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8 individually and on behalf of all others similarly
situated

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**
11

12 JULIO C. POLAR, individually, and on behalf
13 of all others similarly situated,

14 Plaintiff,

15 v.

16 BUTTON TRANSPORTATION, INC., a
17 California corporation; BUTTON
TRANSPORTATION, LLC, a Louisiana
18 limited liability company; and DOES 1
through 100, inclusive,

19 Defendants.
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Case No.: 21STCV02575

*[Assigned for all purposes to the Hon. Carolyn B.
Kuhl, Dept. 12]*

Complex Class Action

**NOTICE OF MOTION AND UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL
OF CLASS AND PAGA REPRESENTATIVE
ACTION SETTLEMENT**

Date: December 6, 2022
Time: 10:00 AM
Dept: 12

*[Filed concurrently with Declaration of Taras Kick;
and [Proposed] Order]*

Complaint filed: January 21, 2021
FAC filed: April 20, 2021
Trial date: None set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on **December 6, 2022, at 10:00 a.m.** in Department 12 of the
3 Spring Street Courthouse located at 312 N. Spring Street, Los Angeles, CA 90012, proposed class
4 representative Julio C. Polar (“Plaintiff”) will and hereby does move the Court for an order:

5 1. Conditionally certifying the Class for purposes of settlement;

6 2. Preliminarily approving the proposed class action settlement between Plaintiff and
7 Defendants Button Transportation, Inc., a California corporation; Button Transportation, LLC, a
8 Louisiana limited liability company; Button Transportation, LLC, a Florida limited liability company; and
9 Robert L. Button, an individual, (collectively, “Defendants”), as fair, adequate, and reasonable, based
10 upon the terms set forth in the Parties’ Settlement and Release Agreement (“Settlement Agreement”),
11 including payment by Defendants of the non-reversionary Gross Settlement Amount (“GSA”) of
12 \$800,000.00 for the Settlement “Class”, and the following estimated allocations therefrom:

Attorneys’ Fees (1/3 of the GSA) (maximum)	(\$266,400.00)
Litigation Costs (maximum)	(\$25,000.00)
Settlement Administration Costs (maximum)	(\$10,000.00)
Service Payment to Class Representative	(\$10,000.00)
PAGA Payment (75% to LWDA)	(\$40,000.00)

16 3. Preliminarily appointing Plaintiff as the Class Representative and The Kick Law Firm,
17 APC as Class Counsel for purposes of settlement;

18 4. Appointing Simpluris, Inc. as the third-party Settlement Administrator for mailing notices
19 and for settlement administration; and

20 5. Approving the proposed Class Notice and ordering it be disseminated to the Class as
21 provided in the Settlement Agreement.

22 The motion is based on this Notice, the attached memorandum of points and authorities, the
23 attached declarations, all matters of which this Court may take judicial notice, all pleadings in this matter,
24 and such evidence and argument as may be presented at the hearing or the Court may allow.

25
26 THE KICK LAW FIRM, APC

27 Dated: October 24, 2022

By:

Taras Kick

Taras Kick

Greg Taylor

Attorneys for Plaintiff and others similarly situated

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. INTRODUCTORY INFORMATION**

3 **a. Introduction**

4 This is an Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement. It
5 asks this Court to take the first step in the approval process after parties in a class action have reached a
6 proposed class action settlement, by deeming that the proposed settlement preliminarily meets the criteria
7 to allow notice to go out to class members, certifying the Settlement Class, appointing Class Counsel and
8 class representatives, and setting the timing and procedures for the future Motion for Final Approval.

9 The underlying putative class action is a trucker wage-and-hour lawsuit. Plaintiff Julio C. Polar
10 brings the action on behalf of himself and a class of 594 similarly situated non-exempt commercial truck
11 drivers in California. Plaintiff alleges that he and his fellow Class members and aggrieved employees were
12 deprived of certain rights afforded to them by the Labor Code and their agreements with Defendants during
13 their employment with Defendants.

14 After a mediation with a neutral mediator, the parties reached a proposed settlement, subject to this
15 Court's review and approval. A true and correct copy of the fully executed Settlement Agreement ("SA"
16 or "Settlement") is attached as Exhibit 1 to the concurrently filed Declaration of Taras Kick ("Kick Decl.>").
17 The proposed Notice of Class Action Settlement ("Class Notice") is attached as Exhibit A to the SA.

18 This memorandum attempts to follow the format of the Checklist for Preliminary Approval of Class
19 Action Settlement provided by the LA Superior Court Complex Civil Department. As shown below, all of
20 the criteria for preliminary approval are met here. Accordingly, Plaintiff respectfully requests that the Court
21 preliminarily approve the Settlement so that notice of a final approval hearing may be disseminated.

22 **b. Identity of the Parties**

23 From approximately August 10, 2020, to January 10, 2021, Plaintiff Julio C. Polar ("Plaintiff")
24 worked as a commercial truck driver for Defendants Button Transportation, Inc. (California corporation),
25 Button Transportation, LLC (Louisiana LLC), Button Transportation, LLC (Florida LLC), and Robert L.
26 Button (collectively, "Defendants" or "Button Transportation"). (Kick Decl., ¶ 9.)¹ Button Transportation
27 is a California-based commercial transportation company, and Robert L. Button is the CEO of Button
28 Transportation. (*Id.*)

29
30

¹ Button Transportation, Inc. and Robert L. Button dispute that they employed Plaintiff.

1 **c. Summary of the Litigation**

2 **i. Brief Procedural History**

3 On January 20, 2021, pursuant to Labor Code § 2699.3, Plaintiff submitted notice to the Labor and
4 Workforce Development Agency (“LWDA”) and to Defendants Button Transportation, Inc. and Button
5 Transportation, LLC (LA), LWDA Case No. LWDA-CM-819220-21, of his intention to litigate various
6 alleged Labor Code violations. (Kick Decl., ¶ 9, Ex. 2.)

7 On January 21, 2021, Plaintiff filed the initial complaint on behalf of himself and others similarly
8 situated to recover damages and penalties for the Labor Code violations alleged against Defendants (“the
9 Action”). Plaintiff alleged further that these violations constituted unfair and unlawful business practices
10 under the Unfair Competition Law (“UCL”), Bus. & Prof. Code § 17200, *et seq.* (Kick Decl., ¶ 10.)

11 On April 20, 2021, Plaintiff filed the First Amended Complaint (“FAC”) to add a cause of action
12 under PAGA, Lab. Code § 2698, *et seq.* The claim for failure to pay overtime was also omitted. (*Id.*) On
13 September 17, 2021, Plaintiff amended the complaint to designate Does 1 and 2 as named defendants
14 Button Transportation, LLC (FL) and Robert L. Button. (*Id.*)

15 Both before and after initiating the Action on behalf of the putative class, Plaintiff and Class
16 Counsel diligently investigated the claims alleged and conducted legal research regarding Defendants’
17 potential liability and defenses. (Kick Decl., ¶¶ 11-12.) The parties engaged in formal discovery, and Class
18 Counsel prepared and propounded interrogatories and production demands on Defendants. (*Id.*) After Class
19 Counsel reviewed and assessed Defendants’ responses to written discovery, and based on consistent good
20 faith meet and confer efforts, the parties agreed to proceed to mediation with Alan R. Berkowitz, Esq., an
21 experienced wage-and-hour mediator. (*Id.*, ¶ 13.)

22 On April 28, 2022, Plaintiff and Defendants engaged in private, neutral mediation that resulted in
23 the proposed Settlement. Based on the parties’ substantial investigation and discovery, Class Counsel was
24 able to act intelligently and effectively in negotiating the proposed Settlement. (Kick Decl., ¶¶ 13-14.)
25 Plaintiff now seeks preliminary approval of the Agreement.

26 **ii. Claims Asserted and General Factual Basis for the Claims**

27 This is a trucker wage-and-hour lawsuit. Plaintiff Julio C. Polar (“Plaintiff”) brings 9 causes of
28 action on behalf of himself and a class of 594 similarly situated non-exempt commercial truck drivers in
29 California. Plaintiff alleges that he and his fellow Class members and aggrieved employees were deprived
30 of certain rights afforded to them by the Labor Code during their employment with Defendants.

1 The operative complaint, the First Amended Complaint (“FAC”), alleges the following causes of
2 action: 1) failure to provide meal periods; 2) failure to provide rest periods; 3) failure to pay minimum
3 wage; 4) failure to timely to pay all wages due at separation; 5) failure to provide accurate itemized wage
4 statements; 6) failure to indemnify employees for necessary business expenses; 7) unlawful deductions
5 from wages; and 8) unlawful and unfair business practices in violation of Bus & Prof. Code § 17200, *et*
6 *seq.*, and 9) violation of PAGA, Lab. Code § 2698, *et seq.*

7 With respect to the alleged meal and rest period violations, Plaintiff’s meal break claim also contends
8 that Defendants breached material terms of the employee handbook and are liable for meal break premiums
9 required by the Labor Code as a matter of contract. On March 31, 2022, Plaintiff sent Defendants a draft
10 Second Amended Complaint to separate Plaintiff’s labor code and contract theories into separate causes of
11 action and a proposed stipulation to amend. Thereafter, Defendants agreed to mediate as to the entire class.
12 If the Action did not settle, Plaintiff would seek to file the amended complaint separating out the meal break
13 claim for breach of contract.

14 With respect to any dispute regarding joint liability, Plaintiff contends Defendants’ records show
15 that the entities at issue are alter egos of one another that relied on and implemented virtually, if not actually,
16 identical policies. Additionally, Plaintiff contends that Defendant Robert L. Button can be held personally
17 liable. Defendants deny these allegations.

18 **B. DUNK/KULLAR ANALYSIS**

19 **a. Summary of the Case, Including the Legal and Factual Basis for Each Claim**

20 Plaintiff’s claims are summarized as follows:

21 **1. Failure to Pay Meal Period Premiums**

22 Labor Code § 512 and Wage Order 9 require employers to provide duty-free meal periods of not
23 less than 30 minutes within the employee’s first 5 hours of work or pay a meal break premium of an hour
24 of additional pay at the employee’s regulate rate in lieu thereof. 8 Cal. Code Regs. § 11090(11); *see also*
25 *Brinker*, 53 Cal.4th at 1033, 1036-37; *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858.
26 Liability arises when an employer adopts a uniform meal period policy that results in violations.
27 Furthermore, “[a]n on-duty meal period is permitted only when the nature of the work prevents an employee
28 from being relieved of all duty and the parties agree in writing.” *Lubin v. The Wackenhut Corp.* (2016) 5
29 Cal.App.5th 926, 932. Where it provides an “on-duty” meal period, the employer has an obligation first to
30 determine “whether the nature of the work prevents an employee from being relieved.” *Id.* at 946 (citing

1 *Brinker*, 53 Cal.4th 1004). Moreover, the agreement must state expressly that the employee may revoke
2 consent in writing at any time. 8 Cal. Code Regs. § 11090(11)(C). Liability similarly attaches “upon a
3 determination that [the employer’s] uniform on-duty meal break policy was unlawful.” *Faulkinbury*, *supra*,
4 216 Cal.App.4th at 235.

5 The systemic failure to pay meal period premiums is “a dominant common issue [that] makes
6 certification proper.” *Safeway, Inc. v. Super. Ct.* (2015) 238 Cal.App.4th 1138, 1153 (quotations omitted);
7 *see also Faulkinbury*, 216 Cal.App.4th at 234 (finding that the use of “blanket off-duty meal break waivers
8 in advance from all security guard employees, regardless of the working conditions at a particular station,”
9 made meal breaks a class wide issue). Here, the FAC alleges that Plaintiff and the class members were
10 employed “under employment agreements that were partly written, partly oral, and partly implied.” (FAC,
11 ¶ 15.) Defendants’ records show drivers were uniformly denied the opportunity to take compliant meal and
12 rest periods, as defined in the Employee Handbook or by statute.

13 However, Defendants would argue California’s meal and rest break requirements are preempted by
14 49 U.S.C. 5125 with respect to drivers subject to FMCSA HOS regulations. Cal.’s Meal & Rest Break Rules
15 for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption, 83 Fed. Reg. 67470,
16 67470 (Dec. 28, 2018); *see also Int’l Bhd. Of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.*,
17 986 F.3d 841 (9th Cir. 2021). In addition, Defendants would argue the putative class is not contractually
18 entitled to meal break premiums under the meal break policy.

19 2. Failure to Pay Rest Period Premiums

20 Labor Code § 226.7 and Wage Order 9 require employers to provide employees timely, duty-free
21 rest periods of not less than ten (10) minutes for every major fraction of four hours worked or pay an
22 additional hour of pay at the employee’s regulate rate in lieu thereof. 8 Cal. Code Regs. § 11090(12). As
23 with meal periods, there is no evidence that Defendants paid premium wages for missed or short rest periods
24 or had any process for auditing records to identify violations, and this issue is also easily certifiable. *See*,
25 *e.g., Safeway, Inc., supra*, 238 Cal.App.4th at 1153 (finding that the failure to pay statutory premium wage
26 payments for years may constitute a “dominant common issue [that makes] certification proper.”) (internal
27 quotations omitted).

28 However, defendant again would argue California’s meal and rest break requirements are preempted
29 by 49 U.S.C. 5125 with respect to drivers subject to FMCSA HOS regulations. 83 FR 47961.

30 3. Failure to Pay Minimum Wages

1 The Labor Code requires employers to pay employees at least minimum wage for each hour worked.
2 *See Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 (“all hours must be paid at the statutory or
3 agreed rate and no part of this rate may be used as a credit against a minimum wage obligation.”) Labor
4 Code §§ 1194 and 1197 make unlawful payments of less than minimum wages fixed by the IWC “for all
5 hours worked.” In California, all time an employee spends subject to the employer’s control is compensable
6 “hours worked.” *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 583; *see also Ridgeway v. Wal-*
7 *Mart Stores, Inc.* (N.D. Cal. 2015) 107 F.Supp.3d 1044, 1053 (truck drivers paid on a piece-rate basis must
8 be separately compensated for unpaid work activities when under the employer’s control). In addition, when
9 they are paid on a piece rate basis, employees must be paid separately for non-piece rate associated activities.
10 *Gonzalez v. Downtown LA Motors* (2013) 215 Cal.App.4th 36, 47 (“[T]he obligation to pay minimum wages
11 attaches to each and every separate hour worked during the payroll period...”)

12 Where the employer’s compensation scheme combines methods, California law also “prohibits
13 borrowing compensation contractually owed for one set of hours or tasks to rectify compensation below the
14 minimum wage for a second set of hours or tasks, regardless of whether the average of paid and unpaid (or
15 underpaid) time exceeds the minimum wage...[because] it does so only at the expense of reneging on the
16 employer’s contractual commitments, in violation of the contract protection provisions of the Labor Code.”
17 *Oman*, 9 Cal.5th at 781. Furthermore, when the employer fails to pay at least minimum wage, the employee
18 is entitled to recover unpaid minimum wages, liquidated damages, and interest. Labor Code § 1194.2. The
19 California Supreme Court has also held that “the relevant wage order and statutes do not permit application
20 of the de minimis rule.” *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 835. Accordingly, the failure to
21 pay wages for *all* hours worked by an employee necessarily results in a minimum-wage violation.

22 Plaintiff and other Class members attested to Defendants’ systemic failure to pay at least minimum
23 wages for all hours worked because not all hours were recorded. Defendants deny this.

24 4. Failure to Pay All Wages Due Upon Discharge of Employment

25 Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who
26 is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days.
27 Labor Code § 203; *Mamika v. Barca*, 68 Cal. App. 4th 487, 492 (1998).

28 Plaintiff alleged Defendants failed to pay non-exempt California drivers all wages due upon
29 separation, in violation of Labor Code §§ 201-203. As Defendants allegedly failed to pay Class members
30 all meal and rest period penalties and minimum wages due during their employment, Plaintiff asserted that

Defendants are subject to waiting time penalties. Defendant could argue that preemption exists for the meal and rest break allegations, and there was no minimum wage violation, and therefore all was paid.

5. Failure to Furnish Accurate Wage Statements

Labor Code § 226(a) requires employers to provide accurate itemized wage statements, including: (1) gross wages earned; (2) total hours worked; (3) the number of piece-rate units earned and any applicable piece rate; ... (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. *See also* 8 Cal. Code Regs. § 11090, Sec. 7 (A-C).

Section 226 applies “if the employee’s principal place of work is in California.” *Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal. App. 5th 334, 344 (quoting *Ward v. United Airlines, Inc.* (2020) 9 Cal. 5th 732, 760 (*Ward I*)). For interstate transportation workers who may not work primarily in California, “this means the worker’s ‘base of work operations [is] in California.’” *Id.* (quoting *Ward I* at 760–761). For purposes of Section 226, “based in” California means the employee performs at least some work in California and “California serves as the physical location where the worker presents himself or herself to begin work.” *Ward v. United Airlines* (2021) 986 F.3d 1234, 1238 (*Ward II*) (quoting *Ward I* at 755).

Plaintiff contended that Defendants’ wage statements do not provide accurate information, including the correct amount of gross or net wages, total hours worked, the applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each rate, in violation of Labor Code § 226(a). In addition, wage statements that name Button Transportation, LLC as the legal entity employer with an address in Louisiana are misleading at best. *See, e.g., Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 960 (reversing summary judgment because wage statements were confusing and “it is not clear that they reflect accurate information.”) Moreover, Defendants’ wage statements fail to provide notice of accrued paid sick leave, which Defendants apparently did not provide.

Plaintiff contended that by virtue of the asserted Labor Code violations, Defendants failed to furnish accurate wage statements. Specifically, Plaintiff alleged that because Class members were denied all wages due, the wage statements issued by Defendant fail to accurately state all gross wages earned, in violation of Labor Code § 226(a)(1), total hours worked, in violation of Labor Code § 226(a)(2), net wages earned, in violation of Labor Code § 226(a)(5), and all applicable hourly rates during the pay period and the corresponding number of hours worked, in violation of Labor Code § 226(a)(9). Such wage statements were simply not provided.

1 6. Failure to Reimburse Necessary Business Expenses

2 Labor Code § 2802(a) requires an employer to indemnify an employee for all necessary expenditures
3 or losses incurred by the employee in direct consequence of the discharge of his or her duties. Plaintiff
4 alleged that Defendants violated Labor Code § 2802 by failing to reimburse class members for multiple
5 expenses, primarily related to costs for cell phone service.

6 7. Unlawful Deductions

7 California Labor Code §§ 221, 223, et alia, and IWC Wage Order No. 9-2001, §8 prohibit an
8 employer from improperly deducting from wages owed to employees. Plaintiff alleged that Defendants
9 violated California Labor Code and Wage Order provisions by unlawfully deducting business expenses
10 from Class Members' pay.

11 8. Unfair Business Practices

12 The Labor Code and Wage Orders violations are actionable under Bus. and Prof. Code § 17200.
13 Plaintiff's unfair business practices claim requires only the showing of an unfair, unlawful, or fraudulent
14 business practice by Defendants, which is clearly satisfied by the above-described claims. *See Cortez v.*
15 *Purolator Air Filtration Products Co.* (2000) 23 Cal. 4th 163, 178-179 ("We recognize that any business
16 act or practice that violates the Labor Code through failure to pay wages is, by definition, an unfair business
17 practice"). Here, Defendants' repeated practice of Labor Code and Wage Order violations is, in and of
18 itself, a violation of section 17200. Once a showing has been made, Plaintiff is entitled to restitution going
19 back four years from the filing of the lawsuit, per the four-year statute of limitations. Thus, Plaintiff sought
20 restitution of unpaid wages from January 21, 2017 to the last date of employment for each Class member.

21 9. PAGA Penalties

22 The Private Attorneys General Act (PAGA) permits aggrieved employees to recover civil penalties
23 specified by the Labor Code that previously only the Labor Commissioner could recover. Labor Code
24 § 2699(e)(1). Under PAGA, a successful employee acting as a private attorney general keeps 25% of the
25 penalties collected, while 75% goes to the state. Labor Code § 558 provides: "(a) Any employer or other
26 person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or
27 any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall
28 be subject to a civil penalty as follows: [¶] (1) For any initial violation, fifty dollars (\$50) for each underpaid
29 employee for each pay period for which the employee was underpaid ... [¶] (2) For each subsequent
30 violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the

employee was underpaid ...” Here, Defendants’ repeated practice of Labor Code and Wage Order violations, including meal and rest break violations, give rise to substantial PAGA penalties.

b. Summary of the Investigation and Discovery Conducted, Including the Specific Documents Reviewed Prior to Agreeing to Settle the Case

Prior to attending private mediation, the parties exchanged substantial written discovery to gather facts and data necessary to reach a fair and reasonable settlement. Among other things, Plaintiff received and reviewed hundreds of pages of data and documents, including Defendants’ written policies, Class members’ driving logs, and a detailed sample of its non-exempt employees’ timekeeping and payroll records. Class Counsel retained an economic expert, Berger Consulting Group, who then analyzed the data and created a damages model based on it. (Kick Decl., ¶ 12.) Class Counsel carefully considered the class claims at issue and its expert’s analysis of violation rates for Defendant’s timekeeping and payroll data. Moreover, Plaintiff determined Defendants’ records show that drivers were uniformly denied the opportunity to take compliant meal and rest periods, as defined in the Employee Handbook or statute. (*Id.*)

The investigation and discovery conducted in this matter have been adequate to give Plaintiff and Class counsel a sound understanding of the merits of their position, Defendants’ defenses, and to evaluate the reasonable value range of the claims of the Class. (*Id.*, ¶¶ 11-15.) The discovery conducted and the information exchanged through negotiations allowed Class counsel to reliably assess the merits of each side’s position and compromise the issues on a fair and equitable basis. (*Id.*) Based on their own independent investigation, discovery, and evaluation, Class counsel has determined that the settlement terms and conditions set forth below are in the best interests of Plaintiff and the members of the Class. (*Id.*)

c. Summary of Settlement Negotiations, Including When the Settlement Was Reached, and Whether the Parties Were Assisted by a Mediator

As discussed above, the Settlement was reached with the assistance of an experienced mediator, Alan R. Berkowitz, Esq., after a mediation on April 28, 2022. (*Id.*, ¶¶ 11-15.) With the assistance of Mr. Berkowitz, the Parties reached a settlement in principle. Following that successful mediation, the Parties drafted and executed a long form agreement. Plaintiff and Class Counsel vigorously prosecuted this case, and Defendants vigorously contested liability. (*Id.*) The Parties engaged in sufficient investigation and discovery to assess the relative merits of Plaintiff’s claims and of Defendants’ defenses to them. (*Id.*)

d. Summary of the Risks, Expenses, Complexity, and Duration of Further Litigation if the Settlement is Not Approved

1 Were litigation to proceed, there is a strong likelihood it would be protracted and contentious, as
2 Defendants dispute all aspects of Plaintiff's claims. Plaintiff would have to prepare and file a motion for
3 class certification, which outcome is uncertain based on Defendants' contentions, *inter alia*, that individual
4 questions of fact predominate, and that Plaintiff cannot show the "willfulness" requirement for Section 203
5 penalties. (*Id.*, ¶ 17.) If the motion were granted, Defendants would likely move for decertification, appeal
6 certification, or move for Summary Judgment. (*Id.*) Plaintiff believes he would prevail on the question of
7 certification, but the risks to absent Class Members are significant. (*Id.*)

8 To succeed on the merits, Plaintiff would have to prove that Defendants actually engaged in the
9 practices and policies alleged and that those practices and policies violated the law. While Class Counsel
10 believe strong evidence exists showing Defendants' liability, there remains a risk that the trier of fact might
11 find otherwise. (*Id.*, ¶ 18.) If the case were to proceed to trial, additional discovery would be needed and the
12 Parties would thus incur significant additional expenses, which money could go instead to fund a settlement
13 for the benefit of the Class as a whole. (*Id.*) Moreover, discovery disputes would have certainly arisen,
14 which would have cost the Parties additional time and money. (*Id.*) Further, regardless of which Party
15 prevailed, appellate practice would no doubt ensue, further delaying any possible recovery by Class
16 Members. (*Id.*) In other words, both Parties would likely incur substantial attorneys' fees and costs from
17 continued litigation, likely approaching hundreds of thousands of dollars. (*Id.*)

18 **e. Summary of the Risks of Achieving and Maintaining Class Action Status**

19 As stated above, the risks of achieving and maintaining class action status include, among others,
20 facing challenges to class certification and liability, the outcome of which is uncertain. Moreover, even
21 though Class Counsel believe strong evidence exists showing Defendant's liability, the costs of continued
22 discovery, law and motion, and trial preparation would be substantial for all Parties. (*Id.*, ¶¶ 17-18.)

23 **f. Specific Information Sufficient for the Court to Independently Determine that the**
24 **Settlement Is Reasonable**

25 Plaintiff hereby provides specific information sufficient for the court to make an independent
26 determination that the consideration being received for the release of Class members' claims is reasonable
27 in light of the strengths and weaknesses of the claims and the risks of the particular litigation. *Kullar, supra*,
28 168 Cal.App.4th at 129. Below, Plaintiff sets forth the maximum realistic recovery of Plaintiff's claims
29 leading up to mediation, calculated with the assistance of Plaintiff's experts, as well as the defenses asserted
30 by Defendants and any other relevant factors justifying the amount offered in settlement.

Figures used for calculations	
594	Number of Employees Included in Class (Provided by Defense Counsel)
123,475	Number of Estimated Shifts in Class (Provided by Defense Counsel)
4.94	Average Number of Shifts per Week
7.00	Average Number of Hours per Shift
24,995	Number of Workweeks/Pay Periods in the Class (Provided by Defense Counsel)
\$12.29	Average Rate of Pay
DAMAGES, RESTITUTION & REIMBURSEMENT	
Meal Break Violations - as Compensatory Damages or Restitution	
100%	Violation Assumption Rate
\$12.29	Penalty per Violation
123,475	Number of Meal Break Violations
\$1,517,508	Damages Due to Meal Break Violations
\$279,798	Interest Due to Meal Break Violations
\$1,797,306	Maximum Damages for Meal Break Violations
Rest Break Violations – as Compensatory Damages or Restitution	
100%	Violation Assumption Rate
\$12.29	Penalty per Violation
123,475	Number of Rest Break Violations
\$1,517,508	Damages Due to Rest Break Violations
\$279,798	Interest Due to Rest Break Violations
\$1,797,306	Maximum Damages for Rest Break Violations
Unpaid Minimum Wages – as Compensatory Damages & Restitution	
0.5	Estimated Unpaid Hours per Shift
123,475	Number of Days with Minimum Wage Violations
61,737.5	Sum of Unpaid Minimum Wage Hours
\$758,754	Damages Due to Unpaid Minimum Wages
\$199,874	Interest Due to Unpaid Minimum Wages
\$958,628	Maximum Damages for Unpaid Minimum Wages
Business Expenses - Compensatory Damages or Restitution	
\$25	Estimated Unreimbursed Expenses per Month
594	Number of Employees Included in Class (Provided by Defense Counsel)
63	Number of months from start of Class Period up to mediation
\$935,550	Maximum Damages for Unreimbursed Expenses
STATUTORY PENALTIES	
Final Wage Waiting Time Penalties (§ 203)	
385	Terminated Employees Three Years Prior to Complaint
7	Average Number of Hours Per Shift
30	Maximum Penalty Days per Employee
\$993,647	Maximum Labor Code § 203 Final Wage Statutory Penalties
Labor Code § 226(e) Accurate Wage Statement Violation Statutory Penalties	
235	Class Members from One Year Prior to Complaint
6,849	Total Pay Periods
\$637,150	Maximum Labor Code § 226(e) Accurate Wage Statement Penalties
PAGA PENALTIES	
PAGA Civil Penalties	
235	Total Aggrieved Employees
6,849	Number of PAGA Pay Periods with a Meal Break Violation

6,849	Number of PAGA Pay Periods with a Rest Break Violation
6,849	Number of PAGA Pay Periods with a Minimum Wage Violation
6,849	Number of PAGA Pay Periods with a Wage Statement Violation
\$100	PAGA Penalty per Violation
\$684,900	Maximum Estimated PAGA Penalties for Meal Break Violations
\$684,900	Maximum Estimated PAGA Penalties for Rest Break Violations
\$684,900	Maximum Estimated PAGA Penalties for Minimum Wage Violations
\$684,900	Maximum Estimated PAGA Penalties for Wage Statement Violations
<i>TOTAL DAMAGES</i>	
\$3,969,104	Maximum Total Damages

Regarding PAGA penalties, with 235 Aggrieved Employees, assuming preemption on the meal and rest break violations, this theoretically would leave as a maximum of \$684,900 in penalties for Minimum Wage violations, and \$684,900 maximum in wage statement violations, for an additional \$1,369,800, meaning a maximum possible total of \$5,338,904. Therefore, if Plaintiff were to prevail on all these liability issues, as well as on class certification, the proposed settlement of \$800,000 represents approximately 15% of Defendant's maximum possible exposure for damages and penalties. As discussed below, accounting for real litigation risks, relative strengths and weaknesses of Plaintiff's claims, and other factors, it is a favorable settlement for class members and aggrieved employees. (Kick Decl., ¶¶ 19-20.)

1. Risks and Defenses.

There were numerous risks to continuing to litigate, including potentially viable defenses that Defendant asserted or could have asserted as outlined below:

No Employment Relationship. Defendants argue that Button Transportation, Inc., a California corporation, cannot be liable because it had no employment relationship with Plaintiff. Defendants argue that the only defendant with an employment relationship with Plaintiff was Button Transportation, LLC, a Florida limited liability company. Plaintiff argues that the various business entities at issue are alter egos of one another that shared officers, used the same business address, and relied on virtually identical policies. Plaintiff also argues that Defendant Robert L. Button had oversight over each of the business entities, regardless of his formal title, and that he could be held personally liable through piercing the veil. However, Plaintiff cannot be certain this argument would prevail. If Defendants were to prevail on the merits of this threshold defense, Plaintiff would lose the only California defendant. (Kick Decl., ¶ 19(a).)

Federal Preemption. Defendants argue that Plaintiff's meal and rest break claims are preempted by the Federal Motor Carrier Safety Administration's ("FMCSA"). Defendants point to 49 U.S.C. 5125 with respect to drivers subject to FMCSA HOS regulations. Cal.'s Meal & Rest Break Rules for Commercial

Motor Vehicle Drivers; Petition for Determination of Preemption, 83 Fed. Reg. 67470, 67470 (Dec. 28, 2018); see also Int’l Bhd. Of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin., 986 F.3d 841 (9th Cir. 2021). Plaintiff has some arguments to the contrary. However, it is uncertain Plaintiff would prevail on these arguments. (Kick Decl., ¶ 19(b).)

Legality of Defendants’ Compensation Policy. Plaintiff also faced the risk Defendants could argue they are not required to pay minimum wage for “all hours worked,” relying on the California Supreme Court’s decision in *Oman v. Delta Air Lines, Inc.* (2020) 9 Cal.5th 762. The *Oman* Court held that “[f]or purposes of evaluating whether an employee has received at least the hourly minimum wage for tasks or periods compensated under the contract, it is generally permissible to translate the contractual compensation—whether it be done by task, work period, or other reasonable basis—into an hourly rate by averaging pay across those tasks or periods.” This decision deviated from the previous line of cases on which Plaintiff relied in alleging the non-productive cases. See, e.g., *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 (holding that averaging of piece rate for performing service work and waiting time is impermissible). The *Oman* Court further held that Labor Code §§ 204 and 226 apply to employees only if California is the principal place of their work, meaning the employee either works primarily in this state during the pay period, or does not work primarily in any state but has his or her base of operations in California. (*Id.*, pp. 10, 13.) Defendants might have therefore tried to argue they are free to wage average and are not required to pay minimum wage for “all hours worked.” (Kick Decl., ¶ 19(c).)

Non-Certification and/or De-Certification. Plaintiff also faced the risk Defendants could argue that common questions do not predominate over individual ones because drivers spent different amounts of time in California, resided in different states, and that the determination of whether California law applied to each driver would give rise to 594 individual inquiries. (*Id.*, ¶ 19(d).)

No Derivative Penalties. Defendants could argue that Plaintiff’s claims for wage statement and waiting time penalties claims are entirely derivative of Plaintiff’s rest period and wage claims, and therefore suffered from not only the same litigation risks as the rest break claims, but also additional risks unique to these claims. For example, with respect to Plaintiff’s waiting time penalty claim, Plaintiff would also be required to establish Defendants’ *willfulness*. However, Defendants deny any willful failure to pay any alleged compensation. (*Id.*, ¶ 19(e).) Moreover, “an employer’s reasonable, good faith belief that wages are not owed may negate a finding of willfulness.” *Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468.

With respect to Plaintiff’s wage statement claim, even if non-certification was not a bar to recovery,

Plaintiff faced the risk Defendants could rely on *Maldonado, et al. v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1334-37 (April 18, 2018) where the Court reversed an award for penalties for inaccurate wage statements because the Court found that inaccurate wage statements alone based on derivative Labor Code violations do not justify penalties, and that the plaintiff arguably might need to establish injury from the inaccuracy and independent inaccuracies different from underpayments or derivative claims. This defense could call into question whether the Class could recover derivative penalties under Labor Code §§ 201-203 and 226 based on underlying rest break premium claims. While Plaintiff remains confident and prepared to zealously pursue the claims, he recognizes the possible risks of losing on the merits. (Kick Decl., ¶ 19(e).)

Other Risk Factors. Plaintiff also had to take into account other risks, including, without limitation, the risks of losing on appeal, the possibility of the law changing, the time value of money, and the inability to collect on a large judgment, among other things. (*Id.*, ¶ 19(f).)

Costs. The Action clearly involves complex legal issues, including class certification. With regard to expected duration, litigating Plaintiff's claims through trial could last two or more years if the proposed settlement is not approved. This would be expensive for all parties and delay or jeopardize what is now a certain recovery for the putative class. (*Id.*, ¶ 19(g).)

Discretionary PAGA Penalties. Under Labor Code § 2699(e)(2), a court may award a lesser amount than the maximum civil penalty specified under PAGA, if based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive or confiscatory. Courts have exercised their discretion to reduce the amount of PAGA penalties awarded to as little as \$5.00 per pay period. *See e.g., Kileigh Carrington v. Starbucks Corporation, et al.*, San Diego Superior Court Case No. 37-2014-00018637-CU-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); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at *4 (reducing PAGA penalties by 82%).

2. Discounts Applied

Plaintiff believes it is reasonable when assessing the value of the settlement to consider applying the following discounts: 50% for the risk of Defendants prevailing on preemption, employment relationship, and *Oman* defenses; 35% for the risk of non-certification; 30% discount on penalty claims under *Maldonado*; and 50% discount on PAGA claims for the Court's discretion on reducing penalties and underlying risks. If one applies only the discount for pre-emption and class certification, this reduces the

1 maximum possible damages and penalties to \$1,735,143. If one also applies the PAGA discount arising
2 from the Court’s discretion to award lesser penalties, this further reduces this risk-adjusted number by an
3 additional \$222,592 to \$1,522,551. This total risk-adjusted realistic exposure is without the Maldonado
4 reduction. The negotiated gross settlement amount of \$800,000 thus represents about 55.2% of the realistic
5 valuation of the claims. (Kick Decl., ¶ 20.)

6 **g. If Approval of the Settlement of Class Claims is Requested Together with Approval of**
7 **Non-Class Claims (Such as Claims Under PAGA) Discuss Why the Amount Allocated to**
8 **the Non-Class Claims is Fair to Those Affected.**

9 When PAGA claims are settled, the trial court must “review and approve” the settlement. Labor
10 Code § 2699(l). In so doing, the court must consider whether the proposed “PAGA settlement is fair and
11 adequate in view of the purposes and policies of the statute.” *O’Connor v. Uber Techs., Inc.*, 201 F. Supp.
12 3d 1110, 1135 (N.D. Cal. 2016).

13 The \$40,000.00 amount allocated towards PAGA penalties here is fair and reasonable given the
14 nature of the PAGA claims, which has a limited 1-year statute of limitations. Further, as discussed above,
15 the availability of PAGA penalties here rely on contested factual issues. Moreover, the PAGA statute
16 provides the Court with broad discretion to adjust and reduce the amount of penalties awarded, if any. Courts
17 “repeatedly approve[] PAGA allocations of both smaller amounts and that comprised a smaller portion of
18 the total settlement consideration in the agreements at issue.” *See Davis v. Cox Commc’ns California, LLC*,
19 No. 16cv989 BAS (BLM), 2017 WL 1496407, at *1 (S.D. Cal. Apr. 26, 2017 (preliminarily approving
20 \$4,000 PAGA allocation in \$275,000 settlement); *Moore v. Fitness Int’l, LLC*, No. 12cv1551 LAB (NLS),
21 2014 WL 12571448, at *5 (S.D. Cal. Jan. 22, 2014) (approving \$2,500 PAGA allocation when attorneys’
22 fees award alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*, No. 09cv1683 MMA (JMA), 2011
23 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement);
24 *Singer v. Becton Dickinson & Co.*, No. 08cv821 IEG (BLM), 2010 WL 2196104, at *2 (S.D. Cal. June 1,
25 2010) (approving \$3,000 PAGA allocation in \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, No.
26 CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009) (approving \$11,250 PAGA allocation
27 in \$1,026,000 settlement).

28 Given these factors, the proposed PAGA allocation is well within a fair and reasonable range.

29 **C. CLASS CERTIFICATION**

30 California Rule of Court 3.769(d) provides that the Court may make an order approving certification
of a provisional settlement class at the preliminary approval stage. It is well-established that trial courts

1 should use a “lesser standard of scrutiny” for determining the propriety of certifying a settlement class, as
2 opposed to a litigation class. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) at 1807 n.19.
3 The reasons include that no trial is anticipated in a settlement class, so the case management issues inherent
4 in determining if the class should be certified need not be confronted; and the trial court’s fairness review
5 of the settlement protects the interests of the non-representative Class Members. (*Id.*); *see also Officers for*
6 *Justice*, 690 F.2d at 633 (“Th[e] relationship between the certification determination and the merits of the
7 case is further attenuated within the context of the settlement evaluation process ... [C]ertification issues
8 raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different
9 light.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1987)(“Confronted with a request for
10 settlement-only class certification, a district court need not inquire whether the case, if tried, would present
11 intractable management problems ... for the proposal is that there be no trial.”) As discussed below, for the
12 purposes of this settlement only, the parties ask this Court to provisionally certify the Class, as defined
13 above, under Cal. Civ. Proc. Code § 382.

14 **a. Numerosity**

15 Numerosity is met if a proposed class is so large that joinder of all members would be impracticable.
16 Code Civ. Proc. § 382. Numerosity is readily satisfied here because there are approximately 594 Class
17 members. (Kick Decl., ¶ 2.) *See, Vasquez v. Superior Court*, 4 Cal.App.3d 800, 811 (1971); *Newberg on*
18 *Class Actions*, § 3.5 (4th Ed. 2004) (40 class members is sufficient to satisfy numerosity). Furthermore, the
19 Class members have already been ascertained through Defendant’s records. (*Id.*)

20 **b. Ascertainability**

21 A test for ascertainability is whether the class definition “identifies a group of unnamed plaintiffs by
22 describing a set of common characteristics sufficient to allow a member of that group to identify himself or
23 herself as having a right to recover based on the description.” *Bartold v. Glendale Federal Bank* (2000) 81
24 Cal.App.4th 816, 828; *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 541-42. In this case,
25 although ascertainability does not require it, Defendants have already identified members of the Settlement
26 Class from its records. (Kick Decl., ¶ 2.) This far exceeds the requirement for ascertainability.

27 **c. Community of Interest**

28 The community of interest requirement has three essential elements: “(1) predominant questions of
29 law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives
30

who can adequately represent the class.” *Linder v. Thrifty Oil Co.*, 23 Cal.App.4th 429, 435 (2000). As shown below, these elements are met.

1. Commonality

To justify certification, the class proponent must show that questions of law or fact common to the class predominate over the questions affecting the individual members. *See Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913 (2001)). While the Parties dispute whether a class certification would be appropriate if the litigation were to continue, they do not dispute, for the purposes of this Settlement only, that all Class members were subject to common policies and practices and were paid according to uniform formulae. Commonality is therefore satisfied here.

2. Plaintiff’s Claims Are Typical of the Class

Typicality “focuses on whether there exists a relationship between the plaintiff’s claims and the claims alleged on behalf of the class.” *Newberg*, § 3:13. Plaintiff is not aware of any characteristics that do not satisfy this. Plaintiff is a member of the proposed class, and was subject to the same employment policies and practices as all other Class members. Typicality is satisfied here.

3. Plaintiff Adequately Represents the Class

Class representatives must establish that they will adequately represent the proposed class. *See, Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540, 546 (2009). This adequacy analysis focuses on any conflicts that would appear between the named Plaintiff and putative class members. *Richmond v. Dart Industries*, 29 Cal.App.3d 462, 470 (1981). The Court must also consider the competency of Plaintiff’s counsel in determining whether to certify a class. *Cal. Pak Delivery v. United Parcel Service, Inc.* 52 Cal.App.4th 1, 12 (1997); *General Tel. Co. v. Falcon*, 457 U.S. 147, 157-8, n. 13 (1982). Class counsel and the class representative meet the adequacy requirement.

Here, the claims of the Class members and the named Plaintiff are coextensive and there is no conflict between Plaintiff and his counsel, on the one hand, and any other Class Member. (Kick Decl., ¶ 21.) In this case, not only is there not any conflict, but Plaintiff’s interests are essentially identical, if not entirely identical, to the interests of all the members of the Settlement Class. (*Id.*) Therefore, Plaintiff is adequate.

4. Superiority

Certification of the Class for settlement purposes also is superior here because there will be a global resolution of all claims at once, which fosters judicial economy. Class certification is also vastly superior to

litigation of numerous individual claims because most of the claims are too small to litigate outside of the class context. *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, 469. Thus, the superiority of proceeding through the class action mechanism is demonstrable in this case because, through the class action device, Plaintiff's counsel was able to negotiate a global Settlement with Defendants that, if approved, will provide a sizeable Class with immediate monetary relief.

d. Adequacy

To satisfy the requirement that a class representative and his or her counsel fairly and adequately represent absent class members, the named plaintiff must be represented by counsel experienced and qualified to conduct the pending litigation, and the named plaintiff's interests cannot be antagonistic to those of the class. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450. The adequacy requirement is clearly satisfied on both counts. Class Counsel, The Kick Law Firm, APC, has significant experience in complex litigation, including wage and hour class actions, and has been diligent in representing the putative Settlement Class. (Kick Decl., ¶¶ 4-7, 21.) The Settlement Agreement itself speaks to Class Counsel's adequacy, evidencing the arm's-length negotiating by which Class Counsel secured a favorable proposed settlement that provides substantial benefits to absent Class Members without incurring unnecessary costs or risking the delays and uncertainty of further, protracted litigation.

Plaintiff Mr. Polar, the proposed Class Representative, has participated actively at all stages of the litigation, and his interests are not in conflict with the absent class members. (*Id.*, ¶¶ 21-22.) Plaintiff agreed to act as Class Representative and understands his responsibility to assist Class Counsel in prosecuting the action on behalf of the Class. (*Id.*)

D. CLAIM REQUIREMENT (IF APPLICABLE)

Not applicable. Class members will not be required to submit a claim to receive compensation.

E. MISCELLANEOUS

a. If Appropriate, Explain Why the Settlement Includes Terms That Are Outside the Scope of the Operative Complaint. (Trotsky v. Los Angeles Fed. Savings & Loan Assn. (1975) 48 Cal.App.3d 134, 148.) If Approval of Settlement of a PAGA Claim is Requested Provide a Copy of Plaintiff's Notice Letter to the LWDA.

The Settlement does not include terms that are outside the scope of the operative complaint. A copy of the Notice Letter to the LWDA is attached as **Exhibit 2** to the Kick Declaration.

b. If Notice Will Be Given in English Only, Explain Why this is Sufficient

1 The Parties agree that Notice in English is sufficient as the Class is comprised of commercial drivers
2 and DOT Regulations (49 CFR 391.11) require they can read and speak in English. (Kick Decl., ¶ 24.)

3 **c. A Statement of Any Affirmative Obligations to Be Undertaken by the Class Member or**
4 **Class Counsel and the Reason for Such Obligations**

5 Other than fulfilling their duties as Class representative and Class counsel, the Settlement Agreement
6 does not create any affirmative obligations to be undertaken by them.

7 **d. Provide Information Regarding Any Fee Splitting Agreement and Whether the Client**
8 **Has Given Written Approval. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219; Rules Prof.**
9 **Conduct, rule 1.5.1; Cal. Rules of Court, rule 3.769.)**

10 Not applicable, as no fee splitting agreement is at issue here. (Kick Decl., ¶ 25.) Pursuant to the
11 Settlement, Class Counsel will request, and Defendants will not oppose, attorneys' fees in the amount of
12 \$266,400, or one-third (1/3) of the GSA, and reimbursement of necessary litigation costs not to exceed
13 \$25,000. (*Id.*; Ex. 1, Settlement, ¶ 3.2.2.)

14 **e. Any Agreement That Has Injunctive Relief Against a Class Representative or Absent**
15 **Class Member Generally Is Not Appropriate in a Class Action Case. Provide the**
16 **Authority and Factual Reasons Why this Case is an Exception**

17 Not applicable, as the Settlement does not provide for any such injunctive relief.

18 **f. Explain Why Any Proposed Class Representative Enhancement is Reasonable,**
19 **Including What the Class Representative Did Beyond the Expected Services of Any**
20 **Class Representative**

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

Here, Plaintiff should be compensated for the significant contributions provided to the Class, the
reputational risks Plaintiff undertook, the time and efforts expended on behalf of the Class, Plaintiff's
entering into a broader waiver of claims outside of the scope of the Class claims released by the Class in the
Settlement, and the significant accomplishments of this case. (Kick Decl., ¶¶ 21-22.) Among other things,

1 Plaintiff stepped forward with willingness to serve the Class, provided essential information for the
2 prosecution of this action and in connection with mediation and settlement, gathered and provided pertinent
3 documents, took time to participate in phone calls with counsel, was available during the all-day mediation,
4 and reviewed the settlement documents. (*Id.*) At no time did Plaintiff ever have a guarantee of any personal
5 benefit as a result of this case. (*Id.*)

6 The proposed service award also falls well within the range of reasonable payments awarded to Class
7 Representatives in similar class actions. Other courts in California also regularly award service awards
8 higher than those requested here. *See e.g. Ross v. US Bank National Association*, No. C 07-02951 SI, 2010
9 WL 3833922, at *2 (N.D. Cal. Sept. 29, 2010) (approving **\$20,000** enhancement award to Class
10 Representative in California wage-and-hour class action settlement); *Louie v. Kaiser Found. Health Plan,*
11 *Inc.*, CASE NO. 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008)
12 (approving “**\$25,000** incentive award for each Class Representative” in wage an hour settlement); *Garner*
13 *v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8 (N.D. Cal.
14 Apr. 22, 2010) (“Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of
15 **\$20,000** or more where, as here, the class representative has demonstrated a strong commitment to the
16 class”).)

17 Finally, at the time of the filing of the Motion for Final Approval, the Named Plaintiff intends to file
18 further detail for this Court’s consideration regarding the time and effort he expended on behalf of the absent
19 class members as a result of having stepped forward to be the class representative.

20 **F. THE SETTLEMENT AGREEMENT**

21 The second half of the LA Superior Court Checklist (“Checklist”) indicates a number of items that
22 the Settlement should address. (*See* Checklist pp. 4-8.) Class Counsel has gone through all items in the
23 Checklist and confirmed that each exist in the proposed Settlement and Notice, including the class definition,
24 monetary terms of the Settlement, release terms, and details of Notice administration. (Kick Decl., ¶ 26.)

25 **G. ATTORNEYS’ FEES AND COSTS**

26 Pursuant to Labor Code section 1194 and Code of Civil Procedure section 1021.5, Class Counsel
27 will request, and Defendants will not oppose, attorneys’ fees in the amount of \$266,400, or one-third (1/3)
28 of the GSA, and reimbursement of necessary litigation costs not to exceed \$25,000. (Kick Decl., ¶ 24, Ex.
29 1 (Agreement ¶ 3.2.2).) Considering both the risks and the potential value of the litigation, the request,
30 calculated as a percentage of the common fund, is reasonable, as the amounts are well-within the range of

1 fees generally sought and approved in similar class action cases. *Chavez*, 162 Cal.App.4th at 66 (“Empirical
2 studies show that, regardless whether the percentage method or the lodestar method is used fee awards in
3 class actions average around one-third of the recovery.”) (citation omitted).

4 “[T]he court may determine the amount of a reasonable fee by choosing an appropriate percentage
5 of the fund created.” *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal. 5th 480, 503. In *Laffitte*, a \$19
6 million employment class action case involving an objection to a one-third percent-based recovery, the
7 California Supreme Court held that “the trial courts have discretion to conduct a lodestar cross-check on a
8 percentage fee . . . [and] also ***retain the discretion to forego a lodestar cross-check*** and use other means to
9 evaluate the reasonableness of a requested percentage fee.” *Id.* at 506 (emphasis added).

10 The percentage approach is preferable to the lodestar calculation approach because it “more
11 accurately reflects the results achieved.” *Id.* at 504 (quoting *Rawlings v. Prudential-Bach Properties* (1993)
12 9 F.3d 513, 516). In fact, “[a] task force commissioned by the Third Circuit concluded that the lodestar
13 approach ... is a cumbersome, enervating, and often surrealistic process of preparing and evaluating fee
14 petitions that now plagues the Bench and Bar and recommended a return to the percentage of the recovery
15 fee formula in cases involving a settlement fund.” *Lealao v. Beneficial California, Inc.* (2000) 82
16 Cal.App.4th 19, 29 (citations and quotation marks omitted). Regardless, should this Court wish to perform
17 a lodestar cross-check, Class Counsel will also provide its lodestar at the time of final approval.

18 **H. EXHIBITS TO THE MOTION (PER THE CHECKLIST)**

19 **Exhibit 1** to the Kick Decl. is a copy of the Settlement Agreement.

20 **Exhibit A** to the Settlement Agreement is the Proposed Notice to the Class.

21 **Exhibit 2** to the Kick Decl. is a copy of the PAGA Notice Letter to the LWDA.

22 **Exhibit 3** to the Kick Decl. is a copy of the Settlement Administration bid from Simpluris, Inc.

23 **Exhibit 4** to the Kick Decl. is a Proposed Judgment not including a dismissal pursuant to CRC 3.769.

24 **Exhibit 5** to the Kick Decl. is proof of submission of the Settlement to the LWDA.

25 **I. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING**

26 The last step in the approval process is the formal hearing, whereby proponents of the settlement
27 may explain and describe its terms and conditions and offer argument in support of approval, and Class
28 members or their counsel may be heard in support of or in opposition to the Settlement. Plaintiff proposes
29 the following schedule, subject to the convenience of the Court’s calendar:
30

Last Day for Defendants to deliver Class Data to the Settlement Administrator	December 20, 2022 Within fourteen (14) days of entry of the Order Granting Preliminary Approval]
Last Day for Settlement Administrator to send Notice by First-Class Mail	December 30, 2022 Within ten (10) days of receiving Class Data
Last Day for Plaintiff to file Motion for Final Approval / Fee Motion	January 27, 2023 Thirty (30) days after Notice is mailed
Last Day for Class Members to submit objection or opt out request ("Response Deadline")	February 13, 2023 Forty-five (45) days after Notice is mailed
Last Day for Parties to Respond to Objections and Provide Final Report of Administrator of Notice Program	February 20, 2023 Seven (7) Days After Objection Deadline
Hearing on Motion for Final Approval / Fee Motion	February 27, 2023 About Thirty Days After Motion for Final Approval Was Filed
Last Day to file Final Accounting	September 15, 2023 Two hundred (200) days after entry of Order Granting Final Approval

J. CONCLUSION

For the stated reasons, Plaintiff's unopposed motion for preliminary approval should be granted.

Dated: October 24, 2022

Respectfully submitted,
THE KICK LAW FIRM, APC

By: Taras Kick
Taras Kick
Greg Taylor
Attorneys for Plaintiff and all others similarly situated

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to this action. My business address is 815 Moraga Drive, Los Angeles, California 90049. On the date of execution below, I served the following document or documents:

- **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT;**
- **DECLARATION OF TARAS KICK IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL; EXHIBITS**

☒ **By electronic service (via electronic filing service provider.)** I caused the documents to be electronically transmitted to Case Anywhere, an electronic filing service provider, at www.caseanywhere.com pursuant to the Court's Electronic Case Management Order governing the matter and mandating electronic service to person(s) at the address(es) listed below. The transmission was reported as complete and without error to the addressees as stated below.

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and ROBERT L. BUTTON

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **October 24, 2022**.

/s/ Alina Muresan
Alina Muresan