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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN FLEMING, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

MATCO TOOLS CORPORATION, a Delaware
corporation; NMTC, INC. d/b/a MATCO
TOOLS, a Delaware corporation, FORTIVE
CORPORATION, a Delaware corporation; and
DOES 1-20, inclusive,

Defendants.

Case No.: 3:19-cv-00463-WHO

**PLAINTIFF JOHN FLEMING’S NOTICE
OF MOTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: January 19, 2022

Time: 2:00 p.m.

Courtroom: 2, 17th Floor

Judge: Hon. William Orrick

Action Filed: January 25, 2019

1 **TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 19, 2022, at 2:00 p.m., or as soon thereafter as
3 the matter may be heard in the courtroom of the Honorable William H. Orrick in Courtroom 2—
4 17th Floor of the United States District Court for the Northern District of California, located at 450
5 Golden Gate Avenue, San Francisco, California, Plaintiff will and hereby does move this Court for
6 an order to approve this class action and PAGA representative settlement. This motion is based on
7 the following Memorandum of Points and Authorities, the supporting Declaration of Peter Rukin
8 and its attached exhibits, the supporting Declaration of Alex Tomasevic, and all other pleadings
9 and papers on file in this action, and such argument as the Court may hear.

10 Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the proposed
11 Settlement; (2) approve the form, content and method of distribution of the Notice of Class Action
12 Settlement; (3) appoint ILYM as the Settlement Administrator; (4) approve the PAGA settlement
13 and \$187,500 PAGA payment to the California Labor and Workforce Development Agency; and
14 (5) schedule a hearing regarding final approval of the proposed Settlement and Class Counsel’s
15 request for attorneys’ fees, costs, and enhancement award payments.

16
17 Respectfully submitted:

18
19 Dated: December 13, 2021

RUKIN HYLAND & RIGGIN LLP

20 By: /s/ Peter Rukin
Peter Rukin
21 Jessica Riggan
22 Valerie Brender

NICHOLAS & TOMASEVIC, LLP

23
24 By: /s/ Shaun Markley
25 Craig M. Nicholas
26 Alex Tomasevic
Shaun Markley

27 Attorneys for Plaintiff and the Certified Class
28

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1 **I. INTRODUCTION**

2 Plaintiff John Fleming seeks preliminary approval of a proposed settlement on behalf of
3 himself and approximately 272 other current and former Distributors of Defendant Matco Tools
4 Corporation (“Matco”).¹ Fleming and the members of the Class, previously certified by this Court,
5 worked or continue to work under Distributorship Agreements as Matco Distributors, responsible
6 for offering and servicing Matco products to Matco’s customers. Plaintiff alleges that he and his
7 fellow Distributors were misclassified as “independent contractors,” and as a result are owed
8 monies under California employment law.

9 The Settlement—the result of years of hard-fought litigation and extensive arms-length
10 negotiations—secures meaningful relief for the Class. The Settlement provides for a gross
11 settlement value of \$15,846,423, consisting of a cash settlement component of \$13,500,000 and a
12 debt relief component of \$2,346,423². The average net value of just the cash component of the
13 settlement per Class Member will be nearly \$35,000 each, and the average total net value (cash and
14 debt relief combined) will be an average of over \$42,000 per Class Member. The Settlement also
15 includes amendments to participating Class Members’ Distributorship Agreements.

16 The Net Settlement Amount will be allocated among the approximately 273 Class Members
17 based on several factors, including: (1) the amount of time spent as a Distributor during the
18 applicable statutory period; (2) whether the individual is a current Distributor and has chosen not
19 to opt out of the arbitration agreement in the amended Distributorship Agreement (in which case
20 they will be entitled to an allocation of \$5,000); and (3) whether the individual is an aggrieved
21 employee and entitled to a portion of the Private Attorneys General Act (PAGA) allocation of the
22 Settlement. The Settlement is a “non-claims made” settlement that does not require the submission
23 of a claims form by Settlement Class Members. Shares of the Net Settlement Amount attributable
24

25 ¹ The proposed settlement also releases claims against Fortive Corporation (Matco’s former
26 parent corporation) and NMTC, Inc. (Matco’s predecessor entity), both of which were named as
27 defendants in Plaintiff’s class action complaint. Plaintiff voluntarily dismissed Fortive
28 Corporation without prejudice in early 2021.

² Matco has agreed to forgive the debt owed by Class Members who terminated their Matco Tools
distributorships on or before September 8, 2021.

1 to any individuals who opt out of the Settlement Class are retained by Matco as these individuals
2 are not releasing their claims.

3 Plaintiff submits that the proposed Settlement is fair and reasonable in light of the risks the
4 Named Plaintiff and Class Members face. The Settlement—negotiated at arms-length and with the
5 assistance of an experienced, independent mediator—is a fair and reasonable resolution of the
6 alleged claims. Accordingly, Plaintiff respectfully requests that the Court grant the motion for
7 preliminary approval and enter the Order requested.

8 **II. PROCEDURAL BACKGROUND**

9 **A. The *Fleming* Matter**

10 On January 25, 2019, Plaintiff filed this class and representative PAGA action on behalf of
11 similarly situated Matco Distributors that worked for Matco at any point over the four years prior
12 to the filing of this action. Plaintiff asserted claims arising from his alleged misclassification,
13 including (1) unreimbursed business expenses; (2) unlawful deductions; (3) unpaid overtime
14 compensation; (4) missed meal and rest breaks; (5) improper wage statements; (6) waiting time
15 penalties; (7) violation of the UCL; and (8) penalties pursuant to the PAGA.

16 On February 19, 2019, Matco moved to dismiss, or in the alternative, transfer venue to the
17 Northern District of Ohio. This Court denied Matco’s motion on the grounds that the Distributorship
18 Agreement’s arbitration clause had a blow-up provision, and that in the absence of FAA preemption
19 the forum selection clause was unenforceable. *Fleming v. Matco Tools Corporation*, 384 F.Supp.3d
20 1124 (N.D. Cal. May 3, 2019). Matco filed a petition for a writ of mandamus. The writ was denied
21 in a memorandum opinion on October 25, 2019. *In re Matco Tools Corporation*, 781 Fed.Appx.
22 681 (9th Cir. Oct. 25, 2019). The Ninth Circuit denied rehearing en banc, and Matco’s petition for
23 a writ of certiorari was also denied. *Matco Tools Corporation v. United States District Court for*
24 *Northern District of California*, 140 S.Ct. 2806 (2020).

25 On February 21, 2021, this Court granted Rule 23 certification of the Plaintiff’s expense
26 reimbursement, wage statement, and UCL claims, while denying certification of Plaintiff’s
27

1 overtime, meal and rest, and waiting time penalty claims based on an outside sales defense. *See*
 2 Dkt. 71 (February 21, 2021 Class Certification Order).

3 In May 2021, Matco moved for judgment on the pleadings and to strike Plaintiff's PAGA
 4 claim to the extent it sought penalties for unpaid overtime as well as meal and rest periods, on the
 5 ground that a trial of the outside sales exemption's applicability would be unmanageable. On July
 6 9, 2021, this Court denied Matco's motion in part and granted it in part. *See* Dkt. 89.

7 The parties first attended a full-day mediation in May 2020 with mediator Jeffrey Ross,
 8 which was ultimately unsuccessful. Following the various motions and related orders noted above,
 9 the parties agreed to a second mediation with Jeffrey Wohl, an experienced mediator and member
 10 of this Court's mediation panel. The mediation was conducted on August 17, 2021. The parties
 11 agreed on certain terms at the mediation and continued their settlement discussions over the course
 12 of several weeks following mediation. Rukin Decl., ¶ 10-11. In September, the parties executed a
 13 memorandum of understanding. Rukin Decl., ¶ 11. On November 18, 2021, the parties executed a
 14 formal Settlement Agreement. Rukin Decl., Exh. 1.

15 **B. The *Goro/Aguilera* Matter**

16 Distributors and Class Members Emanuel Aguilera and Simon Goro also filed a
 17 misclassification lawsuit against Matco claiming they were misclassified as independent
 18 contractors under California law and were not provided with all of the usual protections afforded
 19 by the California Labor Code. In light of the pending *Fleming* action, on March 22, 2019, Aguilera
 20 and Goro voluntarily dismissed their lawsuit against Matco. *See Aguilera, et al. v. Matco Tools*
 21 *Corporation*, Case No. 3:19-CV-00321-YGR.

22 Following the dismissal, Matco instituted arbitration actions³ against Aguilera and Goro in
 23 Ohio and filed a claim against them in federal court in Ohio seeking a determination regarding the
 24 validity of Matco's arbitration agreement. *Matco Tools Corporation v. Aguilera, et al.*, Case No.

25
 26 ³ *Matco Tools Corporation v. Simon Goro and Deidre Goro*, AAA Case No. 01-19-0002-0483;
 27 *Matco Tools Corporation v. Emanuel Aguilera*, AAA Case Number: 01-19-0002-0482.

1 5:19-cv-641-PAB (N.D. Ohio), ECF No. 1. Ultimately, the Court denied Matco's attempt to compel
2 arbitration. *Id.* at ECF No. 26 (Memorandum Opinion and Order denying petition to compel
3 arbitration). At the same time, Aguilera and Goro filed an action in federal court in California
4 seeking a declaratory judgment that the arbitration and forum selection clauses contained in the
5 Distributorship Agreements are unenforceable and seeking injunctive relief enjoining Matco from
6 proceeding with the arbitration actions. *See Emanuel Aguilera, et al. v. Matco Tools Corporation,*
7 *Case No. 19-cv-1576-AJB-AGS, ECF No. 1.* Plaintiffs in that case obtained a favorable preliminary
8 injunctive relief order finding that they were likely to succeed on the merits of their claim. *Id.* at
9 ECF No. 34. The parties agreed to close the arbitration matters and dismiss the injunctive relief
10 action. *See id.* at ECF Nos. 55-56; Tomasevic Decl., ¶ 17.

11 Aguilera and Goro participated in this current action as well. They submitted declarations
12 in support of the class certification motion. *See* Dkts. 58-31 and 58-32. They each sat for a full day
13 deposition and participated in discovery in this case. Rukin Decl., ¶ 21. They also informally shared
14 documents with Class Counsel and otherwise made themselves available as a resource to Class
15 Counsel in connection with the prosecution of this matter. *Id.*

16 Aguilera and Goro are signatories to the Settlement Agreement. *See* Rukin Dec., ¶ 21. They
17 have agreed to sign a full release of their claims against Defendants in connection with the
18 settlement to bring a full and final resolution of the claims at issue in this case. *Id.* The Settlement
19 Agreement permits Aguilera and Goro to seek a service award in connection with their efforts to
20 prosecute this case and in recognition of their broader release of all claims.

21 **III. TERMS OF THE PROPOSED SETTLEMENT**

22 The complete details of the Settlement are contained in the Settlement Agreement signed
23 by the Parties and attached as Exhibit 1 to the Declaration of Peter Rukin. The following
24 summarizes the Settlement Agreement's key terms.

25 **A. The Settlement Class and Scope of the Settlement**

26 Settlement Class Members are defined as all persons who signed Matco Tools franchise
27

1 Distributorship Agreements in the State of California and personally operated a mobile store at any
2 time between January 25, 2015 through and including the date the Court grants preliminary
3 approval of the Settlement (the “Class Period”). Rukin Dec., Ex. 1 at 1.13.

4 The Settlement Class is the same as the Class that was certified by the Court in its Order
5 Granting in Part Motion to Certify Class (“Certification Order”; Dkt. 71); however, the parties
6 propose to certify a scope of claims beyond those certified by the Court. The Court granted
7 certification as to the threshold question of misclassification and Plaintiff’s substantive claims for
8 expense reimbursement, wage statement, and UCL (as to the wage statement claim) but denied it
9 as to Plaintiff’s claims for overtime, meal and rest breaks, waiting time penalties, and wage
10 deductions. *See generally* Certification Order, Dkt. 71. As a condition of the Settlement, the parties
11 have stipulated to the propriety of class certification of the previously uncertified wage and hour
12 claims in addition to those that could have been brought based on the same facts alleged in the
13 operative complaint like Fair Labor Standards Act overtime claims. Rukin Decl., Ex. 1 at 1.41.

14 This is appropriate for a number of reasons. First, including the previously uncertified
15 claims in the scope of the Settlement and release makes sense because the claims arise out of the
16 same common core of facts as the certified claims, rendering reasonable the parties’ expectation of
17 a global settlement. Second, Class Counsel has no indication that any Class Members are interested
18 in pursuing the non-certified claims. Rukin Decl., 17. As such, a resolution of all of their claims in
19 the Settlement would be in their best interest. Nonetheless, in the event any Class Member does
20 desire to pursue the non-certified claims, the parties have preserved their right to opt-out of the
21 Settlement. Rukin Decl., Ex. 1 at 4.1.1. Third, the consideration and relief negotiated is fair,
22 adequate and reasonable with respect to all released claims. In this regard, it is worth noting that
23 this Court expressed in its class certification order that “Matco has a strong argument that the
24 outside sales exemption applies to at least some of the franchisees” as “[t]here is no dispute that
25 franchisees spend the bulk of their time traveling to and visiting with customers in their Matco
26 trucks [e.g. that they likely meet the outside sales definition].” Certification Order, Dkt. 71 at 19.

1 **B. Relief to the Settlement Class**

2 **1. Monetary and Debt Relief**

3 The Gross Settlement Value of the Settlement includes both a Monetary Relief component
4 and Debt Forgiveness by Matco, as detailed below, totaling \$15,846,423. Rukin Decl., Exh. 1 at,
5 1.9, 1.19, 1.27. The Gross Settlement Value includes all Individual Settlement Payments to
6 Settlement Class Members and Aggrieved Individuals, Administrative Costs, Class Counsel’s
7 attorneys’ fees and litigation costs, any Class Representative Service Awards, Debt Forgiveness,
8 and the PAGA Payment.

9 The Settlement provides that Matco will pay \$13,500,000.00 in “cash” in connection with
10 the Settlement. Rukin Decl., Exh. 1 at 1.9. Payment for Court-approved attorneys’ fees and costs,
11 Court-approved Service Awards to the Named Plaintiff, Court-approved Settlement Administration
12 fees and costs, and a payment to the LWDA will be deducted from this amount. *Id.* at p. 1.31. The
13 resulting “Net Settlement Amount” will be distributed to Class Members who participate in the
14 Settlement. *Id.* at 1.31.

15 Additionally, there will be a “Debt Forgiveness” portion of the Settlement, in which Matco
16 will forgive the debt owed by Class Members who terminated their Matco Tools distributorships
17 on or before September 8, 2021 in connection with the Settlement. The amount of the Debt
18 Forgiveness as of September 8, 2021 is approximately \$2,346,423. Rukin Decl., Exh. 1 at 1.19.

19 The Settlement also resolves Plaintiff’s PAGA claim filed on behalf of the State of
20 California. In settlement of that claim, and in exchange for a release, the California Labor and
21 Workforce Development Agency (“LWDA”) shall receive payment of \$187,000 for its 75% share
22 of civil penalties and aggrieved Class Members within the PAGA limitations period shall receive a
23 pro rata share of \$62,500, for a total PAGA settlement share of \$250,000. Rukin Decl., Exh. 1 at
24 1.35. A copy of the Settlement Agreement and this motion have been served on the LWDA. Rukin
25 Decl., ¶ 27.

26 Each Class Member will be eligible to receive a portion of the Net Settlement Amount as
27

1 follows:

2 (a) For Settlement Class Members, the Individual Settlement Payment shall be calculated
3 by dividing the number of eligible workweeks worked during the Class Period by all eligible
4 workweeks during the Class Period attributed to members of the Settlement Class, multiplied by
5 the portion of the Net Settlement Amount that is not attributable to the PAGA Payment. If the
6 Settlement Class Member is an Aggrieved Individual entitled to a PAGA recovery, then the
7 Settlement Class Member shall also receive a share of the PAGA Payment based on the number of
8 eligible workweeks worked during the PAGA Period. Rukin Dec, Exh. 1 at 5.4.

9 (b) The Individual Settlement Payment of a Settlement Class Member who is a former
10 Matco Tools distributor shall account for Debt Forgiveness, provided the Settlement Class Member
11 had terminated their distributorship by, and was indebted to Matco as of, September 8, 2021. For
12 any Settlement Class Member who receives Debt Forgiveness, the portion of his or her Individual
13 Settlement Payment not attributable to the PAGA Payment shall be reduced as follows: (i)
14 Settlement Class Members with debts of up to \$10,000.00 as of September 8, 2021 - 10%; (ii)
15 Settlement Class Members with debts of between \$10,000.01 and \$25,000.00 as of September 8,
16 2021 - 25%; (iii) Settlement Class Members with debts of \$25,000.01 or more as of September 8,
17 2021 - 50%. Rukin Dec, Exh. 1 at 5.51.

18 (c) Any sums by which Settlement Class Members' Individual Settlement Payments
19 were reduced on account of Debt Forgiveness shall be redistributed to those Settlement Class
20 Members who did not benefit from any Debt Forgiveness. Rukin Dec, Exh. 1 at 5.51

21 (d) If a Class Member opts out of the Settlement but is an Aggrieved Individual, that
22 Individual Settlement Payment shall consist solely of a share of the PAGA Payment. Rukin Dec,
23 Exh. 1 at 5.51(c).

24 (e) Any Settlement Class Member who is a current California Matco Tools Distributor
25 and who does not submit a timely and valid Arbitration Amendment Opt Out (effectively opting
26 the Class Member out of the arbitration provision in the Amended Distributorship Agreement) shall
27

1 also receive an Arbitration Amendment Allocation of \$5,000.00. If any Settlement Class Members
2 who are current California Matco Tools distributors submit a timely and valid Arbitration
3 Amendment Opt Out, then their respective Arbitration Amendment Allocations shall be distributed
4 to Settlement Class Members on a pro rata basis. Rukin Dec, Exh. 1 at 5.51(d).

5 **2. Amended Distributorship Agreements**

6 Class Notice to Current California Distributors will include an attached Amended
7 Distributorship Agreement. Class Members who are current California Matco Tools Distributors,
8 and who do not submit a valid Request for Exclusion, shall be deemed to have amended their Matco
9 Tools Distributorship Agreement to incorporate the Amended Terms and the Court's Final
10 Approval Order shall order that their Matco Tools Distributorship Agreements incorporate the
11 Amended Terms. Rukin Decl., Exh. 1 at 6.1.

12 The Amended Distributorship Agreement provides Current California Distributors with
13 certain new rights with respect to their territories, and in many instances, decreases Matco's control
14 over Current California Distributors through the addition or subtraction of numerous contractual
15 provisions, including but not limited to:

- 16 • Adding procedures through which a Distributor can ask Matco to modify the
17 Distributor's customer list (i.e. "List of Calls") and Matco's promise to not
18 "unreasonably withhold consent to modify the List of Calls." (§ 1.2);
- 19 • Adding procedures through which a Distributor can request to sell non-competing
20 products through their distributorship and Matco's promise not to unreasonably
21 withhold permission to sell such products. (§ 3.2);
- 22 • Adding that "pricing of products" is the Distributor's sole prerogative and that
23 should Matco wish to implement discount, incentive, or coupon programs for end
24 customers, then Matco will compensate the Distributor accordingly for his or her
25 participation in those programs. (§§3.12, 6.2);
- 26 • Adding a provision stating that Distributors "have the right to sell [their]"
27

1 Distributorship” and Matco’s promise to not unreasonably withhold consent to sell
2 the Distributorship. (§ 10.1).

3 The Amended Distributorship Agreement also amends Matco’s dispute resolution
4 procedures, including arbitration and forum selection clauses in prior versions of its Distributorship
5 Agreements—some of which this Court previously deemed unenforceable (*see* Dkt. 35). The new
6 dispute resolution procedures remedy the issue identified by this Court by eliminating the PAGA
7 waiver (§ 12.5) and also change other provisions to make Matco’s dispute resolution procedures
8 fairer to Distributors and, in Plaintiffs’ counsel’s opinion, more compliant with California law.
9 These changes include (1) changing the governing law of the Distributor Agreement, including its
10 arbitration provision, to that of California – these Distributors’ home state - as opposed to Ohio law,
11 as had previously been the case (§ 12.1); (2) changing the “Venue and Jurisdiction” clause to adopt
12 California as the appropriate forum for disputes, as opposed to Matco’s home state of Ohio; (3)
13 eliminating the “limitation of actions” provision which previously gave Distributors as little as one
14 year upon which to bring any accrued claim (§ 12.3); (4) limiting the application of the arbitration
15 clause to only the Distributor him or herself and any spouse also executing the Distributor
16 Agreement (as opposed to, as previously was the case, extending the arbitration clause to all
17 “immediate family members” of the principal Distributor) (§ 12.1); (5) deleting the prior
18 “Limitation of Damages” provision which had sought to preclude any award of punitive or
19 consequential damages; and (6) adding that Matco shall pay for all costs unique to arbitration,
20 whereas previously the Distributor was to share equally in any arbitration costs. Moreover, as
21 explained further below, Distributors have the right to opt out of the new dispute resolution
22 provisions. Those who do not opt out will receive a \$5,000 payment. Rukin Decl., Exh. 1 at
23 5.5.1(d).

24 C. Settlement Notice, Claim, and Exclusion Procedures

25 The parties have agreed to a notice plan that will provide Class Members with sufficient
26 information to make an informed decision about how and whether to participate in the proposed
27

1 Settlement, object to the proposed Settlement, or to exclude themselves from the Settlement Class.
2 *See* Rukin Decl., Exh. 1 at Exh. C (proposed Notice).

3 Within fifteen calendar days after preliminary approval of the Settlement⁴, Matco’s counsel
4 shall transmit to the Settlement Claims Administrator each Class Member’s name, last known
5 address, email address, telephone number, numbers of Eligible Workweeks worked during the
6 Class Period, and Social Security number. Rukin Decl., Exh. 1 at 3.3. Upon its receipt of the Class
7 List, the Settlement Claims Administrator shall access the National Change of Address (“NCOA”)
8 Database, and update the addresses maintained by Matco. Rukin Decl., Exh. 1 at 3.4. The
9 Settlement Claims Administrator shall provide the Notice Packet by first class mail, forwarding
10 requested, to the Class Members at the addresses identified through the process described above,
11 as well as by email. *Id.* This mailing shall occur no later than thirty (30) calendar days after the
12 entry of the Preliminary Approval Order. *Id.* If no forwarding address is available, then the
13 Settlement Administrator shall attempt to determine the correct address by using a computer-based
14 skip-trace search, and shall then perform, if feasible, a re-mailing via First Class U.S. Mail within
15 five (5) calendar days. If the last known address is not available for a Class Member, then the Notice
16 of Class Action Settlement for that Class Member will be deemed undeliverable. Only one re-
17 mailing is required. *Id.*

18 Class Members will have forty-five (45) days from the mailing of the Notice to submit a
19 request for exclusion or any objection to the Settlement. Rukin Decl., Exh. 1 at 4.1.1.

20 Separately, Settlement Class Members who are current California Matco Tools Distributors
21 will have thirty (30) calendar days from the date of the mailing of the Notice of Class Action
22 Settlement to postmark an Arbitration Amendment Opt Out whereby they can elect not to be bound
23 by the amended arbitration provision. Rukin Decl., Exh. 1 at 4.1.1.

24 //

25 _____
26 ⁴ Or Court approval of the Notice of Class Action Settlement to the Class, or approval of the
27 Amended Terms or the Amended Charter Terms by any government agencies required by law to
approve amendments to franchise agreements (if any).

1 **D. Release of Claims**

2 Class Members who do not opt out of the Settlement will release all claims or causes of
3 action alleged in the Complaint, as well as all claims arising from the California Labor Code, wage
4 orders and applicable regulations that could have been raised based on the facts alleged in the
5 Complaint. Rukin Decl., Exh. 1 at 7.1. Class Members who cash a settlement check will also release
6 their claims under the federal Fair Labor Standards Act. *Id.*

7 The Named Plaintiff, Goro, and Aguilera agree to a general release of claims. *Id.* at 7.2.

8 **E. Service Awards, Attorneys' Fees and Costs, and Administration**

9 The following sums will be deducted from the Settlement Amount: (1) Service Award
10 payments to the Named Plaintiff, Goro, and Aguilera; (2) the fees and expenses of the Claims
11 Administrator; (3) Class Counsel's attorneys' fees; (4) Class Counsel's litigation costs; and (5)
12 payment of \$250,000 in settlement of the PAGA claims (\$187,500 of which will go to the LWDA
13 and \$62,500 of which will be distributed among the aggrieved employees). Rukin Decl., Exh. 1 at
14 1.31, 1.35. With respect to attorneys' fees, Plaintiff intends to request \$3,961,605.75, an amount
15 equal to 25% percent of the Gross Settlement Value. With respect to service awards, Plaintiff
16 intends to seek \$25,000 for the Named Plaintiff and \$15,000 each to Goro and Aguilera for their
17 participation and assistance in the prosecution of this action and ancillary proceedings.

18 **F. Timing of Settlement Payments**

19 The payments set forth in this Agreement, including all service payments or attorneys' fees,
20 will be distributed no later than 45 calendar days after the Effective Date, which shall be the later
21 of (a) the Court's final approval of the Settlement Agreement, if no objections have been filed, (b)
22 the time of appeal has expired if an objection has been filed and no appeal was filed, (c) or the final
23 resolution of any appeal that has been filed. Rukin Decl., Exh. 1 at 5.5.2. Settlement Class Members
24 shall have one hundred eighty calendar days to cash their checks. *Id.* After the expiration of the
25 180-day period, any uncashed checks shall be voided by the Settlement Administrator, and the value
26 of uncashed checks, including any otherwise unpaid interest accumulated in the Qualified
27

1 Settlement Fund, to California Rural Legal Assistance, Inc., a well-regarded legal services
2 organization in California. One of Plaintiff’s counsel’s firms has worked with CRLA as co-counsel
3 on one or two matters over the years, most recently in *Hernandez v. Dutton Ranch*, 19-cv-00817-
4 EMC (FLSA and PAGA settlement approval and dismissal by Judge Chen on September 10, 2021).
5 Rukin Decl., ¶ 23. No firm involved in this matter has a financial interest in CRLA, no member of
6 any firm is serving on CRLA’s Board or involved with the organization in any other capacity, and
7 no firm is currently co-counseling any case with CRLA. *Id.*

8 The only amounts that will revert to Matco are the Settlement shares of those Class Members
9 who exclude themselves from the Settlement, as they will not be releasing their claims. Rukin
10 Decl., Exh. 1 at 5.6.

11 **G. CAFA Notice**

12 Defendants will be serving CAFA notice within ten (10) days of the filing of the present
13 motion. Rukin Decl., ¶ 26.

14 **IV. ARGUMENT**

15 **A. Preliminary Approval of the Settlement is Appropriate**

16 In class action litigation, a court must approve the dismissal or compromise of the action.
17 Fed. R. Civ. P. 23(e). This involves a two-step process in which the Court first determines whether
18 a proposed class action settlement has the potential to be fair, adequate and reasonable, and, second,
19 after notice is sent to proposed Class Members, whether the settlement merits final approval. *See*
20 *State of California v. eBay, Inc.*, No. 5:12-CV-05874-EJD, 2014 WL 4273888, at *5 (N.D. Cal.
21 Aug. 29, 2014). A full fairness analysis is unnecessary at the preliminary approval stage. *Singer v.*
22 *Becton Dickinson Co.*, 2009 WL 4809646, at *7 (S.D. Cal. 2009). “Rather, at the preliminary
23 approval stage, the Court need only review the parties’ proposed settlement to determine whether
24 it is with the ‘permissible range of possible judicial approval’ and thus, whether the notice to the
25 class and the scheduling of the formal fairness hearing is appropriate.” *Id.* (citations omitted).

26 The Ninth Circuit has identified eight, non-exclusive factors that may be considered during
27

1 both the preliminary and final approval processes. Each factor does not necessarily apply to every
 2 class action settlement, and other factors may be considered. For example, courts often consider
 3 whether the settlement is the product of arms-length negotiations. *See Rodriguez v. W. Publ'g Corp.*,
 4 563 F.3d 948, 965 (9th Cir. 2009) (“We put a good deal of stock in the product of an arms-length,
 5 non-collusive, negotiated resolution.”). Approval of a class action settlement rests in the sound
 6 discretion of the court, which should apply its discretion in light of the judicial policy favoring
 7 settlement of complex class action litigation. *See, e.g., Officers for Just. v. Civ. Serv. Comm'n of*
 8 *City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

9 As discussed below, application of the relevant factors supports preliminary approval.

10 **1. The Settlement is the Product of Informed, Non-Collusive Negotiation**

11 “A settlement following sufficient discovery and genuine arms-length negotiation is
 12 presumed fair.” *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528
 13 (C.D. Cal. 2004) (citations omitted). “The assistance of an experienced mediator in the settlement
 14 process confirms that the settlement is non-collusive.” *Pederson v. Airport Terminal Servs.*, 2018
 15 U.S. Dist. LEXIS 93862, at *18 (C.D. Cal. April 5, 2018) quoting *Satchell v. Fed. Express Corp.*,
 16 Nos. C03-2659 SI, C 03-2878 SI, 2007 U.S. Dist. LEXIS 99066, 2007 WL 1114010, at *4 (N.D.
 17 Cal. Apr. 13, 2007).

18 In this case, the Settlement Agreement is the result of arm’s-length negotiations involving
 19 experienced employment counsel who are well-versed in the applicable substantive law, class
 20 action litigation procedures, and the legal and factual issues of this particular case. Rukin Decl., ¶
 21 12; Tomasevic Decl., ¶ 14. The parties attended two full days of mediation with experienced
 22 mediators and conducted follow-up negotiations over the course of several months. The Settlement
 23 followed extensive document production, depositions of the Named Plaintiff, Class Members, and
 24 Matco representatives, and briefing on several substantive motions. Rukin Decl., ¶¶ 10-12.
 25 “[S]uch negotiations are highly indicative of [the] fairness” of the proposed Settlement. *See In re*
 26 *Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007).

2. The Settlement Falls Within the Range of Possible Approval

In deciding whether the proposed settlement is adequate and falls within the range of possible approval, “courts primarily consider plaintiffs’ expected recovery balanced against the value of the settlement offer,” taking into account the risks of continuing litigation. *See Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009) (internal quotations and citations omitted). Courts should recognize that “the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each gave up something they might have won had they proceeded with litigation.” *Officers for Justice*, 688 F.2d at 624 (internal quotations and citation omitted). Here, the Settlement is fair, adequate and well within the range of possible approval.

a. The Strength of Plaintiff’s Case and the Risk of Further Litigation Support Preliminary Approval

As described in significant detail in the class certification briefing (*see* Dkts. 58, 68, 71), Plaintiff’s primary contention is that Matco classified its Distributors as independent contractors while reserving and exercising levels of control consistent with an employment rather than independent contractor relationship. Plaintiff further alleges that, as a result of this misclassification, Plaintiff and Class Members are owed compensation for various benefits of employment that Matco neglected to pay them.

Although Plaintiff believes that the documents produced in discovery and information revealed during depositions support Plaintiff’s allegations, a finder of fact could conclude that Distributors were properly classified as independent contractors. Indeed, the parties were preparing cross-motions for summary judgment on the issue of employment status when they reached this settlement. Without conceding that any adverse conclusions would be correct or appropriate, the Named Plaintiff recognizes the risk of possible negative outcomes. And, even if Plaintiff prevailed at the summary judgment stage, the Class faced risks proving their claims in a classwide trial with competent classwide evidence. This Settlement avoids that uncertainty, while ensuring that Class

1 Members receive substantial consideration now for a release of their claims.

2 *b. The Settlement Consideration and Allocation Are Fair*

3 The Settlement is a fair and reasonable sum in light of the risks of further litigation. Class
4 Members are recovering, before deduction for attorneys' fees and costs, an average of
5 approximately 41 percent of their maximum potential damages on the certified claims (using
6 overtime hours assumptions based on counsel's investigation). Rukin Decl., ¶¶ 14-15.⁵

7 This is a significant recovery. If all Class Members participate in the Settlement, an average
8 Class Member will receive a net award of approximately \$35,000, after deduction of anticipated
9 attorney's fees, litigation costs, service awards, and administration costs (not including the
10 monetary benefit realized from the debt relief component of the Settlement—a substantial benefit
11 to many Class Members). Under the circumstances, the amounts of the settlement payments are
12 fair, adequate and reasonable. *Id.* at ¶ 15. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459
13 (9th Cir. 2000) (finding a recovery of one sixth (16.67%) of the potential recovery adequate in light
14 of the plaintiff's risks); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012
15 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (preliminarily approving a settlement representing
16 15% of the potential recovery).

17 The Settlement also provides substantial non-monetary relief to Current California
18 Distributors in the form of amended Distributorship Agreements, which provide Distributors with
19 additional contractual rights. Rukin Decl., Exh. 1 at Exhs. A, B.

20 Finally, the plan of allocation of the Settlement to Class Members is fair and reasonable.
21 The Net Settlement Amount will be allocated among Class Members based on several factors,
22 including: (1) the amount of time spent as a Distributor during the applicable liability period; (2)
23 whether they are a current California Distributor and have chosen not to opt out of the arbitration
24 provision in the amended Distributorship Agreement (in which case they will be entitled to an
25 allocation of \$5,000); and (3) whether they are an aggrieved employee and entitled to a portion of

26 _____
27 ⁵ Exposure calculation is based on Distributors' self-reported estimates.

1 the Private Attorneys General Act (PAGA) allocation of the Settlement. *See, e.g., Cicero v.*
 2 *DirectTV, Inc.*, No. EDCV 07-1182, 2010 WL 2991486, at *5 (C.D. Cal. July 27, 2010).

3 **3. The Attorneys' Fees and Costs Requests Are Reasonable**

4 Prior to the final approval hearing, Class Counsel may petition the Court for an award of
 5 fees in an amount not to exceed \$3,961,605.75, an amount equal to 25% percent of the Gross
 6 Settlement Value, and an award of litigation expenses. This is fair and reasonable, given the
 7 significant time and expense that Class Counsel have devoted to this case over nearly three years
 8 and the result that they have achieved for the Class. Rukin Decl., ¶ 19; Tomasevic Decl., ¶ 15. As
 9 the Rukin Declaration reflects, the requested fees, if awarded, would amount to an approximately
 10 2.4 multiplier (or less) on Class Counsel's lodestar, which is fair and reasonable given the work
 11 performed by counsel and the successful resolution obtained for the Class. *See* Rukin Decl., ¶ 19.
 12 Class Counsel's fees will be tied directly to the amount that is actually paid out to the Class, and
 13 the request is within the range of reasonableness under Ninth Circuit authority. *See, e.g., Shaffer v.*
 14 *Cont'l Cas. Co.*, 362 F. App'x 627, 631 (9th Cir. 2010) (in common fund settlement "[t]wenty-five
 15 percent is the benchmark"). In addition, Class Counsel have incurred approximately \$52,912 in
 16 costs to date, which they will seek to recoup from the common fund. Rukin Decl., ¶ 19; Tomasevic
 17 Decl., ¶ 15.

18 **4. The PAGA Settlement Is Reasonable And Should Be Approved.**

19 PAGA provides that 75% of civil penalties recovered under the statute shall be paid to the
 20 California Workforce and Development Agency ("LWDA") and 25% to aggrieved employees.
 21 Here, the Settlement allocates \$250,000 to the PAGA claims brought by Plaintiff. Of that amount,
 22 \$187,500 will be paid to the LWDA, and \$62,500 will be paid to aggrieved employees in California.
 23 Because a settlement of PAGA claims settles claims that could otherwise be brought by the state,
 24 the trial court must "review and approve" any settlement of PAGA claims. Cal. Lab. Code §
 25 2699(1)(2).

26 The \$250,000 PAGA settlement is reasonable. A single PAGA penalty for Matco's alleged
 27

1 failure to provide Distributors with wage statements under Cal. Lab. Code § 226 , assessed on behalf
 2 of each California distributor for every pay period in the PAGA liability period, would amount to
 3 approximately \$2,730,000 million. Rukin Decl., ¶ 20. Given that Plaintiff might fail to prevail on
 4 the merits of his misclassification claim, in which case no PAGA penalties would be recoverable,
 5 a PAGA payment of \$250,000 is a reasonable compromise. *See, e.g., Chu v. Wells Fargo*
 6 *Investments, LLC*, No. C 05-4526 MHP, C 06-7924 MHP, 2011 U.S. Dist. LEXIS 15821, 2011 WL
 7 672645, at * 1 (N.D. Cal. Feb. 16, 2011) (approving PAGA settlement payment of \$7,500 to the
 8 LWDA out of \$6.9 million common-fund settlement); *Ramirez v. Benito Valley Farms, LLC*, 2017
 9 U.S. Dist. LEXIS 137272, at *18 (N.D. Cal. Aug. 27, 2017) (settlement of PAGA claim for 4.5%
 10 of exposure reasonable).

11 **5. The Proposed Service Awards Are Reasonable**

12 “Incentive [or service] awards are fairly typical in class action cases.” *Rodriguez v. W.*
 13 *Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). In evaluating service awards, courts may consider
 14 “1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the
 15 notoriety and personal difficulties encountered by the class representative; 3) the amount of time
 16 and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal
 17 benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.” *Smith v.*
 18 *CRST Van Expedited, Inc.*, 10-CV-1116- IEG WMC, 2013 WL 163293 (S.D. Cal. Jan. 14, 2013)
 19 (quoting *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995)).

20 Here, awarding a service award of \$25,000 to the Named Plaintiff is consistent with a fair,
 21 just and adequate settlement. Rukin Decl., ¶ 21. First, the Named Plaintiff played a very active role
 22 in the prosecution of the case. He spent many hours over a period of years actively assisting Class
 23 Counsel, including regular meetings and calls with counsel, attending two full-day mediation
 24 sessions where he provided invaluable information to counsel and the mediator, sitting for his
 25 deposition, and gathering and producing documents. Second, in taking on the role of class
 26 representative, Plaintiff gave up the right to individually control his own valuable claim in favor of

1 the interests of the Class. The service award he seeks is also appropriate in light of the individual
2 payouts Class Members will be receiving. *See Rankin v. Am. Greetings, Inc.*, 2011 U.S. Dist. LEXIS
3 72250, at *5 (E.D. Cal. July 6, 2011) (approving incentive award that “is reasonably close to the
4 average per class member amount to be received”). An incentive award is also well-supported by
5 the overall value of this Settlement in that it will amount to far less than one percent of the gross
6 settlement value. *See e.g. Alvarez v. Farmers Ins. Exch.*, No. 3:14-CV-00574-WHO, 2017 WL
7 2214585, at *1 (N.D. Cal. Jan. 18, 2017) (assessing incentive awards against overall settlement
8 value). It is also fair for Named Plaintiff to receive additional payments given that he is signing a
9 full 1542 waiver of all claims which is broader than the release of the class.

10 Goro and Aguilera’s participation in this case and the risks they undertook also warrant
11 service awards. Rukin Decl., ¶ 21. While they are not named plaintiffs, they are signatories to the
12 Settlement Agreement. Still further, they faced great risk in the related proceedings described above
13 including being sued in federal court in Ohio and facing arbitration demands in Ohio. These
14 activities in addition to their active participation in this matter as declarants and participants in
15 discovery certainly took up much time and caused personal difficulty. Like Named Plaintiff, these
16 individuals have also waited years for the resolution of this case and assisted in bringing about the
17 very large net benefit to the class. And like Named Plaintiff, they will be signing a full 1542 waiver
18 of all claims which is broader than the release of the class. Modest payments of \$15,000 each to
19 Goro and Aguilera are appropriate under these circumstances. *See id.*; Tomasevic Decl., ¶ 17.

20 At final approval, Named Plaintiff, as well as Goro and Aguilera, will submit declarations
21 documenting the time and effort they put into litigating these issues and the risks they undertook.
22 For now, Plaintiff merely asks that the Court permit dissemination of Notice to the Class identifying
23 the service awards that Plaintiff will be requesting at final approval.

24 **6. The Court Should Appoint ILYM Group, Inc. as Claims Administrator**

25 To ensure the fair and efficient administration of the Settlement, the Court should appoint
26 ILYM Group, Inc. (“ILYM”), an experienced claims administrator, to distribute the Notice and
27

1 administer claims under the Settlement Agreement. *See* Rukin Decl., ¶ 22. Plaintiff anticipates
2 that ILYM will be paid no more than \$10,000 to perform all of the functions of the Claims
3 Administrator under the terms of the Settlement Agreement. *Id.* ILYM was selected after soliciting
4 bids from three different administrators, all of which provided bids within \$5,000 of each other,
5 and none of which was higher than \$10,000. Rukin Decl., 22. Indeed, the entire administration
6 costs are approximately a mere .06% of the Settlement. Of the bids provided, the parties
7 collectively chose ILYM because they had successfully distributed the Bel-Air and class notices
8 previously in this case. *Id.* The Court should appoint ILYM to distribute Notice and administer
9 claims.

10 **B. The Proposed Notice is Adequate**

11 Under Rule 23(e), the Court “must direct notice in a reasonable manner to all class members
12 who would be bound by a propos[ed settlement].” Fed. R. Civ. P. 23(e)(1). Notice is satisfactory
13 “if it generally describes the terms of the settlement in sufficient detail to alert those with adverse
14 viewpoints to investigate and to come forward and be heard.” *Churchill Vill., L.L.C. v. Gen. Elec.*,
15 361 F.3d 566, 575 (9th Cir. 2004) (internal citations omitted).

16 The proposed Class Notice and notice plan satisfy the requirements of Rule 23(e) and due
17 process. The proposed Class Notice clearly explains the nature of the action and the terms of the
18 Settlement (including the Settlement Amount, individual Class Members’ estimated minimum
19 recovery, the attorneys’ fees to be paid, how settlement payments will be calculated, the claims that
20 will be released); and how the Class Member may participate in or opt-out of the Settlement. *See*
21 Rukin Decl., Exh. 1, Exh. B. This information is more than sufficient to satisfy Rule 23(e). *See*,
22 *e.g.*, *Villegas*, 2012 WL 5878390, at *8 (approving a notice containing the same categories of
23 information).

24 As described above in Section III(C), the proposed Class Notice plan also ensures that Class
25 Members receive the best notice possible. In addition to running a National Change of Address
26 search upon receiving the Class List from Matco, as well as emailing the Notice to Class Members,
27

1 the Settlement Administrator will set up and maintain an informational website through which Class
2 Members can view the Settlement Agreement and Class Notice. This is the best notice practicable.
3 *See Misra v. Decision One Mortg. Co.*, No. SACV070994 DOC(RCX), 2009 WL 4581276, at *9
4 (C.D. Cal. Apr. 13, 2009) (use of NCOA database and appropriate skip tracing followed by mailed
5 notice is the ‘best notice that is practicable under the circumstances.’”).

6 **C. The Court Should Set a Final Approval Hearing**

7 Finally, the Court should set a hearing for final approval of the Settlement on a date
8 appropriately scheduled to follow the date by which Class Members must file objections to the
9 Settlement and Plaintiff’s counsel’s request for attorneys’ fees and costs.

10 **V. CONCLUSION**

11 Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the proposed
12 Settlement; (2) approve the form, content and method of distribution of the Notice of Class Action
13 Settlement; (3) appoint ILYM Group, Inc. as the Settlement Administrator; (4) approve the PAGA
14 settlement and PAGA payment to the California Labor and Workforce Development Agency; and
15 (5) schedule a hearing regarding final approval of the proposed Settlement and Class Counsel’s
16 request for attorneys’ fees, costs, and enhancement award payments.

17

18 Dated: December 13, 2021

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