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20 SUPERIOR COURT OF THE STATE OF CALIFORNIA

21 COUNTY OF SAN FRANCISCO

22 COORDINATION PROCEEDING
23 SPECIAL TITLE [RULE 3.550]

Case No.: CJC 15-004857

Judge Curtis E.A. Karnow
Dept. 304

24 **WASH.IO WAGE AND HOUR
25 CASES**

**MEMORANDUM OF POINTS AND
26 AUTHORITIES IN SUPPORT OF
27 PLAINTIFFS' MOTION FOR PRELIMINARY
28 APPROVAL OF REVISED CLASS ACTION
SETTLEMENT**

Date: September 2, 2016
Time: 2:00
Dept.: 304

Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiffs in *Barry Taranto et al. v. Wash.io* (San Francisco Superior Court. No CGC 15-
3 546584) and *Akil Luqman v. Wash.io* (Los Angeles Superior Court No. BC592428) have reached
4 a settlement with Defendant Wash.io, Inc. (“Wash.io”), which will resolve all wage and hour
5 claims against Wash.io arising from its alleged misclassification of its delivery drivers (also
6 referred to as “Ninjas”) as independent contractors. In exchange for this release, Wash.io will
7 reclassify its Ninjas as employees and create a gross settlement fund of \$450,000 or \$675,000,
8 depending on whether Wash.io meets certain financial health contingencies.

9 As detailed in the Supplemental Declaration of Matthew D. Carlson in Support of Revised
10 Class Action Settlement, filed concurrently herewith, this settlement provides excellent value to
11 Class Members in comparison with the likely value of their claims. While Plaintiffs were
12 optimistic that they would be successful in this litigation, the settlement was reached in light of
13 Wash.io’s bleak financial situation, potential bankruptcy in the event of further litigation, and the
14 likelihood that resolution of this litigation could potentially positively impact Wash.io’s financial
15 situation and thus ensure that Class Members would receive the maximum possible benefit from
16 the settlement. The settlement also takes into account the separate legal risks of further litigation
17 (*e.g.*, the risks that Plaintiffs would not be able to obtain class certification, prevail on the
18 misclassification issue, or prevail on their substantive claims). *See* Supp. Carlson Decl. at ¶ 16.

19 As discussed in further detail *infra* and in Plaintiffs’ supporting papers, Plaintiffs submit
20 that this settlement agreement, in light of the above considerations, should be preliminarily
21 approved.

22 **II. FACTUAL BACKGROUND**

23 **A. Litigation History**

24 On June 29, 2015, Plaintiff Barry Taranto filed a class-action lawsuit against Wash.io in
25 San Francisco Superior Court. Taranto subsequently amended his Complaint to include three
26 additional named plaintiffs, Kelly Keyser, Meryl Branch-McTiernan, and Guy Gottlieb. The
27 *Taranto* Plaintiffs allege three causes of action for: (1) failure to reimburse for business expenses
28 (Lab. Code § 2802); (2) unlawful and/or unfair business practices (Bus. and Prof. Code §§ 17200-

1 17208); and (3) violations of the Private Attorneys General Act (“PAGA”). Each claim is
2 predicated on Wash.io’s alleged unlawful practice of misclassifying Ninjas as independent
3 contractors.

4 On August 25, 2015, Plaintiff Akil Luqman filed his lawsuit in Los Angeles Superior
5 Court, which similarly alleges claims arising out of the alleged misclassification of Ninjas by
6 Wash.io. Specifically, the *Luqman* lawsuit contains the same claims as *Taranto* but also includes
7 the following additional claims for: (1) misclassification; (2) failure to pay overtime wages; (3)
8 failure to provide meal periods; (4) failure to provide rest periods; (5) failure to timely furnish
9 accurate itemized wage statements; (6) failure to pay all wages due at termination; and (7)
10 declaratory relief.

11 On February 9, 2016, the Court granted Plaintiff Luqman’s Petition for Coordination
12 recommending coordination of *Luqman* and *Taranto* in this Department of the Superior Court of
13 California, County of San Francisco. The consolidated cases were re-titled *Wash.io Wage and*
14 *Hour Cases*, Case No. CJC 15-004857.

15 On March 7, 2016, the *Luqman* and *Taranto* cases were assigned to this Court and were
16 re-styled as *Wash.io Wage and Hour Cases*, CJC-15-004857. On July 12, 2016, *Bennett v.*
17 *Wash.io, Inc.*, Case No. BC603067 (L.A. Sup. Ct.) (filed December 8, 2015) and *Wynne v.*
18 *Wash.io, Inc.*, Case No. BC621215 (L.A. Sup. Ct.), were added on to the *Wash.io Wage and Hour*
19 *Cases*.¹

20 **B. Discovery**

21 Over the course of this litigation, the parties have exchanged substantial written discovery.
22 Supp. Carlson Decl. at ¶ 7. Wash.io produced numerous documents in response to Plaintiffs’
23 document requests, including documents pertaining to the named Plaintiffs’ work with Wash.io
24 (including contracts, pay statements, and communications), pages from Wash.io’s website, and
25 Wash.io’s online job postings. *Id.* Wash.io also provided substantial information in response to
26

27 ¹ Unless they opt out of the settlement, this release will cover the plaintiffs in *Bennett* (a
28 follow-on putative class action filed on December 8, 2015, more than five months after the
original *Taranto* action) and *Wynne* (a single-plaintiff action). Of course, if the *Bennett* and
Wynne plaintiffs opt out of the settlement they will be free to continue to litigate their cases.

1 Plaintiffs' special interrogatories. *Id.* At the time the parties reached settlement, Plaintiffs had
2 noticed a deposition of Wash.io's person most qualified regarding certain topics, and had filed a
3 motion to compel further production of documents and further responses to interrogatories. Am.
4 *Id.* Wash.io also produced voluminous data concerning potential damages and penalties in
5 connection with the parties' mediation, which allowed Plaintiffs to value the potential claims at
6 issue. *Id.*

7 Additionally, the named Plaintiffs produced numerous documents in response to nearly 50
8 document requests, provided detailed responses to dozens of form and special interrogatories
9 propounded to each of them, and provided substantial information to their attorneys regarding the
10 subject matter of this litigation during both in-person meetings, over email, and by telephone.
11 Supp. Carlson Decl. at ¶ 8.

12 **C. Motion Practice**

13 On September 28, 2015, Wash.io moved to strike the *Taranto* Plaintiffs' nationwide class
14 allegations, which Plaintiffs opposed, and on December 15, 2015, the Court denied the motion
15 without prejudice. Additionally, on May 9, 2016, while settlement negotiations were on-going,
16 and in an attempt to procure additional documents and information to support their anticipated
17 motion for class certification, Plaintiffs filed a motion to compel further discovery responses to
18 numerous document requests and special interrogatories. The Motion was taken off-calendar after
19 the parties agreed to the basic parameters of this settlement. Supp. Carlson Decl. at ¶ 9.

20 **D. Mediation and Settlement**

21 On February 18, 2016, the parties participated in a day-long mediation session with
22 Michael Loeb, an experienced mediator of wage-and-hour class actions. Supp. Carlson Decl. at ¶
23 10. Following several additional months of hard-fought negotiation following the mediation, the
24 parties were able to agree on the terms of this agreement. *Id.*

25 **III. TERMS OF THE SETTLEMENT**

26 The parties' settlement agreement provides two components of relief to Class Members:
27 non-monetary relief – reclassification of Ninjas as employees – and monetary relief:
28

1 **A. Reclassification**

2 Under the terms of the settlement, Wash.io has agreed to reclassify all of its Ninjas as
3 employees. Rev. Agreement, Exhibit F to Carlson Decl., at ¶ 37. This concession is uncommon in
4 cases involving alleged independent contractor misclassification and, as discussed below, will
5 provide numerous and substantial work-related protections for Ninjas. *See* § VI(B)(4).

6 **B. Monetary Payments**

7 Wash.io will also pay a gross amount of \$450,000 or \$675,000, depending on the below-
8 described financial health contingency agreement, to be paid in four or five installments as
9 follows: a first payment of \$100,000, no later than 14 days following final approval;² a second
10 payment of \$100,000 six months after final approval; a third payment of \$125,000 twelve months
11 after final approval; and a fourth payment of \$125,000 eighteen months after final approval. This
12 fourth payment will rise to \$350,000 if Wash.io's value reaches \$60 million at any time before
13 the fourth payment is due. Rev. Agreement at ¶ 28. Additionally, if Wash.io's value does not
14 reach \$60 million at any time before the fourth payment is due, but does reach \$60 million at any
15 time during the one-year period following the due date for the fourth payment (or two and one-
16 half years after final approval), Wash.io will make a fifth payment within three months of
17 contingency being triggered (or 33 months after final approval, at the latest), in the amount of
18 \$225,000. *Id.*

19 Per the terms of the settlement, Wash.io will obtain a valuation from a source mutually
20 agreed upon by the parties no later than January 1, 2017, and another valuation, if necessary, from
21 the same source (or a different source mutually agreed upon by the parties, if the same source is
22 not available), no later than January 1, 2018, and another valuation, if necessary, from the same
23 source (or a different source mutually agreed upon by the parties, if the same source is not
24 available) no later than January 1, 2019. Rev. Agreement at ¶ 29. Plaintiffs' counsel will be
25 provided with the source's analysis and conclusion regarding the valuations subject to a
26

27 ² For ease of reference, Plaintiffs refer to a payment schedule based on the date of final
28 approval. The Agreement, however, sets a payment scheduled based on the "Effective Date," as
defined in the Agreement. Rev. Agreement at ¶ 18(h).

1 confidentiality agreement between the parties. *Id.* Wash.io will inform its counsel immediately if
2 it reaches a valuation of \$60,000,000.00 at any point prior to the date of the final payment in this
3 matter or at any time during the one year following the date of the fourth payment. *Id.* In the
4 event that the contingency payment is triggered, Wash.io's counsel will notify Plaintiffs' counsel
5 and the Settlement Administrator within five business days of the occurrence of the trigger. *Id.*
6 The Settlement Administrator will promptly post a publicly available notice on the settlement
7 website stating that the contingency has been triggered. The parties will identify the source of the
8 first valuation in advance of final approval of the settlement. *Id.*

9 Wash.io has stated that a \$60 million valuation is a reasonable – and indeed a desirable –
10 goal for the company, as that figure would show that the company has a sustainable business
11 model and is on a healthy financial trajectory. Metzner Decl. at ¶ 9.

12 Plaintiffs believe the financial component of the settlement provides significant value to
13 Class Members, particularly in light of Wash.io's agreement to reclassify Ninjas as independent
14 contractors. Carlson Decl. at ¶ 16. The compromise also takes into account Wash.io's financial
15 health and its representation that it would be forced into bankruptcy if litigation continued.
16 Carlson Decl. at ¶¶ 16, 45. *see also* Metzner Decl. at ¶ 7 and attachments thereto. However, the
17 settlement is crafted such that if Wash.io regains its financial health because of the resolution of
18 this litigation – *i.e.*, investors who may have been previously deterred from investing because of
19 pending litigation may no longer be so deterred (particularly because Wash.io has agreed to
20 reclassify its Ninjas) – Class Members will receive an increased payment. Rev. Agreement at ¶
21 28. Thus, Plaintiffs submit that this agreement aligns the interests of Wash.io (in obtaining
22 funding and maintaining its existence) and Class Members (in obtaining higher payments). Supp.
23 Carlson Decl. at ¶ 11.

24 C. Release

25 In exchange for these payments, Class Members who do not opt out agree to release all
26 claims that were or could have been pled based on the factual allegations set forth in the *Luqman*
27 and *Taranto* lawsuits, including all claims reasonably related to the claims asserted in the cases
28 arising from independent contractor misclassification. Rev. Agreement at ¶ 18(c).

1 **D. Plan of Allocation**

2 From the gross settlement fund of either \$450,000 or \$675,000, there will be deductions
3 for the following: (1) \$7,500 will be paid to the State of California pursuant to the parties' PAGA
4 allocation; (2) approximately \$45,000 will be paid to the Settlement Administrator, Garden City
5 Group; (3) \$25,000 will be paid to the named Plaintiffs as Class Representative Service
6 Enhancements (upon approval by the Court); and (4) \$135,000.00 or \$202,500.00 (depending on
7 the financial health contingency) will be paid to Class Counsel (upon approval by the Court).
8 Rev. Agreement at ¶ 18(s).

9 From the net settlement fund – either \$237,500 or \$395,000 – each Class Member will
10 receive a payment in proportion to the total miles they drove while delivering laundry for
11 Wash.io, but no Class Member will receive a payment of less than \$10 from the Settlement. Rev.
12 Agreement at ¶¶ 38-42.

13 If the financial contingency is not met, Class Members will receive from the net
14 settlement fund, on average, approximately \$215. Supp. Carlson Decl. at 12. If the financial
15 contingency is met, Class Members will receive, on average, approximately \$360. Supp. Carlson
16 Decl. at ¶ 13. Class Members who worked the most for Wash.io will receive substantially higher
17 payments because of the agreed upon allocation formula. Rev. Agreement at ¶ 40. Additionally,
18 Class Members in California (the majority of Class Members) will effectively receive double
19 payment, given the uncertainty surrounding whether Class Members performing work outside of
20 California are subject to California wage and hour laws. Rev. Agreement at ¶ 41.

21 According to Plaintiffs' preliminary calculations, Class Members who have worked for
22 Wash.io in California can expect to receive from the net settlement fund approximately 22 cents
23 per mile driven for Wash.io if the contingency payment does not occur, and Class Members who
24 have worked for Wash.io outside California can expect to receive from the net settlement fund
25 approximately 11 cents per mile driven for Wash.io if the contingency payment does not occur.
26 Supp. Carlson Decl. at ¶ 14. Also per Plaintiffs' preliminary calculations, Class Members who
27 have worked for Wash.io in California can expect to receive from the net settlement fund
28 approximately 37 cents per mile driven for Wash.io if the contingency payment does occur, and

1 Class Members who have worked for Wash.io outside California can expect to receive from the
2 net settlement fund approximately 18 cents per mile driven for Wash.io if the contingency
3 payment does occur. *Id.* For example, Plaintiff Taranto will receive either approximately \$300 or
4 \$500 from the net settlement fund, based on his 1,366 miles driven for Wash.io. *Id.*³

5 Class Members will receive their payments by direct deposit, or by mail if requested or if a
6 Class Member's bank information is out of date. Rev. Agreement at ¶ 43. This method of payment
7 is anticipated to result in a high rate of payment, as Class Members are paid by Wash.io for their
8 work via direct deposit. Metzner Decl. at ¶ 6.

9 **E. Notice Plan**

10 The settlement provides that notice will be sent to Class Members via electronic mail, or
11 to a physical address of the electronic mail is undeliverable. Rev. Agreement at ¶ 50. The parties
12 believe this will be the most effective way to distribute notice, as all Class Members were
13 required to provide Wash.io with their electronic email addresses in connection with their work.
14 Metzner Decl. at ¶ 6. These email addresses were used to receive pay statements and other
15 information from Wash.io. *Id.* In the likely few instances where electronic notice is not possible,
16 Wash.io has on file for each Class Member a physical address, and the Settlement Administrator
17 will send notice to that address.

18 The notice will include information concerning the lawsuit, the release, the process for
19 opting out, and the process for objecting, among other information. Notice, Exhibit B to Rev.
20 Agreement, at pp. 1-2. As described in the notice, Class Members will have 60 days to opt out or
21 object by following certain simple procedures. *Id.*

22 The Settlement Administrator will also create a publicly available website, which will
23 include all documents relating to the settlement of this action. Rev. Agreement at ¶ 48.

24 **F. Cy Pres Beneficiary**

25 The parties have agreed to the National Employment Law Project ("NELP") as the cy pres

26 ³ Of course, individuals whose miles-based shares of the net settlement fund will be less
27 than \$10 will receive the \$10 minimum payment. The \$10 minimum payment will have a
28 negligible effect on Plaintiffs' calculations – e.g., payments for certain individuals might decrease
by a few cents. *Id.*

1 beneficiary of the settlement, subject to Court approval. Rev. Agreement at ¶ 69. While the
2 parties anticipate a small cy pres award, the parties agree that NELP is an appropriate beneficiary
3 because of its role in addressing independent contractor misclassification in the United States,
4 including California.⁴ If, however, the Court determines that NELP is an inappropriate cy pres
5 designee, the parties have agreed to meet and confer regarding an alternative beneficiary for
6 presentation to the Court. *Id.*

7 **IV. LEGAL STANDARD**

8 Rule 3.769 of the California Rules of Court (CRC) sets forth the procedures for settlement
9 of class actions in California. A two-step process is required: first, the court preliminarily
10 approves the settlement and the class members are notified as directed by the court. CRC
11 3.769(c)-(f). Second, the court conducts a final approval hearing to inquire into the fairness of the
12 proposed settlement. CRC 3.769(g). If the court approves the settlement, a judgment is entered
13 with provision for continued jurisdiction for the enforcement of the judgment. CRC 3.769(h).

14 At the preliminary approval stage, the court reviews the proposed terms of the settlement
15 and makes a preliminary determination on the fairness, reasonableness, and adequacy of the
16 settlement terms. Manual for Complex Litigation (Federal Judicial Center 4th ed.2008), § 21.632.
17 “[T]he purpose of the preliminary evaluation is to determine only whether the proposed
18 settlement and plan of distribution are within the range of possible approval and whether notice to
19 the settlement class of its terms and conditions, and the scheduling of a ... final approval hearing,
20 will be worthwhile.” Newberg on Class Actions, Class Actions in State Courts, Preliminary
21 Approval (4th ed.2002) § 13:64.

22 The law favors the settlement of lawsuits, particularly in class actions and other complex
23 cases where substantial resources can be served by avoiding time, expense and rigors of
24 protracted litigation. *Neary v. Regents of Univ. of California* (1992) 3 Cal. 4th 273, 277-81;
25 *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 53; *see also Rebney v. Wells*
26 *Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139 (“Compromise is inherent and necessary in the
27

28 ⁴ See <http://nelp.org/campaign/stopping-misclassification/>; *see also* http://campaign.nelp.org/content/content_issues/category/independent_contractor_misclassification_and_subcontracting

1 settlement process...even if the relief afforded by the proposed settlement is substantially
2 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class
3 settlement because the public interest may indeed be served by a voluntary settlement in which
4 each side gives ground in the interest of avoiding litigation"); *Officers for Justice v. Civil Serv.*
5 *Comm'n* (9th Cir. 1982) 688 F.2d 615, 628 ("It is well-settled law that a cash settlement
6 amounting to only a fraction of the potential recovery does not . . . render the settlement
7 inadequate or unfair").

8 **V. CLASS CERTIFICATION**

9 While a court must certify a class for settlement purposes, "it is well established that trial
10 courts should use different standards to determine the propriety of a settlement class, as opposed
11 to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement
12 cases." *Glob. Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 859
13 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

14 Subject to this "lesser standard of scrutiny," settlement classes are authorized under Cal.
15 Code Civ. P. 382 whenever "the question [in a case] is one of a common or general interest, of
16 many persons, or when the parties are numerous, and it is impracticable to bring them all before
17 the court...." Thus, under California law, a party seeking certification of a class must demonstrate
18 three things: "[1] the existence of an ascertainable and sufficiently numerous class, [2] a well-
19 defined community of interest, and [3] substantial benefits from certification that render
20 proceeding as a class superior to the alternatives." *Brinker Restaurant Corp. v. Superior Court*,
21 (2012) 53 Cal.4th 1004, 1021.

22 **A. The Settlement Class is Ascertainable and Sufficiently Numerous**

23 The settlement proposes the following Settlement Class:

24 **"All current and former 'Ninja' drivers who performed at least one drop-off**
25 **or pick-up anywhere in the United States from June 29, 2011 through the**
26 **Preliminary Approval Date."** Rev. Agreement at ¶ 18(hh).⁵

27 Wash.io maintains the names, email addresses, and physical addresses of each of its

28 ⁵ Wash.io began operations in May, 2013. Metzner Decl. at ¶ 3.

1 Ninjas, and has identified approximately 1,100 Class Members. Metzner Decl. at ¶ 6.

2 Accordingly, the class is both ascertainable and sufficiently numerous. *Sevidal v. Target Corp.*
3 (2010) 189 Cal. App. 4th 905, 919 (“[c]lass members are ‘ascertainable’ where they may be
4 readily identified without unreasonable expense or time by reference to official [or business]
5 records”); *see also Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 934 (class of 42
6 individuals sufficiently numerous).

7 **B. Settlement Class Members Share a Community of Interest**

8 The community of interest requirement embodies three factors: (1) predominant common
9 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
10 (3) class representatives who can adequately represent the class. *Linder v. Thrifty Oil Co.* (2000)
11 23 Cal. 4th 429, 435.

12 **1. Questions of Law and Fact Predominate Over Individual Issues**

13 The predominance inquiry is routinely met in cases where plaintiffs assert wage and hour
14 claims arising from their alleged misclassification as independent contractors. *See, e.g., Bradley v.*
15 *Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1146 [150 Cal.Rptr.3d 268, 281],
16 *as modified on denial of reh'g* (Jan. 8, 2013); *O'Connor v. Uber Technologies, Inc.* (N.D. Cal.,
17 Sept. 1, 2015, No. C-13-3826 EMC) 2015 WL 5138097, *15 *as modified in O'Connor v. Uber*
18 *Technologies, Inc.* (N.D. Cal. 2015) 311 F.R.D. 547; *Dalton v. Lee Publications, Inc.* (S.D. Cal.
19 2010) 270 F.R.D. 555, 565; *Jaimez v. DAIOWS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1301;
20 *Villalpando v. Exel Direct Inc.* (N.D. Cal. 2014) 303 F.R.D. 588, 608. In these cases, Courts have
21 generally found that a uniform right to control (provable, for example, by form contracts, as well
22 as by a defendant’s right to impose standards, rules, and procedures); uniform job responsibilities;
23 and a finding that the putative employees’ job is consistently integral to the defendant’s business,
24 are sufficient bases on which to adjudicate the independent contractor issue on a classwide basis.
25 *Id.* Likewise, the substantive wage and hour claims that flow from such misclassification may be
26 found to be resolvable on classwide basis. *Id.*

27 The same result should follow here, where Wash.io has uniformly classified its Ninjas as
28 independent contractors subject to substantively the same form agreements, where Ninjas are

1 subject to uniform standards that (modifiable at Wash.io’s discretion) that govern the manner and
2 means of their work, and where Ninjas are uniformly an integral part of Wash.io’s business
3 model. Carlson Decl., Exhs. A-E. Accordingly, the Settlement Class meets the predominance
4 requirement of § 382.

5 **2. The Class Representatives Are Typical of the Class**

6 “The typicality requirement is met when the claims of the representative plaintiff arises
7 [sic] from the same course of conduct that gives rise to the claims of the other class members, and
8 where the claims are based upon a similarity of legal theories.” *Hopkins v. De Beers Centenary*
9 *AG* (Cal. Super. Ct., Apr. 15, 2005, No. CGC-04-432954) 2005 WL 1020868, *6 citing *Classen v.*
10 *Weller* (1983) 145 Cal. App. 3d 27, 46.

11 The proposed Class Representatives, like all Class Members, assert the same legal theory
12 of recovery: that they have been allegedly misclassified as independent contractors and have,
13 therefore, been denied the protections of California wage and hour laws. Thus, the claims of the
14 proposed Class Representatives arise from the same course of conduct – alleged misclassification
15 – that gives rise to the claims of the other Class Members. Accordingly, the Class Representatives
16 are typical of all Class Members.

17 **3. The Class Representatives Can Adequately Represent the Class**

18 Similar to the typicality requirement, the adequacy requirement is met if “the class
19 representative's personal claim [is] not [] inconsistent with the claims of other members of the
20 class.” as *Glob. Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 851, 7 Cal.
21 Rptr. 3d 28, 41 (2003).

22 As discussed, the Class Representatives’ personal claims are consistent with the claims of
23 other Class Members, all of whom assert that they have been misclassified by Wash.io as
24 independent contractors. Accordingly, the adequacy of representation – and all other requirements
25 for a settlement class under the “lesser standard of scrutiny” – have been met, and the Court
26 should certify the proposed Settlement Class.

27 //
28

1 **VI. THE SETTLEMENT IS FAIR AND REASONABLE**

2 **A. The Presumption of Fairness**

3 While the burden is on the proponent of the settlement to show the settlement fair and
4 reasonable, “a presumption of fairness exists where: (1) the settlement is reached through arm's-
5 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
6 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
7 objectors is small.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245.

8 The settlement that has been reached, subject to this Court's approval, is the product of
9 tremendous effort and tenacious negotiations by the Parties and their counsel. The settlement was
10 finalized after a full day-long mediation session with Michael Loeb, an experienced mediator of
11 wage-and-hour class actions; and continuing hard fought negotiations over the course of several
12 months following the mediation.

13 As described herein, the parties have conducted significant research, investigation and
14 formal and informal discovery in connection with this case, and have engaged in limited but
15 significant motion practice. Both the Plaintiffs’ firms involved in the case have a great deal of
16 experience in wage and hour class action litigation. Class Counsels’ firms’ have been approved as
17 Class Counsel in numerous other wage and hour class actions. Supp. Carlson Decl. at ¶¶ 51-55;
18 Declaration of Kevin T. Barnes at ¶¶ 2-6, 10-11.

19 **B. The Kullar Factors**

20 In determining whether a class settlement is fair, adequate, and reasonable – and viewed
21 through the prism of the presumption of fairness – the trial court should the strength of plaintiffs’
22 case; the risk, expenses, complexity and likely duration of further litigation’ the risk of
23 maintaining class action status through trial; the amount offered in the settlement; the extent of
24 discovery contemplated and the stage of the proceedings; the experience and views of counsel;
25 the presence of a governmental participant; and the reaction of the class members to the proposed
26 settlement. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The list of factors
27 is not exclusive and the court is free to engage in a balancing and weighing of factors depending
28 on the circumstances of each case. *Wershba*, 91 Cal.App.4th at 245.

1 **1. The Strength of Plaintiffs’ Case**

2 The merits of the underlying class claims are not a basis for upsetting the settlement of a
3 class action[.], [and] [t]he proposed settlement is not to be judged against a hypothetical or
4 speculative measure of what might have been achieved had plaintiffs prevailed at trial. *Id.* at 246.
5 Rather, “[i]n the context of a settlement agreement, the test is not the maximum amount plaintiffs
6 might have obtained at trial on the complaint, but rather whether the settlement was reasonable
7 under all of the circumstances.” *Id.* at 250. Nonetheless, Plaintiffs recognize this Court’s
8 expectations and that *Kullar* instructs that the parties must provide “a meaningful and
9 substantiated explanation of the manner in which the factual and legal issues have been
10 evaluated.” *Kullar*, 168 Cal.App.4th at pp. 132–133.

11 Accordingly, Plaintiffs refer the Court to the Carlson Decl. at ¶¶ 18-44, which discusses,
12 in detail, the nature and magnitude of the claims at issue in this litigation and Plaintiffs’ basis for
13 concluding that the settlement is a reasonable compromise.

14 **2. The Risks of Further Litigation**

15 While Plaintiffs were optimistic that they would succeed in this action, in reaching this
16 settlement, they gave considerable weight to Wash.io’s limited financial means to pay for
17 resolution of Plaintiffs’ claims. Were the parties unable to reach a settlement, and further
18 litigation were to ensue, Wash.io would likely file for bankruptcy, and Class Members would be
19 left with essentially no recovery, and those still working for Wash.io would lose their jobs (and of
20 course would not be reclassified as employees). As stated in *Chatelain v. Prudential-Bache Sec.,*
21 *Inc.* (S.D.N.Y. 1992) 805 F. Supp. 209, 214 (*quoting In re. Warner Communications Sec. Litig.*
22 *(S.D.N.Y. 1985) 618 F. Supp. 735, 746 aff’d, 798 F.2d 35 (2d Cir. 1986)*): “The prospect of a
23 bankrupt judgment debtor down at the end of the road does not satisfy anyone in the use of class
24 action procedures.” *See also In re Critical Path, Inc.* (N.D. Cal. June 18, 2002) 2002 U.S. Dist.
25 LEXIS 26399, *20-21 (“[t]hrough protracted litigation, the settlement class could conceivably
26 extract more, but at a plausible risk of getting nothing.”); *Torrisi v. Tucson Elec. Power Co.* (9th
27 Cir. 1993) 8 F.3d 1370, 1375 (stating “one factor predominates” – Defendants’ financial
28 condition). Notably, Plaintiffs structured the settlement so that if Wash.io’s financial health

1 improves, Class Members will benefit from a higher final payment. *Id.*

2 Plaintiffs also weighed the risks that (1) the Court would determine, on an opposed motion
3 for class certification, that a finder of fact could not resolve the misclassification issue on a
4 classwide basis, (2) the Court would determine that some or all of Plaintiffs' substantive claims
5 were not susceptible to classwide adjudication, (3) that Plaintiffs might lose at trial on the
6 independent contractor issue, (4) that Plaintiffs might lose at trial on some or all of their
7 substantive claims, and (5) that Wash.io would likely appeal any adverse orders. Supp. Carlson
8 Decl. at ¶ 46.

9 Indeed, Wash.io contends that its employment policies and practices did not violate
10 applicable wage and hour laws and that none of Plaintiffs' claims are suitable for class
11 certification because individual issues predominate over common issues on these claims. Wash.io
12 also contends that individualized inquiries preclude class certification because a class action
13 cannot be maintained where the existence of damage, the cause of damage and the extent of
14 damage have to be determined on a case-by-case basis, even if there are some common questions.
15 See *Brinker*, 54 Cal.4th at 1021 (whether common issues predominate turns on whether the
16 theory of recovery advanced by proponents of certification is, as an analytical matter, likely to
17 prove amenable to class treatment). Thus, according to Wash.io, the individualized inquiry could
18 be focused on the unique experiences of each driver.

19 Additionally, Wash.io contends that even if class certification was granted, there is no
20 guarantee of a good outcome for Plaintiff at trial. Wash.io is represented by competent and
21 experienced counsel, and would undoubtedly have raised all of the above arguments, and more, in
22 continued litigation. Despite Plaintiffs' confidence in their ability to prove all claims on a class
23 wide basis, any one of the above defenses and arguments, if decided in favor of Defendant could
24 reduce or even eliminate any potential damage awards.

25 3. The Risks of Maintaining Class Action Status Through Trial

26 As noted, there is the risk of an adverse order regarding an opposed motion for class
27 certification. Additionally, even if Plaintiffs were successful on a motion for class certification,
28 Wash.io would likely argue for decertification on various grounds.

4. The Amount Offered in Settlement

The monetary component of the settlement is, of course, a compromise, though in this case a favorable one given the value of Plaintiffs' claims. Thus, in light of Wash.io's risk of bankruptcy, which Wash.io has stated may be staved off by resolution of this litigation, and the other risks of further litigation, Plaintiffs believe the amount offered is reasonable. Notably, the structure of the settlement provides for an increased contingency payment if Wash.io's financial health improves. Wash.io states that the increased contingency payment is an obtainable – and indeed desirable – goal for the company, as that figure would show that the company is on a healthy financial path. Moreover, the occurrence of the contingency is made more likely by resolution of this action, as investors may be less likely to be scared away from Wash.io by pending litigation. This is particularly so when Wash.io has substantially foreclosed future independent contractor misclassification cases because of its agreement to reclassify its Ninjas.

Further, and perhaps more importantly, Wash.io has agreed to reclassify its Ninjas – a tremendous concession uncommon to settlements involving independent contractor misclassification. This reclassification will provide significant protections and benefits to Wash.io Ninjas, including but not necessarily limited to:

- Entitlement to minimum wage and overtime under federal law;
- Entitlement to numerous protections under California wage and hour law, including reimbursement for work-related expenditures, daily overtime pay, California or local minimum wage, meal and rest periods;
- Protection from discrimination under state law and federal law;
- Eligibility for unemployment benefits;
- Workers' compensation coverage;
- Eligibility for benefits under the Family and Medical Leave Act and California Family Rights Act;
- The right to engage in protected activity under the National Labor Relations Act; and
- Potential benefits under state and local law, including paid sick leave and employer contributions to health care.

1 While the precise dollar value of these protections and benefits would vary, and is difficult
2 to precisely quantify, they will be available to Wash.io Ninjas because of this settlement.

3 **5. The Extent of Discovery Completed and the Stage of Proceedings**

4 This case settled not long before Wash.io would have filed for bankruptcy. Thus, while it
5 is not in a posture as advanced as some cases (though it is further advanced than the many cases
6 that settle immediately after filing), it was essential for the case to settle now or risk class
7 members fighting over scraps in bankruptcy proceedings and, worse yet, losing out on Wash.io's
8 reclassification of its Ninjas as employees.

9 The Parties have conducted significant investigation of the facts and law during the
10 prosecution of this Action, including the formal and informal discovery already described.
11 Plaintiffs have successfully opposed a Motion to Strike Class and PAGA Allegations, and filed a
12 Motion to Compel Further Responses to Interrogatories and Further Production of Documents
13 that was pending at the time the parties reached an agreement in principle.

14 **6. The Experience and View of Counsel**

15 Counsel for the Settlement Class are experienced in wage and hour class actions and
16 believe this settlement is a reasonable compromise given Wash.io's financial health, the value –
17 both monetary and non-monetary – of the settlement, the value of Plaintiffs' claims, and the risks
18 of further litigation. Supp. Carlson Decl. at ¶ 50; Barnes Decl. at ¶ 12. Wash.io's counsel is also
19 experienced in wage and hour class actions, and likewise believe the settlement is a reasonable
20 compromise for the same reasons.

21 **7. The Presence of a Governmental Participant**

22 There are no governmental participants in the case, and the State of California has
23 declined (at least twice) to litigate PAGA claims against Wash.io, once in response to the *Taranto*
24 Plaintiffs' PAGA notice, and once in response to Plaintiff Luqman's PAGA notice. Supp. Carlson
25 Decl. at ¶ 48. The LWDA has been notified of the settlement pursuant to the July 1, 2016
26 amendments to the PAGA statutes. *Id.*

27 **8. The Reaction of Class Members to the Proposed Settlement**

28 Plaintiffs will inform the Court of Class Members' reaction to the settlement at Final

1 Approval, following Notice to the Class. Supp. Carlson Decl. at ¶ 49.

2 **C. Other Terms of the Settlement Support Preliminary Approval**

3 **1. The Scope of the Release is Appropriate**

4 Releases and class settlements should be approved when claims released by unnamed
5 class members are limited to those related to the conduct alleged in the complaint. *See Rodriguez*
6 *v. W. Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 957 (affirming settlement that provided for
7 “release of all claims...related to the conduct alleged in the complaint”); *see also Howard v.*
8 *America Online Inc.* (9th Cir.2000) 208 F.3d 741, 747 (enforcing release that “bar[red] claims
9 that ‘ar[o]se out of or [we]re related to the matters referred to’ in the complaint”); *Greko v. Diesel*
10 *U.S.A., Inc.* (N.D. Cal. Apr. 26, 2013) 2013 WL 1789602, *6 (approving release of claims
11 “arising from, or related to, the same facts alleged in or that reasonably could have been
12 included” in the complaint); *Bond v. Ferguson Enterprises, Inc.* (E.D. Cal. June 30, 2011) 2011
13 WL 2648879, *3 (approving release of “All claims, demands, rights, liabilities, and causes of
14 action, whether brought directly, representatively, or in any capacity, that were or could have
15 been asserted in the Lawsuit based upon the facts alleged therein”).

16 The scope of the release here follows the above parameters, as it is limited to claims that
17 were or could have been pled based on the factual allegations in this action, including all claims
18 reasonably related to the claims asserted in the cases arising from independent contractor
19 misclassification. Claims unrelated to misclassification – *e.g.*, claims for discrimination, are not
20 released by this settlement. Claims that arise against Wash.io post-preliminary approval, even
21 misclassification-based claims, are not likewise not released (nor could they be released).

22 **2. The Notice Plan is Reasonable**

23 The notice given to a class must fairly apprise class members of the terms of the proposed
24 compromise and of the options open to dissenting class members. *Wershba*, 91 Cal.App.4th at
25 251–252. The purpose of a class notice in the context of a settlement is to give class members
26 sufficient information to decide whether they should accept the benefits offered, opt out and
27 pursue their own remedies, or object to the settlement. *Id.* As a general rule, class notice must
28 strike a balance between thoroughness and the need to avoid unduly complicating the content of

1 the notice and confusing class members. *Id.*

2 The proposed notice here is easy to read and includes all information necessary for Class
3 Members to decide whether to be part of the settlement, opt out, or object. Class Members will
4 receive the notice by email at the email addresses they provided to Wash.io as part of Wash.io's
5 hiring process, and at which they received notifications from Wash.io. In the unlikely event that
6 an email is returned the Settlement Administrator as undeliverable, it will be sent to the Class
7 Member's last known address on file with Wash.io. Plaintiffs believe this notice plan is an
8 efficient, effective, and cost-efficient way to provide notice of the settlement to Class Members.
9 *See Cotter v. Lyft, Inc.*, Case No. 13-cv-04065-VC (N.D. Cal. 2016), Dkt. No. 256 (approving
10 similar notice plan with respect to members of Settlement Class of Lyft drivers).

11 **3. The Plan of Allocation is Reasonable**

12 An allocation formula should, Lastly, "to the extent feasible, the plan should provide class
13 members who suffered greater harm and who have stronger claims a larger share of the
14 distributable settlement amount. *Hendricks v. StarKist Co.* (N.D. Cal. July 23, 2015) 2015 WL
15 4498083, *7 (citing cases). However, "courts recognize that an allocation formula need only have
16 a reasonable, rational basis, particularly if recommended by experienced and competent counsel."
17 *Id. citing Vinh Nguyen v. Radiant Pharm. Corp.* (C.D.Cal. May 6, 2014) 2014 WL 1802293, *5 .

18 Here, the allocation formula is miles-based, and, therefore, Class Members who worked
19 the most for Wash.io will receive proportionally higher payments. California Class Members will
20 also receive larger payments than Class Members who have not worked for Wash.io in California
21 because of the uncertainty surrounding the extraterritorial application of California law under
22 these circumstances, as discussed in the Court's order regarding Wash.io's motion to strike. Thus,
23 as required, the plan provides Class Members who suffered greater harm and who have stronger
24 claims a larger share of the settlement fund.

25 **4. The Cy Pres Beneficiary is Appropriate**

26 Cal. Code. Civ. P. § 384 provides that residual funds in a class settlement should be
27 distributed, to the extent possible, in a manner designed either to further the purposes of the
28 underlying causes of action, or to promote justice for all Californians.

1 The parties have agreed that any residual funds from the settlement should be distributed
2 to NELP, an organization that fights for reforms on behalf of workers, including workers
3 potentially misclassified as independent contractors. While NELP is a national organization, its
4 efforts specifically focus on the “gig economy,” which, of course, encompasses Wash.io and
5 companies like it, and which is ubiquitous in California. *See* [http://nelp.org/blog/3-new-studies-](http://nelp.org/blog/3-new-studies-of-gig-economy-workers-rights)
6 *of-gig-economy-workers-rights*. Further, some members of the Settlement Class do not reside in
7 California, making a national organization an appropriate choice under these circumstances.
8 Additionally, Plaintiffs note that NELP has been approved as a *cy pres* beneficiary in other
9 litigation. *E.g., Plotz v. NYAT Maintenance Corp.* (S.D.N.Y., Feb. 6, 2006, No. 98 CIV.
10 8860(RLE)) 2006 WL 298427, *2.

11 **5. Note Regarding Proposed Attorneys’ Fees and Class Representative**
12 **Enhancements**

13 Plaintiffs will brief the fairness of the proposed attorneys’ fees and class representative
14 enhancements in connection with their Final Approval papers, but preliminarily note that the
15 requests for up thirty percent of the gross settlement for attorneys’ fees and \$5,000 per each of the
16 five named Plaintiffs are in line with California precedent. *See Laffitte v. Robert Half Intern. Inc.*
17 (Cal., Aug. 11, 2016, No. S222996) 2016 WL 4238619, *14 (approving courts awarding
18 attorneys’ fees based on percentage of common fund, with optional lodestar cross-check based on
19 summary of time spent); *see also In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545,
20 558 (“fee awards in class actions average around one-third of the recovery”); *see also Hopson v.*
21 *Hanesbrands Inc.* (N.D. Cal., Apr. 3, 2009, No. CV-08-0844 EDL) 2009 WL 928133, *10
22 (approving \$5,000 award to one member of 217 member class from \$408,420 settlement amount
23 and noting “[i]n general, courts have found that \$5,000 incentive payments are reasonable”).

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1 **VII. CONCLUSION**

2 Based upon the foregoing, and the papers filed in support of this Motion, Plaintiffs
3 respectfully requests that the Court grant the Motion and enter the proposed Order.
4

5 Dated: August 23, 2016

6 LICHTEN & LISS-RIORDAN, P.C.
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