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12 proposed class

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF LOS ANGELES**

15 TAMARA WHITMER, in a Representative
16 capacity, and on behalf of the proposed class

17 Plaintiff,

18 v.

19 USP MISSION HILLS, INC., a California
20 Corporation, and DOES 1-10, inclusive

21 Defendants

CASE NO. 20CHCV00209

22 **PLAINTIFFS' UNOPPOSED MOTION**
23 **FOR CONDITIONAL CERTIFICATION**
24 **OF SETTLEMENT CLASS AND**
25 **PRELIMINARY APPROVAL OF GOOD**
26 **FAITH DETERMINATION OF CLASS**
27 **ACTION SETTLEMENT**

Date: August 17, 2022

Time: 10:00 am

Dept.: 11

Judge: Hon. David S. Cunningham

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1 **I. SUMMARY OF MOTION**

2 This matter is a proposed “wage and hour” class action, brought by Plaintiff Tamara Whitmer
3 (“Whitmer” or “Plaintiff”) against Defendant USP Mission Hills, Inc. (“Defendant” or “USP”).

4 Following several months of pre-filing investigation and almost two years of litigation, and
5 lengthy class mediation and settlement discussions, the parties have agreed to the terms of a proposed
6 class action settlement. The parties have drafted and executed a formal Class Action Settlement
7 Agreement (the “Agreement,” please see Exhibit 1 to Yaeckel Decl.). The proposed terms of the
8 settlement are as follows:

9	Approximate size of class:	207 individuals
10	Notice Period:	30 days from Mailing of Notice
11	Settlement Fund (“GSA”):	\$375,000.00
12	Settlement Administration:	\$6,750 (or less)
13	Class representative incentive:	\$5,000
14	LWDA payment:	\$60,000 [75% (\$45,000) to the State of California and
15		25% (\$15,000) to PAGA members]
16	Attorney’s fees:	\$125,000 (1/3 OF TOTAL)
17	Litigation costs:	\$15,000

18 After the deductions proposed above, there will be a Net Settlement Amount (“NSA”) available
19 to class members who do not opt-out. An “average” class member will receive a payment of
20 approximately **\$861.11**. The class members’ actual payment will be based on the amount of
21 workweeks they were employed during the limitations period.

22 **Please Note:** This is a **non reversionary** settlement, in that the entire net settlement amount,
23 after the awarded costs and fees are deducted, will be automatically disbursed to all class members
24 who submit valid claims and who do not file a request to “opt-out” of participation in the lawsuit.

25 The parties now move the court for an order: (1) provisionally certifying the proposed class;
26 (2) preliminarily approving the proposed class action settlement; (3) directing that Notice (defined
27 below) of the proposed settlement be provided to Class Members; and (4) scheduling a hearing for
28

1 final approval of the proposed settlement and entry of the parties' proposed Final Order Approving
2 Class Action Settlement.

3 As explained in greater detail in Section V below, all of the following relevant factors favor
4 approval of the parties' settlement:

- 5 (i) the strength of the plaintiff's case;
- 6 (ii) the risks, expense, complexity and likely duration of further litigation;
- 7 (iii) the risk of maintaining class action status throughout the trial;
- 8 (iv) the amount offered in settlement;
- 9 (v) the extent of discovery completed;
- 10 (vi) the stage of the proceedings;
- 11 (vii) the experience and views of counsel;
- 12 (viii) the presence of a governmental participant; and
- 13 (ix) any reaction of putative class members to the proposed settlement.

14 Finally, Plaintiff is well aware of this Court's instruction to comply with all terms on the
15 "Complex Civil Department Checklist." If it will assist the Court, Plaintiff has submitted a completed
16 checklist which cross-references where each item is found in these moving papers. (See **Exhibit D.**)

17 **II. FACTUAL AND PROCEDURAL HISTORY**

18 This matter involves wage and hour claims against a proposed class of USP employees.

19 **1. The Operative Claims and Investigation and Discovery Conducted**

20 On March 18, 2020, Plaintiff filed a representative action Complaint against Defendant USP
21 Mission Hills. The original Complaint alleged six causes of action, all under California's Private
22 Attorneys General Act ("PAGA") pursuant to Labor Code section 2698, et seq.: (1) Meal and Rest
23 Period Violations; (2) Minimum Wage Violations; (3) Overtime Violations; (4) Wage Statement
24 Violations; (5) Failure to Reimburse; and (6) Failure to Pay Wages Upon Separation. (Yaeckel decl.
25 ¶ 3; ROA # 1.)

26 On August 12, 2020, a First Amended Complaint was filed to clarify Defendant's specific
27 violations as evidence became available to Plaintiff. (Yaeckel decl. ¶ 4.)

28 The parties have stipulated to the filing of a Second Amended Complaint which added the
Class Claims. The parties are also now stipulating to the filing of a Third Amended Complaint, which
will be the operative pleading for purposes of Settlement. The Third Amended Complaint is based on
the alleged violations of the same Labor Code sections that were at issue in the original and First

1 Amended Complaint. Specifically, the Third Amended Complaint alleges violations of Labor Code
2 §§ 201-203, 226, 226.7, 510, 512, 1197, 1198, 2802, and the IWC Wage Orders, and California's
3 Business and Professions Code. (Yaeckel decl. ¶¶ 5,6.)

4 On June 8, 2020, Plaintiff Whitmer propounded her first set of written discovery requests of
5 Defendant, including requests for admission, special interrogatories, requests for production of
6 documents, and general and employment form interrogatories. Through these requests, Plaintiff sought,
7 among other information and documents, the identities of putative class members, Defendant's
8 compensation policies, employee handbooks, wage statements, payroll records, time records and
9 reimbursement policies. (Yaeckel decl. ¶ 7.)

10 On February 8, 2021, Plaintiff Whitmer filed a motion to compel discovery responses. (Yaeckel
11 decl. ¶ 8.) After a further meet and confer process, Defendant agreed to provide information and
12 documents responsive to Plaintiff's requests. USP produced, *inter alia*, Plaintiff's time and wage
13 records, a copy of the operative employee handbooks, copies of all other relevant employee policies,
14 and the contents of Plaintiff's employee files. The parties also continued to discuss the production of
15 a sampling of class member time and wage records data. (Yaeckel decl. ¶ 9.)

16 **2. Settlement Efforts**

17 On August 26, 2021, the parties attended a mediation before experienced "wage and hour"
18 mediator Louis Marlin, Esq.. Following a full day of arms-length negotiations, the Parties both agreed
19 to a mediator's proposal to resolve all potential claims against Defendant, including on an individual,
20 representative and class-wide basis. (Yaeckel decl. ¶ 10.)

21 Prior to the mediation, Defendant produced a 25% of class member time and wage records, in
22 addition to a detailed information about the parameters of the class and PAGA groups. (Yaeckel decl.
23 ¶ 11.)

24 Additionally, both parties submitted detailed written submissions to the Mediator. Plaintiff's
25 brief (shared with opposing counsel) contained a detailed explanation of the claims at issue, including
26 all prosecution theories and the results of Plaintiff's counsel's analysis of the potential Class Members
27 time and wage records. (Yaeckel decl. ¶ 12.)
28

1 Plaintiff's counsel also interviewed numerous other putative class members during the course
2 of the litigation. (Yaeckel decl. ¶ 13.)

3 The parties were able to reach a tentative agreement on the key terms of settlement at
4 mediation. Negotiations over the final terms continued. (Yaeckel decl. ¶ 14.)

5 As of November 29, 2021 the parties finalized and executed a Joint Stipulation re: Class Action
6 Settlement (the "Agreement"), which contains all of the parties' agreed upon terms. (Yaeckel decl. ¶
7 15); **Ex. 1.**) All terms set forth herein are intended to have the same definitions as those set forth in
8 the Agreement.

9 **III. THE CLAIMS AT ISSUE AND POTENTIAL DAMAGES**

10 Each of the primary claims also had risks to obtaining both class certification and liability. If
11 Defendant's asserted defenses were successful, the class would not receive anything. As set forth
12 below, Plaintiff submits that the most realistic, "best case" scenario would be an average recovery per
13 class member of approximately \$1,815.54 and a worst case scenario would be a recovery of \$0, by way
14 of denial of class certification or defense verdict. (Yaeckel decl. ¶¶ 24 - 26.)

15 **A. MEAL PERIOD CLAIMS**

16 Plaintiff's meal period claims were centered on USP's time records and policies which Plaintiff
17 alleged, showed violations of California Law. Defendants argue that even if there were late or missing
18 meal periods shown on the time records, that USP had properly "provided" the opportunity for a meal
19 period. (Yaeckel decl. ¶ 19.)

20 Based on Counsels' analysis, this claim was worth as little as \$0 (a defense verdict or denial
21 of class certification) or as much as \$214,218.00. (Yaeckel decl. ¶ 24.)

22 **B. REST PERIOD CLAIMS**

23 Plaintiff's rest period claims alleged that USP's policies restricted employees from taking rest
24 periods, as employees were not allowed to leave the premises during breaks, and rest period premiums
25 were not paid. Defendant argued that in practice no such "leave the premises" restriction was ever
26 enforced, and was willing to provide witnesses to testify to such a representation. Defendants also
27 contend individualized inquiries will abound as to why individual employees may have failed to take
28

1 appropriate rest periods. (Yaeckel decl. ¶ 20.)

2 While there are time records to support the existence of meal period violations, there are no
3 corresponding rest period records, making this aspect of the claim much harder to prove. Some Courts
4 have been disinclined to accept survey evidence that may have been needed to help establish rest
5 period violations. See e.g. *Duran v. U.S. Bank National Assn.* (2019) 19 Cal.App.5th 630.

6 Based on Counsels' analysis, this claim was worth as little as \$0 (a defense verdict or denial
7 of class certification) or as much as \$191,368.08. (Yaeckel decl. ¶ 24.)

8 **C. MINIMUM WAGE AND OVERTIME CLAIMS**

9 Plaintiff's unpaid wages (and unpaid overtime) claims were centered around the fact that
10 employees were performing unpaid work during meal and rest periods, and USP failed to accurately
11 calculate the regular rate of pay and overtime by using an illegal rounding practice. Plaintiff alleged
12 this resulted in regular time and overtime pay being owed where Defendants were on notice of work
13 being performed outside the scheduled hours. Defendants were defending these claims on the grounds
14 that the lack of accurate start and end times did not necessarily evidence Labor Code violations, and
15 that proving up these violations could necessitate individual inquiries, which could preclude class
16 certification and make any PAGA claims unmanageable. (Yaeckel decl. ¶ 21.)

17 Based on Counsels' analysis, this claim was worth as little as \$0 (a defense verdict or denial
18 of class certification) or as much as \$48,556.08. (Yaeckel decl. ¶ 24.)

19 **D. WAGE STATEMENT CLAIMS**

20 Plaintiff contends Defendants also violated Labor Code § 226 on multiple grounds in that it
21 failed to provide accurate information on the Wage Statements provided to employees. However,
22 Plaintiff acknowledges that these claims were largely derivative, in that both the gross and net wages
23 would be inaccurate due to the above-referenced claims. Defendants argue that the failure to list gross
24 and net wages are derivative of other claims that may ultimately fail and as a result there is no
25 "knowing and intentional failure" to list information, which is what triggers liability under Labor Code
26 § 226 (e). (Yaeckel decl. ¶ 22.) Based on Counsels' analysis, this claim was worth as little as \$0 (a
27 defense verdict or denial of class certification) or as much as \$ 4,075 . (Yaeckel decl. ¶ 24.)
28

1 **E. REIMBURSEMENT CLAIMS**

2 Plaintiff contends Defendants violated Labor Code § 2802 by failing to reimburse its
3 employees for, *inter alia*, cellular phone costs. Specifically, Plaintiff argued Defendants required
4 employees to call in if they are to be absent or late, but are not reimbursed for such expenses. Plaintiff
5 contends that California law requires reimbursement to these employees whenever a cell phone is used
6 in such a manner. See e.g. *Cochran v. Schwan's Home Service, Inc.*(2014) Cal.App.4th 1137.
7 Defendants argued that *Cochran* is distinguishable because the policy in this case does not require
8 employees to use their cellular phones. Defendants also argue that individualized inquiries regarding
9 the use of cellular phones would predominate and bar class certification. (Yaeckel decl. ¶ 23.)

10 Based on Counsels' analysis, this claim was worth as little as \$0 (a defense verdict or denial
11 of class certification) or as much as \$39,670. (Yaeckel decl. ¶ 24.)

12 **F. RELEVANT CASE LAW SUPPORTS A FURTHER REDUCTION ON ANY RECOVERY**

13 Plaintiff concedes it would be highly unlikely to ever be awarded any amount approaching the
14 maximum damages set forth above. To wit, the majority of the damages would be "derivative"
15 penalties under PAGA, Labor Code § 203 and Labor Code § 2226. The Court would have great
16 discretion to mitigate any penalties awarded. *Thurman v. Bayshore Transit Management, Inc.* (2012)
17 203 Cal.App.4th 1112, 1135 (disapproved on other grounds).

18 In a recent trial involving plaintiff's counsel, the Court found liability, but then significantly
19 reduced the PAGA penalties, down to \$5 a violation. See *Carrington v. Starbucks Corp.* (2018) 30
20 Cal.App.5th 504; See accord *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK(OPx), 2011 WL
21 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because
22 employer was "not aware" of violations).

23 In the *Carrington* decision, the Court also noted that other trial Courts have declined to "stack"
24 (impose multiple) penalties based on the same underlying Labor Code violation. See *Ruelas v. Costco*
25 *Wholesale Corporation* (N.D. Cal. 2014) 67 F.Supp.3d 1137; See Accord and *Naranjo v. Spectrum*
26 *Security Services, Inc.* (2019) 40 Cal.App.5th 444 (Cal. Supreme Court Review pending) [declining
27 to impose Labor Code §§ 203 and 226 penalties based on unpaid meal break premiums.]

Accordingly, our office's realistic anticipated "best case" judgment following trial would be approximately \$626,362.26 (which is the analysis above and applying a 15% discount considering likely mitigation). Discounting 40% for contingent costs (fees and costs award, enhancement bonus, administration, etc.), the average class member's share of this recovery would be \$1,815.54. (Yaeckel decl. ¶ 24.) Given our office's analysis, I submit this number is the most likely "best case" recovery per class member. However, it is very unlikely to get a best case recovery given the numerous defenses to certification and liability asserted. Accordingly, counsel submits the **\$861.11** average recovery secured via this settlement, is a reasonable compromise and is in the best interests of the class given all the risks of continued litigation. (Yaeckel decl. ¶ 25.) As to the potential PAGA penalties, our office submits that this PAGA allocation is fair and reasonable. It was negotiated by a well respected mediator as a result of arms length negotiations. It is in line with percentages approved in other California Court's and takes into consideration that there is a significant risk any penalties awarded would be significantly mitigated. (Yaeckel decl. ¶ 26.)

IV. SETTLEMENT TERMS

The Agreement includes the following key terms:

1. Contingent Nature of the Settlement

The parties entered into the Agreement exclusively for the purpose of resolving this action and facilitating the negotiated settlement. Should the Court, for any reason, not preliminarily and/or finally approve the Agreement, or if the Agreement is otherwise terminated for any reason, then the parties have acknowledged that the Agreement will be null and void and this action will revert to its status with respect to any and all matters as they existed prior to the parties signing the Agreement. (See Exhibit 1 at ¶ 33.)

2. Description of the Settlement Class

Solely for the purposes of the Agreement, the parties have agreed that "Class" is defined as:

All persons who have worked for defendant USP Mission Hills, Inc. as non-exempt employees in the State of California at any time during the Class Period. The term "Class Period" shall mean the time period from March 18, 2016 to the earlier of December 31, 2021 or the Preliminary Approval Date. (See Ex. 1 at § I, ¶¶ 1(e)-(f).)

1 There are approximately 207 Class Members. (See Ex. 1 at ¶ 13.)

2 **3. Appointment of Settlement Claims Administrator**

3 The parties agreed to use Phoenix Class Action Administration Solutions (“Phoenix”) as the
4 “Settlement Claims Administrator” for the purposes of, *inter alia*, providing Notice forms to
5 Settlement Class Members, issuing all payments pursuant to the Agreement, and to track all opt-outs
6 and objections to the settlement. Phoenix’s sole business has been the administration of class action
7 settlements and class action notices, an area in which it has extensive experience. (Yaeckel decl. ¶ 27.)

8 **4. Scope of Release**

9 For purposes of the Agreement, participating Class Members will release any and all claims
10 and resultant penalties and damages, arising from or related to the claims litigated in the Lawsuit
11 against Defendants, during the Class Period. The specific release is as follows:

12 “Released Claims”: Any and all claims, actions, demands, causes of action, suits, debts,
13 obligations, damages, rights or liabilities that have been asserted by Plaintiff, or the Class
14 Members or any of their respective heirs, executors, administrators, beneficiaries, predecessors,
15 successors, attorneys, assigns, agents, and/or representatives arising out of any claims that were
16 encompassed in the Action, and any claims which reasonably flow from the facts alleged in
17 Plaintiff’s Complaint, First Amended Complaint, or Second Amended Complaint, including,
18 but not limited to: claims for unpaid wages (including claims for minimum wage, regular
19 wages, and overtime compensation), meal and rest periods, failure to pay or calculate proper
20 meal and rest period premiums (including claims for failure to pay premiums and failure to pay
21 premiums at the correct rate of pay), unreimbursed business expenses, interest, penalties
22 (including waiting time penalties pursuant to Labor Code sections 203 and 204, pay stub
23 penalties pursuant to Labor Code section 226, recordkeeping penalties pursuant to Labor Code
24 section 1174, and civil penalties pursuant to the Labor Code Private Attorneys General Act of
25 2004 (Labor Code sections 2698, et seq.) (“PAGA”)), claims pursuant to all of the theories of
26 relief described above, including but not limited to penalties relating to alleged violations of
27 Labor Code sections 200, 201, 202, 203, 204, 218.5, 218.6, 226, 226.7, 510, 512, 558, 1194,
28 1194.2, 1197, 1197.1, 1198, 2698, et seq., 2800, and 2802, the Industrial Welfare Commission
Wage Orders relating to claims for unpaid hours worked, meal periods and rest breaks,
provision and maintenance of tools and equipment, and recordkeeping, and claims under
Business and Professions Code sections 17200, et seq., claims for attorneys’ fees and costs,
conversion, fraud, common count, and unfair business practices. Released Claims include all
claimed or unclaimed compensatory, consequential, incidental, liquidated, punitive and
exemplary damages, restitution, interest, costs and fees, injunctive or equitable relief, and any
other remedies available at law or equity (including, to the extent permitted by law the FLSA),
allegedly owed or available to the Class arising or reasonably flowing from the allegations
contained in the Complaint, First Amended Complaint, and/or Second Amended Complaint
against the Released Parties for the time period from the beginning of time up to and including
the earlier of December 31, 2021 or the date of preliminary approval of the settlement
(collectively referred to as the “Released Claims”). The res judicata effect of the Judgment will
be the same as that of the Release.

(Exhibit 1 at ¶ 15.) There is also a limited section 1542 waiver, however it is not a general release and is based only on claims plead or which reasonably flow from the facts alleged in Plaintiff's operative pleading. (Exhibit 1 at ¶ 16.)

Please Note: Plaintiff executed a separate individual settlement agreement and release. This amount being paid to Plaintiff is separate and apart from the amount negotiated for the class. This individual package was separately negotiated with the assistance of the mediator and provides a much broader release of claims (and a resignation from her position with Defendant) in exchange for the consideration. (Yaeckel decl. ¶ 28.) The class is being notified. (See Ex. A to the Agreement at § IV.)

5. Cash Payment and Allocation

The Agreement provides for an automatic cash payment to the members of the class who do not submit valid requests for exclusion. The settlement is non-reversionary, in that all of the Net Settlement Amount, after all costs and fees are deducted, will be paid to the participating Class Members. (Exhibit 1 at ¶ 20.) Class Members will be entitled to an average share of approximately \$861.11. This is an estimate only and does not account for the fact that class members will receive more or less than an "average" share depending on the number of workweeks each individual worked for Defendants.

The settlement checks returned as undeliverable and those settlement checks remaining un-cashed for more than one hundred eighty (180) calendar days after . In the event that an Individual Settlement Award is paid to a Class Member by check and the check is not cashed on or before the Check Cashing Deadline, the amount of the Individual Settlement Award shall be considered unclaimed. Each unclaimed Individual Settlement Award paid to a Class Member but not cashed on or before the Check Cashing Deadline shall be tendered to the State of California Unclaimed Property Fund in the Class Member's name. (Exhibit 1 at ¶¶ 1(b), 20.)

6. Proposed Settlement and Notice Program

Subject to Court approval, the Parties agree that, within thirty (30) days after the Court enters any Order granting preliminary approval of the Settlement, Defendants will provide the Claims Administrator with a class list containing contact and workweek information for each member of the

1 Class. (Exhibit 1 at ¶26.) The Claims Administrator will perform additional address updates and
2 verifications, as necessary, prior to the first mailing. After the Claims Administrator receives the Class
3 Information from Defendant, and subject to Court approval, the Claims Administrator will mail a
4 Notice of Proposed Class Action Settlement (“Notice”) to each Class Member, by first class
5 mail.(Exhibit 1 at ¶21.)) Mailed with the Notice will information detailing the individual’s estimated
6 share, and instructions on how to request exclusion or object to the settlement. The proposed Class
7 Notice packet is attached to the Agreement as an Exhibit. (See Exhibit A.).

8 Notice is designed to provide Class Members with detailed information about the lawsuit, the
9 Agreement, their rights and the settlement benefits, how to submit a claim, how to dispute their
10 payment amounts, exclude themselves or object. From the date the Notices are mailed, the Class
11 Members will have thirty (30) calendar days to request to be excluded, or make objections.

12 The Class members will be given notice of the release and information detailing their expected
13 settlement amount based on the workweeks they were employed with Defendants during the Class
14 period. If they wish to receive a share of the Settlement class members need not take any additional
15 action. Class Members are also given the option to “opt-out” by sending back a request for exclusion
16 (by mail or fax). Class members may also file objections, or appear at the final approval hearing to
17 state objections. (See generally the Class Notice at Ex. A to the Agreement.)

18 The Notice program also has additional safeguards. For instance, for Notices returned as
19 nondeliverable, the Class Administrator is permitted to perform a skip-trace and mail or re-mail Notice
20 to an updated address (if any), upon receipt of the returned mail. (Ex 1 at ¶ 21(c).) It is the intent of
21 the parties that all reasonable means be used to locate Class Members.

22 **7. Contingent Costs**

23 Defendants agree to pay One Hundred and Twenty-Five Thousand Dollars(\$125,000.00) in
24 attorneys’ fees, which is 1/3 of the total settlement, and up to Fifteen Thousand Dollars (\$15,000.00)
25 in litigation costs. (Exhibit 1 at ¶ 19(a),(c).)

26 For costs incurred in administrating the claims process, Defendants will pay the actual costs,
27 out of the settlement amount to the Claims Administrator, not to exceed \$6,750. (Exhibit 1 at ¶ 19(d).)

1 The parties have agreed to allocate Sixty Thousand (\$60,000.00) to Plaintiff's representative
2 claims under California Labor Code 2698, et seq., with 75% of this amount (\$45,000.00) being paid
3 directly to the LWDA, and the remaining 25% (\$15,000.00), being distributed amongst the class
4 members. (Exhibit 1 at ¶ 19(e).)

5 Defendants also agree to pay Plaintiff Five Thousand Dollars (\$5,000.00) as an enhancement
6 award in consideration for her service as Class Representative. (Exhibit 1 at ¶ 19(c).) The enhancement
7 award was decided pursuant to good faith negotiations at, and following, mediation and thereafter and
8 is intended to recognize that it was Plaintiff who initiated the lawsuit, initiated the PAGA claims,
9 provided critical documents and witnesses to her attorneys, all in an effort to obtain moneys allegedly
10 owed not only to herself, but to all other employees. Additionally, Plaintiff also could have been liable
11 for a very large award of costs, should Defendant have prevailed in this action. (Yaeckel decl. ¶ 29.)

12 **V. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

13 Under California law, a class action is appropriate when the class is ascertainable and there is
14 "a well defined community of interest in the questions of law and fact involved affecting the parties
15 to be represented." Cal. Code Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34
16 Cal. 4th 319, 341. State law requirements under California Code of Civil Procedure § 382 for class
17 certification are similar to those of federal law under Rule 23 of the Federal Rules of Civil Procedure:
18 numerosity, typicality of the class representatives' claims, adequacy of representation, predominance
19 of common issues, and superiority. See Fed. R. Civ. P. 23(a); see also *Hanlon v. Chrysler Corp.* (9th
20 Cir. 1998) 150 F.3d 1011, 1019. Thus, for settlement purposes, each of these elements must be present.
21 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 237-38.

22 **A. THE PROPOSED SETTLEMENT CLASS IS ASCERTAINABLE**

23 The proposed class is ascertainable because all Class Members currently or formerly worked
24 for Defendant in the state of California and were designated by USP as non-exempt employees. See
25 *Rose v. City of Hayward*, (1981) 126 Cal.App.3d 926, 932 (finding that "Class Members are
26 'ascertainable' where they may be readily identified without unreasonable expense or time by reference
27 to official records"). Thus, the ascertainability requirement is met.
28

1 **B. THE PROPOSED SETTLEMENT CLASS IS SUFFICIENTLY NUMEROUS**

2 The numerosity requirement is met if the class is so large that joinder of all members would
3 be impracticable. *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 318. Here, Defendant’s records show
4 that approximately 207 class members worked for the company during the limitations period. Thus,
5 joinder of all members of the class would be impracticable.

6 **C. THE COMMONALITY REQUIREMENT IS MET**

7 The commonality requirement is met if there are questions of law and fact common to the class.
8 See *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent legal factual
9 predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies
10 within the class”).

11 Here, for purposes of the Settlement, the parties stipulated that class certification is appropriate.
12 The claims of Class Members all involve the same questions of law and fact. Namely, all class
13 members worked in the same or similar capacities and were subject to the same compensation policies
14 and practices of Defendant. Thus, the common question exists as to whether the policies and practices
15 Class Members were subjected to are illegal. Under these circumstances, the commonality requirement
16 is satisfied. See *Hanlon, supra*, 150 F.3d at 1019-20.

17 **D. THE TYPICALITY REQUIREMENT IS MET**

18 The typicality requirement is met if the class representatives and class counsel have no interests
19 adverse to the interests of the proposed Class Members and are committed to vigorously prosecuting
20 the case on behalf of the class. See *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).
21 Here, there are no such adverse interests. Plaintiff has claims substantially the same as all the Class
22 Members. Factual differences may exist between the class representatives and the Class Members so
23 long as the claims arise from the same events or course of conduct and are based on the same legal
24 theories. See *Hanlon*, 150 F.3d at 1020; see also 1 *Newberg* § 53.13 at 3-76-77 (“When it is alleged
25 that the same unlawful conduct was directed at or affected both the named plaintiff and the class
26 sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns
27 which under lie individual claims.”) Thus, the typicality requirement is also satisfied.

1 **E. THE ADEQUACY REQUIREMENT IS MET**

2 The adequacy of the representation component of the community of interest requirement
3 “comes into play when the party opposing certification brings forth evidence indicating widespread
4 antagonism to the class suit.” *Capitol People First v. Dep’t of Developmental Servs.* (2007) 155
5 Cal.App. 4th 676, 696-97. The adequacy inquiry “serves to uncover conflicts of interest between
6 named parties and the class they seek to represent.” *Id.* To assure “adequate” representation, the “class
7 representative’s [...] claim must not be inconsistent with the claims of other members of the class.” *Id.*

8 No such “inconsistencies” exist here. As part of her payment as a participating Class Member,
9 Plaintiff will be paid in the same manner, through the same formula, and releases all the same claims
10 as the other Class Members.

11 Additionally, any Class Member who wishes to “opt out” of the Settlement may do so. There
12 is therefore no conflict of interest between Plaintiff and the Class Members. Thus, at least for
13 settlement purposes, the adequacy prong is met.

14 **F. COMMON ISSUES PREDOMINATE AND CLASS-WIDE SETTLEMENT IS**
15 **SUPERIOR TO OTHER AVAILABLE METHODS OF RESOLUTION**

16 Class certification is authorized where common questions of law and fact predominate over
17 individual questions, and where class-wide treatment of a dispute is superior to individual litigation.
18 See *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 469 (1981). The test is whether the proposed class
19 is sufficiently cohesive to warrant adjudication by representation. See *Hanlon*, 150 F.3d at 1022.

20 Here, the primary claims all involved standard USP policies and/or practices, which would
21 stand- or fall - based primarily on a legal determination as found and applied by the Court. As such,
22 it would be preferable to resolve all of the Class Members’ claims by means of a class-wide settlement
23 than to require each Class Member to litigate his or her individual claims.

24 For example, one of Ms. Whitmer’s primary claims is that USP failed to provide a legally
25 compliant meal periods. Additionally, Plaintiff alleged USP failed to provide minimum wage and
26 overtime compensation to its employees in violation of, *inter alia*, Labor Code Sections 1194 and 510
27 and the IWC Wage Order 4. These issues could be resolved determined via a review of USP’s own
28

1 verified employment policies and time records. Plaintiff submits these issues do not depend on
2 individualized facts, and as the Court can (and would have) resolved this legality question via a single
3 decision, common issues predominate, and class settlement is proper.

4 USP also possessed uniform compensation and meal and rest period policies. USP also
5 possessed standard reimbursement policies, and provided standardized itemized wage statements as
6 to all Class Members. As such, all members of the Class worked under the same conditions and
7 experienced the same policies and practices of USP which Plaintiff contends are illegal. Thus, the
8 Class is sufficiently cohesive.

9 **VI. PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT IS PROPER**

10 The trial court has broad discretion to determine whether a class action settlement is fair and
11 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. Fairness is presumed where
12 (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are
13 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
14 litigation; and (4) the percentage of objectors is small. *Chaves v. Netflix, Inc.* (2008) 162 Cal.App.4th
15 43, 52; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802. But, even where it appears the
16 settlement is fair, the court must still determine on the record before it whether the settlement should
17 be approved after considering "the strengths and weaknesses of the claims and risks of the particular
18 litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. It considers: (i) the
19 strength of the plaintiff's case; (ii) the risks, expense, complexity and likely duration of further
20 litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount offered
21 in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the
22 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any
23 reaction of putative class members to the proposed settlement. *Dunk*, 48 Cal.App.4th, at 1800-1801;
24 *In re Microsoft I-V Cases*, 135 Cal.App.4th, at 723.

25 When evaluating these factors, the court "must stop short of the detailed and thorough
26 investigation that it would undertake if it were actually trying the case," but nonetheless it "must
27 eschew any rubber stamp approval in favor of an independent evaluation." *Kullar*, 168 Cal.App.4th,
28

1 at 130. Ultimately, the court approves the proposed class action settlement when the settlement is fair
2 and falls “within the range of reasonableness.” *Hernandez v. Vitamin Shoppe Indus., Inc.* (2009) 174
3 Cal.App.4th 1441, 1446.

4 **A. FAIRNESS OF THE SETTLEMENT**

5 For preliminary approval purposes, a proposed class action settlement is *presumed* to be fair
6 where, as here, (1) the settlement is reached through arm’s-length bargaining; (2) investigation and
7 discovery are sufficient to allow counsel and the court to act intelligently; and (3) counsel is
8 experienced in similar litigation. *Chaves, supra*, 162 Cal.App.4th at 52.

9 The proposed settlement in this action meets these criteria, and merits preliminary approval.
10 As discussed above, the parties only agreed to the Agreement after engaging in Mediation (before an
11 experienced wage and hour mediator Louis Marlin, Esq.) (Yaeckel decl. ¶¶ 9-13) These settlement
12 discussions were preceded by substantial investigation and discovery into the claims at issue,
13 interviews of numerous Class Members, disclosure and review of documents detailing company-wide
14 policies and practices, and informal information exchanges for mediation purposes. (*Id.*) Ultimately,
15 the parties were able to come to a mutual understanding regarding settlement. Thereafter, the parties
16 memorialized the details of this settlement via the Agreement. (*Id.*)

17 When negotiating the settlement, both sides took into account the strengths and weaknesses
18 of their opponent’s positions, the data available to evaluate liability and damages, the reliability of data
19 or evidence on certain issues, and the substantial and evolving law applicable to the merits of the
20 claims. The Agreement was only agreed to after extensive arms-length negotiations resulting in a
21 unique compromise that permits all parties to move forward and bring this action to close. In spite of
22 a mutual desire to resolve this action, the negotiations remained at all times adversarial.

23 As set forth in greater detail below in section H, counsel for both parties have extensive
24 experience in litigating wage and hour class action lawsuits. Based on this experience, counsel have
25 determined that the settlement is fair, adequate, and reasonable.

26 **B. STRENGTH OF PLAINTIFF’S CASE**

27 The most important factor courts consider when evaluating the fairness of the class action
28

1 settlement is the strength of the plaintiff's case balanced against the amount offered in settlement.
2 *Kullar*, 168 Cal.App.4th, at 130.

3 All of Plaintiffs' claims – individual, PAGA, and class claims - presented hurdles including
4 obtaining class certification, in addition to a substantial risk of a defense verdict by way of summary
5 judgment motion or at trial. While the parties disagreed on the merits of the defenses, Plaintiff
6 concedes Defendant was able to present cogent defenses to each of the claims at issue. (Yaeckel decl.
7 ¶¶ 19-23.)

8 The parties extensive discovery conducted, exchange of mediation briefs, the assistance of an
9 experienced mediator, and the parties' ongoing negotiations all helped the parties realize the strengths
10 and weaknesses of their case, as well as the risks and expenses of continuing litigation. (Yaeckel decl.
11 ¶¶ 7-13.)

12 Moreover, the merits of each of the underlying claims are rooted in statutory law, much of
13 which is contemporaneously evolving. Further, Plaintiff's claims will require expert analysis and
14 testimony at trial, which will be subject to jury interpretation.

15 Additionally, as trial approaches, each party's monetary risk increases significantly as
16 substantial additional attorney hours and expert witness hours would have to be devoted to this case
17 by each party. Each party bears a real risk at trial, and considering the balance of the strengths of
18 Plaintiff's claims versus the risks inherent in trial and the consideration given to settle now, the
19 settlement reflects a fair and adequate resolution to this action.

20 **C. THE RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF FURTHER**
21 **LITIGATION**

22 Plaintiff's Counsel's effectiveness in prosecuting this case has translated into tangible monetary
23 and non-monetary benefits for the Settlement Class Members in the following respects: **(1)** a
24 guaranteed favorable result; **(2)** guaranteed monetary recovery over a reasonably short period of time,
25 as opposed to possibly waiting additional years for a potentially worse result; and **(3)** significant
26 savings in attorneys' fees and costs, which would have increased had the case progressed through trial
27 and possible appeals.
28

1 If the litigation were to proceed in lieu of settlement, additional and substantial attorneys fees
2 and costs, expert witnesses fees, and discovery costs and fees would quickly accumulate. Given the
3 numerous claims being litigated, the parties may be required to hire up to as many as three experts
4 each. This would result in not only the production of six expert reports, but six expert depositions as
5 well. The parties also were about to incur substantial more time and expense in opposing the dueling
6 motions for summary adjudication / judgment.

7 Importantly, even after engaging in all of the potential continued and protracted litigation set
8 forth above, the putative class would continue to have no guarantee of success on any of the claims
9 advanced in this case. Even if Plaintiff was successful at trial, it is very likely an appeal would follow
10 delaying recovery for many additional months, or even years. Thus, the parties and their counsel
11 believe in good faith that the proposed resolution is a fair, reasonable, and adequate compromise.

12 **D. THE RISK OF MAINTAINING CLASS ACTION STATUS THROUGH THE TRIAL**

13 The parties have stipulated to add Class Action claims as Defendant had a desire to settle all
14 PAGA claims, as well as the underlying wage and statutory violations claims. However, if not for this
15 settlement, any request by Plaintiff to certify a class would have been heavily contested by Defendant.

16 Therefore this class action settlement is a superior result for both parties. In exchange for a full
17 release, Class members are given a guaranteed monetary recovery now. Defendant is also able to “buy
18 the peace” and avoid the costs of defending all future proceedings. (Yaekel decl. ¶ 30.)

19 Regarding Plaintiff’s representative (PAGA) claims, there is also a substantial risk that, at trial,
20 Plaintiff will either fail to obtain a favorable judgment on one or more of these claims, or that a
21 favorable award on one or more PAGA claims may be greatly reduced, as these claims are subject to
22 mitigation by the Court. *See Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112,
23 1135.

24 **E. THE AMOUNT OFFERED IN THE SETTLEMENT**

25 After deduction from the total “Gross Settlement Amount” of the projected costs of
26 administration, proposed class representative service awards, potential attorney fees and costs and the
27 PAGA payment, the **full** “Net Settlement Amount” (“NSA”) will be distributed to the participating
28

1 Class Members. (Exhibit 1 at ¶ 19(g).) Participating Class Members will get a pro rata share of the
2 NSA based on the total workweeks they worked during the Class Period. (*Id.*) As there is no reversion,
3 100% of the NSA will be distributed to all participating Class Members.

4 If the projected costs, fees, incentive awards, and PAGA payment are approved, each
5 Participating Class Member should receive an average of **\$861.11**. This amount will vary based the
6 actual workweeks the individual was employed. (Yaeckel decl. ¶ 16.)

7 **F. THE EXTENT OF DISCOVERY COMPLETED**

8 Please See Section II, above. From that record it is clear sufficient discovery has been
9 conducted to allow the parties to participate in an informed, arms-length negotiation process.

10 **G. THE STAGE OF THE PROCEEDINGS**

11 The parties proceeded to a watershed moment in the litigation, as the majority of discovery was
12 already completed and Plaintiff's counsel was in possession of all records necessary to prepare motions
13 for class certification and/or final expert reports. Depending on the outcome of this motion, Plaintiff
14 may have lost her ability to negotiate a classwide or representative settlement agreement on certain
15 issues. Alternatively, Defendant stood to lose a key negotiating tool in the event the Motion was
16 decided in Plaintiff's favor. Therefore, the parties achieved a settlement agreement at a point when
17 neither side had a stated advantage in the litigation.

18 **H. THE EXPERIENCE AND VIEWS OF COUNSEL**

19 Class Counsel has considerable experience in wage and hour and class action litigation. Trial
20 Attorney, William Sullivan has over 26 years of experience, 24 years of which has been devoted to
21 both prosecuting and defending class action litigation. Attorney Eric Yaeckel over 11 years of
22 experience all of which have been dedicated to class action and representative action (PAGA)
23 litigation. (Yaeckel decl. ¶ 31.)

24 Plaintiff's counsel considers the Agreement to represent a fair, adequate and reasonable
25 settlement that is well within the accepted range of recoveries when compared to similar wage and
26 hour class actions. (Yaeckel decl. ¶ 33.)

27 ///

1 **I. PRESENCE OF A GOVERNMENTAL ACTOR**

2 Although the State is not directly involved in this action, Plaintiff “stands in the shoes” of the
3 Labor and Workforce Development Agency (“LWDA”) by bringing his PAGA action. Consideration
4 has been made to compensate to Labor Workforce Development Agency (“LWDA”) in the amount
5 of \$45,000.00 (which is the LWDA’s 75% share of a \$60,000 allocation). (Exhibit 1 at ¶ 19)e.)

6 The LWDA was notified and declined to prosecute the claims itself. Counsel for the parties
7 believe this is a fair, reasonable, and adequate allocation. (Yaeckel decl. ¶ 27.) The LWDA was also
8 served with copies of the proposed settlement and has not objected or responded to date. (See Proof
9 of Service.)

10 **J. REACTION OF THE CLASS MEMBERS TO THE PROPOSED SETTLEMENT**

11 Prior to preliminary approval, and a notice of settlement to the class, what can be said of the
12 reaction the class members is limited. However, Plaintiff’s counsel has spoken to a few Class Members
13 prior to agreeing to the proposed settlement, and **all** were in favor of the settlement. (Yaeckel decl. ¶
14 34.)

15 As explained in the Agreement, the Settlement Claims Administrator will send a detailed
16 Notice. The proposed Notice packet is attached to the Agreement as Exhibit A.

17 The proposed Notice advises the Settlement Class of their anticipated recovery under the
18 Agreement, how to object, how they can opt-out, the amount of fees and costs sought by Settlement
19 Class Counsel, the amount of enhancement payments sought on behalf of the class representatives,
20 and the date of the final approval hearing. (See Exhibit A to the Agreement.) Thus, the proposed
21 Notice complies with the notice requirements set forth in CRC Rule 3.766(d) and Rule 3.769(f).

22 **VII. PROPOSED TIMELINE OF EVENTS AND FINAL APPROVAL**

23 Plaintiffs also request that the Court set a Final Approval Hearing in accordance with the
24 chronology of events set forth in the Settlement Agreement:

- 25 • No later than thirty (30) calendar days following preliminary approval of this Settlement by the
26 Court, Defendant shall provide the Settlement Administrator with data that is within
27 Defendant’s possession containing, for each Class Member: (a) the Class Member’s name; (b)
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the Class Member's last known address; (c) the Class Member's social security number; (d) the total number of "qualified weeks" during which the Class Member was employed by Defendant in California in a non-exempt role during the Class Period; and (e) the total number of "qualified weeks" during which the Class Member was employed by Defendant in California in a non-exempt role during the PAGA Period, if any;

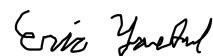
- Within seven (7) calendar days of receipt of the information from Defendant, the Settlement Administrator will mail the Notice to the Class Members.
- 30 Calendar Days After Claims Administrator Has Mailed the Notice Packets to Class Members: Deadline for Class Members to postmark and submit all Requests for Exclusions, or to file written objections to the settlement with the Court;
- Approximately ten (10) days after the conclusion of the Notice and Claims Period, and at least 16 Court days before the hearing, Plaintiff will file an *Unopposed* Motion for Final Approval; and
- Consistent with the above, Plaintiff requests a final approval hearing that is approximately 90 days (or the first available Court date thereafter) after the date the Court enters an Order granting preliminary approval of the Settlement.

VIII. CONCLUSION

Based on the foregoing, and because the Agreement is beneficial to the Settlement Class Members by efficiently, economically, and favorably resolving what would otherwise require protracted and expensive litigation, Plaintiffs respectfully requests that the Court issue an Order Certifying the Proposed Settlement Class and Preliminarily approving all other terms of the settlement as set forth in the Agreement

Dated: May 27, 2022

SULLIVAN & YAECKEL LAW GROUP, APC



Eric K. Yaeckel
Attorneys for Plaintiff TAMARA WHITMER, in a Representative capacity only, and on behalf of other members of the general public similarly situated