

POTTER HANDY LLP
Mark D. Potter (SBN 166317)
mark@potterhandy.com
James M. Treglio (SBN 228077)
jimt@potterhandy.com
100 Pine St., Ste 1250
San Francisco, CA 94111
Phone: (858) 375-7385
Fax: (888) 422-5191

Attorneys for Plaintiff and all Aggrieved Employees

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

MARVIN OSOY, individual, on behalf of the
State of California, as private attorney
general, and on behalf of all aggrieved
employees,

Plaintiff,

v.

CALIBER HOLDINGS CORPORATION, a
Delaware corporation; and DOES 1 to 100,
inclusive,

Defendants.

CASE NO. 21STCV12589
Complaint Filed: April 1, 2021

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR ORDER GRANTING
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Judge: Hon. Alison Mackenzie
Hearing Date: April 11, 2024
Time: 8:30 a.m.

1 **NOTICE IS HEREBY GIVEN** that, on April 11, 2024 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department 55 of the Superior Court of California, County of Los Angeles
3 before the Honorable Alison Mackenzie, pursuant to Cal. Code of Civ. Pro. § 382, Plaintiff Marvin
4 Osoy (“Plaintiff”) individually and on behalf of all others similarly situated, will and do hereby move
5 this Court for entry of an Order:

- 6 1. Preliminarily certifying the Settlement Class for purposes of Settlement;
- 7 2. Preliminarily appointing Plaintiff Marvin Osoy as Class Representative for purposes of
8 settlement;
- 9 3. Preliminarily appointing James M. Treglio of Potter Handy LLP as Class Counsel for
10 purposes of settlement;
- 11 4. Preliminarily approving the settlement as fair, adequate, and reasonable, based upon the
12 terms set forth in the Parties’ Joint Stipulation of Class Action, Collective Action, and PAGA
13 Representative Action Settlement and Release (“Settlement Agreement”), including payment by
14 Defendant Caliber Holdings LLC f/k/a Caliber Holdings Corporation (“Defendant”) of the Maximum
15 Settlement Amount (“MSA”) of \$610,000.00;
- 16 5. Preliminarily approving a Service Enhancement of \$10,000.00 for the named Plaintiff
17 from the MSA in recognition of his service to the Settlement Class;
- 18 6. Preliminarily approving Plaintiff’s Counsel’s request for up to one third of the MSA as
19 attorneys’ fees (i.e., up to \$203,333.33), plus reimbursement of actual litigation costs up to \$15,000.00;
- 20 7. Preliminary approving a payment of PAGA penalties of \$10,000.00, including payment
21 to the Labor and Workforce Development Agency for its share of penalties pursuant to PAGA in an
22 amount of \$7,500.00;
- 23 8. Preliminary approving the FLSA Settlement Fund in the amount of \$60,000.00 to be
24 allocated among the FLSA Members deducted from the MSA, based on their eligible employee service
25 time for Covered FLSA Workweeks, as reflected on Caliber’s internal records;
- 26 9. Appointing Phoenix as the third-party Settlement Administrator for mailing notices and
27 for settlement administration, and approving that \$10,000.00 be deducted from the MSA for the costs
28 of claims administration; and

10. Approving the proposed Notice of Class Action Settlement (“Class Notice”) and ordering it be disseminated to the Class Members as provided in the Settlement Agreement.

This Motion is based upon the supporting Memorandum of Points and Authorities, the Declarations of James M. Treglio, and Marvin Osoy, the Settlement Agreement, the Class Notice, and the other papers and exhibits filed herewith.

Dated: Respectfully submitted,

POTTER HANDY LLP

By: /s/ James M. Treglio
James M. Treglio, Esq.
Attorneys for Plaintiff and the Class

TABLE OF CONTENTS

TABLE OF AUTHORITIES	6
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION	1
II. BACKGROUND	2
A. General Background Information About Defendants and Plaintiffs.....	2
B. Procedural History, Informal Discovery, and Mediation.....	3
III. SUMMARY OF THE PROPOSED SETTLEMENT	4
IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS UNDER THE LESSER STANDARD OF SCRUTINY FOR SETTLEMENT-ONLY CONSIDERATION IS APPROPRIATE FOR PURPOSES OF SETTLEMENT	6
A. Numerosity and Ascertainability	7
B. Well-Defined Community of Interest	7
1. Commonality.....	7
2. Typicality	8
3. Adequacy of Representation	8
4. Superiority.....	9
5. Predominance.....	9
V. THE COURT SHOULD PRELIMINARY APPROVE THE SETTLEMENT, WHICH IS FAIR, ADEQUATE, AND REASONABLE	9
A. Class Action Settlements are Subject to Judicial Review and Approval Under the California Rules of Court.....	9
B. The Settlement is the Result of Serious, Informed, Non-Collusive Negotiations	11
C. The Potential Partial Reversion Here is Justifiable in Light of the Lack of Collusion	11
D. The Extent of the Pre-Litigation Discovery and Investigation was More Than Sufficient to Permit Preliminary Approval of the Settlement	12
E. The Settlement is a Reasonable Compromise of Claims	12
1. Plaintiffs' Claims and Estimated Damages.....	13
F. The Risks Inherent in Continued Litigation are Great.....	16
1. Defendant's Defenses	16

1	G.	Plaintiff’s Counsel are Experienced in Similar Wage-and-Hour Litigation.....	18
2	H.	The Class Notice Plan Conforms to All Applicable Statutes and Rules.....	18
3	I.	The Class Representative Service Enhancement Award is Fair and	
4		Appropriate	19
5	J.	The Attorneys’ Fee Allocation Under the Settlement Agreement is Fair.....	20
6	VI.	CONCLUSION.....	22

TABLE OF AUTHORITIES

Cases

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591, 620 (1987)	6
<i>Archibald v. Cinerama Hotels</i> , 15 Cal. 3d 853, 861 (1976)	18
<i>Arenas v. El Torito Rests., Inc.</i> , 183 Cal. App. 4th 723, 732 (2010)	7
<i>Barboza v. West Coast Digital GSM, Inc.</i> , 179 Cal. App. 4th 540, 546 (2009)	8
<i>Bell v. Farmers Ins. Exchange</i> , 115 Cal.App.4th 715, 726 (2004)	19
<i>Bond v. Ferguson Enterprises, Inc.</i> No. 1:09-cv-1662-OWW-MSJ, 2011 WL 2648879, at *2-3 (E.D. Cal. 2011).....	11, 20
<i>Cellphone Termination Fee Cases</i> (2009) 180 Cal.App.4th 1110, 1117.....	9
<i>Cho v. Seagate Tech. Holdings, Inc.</i> , 177 Cal. App. 4th 734, 742 43 (2009).....	9
<i>Clark v. American Residential Services LLC</i> , 175 Cal.App.4 th 785, 806-7 (2009).....	19
<i>Clayton v. Knight Transportation</i> , No. 1:11-cv-00735-SAV, 2013 WL 5877213, at *2 (E.D. Cal. 2013)	11
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1801 (1996)	9, 10, 16
<i>Ellis v. Naval Air Rework Facility</i> , 87 F.R.D. 15, 18 (N.D. Cal. 1980), aff'd, 661 F.2d 939 (9th Cir. 1981)	18
<i>Garner v. State Farm Mut. Auto. Ins. Co.</i> , No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010).....	20
<i>Glass v. UBS Fin. Servs.</i> , No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *52 (N.D. Cal. Jan. 26, 2007)	20
<i>In re Microsoft I-V Cases</i> (2006) 135 Cal.App.4th 706, 723	9
<i>In re Taco Bell Wage & Hour Actions</i> No. 1:07-cv-01314-SAB) 2016 U.S. Dist. LEXIS 32690, at *4-5 (E.D. Cal. Mar. 14, 2016)	17
<i>In re Taco Bell Wage & Hour Actions</i> , No. 1:07cv1314 LJO DLB, 2012 U.S. Dist. LEXIS 168219, at *12 (E.D. Cal. Nov. 26, 2012).....	17
<i>Kakani Oracle Corp.</i> , 2007 U.S. Dist. Lexis 47515 at 13 (ND Cal. 2007)	11
<i>Laffitte v. Robert Half Int'l Inc.</i> , 1 Cal. 5 th 480, 506 (2016)	20, 21
<i>Linney v. Cellular Alaska P'ship</i> , 151 F.3d 1234, 1242 (9th Cir., 1998).....	17
<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.</i> , 244 F.3d 1152, 1162 (9th Cir. 2001).....	8

1	<i>Louie v. Kaiser Found. Health Plan, Inc.</i> , CASE NO. 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008)	20
2	<i>Lubin v. The Wackenhut Corp.</i> (2016) 5 Cal. App. 5 th 926, 932	13
3	<i>Maldonado, et al. v. Epsilon Plastics, Inc.</i> , 22 Cal.App.5 th 1308, 1334-37, 2018 Cal.App. LEXIS 413, *46-52 (April 18, 2018)	16
4	<i>Martin v. FedEx Ground Package System, Inc.</i> , No. C 06-6883 VRW, 2008 WL 5478576, at *8 (N.D. Cal. Dec. 31, 2008)	21
5	<i>Medraza v. Honda of N. Hollywood</i> , 166 Cal. App. 4th 89, 101 (2008)	7
6	<i>Monterrubio v. Best Buy Stores, L.P.</i> , Case 2:11-cv-03270-MCE-AC, ECF No. 47, at 23 (E.D. Cal. Nov. 20, 2013)	21
7	<i>Rodriguez v. West Publishing</i> , 563 F.3d 948, 959 (9th Cir. 2009)	19
8	<i>Romero v. Producers Dairy Foods, Inc.</i> , No. 1:05cv0484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007)	21
9	<i>Ross v. US Bank National Association</i> , No. C 07-02951 SI, 2010 WL 3833922, at *2 (N.D. Cal. Sept. 29, 2010)	20
10	<i>Singer v. Becton Dickinson & Co.</i> , 2010 U.S. Dist. Lexis 53416 (S.D. Cal. 2010)	11
11	<i>Singer v. Becton Dickinson and Co.</i> , No. 08-cv-821-IEG (BLM), 2010 WL 2196104, at * 8 (S.D. Cal. June 1, 2010)	21
12	<i>Staton v. Boeing Co.</i> , 327 F.3d 938, 976-7 (9th Cir. 1993)	19
13	<i>Stuart v. RadioShack Corp.</i> , No. C-07-4499 EMC, 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010)	21
14	<i>Vasquez v. Coast Valley Roofing, Inc.</i> , 266 F.R.D. 482, 493 (E.D. Cal. 2010)	20
15	<i>Washington Mut. Bank v. Superior Court</i> , 24 Cal. 4th 906, 913 (2001)	7
16	<i>West v. Circle K Stores, Inc.</i> , NO. CIV. S-04-0438 WBS GGH, 2006 U.S. Dist. LEXIS 76558, at *28 (E.D. Cal. Oct. 19, 2006)	20
17	<i>Wilson v. Kiewit Pacific Co.</i> , No. 09-cv-03630, ECF No. 119 (N.D. Cal. 2012)	21
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

Statutes

Cal. Code Civ. Proc. § 382	6
California Rule of Court 3.769(d).....	6
IWC Wage Order 4-2001	12
Labor Code § 226.7.....	12, 13
Labor Code § 2699(f)(2).....	14
Labor Code § 512.....	13
Labor Code Section 226.....	13
Labor Code section 2699(e)(2)	17
Section 382 of the Code of Civil Procedure	6

Treatises

4 Newberg on Class Actions § 13:13 (5th ed.)	9
Herbert B. Newberg & Alba Conte, <i>Newberg on Class Actions</i> (“ <i>Newberg</i> ”) § 11:25 (4th ed. 2002)....	10
<i>Manual For Complex Litigation</i> (Third) § 30.41 (1995).....	10
<i>Newberg</i> , § 3:13	8

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Motion seeks preliminary approval of a wage-and-hour class action settlement between
4 Plaintiff Marvin Osoy (“Plaintiff”) and Defendant Caliber Holdings LLC f/k/a Caliber Holdings
5 Corporation (“Defendant”) for approximately 57 current and former exempt Production Managers,
6 and/or hourly employees of Defendant in California which provides them with an overall value of
7 \$610,000.00. Plaintiff seeks to represent a class defined as (a) All individuals employed by Caliber as
8 exempt Production Managers in California between January 27, 2020 and the Preliminary Approval
9 Date (“PAGA Members”); (b) All individuals employed by Caliber as exempt Production Managers in
10 California between April 1, 2018 and the Preliminary Approval Date, excluding any individuals who
11 previously signed releases covering the Released FLSA Claims (“FLSA Members”); and (c) All
12 individuals employed by Caliber as exempt Production Managers in California between April 1, 2017
13 and the Preliminary Approval Date, excluding any individuals who previously signed releases covering
14 the Released Class Claims (“Class Members”).¹ Among other things, Plaintiff alleged that Defendant
15 violated California’s wage and hour laws and unfair competition laws.

16 Because the settlement is fair and reasonable, was negotiated at arm’s length between counsel
17 following extensive informal discovery, and was reached after attendance at a full-day mediation and
18 continued negotiations over several months, it should be preliminarily approved.

19 Through this motion, Plaintiff requests that the Court enter an order: (1) conditionally certifying
20 the Settlement Class under Cal. Code of Civil Procedure § 382 and California Rule of Court 3.769(c) for
21 settlement purposes only and preliminarily approving the settlement; (2) approving the proposed Class
22 Notice as to form and content and directing the mailing of the Class Notice to Class Members pursuant
23 to the Settlement Agreement²; (3) approving settlement services to be provided by Phoenix as the
24 Settlement Administrator; (4) appointing Named Plaintiff and Plaintiff’s Counsel as representatives of
25 the Settlement Class; (5) approving the Service Enhancement payment to Named Plaintiff as Class
26 Representative; (6) approving the application of payment of reasonable attorneys’ fees and costs to

27 ¹ Any Class Member hired after the date of preliminary approval shall not be included in the Settlement Class.

28 ² The Notice of Class Action Settlement and Claim Form are attached to the Settlement Agreement as Exhibit A. (See, Declaration of James M. Treglio in Support of Plaintiff’s Motion for Order Granting Preliminary Approval of Class Action Settlement (“Treglio Decl.”), Exhibit A.).

1 Plaintiff's counsel; and (7) scheduling a Final Approval Hearing on the question of whether the proposed
2 settlement should be finally approved as fair, reasonable, and adequate as to the members of the
3 Settlement Class, FLSA Members, and PAGA Members.

4 The settlement fairly takes into account the significant risks associated with pursuing this
5 litigation further. Those risks include, by way of example only, denial or limitation of class certification,
6 key factual and legal disputes as to the viability of Plaintiff's claims under the Labor Code, the potential
7 for the action to be compelled into individual arbitration, and the risk of loss on the merits at trial.
8 Accordingly, Plaintiff respectfully requests that the Court preliminarily approve the settlement as fair,
9 reasonable, and adequate, allow notice to issue, and schedule proceedings for final approval of the
10 settlement.

11 **II. BACKGROUND**

12 **A. General Background Information About Defendant and Plaintiff**

13 Defendant Caliber Holdings LLC f/k/a Caliber Holdings Corporation is a Delaware limited
14 liability company. Caliber provides auto repair services such as paintless dent repair, auto glass, and
15 vehicle reassembly, car rentals, insurance, towing, and warranty. Caliber employs individuals such as
16 Plaintiff and the Class Members as exempt Production Managers, within the County of Los Angeles.
17 Treglio Decl. ¶ 12.

18 Plaintiff and all similarly situated employees are, and at all times pertinent hereto, have been hired
19 by Defendant to work in California. Treglio Decl., ¶ 13.

20 In August 2015, Plaintiff was hired as a production manager at Caliber's Valencia, California
21 center where he worked until he was laid off in April 2020. Treglio Decl., ¶ 14.

22 Plaintiff alleges that Defendant improperly classified Plaintiff and the Class Members as
23 "exempt." Consequently, Plaintiff and the Class were not paid overtime wages for hours worked in
24 excess of eight hours per day and/or forty hours per week. Although classified as exempt, the duties of
25 Plaintiff and the Class Members do not meet the requirements set forth in IWC Wage Order No. 4. For
26 instance, Plaintiff would usually spend only around two hours of his workday in the office to attend a
27 production meeting that his boss would run. The rest of Plaintiff's workday would then be spent going
28 around the shop to make sure things ran smoothly – he would go over paperwork with technicians and

1 service advisors, walk around to check cars that are done to ensure that they pass the company's quality
2 standards before they are released, help out in detailing as needed, and process all new cars that came in.
3 Plaintiff's tasks would sometimes even include taking out the shop and office trash. While Plaintiff
4 supervised around 20 staff, he was not responsible for their schedule, discipline, hiring, training, and
5 firing. Plaintiff had no power to make his own decisions without a manager since all of his decisions
6 needed his manager's approval. Treglio Decl., ¶ 15.

7 Plaintiff alleges that throughout their employment, Plaintiff and the Class Members were
8 systematically misclassified by Defendant as "exempt" when in fact they were not. Thus, even if
9 Plaintiff and the Class Members regularly worked for 50 hours per week or in excess of 8 hours a day
10 and 40 hours per week, they did not receive overtime compensation. In addition, Plaintiff and the Class
11 Members did not receive meal and rest periods although they were entitled to them. Treglio Decl., ¶ 16.

12 Plaintiff alleges that he and the Class Members also had to use their personal mobile phones to
13 make business calls. However, Defendant did not reimburse these business expenses. While Plaintiff
14 was laid off on April 3, 2020, his final check was only paid by Caliber on April 6, 2020. Treglio Decl., ¶
15 17.

16 Defendant denies Plaintiff's claims and asserts that it has complied fully with all applicable labor
17 laws and wage orders. Consequently, Defendant does not believe that any liability to Plaintiff, the State
18 of California or the LWDA, or to any other individual whom Plaintiff seeks to represent exists, or that
19 Plaintiff, the State of California or the LWDA, or any other individual whom Plaintiff seeks to represent
20 are entitled to any recovery in the Action.

21 **B. Procedural History, Informal Discovery, and Mediation**

22 On January 21, 2021, Plaintiff filed his PAGA Notice with the Labor Workforce Development
23 Agency ("LWDA"), paid the \$75 filing fee, and sent notice to Defendant setting forth the facts and
24 theories of the violations supporting their allegations. Treglio Decl., ¶ 18.

25 On April 1, 2021, Plaintiff filed his complaint before the Superior Court for the County of Los
26 Angeles. On June 6, 2023, Plaintiff filed the First Amended Complaint alleging causes of action for (1)
27 failure to pay Plaintiff and his fellow employees in California for all hours worked; (2) failure to provide
28 Plaintiff and his fellow employees paid rest breaks and pay rest break premiums; (3) failure to provide

1 Plaintiff and his fellow employees meal periods and pay missed meal period premiums; (4) failure to
2 reimburse Plaintiff and his fellow employees business expenses incurred; (5) failure to pay all wages
3 owed in a timely manner; (6) failure to provide complete wage statements to Plaintiff and his fellow
4 employees within the four years prior to the filing of this Complaint; (7) failure to pay all wages due to
5 former employees based on the foregoing; (8) failure to pay overtime wages to Plaintiff and his fellow
6 employees; (9) PAGA violations based on the foregoing; and (10) violations of the Fair Labor Standards
7 Acts (“FLSA”) for failure to pay minimum and overtime wages. Treglio Decl., ¶ 19.

8 On or about February 23, 2022, Plaintiff sent an informal discovery request to Defendant by e-
9 mail. Defendant subsequently produced, for purposes of mediation, information regarding allegedly
10 aggrieved employees and payperiods and document including: (1) Job description of Production
11 Managers. Treglio Decl., ¶ 20.

12 On April 19, 2022, counsel for the Parties participated in a mediation with experienced mediator
13 Lisa Klerman, Esq. With Ms. Klerman’s assistance, the Parties negotiated a complete settlement of
14 Plaintiff’s claims. The Parties were able to execute the long form Settlement Agreement now before the
15 Court for preliminary approval. Treglio Decl., ¶¶ 21- 22.

16 **III. SUMMARY OF THE PROPOSED SETTLEMENT**

17 **A. Overview**

18 Under the terms of the Settlement Agreement (“S.A.”), Defendant is discharged of all the claims
19 asserted in the pending lawsuit in exchange for Defendant’s to (1) pay \$610,000.00 MSA (S.A., ¶ I. 25);
20 (2) the Settlement Administration Expenses, not to exceed \$10,000.00 (S.A., ¶ I. 41); (3) Plaintiff’s
21 proposed Service Enhancement Award of \$10,000.00 (S.A., ¶ I. 40); (4) attorneys’ fees of up to
22 \$203,333.33 (up to one third of the MSA) (S.A., ¶ IV. E. (a)); (5) actual litigation costs of up to
23 \$15,000.00 (*Id.*); and (6) a payment to the LWDA for their portion of the PAGA penalties in the amount
24 of \$7,500.00 as its share of the settlement for civil penalties pursuant to PAGA (S.A., ¶ I. 30).

25 Within thirty (30) days after the Preliminary Approval Date, Caliber shall provide to the
26 Settlement Administrator information in electronic format regarding all Class Members, including
27 name(s), last known residence addresses, Social Security numbers, and dates worked for Covered Class
28 Workweeks, Covered FLSA Workweeks, and Covered PAGA Pay Periods. Class Member data shall

only be used by the Settlement Administrator for the purpose of calculating settlement shares and finding and notifying Class Members of the settlement. Class Member data will be subject to the Settlement Administrator's confidentiality agreement and shall not be disclosed to the Named Plaintiff, Class Counsel, or any other Class Members without the written consent of Caliber.

Within thirty (30) days of receiving the Class Member data from Caliber and after it has completed all of the address updates for Class Members, the Settlement Administrator shall mail the Class Notice to Class Members. At least five (5) business days prior to this mailing, the Settlement Administrator shall provide Caliber with a report listing the estimated settlement payment amounts to each Class Member.

Class Members shall have forty-five (45) days from the date of mailing of the Class Notice to opt out of the Class or object to the Settlement. If the 45th day falls on a Sunday or holiday, the deadline will be the next business day that is not a Sunday or holiday. After recalculating estimated settlement allocations to account for opt-outs, Settlement Class Members, FLSA Members, and PAGA Members will receive their allocation from the settlement fund agreed upon pursuant to this Settlement Agreement and calculated by the Settlement Administrator. There will be no payments for Covered Class Workweeks made to Class Members who opt out of this Settlement.

All Settlement Administration Expenses shall come out of the Maximum Settlement Amount.

The Settlement Administrator shall calculate pro rata Class Settlement Payments out of the Net Settlement Amount to Class Members, pro rata FLSA Settlement Payments out of the FLSA Settlement Fund to FLSA Members, and pro rata individual PAGA Group Payments to PAGA Members as described in Paragraph **Error! Reference source not found.** of this Settlement Agreement, and based on Caliber's internal records.

In addition, Caliber, through the Settlement Administrator, shall also make a payment to the California LWDA for the PAGA LWDA Payment as consideration for the release of all PAGA claims that are the subject of the Action on behalf of the State of California.

Within 14 days after the Effective Date, Caliber will provide payment of the Maximum Settlement Amount to the Settlement Administrator to fund the QSF to be created by the Settlement Administrator, in addition to Caliber's share of employer payroll taxes for the payments reportable on

1 IRS Form W-2.

2 Within 30 days after the Effective Date, the Settlement Administrator shall distribute and pay all
3 Class Settlement Payment checks to the Settlement Class Members, issue FLSA Settlement Checks to
4 the FLSA Members, issue checks to the PAGA Members for their individual PAGA Group Payments,
5 issue a check to the LWDA for the PAGA LWDA Payment, pay the Named Plaintiff his Service
6 Enhancement payment, and pay Class Counsel's attorneys' fees and costs.

7 Settlement Class Members, FLSA Members, and PAGA Members will have 90 calendar days
8 after mailing by the Settlement Administrator to cash settlement checks and will be so advised of such
9 deadline. If such Settlement Class Members, FLSA Members, and/or PAGA Members do not cash their
10 checks within that period, those checks will become void and a stop payment will be placed on the
11 uncashed checks. Within thirty (30) days after the expiration date of the settlement checks, the
12 Settlement Administrator shall provide to Class Counsel and Caliber's Counsel a verification/declaration
13 signed under penalty of perjury that it has mailed the settlement checks to Settlement Class Members,
14 FLSA Members, and/or PAGA Members, and if uncashed, that such amounts have been sent to the
15 Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil
16 Code Section 1500, *et seq.* in the name of the Settlement Class Member, FLSA Member, and/or PAGA
17 Member to whom the uncashed check was addressed, for the benefit of those Settlement Class
18 Members, FLSA Members, and/or PAGA Members who did not cash their checks until such time as
19 they claim their property.

20 **IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS UNDER THE**
21 **LESSER STANDARD OF SCRUTINY FOR SETTLEMENT-ONLY**
CONSIDERATION IS APPROPRIATE FOR PURPOSES OF SETTLEMENT

22 California Rule of Court 3.769(d) provides that the Court may make an order approving
23 certification of a provisional settlement class at the preliminary approval stage. It is well-established
24 that trial courts should use a "lesser standard of scrutiny" for determining the propriety of certifying a
25 settlement class, as opposed to a litigation class. *Dunk*, 48 Cal. App. 4th at 1807, n.19. The reasons
26 include that no trial is anticipated in a settlement class, so the case management issues inherent in
27 determining if the class should be certified need not be confronted; and the trial court's fairness review
28 of the settlement protects the interests of the non-representative class members. *Id.*; *see also Officers*

1 *for Justice*, 688 F.2d at 633 (“Th[e] relationship between the certification determination and the merits
2 of the case is further attenuated within the context of the settlement evaluation process
3 [C]ertification issues raised by class action litigation that is resolved short of a decision on the merits
4 must be viewed in a different light.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1987)
5 (“Confronted with a request for settlement-only class certification, a district court need not inquire
6 whether the case, if tried, would present intractable management problems . . . for the proposal is that
7 there be no trial.”). As discussed below, for settlement purposes only, the Parties ask this Court to
8 provisionally certify the Settlement Class, as defined above, under Section 382 of the Code of Civil
9 Procedure.

10 **A. Numerosity and Ascertainability**

11 Numerosity is met if a proposed class is so large that joinder of all members would be
12 impracticable. *See* Cal. Code Civ. Proc. § 382. A proposed settlement class is ascertainable if the class
13 members can be objectively identified and given notice of the litigation without unreasonable time or
14 expense. *See Medrazo v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 101 (2008). Here, Defendant
15 has informed Plaintiff’s counsel that the proposed class consists of approximately 57 Class Members.

16 **B. Well-Defined Community of Interest**

17 **1. Commonality**

18 To justify certification, the class proponent must show that questions of law or fact common to
19 the class predominate over the questions affecting the individual members. *See Arenas v. El Torito*
20 *Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank v. Superior Court*, 24 Cal.
21 4th 906, 913 (2001)). The commonality element is satisfied here.

22 In this case, Plaintiff alleges there are common legal and factual question as to whether (1)
23 Defendant violated sections 1194, 1194.2, 1197.1, and 1198 of the Labor Code by failing to pay
24 Plaintiff and the members of the Class minimum wages and for all hours worked during the Class
25 Period; (2) Defendant violated Section 12 of IWC Wage Order No. 4 by failing to provide paid rest
26 periods to Plaintiff and the members of the Class in California during the Class Period; (3) Defendant
27 violated Labor Code section 226.7 by failing to provide one hour of premium pay to each member of the
28 Class for each day that a paid rest period was not provided in California during the Class Period; (4)

1 Defendant violated Labor Code sections 512 and 226.7, and section 11 of IWC Wage Order No. 4 by
2 failing to pay one hour of premium pay to each member of the Class for each day that an unpaid meal
3 break was not provided during the Class Period; (5) Defendant violated 2802 of the Labor Code during
4 the Class Period by failing to reimburse Plaintiff and the Class Members for their work-related
5 expenses; (6) Defendant violated Labor Code sections 204 and 210 by failing to pay Plaintiff and the
6 Class Members all wages owed with seven days of the close of payroll; (7) Defendant violated Section
7 203 of the Labor Code by failing to pay all wages due upon termination; (8) Defendant failed to provide
8 Plaintiff and the Wage Statement Penalty Subclass Members complete wage statements in violation of
9 Labor Code Section 226(a); (9) Defendant violated Sections 510, 1194, 1194.2, and 1198 of the Labor
10 Code and IWC Wage Order No. 4 during the Class Period by failing to pay Plaintiff and the Class
11 Members all overtime wages owed; (10) Defendant violated the FLSA by failing to pay Plaintiff and
12 the Class Members minimum and overtime wages; (11) The proper formula(s) for calculating damages,
13 interest, and restitution owed to Plaintiff and the Class Members; and (12) The nature and extent of
14 class-wide damages.

15 **2. Typicality**

16 Typicality “focuses on whether there exists a relationship between the Plaintiff’s claims and the
17 claims alleged on behalf of the class.” *Newberg*, § 3:13. Here, Plaintiff alleges his claims are typical of
18 the claims of the proposed Class. Both Plaintiff and Class Members sustained injuries and damages, and
19 were deprived of property rightly belonging to them, arising out of and caused by Defendant’s common
20 course of conduct in violation of law as alleged herein, in similar ways and for the same types of unpaid
21 wages. Plaintiff seeks wage and penalties, for himself and the rest of the Class. (*Id.*).

22 **3. Adequacy of Representation**

23 The proposed class representative must establish that he or she will adequately represent the
24 proposed class. See *Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540, 546 (2009).
25 Specifically, Plaintiff is adequate as a Class representative since he is committed to representing the
26 interests of the Class, has no interests that is averse to members of the Class, and understands and
27 accepted his duty to represent the best interests of the class. (Osoy Decl., ¶ 8). Plaintiff provided counsel
28 with information which was crucial to the drafting of the class complaint and mediation brief, discussed

1 settlement strategy with his counsel, spoke to other Class Members about their experiences working for
2 Defendant, and was available for the duration of the all-day mediation, all of which demonstrated his
3 commitment to the Class. (*Id.*).

4 Adequacy may be established by the fact that counsel are experienced practitioners. *See Local*
5 *Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th
6 Cir. 2001). Plaintiff is represented by a counsel experienced in the litigation of wage and hour class
7 actions, who have no interests averse to Plaintiff or the Class, who have and will continue to vigorously
8 prosecute this action on behalf of the Class alongside Plaintiff, and who have the financial resources to
9 handle this case. (Treglio Decl., ¶¶ 4-9).

10 **4. Superiority**

11 Certification of the Class for settlement purposes is superior here because there will be a global
12 resolution of all claims at once, which fosters judicial economy. Class certification is also vastly
13 superior to litigation of numerous individual claims because most of the claims are too small to litigate
14 outside of the class context.

15 **5. Predominance**

16 The common issues here, concerning alleged uniform deficiencies to Defendant's compensation,
17 meal and rest break, final pay, wage statement³, and overtime policies raise predominating factual and
18 legal issues supporting certification of a settlement class.

19 **V. THE COURT SHOULD PRELIMINARY APPROVE THE SETTLEMENT, WHICH** 20 **IS FAIR, ADEQUATE, AND REASONABLE**

21 **A. Class Action Settlements are Subject to Judicial Review and Approval Under** 22 **the California Rules of Court**

23 The decision to approve or reject a proposed settlement is committed to the Court's sound
24 discretion. *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1117. The Court has broad
25 powers to determine whether the proposed settlement is fair under the circumstances of the case. *In re*
26 *Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723.

27 This is the preliminary approval stage, and final approval will come in a few months, after the

28 ³ See, e.g. *McKenzie*, 275 F.R.D. at 299-300; see also *Willner v. Manpower, Inc.*, 2012 U.S. Dist. LEXIS 62227 (N.D. Cal.
May 3, 2012) (certifying settlement class for purposes of wage statement settlement).

1 Class Members have had an opportunity to participate in the settlement, object, or request exclusion
2 from the settlement “opt out.” The purpose of the preliminary evaluation of a class action settlement is
3 to determine whether the proposed settlement is within the range of possible approval, and thus whether
4 notice to the class of the settlement terms and the scheduling of a formal fairness hearing is worthwhile.
5 *Wershba*, supra, 91 Cal.App.4th at 234–35; 4 Newberg on Class Actions § 13:13 (5th ed.).

6 The Court’s ultimate duty is to determine whether the settlement is fair, adequate, and
7 reasonable. See *Dunk v. Ford Motor Co.* 9 (“*Dunk*”), 48 Cal. App. 4th 1794, 1801 (1996) (setting forth
8 the “fair, adequate, and reasonable” standard) (citing *Officers for Justice*, 688 F.2d at 625); *Cho v.*
9 *Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742 43 (2009) (a trial court must approve a class
10 action settlement agreement, but only after determining that it is ““fair, adequate and reasonable,””
11 considering factors such as the ““risk, expense, [and] complexity”” of continued litigation) (citations
12 omitted). The Court enjoys broad discretion in making its fairness determination, and should consider
13 factors including, but not limited to:

14 [T]he strength of Plaintiff’s case, the risk, expense, complexity and likely duration of
15 further litigation, the risk of maintaining class action status through trial, the amount
16 offered in settlement, the extent of discovery completed and the stage of the proceedings,
17 the experience and views of counsel . . . and the reaction of the class members to the
proposed settlement.

18 *Dunk*, 48 Cal. App. 4th at 1801 (setting forth a non-exhaustive list of factors for the court’s
19 consideration at final approval).

20 The above factors are not exclusive, “. . . and the court is free to engage in a balancing and
21 weighing of factors depending on the circumstances of each case.” *Wershba*, 91 Cal. App. 4th at 245.
22 However, in doing so, the Court must give “[due] regard to what is otherwise a private consensual
23 agreement between the parties.” (*Id.*) The inquiry must be limited “to the extent necessary to reach a
24 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
25 between, the negotiating parties.” (*Id.*, citation and internal quotation marks omitted).

26 At the preliminary approval stage, the Court need only determine that the settlement falls within
27 the “range of possible judicial approval,” so that notice to the class and the scheduling of the fairness
28 hearing are worthwhile. See Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (“*Newberg*”)

§ 11:25 (4th ed. 2002). Indeed, the Court should grant preliminary approval if there are no “grounds to doubt its fairness or other obvious deficiencies . . . and [the settlement] appears to fall within the range of possible approval.” *Manual For Complex Litigation* (Third) § 30.41 (1995); see *Dunk*, 48 Cal. App. 4th at 1802. A “presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802 (citing *Newberg* § 11:41). As shown below, the settlement falls well within the range of approval because there are no grounds to doubt its fairness.

B. The Settlement is the Result of Serious, Informed, Non-Collusive Negotiations

The settlement is fair and reasonable, and was negotiated at arm’s length between counsel that included a mediator and lasted for nearly a year. (Treglio Decl., ¶ 39). Counsel for both parties were thoroughly familiar with the complex legal and factual questions at issue in this litigation. (*Id.*). The settlement is a product of intensive negotiations, supported by investigation and direct exchanges of information through informal discovery, and during the course of settlement negotiations, including a full-day mediation. (*Id.*).

C. The Potential Partial Reversion Here is Justifiable in Light of the Lack of Collusion

Although class action settlements that are completely reversionary and where class counsel’s attorneys’ fees are fixed as a percentage of the settlement fund regardless of the claim rate are generally disfavored in California, see *Kakani Oracle Corp.*, 2007 U.S. Dist. Lexis 47515 at 13 (ND Cal. 2007), claims-made class action settlements with a certain percentage floor on distribution of the net settlement amount (also known as partially reversionary settlements), have repeatedly been approved. See e.g., *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. Lexis 53416 (S.D. Cal. 2010) (approving claims made settlement with a 50 percent floor on distribution and fees at 1/3 of the common fund because at least half of settlement fund would be distributed and the court could examine the claim rate and settlement notice results prior to final approval); *Bond v. Ferguson Enterprises, Inc.* No. 1:09-cv-1662-OWW-MSJ, 2011 WL 2648879, at *2-3 (E.D. Cal. 2011) (approving a \$2,250,000 deal with a 60 percent floor in Fresno eastern district federal court); and *Clayton v. Knight Transportation*,

No. 1:11-cv-00735-SAV, 2013 WL 5877213, at *2 (E.D. Cal. 2013) (approving a settlement with a 40 percent floor).

Here, completely unlike the situation in *Kakani*, there is no indication whatsoever of any collusion between counsel for the parties. After informal discovery and an all-day arm's length mediation, the opposite conclusion is demonstrably obvious. Treglio Decl., ¶¶ 20-21. Here, regardless of the claim rate, the class recovery will be at least \$610,000.00—a far cry from the collusive settlement in *Kakani*. *Id.* Finally, class counsel's fees will be supported based on their lodestar hours and a reasonable percentage of the maximum settlement amount at \$610,000.00.

D. The Extent of the Pre-Litigation Discovery and Investigation was More Than Sufficient to Permit Preliminary Approval of the Settlement

Notably, the parties spent months prior to the mediation developing the factual record for this case, engaging in informal discovery and exchanges of documents and information, drafting detailed mediation briefs, all of which ensured both sides were fully informed about the strengths and weaknesses of their respective positions at the mediation and during subsequent settlement negotiations. (Treglio Decl., ¶¶ 20-21). The Parties and their counsel attended a full-day mediation session before an experienced mediator Lisa Klerman, Esq. With Ms. Klerman's assistance, the Parties negotiated a complete settlement of Plaintiff's claims. (*Id.*). In addition, the parties are represented by skilled and experienced counsel with extensive backgrounds in complex litigation and experience litigating and settling similar wage and hour class actions. (Treglio Decl., ¶¶ 4-9). Plaintiff's counsel shares the view that this settlement is fair, adequate, and reasonable, in the best interests of Class Members, and should be preliminarily approved. (Treglio Decl. ¶ 42).

E. The Settlement is a Reasonable Compromise of Claims

The settlement represents a fair compromise given the risks and uncertainties presented by continued litigation. (Treglio Decl. ¶ 39). Defendant asserted and would have continued to assert legal and factual grounds to defend against this action, including the possibility of having to pursue only Plaintiff's individual claims in arbitration, non-certification of certain claims, and factual and legal defenses on the merits. (*Id.*, ¶ 39). Moreover, continued litigation would be costly, time consuming, and uncertain in outcome. By contrast, this settlement ensures timely relief and substantial recovery of

penalties Plaintiff contends are owed to the Class Members.

1. Plaintiff's Claims and Estimated Damages

Plaintiff's estimated damages are based on the following facts and figures:

Rest Breaks

Labor Code § 226.7 provides "an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission ("IWC"). Under IWC Wage Order 4-2001 an employer must authorize and permit all employees to take ten (10) minute duty free rest periods for every major fraction of four (4) hours worked. *See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th 257, 269 (concluding that "during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time."). In *Augustus*, the court expressly rejected the employer's assertion that it could provide an on-duty rest period to employees who worked as security guards and further explained "that employers [must] relinquish any control over how employees spend their break time, and relieve their employees of all duties." *Id.* at 273.

California Labor Code Section 226.7 requires an employer to pay an additional hour of compensation for each rest period the employer fails to provide in accordance with the applicable Industrial Welfare Commission Wage Order. Therefore, Plaintiff calculated Defendant's maximum liability for rest breaks as follows: \$37.50 per missed rest period * 5098 workweeks = \$191,175.

Meal Breaks

Labor Code § 512 requires employers to provide employees with thirty (30) minute uninterrupted and duty free meal period within the first five hours of work. Moreover, an employee who works more than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty free meal period. "An on-duty meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty and the parties agree in writing to an on-duty paid meal break." (*Lubin v. The Wackenhut Corp.* (2016) 5 Cal. App. 5th 926, 932) The written agreement must include a provision allowing the employee to revoke it at any time. *Id.*

California Labor Code Section 226.7 requires an employer to pay an additional hour of compensation for each meal period the employer fails to provide in accordance with the applicable

1 statute or Industrial Welfare Commission Wage Order.

2 Therefore, Plaintiff calculated Defendant's maximum liability for meals breaks as follows
3 \$37.50 per missed meal period * 5098 workweeks = \$191,175.

4 ***Overtime***

5 As noted above, the hourly rate of Plaintiff and the Class Members was \$37.50 per hour. Thus,
6 for each workweek, Plaintiff alleges there was a loss of approximately 1 hour, which should have been
7 compensated at \$56.25 (1.5 times the hourly rate). As per the data provided by Defendant, there were
8 5,098 workweeks. As such, Plaintiff calculates the exposure for unpaid time is \$56.25 * 5,098
9 workweeks, or **\$286,762.5**.

10 ***Unreimbursed Expenses***

11 Plaintiff contends that each and every week he incurred \$10 in costs (cell phone charges) per
12 workweek, which appears to be standard. For mediation purposes, Plaintiff estimates each Class
13 Member incurred \$10 in cell phone expenses. As such, Plaintiff calculates the exposure as follows:

14
15 Phone: \$10 per workweek x 5,098 workweeks = \$50,980.

16 ***Waiting Time Penalties***

17 As a result of Defendant's alleged failure to pay the Class Members for meal/rest period
18 premiums, Plaintiff alleges that Defendant violated Labor Code § 203. Labor Code § 203 provides "if an
19 employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages
20 of the employee shall continue as a penalty. . ." for up to 30 days. Lab. Code § 203; Mamika v. Barca,
21 (1998) 68 Cal.App.4th 487, 492.

22 Plaintiff alleges that Defendant has failed to pay all the Class Members for rest period premiums,
23 and meal period premiums, whose sums were certain, at the time of termination or within seventy-two
24 (72) hours of their resignation and have failed to pay those sums for thirty (30) days thereafter.

25 As noted above, there are approximately 57 Class Members. Therefore the waiting time
26 penalties, calculated at 30 days of pay at the regular rate, are calculated as follows:

27 57 Class Members x \$37.50 hourly rate of pay x 8 hours a day x 30 days = \$513,000.

28 ***Inaccurate Itemized Wage Statements***

Labor Code Section 226 requires an employer to furnish its employees with an accurate itemized wage statement in writing, showing among other things, (1) gross wages earned, (2) total hours worked by each respective individual, (3) all deductions, (4) net wages earned and/or (5) all applicable hourly rates in effect during each respective pay period and the corresponding number of hours worked at each hourly rate by each respective individual.

Pursuant to Labor Code Section 226(e), Plaintiff alleges that he and the other current and former employees of Defendant are entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and are entitled to an award of costs and reasonable attorneys' fees.

Therefore, Plaintiff calculated Defendant's maximum liability for inaccurate itemized wage statements as follows:

57 Class Members x \$4,000 per Class Member = \$228,000.

PAGA Penalties

Plaintiff alleges that under California Labor Code § 2699(f)(2) Defendant is subject to a civil penalty of \$100 for the initial violation of the aforementioned Labor Code violations, and \$200 for each subsequent pay period where the violation occurred.

Without stacking PAGA penalties, Plaintiff alleges that Defendant's PAGA exposure is:

2,050 pay periods * \$100 per pay period = \$205,000.

The estimated 57 Class Members will enjoy substantial monetary recovery amounting to an estimated average recovery per Class Member of approximately \$5,292 on a net basis.⁴ This amount is substantial for Class Members in a class action involving on duty meal and rest breaks and consistent with average settlement awards in similar cases handled by Class Counsel.

Total Exposure

PAGA Violations:	\$205,000
Unpaid Overtime:	\$286,762.5
Meal and Rest Periods:	\$382,350

⁴ Net Settlement Amount of \$301,666 / 57 Settlement Class Members = \$5,292

Waiting Time Penalties: \$513,000
Wage Statement Damages: \$228,000
2802 Reimbursement: \$50,980
Total: \$ 1,666,092.5

F. The Risks Inherent in Continued Litigation are Great

To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court also should consider “[t]he strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, [and] the risk of maintaining class action status.” *See Dunk*, 48 Cal. App. 4th at 1801. As described above, Defendant has strong defenses to Plaintiff’s claims summarized below, which create a real possibility that the claims might not be certified and/or might fail on the merits. Proceeding with litigation would impose significant risk of no recovery as well as ongoing, substantial additional expenditures of time and resources. If settlement were not achieved, continued litigation of the claims would take substantial time and possibly confer no benefit on Class Members. By contrast, the settlement will yield a prompt, certain, and substantial recovery for Class Members, which also benefits the parties and the Court.

1. Defendant’s Defenses

Defendant asserted various significant defenses summarized below.

Wage Statement Defense

Defendant can rely on a recent California Court of Appeal case, *Maldonado, et al. v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1334-37, 2018 Cal.App. LEXIS 413, *46-52 (April 18, 2018) where the Court reversed their award for penalties for inaccurate wage statements because the Court found that inaccurate wage statements alone do not justify penalties; the plaintiff must establish injury from the inaccuracy. The Court also rejected “derivative” wage statement penalties. Therefore, Plaintiff assessed an 80% discount on Plaintiff’s claims for inaccurate wage statements. (Treglio Decl., ¶ 33).

Risk of Prevailing on the Merits

Even if Plaintiff successfully obtained certification, it was not a foregone conclusion that Plaintiff would prevail on the merits and decertification also remained a possibility. In another recent case involving claims where punch data somewhat unusually existed for the rest periods at issue—which

1 also applies here—a federal jury found in favor of the defendant against 37,208 employees on a claim
2 for failure to provide lawful rest periods despite the fact that the defendant’s policy was facially invalid
3 because it “only provides one ten minute break for employees working between six and seven hours.”
4 *See In re Taco Bell Wage & Hour Actions* No. 1:07-cv-01314-SAB) 2016 U.S. Dist. LEXIS 32690, at
5 *4-5 (E.D. Cal. Mar. 14, 2016); *In re Taco Bell Wage & Hour Actions*, No. 1:07cv1314 LJO DLB, 2012
6 U.S. Dist. LEXIS 168219, at *12 (E.D. Cal. Nov. 26, 2012). Therefore, Plaintiff assessed a 25%
7 discount on the risk of losing on the merits. (Treglio Decl. ¶ 34). Further, Defendant contended, and had
8 evidence of, Class Members documenting both their meal periods, and rest periods.

9 ***Discounts on the PAGA Penalties***

10 Under Labor Code section 2699(e)(2) a court may award a lesser amount than the maximum
11 civil penalty specified under PAGA, if based on the facts and circumstances of the particular case, to do
12 otherwise would result in an award that is unjust, arbitrary, and oppressive or confiscatory. Courts often
13 exercise their discretion to reduce the amount of PAGA penalties to as little as \$5.00 per pay period or
14 18% of the available PAGA penalties.⁵ Additionally, the Labor Commissioner has specifically stated as
15 recently as last year that the main purpose for assessing PAGA penalties by the Labor and Workforce
16 Development Agency is to enforce California’s Labor Code, and obtain compliance. Specifically, with
17 regard to assessing the adequacy of settlements, the penalty amounts are resigned to “promote PAGA’s
18 compliance and deterrence goals.” Amicus Curiae Brief submitted by the State Labor Commissioner,
19 *Price v. Uber Technologies*, June 16, 2017. Therefore, Plaintiff assessed a 50% discount on the
20 maximum liability for PAGA penalties due to the discretionary nature of PAGA penalties. (Treglio
21 Decl. ¶ 35).

22 In sum, the settlement amount, negotiated at arms’-length, is fair and reasonable in light of the
23 strengths and weaknesses of Plaintiff’s case and Defendant’s defenses.

24
25
26
27 ⁵ See e.g., *Kileigh Carrington v. Starbucks Corporation, et al.*, San Diego Superior Court Case No. 37-2014-00018637-CU-
28 OE-CTL (Apr. 3, 2017) holding that the plaintiff was only entitled to collect the reduced penalty amount of \$5.00 for each
pay period in which a meal period violation occurred or 5% of the PAGA penalties at issue); *Fleming v. Covidien, Inc.* (C.D.
Cal. Aug. 12, 2011) 2011 WL 7563047, at *4 (reducing PAGA penalties by 82%).

1 **G. Plaintiff's Counsel are Experienced in Similar Wage-and-Hour Litigation**

2 Plaintiff's counsel is experienced in wage-and-hour class actions. Numerous state and federal
3 courts have certified them as adequate and competent class counsel in similar wage and hour class
4 actions. (Treglio Decl., ¶¶ 4-9). Plaintiff's counsel shares the view that this settlement is fair, adequate,
5 and reasonable, in the best interests of Class Members, and should be preliminarily approved. (Treglio
6 Decl. ¶ 42).

7 Experienced counsel, operating at arm's length, have weighed the strengths and risks of the case,
8 and endorse the proposed settlement. (*Id.*). The view of the attorneys actively conducting the litigation is
9 entitled to significant weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework*
10 *Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Kullar v. Foot Locker*
11 *Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (court must take into account "the experience and view
12 of counsel") (internal quotation and citation omitted).

13 **H. The Class Notice Plan Conforms to All Applicable Statutes and Rules**

14 The proposed Class Notice should be approved, as it fully informs the Class Members of the
15 nature of the lawsuit and each Class Member's rights under terms of the Settlement Agreement and
16 applicable law. The manner in which the Class Notice shall be disseminated, as outlined above, shall
17 ensure that all or nearly all of the Class Members shall be properly notified of the proposed settlement.

18 The proposed Class Notice and proposed plan for the Settlement Administrator to mail the Class
19 Notice to the last known address of all class members complies with all the requirements of California
20 Rule of Court 3.79(f) and 3.766(b). The contents of the proposed Class Notice include: (1) the material
21 terms of the settlement; (2) the proposed attorneys' fees, litigation expenses, and the costs of
22 administration; (3) details about the final fairness hearing, how class members may participate in the
23 settlement and receive their settlement share, exclude themselves, or make an objection; and (4) how
24 Class Members can obtain additional information. See Class Notice (S.A., **Exhibit A**).

25 The Court has wide discretion in approving the means of providing notice, so long as the class
26 representative "provide(s) meaningful notice in a form that should have a reasonable chance of reaching
27 a substantial percentage of class members." *Archibald v. Cinerama Hotels*, 15 Cal. 3d 853, 861 (1976).
28 Here, the parties' notice plan is that notice of the settlement will be disseminated directly to the class

1 members by first class mail by the Settlement Administrator, since Defendant has the last known
2 addresses of all class members and the Settlement Administrator will perform a search based on the
3 National Change of Address Database to update and correct for any identifiable address changes.

4 The notice plan and the Class Notice satisfy the requirements of Rule of Court 3.766 and affords
5 Class Members with all due process protections required by the United States Constitution. Moreover,
6 the contents of the Class Notice are in compliance with Cal. R. Ct. 3.766(d), because the Class Notice
7 includes, without limitation (1) a detailed explanation of the case, including the basic contentions or
8 denials of the parties; (2) a statement that the court will exclude the member from the class if the
9 member so requests by a specified date; (3) a procedure for the member to follow in requesting
10 exclusion from the class; (4) a statement that the judgment, whether favorable or not, will bind all
11 members who do not request exclusion; and (5) a statement that any member who does not request
12 exclusion may, if the member so desires, enter an appearance through counsel. The 45-day deadline for
13 Class Members to exclude themselves is reasonable, as it provides Class Members with sufficient time
14 to do so and, if they so choose, to seek independent legal advice in the interim.

15 **I. The Class Representative Service Enhancement Award is Fair and**
16 **Appropriate**

17 The Settlement Agreement provides a Service Enhancement award of \$10,000.00 to the Plaintiff.
18 The proposed Service Enhancement award is intended to recognize the time, effort, and risk that the
19 Plaintiff undertook in bringing this case and helping to secure the relief obtained for the members of the
20 Class. *See Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 726 (2004) (upholding “service
21 payment” to named plaintiff for his efforts in bringing class case); *Rodriguez v. West Publishing*, 563
22 F.3d 948, 959 (9th Cir. 2009) (stating that incentive awards are “intended to compensate class
23 representatives for work done on behalf of the class, to make up for financial or reputational risk
24 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private
25 attorney general.”). To determine the propriety of a service award, courts consider the actions protecting
26 class interests, the benefit provided to the class based on those actions, and the amount of time and effort
27 expended by the plaintiff. *Staton v. Boeing Co.*, 327 F.3d 938, 976-7 (9th Cir. 1993). The service award
28 must be supported by evidence of the time and effort expended by the named plaintiff and a reasoned

1 explanation of the financial and other risks taken by the named Plaintiff in bringing the case. *See Clark*
2 *v. American Residential Services LLC*, 175 Cal.App.4th 785, 806-7 (2009).

3 Plaintiff's requested Service Enhancement award serves to recognize his time and effort on
4 behalf of the class, including time spent in meetings with Class Counsel, and his acceptance of the
5 financial risk in pursuing this litigation. (S.A. ¶ I. 40; Treglio Decl. ¶¶ 43-46). The Service Enhancement
6 award also fall within the range of service awards typically awarded to Class Representative in similar
7 class actions. *See e.g. Bond v. Ferguson Enterprises, Inc.*, No. 1:09-cv-1662 OWW MJS, 2011 WL
8 2988879 (E.D. Cal. June 30, 2011) (approving \$11,250 service award to each of the two class
9 representatives in a trucker meal break class action; *Ross v. US Bank National Association*, No. C 07-
10 02951 SI, 2010 WL 3833922, at *2 (N.D. Cal. Sept. 29, 2010) (approving \$20,000 enhancement award
11 to Class Representative in California wage-and-hour class action settlement); *Vasquez v. Coast Valley*
12 *Roofing, Inc.*, 266 F.R.D. 482, 493 (E.D. Cal. 2010) (approving service awards in the amount of \$10,000
13 each from a \$300,000 settlement fund in a wage/hour class action); *West v. Circle K Stores, Inc.*, NO.
14 CIV. S-04-0438 WBS GGH, 2006 U.S. Dist. LEXIS 76558, at *28 (E.D. Cal. Oct. 19, 2006) ("the court
15 finds Plaintiff's enhancement payments of \$15,000 each to be reasonable."); *Glass v. UBS Fin. Servs.*,
16 No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *52 (N.D. Cal. Jan. 26, 2007) (finding
17 "requested payment of \$ 25,000 to each of the named plaintiffs is appropriate" in wage and hour
18 settlement); *Louie v. Kaiser Found. Health Plan, Inc.*, CASE NO. 08cv0795 IEG RBB, 2008 U.S. Dist.
19 LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008) (approving "\$25,000 incentive award for each Class
20 Representative" in wage an hour settlement); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365
21 CW (EMC), 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010) ("Numerous courts in the Ninth
22 Circuit and elsewhere have approved incentive awards of \$20,000 or more where, as here, the class
23 representative has demonstrated a strong commitment to the class"). Thus, when examined in the
24 context of the gross funds obtained on behalf of the class as a result of Plaintiff's undertaking the role of
25 Class Representative, the requested Service Enhancement award is proportionally modest, fair and
26 reasonable.

27 **J. The Attorneys' Fee Allocation Under the Settlement Agreement is Fair**

28 In addition, concurrent with final approval, Plaintiff's counsel will request a Class Counsel

1 attorneys' fees payment of up to \$203,333.33 (*i.e.*, up to one third of the maximum settlement amount)
2 and Class Counsel litigation costs payment of up to \$15,000.00. (S.A. ¶ IV. E. (a)). Recently, the
3 California Supreme Court approved Superior Courts' usage of the common fund method of awarding
4 attorneys' fees in wage and hour class actions, like this one, and upheld a fee award at 1/3 of the total
5 settlement amount obtained for the class. *See Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 506
6 (2016); *see also*, 4 Newberg on Class Actions, § 14:6 at 552 ("fee awards in class actions average
7 around one-third of the recovery"). Specifically, in *Laffitte*, the California Supreme Court wrote: "[w]e
8 join the overwhelming majority of federal and state courts in holding that when class action litigation
9 establishes a monetary fund for the benefit of the class members, and the trial court in its equitable
10 powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable
11 fee by choosing an appropriate percentage of the fund created"). *Id.* at 506. The California Supreme
12 Court also noted that trial courts have the discretion to award fees as a percentage of the common fund,
13 with or without the necessity to conduct a lodestar cross-check. *Id.* ("...[Courts] ... retain the discretion
14 to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested
15 percentage fee.").

16 The requested fees of up to one-third of the Maximum Settlement Amount is also consistent with
17 awards obtained in similar wage and hour class action cases approved by various courts in California.
18 *See e.g.*, *Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010)
19 (approving fee award of 1/3 of the total maximum settlement amount of \$4.5 million) (the court noted
20 that the fee award of 1/3 of the total settlement was "well within the range of percentages which courts
21 have upheld as reasonable in other class action lawsuits"); Memorandum & Order, *Monterrubio v. Best*
22 *Buy Stores, L.P.*, Case 2:11-cv-03270-MCE-AC, ECF No. 47, at 23 (E.D. Cal. Nov. 20, 2013)
23 (approving fee award of 30%); *Wilson v. Kiewit Pacific Co.*, No. 09-cv-03630, ECF No. 119 (N.D. Cal.
24 2012) (approving fee award of 1/3 of the common fund and noting that such award is fair, reasonable
25 and appropriate); *Singer v. Becton Dickinson and Co.*, No. 08-cv-821-IEG (BLM), 2010 WL 2196104,
26 at * 8 (S.D. Cal. June 1, 2010) (approving fee award of 33.33% of the common fund); *Romero v.*
27 *Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007)
28 (awarding fees of 1/3 of common fund in a wage and hour class action, noting: "[f]ee awards in class

actions average around one-third of the recovery.”); *Martin v. FedEx Ground Package System, Inc.*, No. C 06-6883 VRW, 2008 WL 5478576, at *8 (N.D. Cal. Dec. 31, 2008) (approving attorneys’ fees of 1/3 of common fund). Moreover, if it becomes necessary to litigate this matter further, counsel have the financial resources and are prepared to devote whatever time and effort are required to zealously advocate on behalf of Plaintiff and the Class Members.

Here, the requested fees represent 1/3 of the Maximum Settlement Amount, including payments to the LWDA, and cash payment to the Class Members.

VI. CONCLUSION

For these reasons, Plaintiff’s motion for preliminary approval of the parties’ class action settlement should be granted.

Dated: March 20, 2024

POTTER HANDY LLP

By: /s/ James M. Treglio
James M. Treglio, Esq.
Attorney for Plaintiff and the Class