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9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 RICHARD HOSE, on his own behalf,  
12 and on behalf of all others similarly  
13 situated,

14 Plaintiffs,

15 vs.

16 WASHINGTON INVENTORY  
17 SERVICE, INC., d/b/a WIS  
18 INTERNATIONAL, a California  
19 corporation, RETAIL SERVICES WIS,  
20 CORPORATION, a Delaware  
21 Corporation; and CENTRE LANE  
22 PARTNERS, LLC, a New York Limited  
23 Liability Company.

24 Defendants.

Case No. 14-cv-2869 WQH (AGS)

**DECLARATION OF JOSHUA G.  
KONECKY IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF  
COLLECTIVE ACTION  
SETTLEMENT**

Date: December 2, 2019

**NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT**

1 I, Joshua G. Konecky, declare as follows:

2 1. I am an attorney duly licensed to practice law in the State of California and  
3 counsel of record for Plaintiffs in the above-captioned case. I am familiar with the file,  
4 the documents, and the history related to this case. The following statements are based  
5 on my personal knowledge and review of the files and, if called on to do so, I could and  
6 would testify competently thereto. I am submitting this Declaration in support of  
7 Plaintiffs’ motion for preliminary approval of the proposed collective action settlement  
8 in this case.

9 **CASE BACKGROUND AND PROCEDURAL HISTORY**

10 *Plaintiffs’ Claims and Litigation Risk at the Time of Filing*

11 2. This case alleged that that WIS’s timekeeping and compensation policies  
12 resulted in the systematic underreporting of hours of, and corresponding underpayment  
13 of wages to, WIS’s Inventory Associates. It further alleged that WIS failed to  
14 compensate employees for all the time they spent traveling with equipment between  
15 WIS meet sites and inventory sites in company transportation. Complaint (Dkt. 1) ¶¶ 1-  
16 4, 15-81; Third Amended Complaint (“TAC”) (Dkt. 194) ¶¶ 1-5, 28-58.

17 3. The named Plaintiff, Richard Hose, first brought these claims to our attention  
18 in November 2014, when he contacted our firm to ask for legal advice regarding the  
19 policies and practices he worked with during his employment with WIS. After  
20 conducting our initial investigation, we were confident about the merits of the off-the-  
21 clock claims and that class-wide evidence would support the “pattern and practice”  
22 claims. At the same time, bringing a class action case based on pattern and practice  
23 allegations carried significant risk for our firm. Obtaining class certification of a pattern  
24 and practice claim—even when meritorious—is difficult, in part because of an absence  
25 of facially unlawful policies. *See, e.g., Civil Rights Education and Enforcement Center*  
26 *v. Hospitality Properties Trust*, 867 F.3d 1093, 1104 (9th Cir. 2017) (citing *Nordstrom*  
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1 v. *Ryan*, 762 F.3d 903, 911 (9th Cir. 2014)). We also faced the risk, post-certification,  
2 that we would not be able to prove liability on the merits across the collective.

3 4. Another component of Plaintiffs’ minimum wage and overtime claims was the  
4 legal challenge to Defendants’ policy of not paying for the first hour of travel between  
5 the WIS meeting sites and the WIS inventory sites on the basis that this was an ordinary  
6 commute. We maintained in our pleadings and in the evidence we gathered that the  
7 ordinary commute was really the time the Inventory Associates spent traveling between  
8 their homes and the WIS meeting sites, not between the WIS meeting sites and the WIS  
9 inventory sites. We also noted that the travel was such an integral part of the day and  
10 that it included substantial time waiting for the transportation to be ready, such that it  
11 was unfair, and contrary to law, to deduct an hour each way as a so-called commute  
12 time, particularly when the employees made so close to the minimum wage to begin  
13 with. Nonetheless, Defendants strongly maintained that guidance from the Department  
14 of Labor and other district courts validated their policies. While we countered that  
15 Defendants’ authorities were distinguishable, we nonetheless understood that this claim  
16 carried a fair degree of risk and uncertainty.

17 5. Despite these challenges, we believed in the claims and stuck with them for  
18 nearly five years of protracted litigation and difficult negotiations.

19 *Resolution of the Pleadings and Pre-Certification Discovery*

20 6. On February 2, 2015, WIS filed a motion to dismiss the Complaint for failure  
21 to state a claim under Federal Rule 12(b)(6), based on then-recent authority *Landers v.*  
22 *Quality Commc’ns, Inc.*, 771 F.3d 638 (9th Cir. 2015), which established a heightened  
23 pleading standard for FLSA claims. (Dkt. 5). The Court granted Defendants’ motion  
24 without prejudice in light of *Landers*, and directed Plaintiffs to file an amended  
25 complaint. *See* Order (Dkt. 13). On April 17, 2015, we filed a motion for leave to file  
26 the First Amended Complaint (“FAC”), (Dkt.17), which the Court granted.

1 7. Following resolution of the pleadings, the parties engaged in early stage  
2 discovery. In the summer of 2015, Plaintiffs served Requests for Production of  
3 Documents and Interrogatories on Defendants, focused on issues relevant to collective  
4 action certification, such as Defendants' timekeeping and compensation policies and  
5 procedures. The Parties exchanged initial disclosures on October 5, 2015. In the same  
6 timeframe, Defendants served Requests for Production on Named Plaintiff Richard  
7 Hose. Thereafter, Mr. Hose produced 790 pages of documents.

8 8. After meet and confer, WIS produced policy and procedure documents, as well  
9 as other relevant documents. However, a dispute arose regarding whether and to what  
10 extent WIS was obligated to search for and produce records of complaints made by  
11 members of the putative collective regarding pay and timekeeping issues. On November  
12 20, 2015, Plaintiffs moved to compel production of the complaint records, *see* Mtn.  
13 (Dkt. 49), which the court granted. (Dkt. 56).

14 9. On November 18, 2015, Plaintiffs took the deposition of WIS's corporate  
15 designee witness pursuant to Rule 30(b)(6), Mark Hubbard. WIS took the deposition of  
16 Mr. Hose on January 26, 2016.

17 *Motion for Conditional Certification and First Motion to Compel Arbitration*

18 10. On December 4, 2015, WIS moved to compel arbitration of 13 of the  
19 approximately 33 employees who had opted-in to the case before the Court's ruling on  
20 Plaintiffs' motion for conditional certification. (Dkt. 57). Plaintiffs opposed the motion  
21 on contract formation grounds, contesting the validity of the electronic signatures. *See*  
22 *Ps' Opp.* (Dkt. 72). The parties also conducted additional discovery and submitted  
23 supplemental briefing addressing the evidentiary issues arising from the electronic  
24 signature dispute. Thereafter, the Court held an evidentiary hearing regarding WIS's  
25 procedures for gathering the electronic signatures. *Id.*

26 11. In the meantime, on December 14, 2015, Plaintiffs moved for leave to file a  
27 proposed Second Amended Complaint ("SAC"), which sought to add common law  
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1 claims for nonpayment of wages, based on a breach of contract theory. (Dkt. 58). On  
2 March 4, 2016, the Court granted Plaintiffs' motion. (Dkt.81).

3 12. On January 11, 2016, Plaintiffs moved to facilitate notice of this case to the  
4 putative collective, and for conditional certification pursuant to 29 U.S.C. § 216(b).  
5 (Dkt. 62). We supported Plaintiffs' motion with the deposition testimony of WIS's  
6 corporate designee witness, the sworn declarations of several Inventory Associates, and  
7 WIS's company documents produced in discovery.

8 13. While the motion to compel arbitration and motion for conditional certification  
9 were pending, the parties conducted further discovery on the merits of Plaintiffs' claims.  
10 The parties served additional sets of written discovery, with WIS serving requests for  
11 production on all of the individuals who had opted in to the action prior to conditional  
12 certification. The parties also negotiated a protocol for conducting searches of  
13 Defendants' electronically stored information (ESI), including the email boxes of  
14 agreed-on custodians, which resulted in Defendants producing thousands of pages of  
15 communications.

16 14. On June 7, 2016, the Court granted conditional certification (Dkt. 94) and in a  
17 subsequent order, provided putative members of the collective until September 19,  
18 2016, to file consent to join forms (*i.e.* "opt in" to the case). (*See* Dkt. 104).

19 15. On August 30, 2016, the Court granted WIS's motion to compel arbitration of  
20 the 13 individuals who had opted in to the case before the Order granting conditional  
21 certification. In its Order granting conditional certification, however, the Court agreed  
22 with Plaintiffs' position that other Inventory Associates who were subject to the same  
23 arbitration agreement would not be barred from opting-in to the action or from opposing  
24 arbitration of their claims. (Dkt. 94 at 11:23-27).

25 16. By September 19, 2016, more than 14,000 Inventory Associates had mailed  
26 opt-in consent forms to the notice administrator. Plaintiffs filed the opt-in consent forms  
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1 received by the notice administrator with the Court. *See, e.g.*, Notice of Filing of  
2 Consents (Dkt. 155).

3 *Second and Third Motions to Compel Arbitration and Further Merits-based*  
4 *Discovery*

5 17. On February 24, 2017 and April 4, 2017, WIS brought consecutive motions to  
6 compel approximately 13,830 of the opt-in Plaintiffs to individually arbitrate their  
7 claims. (Dkt. 172, 176). Plaintiffs opposed these motions on various grounds, including  
8 that WIS's forced individual arbitration program erects cost-prohibitive financial and  
9 administrative barriers to the vindication of non-waivable wage rights. (Dkt. 174, 177).

10 18. While the motions were pending, the parties continued to conduct merits  
11 discovery. Plaintiffs took the depositions of five of Defendants' witnesses, including a  
12 regional manager and the head of WIS's payroll department, among other managers.  
13 WIS took the depositions of seven opt-in Plaintiffs.

14 19. On July 19, 2017, the Court granted WIS's motion in part and compelled to  
15 arbitration the claims of all Plaintiffs who signed arbitration agreements that did not  
16 include an exemption for pending litigation. (Dkt. 189 at 17:5-14). In the same Order  
17 the Court granted in part WIS's motion for summary judgment against opt-in Plaintiffs  
18 whose claims were outside the statute of limitations except with respect to Plaintiff  
19 Latoya Smith. (Dkt. 189 at 17:15-19).

20 20. Following the Court's Order on WIS's motions to compel arbitration,  
21 Plaintiffs began conducting extensive outreach to the individuals whose claims were  
22 compelled to arbitration. As part of this outreach effort, we engaged and worked with a  
23 consultant to establish a website portal (known as "Wis.claims"), which used online  
24 surveys and interviews to gather information from the individuals compelled to  
25 arbitration. The portal also was dedicated to providing updates regarding the individual  
26 arbitrations and the status of the claims, and facilitating other communications with the  
27 opt-in Plaintiffs.

1 The Sale of WIS and Third Amended Complaint

2 21. In the meantime, on May 31, 2017, we received a letter from Roger Schwartz  
3 of Latham & Watkins, LLP on behalf of his client, Antares Capital LP, stating that WIS  
4 had defaulted on a credit agreement and that a foreclosure sale of the assets of WIS  
5 would occur on or after June 8, 2017. (Dkt. 182-2 at ¶ 4). On June 8, 2017, a then-newly  
6 formed company called Retail Services WIS acquired the WIS International business.  
7 (Dkt. 251, at 3:21-24). Retail Services WIS had been incorporated on April 17, 2017,  
8 backed by a private equity firm called Centre Lane Partners. (Dkt. 251, at 3:19-20).

9 22. On June 21, 2017, Plaintiffs moved the Court for leave to amend to add Retail  
10 Services WIS and Centre Lane Partners as Defendants. (Dkt. 182), which the Court  
11 granted on August 3, 2017. (Dkt. 193). The TAC filed on August 7, 2017 (Dkt. 194),  
12 alleges that Defendants Retail Services WIS and Centre Lane Partners are liable to the  
13 collective as successors in interest to WIS.

14 First Mediation

15 23. On August 21, 2017, the Parties submitted a joint request for a stay to pursue  
16 mediation with Jeffrey Ross, Esq., an experienced employment and class action  
17 mediator. (Dkt. 197). The Court granted the stay on August 28, 2017. (Dkt. 198). The  
18 parties appeared for an in-person mediation session on January 4, 2018, and continued  
19 to mediate the case with Mr. Ross until March 28, 2018, when it was determined that a  
20 settlement would not be reached at that time. (Dkt. 208).

21 Discovery Regarding Successor Defendants

22 24. After the lengthy mediation talks ended, the parties directed their efforts to  
23 conducting discovery on successor liability. Plaintiffs issued sets of interrogatories and  
24 requests for production of documents on Retail Services WIS and Centre Lane Partners,  
25 to which Defendants partially responded.

26 25. Defendants Retail Services WIS and Centre Lane Partners produced the  
27 foreclosure sale agreement related to the purchase of the predecessor WIS and a  
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1 corporate chart in response to the discovery, among other documents, but did not  
2 initially produce the relevant ESI that Plaintiffs had requested. After meet and confer,  
3 Plaintiffs moved to compel production of the various ESI that had been requested. *See*  
4 *Mtn.* (Dkt. 212). Following a hearing before the Magistrate Judge, Defendants agreed  
5 to produce a substantial portion of the merits-based ESI. (*See* Dkt. 231, 233, 235).

6 26. The parties also litigated a discovery dispute regarding Defendants' requests  
7 for individualized discovery on the opt-in Plaintiffs whose claims had not been  
8 compelled to arbitration.

9 27. On October 17, 2018, Defendants filed a motion to compel 449 of these 485  
10 opt-in Plaintiffs to provide responses to Defendants' Requests for Admissions,  
11 Interrogatories, and Requests for Production. (Dkt. 240). Although Plaintiffs had  
12 already provided substantive responses for more than 25% (125) of these opt-ins,  
13 Defendants took the position that those responses were not detailed enough. (Dkt. 240).  
14 On November 14, 2019, the Court denied Defendants' motion as to the majority of the  
15 opt-in plaintiffs, directing Plaintiffs to provide responses for 40 opt-in plaintiffs. (Dkt.  
16 243).

17 28. In December of 2018, we took the depositions of the Managing Director of  
18 Centre Lane Partners (Mayank Singh), the CFO of Retail Services WIS (Tom  
19 Compogiannis), and the Director of Employment Practices of Retail Services WIS  
20 (Brenda Vaughn), regarding facts relevant to successor liability.

21 *Filing of Arbitration Demands and Motion for Declaratory Relief*

22 29. Meanwhile, starting in April 2018, we began submitting Plaintiffs' individual  
23 arbitration demands to the American Arbitration Association (AAA). Each demand  
24 named WIS, Retail Services WIS and Centre Lane Partners as Respondents. (*See* Dkt.  
25 215-6).

26 30. Following our filing of the arbitrations, AAA assessed arbitral fees on  
27 Defendants, pursuant to the terms of their standard arbitration agreements, which  
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1 provide that the employer would pay the costs of arbitration. For various reasons,  
2 Defendants opposed paying these fees. *See* Dkt. 215-2 at ¶¶ 7-10. Additionally,  
3 Defendants Retail Services WIS and Centre Lane Partners argued that they were not  
4 subject to arbitration because, among other things, they were not signatories to the  
5 arbitration agreements. *Id.* at ¶ 10.

6 31. On June 8, 2018, after months of discussions between AAA and the parties,  
7 AAA stayed administration of the arbitrations so that the parties could seek judicial  
8 intervention with regard to the alleged successors' refusal to participate. *Id.* at ¶ 11.

9 32. On July 9, 2018, Plaintiffs moved the Court for an order declaring that Retail  
10 Services WIS and Centre Lane Partners are bound as successors, affiliates, parents  
11 and/or subsidiaries of WIS under the arbitration agreements, and ordering Retail  
12 Services WIS and Centre Lane Partners to comply with the AAA's assessment of filing  
13 fees necessary to commence the individual arbitrations their predecessor compelled.  
14 (Dkt. 215-1). On December 18, 2018, the Court issued an order holding that Defendant  
15 Retail Services WIS was bound by the terms of the arbitration agreements, and must  
16 participate in the arbitrations. (Dkt. 251).

17 *The Bankruptcy Proceedings*

18 33. Meanwhile, on July 2, 2018, the predecessor WIS filed for Chapter 11  
19 bankruptcy. (Dkt 214). Since then, the WIS bankruptcy proceedings, known as *In re*  
20 *SIW Holding Co., Inc., et al.*, Case No. 18-11579, have been running in parallel to this  
21 case in the Bankruptcy Court of the District of Delaware.

22 34. On July 16, 2018, Plaintiff Hose petitioned the United States Trustee  
23 overseeing the bankruptcy proceeding to establish an Official Committee of Unsecured  
24 Creditors, so as to allow Plaintiffs to oversee the bankruptcy proceedings and protect  
25 the interests of the Inventory Associates in arbitration and in the Collective Action.

26 35. The Trustee did not form a Committee at the outset of the proceedings. Rather,  
27 on August 29, 2018, the Trustee moved to convert the bankruptcy to a Chapter 7  
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1 liquidation proceeding. While its motion was pending, however, the Trustee granted  
2 Plaintiff Hose's petition and appointed an Official Committee of Unsecured Creditors.  
3 The Committee is made up of Mr. Hose; Ms. Arispe (the Plaintiff in the case against  
4 WIS for civil penalties under the PAGAs), and a representative for the Rabbi Trust  
5 claimants. On October 11, 2018, the Trustee withdrew its motion, and the bankruptcy  
6 continued as a Chapter 11 proceeding with oversight by the Committee of Unsecured  
7 Creditors.

8 Settlement Conference with Committee of Unsecured Creditors and Successor  
9 Defendants

10 36. The parties resumed settlement discussions in early 2019. While productive,  
11 the negotiations were complex and protracted, and had to be coordinated with resolution  
12 discussions occurring in the Chapter 11 bankruptcy proceeding and the *Arispe* matter  
13 in California state court. *See* Stipulation (Dkt. 280).

14 37. On February 13, 2019, the parties convened for an in-person settlement  
15 meeting in New York City with the various stakeholders, including: the Committee of  
16 Unsecured Creditors; the UCC counsel and financial consultants; Hose counsel; Arispe  
17 counsel; the Debtors' counsel, the executive leadership of Retail Services WIS; the  
18 executive leadership of Centre Lane Partners, and their respective counsel. *See*  
19 Stipulation (Dkt. 259). Given the number parties, issues and moving parties, the  
20 negotiations took nine months to complete. (Dkt. 267, 269, 278, 287).

21 Final Resolution

22 38. At the beginning of the negotiations, the WIS Bankruptcy estate had only  
23 approximately \$3.5 million in assets. As shown in the Debtor's Joint Plan of  
24 Liquidation, attached as Exhibit 2 to this Declaration, this was only a small fraction of  
25 the approximately \$252,801,291.31 in secured and unsecured claims.

26 39. The multiple stakeholders, complexities of bankruptcy, and the limited funds  
27 in the bankruptcy estate, all raised significant challenges in the negotiations. The  
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1 financial condition of the debtors' estate required the parties to work together to find a  
2 reasonable distribution of the limited resources available. As I mentioned above, the  
3 negotiations lasted for some nine months, with numerous offers, counter-offers, and  
4 multi-lateral discussions.

5 40. On October 30, 2019, the parties executed the Settlement Agreement that is  
6 attached to this Declaration as Exhibit 1. Under the Settlement Agreement, Defendants  
7 Retail Services WIS and Centre Lane Partners, which continue to deny their status as a  
8 successors of WIS, agreed to forfeit Retail Services WIS's claim for approximately  
9 \$123 million against the debtors' estate, and to contribute an additional \$3.9 million  
10 towards a global resolution of all the claims at issue in the bankruptcy proceeding. In  
11 addition, the Centre Lane Parties agreed to permit the Rabbi Trust Claimants to obtain  
12 satisfaction of their claims through a new deferred compensation plan that will fully  
13 vest in June 2021. The total value of the Settlement for the WIS case, including the  
14 \$400,016.59 in Rabbi Trust claims that will revert back to the qualified settlement fund  
15 in June 2021 for the benefit of the Hose claimants, if Retail Services WIS remains  
16 solvent, is \$6,565,516.

17 **VALUE OF THE SETTLEMENT AND ALLOCATION FORMULA**

18 41. As indicated above, the parties laid a foundation for the ultimate settlement  
19 through a mediation with a well-respected mediator experienced in the area of wage and  
20 hour collective action cases: Jeffrey Ross, Esq. Although the case did not settle during  
21 the lengthy mediation and follow-up in 2018, the process allowed the parties to assess  
22 the strengths and weaknesses of their claims and defenses, which laid the groundwork  
23 for the negotiations that followed. The touchstone of these later negotiations was the in-  
24 person settlement meeting on February 13, 2019. This meeting continued with extensive  
25 follow-up negotiations over the next nine months, which ultimately resulted in the  
26 successful settlement achieved here.

1 42. Our firm has extensive experience litigating and settling complex wage and  
2 hour collective actions. Bringing this experience to bear, we thoroughly investigated  
3 the factual and legal issues raised in this action, and diligently litigated the Plaintiffs'  
4 claims for more than four years. Indeed, the arms-length negotiations precipitating the  
5 settlement followed extensive discovery on the merits of Plaintiffs' claims, including  
6 various depositions, the mining of ESI, and substantial written discovery.

7 43. Under the Settlement Agreement, attached as Exhibit 1 to this Declaration, the  
8 Centre Lane Parties, which continue to deny their status as a successors of WIS, agreed  
9 to forfeit Retail Services WIS's claim for approximately \$123 million against the  
10 debtors' estate, and to contribute an additional \$3.9 million towards a global resolution  
11 of all the claims at issue in the bankruptcy proceeding. In addition, the Centre Lane  
12 Parties agreed to permit the Rabbi Trust Claimants to obtain satisfaction of their claims  
13 through a new deferred compensation plan that will fully vest in June 2021. The total  
14 value of the Settlement for the WIS case, including the \$400,016.59 in Rabbi Trust  
15 claims that will revert back to the qualified settlement fund in June 2021 for the benefit  
16 of the Hose claimants, if Retail Services WIS remains solvent, is \$6,565,516. None of  
17 this amount will revert to Defendants. Settlement Agreement at p. 10, ¶ 25, p. 17, ¶ 9.

18 44. The release for the *Hose* Plaintiffs is limited to claims asserted or which could  
19 have been asserted based on the facts and claims alleged in the operative Third  
20 Amended Complaint, filed August 7, 2017, which have accrued from July 22, 2013  
21 through the date this Court enters an order preliminarily approving the Settlement.

22 45. The proposed Settlement Administrator, Heffler Claims Group, has estimated  
23 that the costs of settlement administration, absent unforeseen or unusual circumstances,  
24 will be \$220,370. The costs are reflective of the number of opt-in Plaintiffs, the rigor  
25 of the individualized noticed campaign by mail and email, and the need to keep the  
26 Qualified Settlement Fund open for two separate disbursements over two years. (As  
27 discussed below, we believe that, overall, having two settlement disbursements is in the  
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1 best interests of the collective because it will allow some payments to occur now, while  
2 also allowing the parties to ultimately secure a substantially larger settlement value by  
3 having Retail Services WIS make its contributions over time, which in turn will better  
4 allow the company to stay solvent and employee Inventory Associates.)

5 46. Our records indicate that there are approximately 14,300 individuals in the  
6 settlement collective. The distribution formula requires that all opt-in Plaintiffs receive  
7 a minimum payment under the Settlement Agreement, regardless of whether they  
8 submit a claim form. This is designed to safeguard individuals who do not submit claim  
9 forms by ensuring that they are not releasing claims under the Settlement without  
10 receiving compensation.

11 47. At the same time, the distribution formula provides a comparatively larger  
12 share to individuals who demonstrate an interest and willingness to pursue their claims  
13 by submitting a claim form. In this respect, the *Hose* Plaintiffs who submit claim forms  
14 will receive additional pro-rata shares based on the number of workweeks they have in  
15 proportion to the aggregate number of workweeks for all other *Hose* Participating  
16 Plaintiffs who submit claim forms. This aspect of the formula ensures that individuals  
17 with longer tenures during the liability period receive a comparatively larger share than  
18 individuals with shorter tenures.

19 48. In addition, the distribution formula provides for a reasonable, upward  
20 adjustment in the value of each workweek based on objective factors tied to the relative  
21 strength of an opt-in Plaintiffs' claims.

22 49. First, any workweek belonging to a *Hose* Participating Plaintiff who remained  
23 in Court and who either appeared for deposition or submitted substantive interrogatory  
24 responses to Defendants' Interrogatories will be adjusted upwards by a multiplier of  
25 three. A list identifying these individuals is attached as Exhibit A to the Settlement  
26 Agreement, which in turn is attached to this Declaration as Exhibit 1.

1 50. Second, any workweek belonging to a *Hose* Participating Plaintiff who was  
2 compelled to arbitration and who substantially completed the written survey circulated  
3 via the dedicated website established by Plaintiffs' counsel (<https://Wis.claims>) will be  
4 adjusted upward by a multiplier of two. The survey was purposed to gather important  
5 evidence to prepare the arbitrations. A list identifying these individuals is attached as  
6 Exhibit B to the Settlement Agreement, which again is attached to this Declaration as  
7 Exhibit 1.

8 51. We propose this distribution formula after significant consideration, based on  
9 our assessment of the strengths and risks confronting the opt-in Plaintiffs in this  
10 particular case, as well as our experience in class and collective actions generally over  
11 the years. After much deliberation, we came to believe that the distribution formula  
12 described above would most fairly account for the relative increases and decreases in  
13 the value of claims that may reasonably be expected to occur as a result of the factors  
14 at play here, while not being overly complicated with too many variables so as to be  
15 unmanageable. Specifically, the factors that became ever more prominent in the  
16 litigation and negotiations in terms of how we could negotiate value for the case,  
17 primarily consisted of the following: the quantity of individuals who participated in  
18 discovery; the particular difficulties of proceeding in individual arbitrations rather than  
19 being able to remain in the collective action in Court; and the number of workweeks at  
20 issue for which damages might accrue. We incorporated these risk factors into the  
21 distribution formula.

22 52. Under the Settlement Agreement, *Hose* Participating Plaintiffs will receive  
23 payments in two installments. We submit that the phased distribution is reasonable in  
24 light of the financial condition of Defendants and the constraints of the Bankruptcy. As  
25 discussed above, a meaningful recovery beyond the limited assets available in the WIS  
26 bankruptcy depended on a substantial contribution from the alleged successor  
27 Defendants, which themselves were creditors in the bankruptcy, and still maintain they  
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1 are not bona-fide successors to WIS. To make this contribution possible, it was  
2 necessary for the alleged successor Defendants to make the payments incrementally in  
3 the coming two years. Moreover, having the second distribution after vesting of the new  
4 deferred compensation plan allows the Hose Plaintiffs to realize the additional benefit  
5 of the value of the Rabbi Trust claim that will revert back to the Hose Settlement fund  
6 if Retail Services WIS stays solvent through June 9, 2021. Even still, Plaintiffs who  
7 submit a claim form will receive the first of their two disbursements in early 2020.

8 53. Given the complex nature of this dispute, the forfeiture sale and bankruptcy of  
9 WIS, the number of factual, legal, and procedural issues contested, the risks of  
10 continued litigation, and the Settlement's favorable comparison to settlements in  
11 analogous cases that do not carry some of these risk factors (e.g. bankruptcy, arbitration,  
12 etc.), we believe that this is an excellent result for the class.

### 13 **NOTICE OF PROPOSED SETTLEMENT**

14 54. Members of the Collective will be notified by first class mail of the settlement  
15 and, where available, email. Our offices have worked with several settlement  
16 administration services in connection with various class action proceedings. Heffler  
17 Claims Group is one such group. Based on our experience with Heffler Claims Group  
18 in past cases, we proposed that Heffler Claims Group be the settlement administrator in  
19 this case. The other parties to the Settlement Agreement have agreed to have Heffler  
20 Claims Group serve as settlement administrator.

21 55. One particular benefit to having Heffler Claims Group serve as the Settlement  
22 Administrator is that it previously served as the FLSA notice and opt-in administrator  
23 for this case, and therefore has systems and a knowledge base for this case that will  
24 allow for a more efficient and informed process. Additionally, Heffler Claims Group  
25 served as the FLSA collective action notice administrator for our offices in *Julian, et*  
26 *al. v. Swift Transportation Company, Inc., et al*, Case No. CV-16-00576-PHX-ROS (D.  
27 Ariz.). Heffler also has served as settlement administrator for three matters handled by  
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1 our offices, but not by me directly: *Asalti, et al. v. Intel Corporation, et al.*, Case No.  
2 16cv302615 (Superior Court of California, County of Santa Clara); *Guilbaud, et al. v.*  
3 *Sprint Nextel Corp., et al*, Case No. 13-cv-04357-VC (N.D. Cal.); and *Knapp, et al. v.*  
4 *Art.com, Inc., et al*, Case No. 3:16-cv-00768-WHO.

5 56. Heffler Claims Group has attested to its commitment to undertake its best  
6 efforts to ensure that the settlement notice is sent to the most current addresses of the  
7 members of the Collective, including conducting a national change of address search  
8 before the mailing and skip tracing for any notices returned as undeliverable. Notice  
9 will also be sent by e-mail to individuals, where valid e-mail addresses are available in  
10 our records and/or the records of Defendants. We will file the Declaration of Mark  
11 Rapazzini, Partner at Heffler Claims Group, concurrently with the Motion for  
12 Preliminary Approval. Mr. Rapazzini's Declaration provides an overview of Heffler  
13 Claims Group's qualifications as a settlement administrator, and provides an estimate  
14 of administration expenses.

15 57. The proposed notice of collective action settlement is attached as Exhibit C to  
16 the Settlement Agreement, and the Settlement Agreement is attached as Exhibit 1 to  
17 this Declaration. The proposed settlement notice provides, among other things, a  
18 description of the case; the total settlement amount and how it will be funded; an  
19 explanation of the formula for calculating settlement awards for the opt-in Plaintiffs;  
20 the amount of attorneys' fees and costs that Plaintiffs will seek and how to review  
21 Plaintiffs' motion for attorneys' fees and costs; the maximum service award that will be  
22 sought for Mr. Hose; the procedures for opting out of the settlement, objecting to the  
23 settlement, and disputing workweek information; and how to obtain additional  
24 information. In addition, each settlement notice also will be individually tailored to  
25 provide the opt-in Plaintiff receiving the notice with the number of workweeks that  
26 Plaintiff worked for Defendants during the relevant time period for calculating  
27 settlement awards.

## **STRENGTHS, RISKS, AND COMPLEXITIES OF THE CASE**

### *Summary of strength, risk and complexity analysis*

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2  
3 58. Based on our years of experience in wage and hour class and collective actions,  
4 as well as the particular factors at play in this case, we believe that the \$6,565,516.59  
5 recovery achieved in the Settlement here represents a very strong result. In addition to  
6 the various risk factors and delays inherent in succeeding in a collective action  
7 generally, this case involved a successful motion by the original Defendant to compel  
8 thousands of individual arbitrations, a subsequent forfeiture sale and Chapter 11  
9 bankruptcy of that Defendant, and the ensuing need to prove successor liability, among  
10 other things.

11 59. Defendant WIS's bankruptcy posed an existential risk to the case. Yet, the total  
12 settlement amount is well in excess of the approximately \$3.5 million comprising the  
13 total assets WIS had available to distribute to its creditors in the bankruptcy. Despite its  
14 limited assets, WIS had to contend with approximately \$250 million in creditor claims  
15 in the bankruptcy. Had Plaintiffs not petitioned the United States Trustee to create the  
16 Committee of Unsecured Creditors and protect the interests of the Inventory Associates  
17 in the bankruptcy, the available funds may well have been exhausted before any  
18 consideration of Plaintiffs' claims. Instead, Plaintiffs ensured they had a seat at the  
19 bankruptcy table. This allowed Plaintiffs to negotiate an agreement under which  
20 Defendants Retail Services WIS and Center Lane Partners—who maintain that they are  
21 not liable as successors to WIS, and who in fact had their own \$123 million claim  
22 against WIS in the bankruptcy—will nonetheless contribute an additional \$3.9 million  
23 to the Settlement.

24 60. Moreover, without the Settlement, Plaintiffs would have had to establish the  
25 successor liability of Retail Services WIS and/or Centre Lane Partners to secure a  
26 meaningful recovery beyond the limited assets possessed by WIS. While Plaintiffs  
27 maintain that they would have been able to establish successor liability based on  
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1 evidence of the alleged successor Defendants' control over day-to-day operations,  
2 Plaintiffs still faced considerable uncertainty in this regard. For instance, Defendants'  
3 filed a motion for summary judgment on successor liability. While the case settled  
4 before Defendants' motion was heard, a victory for Defendants would have disposed of  
5 Plaintiffs' successor liability claims against Centre Lane Partners in the FLSA case, and  
6 potentially had a preclusive effect in the individual arbitrations. Defendants also were  
7 poised to argue that any claims against Retail Services WIS and Centre Lane Partners  
8 were subsumed by the bankruptcy. Plaintiffs faced the risk of obtaining no recovery at  
9 all if we could not establish both (1) successor liability, and (2) that such liability, if it  
10 existed, would not belong to the bankruptcy estate.

11 61. Furthermore, the success of Defendants' multiple motions to compel  
12 arbitration posed substantial risks that most plaintiffs would be unable to vindicate their  
13 rights. Following resolution of these motions, only approximately 485 individuals  
14 remained a part of the action in Court, with approximately 13,781 compelled to  
15 individual arbitration.

16 62. Plaintiffs asserted a claim in the WIS bankruptcy of approximately \$66  
17 Million. This was based on calculations Plaintiffs' counsel performed in connection  
18 with the early mediation before Jeffrey Ross, Esq. These calculations assumed all the  
19 Inventory Associates compelled to arbitration would file individual arbitration demands  
20 and participate in the thousands of separate arbitration proceedings. It also assumed that  
21 all the opt-in Plaintiffs, whether in Court or arbitration, would be successful on the  
22 merits and damages estimations on *all* their claims.

23 63. In this connection, achieving success on the merits of Plaintiffs' individual  
24 claims was far from assured. For instance, an important component of Plaintiffs'  
25 minimum wage and overtime claims were based on the legal challenge to Defendants'  
26 policy of not paying for the first hour of travel to and from the inventory sites. As  
27 discussed above, Plaintiffs maintained that this travel time began after the commute to  
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1 the WIS meet site and ended before the commute from the WIS meet site back home,  
2 which in our view meant that it could not be considered a commute. Plaintiffs also  
3 maintained that this travel time comprised such a significant component of the work  
4 day, including time that opt-ins spent “engaged to be waiting” during inefficiently run  
5 travel, that it was compensable time under applicable law. In contrast, Defendants cited  
6 case law in their Motion for Summary Judgment holding that analogous employees  
7 were not entitled to compensation for the first hour of travel under the FLSA and the  
8 Portal-to-Portal Act. *See* Ds’ MPA (Dkt. 272) at 15-16. This issue was hotly contested  
9 and posed significant risk to Plaintiffs.

10 64. Plaintiffs also asserted minimum wage and overtime claims based on  
11 allegations that Defendants had regularly required Inventory Associates to work off-  
12 the-clock and without pay before and after the inventory counts. However, such “pattern  
13 and practice” claims—even when meritorious—can be difficult to prove. *See, e.g., Civil*  
14 *Rights Education and Enforcement Center v. Hospitality Properties Trust*, 867 F.3d  
15 1093, 1104 (9th Cir. 2017) (citing *Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th Cir.  
16 2014)).

17 65. Moreover, the process of litigating thousands of separate arbitrations alongside  
18 the action in Court would be extremely protracted, costly and uncertain, whereas the  
19 Settlement provides certainty and more immediate relief.

20 *Comparison of Settlement with Exposure Analysis*

21 66. The Joint Plan of Liquidation, attached as Exhibit 2 to this Declaration,  
22 indicates that the Settlement recovery of \$6,565,516 is approximately 9.86% of the total  
23 theoretical exposure of \$66 Million that Plaintiffs originally asserted—approximately  
24 9.24% even without the value of the Rabbi Trust claims that are scheduled to revert  
25 back to settlement fund for the benefit of the Hose Plaintiffs in June 2021. This is a  
26 very high percentage, given all the factors discussed above. Again, Plaintiffs’  
27 calculation of Defendants’ outside exposure assumed 100% success of every individual  
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1 claim on the merits and on each Plaintiffs' ability to prove the projected damages,  
2 whether in Court or in arbitration, and without any reduction for the Bankruptcy. As  
3 just a few other points of comparison, the Joint Plan of Liquidation (Exhibit 2) shows  
4 that the *Arispe* claims and the other unsecured general claims are receiving significantly  
5 less of a percentage of the asserted value of their claims, and the secured purchaser  
6 claim is being reduced to zero.

7 **PROPOSED SERVICE AWARD**

8 67. I can attest based on my personal interactions and observations over the past  
9 several years, that Plaintiff Richard Hose devoted considerable time and provided an  
10 invaluable service to the prosecution of this case.

11 68. As will be further detailed in a separate motion, we believe that Mr. Hose's  
12 efforts in this case warrant a significant service award. In agreeing to serve as a  
13 representative of the Collective, Mr. Hose accepted the responsibility of representing  
14 the interests of all members of the Collective. He provided information during lengthy  
15 interviews, responded to extensive written discovery, provided hundreds of pages of  
16 documents, and assisted us in preparing for depositions and in seeking discovery. He  
17 also prepared for and sat for his deposition, which required him to travel from Texas to  
18 California. He further assisted in preparing and evaluating the case for mediation, and  
19 in the settlement process itself, again traveling from Texas to California to personally  
20 attend the mediation with Mr. Ross. In addition, Mr. Hose agreed to petition the United  
21 States Trustee to establish a Committee of Unsecured Creditors, a step that proved  
22 critical to ensuring that the interests of the more than 14,000 opt-in plaintiffs were  
23 protected in the bankruptcy proceedings. Mr. Hose also incurred considerable risk in  
24 bringing the case.

25 69. In light of Mr. Hose's specific efforts and the very favorable impact on the  
26 litigation that resulted from those efforts, we will be seeking \$25,000 in a service award  
27 in a separate motion to be brought for hearing at final approval. This represents less  
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1 than 0.4% of the Hose Total Settlement Amount. In addition, the amount of the service  
2 awards that Plaintiff will seek is specified in the Notice of Collective Action Settlement  
3 and the Members of the Collective will have an opportunity to comment on it. We  
4 believe that the service award Plaintiff will seek fairly reflects the time, risks and  
5 contributions he made to achieve this settlement on behalf of the collective. This will  
6 be further discussed when we file the motion for a service award in connection with the  
7 final fairness hearing.

8 **ATTORNEYS' FEES AND COSTS**

9 70. We also request the opportunity to file a separate motion for attorneys' fees  
10 and costs on a date to be set by the Court. Under the Settlement, the maximum amount  
11 of attorneys' fees that we may seek is approximately \$2.18 million, which is one-third  
12 of the total settlement amount of \$6,565,516.59. At the same time, to date, our office  
13 has expended considerable time and resources on the litigation, having devoted  
14 approximately 7,790 hours for a lodestar of approximately \$4.4 million. This does not  
15 include additional time we will devote to preparing the motions for attorneys' fees and  
16 costs, service awards, and final approval; communicating with opt-in Plaintiffs during  
17 the notice period; overseeing the settlement; and other tasks. Thus, even a request for  
18 the maximum amount of fees would result in a "negative multiplier" of approximately  
19 0.5.

20 71. Our office has also advanced approximately \$664,452.63 in litigation  
21 expenses. Aside from the more typical costs related to depositions, travel, mediation,  
22 filing and service fees, we have incurred over \$211,000 in mailing and administration  
23 costs for the FLSA notice and opt in process; nearly \$70,000 in costs to establish the  
24 Wis.claims website portal to enable us to effectively communicate with and gather  
25 information from the thousands of individuals compelled to individual arbitration; over  
26 \$100,000 in eDiscovery fees (which in turn allowed Plaintiff to maintain and mine ESI  
27 for important evidence); and over \$70,000 in expert fees. Even the copying costs for  
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1 preparing thousands of arbitrations were substantial. Making this investment, although  
2 taxing, was critical to our success in the litigation.

### 3 EXPERIENCE OF COUNSEL

4 72. Schneider Wallace Cottrell Konecky Wotkyns LLP is a leading private  
5 plaintiff firm in employment and civil-rights class actions. In November 2012, the  
6 Recorder listed our firm as one of the “top 10 go-to plaintiffs’ employment firms in  
7 Northern California.” Our partners and attorneys have litigated major wage and hour  
8 class actions, have won several prestigious awards, and sit on important boards and  
9 committees in the legal community. More details on the work, experience and  
10 accomplishments of the firm can be found at [www.schneiderwallace.com](http://www.schneiderwallace.com), and on the  
11 Firm Profile, attached hereto as Exhibit 3.

### 12 DESIGNATED CYPRES BENEFICIARY

13 73. The designated cy pres beneficiary is Legal Aid At Work (LAAW), which  
14 advises, counsels, and represents employees regarding their legal rights, including wage  
15 and hour protections. I am on the Board of Directors of this organization and can vouch  
16 for the integrity and importance of its work in benefiting employees in California.  
17 LAAW has a substantial nexus to the class claims because it seeks to strengthen the  
18 same kind of workplace protections (such as overtime) that are asserted in this case, on  
19 behalf of employees in California. More information about LAAW is attached to this  
20 Declaration as Exhibit 4, including a webpage describing its efforts to enforce overtime  
21 and other wage and hour protections.

### 22 EXHIBITS

23 74. Attached as Exhibit 1 to this Declaration is a true and correct copy of the  
24 proposed “Settlement Agreement and Release” between Plaintiffs and Defendants in  
25 this case. The proposed notice and claim form to be mailed and e-mailed to members  
26 of the collective upon court approval is attached as Exhibit C to the Settlement  
27 Agreement.

1 75. Attached as **Exhibit 2** to this Declaration is a true and correct copy of Debtor’s  
2 Joint Plan of Liquidation in *In re SIW Holding Co., Inc., et al.*, Case No. 18-11579.

3 76. Attached as **Exhibit 3** to this Declaration is a true and correct copy of a  
4 document entitled “Schneider Wallace Cottrell Konecky Wotkyns, LLP Firm Profile.”

5 77. Attached as **Exhibit 4** to this Declaration are true and correct copies of the  
6 “Our Mission and How We Work” and “Combating Wage Theft” pages of Legal Aid  
7 At Work—available at <https://legalaidatwork.org/our-mission-and-how-we-work/>, and  
8 <https://legalaidatwork.org/our-programs/combating-wage-theft/>, respectively  
9 (retrieved on October 29, 2019).

10  
11 I declare under penalty of perjury under the laws of the State of California and the  
12 United States of America that the foregoing is true and correct and is based upon my  
13 personal knowledge. Executed this on October 30, 2019 in Emeryville, California.

14  
15 /s/ Joshua G. Konecky

16 Joshua G. Konecky  
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