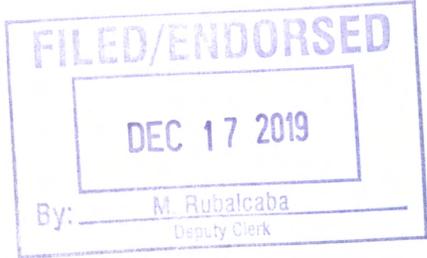


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**ATTORNEYS FOR PLAINTIFF**  
**Robert J. Kramer, on behalf of himself**  
**and all others similarly situated**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF SACRAMENTO**

ROBERT J. KRAMER, on behalf of himself  
and all others similarly situated,

Plaintiff,

vs.

LUMBER LIQUIDATORS, INC., a Delaware  
Corporation; and DOES 1 through 100,  
inclusive,

Defendants.

**CASE NO.: 34-2017-00222434**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION FOR FINAL  
APPROVAL OF CLASS SETTLEMENT**

**DATE: January 17, 2020**

**TIME: 9:30 a.m.**

**PLACE: Dept. 35**

Trial Date: None Set

**BY FAX**

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1           **I.       INTRODUCTION**

2           On September 19, 2019, this Court granted preliminary approval of this wage-and-hour  
3 class action settlement (the “Settlement”) in the Total Settlement Amount<sup>1</sup> of \$4,750,000.00  
4 between plaintiff Robert Kramer and (“Plaintiff”) and Defendant Lumber Liquidators, Inc.  
5 (“Defendant” or “Lumber Liquidators”). The Court appointed Plaintiff’s counsel as Class Counsel  
6 and directed that Notice be given. The Court preliminarily approved the allocation of the  
7 Settlement proceeds and scheduled the Final Settlement Approval hearing for January 17, 2020.

8           Since the time of the Court’s grant of preliminary approval, notice has been disseminated  
9 to the Class in accordance with the Court’s Order. **The Class’s response to the Settlement has**  
10 **been 100% positive. Not a single Class Member has opted out of the Settlement, and not a**  
11 **single Class Member has objected. Because this is a non-reversionary settlement, no Class**  
12 **Member was required to submit a claim.**

13           **This Settlement represents an outstanding outcome for members of the Class, who will**  
14 **receive an average payout of \$22,113.53 each, equivalent to more than 6 months’ wages for**  
15 **the average Class Member.**

16           As the Court found at preliminary approval, the Settlement is fair, adequate and reasonable  
17 and there is no reason, following Notice to the Settlement Class, to question that finding. Plaintiff  
18 respectfully requests that the Court enter an order: (1) making final its earlier Order conditionally  
19 certifying the Class under California Code of Civil Procedure § 382; (2) finding that the Notice of  
20 Settlement was duly disseminated and complied with due process; (3) approving the Settlement as  
21 set forth in the Settlement Agreement; and (4) finding that the Class Members are bound by the  
22 Final Approval Order and Judgment.<sup>2</sup>

23           **II.       Factual Summary**

24           Plaintiff provided a detailed factual background of the litigation, as well as a summary of  
25 the salient terms of the Settlement, in support of his Motion for Preliminary Approval. Without

26 <sup>1</sup> The terminology used in this Motion is the same as that used in the Settlement Agreement, which is on file with the  
27 Court as Exhibit 7 to the Messiha Decl., filed concurrently with the Motion for Preliminary Approval of Class Action  
Settlement.

28 <sup>2</sup> Class Counsel is separately and simultaneously moving for approval of their fees and costs and the Service Payment  
to the Class Representative.

1 repeating those facts here, Plaintiff provides a capsule summary of pertinent information.

2 The Class of 138 individuals consists of all current and/or former Store Managers and Store  
3 Managers in Training employed in the state of California by Defendant at any time between  
4 November 17, 2013, and September 19, 2019 (the date of Preliminary Approval).

5 The gravamen of the operative First Amended Complaint is for misclassification of the  
6 Settlement Class as overtime-exempt under California law. The claims which were pled and which  
7 are being settled are as follows:

- 8 1) Failure to Pay All Wages Earned (Labor Code § 204);
- 9 2) Failure to Pay Overtime Wages (Labor Code §§ 510, 1194(a) and 1198);
- 10 3) Failure to Provide Accurate, Itemized Wage Statements (Labor Code § 226(a));
- 11 4) Failure to Provide Meal Periods (Labor Code §§ 226.7 and 512(a));
- 12 5) Failure to Provide Rest Breaks (Labor Code § 226.7);
- 13 6) Failure to Maintain Records (Labor Code § 1174(d));
- 14 7) Failure to Reimburse Business Expenses (Labor Code § 2802);
- 15 8) Failure to Pay All Wages At Termination (Labor Code §§ 201-203);
- 16 9) Unfair Business Practices (Business & Professions Code § 17200 et seq.);
- 17 10) California Private Attorneys General Act (Labor Code §§ 2699 et seq.).

18 Messiha Decl. in Support of Preliminary Approval ¶ 12; Ex. 3.

19 The Settlement was achieved after numerous, arms-length and, at times, heated  
20 negotiations. The Settlement provides for a non-reversionary Total Settlement Amount of  
21 \$4,750,000.00.

22 **a. The Parties' Discovery and Investigation**

23 Prior to engaging in settlement discussions, the Parties conducted substantial written  
24 discovery. More specifically, Plaintiff served four (4) sets of document demands to Defendant and  
25 one (1) set of special interrogatories, and Defendant, in turn, served document demands upon  
26 Plaintiff. *Id.* at ¶ 29.

27 Defendant provided Class Counsel with Plaintiff's personnel file and payroll records;  
28

1 Defendant's company policies applicable to Store Managers and Store Managers in Training,  
2 including model schedules, job descriptions, lists of job duties and expectations for hours worked  
3 and how working time should be allocated to various tasks. Defendant further provided  
4 information about the putative class, including the total number of class members and the number  
5 of full-time equivalent employees ("FTEs"), weeks worked, and each class member's dates of  
6 employment with Defendant. Defendant also provided alarm system records for the named Plaintiff  
7 which helped to provide a record of the hours he worked. Finally, Defendant also provided  
8 individual salaries for the Class Members. *Id.* at ¶¶ 30, 31.

9 As described below, the pre-mediation discovery confirmed (in Plaintiff's estimation) that  
10 whether or not the putative class was misclassified as overtime exempt was legitimately  
11 questionable. *Id.* at ¶ 32. After detailed pre-mediation discussions among the parties, and after a  
12 full-day mediation, the parties decided to accept the mediator's proposal to resolve the matter for  
13 the Total Settlement Amount of \$4,750,000.00. Nevertheless, the Parties also spent the next two  
14 months-plus engaged in further negotiations regarding the terms of the release provided and  
15 numerous other non-monetary issues.

16 **b. Class Members' Release of Claims**

17 The claims released in this Settlement are "all claims which were pled in the operative First  
18 Amended Complaint (titled Class Action and Private Attorneys' General Act Complaint) or which  
19 could have been pled based on the facts alleged in the operative First Amended Complaint,  
20 including without limitation, claims for unpaid wages and overtime, itemized wage statements,  
21 meal and rest period wages and premiums, record-keeping violations, unpaid business expenses,  
22 untimely final paychecks, and unfair competition."

23 The Released Parties are Defendant Lumber Liquidators, Inc., a Delaware Corporation, its  
24 subsidiaries and affiliates, employee benefit plans sponsored or maintained by any of the foregoing,  
25 their attorneys, and their respective successors and predecessors in interest; all of their respective  
26 officers, directors, employees, administrators, fiduciaries, trustees, beneficiaries and agents; and  
27 each of their past, present and future officers, directors, shareholders, members, employees, agents,  
28 principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers. *Id.* at.

1 ¶ 57; Ex. 7.

2 The scope of this release language is consistent with that routinely approved by courts and  
3 is narrowly tailored to the claims asserted in the FAC.

4 **c. Notice Procedures**

5 The Notice disseminated was approved by the Court at the time of preliminary approval.  
6 The declaration of Brian Devery of Angeion, Inc., the Settlement Administrator approved by the  
7 Court, is attached hereto. That Declaration attests that Notice was duly disseminated to the 138  
8 Class Members as specified by the Court in its Preliminary Approval Order.

9 As the Court determined at the time of Preliminary Approval, the content and manner of  
10 the Class Notice complied with the California Rules of Court 3.776(d) and (e). The Notice contains,  
11 among other things, a brief explanation of the case, including the basic contentions and denials of  
12 the parties; a statement that the court will exclude the member from the class if the member so  
13 requests by a specified date; the procedures for Class Members to follow in requesting exclusion  
14 from the Class; a statement that the judgment will bind all members that do not request exclusion;  
15 and a statement that any member who does not request exclusion may enter an appearance through  
16 counsel.

17 Per the Declaration of Brian Devery of Angeion, Inc., Notice was mailed to all 138 Class  
18 Members on October 10, 2019 via United States Mail. Devery Decl. ¶ 7. A total of 10 notices  
19 were returned to Angeion without forwarding addresses. *Id.* at ¶ 9. Angeion received updated  
20 addresses for 3 of these notices and conducted skip traces for 5 notices. Notices were re-mailed to  
21 these 8 Class Members. *Id.* at ¶¶ 10-11.

22 As noted above, no Class Member asked to be excluded from the Settlement. *Id.* at ¶ 12.  
23 Nor did any Class Member object. *Id.* at ¶ 12.

24 **d. The *Cy Pres* Recipient Is A Charitable Organization Assisting Employees**

25 Any funds associated with uncashed checks issued under the Settlement will be paid to the  
26 Katharine and George Alexander Community Law Center, in the name of the Class Member who  
27 did not cash their check. In its Preliminary Approval Order, the Court requested that the parties  
28 provide evidence that the Alexander Community Law Center is an organization that supports

1 projects that will benefit the class or similarly-situated individuals, and/or furthers the objectives  
2 and purposes of the underlying litigation.

3 Per its website, the Alexander Community Law Center maintains a “Workers’ Rights  
4 Practice Area” that provides “free legal services to low-income individuals who have experienced  
5 unfair and illegal treatment at their place of employment.” This specifically includes unemployment  
6 issues, unpaid wages, harassment and discrimination, retaliation, medical leaves and representation  
7 at the Labor Commission and the Unemployment Insurance Appeals Board. The Alexander  
8 Community Law Center puts on weekly clinics on these topics and others. See Messiha Decl. in  
9 Support of Final Approval ¶ 12.

10 Accordingly, the Alexander Community Law Center provides assistance to employees just  
11 like the Class Members, on a wide range of employment issues including unpaid wages, which are  
12 the subject of this lawsuit and Settlement.

### 13 **III. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

#### 14 **a. This Case Meets All Requirements For Approval Under the California Rules** 15 **of Court**

16 A class settlement should be approved if the settlement is found to be fair, adequate, and  
17 reasonable. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). Generally, a presumption  
18 of fairness exists where: (1) the settlement is reached through arm’s length bargaining; (2)  
19 investigation and discovery are sufficient to allow counsel and the Court to act intelligently; (3)  
20 counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Id.* at 1802.  
21 The proposed Settlement readily satisfies the above requirements, as the Court has already  
22 preliminarily concluded.

23 Moreover, there is a strong and uniform policy in the State of California favoring  
24 compromises leading to the expeditious resolution of litigation. *Hamilton v. Oakland School*  
25 *Dist.*, 219 Cal. 322, 329 (1933) (“it is the policy of the law to discourage litigation and to favor  
26 compromises”); *Rich Vision Ctrs., Inc. v. Board of Medical Examiners*, 144 Cal.App.3d 110, 115  
27 (1983) (there exists a “general policy of favoring compromises of contested rights”); *Stambaugh v.*  
28 *Superior Court*, 62 Cal.App.3d 231, 235 (1976). This judicial policy is particularly compelling in

1 cases such as this involving a complex representative action. *Officers for Justice v. Civil Service*  
2 *Comm'n.*, 688 F.2d 615, 625 (9<sup>th</sup> Cir. 1982)(“voluntary conciliation and settlement are the preferred  
3 means of dispute resolution . . . especially . . . in complex class action litigation.”)

4 “The settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on  
5 the merits.” *Officers for Justice, supra*, 688 F.2d at 625. Yet, the Court should explore “all the  
6 relevant factors” bearing on approval of a class action settlement. *See Hanlon, supra*, 150 F.3d at  
7 1026. In determining the fairness of a proposed settlement, the court is guided by factors which  
8 were summarized by the Ninth Circuit in *Hanlon*, 150 F.3d at 1026:

9 Assessing a settlement proposal requires the district court to balance a  
10 number of factors: the strength of the plaintiffs’ case; the risk, expense,  
11 complexity, and likely duration of further litigation; the risk of  
12 maintaining class action status throughout the trial; the amount offered  
13 in settlement; the extend of discovery completed and the stage of the  
14 proceedings; the experience and views of counsel; the presence of a  
15 governmental participant; and the reaction of the class members to the  
16 proposed settlement.

17 *Accord In re Mega Finan.al Corp. Secur. Lit. v. Nadar*, 213 F.3d 454, 458 (9th Cir. 2000); *Torrisiv.*  
18 *Lazar*, 8 F.3d 1370, 1375 (9th Cir. 1993). “Due regard should be given to what is otherwise a  
19 private consensual agreement between parties.” *Dunk, supra* at 1801. “The relative degree of  
20 importance to be attached to any particular factor will depend upon and be dictated by the nature  
21 of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances  
22 presented by each individual case.” *Officers for Justice, supra*, 688 F.2d at 625. The inquiry “must  
23 be limited to the extent necessary to reach a reasoned judgment that the agreement is not the  
24 product of fraud or overreaching by, or collusion between, the negotiating parties, and that the  
25 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Id.*

26 As the Court provisionally concluded at the time of Preliminary Approval, the Settlement  
27 is fair, adequate and reasonable and is not the product of overreaching or collusion.

### 28 **1. The Settlement Is The Result Of Arm’s-Length Negotiations**

The proposed settlement here is the result of more than eighteen (18) months of contested  
litigation which included settlement discussions spanning several months, from pre-mediation  
exchanges of information to the negotiation and execution of a long-form Settlement Agreement.

1 Class Counsel was fully informed of the evidence supporting Plaintiff's allegations, the size of the  
2 putative class, and the scope of the injuries of its members when they negotiated the Settlement.

3 **2. Substantial Investigation And Discovery Have Been Conducted**

4 As set forth in Plaintiff's Motion for Preliminary Approval, Class Counsel conducted in-  
5 depth factual discovery concerning the claims at issue before and during the course of the litigation.  
6 Class Counsel also interviewed approximately a dozen Class Members.

7 **b. Class Counsel Is Experienced In Similar Wage-And-Hour Litigation**

8 Class Counsel has substantial experience in wage-and-hour class actions, including similar  
9 cases. *See generally* Messiha Decl. in Support of Final Approval; Marino Decl. in Support of Final  
10 Approval. Class Counsel hold the view that this is a fair and reasonable settlement in light of the  
11 complexities of the case, the state of the law, and uncertainties of class certification and litigation.  
12 *Id.* Given the risks inherent in litigation and the defenses asserted, this settlement is fair, adequate,  
13 and reasonable and in the best interests of Class Members, and should be preliminarily approved.

14 Because experienced counsel, operating at arm's length, have weighed the strengths and  
15 risks of the case, and endorse the proposed settlement, their view is entitled to significant weight in  
16 deciding whether to approve the Settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18  
17 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.  
18 App. 4th 116, 128 (2008) (court must account for "the experience and view of counsel") (internal  
19 quotation and citation omitted).

20 **c. The Class's Response To The Settlement Has Been 100% Positive**

21 Following the close of the 45-day notice period as ordered by the Court at preliminary  
22 approval, **not a single Settlement Class Member has opted-out or Objected.** Indeed, Class  
23 Counsel received a number of inquiries from individuals who wanted to ensure that they were  
24 included in the Settlement. Class Counsel is unaware of any negative reaction by a Class Member  
25 to the Settlement. See Messiha Decl. ¶ 24.

26 **d. The Settlement Is Fair, Adequate, and Reasonable**

27 **1. The Settlement Is The Result Of Serious, Informed, Non-**

28

1 **Collusive Negotiations**

2 As this Court opined at the preliminary approval stage, the Settlement falls well within the  
3 range of preliminary approval with no grounds to doubt its fairness. Nothing has occurred since  
4 that time to undermine that finding.

5 The Settlement was the product of extensive arm’s length negotiations between counsel  
6 who are very experienced wage-and-hour class action practitioners. Messiha Decl. in Support of  
7 Final Approval at ¶¶ 6-11; Marino Decl. in Support of Final Approval at ¶¶ 12, 17-22. Though  
8 professional, the settlement negotiations were adversarial and non-collusive in nature. *Id.* The  
9 Settlement reached is the product of substantial effort by the parties and their counsel. *Id.*  
10 Although Plaintiff and his counsel believed that there was a strong likelihood of certifying the  
11 claims, they recognized the potential risk, expense, and complexity posed by litigation, such as  
12 class certification, summary judgment, at trial and/or on the damages awarded, and/or on an appeal  
13 that can take several more years to litigate, as well as potential collectability issues. *Id.*

14 **2. The Extent Of The Pre-Litigation Discovery Was More Than**  
15 **Sufficient To Permit Final Approval Of The Settlement**

16 As the Court found at the preliminary approval stage, the Parties thoroughly investigated  
17 and evaluated the factual and legal strengths and weaknesses of this case before reaching the  
18 Settlement. As described above, the Settlement was reached after extensive investigation and  
19 research, substantial exchanges of documents, and a thorough evaluation of class-wide data and  
20 materials.

21 The Settlement came only after the case was thoroughly investigated by Class Counsel, who  
22 in addition to interviewing Plaintiff also interviewed a substantial number of other Store Managers  
23 employed by Defendant. Marino Decl. in Support of Preliminary Approval at ¶ 20.

24 **3. The Settlement Is A Reasonable Compromise Of Claims**

25 Defendant maintains that its classification and compensation of Store Managers and Store  
26 Managers in Training was and is lawful, and that Class Members have been fully compensated for  
27 all time worked pursuant to both the Wage Orders and the California Labor Code. Defendant also  
28 alleged that even if Class Members were entitled to overtime compensation (which it denies),

1 overtime hours worked were minimal or negligible.

2 Furthermore, Defendant anticipated mounting a serious challenge to class certification,  
3 arguing that how Class Members spent their time (whether on exempt or non-exempt tasks) was an  
4 individualized question that could not be determined on a class basis. Furthermore, Defendant  
5 would contend that such an analysis must be carried out not just on an employee-to-employee basis,  
6 but on a workweek-by-workweek basis for each Class Member. Moreover, Defendant was  
7 prepared to argue that Plaintiff's claims were not suitable for representative treatment under the  
8 PAGA because the claims were unmanageable.

9 In response, Plaintiff was prepared to argue that there was a single predominant legal  
10 question that required class certification: namely whether Defendant's single decision to classify  
11 all its Store Managers and Store Managers in Training, without regard to their actual duties  
12 performed, was lawful. Accordingly, both class and representative treatment were appropriate and  
13 necessary.

14 The potential value of the Class's claims, assuming the Court certified the Action, and  
15 assuming that Class Members prevailed in demonstrating that they were misclassified as overtime  
16 exempt, ranges from zero to approximately \$17,954,571.00 plus premiums, penalties and interest.  
17 This assumes the Class could demonstrate that each class member worked at least 15 hours per  
18 week of unpaid overtime for the duration of the class period. However, if the Court declined to  
19 certify the claims, if the Plaintiffs were unable to demonstrate that they were misclassified as  
20 overtime exempt, or if the number of hours of overtime worked by the Class was *de minimis* or  
21 substantially less than 15 hours per week, that liability could be substantially reduced or even  
22 eliminated completely. *Messiha Decl. In Support of Preliminary Approval at ¶ 71.*

23 Taking all of the foregoing arguments and defenses into account, as well as the expense and  
24 delay of protracted complex litigation, the Total Settlement Amount of \$4,750,000 reflects the  
25 realistic and fair value of the class claims at issue in light of all of Defendant's potential defenses.

26 **e. The Risks Inherent In Continued Litigation Are Significant**

27 To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court  
28 also should consider "[t]he strength of plaintiff's case, the risk, expense, complexity and likely

1 duration of further litigation, [and] the risk of maintaining class action status.” *See Dunk, supra*,  
2 48 Cal. App. 4th at 1801.

3 As described above, Defendant has strong defenses to Plaintiff’s claims, and those defenses  
4 create a real possibility that the claims might not be certified and/or might fail on the merits.  
5 Whereas proceeding with litigation would impose a risk of no recovery as well as ongoing,  
6 substantial additional expenditures of time and resources, the settlement achieved confers  
7 substantial benefits on Plaintiff and Class Members. *Id.*

8 Nonetheless, despite the potential recovery and the confidence that Plaintiff has in the  
9 substantive underpinning of his case, continuing to litigate this dispute is not without risks. For  
10 example, if litigation continued, this matter would still need to overcome the hurdle of obtaining  
11 class certification as well as any potential motion for summary judgment. These hurdles were alone  
12 significant enough to warrant a discount at settlement. If Defendant defeated certification there  
13 would be no class-wide relief regardless of the merits of the Class Members’ claims.

14 Further, even if Plaintiff was successful on a motion for class certification, Defendant could  
15 move for decertification of the Class before or during trial and likely would challenge certification  
16 on appeal. Accordingly, this factor weighs heavily in favor of final approval of the Settlement  
17 Agreement, because if at any point the Class failed to become certified or if certification was  
18 reversed, the Class would get nothing. Further, even if the Class was certified *via* motion and this  
19 matter continued through trial, there is no way to assure that the Class would fare any better than the  
20 proposed Settlement. Even a meritorious case can be lost at trial. *See In re JDS Uniphase Corp.*  
21 *Sec. Litig.*, No. C-02-1486CW, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (after a lengthy trial,  
22 jury returned a verdict against plaintiffs, the action was dismissed and plaintiffs were ordered to  
23 pay defendants the costs of defending the action.)

24 Indeed, as one court has aptly noted, “it is the very uncertainty of outcome in litigation and  
25 avoidance of wasteful and expensive litigation that induce consensual settlements”. *Officers for*  
26 *Justice v. Civil Service Com’n, of City and County of San Francisco*, 688, F.2d 615, 625 (9<sup>th</sup> Cir.  
27 1982). Nor does success at trial eliminate the risk to the Class. In *In re Apollo Group, Inc. Sec.*  
28 *Litig.*, following a plaintiffs’ verdict, the court overturned the verdict and granted defendants’

1 motion for judgment as a matter of law. (*In re Apollo Group, Inc. Sec. Litig.*, No. CV 04-2147-  
2 PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008).)

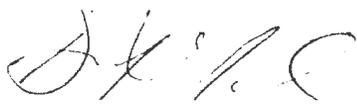
3 The Settlement also provides for relief now rather than a speculative payment years from now.  
4 Consequently, Plaintiff is confident that the proposed settlement is a highly successful result for the  
5 Class.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Plaintiff respectfully requests that the Court grant his unopposed  
8 Motion For Final Approval of the Parties' Settlement.

9  
10 DATED: December 17, 2019

11 Respectfully Submitted,  
12 **LAW OFFICE OF**  
13 **DOMINIC J. MESSIHA, PC**

14 

15 \_\_\_\_\_  
16 Dominic J. Messiha  
17 Attorneys for Plaintiff and the Class  
18 Robert J. Kramer, on behalf of himself  
19 and all others similarly situated  
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