

**FILED**  
Superior Court of California  
County of Los Angeles

**JAN 04 2021**

Sherri R. Carr, Clerk  
*Alfredo Morales* deputy  
ALFREDO MORALES

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES**

Case No.: BC708547

LUKE SWOBODA, individually and on  
behalf of other persons similarly situated,  
  
Plaintiff,

v.

BRAND ENERGY SERVICES, LLC, a  
Delaware limited liability corporation;  
BRAND ENERGY SERVICES OF  
CALIFORNIA, INC., a Delaware  
corporation; and DOES 1-50,  
  
Defendants.

~~TENTATIVE~~ ORDER GRANTING  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT ON CONDITIONS

Date: January 4, 2020  
Dept.: SSC-7  
Time: 2:00 p.m

**I. BACKGROUND**

This is a wage and hour class action. On June 8, 2018, Plaintiff Swoboda commenced this action initially suing Defendants Brand Energy Services, LLC, and Brand Energy Services of California, Inc. On January 28, 2019 the Court, per stipulation

1 of the Parties, permitted the Plaintiff to file a First Amended Complaint adding Industrial  
2 Specialists of California, Inc. ("ISCI") as a Defendant. At the same time, Plaintiff, assured  
3 by Defendants' counsel that Plaintiff had not been employed by Brand, dismissed Brand  
4 Energy Services, LLC, and Brand Energy Services of California, Inc. without prejudice.  
5 It is represented that the Brand entities and ISCI are all related. The parent corporation  
6 was, at the time, Brand Energy & Infrastructure Services, Inc.

7 The First Amended Complaint alleges the following causes of action: 1) Failure  
8 to pay minimum wages; 2) Failure to Provide Meal Breaks; 3) Failure to timely pay wages  
9 pursuant to Labor Code § 201 et seq.; and 4) Unfair competition.

10 Counsel represents that they investigated the facts of the Action and Plaintiff's and  
11 Class Members' claims, through formal discovery, informal disclosures between the  
12 Parties, and other investigations.

13 The Parties attended mediation with mediator Michael Young, Esq., on September  
14 24, 2019, and were ultimately able to come to a settlement agreement. A fully executed  
15 Settlement Agreement is attached to the Declaration of Dennis F. Moss ("Moss Decl.")  
16 as Exhibit 1.

17 On July 31, 2020, the Court issued a checklist of items for counsel to address. In  
18 response, counsel filed an Amended Settlement Agreement attached as Exhibit 1 to the  
19 Supplemental Declaration of Dennis F. Moss ("Moss Supp. Decl.").

20 Now before the Court is Plaintiff's motion for preliminary approval of the  
21 settlement. For the reasons set forth below the Court preliminarily grants approval for  
22 the settlement on condition that counsel either omit Paragraph ¶II.B.8 or brief its  
23 propriety.

24  
25 **II. THE TERMS OF THE SETTLEMENT**

1           **A.     SETTLEMENT CLASS AND RELATED DEFINITIONS**

2           “Class Members” means all hourly employees employed by Defendant ISCI at the  
3 oil and gas facilities known as the Exxon/Mobil refinery in Torrance, California and the  
4 Chevron refinery in El Segundo, California at any time since January 28, 2015.  
5 (Settlement Agreement, ¶I.G.)

6           “Class Position” means all hourly employees employed by Defendant ISCI at the  
7 oil and gas facilities known as the Exxon/Mobil refinery in Torrance, California and the  
8 Chevron refinery in El Segundo, California at any time during the period January 28,  
9 2015 through December 31, 2018. (¶I.I)

10          "Class Period" means January 28, 2015, through December 31, 2018. (¶I.H)

11          There are 202 Class Members. (Moss Decl., ¶21)

12          The Parties stipulate and agree to the conditional certification of this Action for  
13 purposes of this Settlement only. (¶IV)

14           **B.     THE MONETARY TERMS OF SETTLEMENT**

15          The essential monetary terms are as follows:

16          The Common Fund (“CF”) is \$426,000 (¶I.K).

17          The Net Common Fund (“Net”) (**\$257,000**) is the CF less:

- 18           ○ Up to \$142,000 (1/3) for attorney fees (¶II.D.1);
    - 19               ▪ **Fee Split:** 75% to Moss Bollinger, LLP, and 25% to Spiro Law  
20               Corporation. (Moss Supp. Decl., ¶2.)
  - 21           ○ Up to \$9,500 for attorney costs (¶II.D.1);
  - 22           ○ Up to \$7,500 for a service award to the proposed class representative  
23           (¶II.C.1); and
  - 24           ○ Estimated \$10,000 for settlement administration costs (¶II.E).
- 25

- 1 • The employer's portion of FICA, FUTA and/or employer-paid legal standard tax  
2 withholdings based on each Individual Settlement Payment shall be paid separate  
3 and apart from the Common Fund by Defendant. (§I.K)
- 4 • Assuming the Court approves all maximum requested deductions, approximately  
5 \$257,000 will be available for automatic distribution to participating class  
6 members. Assuming full participation, the average settlement share will be  
7 approximately \$1,272.28. ( $\$257,000 \text{ Net} \div 202 \text{ class members} = \$1,272.28$ ).
- 8 • There is no Claim Requirement. (§I.K)
- 9 • The settlement is not reversionary. (§I.K)
- 10 • Individual Settlement Payments will be paid from the Net Common Fund to  
11 Participating Class Members as follows: (a) 80% of the Net Common Fund is  
12 attributable to Labor Code § 203 claims and shall be paid in equal amounts to each  
13 Participating Class Member; (b) the remaining 20% of the Net Common Fund  
14 shall be paid to each Participating Class Member based on the number of weeks  
15 the Participating Class Member worked in a Class Position during the Class Period  
16 divided by the total weeks all Participating Class Members worked in a Class  
17 Position during the Class Period. (§II.B.2)
  - 18 ○ Tax Withholdings: 10% as wages, 80% as penalties, and 10% as interest.  
19 (§II.B.4)
- 20 • Uncashed Checks: The Individual Settlement Payment checks will be void after  
21 180 days from the date of issuance. After 180 calendar days from the date of  
22 mailing, the checks shall become null and void, and any monies remaining in the  
23 distribution account shall be distributed to the Controller of the State of  
24 California to be held pursuant to the Unclaimed Property Law, California Civil  
25 Code § 1500 et seq., for the benefit of those Settlement Class members who did

1 not cash their checks until such time that they claim their property. The Settling  
2 Parties agree that this disposition results in no "unpaid residue" under California  
3 Civil Procedure Code § 384, as the entire Settlement Payment will be paid out to  
4 Settlement Class members, whether or not they all cash their Settlement Checks.  
5 Therefore, Defendant will not be required to pay any interest on said amount.

6 (¶II.B.7)

- 7 • The settlement is a cash settlement, with any unclaimed portion of the amount of  
8 the Settlement Fund allocated to pay Class Members to escheat to the State of  
9 California pursuant to California Code of Civil Procedure section 1513.

10 (¶II.B.8.)

- 11 • Funding and Payment of the Settlement: Within 20 days after the Effective  
12 Settlement Date, Defendant will pay to the Claims Administrator the Common  
13 Fund (the "Funding Date"). Ten days after the Funding Date will be known as  
14 the "Payment Date." If any appeal or action or proceeding to challenge the  
15 Settlement is pending as of the Funding Date or Payment Date, the Funding Date  
16 and/or Payment Date shall be extended to 20 days and 10 days, respectively,  
17 after final resolution of any appeals, actions or proceedings to challenge the  
18 Settlement. (¶V.L.1)

19 **C. TERMS OF RELEASES**

- 20 • In exchange for the consideration recited in this Settlement Agreement, all  
21 Participating Class Members, on behalf of themselves and on behalf of their  
22 current, former, and future heirs, executors, administrators, attorneys, agents, and  
23 assigns, do hereby and forever release, waive, acquit and discharge the Released  
24 Parties from the Released Claims. (¶III.A)
- 25

- 1 • In addition to the terms of the Release outlined above, no Participating Class  
2 Member will have any claim against any of the Released Parties, Defendant's  
3 attorneys of record, the Named Plaintiff, any other Class Member, or Class  
4 Counsel based on errors in administrating claims or performing the mailing and  
5 skip-tracing requirements of the Claims Administrator under this Agreement.

6 (¶III.B)

- 7 ○ "Released Claims" means all claims and allegations of liability made in the  
8 Case, including all claims for minimum wage, waiting time penalties,  
9 recordkeeping penalties, violation of Labor Code sections 201, 202, 203,  
10 218, 218.5, 1174, 1194, 1194.2, Labor Code section 2698 et seq, Industrial  
11 Wage Commission Wage Order 16-2001, and Business and Professions  
12 Code section 17200 as it relates to the underlying Labor Code claims  
13 referenced above, interest, fees, and costs from January 28, 2015 through  
14 the date the Court grants preliminary approval, whether known or  
15 unknown, suspected or unsuspected, including any damages, restitution,  
16 interest waiting time penalties, punitive damages, attorneys' fees, costs, or  
17 any other form of relief whatsoever. The Release of claims shall not be  
18 effective until such time as the Defendant funds the Settlement payments.

19 (¶I.U)

- 20 ○ "Released Parties" means Industrial Specialists Company, Inc. and its  
21 parents, subsidiaries and affiliates, assigns, officers, directors, agents,  
22 employees, shareholders, insurance companies, attorneys or  
23 representatives. (¶I.U)

- 24 • The releases are effective when Defendant funds the Settlement payments. (¶I.U)

25

1                   **D. SETTLEMENT ADMINISTRATION**

- 2                   • The proposed Settlement Administrator is Phoenix Class Action Settlement  
3                   Administrators, which has provided evidence that no counsel are affiliated with it  
4                   and that it has adequate procedure in place to safeguard the data and funds to be  
5                   entrusted to it. (¶I.B; See Declaration of Jodey Lawrence.)  
6  
7                   • Settlement administration costs are estimated to be \$10,000. (¶II.E.)  
8  
9                   • Notice: The manner of giving notice is described below.  
10  
11                  • Class members have 45 days from the mailing of the Notice Packet to mail a  
12                  request for exclusion, objection or workweek dispute. (¶¶V.B-F.)  
13                          ○ If prior to the Final Fairness Hearing, the Claims Administrator has  
14                          received timely requests to opt out, as outlined herein, from greater than  
15                          10% of the total number of Class Members, Defendant will have the sole  
16                          and absolute discretion if it so chooses to withdraw from this Settlement.  
17                          (¶IX.B.1.)  
18  
19                  • Notice of Final Judgment shall be posted on the Settlement Administrator’s  
20                  website. (¶V.J.)

21                   **D. ATTORNEYS’ FEES**

22                   Counsel for the proposed class seek \$142,000 (1/3) in attorney’s fees and \$9,500 in  
23                   costs. (¶II.D.1.)

24                   The fee split between Class Counsel is as follows: 75% to Moss Bollinger, LLP, and  
25                   25% to Spiro Law Corporation. (Moss Supp. Decl., ¶2.)

1  
2 **E. SERVICE AWARDS**

3 The named plaintiffs seek enhancement awards totaling \$7,500. (¶III.C.1.)

4 **III. SETTLEMENT STANDARDS AND PROCEDURE**

5  
6 California Rules of Court, rule 3.769(a) provides: “A settlement or compromise  
7 of an entire class action, or of a cause of action in a class action, or as to a party,  
8 requires the approval of the court after hearing.” “Any party to a settlement agreement  
9 may serve and file a written notice of motion for preliminary approval of the settlement.  
10 The settlement agreement and proposed notice to class members must be filed with the  
11 motion, and the proposed order must be lodged with the motion.” See Cal. Rules of  
12 Court, rule 3.769(c).

13 “In a class action lawsuit, the court undertakes the responsibility to assess  
14 fairness in order to prevent fraud, collusion or unfairness to the class, the settlement or  
15 dismissal of a class action. The purpose of the requirement [of court review] is the  
16 protection of those class members, including the named plaintiffs, whose rights may not  
17 have been given due regard by the negotiating parties.” *Consumer Advocacy Group,*  
18 *Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal. App.4th 46, 60 [internal  
19 quotation marks omitted]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,  
20 245, disapproved on another ground in *Hernandez v. Restoration Hardware, Inc.* (2018)  
21 4 Cal. 5th 260 (“*Wershba*”), [Court needs to “scrutinize the proposed settlement  
22 agreement to the extent necessary to reach a reasoned judgment that the agreement is  
23 not the product of fraud or overreaching by, or collusion between, the negotiating  
24 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all  
25 concerned.”] [internal quotation marks omitted].



1           “The burden is on the proponent of the settlement to show that it is fair and  
2 reasonable. However, “a presumption of fairness exists where: (1) the settlement is  
3 reached through arm’s-length bargaining; (2) investigation and discovery are sufficient  
4 to allow counsel and the court to act intelligently; (3) counsel is experienced in similar  
5 litigation; and (4) the percentage of objectors is small.” *Wershba*, 91 Cal. App. 4<sup>th</sup> at  
6 245 [citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802 ].

7           Notwithstanding an initial presumption of fairness, “the court should not give  
8 rubber-stamp approval.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th  
9 116, 130 (“*Kullar*”). “[W]hen class certification is deferred to the settlement stage, a  
10 more careful scrutiny of the fairness of the settlement is required.” *Carter v. City of*  
11 *Los Angeles* (2014) 224 Cal.App.4th 808, 819. “To protect the interests of absent class  
12 members, the court must independently and objectively analyze the evidence and  
13 circumstances before it in order to determine whether the settlement is in the best  
14 interests of those whose claims will be extinguished.” *Kullar*, 168 Cal. App. 4<sup>th</sup> at 130.  
15 In that determination, the court should consider factors such as “the strength of  
16 plaintiffs' case, the risk, expense, complexity and likely duration of further litigation,  
17 the risk of maintaining class action status through trial, the amount offered in  
18 settlement, the extent of discovery completed and stage of the proceedings, the  
19 experience and views of counsel, the presence of a governmental participant, and the  
20 reaction of the class members to the proposed settlement.” *Id.* at 128. “Th[is] list of  
21 factors is not exclusive and the court is free to engage in a balancing and weighing of  
22 factors depending on the circumstances of each case.” *Wershba*, 91 Cal. App. 4<sup>th</sup> at  
23 245.

24           At the same time, “[a] settlement need not obtain 100 percent of the damages  
25 sought in order to be fair and reasonable. Compromise is inherent and necessary in the

1 settlement process. Thus, even if ‘the relief afforded by the proposed settlement is  
2 substantially narrower than it would be if the suits were to be successfully litigated,’ this  
3 is no bar to a class settlement because ‘the public interest may indeed be served by a  
4 voluntary settlement in which each side gives ground in the interest of avoiding  
5 litigation.’” *Id.* at 250.

6  
7 **IV. ANALYSIS OF SETTLEMENT AGREEMENT**

8  
9 **A. THERE IS A PRESUMPTION OF FAIRNESS**

10 The settlement is entitled to a presumption of fairness for the following reasons:

11  
12 **1. The settlement was reached through arm’s-length bargaining**

13 The Parties attended mediation with mediator Michael Young, Esq., on September  
14 24, 2019, and were ultimately able to come to a settlement agreement. (Moss decl., ¶24.)

15  
16 **2. The investigation and discovery were sufficient**

17 Counsel represents that they investigated the facts of the Action and Plaintiff’s and  
18 Class Members’ claims, through formal discovery, informal disclosures between the  
19 Parties, and other investigations. (*Id.* at ¶¶22-23.) Defendant provided counsel with data  
20 from which it was determined the number of employees, shifts, and workweeks during the  
21 class period and conduct an exposure analysis from. (*Id.* at ¶¶52-57.)

22 This is sufficient to value the case for settlement purposes.

23  
24 **3. Counsel is experienced in similar litigation**

1 Class Counsel represent that are experienced in class action litigation, including  
2 wage and hour class actions. (*Id.* at ¶63; Declaration of Ira Spiro (“Spiro Decl.”), ¶¶2-8.)

3  
4 **4. Percentage of the class objecting**

5 This cannot be determined until the final fairness hearing. Weil & Brown et al.,  
6 Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2019) ¶ 14:139.18 [“Should  
7 the court receive objections to the proposed settlement, it will consider and either sustain  
8 or overrule them at the fairness hearing.”].

9  
10  
11 **B. THE SETTLEMENT MAY PRELIMINARILY BE CONSIDERED**  
12 **FAIR, ADEQUATE, AND REASONABLE**

13  
14 Notwithstanding a presumption of fairness, the settlement must be evaluated in its  
15 entirety. The evaluation of any settlement requires factoring unknowns. “As the court  
16 does when it approves a settlement as in good faith under Code of Civil Procedure  
17 section 877.6, the court must at least satisfy itself that the class settlement is within the  
18 ‘ballpark’ of reasonableness. See *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985)  
19 38 Cal.3d 488, 499–500. While the court is not to try the case, it is ‘called upon to  
20 consider and weigh the nature of the claim, the possible defenses, the situation of the  
21 parties, and *the exercise of business judgment* in determining whether the proposed  
22 settlement is reasonable.’ (*City of Detroit v. Grinnell Corporation, supra*, 495 F.2d at p.  
23 462, italics added.)” *Kullar*, 168 Cal.App.4th at 133 (emphasis in original).

24  
25 **1. Amount Offered in Settlement**

1 The most important factor is the strength of the case for plaintiffs on the merits,  
2 balanced against the amount offered in settlement.” *Id.* at 130.

3 Class Counsel estimated Defendant’s maximum exposure at **\$1,829,446.34**,  
4 broken down as follows:

5 CLAIM	EXPOSURE
6 Unpaid Training-Minimum Wage	\$156,954.00
7 Off the Clock Work -Minimum Wage	\$235,256.17
8 Meal Break Exposure	\$235,256.17
9 Labor Code §203	\$1,201,980.00
10 <b>TOTAL</b>	<b>\$1,829,446.34</b>

11 (Moss Decl., ¶¶52-57)

12 Class Counsel obtained a gross settlement valued at \$426,000. This is 23.3% of  
13 Defendant’s maximum exposure.

14  
15 **2. The Risks of Future Litigation**

16 The case is likely to be expensive and lengthy to try. Procedural hurdles (e.g.,  
17 motion practice and appeals) are also likely to prolong the litigation as well as any  
18 recovery by the class members. Even if a class is certified, there is always a risk of  
19 decertification. *Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1226  
20 [“Our Supreme Court has recognized that trial courts should retain some flexibility in  
21 conducting class actions, which means, under suitable circumstances, entertaining  
22 successive motions on certification if the court subsequently discovers that the propriety  
23 of a class action is not appropriate.”].) Further, the settlement was negotiated and  
24 endorsed by Class Counsel who, as indicated above, are experienced in class action  
25 litigation. Based upon their investigation and analysis, the attorneys representing

1 Plaintiff and the class are of the opinion that this settlement is fair, reasonable, and  
2 adequate. (Moss Decl., ¶24, 43,51, 64.)

### 3 4 **3. The Releases Are Limited**

5 The Court has reviewed the Releases to be given by the absent class members and  
6 the named plaintiffs. The releases, described above, are tailored to the pleadings and  
7 release only those claims in the pleadings. There is no general release by the absent  
8 class. The named plaintiff's general releases are appropriate given that he was  
9 represented by counsel in its negotiation.

### 10 11 **4. Conclusion**

12 Class Counsel estimated Defendant's maximum exposure at Class Counsel estimated  
13 Defendant's maximum exposure at **\$1,829,446.34**.

14 Class Counsel obtained a gross settlement valued at \$426,000. This is 23.3% of  
15 Defendant's maximum exposure, which, given the uncertain outcomes, including the  
16 potential that the class might not be certified, that liability is a contested issue, and that  
17 the full amount of penalties would not necessarily be assessed even if the class is certified  
18 and liability found, the settlement is within the "ballpark of reasonableness."

### 19 20 **C. CONDITIONAL CLASS CERTIFICATION MAY BE GRANTED**

21 A detailed analysis of the elements required for class certification is not required,  
22 but it is advisable to review each element when a class is being conditionally certified.  
23 *Amchem Products, Inc. v. Winsor* (1997) 521 U.S. 591, 620, 622-627. The party  
24 advocating class treatment must demonstrate the existence of an ascertainable and  
25 sufficiently numerous class, a well-defined community of interest, and substantial

1 benefits from certification that render proceeding as a class superior to the alternatives.”  
2 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.

3  
4 **1. The Proposed Class is Numerous**

5 There are 202 putative Class Members. (Moss Decl. ¶52.) Numerosity is  
6 established. *Franchise Tax Bd. Limited Liability Corp. Tax Refund Cases* (2018) 25  
7 Cal.App.5th 369, 393: stating that the “*requirement that there be many parties to a*  
8 *class action is liberally construed,*” and citing examples wherein classes of as little as  
9 10, *Bowles v. Superior Court* (1955) 44 Cal.2d 574, and 28, *Hebbard v. Colgrove*  
10 (1972) 28 Cal.App.3d 1017, were upheld).

11 **2. The Proposed Class Is Ascertainable**

12 “A class is ascertainable, as would support certification under statute governing  
13 class actions generally, when it is defined in terms of objective characteristics and  
14 common transactional facts that make the ultimate identification of class members  
15 possible when that identification becomes necessary.” *Noel v. Thrifty Payless,*  
16 *Inc.* (2019) 7 Cal.5th 955, 961 (*Noel*).

17 The class is defined above. Class Members are ascertainable through  
18 Defendant’s records. (Moss Decl., ¶66.)

19 **3. There Is A Community of Interest**

20 “The community of interest requirement involves three factors: ‘(1) predominant  
21 common questions of law or fact; (2) class representatives with claims or defenses typical  
22 of the class; and (3) class representatives who can adequately represent the class.’”  
23 *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

24 Counsel contends that commonality is met because all class members were subject  
25 to common policies or practices regarding training requirements, procedures for entering

1 and exiting the refinery premises, use of cell phones on refinery premises, meal breaks,  
2 and payment of final wages. (Motion, 21:24-26.)

3 Counsel further contends that the requisite nexus for typicality exists between the  
4 named Plaintiff and absent Settlement Class Members, as Plaintiff is asserting the same  
5 claims and seeking the same remedies as the absent Settlement Class Members. (Motion,  
6 22:14-17.) It is represented that Plaintiffs has no conflicts with the class. (Motion, 22:25-  
7 27. Class Counsel have experience in class action litigation. (*Ibid.*)

#### 8 **4. Substantial Benefits Exist**

9  
10 Given the relatively small size of the individual claims, a class action is superior to  
11 separate actions by the class members.

#### 12 **D. THE PROPOSED NOTICE PLAN MEETS THE REQUIREMENTS** 13 **OF DUE PROCESS**

14  
15 The purpose of notice is to provide due process to absent class members. A practical  
16 approach is required, in which the circumstances of the case determine what forms of  
17 notice will adequately address due process concerns. *Noel*, 7 Cal.5th at 982. California  
18 Rules of Court, rule 3.766 (e) provides that in determining the manner of the notice, the  
19 court must consider: (1) the interests of the class; (2) the type of relief requested; (3) the  
20 stake of the individual class members; (4) the cost of notifying class members; (5) the  
21 resources of the parties; (6) the possible prejudice to class members who do not receive  
22 notice; and (7) the res judicata effect on class members.

#### 23 **1. Method of class notice**

24 Defendant will provide a Class List to the Claims Administrator within 10  
25 business days after entry and service of an Order Granting Preliminary Approval.

1 (¶V.B.1.) Within 7 days after the Claims Administrator receives the Class List from  
2 Defendant, the Claims Administrator will first update all addresses using the National  
3 Change of Address System (NCOA) and then mail to all Class Members, via first-class  
4 United States Mail. The Notice Packet shall be sent in both English and Spanish versions.

5 (¶V.C.2.)

6 In the event of returned or non-deliverable Notice Packets, the settlement  
7 administrator will make reasonable efforts to locate Class Members through skip-tracing  
8 services offered by publicly available databases, and will re-send the Notice Packet to the  
9 best available address after performing the skip-tracing. It will be conclusively presumed  
10 that a Class Member's Notice Packet was received if the Notice Packet has not been  
11 returned within 45 days of the original mailing of the Notice Packet to the Class Member.

12 (¶V.C.3.)

### 13 **2. Content of class notice.**

14 A copy of the proposed class notice is attached to the Settlement Agreement as  
15 Exhibit 1. The notice includes information such as: a summary of the litigation; the  
16 nature of the settlement; the terms of the settlement agreement; the maximum  
17 deductions to be made from the gross settlement amount (i.e., attorney fees and costs,  
18 the enhancement award, and claims administration costs); the procedures and deadlines  
19 for participating in, opting out of, or objecting to, the settlement; the consequences of  
20 participating in, opting out of, or objecting to, the settlement; and the date, time, and  
21 place of the final approval hearing. See Cal Rules of Court, rule 3.766(d).

### 22 **3. Settlement Administration Costs**

23 Settlement administration costs are estimated at \$10,000, including the cost of  
24 notice. (¶II.E.) Prior to the time of the final fairness hearing, the settlement  
25



1 administrator must submit a declaration attesting to the total costs incurred and  
2 anticipated to be incurred to finalize the settlement for approval by the Court.

3  
4 **E. ATTORNEY FEES AND COSTS**

5 California Rule of Court, rule 3.769(b) states: “Any agreement, express or  
6 implied, that has been entered into with respect to the payment of attorney fees or the  
7 submission of an application for the approval of attorney fees must be set forth in full in  
8 any application for approval of the dismissal or settlement of an action that has been  
9 certified as a class action.”

10 Ultimately, the award of attorney fees is made by the court at the fairness  
11 hearing, using the lodestar method with a multiplier, if appropriate. *PLCM Group, Inc.*  
12 *v. Drexler* (2000) 22 Cal.4<sup>th</sup> 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.*  
13 (2000) 82 Cal.App.4<sup>th</sup> 615, 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4<sup>th</sup> 1122,  
14 1132-1136. In common fund cases, the court may use the percentage method. If  
15 sufficient information is provided a cross-check against the lodestar may be conducted.  
16 *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5<sup>th</sup> 480, 503. Despite any  
17 agreement by the parties to the contrary, “the court ha[s] an independent right and  
18 responsibility to review the attorney fee provision of the settlement agreement and  
19 award only so much as it determined reasonable.” *Garabedian v. Los Angeles Cellular*  
20 *Telephone Company* (2004) 118 Cal.App.4<sup>th</sup> 123, 128.

21 The question of class counsel’s entitlement to **\$142,000 (1/3)** in attorney fees  
22 will be addressed at the final fairness hearing when class counsel brings a noticed  
23 motion for attorney fees. If a lodestar analysis is requested class counsel must provide  
24 the court with current market tested hourly rate information and billing information so  
25

1 that it can properly apply the lodestar method and must indicate what multiplier (if  
2 applicable) is being sought.

3 Class counsel should also be prepared to justify the costs sought (capped at  
4 \$9,500) by detailing how they were incurred.

5  
6 **F. SERVICE AWARDS**


7 The Settlement Agreement provides for service awards totaling up to \$7,500 for  
8 the class representatives. Trial courts should not sanction enhancement awards of  
9 thousands of dollars with “nothing more than *pro forma* claims as to ‘countless’ hours  
10 expended, ‘potential stigma’ and ‘potential risk.’ Significantly more specificity, in the  
11 form of quantification of time and effort expended on the litigation, and in the form of  
12 reasoned explanation of financial or other risks incurred by the named plaintiffs, is  
13 required in order for the trial court to conclude that an enhancement was ‘necessary to  
14 induce [the named plaintiff] to participate in the suit . . . .’” *Clark v. American*  
15 *Residential Services LLC* (2009) 175 Cal.App.4th 785, 806-807, italics and ellipsis in  
16 original.

17 In connection with the final fairness hearing, the named Plaintiffs must submit a  
18 declaration attesting to why they should be compensated for the expense or risk they  
19 have incurred in conferring a benefit on other members of the class. *Id.* at 806.

20 The Court will decide the issue of the enhancement award at the time of final  
21 approval.

22  
23 **V. CONCLUSION AND ORDER**

24 Contingent upon <sup>having</sup> counsel addressing the issue of Paragraph II.B.8 ~~by~~

25  , the Court hereby:

- (1) Grants preliminary approval of the settlement as fair, adequate, and reasonable;
- (2) Grants conditional class certification;
- (3) Appoints Luke Swoboda as Class Representative;
- (4) Appoints Moss Bollinger LLP and Spiro Law Corp. as Class Counsel;
- (5) Appoints Phoenix Class Action Administrators as Settlement Administrator;
- (6) Approves the proposed notice plan; and
- (7) Approves the proposed schedule of settlement proceedings as follows:

- Preliminary approval hearing: 1/4/2021
- Deadline for Defendant to provide class list to settlement administrator: 1/19/2021 (within 10 business days of preliminary approval)
- Deadline for settlement administrator to mail notices: 1/26, 2021 (within 7 days from receiving the class list)
- Deadline for class members to opt out: 3/12, 2021 (45 days from the initial mailing of the Notice Packets)
- Deadline for class members to object: 3/12, 2021 (45 days from the initial mailing of the Notice Packets)
- Deadline for class counsel to file motion for final approval:  
2/22 2021 (16 court days prior to final fairness hearing)
- Final fairness hearing: 4/15, 2021 at 10:00 am.

Any failure to fully and timely comply with the contingencies may result in the revocation of this Order in its entirety.

Dated:

1/4/2021

  
Hon. Amy Hogue

Judge of the Superior Court