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6 Attorneys for Defendants
 7 FAST WATER HEATER PARTNERS I, LP
 DBA FAST WATER HEATER COMPANY,
 8 FWH ACQUISITION COMPANY, LLC DBA
 FAST WATER HEATER COMPANY;
 9 JEFFREY DAVID JORDAN; AND JASON
 SPARKS HANLEYBROWN

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

13 MIHAIL SLAVKOV, NIKOLA
 VLAOVIC AND MARTIN ARNAUDOV,
 14 individually and on behalf of those
 similarly situated,

15 Plaintiffs,

16 v.

17 FAST WATER HEATER PARTNERS I,
 18 LP dba Fast Water Heater Company, a
 Delaware Limited Partnership; FWH
 19 ACQUISITION COMPANY, LLC dba
 Fast Water Heater Company, a Delaware
 20 Limited Liability Company; JEFFREY
 DAVID JORDAN, an individual; and
 21 JASON SPARKS HANLEYBROWN, an
 individual,

22 Defendants.
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Case No. CV 14-4324 JST SHK

**JOINT STIPULATION TO DISMISS
 CLASS CLAIMS AND FILE AMENDED
 COMPLAINT; [~~PROPOSED~~] ORDER
 THEREON**

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 28 STIPULATION AND [~~PROPOSED~~] ORDER
 Case No. CV 14-4324 JST

1 Through this stipulation, Plaintiffs Mihail Slavkov, Nikola Vlaovic, and Martin Arnaudov
2 (“Plaintiffs”) and Defendants Fast Water Heater Partners I, LP dba Fast Water Heater Company;
3 FWH Acquisition Company, LLC dba Fast Water Heater Company; Jeffrey David Jordan; and
4 Jason Sparks Hanleybrown (“Defendants”) jointly stipulate and request that the Court dismiss the
5 class and collective allegations¹ (collectively, “Class Allegations”) in Plaintiffs’ Second Amended
6 Complaint (“SAC”). The Parties further stipulate that Plaintiffs be permitted to file a Third
7 Amended Complaint (“TAC”), which is attached hereto as Exhibit A, with a redline comparing
8 the TAC to the SAC is attached as Exhibit B. The Parties reached this stipulation, in principle,
9 with the assistance of Magistrate Judge Sallie Kim on at a Mandatory Settlement Conference.

10 Good cause exists for the Court to grant this request and issue an order on the stipulation.
11 After nearly two years of litigation, the Parties agree that it is unlikely that this matter meets the
12 requirements to proceed as a class or collective action under Rule 23 or the Fair Labor Standards
13 Act. Further, dismissal of the class claims will not prejudice any individual. A majority of the
14 putative class have either settled individually with Defendants or are currently represented by
15 Plaintiffs’ counsel. Most of the remainder cannot be presently located. And pursuant to the
16 tolling agreement contained in this stipulation, the remaining members of the putative subclasses
17 who can be located can pursue and prosecute their individual claims. The Parties, therefore,
18 agree that this matter should be pursued on an individual and not a class basis.

19 As set forth below, each Party has asserted various factual and legal claims or defenses
20 regarding the allegations in the SAC. Except as specifically set forth in this stipulation, neither
21 Party is conceding the validity or accuracy of the factual and legal claims or defenses regarding
22 the allegations in the SAC. Further, in stipulating that Plaintiffs may file the TAC, Defendants do
23 not admit the legal sufficiency or factual accuracy of any of the allegations in the TAC.
24 Defendants do not waive any defenses they may assert to any of the legal or factual claims in the
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27 ¹ Specifically, the Class Allegations include paragraphs 1-2, 14-25, 107-114 of the SAC,
28 references to “current and former employees” in paragraphs 2, 16, 30-31, 33, 109, and 113 of the
SAC as well as the references to “current and former non-exempt employees” in paragraphs 1-2,
10-11, 14-18, 26-29, 35-39 of the SAC.

1 TAC, including whether joinder of any or all of the Plaintiffs in a single consolidated case is
2 appropriate.

3 This stipulation and request is made on the following facts:

4 The putative class members are current and former hourly, non-exempt water heater
5 installers who operate in California, Washington, and Oregon. Defendants claim the three states
6 are split into four different geographic regions, each of which is managed by a Regional Field
7 Supervisor. While Plaintiffs initially proposed up to 10 putative subclasses, the putative class can
8 be thought of as generally comprised of three putative subclasses, the California Putative
9 Subclass,² the FLSA Putative Subclass,³ and the FCRA Putative Subclass.⁴ The majority of the
10 claims in the SAC relate to the California Putative Subclass. The SAC primarily alleges: (1) that
11 Defendants miscalculated the overtime compensation for the California and FLSA Putative
12 Subclasses because they did not include a periodic bonus (which Plaintiffs contend is non-
13 discretionary) in the regular rate for purposes of calculating overtime; (2) that time the California
14 Putative Subclass spent traveling from and/or to home to and/or from the first and last job site
15 was not properly considered compensable; (3) that Defendants did not comply with San Francisco
16 city ordinances regarding sick leave pay for the California Putative Subclass; (4) that Defendants
17 did not fully reimburse the California Putative Subclass for business expenses; and (5) that the
18 notice and authorization form Defendants provided prior to obtaining a consumer report did not
19 comply with state and federal law.

20 Defendants have asserted factual and legal defenses to each of these allegations, including
21 (1) that any bonuses were issued at the discretion of the individual manager, and so not includable

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23 ² As defined in paragraph 18 of the SAC, Defendants submit the California Putative
24 Subclass includes 71 individuals who may have a claim under each claim in the SAC.
Specifically, each individual in the California Putative Subclass is also a member of each of the
other two putative subclasses.

25 ³ As defined in paragraph 14 of the SAC, the FLSA group are the individuals who elect to
26 opt-in to Plaintiffs' claim for recovery under the Fair Labor Standards Act, 29 U.S.C. § 201 *et*
seq. Defendants contend there are 95 individuals who are eligible for this putative subclass. All
of the individuals in the California Putative Subclass are eligible for the FLSA Putative Subclass.
27 4 in California have opted into the putative subclass.

28 ⁴ As defined in paragraph 22 of the SAC, there are 119 individuals who are eligible for the
FCRA Putative Subclass. Of those, Defendants submit only 24 are not members of the other two
putative subclasses.

1 in the regular rate or subject to class adjudication; (2) that travel time is non-compensable because
2 it is not time subject to the control of the employer; (3) that no individuals worked in San
3 Francisco enough hours to be subject to its sick pay ordinance; (4) that Defendants reimbursed
4 business expenses as required by law; and (5) that Defendants did not obtain a consumer report
5 for employment purposes, but, instead, a third party obtained that report using a form that
6 substantially complied with the various applicable statutes.

7 Beginning in November 2015, Defendants offered individual settlement agreements to
8 most of the members of the putative class. Of all 119 putative class members, Defendants submit
9 that 53 accepted the settlement offer, 12 rejected the offer, 32 did not respond, and 22 did not
10 receive an offer because they were FCRA-only putative subclass members. Of the 71 California
11 Putative Subclass members, Defendants contend that 46 accepted the settlement offer, 2 rejected
12 the offer, 3 are named plaintiffs, 4 have opted into the collective action, and 16 did not respond.
13 Of those 16 who did not respond, Defendants contend they skip traced 8 of these individuals for
14 current addresses and are presently unable to state whether the non-responders can be found—6
15 of the non-responders are former employees who are no longer in contact with the Company. An
16 exemplar of the settlement offer is attached as Exhibit C.

17 In November 2015, Plaintiffs' counsel sent letters to the last known address of all
18 members of the putative class, notifying them of this litigation and requesting that the individuals
19 opt-in to the FLSA Putative Subclass. Plaintiffs' counsel received responses or otherwise heard
20 from 6 individuals who have or have expressed an intention to opt-in to the FLSA Putative
21 Subclass and assert the other applicable allegations in this case. In 2016, Defendants' counsel
22 mailed additional settlement offers to individuals who did not accept earlier offers. Between
23 letters from Plaintiffs' counsel and Defendants' counsel, every member of the putative class has
24 received at least two notices regarding this litigation or cannot be located so far. Members of the
25 California Putative Subclass may have received as many as six different notices from the Parties'
26 counsel regarding this litigation.

1 Based on these facts, the Parties no longer believe that this matter is appropriate for class
2 treatment and that further litigating this matter as a class or collective action will result in the
3 waste of judicial and litigation resources.

4 **First**, the Parties no longer believe that this matter necessarily meets the numerosity
5 element of Rule 23(a) in order to bring a class claim because there are relatively few members of
6 the putative class who have not reached a settlement with Defendants or elected to be represented
7 by Plaintiffs' counsel (those few individuals who did not settle and are also not represented by
8 Plaintiffs' counsel are referred to as "**Absent Members**"). Of the 71 individuals originally in the
9 California Putative Subclass, 46 have entered into an individual settlement agreement with
10 Defendants. Of the 25 members of the California Putative Subclass who remain, 7 are
11 represented by Plaintiffs' counsel. Accordingly, there are only 18 Absent Members, 16 of whom
12 have not responded to either party. The Parties do not believe this meets the threshold for a
13 putative class action in the Northern District of California. *See e.g., Greko v. Diesel U.S.A., Inc.*,
14 277 F.R.D. 419, 425 (N.D. Cal. 2011) (finding as a general matter that a class greater than forty
15 satisfies the numerosity requirement); *Californians for Disability Rights, Inc. v. California Dep't*
16 *of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008) ("While there is no bright-line rule as to how
17 many class members are required to be sufficiently numerous, various courts have found that the
18 numerosity factor is satisfied if the class comprises 40 or more members").

19 Similarly, of the 95 individuals in the FLSA Putative Subclass, only 9 have elected to opt-
20 in or assert a claim (including the three named Plaintiffs). A further 51 individuals have entered
21 into individual settlement agreements with Defendants.

22 The absent members of the putative class also do not appear ascertainable. Despite efforts
23 by both Parties, the Parties are unable to verify the contact information of 16 members of the
24 putative class, all of whom are former employees. This is especially true of the FCRA Putative
25 Subclass, most of whom are former applicants, not employees, whose location is presently
26 unknown despite vigilant efforts by both Parties. Courts have recognized the need for a class to
27 be ascertainable in order for it to proceed as a class under Rule 23. *See, e.g., Herrera v. LCS Fin.*
28 *Servs. Corp.*, 274 F.R.D. 666, 672 (N.D. Cal. 2011).

1 The issues with numerosity and ascertainability, alone, evidence good cause to dismiss
2 class allegations and permit those represented by Plaintiffs' counsel to pursue their claims
3 individually.

4 **Second**, Defendants assert that they are of limited financial means, such that they would
5 not be able to pay the damages sought for a class, even if Plaintiffs were able to certify a class.
6 Defendants have provided Plaintiffs' counsel with sufficient access to its financial data to satisfy
7 Plaintiffs' counsel that this is an appropriate basis for entering this stipulation.

8 **Third**, no individuals will be prejudiced by the dismissal of Class Allegations. Based on
9 the above, the named Plaintiffs and those who have elected to pursue their claims intend to
10 proceed with their individual claims. The remaining members of the putative class have either
11 resolved all disputed claims with Defendants or are otherwise entitled pursue a claim
12 individually. All individuals have received multiple notices of this litigation, and so are aware
13 that there are some employees who believe there may be individual claims to assert against the
14 Company. In order to avoid any question of prejudice, the Parties have also stipulated and agreed
15 that the statute of limitations relating to the claims asserted in this litigation is to be tolled for the
16 Absent Members. This tolling agreement is dependent on the Court entering an order approving
17 this stipulation and request. Specifically, the tolling period will extend so that an Absent Member
18 will have the same claims available as if the individual was a named Plaintiff at the filing of this
19 suit. The statute of limitations would resume running only upon the entry of any order approving
20 this stipulation. Accordingly, no Absent Member will be prejudiced by the dismissal of Class
21 Allegations should they decide to pursue and individual claim.

22 **Therefore**, the Parties agree that dismissal of class claims and allegations without
23 prejudice is appropriate. Individual claims of the named Plaintiffs and the Absent Members are
24 preserved, without the possibility of unnecessary expenditure of judicial and litigation resources
25 that may come with bringing a motion for class certification which the Parties recognize could
26 very well not be granted. The Parties have reached this stipulation after extensive discovery, two
27 mediation sessions with private mediators, and two mediation sessions with Magistrate Judge
28 Kim. Plaintiffs and Defendants, therefore, stipulate to and request that the Court issue an order as

1 follows: (1) Plaintiffs shall file the Third Amended Complaint (Exhibit A) within 10 days of the
2 Court's Order relating to this Stipulation; (2) the class and collective claims asserted in the
3 Second Amended Complaint shall be dismissed without prejudice and all deadlines relating to the
4 class certification motion shall be vacated; and (3) the statutes of limitation relating to the absent
5 class members shall be tolled until an order is entered regarding this stipulation.

6 DATED: September 30, 2016

PERKINS COIE LLP

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8 By: /s/ Jonathan S. Longino

Sue J. Stott

Jonathan S. Longino

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10 Attorneys for Defendants

11 DATED: September 30, 2016

WOODALL LAW OFFICES

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13 By: /s/ Kevin F. Woodall

Kevin F. Woodall

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15 Attorneys for Plaintiffs

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PROPOSED ORDER

PURSUANT TO THE STIPULATION OF THE PARTIES, and finding good cause, IT IS ORDERED that:

1. The class and collective actions asserted in the Second Amended Complaint be dismissed without prejudice;
2. All deadlines relating to the class certification motion shall be vacated;
3. Plaintiffs shall file the Third Amended Complaint, which is attached to the Stipulation as Exhibit A, within 10 days of this Order; and
4. The claims of the absent class members shall be tolled until the date of this Order.

DATED: October 3, 2016



HON. JON S. TIGAR
UNITED STATES DISTRICT COURT JUDGE