claims Administrator will also notify Class Counsel, and provide the claimant
17 with Class Counsel’s contact information so that the claimant may seek Class Counsel’s assistance.

18 **P. The Effective Date.** “Settlement Effective Date” shall mean the first day following the
19 last of the following occurrences:

20 -If there are no objections to the settlement, then 10 days after the date of final approval by the
21 Court; or

22 -If there are objections to the settlement, and if an appeal, review or writ is not sought from
23 the order granting final approval of the settlement, the 31st day after service of notice of entry of the
24 order; or

25 -If an appeal or other judicial review has been taken or sought, the date the final Judgment is
26 finally affirmed by an appellate court with no possibility of subsequent appeal or other judicial review
27 therefrom, or the date the appeal(s) or other judicial review therefrom are finally dismissed with no
28 possibility of subsequent appeal or other judicial review.

1 **Q. Due Diligence and Proof of Mailing.** The Claims Administrator will certify jointly to
2 Class Counsel and Defendants' Counsel what timely claims were filed and which Class Members, if
3 any, elected to opt out of the Settlement. Class Counsel shall provide to the Court, at least five
4 calendar days prior to the final approval hearing, a declaration by the Claims Administrator of due
5 diligence and proof of mailing with regard to the mailing of the Notice of Pendency of Class Action
6 and Proposed Settlement. Within 30 calendar days of the expiration of the Claims Period, the Claims
7 Administrator shall provide Class Counsel and Defendants' Counsel with a report listing the amount
8 of all payments to be made to each Class Member. The Claims Administrator will provide proof of
9 payment to Class Counsel, who shall file proof of payment with the Court and provide a copy to
10 Defendants' Counsel.

11 **R. Resolution of Claim Disputes.** If a Class Member submits a timely Claim Form but
12 disputes the number of Compensable Workweeks listed on the Claim Form, *and* the Class Member
13 provides a written statement or other documentation supporting his or her claim to a greater number
14 of workweeks than the number listed on the Claim Form, the Claims Administrator will first notify all
15 counsel of the disputed claim. Defendant will review its records and provide information to the
16 Claims Administrator in response to the disputed claim. If after receiving this information the Claims
17 Administrator intends to reject the claim for additional workweeks, it will notify the claimant in
18 writing of the rejection and the reason for it, offer the claimant an opportunity to provide additional
19 information in support of the claim within 15 days or by the end of the claims period, whichever is
20 later, and provide the claimant with Class Counsel's contact information so that the claimant may
21 seek Class Counsel's assistance. The Claims Administrator will at the same time provide Class
22 Counsel with the names and supporting documentation of any Class Members whose disputed claims
23 are rejected. If the claimant thereafter submits additional supporting information, the Claims
24 Administrator will consider it. Counsel for the parties will confer and attempt to resolve any such
25 disputes in good faith, in cooperation with the Claims Administrator. Absent a mutual agreement, the
26 Claims Administrator's determination on whether to accept or reject the claim will be final and
27 binding. In the event of a final rejection by the Claims Administrator of a disputed claim, the
28 claimant shall have the right to opt out of the Settlement and pursue his or her own individual case, by

1 submitting an Exclusion Form within the deadline for submitting such claims or within ten (10) days
2 after notification of the Claims Administrator's determination, whichever comes later. Any Claimant
3 who opts out of the Settlement may not object to the Settlement and/or appear at the hearing to raise
4 any objections to the Settlement. Therefore, any Claimant who withdraws a claim and submits an
5 Exclusion Form after the rejection of his or her claim for additional workweeks will be deemed to
6 have withdrawn any prior objections that the Claimant may have submitted in connection with the
7 prior claim.

8 The dispute-resolution procedure described in the preceding paragraph shall also apply to any
9 persons who may believe they were wrongly excluded from the class list; provided, however, that any
10 such persons excluded from the class need not file an Exclusion Form in order to opt out of the class.

11 **S. Final Settlement Payment Due Date.** Defendant shall tender the full amount of the Final
12 Settlement Payment to the Claims Administrator on the Settlement Effective Date.

13 **T. Mailing of Settlement Payments.** The Claims Administrator shall be responsible for
14 issuing the settlement payments to the Class Members within ten (10) calendar days after the
15 Settlement Effective Date. The Claims Administrator will provide proof of payment to Class
16 Counsel, who will file proof of payment with the Court and to Defendants' Counsel.

17 **U. Mailing of Other Court Approved Payments.** The Claims Administrator shall cause
18 the Class Representatives' service payments, attorneys' fees, litigations costs and LWDA penalties to
19 be mailed within ten (10) calendar days after the Settlement Effective Date.

20 **V. Uncashed Checks: Expiration of Settlement Payments and Resulting Residue.** Any
21 Settlement Payments issued by the Claims Administrator will be negotiable for 180 days. Any
22 residue representing uncashed checks will be tendered to the American Cancer Society 190 days after
23 said check(s) were issued.

24 **W. Right of Class Members to Object to or Opt Out of the Settlement.**

25 **1. Object**

26 Class Members who wish to object must file with the Court and serve on counsel for the
27 Parties, not later than sixty (60) days after the date the Claims Administrator first mails the Notice
28 Packet, a written statement objecting to the Settlement and setting forth the grounds for objection.

1 The statement must indicate whether the Class Member intends to appear and object to the Settlement
2 at the Final Approval Hearing. A failure to so indicate will constitute a waiver of the right to appear
3 at the hearing. A Class Member who does not file and serve an objection in the manner and by the
4 deadline specified above will be deemed to have waived all objections and will be foreclosed from
5 making any objection to the Settlement, whether by appeal or otherwise.

6 **2. Opt Out/ Exclusion Process**

7 Eligible Class Members who wish to exclude themselves from the Settlement (“opt out”)
8 must submit to the Claims Administrator, not later than sixty (60) days after the date that the Claims
9 Administrator first mails the Notice Packet, a completed Exclusion Form. Exclusion Forms may be
10 submitted to the Claims Administrator via U.S. Mail, fax, and/or email. A Class Member who does
11 not complete and submit a timely Exclusion Form in the manner and by the deadline specified above
12 will automatically become a Participating Class Member and, if the Court approves the Settlement,
13 will be bound by all terms and conditions of the Settlement and by the Judgment, regardless of
14 whether he or she submits a Claim Form, except as to any claims under the FLSA. An eligible Class
15 Member who timely submits an Exclusion Form will not participate or be bound by the Settlement or
16 the Judgment in any respect. Persons who submit an Exclusion Request will not be permitted to file
17 objections to the Settlement or appear at the Final Approval Hearing to voice objections.

18 If an eligible Class Member completes and submits both a Claim Form and an Exclusion
19 Form, the Claims Administrator will contact the Class Member and obtain clarification of the Class
20 Member’s intent. In the event the Claims Administrator cannot obtain this clarification of intent by
21 the time of the Final Approval Hearing, it will be presumed the Claim Form is controlling, and the
22 Class Member shall remain a Class Member and be bound by the terms of the Settlement.

23 Eligible Class Members who do not submit either a valid and timely Claim Form or a valid
24 and timely Exclusion Form will be bound by all of the terms of the Settlement and the release set
25 forth herein, except as to any claims under the FLSA.

26 If more than ten percent (10%+) of the Class Members timely submit Exclusion Forms,
27 Defendant shall have the exclusive right to void this Settlement. The Parties agree that neither side
28 will encourage opt-outs. Defendant shall make its election within ten (10) days after the Claims

1 Administrator notifies the parties of the number of valid Exclusion Forms received, which the Claims
2 Administrator will do within ten (10) days after the deadline for submission of Exclusion Forms. If
3 the Settlement is voided, neither the Class Representatives nor Class Counsel shall be liable for any
4 costs of administration.

5 **X. Scope of Release Provisions.** Upon the Court’s final approval of the Settlement, and
6 except as to such rights or claims as may be created by the Settlement, the Class Representatives and
7 the Class Members (other than those who file Exclusion Forms) will release and discharge Defendant
8 Bastanchury Waters Company, Inc., previously doing business as Yosemite Waters Company, and its
9 officers, directors, employees, partners, shareholders and agents, and any other successors, assigns, or
10 legal representatives (collectively, “the Released Parties”), from wage-and-hour claims pled in the
11 First Amended Complaint, and also claims of meal and rest period violations, waiting time penalties,
12 and PAGA claims. These additional claims were investigated by Plaintiffs' counsel, discussed by the
13 parties, and considered as part of the settlement at the mediation of this action. The parties have
14 stipulated to the filing of a Second Amended Complaint that includes these claims as well as the
15 claims contained in the First Amended Complaint. Henderson Decl., ¶¶ 11, 13, 16. The released
16 claims thus include any and all known or unknown claims of unpaid wages, including overtime
17 premium pay, meal/rest period premiums, liquidated damages, attorneys' fees and costs, any and all
18 available penalties, including but not limited to record-keeping penalties, pay stub penalties, waiting
19 time penalties, minimum wage penalties, and interest, up to and including the date of final court
20 approval of this Settlement; except, however, claims under the FLSA are released only by those Class
21 Members who submit Claim Forms pursuant to this Settlement. The claims released by the Class
22 Members (other than those who submit timely and valid Exclusion Forms) include those that arise
23 under the California Labor Code sections 201, 202, 203, 226, 226.7, 510, 512, 515, 1194, and 1198;
24 Business and Professions Code §§ 17200 et seq.; the Private Attorneys General Act of 2004 (codified
25 at California Labor Code §§ 2698 through 2699); California Industrial Welfare Commission Wage
26 Orders; the FLSA; (collectively, "Class Members' Released Claims"); provided, however, that Class
27 Members who do not submit claims will not be releasing claims under the FLSA.

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1 As to the released claims only, the Class Members each waive all rights and benefits afforded
2 by Section 1542 of the Civil Code of the State of California, and do so understanding the significance
3 of that waiver.

4 In consideration for the service payments being paid to the Class Representatives, each of the
5 Class Representatives, upon the Court's final approval of the Settlement, will fully and finally release
6 and discharge the Released Parties from all known and unknown claims they may have against the
7 Released Parties, of every nature or description whatsoever, up to the date of the Court's final
8 approval of the Settlement, in addition to the Class Members' Released Claims described in the
9 preceding paragraph. This general release of claims includes any and all known or unknown contract,
10 tort, statutory, common law, constitutional, discrimination, public policy, retaliation, wrongful
11 discharge, and other claims of any type whatsoever, to the fullest extent such claims are releasable by
12 law, arising out of the Class Representatives' employment with Defendant, the termination of their
13 employment, and their other dealings with the Defendant and the Released Parties (collectively,
14 "Class Representatives' Released Claims").

15 **Y. Continuing Jurisdiction For Purposes Of Enforcing Settlement.** After entry of
16 the Judgment, the Court will have continuing jurisdiction over the Action and the Settlement pursuant
17 to California Code of Civil Procedure Section 664.6 and California Rules of Court ("C.R.C.") Rule
18 3.769(h) which requires "retention of the court's jurisdiction" solely for purposes of enforcing the
19 Settlement, addressing settlement administration matters, and addressing such post-Judgment matters
20 as may be appropriate under court rules or applicable law.

21 **V. STANDARDS FOR PRELIMINARY APPROVAL OF SETTLEMENT**

22 **A. Court Approval is Required**

23 "To prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
24 action requires court approval." *Malibu Outriggers Board of Governors v. Sup. Ct.* (1980) 103
25 Cal.App.3d 573, 578-79 (citing *Marcarelli v. Cabell* (1976) 58 Cal.Spp.3d 51. The trial court has
26 broad powers to determine whether a proposed settlement in a class action is fair. *Rebney v. Wells*
27 *Fargo Bank* (1990) 220 Cal.App.3d 1117,1138; *Mallick v. Sup. Ct.* (1979) 89 Cal.App.3d 434 ("In
28 evaluating a proposed settlement of a class action, the district court is required to examine the terms

1 of the settlement and the process by which the settlement was arrived at, to make sure that the terms
2 are reasonable and that the settlement is not the product of fraud, overreaching or collusion. [Citation]
3 The fact that the plaintiff might have received more if the case had been fully litigated is no reason not
4 to approve the settlement.”)

5 **B. Procedure for Obtaining Court Approval**

6 Public policy has long favored settlement of litigation, particularly in class actions and other
7 complex cases where substantial resources can be conserved by avoiding the time, costs and rigors of
8 protracted litigation. Newberg On Class Actions (3d ed. 1992) (“Newberg”) § 11.41; *Osumi v. Sutton*
9 (2007) 151 Cal.App.4th 1355, 1359 [It is “the strong public policy of this state to encourage the
10 voluntary settlement of litigation”]. Trial courts are given broad discretion over the maintenance,
11 administration and settlement of class actions. CRC Rule 3.76 (c) and (d) authorize motions for
12 preliminary approval of settlement of class actions, such as this motion. Court approval of settlement
13 of class actions usually involves:

- 14 1. Preliminary approval of the proposed settlement at an informal hearing;
- 15 2. Notice to class members of the pendency of the action and the essential terms of the
16 proposed settlement; and
- 17 3. A formal hearing on the fairness of the proposed settlement, at which members of the
18 class may be heard concerning their support for or objection to the settlement.

19 Manual for Complex Litigation (3rd Ed, 1995) §30.41, pp. 236-238; *Bell v. American Title*
20 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1599.

21 **C. Preliminary Approval is Granted When the Proposed Settlement is Within the**
22 **“Range of Reasonableness”**

23 In reviewing a request for preliminary approval of a class action settlement, the Court’s task is
24 to determine whether the proposed settlement is within the “range of reasonableness” that would
25 warrant sending out a notice of the settlement and giving the class members the opportunity to object.
26 Newberg, *supra*, §11.25; Manual for Complex Litigation, *supra*, §30.41.

27 In assessing a proposed settlement, the Court should consider “the strength of Plaintiffs’ case,
28 the risk, expense and complexity and likely duration of further litigation, the risk of maintaining class

1 action status through trial, the amount offered in settlement, the extent of discovery completed and the
2 stage of the proceedings, the experience and view of counsel, the presence of a governmental
3 participant [if any], and the reaction of the class members to the proposed settlement.” *Dunk v. Ford*
4 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. “Due regard should be given to what is otherwise a
5 private consensual agreement between the parties.” *Id.*; *Sutter Health Uninsured Pricing Cases*
6 (2009) 171 Cal.App.4th 495, 504-505. The trial court “is given wide discretion to make class
7 determinations at such times and under such circumstances as will best fit the needs of a particular
8 case.” *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.* (E.D. Pa.
9 1970) 323 F.Supp. 364, 373.

10 **D. A Proposed Settlement is Presumed to Be Fair and Reached in Good Faith**

11 Courts do not substitute their judgment for that of the proponents, particularly when
12 settlement has been reached through arms-length negotiations by experienced counsel familiar with
13 the litigation. *Hammon v. Barry* (D.D.C. 1990) 752 F. Supp. 1087; *Steinberg v. City Investing Co.*
14 (S.D.N.Y. 1979) 470 F. Supp. 471. There is a presumption that the negotiations were conducted in
15 good faith. *Newberg, supra*, §11.51; *see also In re Chicken Antitrust Litig.* (N.D. Ga. 1980) 560
16 F.Supp.957, 962; *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.* (7th Cir. 1987) 834
17 F. 2d 677, 681. While the recommendations of counsel proposing the settlement are not conclusive,
18 the Court can properly take them into consideration, particularly if they have been involved in
19 litigation for some period of time, appear to be competent, have experience with this type of litigation,
20 and significant discovery has been completed. *See Newberg, supra*, §11.47.

21 The trial court should not analyze a proposed settlement “against a hypothetical or speculative
22 measure of what might have been achieved had plaintiffs prevailed at trial.” *Wershba v. Apple*
23 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 246. Courts recognize that “the merits of the underlying
24 class claims are not a basis for upsetting the settlement of a class action; the operative word is
25 ‘settlement’”. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th
26 1135, 1150.

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1 A settlement is presumed to be fair when:

- 2 1. The settlement is reached through arm’s length bargaining;
- 3 2. Investigation and discovery are sufficient to allow counsel and the court to act
- 4 intelligently;
- 5 3. Counsel is experienced in similar litigation; and
- 6 4. The percentage of objectors is small.

7 *Dunk, supra*, 48 Cal. App. 4th at 1802 (*citing* Newberg, *supra*, at § 11.41). Fairness is also
8 presumed where the settlement follows a formal mediation, especially where, as here, the mediator is
9 a respected member of the legal community. *Id.*

10 The proposed settlement meets the above criteria and merits the Court’s preliminary
11 approval because it was reached through arm’s length negotiation and bargaining, involved
12 extensive mediation before an experienced mediator, investigation and discovery were sufficient to
13 allow counsel for both sides to act intelligently, and because Plaintiffs’ counsel are experienced in
14 similar litigation as well as in complex matters.

15 **VI. THE PROPOSED SETTLEMENT MEETS THE STANDARDS FOR**
16 **PRELIMINARY APPROVAL**

17 **A. The Settlement is the Result of Serious, Informed, Non-Collusive, Extensive**
18 **Negotiations**

19 Court review of class action settlements “includes not only consideration of whether there was
20 actual fraud, overreaching or collusion but, as well, substantive consideration of whether the terms of
21 the decree are ‘fair, reasonable and adequate to all concerned.’” *Staton v. Boeing* (9th Cir. 2003) 327
22 F.3d 938, 960 (*quoting* *Officers for Justice v. CCSF* (9th Cir. 1982) 688 F.2d 615, 625). Courts
23 should review aspects of a class action settlement that lend themselves to pursuit of self-interest,
24 namely attorneys' fees and distribution of monetary relief among class members, to ensure it “strictly
25 comport[s] with substantive and procedural standards designed to protect the interests of the class
26 members.” *Staton, supra*, 327 F.3d at 960.

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1 **B. The Settlement Followed Extensive Investigation, Discovery, and Analysis**

2 The parties reached a non-collusive settlement after receiving sufficient discovery to enable
3 counsel to make educated decisions about the strengths and weaknesses of this case. Henderson
4 Decl., ¶ 8. After extensive discovery and analysis, the parties engaged in a fully briefed mediation
5 session before a respected class action mediator, Joel Grossman, on February 7, 2011. Henderson
6 Decl., ¶ 8. Prior to mediating, the parties conducted extensive investigations, including lengthy
7 depositions of both named Plaintiffs by Defendant, and Plaintiffs’ counsel’s interviews and meetings
8 with many members of the proposed class. Henderson Decl., ¶¶ 9-10.

9 Plaintiffs’ counsel requested, reviewed and analyzed thousands of pages of documents,
10 including personnel files, pay stubs, timekeeping and billing records. Henderson Decl., ¶ 10.
11 Plaintiffs’ counsel also conducted scores of interviews with Route Drivers throughout California, both
12 telephonically and in person, including meeting with Route Drivers near their homes throughout
13 Southern California. Henderson Decl., ¶ 10.

14 Plaintiffs’ counsel also reviewed past litigation against Defendant, including *Ramirez v.*
15 *Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785; *Hart v. Indian Head Water Company*, LASC Case
16 No. BC 210069; *Kerr v. Triple AAA Water Co, et al.*, OSC Case No. 01CC00230; *Rojero v.*
17 *Bastanchury Waters Company Inc., et al.*, OSC Case No. 01CC01432; *Matute v. Indian Head Water*
18 *Co. Inc.*, Case No. BC 286596. Plaintiffs’ counsel also spoke with counsel for the plaintiffs in the
19 case of *Hart, supra*, LASC Case No. BC 210069; and *Rojero, supra*, OSC Case No. 01CC01432.
20 Henderson Decl., ¶ 12.

21 The proof of extended negotiation is moreover proven in the fact that although the parties
22 failed to reach a settlement at the mediation, the parties agreed to continue negotiations, and after
23 extensive discussions, arrived at the proposed Settlement.

24 **C. The Strengths and Weaknesses of Plaintiffs’ Case Were Balanced Against**
25 **the Amount Offered In Settlement.**

26 Both sides had strengths and weaknesses in their respective positions, and the risks each side
27 faced had to be balanced against the likelihood of prevailing. The outcome is a fair and reasonable
28 settlement with real value for the Route Drivers.

1 Plaintiffs' counsel concluded, based on substantial interviews with class members and
2 supporting payroll documents, that the Route Drivers were misclassified as exempt because their
3 primary function was to deliver a product and service, not to sell the product and service. Therefore,
4 Plaintiffs' counsel contended that the Route Drivers were entitled to overtime premium pay, meal and
5 rest periods, accurate pay stubs, and that a class could be certified because the Route Drivers' duties
6 were roughly identical. Plaintiffs' counsel expected to be able to show that the Route Drivers' duties
7 were similar enough, regardless of their particular route, that a representative action was appropriate,
8 and that the amount of time spent selling the product/service versus the amount of time spent on
9 delivery tasks was not enough to qualify for the outside sales commission exemption.

10 Defendant denied (and denies) all allegations. Defense counsel contended that the drivers
11 were not misclassified nonexempt delivery people, but instead were properly treated as exempt
12 commissioned salespeople and that they spent most of their time on sales or sales-related activities.
13 Defendant argued that they would show a need for individualized inquiry on the issues of off-the-
14 clock work and how much time was spent selling versus other duties (that is, how each and every
15 Route Driver spent their day), and this would necessarily defeat any effort at class certification.
16 Defendant also argued that meal and rest periods need only be provided, not ensured, in order to
17 comply with the Labor Code, and that the Route Drivers could have taken meal and rest periods if
18 they chose to do so, and in fact usually did so. Finally, Defendant argued the Plaintiffs were
19 inadequate class representatives.

20 The negotiations were conducted at arm's length and always in an adversarial manner, despite
21 a mutual desire to resolve this case. The parties failed to reach agreement at the mediation, but
22 continued their efforts. Arriving at a settlement acceptable to both sides was difficult, and both sides
23 engaged in settlement negotiations taking into consideration the strengths and weaknesses of their
24 respective positions. The settlement finally arrived at is fair, reasonable and in the best interests of the
25 Route Drivers, especially given the constraints and realities of this case, the difficulties in obtaining
26 class certification, and the fact that Defendant has ceased operations by selling the business and laying
27 off all Route Drivers. Henderson Decl., ¶¶ 13-14.

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1 The estimated per workweek value of the Settlement for Route Drivers, *after* attorneys’ fees
2 and costs, claims administration expenses, and so forth, are accounted for, is over \$40 per workweek.
3 This represents over five hours of labor each week at the California minimum wage of \$8.00 per
4 hour. Most Route Drivers should receive checks for thousands of dollars. For Route Drivers who
5 worked fifty weeks a year, their payments should come to over two thousand dollars for *each year*
6 they spent driving during the proposed Class Period. Henderson Decl., ¶ 15. Clearly, this is not a
7 “coupon” class action settlement, this Settlement has real value for the Route Drivers.

8 Plaintiffs’ counsel are experienced wage and hour class action litigators (see below). As
9 discussed above, there were real risks regarding class certification, as well as proving the Route
10 Drivers’ misclassification, while there is extensive evidence that the Settlement is fair and reasonable,
11 not least of which is the amount of settlement compensation per workweek after extensive discovery
12 and protracted arms-length negotiations. *See, e.g., Linney v. Cellular Alaska P’ship* (N.D.Cal. Jul.18,
13 1997) 1997 WL 450064, at *5 (“The involvement of experienced class action counsel and the fact
14 that the settlement agreement was reached in arm’s length negotiations, after relevant discovery had
15 taken place, creates a presumption that the agreement is fair.”).

16 **D. Plaintiffs’ Counsel Are Experienced Wage and Hour Class Action Counsel.**

17 The Law Offices of Thomas W. Falvey is experienced in handling wage and hour class
18 actions as well as other class actions. Henderson Decl., ¶¶ 2-3; Falvey Decl., ¶¶ 5-9. The Law
19 Offices of Thomas W. Falvey is currently handling approximately ten (10) wage and hour or
20 consumer class actions. Resolved class actions by the Law Offices of Thomas W. Falvey include:

21 A. *Dat Chau v. CVS Pharmacy, Inc.* (formerly *Tong v. CVS Pharmacy, Inc.*), Los
22 Angeles Superior Court Case no. BC349224 (settlement for \$19,750,000);

23 B. *Shoff v. AT&T, et al.*, US District Court, Central District of California Case No.
24 CV 07-3289 DSF (settlement for \$16,000,000).

25 C. *Silva v. Getronics NV, et al.*, Los Angeles Superior Court Case No. BC368049 -
26 (settlement for \$1,550,000).

27 D. *Doyle v. AT&T, et al.*, US District Court, Southern District of California, Case No.
28 08 CV 1275 JAH (WMC) - (settlement for \$10,500,000).

1 E. *Henderson v. Raytheon, et al.*, Los Angeles Superior Court Case No. BC381868 -
2 (settlement for \$1,425,000).

3 F. *Waters v. AT&T, et al.*, US District Court, Northern District of California Case No.
4 C09-3983 BZ - (settlement for \$17,000,000).

5 G. *Elkin v. Six Flags, et al.*, Los Angeles Superior Court Case No. BC342663 -
6 (settlement for \$14,225,000).

7 Further details regarding the experience and qualifications of Plaintiffs' Counsel are contained
8 in their respective declarations in support of this Motion, filed concurrently herewith.

9 **VII. THE PROPOSED ATTORNEYS' FEES AND COSTS ARE REASONABLE**

10 It is an accepted practice in wage and hour class action settlements to award attorney's fees to
11 class counsel based on a percentage of the total settlement value agreed upon by the parties. This
12 includes cases in which the employer's final payout is limited to the amounts of validly-presented
13 claims, approved attorney's fees, costs, and class representative enhancements. As is the case here, a
14 settlement often includes a "safe harbor" provision by which the employer agrees not to oppose an
15 application to the Court for a specified percentage of the total settlement value.

16 **A. Percentage Method.**

17 Plaintiffs' counsel seek attorneys' fees of \$217,500, and past, present and future costs of
18 \$10,000. Defendant does not oppose this request. The requested fee falls well within the historical
19 range of attorney's fee awards. The request here, of 30% of the Maximum Payment, is fair
20 compensation for undertaking complex, risky, expensive, and time-consuming litigation on a
21 contingent fee basis.

22 Both California and federal courts have recognized that an appropriate method for awarding
23 attorney's fees in class actions is to award a percentage. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34;
24 *Staton, supra*, 327 F.3d 938; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043; *Vincent v.*
25 *Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. When a lawsuit results in a recovery which
26 benefits others as well as the plaintiff (e.g., a class action), the court has inherent equitable power to
27 order plaintiff's attorney's fees be paid out of the common recovery. *Serrano v. Priest, supra*, 20
28 Cal.3d at 141. The Ninth Circuit routinely uses the percentage approach to determine the award of

1 attorney's fees. See, e.g., *In re Pacific Enterprises Securities City and County of San Francisco*
2 *Litigation* (9th Cir. 1994) 47 F.3d 373, 378-79. Assessing an appropriate fee based on a percentage
3 involves taking into account "all of the circumstances of the case." *Vizcaino, supra*, 290 F.3d at
4 1048.

5 Though there is sparse case law addressing the evaluation of reasonable attorney's fees in
6 employee class actions, *Vizcaino* is on point. The Ninth Circuit's analysis for awarding attorney's
7 fees addressed five "relevant circumstances":

- 8 (1) class counsel "achieved exceptional results for the class . . . in the absence of supporting
9 precedents . . . and against . . . vigorous opposition throughout the litigation.";
- 10 (2) the case was extremely risky for class counsel;
- 11 (3) counsel's performance generated benefits beyond the recovery (Microsoft agreed to change
12 its personnel classification practices and class members also received non-monetary
13 benefits associated with full-time employment);
- 14 (4) the fee awarded was at or below the market rate; and
- 15 (5) the burdens of representation of the class on a contingency basis over significant time,
16 incurring costs and expenses, and requiring counsel to forgo significant other work,
17 resulting in a decline in the firm's annual income.

18 *Vizcaino, supra*, 290 F.3d at 1048-49.

19 The Settlement reached in this case is an exceptional result for the Route Drivers. A
20 substantial recovery was negotiated in the face of serious defense challenges. These wage and hour
21 issues are a developing area of case law with conflicting authorities, and recent class action practice
22 has shown obtaining class certification is often quite difficult, especially in misclassification cases or
23 in cases alleging off the clock work which defense counsel routinely argue requires individualized
24 analysis. In addition, this Defendant has ceased operations and laid off all Route Drivers.

25 Plaintiffs' counsel have borne, and continue to bear, the entire risk and cost of litigation
26 associated with this class action on a pure contingency basis. Given the uncertainty currently existing
27 regarding meal and rest break penalties, the fee award is amply justified. It is clear this case posed
28 considerable risk for Plaintiffs' counsel, given that wage and hour class actions routinely require a

1 great expenditure of attorney time as well as money, with an uncertain outcome. Enormous efforts
2 might result in little or no return. There is the possibility of class certification being denied, or
3 granted and then later decertified. Defendant might obtain individual settlements with class members
4 prior to trial (depriving the class of its class members). Defendant might suddenly locate the presence
5 of arbitration agreements which lead to the possibility that no class action can be undertaken. There is
6 the distinct reality of unrecoverable judgments due to corporate bankruptcy filings even when a
7 plaintiff prevails. This hard-fought litigation took a great deal of time and effort which Plaintiffs'
8 counsel could have spent on other cases.

9 And, finally, the fees and costs requested here are well within the market rate and are based on
10 fees awarded to Plaintiffs' counsel in other recent comparable California wage and hour class actions.

11 **B. Lodestar Method.**

12 Using the lodestar method, the requested fee of \$217,500 is compared with the lodestar to
13 determine whether the requested fee is within the range of fees freely negotiated in the legal
14 marketplace in a comparable case. *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th
15 615, 625-26. The lodestar method for determining attorney fees requires the trial court to first
16 determine a touchstone or lodestar figure based on a careful compilation of the time spent and
17 reasonable hourly compensation for each attorney. That touchstone figure may then be augmented or
18 diminished by taking various relevant factors into account, including (1) the novelty and difficulty of
19 the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of
20 the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee
21 award, based on the uncertainty of prevailing on the merits and of establishing eligibility for the
22 award. This approach is meant to increase objectivity and predictability in fee awards. Such a
23 multiplier or enhancement may be used where the court finds the lodestar figure does not provide
24 sufficient compensation. *Id.*

25 Here the hourly rates for each Plaintiffs' counsel have all previously been approved by other
26 courts as within the range of fees available in the legal marketplace of Southern California. Plaintiffs'
27 counsel will demonstrate in a Motion for Attorneys' fees and supporting declarations, a showing of
28 over \$300,000 in fees for time incurred in this case. Even a multiplier of less than 1 would result in

1 the requested fee of \$217,500. Given the risks of this protracted class-action litigation, the extensive
2 discovery and investigation conducted, and the excellent results achieved, the requested fees are
3 reasonable.

4 By way of comparison, an ordinary 40% contingency fee in an ordinary single-plaintiff case
5 that settled for \$725,000 would be \$290,000 - almost \$75,000 more than requested amount in this
6 complicated and vigorously-defended litigation. Plaintiffs' counsel's requested fee amount of
7 \$217,500 is a clearly reasonable and ordinary fee for an uncertain contingency fee class action case
8 such as this.

9 An experienced trial judge "is the best judge of the value of professional services rendered in
10 his court, and while his judgment is of course subject to review, it will not be disturbed unless the
11 appellate court is convinced that it is clearly wrong." *Serrano, supra*, 20 Cal.3d at 49.

12 For the reasons provided above, the Court should preliminarily approve the requested
13 attorneys' fees and costs, which are justified by the outstanding results achieved, the complexity of the
14 issues, the difficulty of the case, and the great risk undertaken by Plaintiffs' counsel. The requested
15 attorneys' fees are not opposed by Defendants and are well within established guidelines.⁵

16 **VIII. THE SETTLEMENT AMOUNTS PAYABLE TO THE NAMED PLAINTIFFS ARE**
17 **REASONABLE**

18 Plaintiffs William Baisley and Ted Portillo are entitled to an enhanced award for their services
19 as class representatives and the great risk they took in being named plaintiffs against this corporate
20 employer defendant. The Plaintiffs devoted time and work assisting counsel in the case, sat for
21 extended depositions, communicated frequently with counsel, and furnished background information
22 concerning the claims involved. Plaintiffs risked intrusive discovery and, of equal or greater
23 importance, risk disclosure to future potential employers that they sued a former employer, making
24 their future uncertain.

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27 ⁵ Studies show that, "regardless whether the percentage method or the lodestar method is used,
28 fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162
Cal. App.4th 43, 66, fn.11.

1 Both Plaintiffs met with Plaintiffs' counsel multiple times, provided numerous documents,
2 endured deposition preparation sessions, multiple lengthy interviews, and each responded to frequent
3 requests for information by Plaintiffs' counsel via email and telephone. They each were deposed
4 multiple times by Defendant. In addition, both named Plaintiffs agreed to waive any and all claims
5 against Defendant. Accordingly, they have risked much, given much, and are entitled to a significant
6 enhancement award. Plaintiffs have clearly risked much more, and given up much more, than the rest
7 of the Route Drivers in reaching this exceptional settlement, justifying their enhancement awards.

8 Additionally, the two class representatives risked a potential and devastating judgment against
9 them if this action was unsuccessful. A losing party, including a class representative, may be found
10 liable for the prevailing party's costs. *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1433.
11 The class representatives could have had cost bills entered against them, leaving them ultimately
12 liable for potentially tens of thousands of dollars. *See, e.g., Whiteway v. FedEx Kinkos Office & Print*
13 *Services, Inc.* (N.D.Cal., 2007) 2007 WL 4531783 (ordering unsuccessful wage and hour class action
14 plaintiff to pay defense costs of \$56,788.68). Few individuals are willing to take this enormous risk.
15 However, these Plaintiffs were champions on behalf of their fellow Route Driver's cause, taking
16 monetary and employment risks which were (and remain) quite significant, risks that other Route
17 Drivers did not take. Defendant has agreed not to oppose the proposed service fee amounts
18 (\$10,000/each), which are, in these circumstances, more than fair and reasonable.

19 Courts have routinely granted approval of settlements containing such enhancements. *See,*
20 *e.g., Staton, supra*, 327 F.3d at 977.

21 [N]amed plaintiffs . . . are eligible for reasonable incentive payments. The district
22 court must evaluate their awards individually, using 'relevant factors includ[ing] the
23 actions the plaintiff has taken to protect the interests of the class, the degree to which
24 the class has benefitted from those actions... the amount of time and effort the plaintiff
expended in pursuing the litigation . . . and reasonabl[e] fear[s] of workplace
retaliation.'

25 *Id.* [citation omitted].

26 In *Rodriguez v. West Publishing Co.*, 563 F.3d 948 (9th Cir. 2009), the court recognized the
27 appropriateness of incentive awards noting that "incentive awards are fairly typical in class action
28 cases". *Id.* at 958. (Citing *Newberg on Class Actions* § 11:38 (4th ed. 2008); Theodore Eisenberg &

1 Geoffrey P. Miller, *Incentive Awards to class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A.
2 L.Rev. 1303 (2006)).

3 The typical enhanced award in overtime cases varies, although many are much higher than the
4 ones reasonably sought here. *See, e.g. Hainey v. Parrott* (S.D.Ohio, 2007) 2007 WL 3308027
5 (awarding \$50,000 for each of four class representatives); *Bradburn Parent Teacher Store, Inc. v. 3M*
6 (E.D.Pa. 2007) 513 F.Supp.2d 322, 342 (approving incentive award of \$75,000.); *Van Vranken v.*
7 *Atlantic Richfield Co.* (N.D.Cal.1995) 901 F.Supp. 294, 300 (“After evaluating the time Van Vranken
8 committed to this case, the Court finds that an incentive award of \$50,000 is just and reasonable
9 under the circumstances.”); *In re Dun & Bradstreet Credit Servs. Customer Litig.* (S.D. Ohio 1990)
10 130 F.R.D. 366, 373-74 (approving two incentive awards of \$55,000 and three incentive awards of
11 \$35,000); *In re Revco Sec. Litig.* (N.D.Ohio 1992) 1992 WL 118800, *7 (\$200,000 incentive award
12 to named plaintiff); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.* (S.D.Ohio 1991)
13 137 F.R.D. 240, 250-51 (\$50,000 incentive awards to each of the six named plaintiffs).

14 Given the size of the typical enhancement award in similar cases and the assistance rendered
15 to the class throughout this litigation by these two dedicated Route Drivers, as discussed above, the
16 sum of \$10,000 for Plaintiffs William Baisley and Ted Portillo are comparatively modest amounts,
17 especially when considering the general waiver of all claims they provided in order to settle this
18 action on terms beneficial to their fellow Route Drivers, and considering the exceptional result
19 obtained here in the face of substantial risks.

20 **IX. CONCLUSION**

21 This Settlement represents an excellent outcome for the proposed class of Route Drivers. It
22 will result in substantial payments to them, is non-collusive, and it was achieved as the result of
23 extensive informed arms-length negotiations conducted by Plaintiffs’ counsel who are experienced in
24 wage and hour class action litigation.

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1 For the foregoing reasons, Plaintiffs request that the Court grant preliminary approval of the
2 proposed settlement, approve and authorize mailing of the proposed Class Notice and the proposed
3 Claim Form submitted herewith, and set a date for a final Fairness Hearing.

4 Dated: August 24, 2011

LAW OFFICES OF THOMAS W. FALVEY

5
6 By: 

7 Daniel O'Neil-Ortiz
8 Attorneys for Plaintiffs WILLIAM BAISLEY and
9 TED PORTILLO, Individually and on Behalf of All
10 Similarly Situated Individuals
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