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11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**

13 HAROLD JONES, et al.,

14 Plaintiffs,

15 vs.

16 CERTIFIEDSAFETY, INC.

17 Defendants.

Lead Case No. 3:17-cv-02229-EMC
 Consolidated with 3:17-cv-03892-EMC (*Crummie*)
 Related to: 3:18-cv-04379-EMC (*Ross*)
 3:19-cv-01338-EMC (*Jones II*)
 3:19-cv-01380-EMC (*Jones III*)
 3:19-cv-01381-EMC (*Jones IV*)
 3:19-cv-01427-EMC (*East*)
 3:19-cv-01428-EMC (*Jones V*)

**DECLARATION OF CAROLYN HUNT
 COTTRELL IN SUPPORT OF PLAINTIFFS’
 MOTION FOR PRELIMINARY APPROVAL
 OF CLASS AND COLLECTIVE ACTION
 SETTLEMENT**

Date: January 2, 2020
 Time: 1:30 p.m.
 Courtroom: 5 (17th Floor)
 Judge: Honorable Edward M. Chen

Jones Complaint filed: April 21, 2017

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Attorneys for Plaintiffs and the Putative Classes and Collective

1 I, Carolyn Hunt Cottrell, hereby declare as follows:

2 1. I am an attorney at law duly licensed and in good standing to practice law in the
3 courts of California (No. 166977) and am admitted to practice law before this Court, the United
4 States District Court Northern District of California.

5 2. I am a partner at the law firm of Schneider Wallace Cottrell Konecky Wotkyns LLP
6 (“SWCKW”). SWCKW specializes in class, collective, and PAGA litigation in state and federal
7 court.

8 3. I am lead counsel of record for Harold Jones, Tierre Crummie, Genea Knight,
9 Marcellous Ross, and Michael East, on behalf of themselves and all others similarly situated
10 (“Plaintiffs”), in the above-captioned cases. I submit this declaration in support the Parties’ Joint
11 Supplemental Brief in Support of Plaintiffs’ Motion for Preliminary Approval of Class and
12 Collective Action Settlement. I am familiar with the file, the documents, and the history related to
13 these cases. The following statements are based on my personal knowledge and review of the files.
14 If called to do so, I could and would testify competently thereto.

15 4. To calculate the PAGA penalties owed to California Safety Attendants, Plaintiffs’
16 counsel used the number of Safety Attendants¹ and the number of pay periods within the PAGA
17 limitations period. Plaintiffs then applied assumptions about California Labor Code violation rates
18 and the amount of penalties that would be imposed per violation to arrive at an estimate of
19 Defendant’s total PAGA exposure.

20 5. Ahead of the April 23, 2019 mediation, Defendant’s counsel provided updated class
21 data that included, *inter alia*, the total number of California Safety Attendants from April 21, 2013
22 through April 15, 2019 and the number of pay periods that they worked. This data showed that
23 there were 1,245 Safety Attendants who worked for CertifiedSafety in California during this
24 timeframe, and these individuals worked a total of 21,367 pay periods.

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¹ As in Plaintiffs’ preliminary approval motion, Plaintiffs use the term Safety Attendants to refer to CertifiedSafety’s Safety Attendants and Safety Foremen, the two positions that are within the proposed Class and Collective definitions.

1 6. To provide an accurate damages and penalty analysis with their motion, Plaintiffs
2 extrapolated this data so that it extended to November 22, 2019, the date of filing of the
3 preliminary approval motion. With extrapolation, Plaintiffs estimated that there were 1,371
4 California Safety Attendants from April 21, 2013 through November 22, 2019, and these
5 individuals worked an estimated 23,528 pay periods.

6 7. Next, Plaintiffs further estimated the number of Safety Attendants and the number of
7 pay periods during the narrower timeframe of the PAGA limitations periods. To do so, Plaintiffs'
8 counsel assumed that the Safety Attendants and pay periods were evenly distributed from April 21,
9 2013 through November 22, 2019. Plaintiffs applied a one-year look-back period for the PAGA
10 claims (from the April 21, 2017 filing date of Plaintiffs' initial complaint), as the statute of
11 limitations on a PAGA claim is one year. Thus, Plaintiffs calculated, on a proportional basis, the
12 number of California Safety Attendants and the number of associated pay periods from April 21,
13 2016 through November 22, 2019. Plaintiffs' resulting estimates for the number of California
14 Safety Attendants and pay periods per year in this timeframe are as follows: 151 Safety Attendants
15 and 2,594 pay periods in 2016, 217 Safety Attendants and 3,727 pay periods in 2017, 217 Safety
16 Attendants and 3,727 pay periods in 2018, and 134 Safety Attendants and 2,298 pay periods in
17 2019. In total, Plaintiffs estimated that 719 California Safety Attendants worked 12,346 pay
18 periods during this timeframe.

19 8. Plaintiffs then assumed that they could prove three PAGA violations per every pay
20 period for every one of these employees from 2016 through 2018, and two PAGA violations per
21 every pay period for every one of these employees in 2019. For 2016 through 2018, Plaintiffs
22 assumed that they could prove one violation each for (1) off-the-clock work/unpaid overtime, (2)
23 meal and rest break violations, and (3) unreimbursed business expenses. For 2019, Plaintiffs
24 assumed that they could prove one violation each for (1) off-the-clock work/unpaid overtime, and
25 (2) unreimbursed business expenses. Plaintiffs' counsel deducted the 2019 meal and rest break
26 violations from this analysis because CertifiedSafety began paying premium pay for missed meal
27 and rest breaks.

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1 9. Plaintiffs assumed that each Safety Attendants is owed \$100 per first pay period
2 violations, and \$200 for all subsequent pay period violations, for each of these PAGA violations.
3 This is an aggressive assumption, as there is some authority that the enhanced “subsequent
4 violation” penalty may be assessed only after the Labor Commissioner or a court rules that the
5 employer’s conduct is in violation of the Labor Commissioner or a court rules that the employer’s
6 conduct is in violation of the Labor Code. Plaintiffs also did not incorporate any discretionary
7 reduction by the Court, even though the PAGA statute enables the Court to make such a reduction.

8 10. Plaintiffs did not “stack” derivative violations, such as failure to provide accurate,
9 itemized wage statements and waiting time penalties.

10 11. With these inputs and assumptions, Plaintiffs calculated the PAGA penalties as
11 follows. For 2016, Plaintiffs multiplied the number of Safety Attendants in the year (151) by the
12 number of PAGA violations per pay period (3) by the \$100 first pay period penalty amount. In this
13 calculation, the number of Safety Attendants in the year is used to approximate the number of first
14 pay periods in the year. The resulting amount (\$45,340) is the estimated penalties for first pay
15 period violations in 2016. Also for 2016, Plaintiffs multiplied the number of subsequent pay
16 periods (2,594 minus 151) by the number of PAGA violations per pay period (3) by the \$200
17 subsequent pay period penalty amount. The resulting amount (\$1,465,608) is the estimated
18 penalties for subsequent pay period violations in 2016. Adding these amounts together yields the
19 total estimated PAGA penalties for 2016 (\$1,510,948). Plaintiffs used the same calculation to
20 estimate PAGA penalties for 2017 (\$2,171,245), 2018 (\$2,171,245), and 2019 (\$892,292).
21 Totaling all of these amounts yields Plaintiffs’ total estimate for Defendant’s PAGA exposure of
22 \$6,745,730.

23 12. On January 10, 2018, CertifiedSafety’s Rule 30(b)(6) designee, Vice President of
24 Human Resources Steve Hines, testified that Safety Attendants are required to complete
25 uncompensated pre-employment training to be eligible to work for CertifiedSafety. Attached
26 hereto as **Exhibit 1** are true and correct copies of excerpts of the deposition of Mr. Hines. VP
27 Hines testified that these trainings are held in three locations: Benicia, California, League City,
28 Texas, and Gonzales, Louisiana.

1 13. Of these three jurisdictions, Plaintiffs assert a Rule 23 class only for Safety
2 Attendants who worked in California; Plaintiffs do not assert Rule 23 classes for Texas or
3 Louisiana. CertifiedSafety does not provide this training in the other states for which Plaintiffs
4 assert Rule 23 classes (Washington, Minnesota, Illinois, Ohio, and Alaska).

5 14. The Parties have proposed the uncashed check funds “be tendered to the State
6 Controller’s Office Unclaimed Property Division (or similar/equivalent state agency) for the state
7 where the Participating Individual most recently worked for CertifiedSafety.” As Safety Attendants
8 worked for CertifiedSafety in numerous different states across the country, these funds may be
9 transferred to the unclaimed property divisions of several states.

10 15. A review of their websites confirms that monies tendered to these programs are held
11 indefinitely and can be claimed at any time:

- 12 • In California, the State Controller’s Unclaimed Property Division holds unclaimed property
13 indefinitely. According to the Division, “there is no time limit for filing a claim. You can
14 file a claim at any time after the Unclaimed Property has been transferred to the State
15 Controller’s Office.” *See* California State Controller’s Unclaimed Property Division
16 website, https://sco.ca.gov/upd_faq_consumer_claim_about_q10.html.
- 17 • In Washington, there is no time limit for filing a claim and rightful owners or their heirs
18 can claim property reported since 1955. *See* Washington Department of Revenue’s
19 Unclaimed Property Section website, <https://ucp.dor.wa.gov/aboutUCP.aspx>.
- 20 • Minnesota also appears to hold unclaimed property indefinitely. According to the
21 Minnesota Commerce Department Unclaimed Property Program, “the Department is
22 responsible for safeguarding the funds or property until claimed by the rightful owners or
23 heirs.” *See* Minnesota Commerce Department Unclaimed Property Program website,
24 <https://mn.gov/commerce/consumers/your-money/find-missing-money/>.
- 25 • Illinois holds unclaimed property indefinitely. According to the Illinois State Treasurer's
26 Unclaimed Property Division, “[t]he State of Illinois serves as a custodian of the assets and
27 never takes ownership of them. Generations from now, a family member could claim your
28 property with the right paperwork.” *See* Illinois State Treasurer's Unclaimed Property

1 Division website, <https://icash.illinoistreasurer.gov/app/faq-general>.

- 2 • Ohio holds unclaimed property indefinitely. According to the Ohio Department of
3 Commerce Division of Unclaimed Funds, “the funds are held until the rightful owner or his
4 or her heir claims them.” *See* Ohio Department of Commerce Division of Unclaimed Funds
5 website, <https://www.com.ohio.gov/unfd/ClaimantFAQ.aspx>.
- 6 • The State of Alaska's Unclaimed Property program does not set forth any time limitations
7 or deadlines to file claims for unclaimed property. *See* State of Alaska's Unclaimed
8 Property program website, <https://treasury.dor.alaska.gov/Unclaimed-Property.aspx>.
- 9 • In Texas, funds remain with the Texas Comptroller’s State of Texas Unclaimed Property
10 Program indefinitely. “There is no statute of limitations for unclaimed property. Funds
11 reported will remain here indefinitely until returned to their rightful owner.” *See* Texas
12 Comptroller’s State of Texas Unclaimed Property Program website,
13 <https://claimitexas.org/app/faq-ucp>.

14 16. Until receiving the Court’s Order re Supplemental Briefing and/or Evidence (ECF
15 210), the Parties had not discussed using a cy pres beneficiary as an alternative to uncashed check
16 funds going to the state unclaimed property programs.

17 17. As the Safety Attendants are a highly mobile group of employees who regularly
18 travel around the country for their work, the Parties sought to maximize the opportunity for these
19 workers to obtain their settlement allocations beyond the check-cashing deadline. However, if the
20 Court prefers that the uncashed check funds are transferred to cy pres, the Parties are amenable to
21 proposing an appropriate cy pres recipient to the Court and amending the Settlement Agreement to
22 effect this change.

23 18. Plaintiff asked CertifiedSafety’s Rule 30(b)(6) designee, VP Hines, about issues
24 related to the alleged joint employer relationship. VP Hines testified that the Refineries controlled
25 multiple aspects of Safety Attendants and Safety Foremen’s work, including their rate of pay,
26 schedules, shifts, hours worked, timekeeping, reimbursements, training, and safety protocols.

27 19. In particular, VP Hines testified that rates of pay, shifts, and hours worked by the
28 Safety Attendants are dictated by the Refineries. VP Hines testified that the Refineries also

1 determine the per-diem amount that is reimbursed to Safety Attendants for travel expenses for out-
2 of-town assignments.

3 20. VP Hines further testified that labor budgets and scope of the work performed by
4 Safety Attendants are dictated by the Refineries. He testified that the Refineries determine the
5 work schedules and staffing levels for Safety Attendants. He stated that shift times, job duties,
6 timekeeping process, and lunch break timing are all set by the Refineries. VP Hines testified that
7 the Refineries require Safety Attendants to use their own timekeeping systems, in the form of the
8 Refineries' badging systems. He also testified that the Refineries determine the safety procedures
9 to be followed on each job, and the amount and level of equipment and personal protective gear
10 required.

11 21. Taken together, CertifiedSafety has admitted that the Refineries have direct control
12 over the wages, hours, and working conditions for the Safety Attendants.

13 22. Additionally, CertifiedSafety has produced Bates-stamped documents that contain
14 pre-assignment instructions for specific assignments for the Named Plaintiffs. A true and correct
15 copy of such a document, Bates-stamped CertifiedSafety/Jones 000147, is attached hereto as
16 **Exhibit 2**. Plaintiffs maintain that these documents show that the Refineries control where Safety
17 Attendants are to park, the precise route they are to use to traverse the refinery location, and the
18 location where they are to report.

19 23. At the time of mediation, the Parties were involved in extensive and ongoing meet
20 and confer efforts regarding Plaintiffs' formal discovery requests. Plaintiffs anticipated that these
21 requests would have adduced additional evidence regarding their joint employer claims of liability
22 against the Refineries.

23 24. At the time of settlement and the preliminary approval motion, Plaintiffs had not yet
24 conducted formal or informal discovery directly with any Refinery Defendant.

25 25. However, Plaintiffs acknowledge that discovery with CertifiedSafety and later
26 discovery taken directly against the Refineries may have shown that the level of control exercised
27 by the Refineries varies from company to company, location to location, and assignment to
28 assignment, and may have contradicted the testimony of VP Hines. Plaintiffs acknowledged a

1 significant risk that, in the end, the Court would find for the Defendants on the joint employer
2 issue, at the summary judgment or trial phase of the litigation

3 26. The overall lodestar for Schneider Wallace Cottrell Konecky Wotkyns LLP
4 (“SWCKW”) across all of the consolidated and related actions is currently \$1,664,249, based on
5 2,631 hours of attorney and staff labor. This is comprised of \$1,491,229 in aggregate lodestar for
6 SWCKW attorneys, based on 2,060 attorney hours, as well as \$173,020 in aggregate lodestar for
7 SWCKW staff members, based on 571 staff hours.²

8 27. SWCKW’s lodestar is calculated based on hourly rates for attorneys ranging from
9 \$600 to \$925 per hour, and hourly rates for staff members ranging from \$200 to \$400 per hour.

10 28. A true and correct summary of the hours billed by all SWCKW attorneys and staff in
11 each of the actions and their hourly rates is attached hereto as **Exhibit 3**.

12 29. SWCKW has estimated the number of hours spent on major litigation tasks, across
13 all of the consolidated and related actions, as follows:

- 14 • Case and Document Administration: 305.7 hours
- 15 • Case Management Conferences: 50.1 hours
- 16 • Case Organization, Planning, and Strategy (including mediation efforts): 209.5 hours
- 17 • Class Outreach and Contact: 794.05 hours
- 18 • Communications with Opposing Counsel: 28.6 hours
- 19 • Depositions: 90.11 hours
- 20 • Discovery (Non-Deposition): 64.82 hours
- 21 • Pleadings and Motions: 749.37 hours
- 22 • Miscellaneous Research: 68.6 hours
- 23 • Settlement: 235.9 hours
- 24 • Miscellaneous: 37.6 hours

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27 ² The lodestar amounts presented here do not include any billing or hours for attorneys or staff from
28 Lawyers for Justice, PC, who filed the *Crummie* action and who have contributed to the combined
litigation efforts.

1 30. Based on the current SWCKW aggregate lodestar of \$1,664,322, Plaintiffs’ counsel
2 requests a multiplier of 1.26 with the requested fee award of \$2,100,000.

3 31. The SWCKW lodestar will increase as a result of arguing the preliminary approval
4 motion, overseeing the notice of settlement process, drafting final approval papers, arguing the
5 final approval motion, overseeing settlement administration, and fielding inquiries from Safety
6 Attendants. As the SWCKW lodestar increases, the multiplier amount will decrease.

7 32. The Parties have agreed to use Heffler Claims Group (“Heffler”) to administer the
8 Settlement, for total fees and costs currently estimated at \$66,000.

9 33. Plaintiffs’ counsel solicited quotes from three settlement administrators, setting forth
10 the parameters and requirements for administration: the number of Safety Attendants in the case,
11 the allocation and weighting scheme, dissemination of notice via U.S. Mail and email, creation of a
12 settlement website, establishment of a toll-free call center to field Class Member inquiries, and tax
13 reporting in an estimated 20 states.

14 34. Plaintiffs’ counsel requested settlement administration estimates from Heffler, ILYM
15 Group, Inc. (“ILYM”), and JND Legal Administration (“JND”). ILYM provided the lowest
16 estimate, at \$45,000, and JND’s estimate was \$46,238.00. Heffler’s estimate was \$66,000.

17 35. I have worked with virtually all of the major settlement administration firms
18 throughout their history, as have the other Partners at SWCKW.

19 36. In particular, I used Heffler for administration of a \$5 million wage and hour class
20 action settlement in *Asalati v. Intel Corp.* (Santa Clara Superior Court. Case No. 16cv302615),
21 which was paid in December 2018. I am also currently working with Heffler on a large FLSA
22 notice and opt-in administration project for a FLSA action against a major retailer. SWKWCW is
23 working with Heffler on settlement administration for *Hose v. Washington Inventory Settlement, et*
24 *al.* (S.D. Cal., Case No 3:14-cv-02869-WQH-AGS) (FLSA collective action), and worked with
25 Heffler previously this year for settlement administration for *Shaw, et al. v. AMN Services, LLC, et*
26 *al.* (N.D. Cal., Case No. 3:16-cv-02816-JCS) (California Labor Code class action). Additionally,
27 SWCKW previously worked with Heffler approximately two years ago for FLSA notice and opt-in
28 administration for *Julian v. Swift Transportation Company Incorporated, et al.* (D. Ariz., Case No.

1 2:16-cv-00576-ROS). Based on my experience working with numerous settlement administrators,
2 my Partners and I have found Heffler to be the most proficient.

3 37. In my experience, many settlement administrators regularly make errors and are not
4 properly resourced to handle a large influx of class member inquiries. However, my Partners and I
5 recognized that Heffler has consistently performed its duties at a high level with minimal errors.

6 38. Because the instant Settlement is complex, involving detailed calculations of
7 workweeks across multiple jurisdictions that are highly individualized to each Safety Attendant
8 and a complex weighting formula, we selected Heffler because, in our experience and opinion, it is
9 most likely to successfully perform the administration duties.

10 39. The Parties agree that CAFA notice is required here, and that the notices will be
11 made by CertifiedSafety after the Court grants preliminary approval. The notices will include the
12 contents required by 28 U.S.C. § 1715(b), and will be made to the Unites States Attorney General
13 and the Labor Commissioners and/or Attorneys General for each state in which the Rule 23 Class
14 Members reside.

15 40. Plaintiffs have referred to a recent hybrid FLSA/Rule 23 settlement in their
16 preliminary approval motion, *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-
17 00251-VC (N.D. Cal. Oct. 23, 2019). That action involved technicians who install cable television
18 services, and like the instant case, it involved FLSA claims, state law claims and classes for
19 various states, and claims of joint employer liability against the entity that contracted with the
20 “direct” employer to obtain the services of the technicians. The settlement in *Soto* was finally
21 approved by Judge Vince Chhabria on October 23, 2019.

22 41. *Soto* involved approximately 4,508 settlement class members, and there were no opt-
23 outs or objections to the settlement. The notice of settlement was disseminated via U.S. Mail and
24 email, and the Parties created a settlement website. Class members did not have to submit a claim
25 form to participate in the settlement. The average payment to each settlement class member was
26 approximately \$1,027 and the highest payment was approximately \$8,273.

27 42. In *Soto*, the 180-day cash cashing deadline has not yet arrived, but Plaintiffs’ counsel
28 do not anticipate that there will be a significant amount of uncashed check funds, due to high

1 interest in the case and class member satisfaction with the recovery. In the event that uncashed
2 check funds are less than \$75,000, these monies will revert as cy pres to the University of
3 California at Berkeley's Institute for Research on Labor and Employment. If the funds exceed
4 \$75,000, there will be a second distribution where the uncashed check funds will be distributed on
5 a pro rata basis to those class members who cashed their checks.

6 43. Plaintiffs' counsel in *Soto* were awarded \$2,500,000 (one-third of the gross
7 settlement amount) in attorney's fees, which were split between SWCKW and co-counsel Berger
8 Montague PC. The settlement administration costs to settlement administrator CPT Group, Inc.
9 were \$40,000. The administration costs were significantly less than those in the instant case
10 primarily because the *Soto* class members worked in approximately six states, while the Safety
11 Attendants at issue here have worked for CertifiedSafety in an estimated 20 states. As tax reporting
12 is completed by the settlement administrator and required for each state where Class Members
13 worked, the tax reporting costs are much higher in the instant case. Additionally, the *Soto*
14 settlement involved two Rule 23 classes (in addition to the FLSA collective) while the instant
15 settlement involves six Rule 23 classes (in addition to the FLSA collective), resulting in a more
16 complex weighting formula and calculation requirements.

17 44. Plaintiffs have incorporated the Court's suggested changes to the Class and
18 Collective Notices. The revised Class, Collective, and Class/Collective notices are attached hereto
19 as **Exhibits 4-6** (in clean format) and **Exhibits 7-9** (in redline format), respectively.
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21 I declare under penalty of perjury under the laws of the United States that the foregoing is
22 true and correct. Executed on this 19th day of December, 2019, in Emeryville, California.
23

24 /s/ Carolyn Hunt Cottrell
25 Carolyn Hunt Cottrell
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