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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
10

11 JON BETTERTON,

12 Plaintiff,

13 vs.
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15 ACCENTURE FLEX, LLC, et al.,

16 Defendants.
17

Case No.: 20CV368771

**ORDER CONCERNING
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF
CLASS/PAGA SETTLEMENT**

18 This is a putative class and Private Attorneys General Act (PAGA) action on behalf of
19 employees of Defendant Accenture Flex, LLC. Plaintiff Jon Betterton alleges that Defendant
20 failed to include shift differentials in employees' regular rates of pay, including for purposes of
21 cashing out sick leave. Before the Court is Plaintiff's motion for preliminary approval of a
22 settlement. Plaintiff's motion is unopposed, and no one appeared at the August 12, 2021 hearing
23 to contest the Court's tentative ruling. The Court now issues its final order, which GRANTS
24 preliminary approval.

25 **I. BACKGROUND**

26 Defendant is a Delaware limited liability company doing business in California, and
27 provides professional and specialized staffing services to clients across the United States.
28 (Complaint, ¶ 10.) Plaintiff worked for Defendant as a content moderator from September 2018

1 to November 23, 2019. (*Id.*, ¶ 7.) He was a non-exempt, hourly employee. (*Ibid.*) Plaintiff was
2 paid various nondiscretionary incentive wages, including “ShiftDiff” and/or “ShiftPremPerct”
3 wages. (*Id.*, ¶ 8.) He was also paid wages for sick time. (*Ibid.*) But Plaintiff alleges that when
4 he and other employees were paid shift differential wages, Defendant failed to identify the
5 applicable hourly rates of pay and corresponding hours on employees’ wage statements. (*Id.*,
6 ¶ 26.) And when employees earned sick pay in the same pay period, they were paid at their base
7 rate of pay rather than the correct, regular hourly rate. (*Ibid.*)

8 Based on these allegations, Plaintiff brings putative class claims for: (1) violation of
9 Labor Code section 226, subdivision (a); and (2) violation of Labor Code sections 201–203, as
10 well as (3) a representative claim under PAGA.

11 The parties have now reached a settlement. Plaintiff moves for an order preliminarily
12 approving the settlement of the class and PAGA claims, provisionally certifying the settlement
13 class, approving the form and method for providing notice to the class, and scheduling a final
14 fairness hearing.

15 **II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL**

16 **A. Class Action**

17 Generally, “questions whether a [class action] settlement was fair and reasonable,
18 whether notice to the class was adequate, whether certification of the class was proper, and
19 whether the attorney fee award was proper are matters addressed to the trial court’s broad
20 discretion.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*),
21 disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th
22 260.)

23 In determining whether a class settlement is fair, adequate and reasonable, the
24 trial court should consider relevant factors, such as the strength of plaintiffs’ case,
25 the risk, expense, complexity and likely duration of further litigation, the risk of
26 maintaining class action status through trial, the amount offered in settlement, the
27 extent of discovery completed and the stage of the proceedings, the experience
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1 and views of counsel, the presence of a governmental participant, and the reaction
2 of the class members to the proposed settlement.

3 (*Wershba, supra*, 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

4 In general, the most important factor is the strength of the plaintiffs’ case on the merits,
5 balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008)
6 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and
7 weighing of factors depending on the circumstances of each case. (*Wershba, supra*, 91
8 Cal.App.4th at p. 245.) The trial court must examine the “proposed settlement agreement to the
9 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
10 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
11 whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, citation and internal quotation
12 marks omitted.)

13 The burden is on the proponent of the settlement to show that it is fair and
14 reasonable. However “a presumption of fairness exists where: (1) the settlement
15 is reached through arm’s-length bargaining; (2) investigation and discovery are
16 sufficient to allow counsel and the court to act intelligently; (3) counsel is
17 experienced in similar litigation; and (4) the percentage of objectors is small.”
18 (*Wershba, supra*, 91 Cal.App.4th at p. 245, citation omitted.) The presumption does not permit
19 the Court to “give rubber-stamp approval” to a settlement; in all cases, it must “independently
20 and objectively analyze the evidence and circumstances before it in order to determine whether
21 the settlement is in the best interests of those whose claims will be extinguished,” based on a
22 sufficiently developed factual record. (*Kullar, supra*, 168 Cal.App.4th at p. 130.)

23 **B. PAGA**

24 Labor Code section 2699, subdivision (l) provides that “[t]he superior court shall review
25 and approve any penalties sought as part of a proposed settlement agreement pursuant to”
26 PAGA. The court’s review “ensur[es] that any negotiated resolution is fair to those affected.”
27 (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties
28 recovered under PAGA go to the Labor and Workforce Development Agency (“LWDA”),

1 leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS*
2 *Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.)

3 “[W]hen a PAGA claim is settled, the relief provided ... [should] be genuine and
4 meaningful, consistent with the underlying purpose of the statute to benefit the public”
5 (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV12261PSGJEMX)
6 2015 WL 12732709, at *13.) The settlement must be reasonable in light of the potential verdict
7 value. (See *O’Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135
8 [rejecting settlement of less than one percent of the potential verdict].) But a permissible
9 settlement may be substantially discounted, given that courts often exercise their discretion to
10 award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See
11 *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL
12 5907869, at *8–9.)

13 **III. SETTLEMENT PROCESS**

14 According to Plaintiff, after he filed his Complaint, Defendant informed him that an
15 arbitration agreement applied to his employment. During meet and confer about the
16 enforceability of that agreement, the parties agreed to attempt mediation. They engaged in
17 informal discovery, with Defendant providing data and information about the number of putative
18 class members, the number of pay periods at issue, and the hourly rates of pay for the putative
19 class, as well as documents and information pertaining to Defendant’s policies and practices
20 concerning the payment of sick pay wages and wage statements. Plaintiff’s counsel performed
21 an analysis of liability and the maximum exposure in the case.

22 On April 26, 2021, the parties engaged in a full day of mediation with Joel Grossman,
23 Esq. They were able to reach the settlement before the Court.

24 **IV. SETTLEMENT PROVISIONS**

25 The non-reversionary gross settlement amount is \$1,500,000. Attorney fees of up to
26 \$500,000 (one-third of the gross settlement), litigation costs not to exceed \$20,000, and
27 administration costs of up to \$9,950 will be paid from the gross settlement. \$100,000 will be
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1 allocated to PAGA penalties, 75 percent of which will be paid to the LWDA. The named
2 plaintiff will also seek an enhancement award of \$10,000.

3 The net settlement will be approximately \$885,050. The net settlement will be
4 apportioned 80 percent to the Wage Statement Class and 20 percent to the Sick Pay Class and
5 distributed to Wage Statement Class members pro rata based on their weeks worked during the
6 applicable class period and to Sick Pay Class Members on a per capita basis. The average
7 payment will be \$1,212.40 to each Wage Statement Class member and \$1,180.07 to each Sick
8 Pay Class member. Class members will not be required to submit a claim to receive their
9 payments. Settlement payments will be allocated 100 percent to penalties for tax purposes.
10 Funds associated with checks uncashed after 180 days will be redistributed to the class; after an
11 additional 90 days, remaining funds will be deposited with the State of California's unclaimed
12 property fund in the name of the appropriate class member.

13 Wage Statement Class members who do not opt out of the settlement will release all
14 claims "based on the facts in the Complaint or in Plaintiff's PAGA Notice against the Released
15 Parties, that accrued during the Class Period for the Wage Statement Class, arising out of any
16 violation of Labor Code section 226," including specified claims. Sick Pay Class members will
17 release all such claims "arising out of any violation for failure to pay sick pay"

18 **V. FAIRNESS OF SETTLEMENT**

19 Plaintiff estimates that Defendant faces potential liability of \$1,599,618 for the wage
20 statement and sick pay claims, based on an estimated 8,723 wage statement violations and 144
21 putative Sick Pay Class members. The maximum PAGA penalties could total \$2,194,150, but
22 the amount of PAGA penalties is discretionary. The settlement accordingly represents just under
23 40 percent of the maximum exposure in the case, a good result for the class. Defendant has
24 revised its wage statements as of February 6, 2021. As to the sick pay claim, Defendant
25 maintains its policy is compliant with a grandfathered PTO policy.

26 The Court agrees with Plaintiff that the settlement is fair and reasonable to the class in
27 light of the risks on the merits and at class certification, especially considering the portion of the
28 case's value attributable to highly uncertain penalties. The Court also finds that the PAGA

1 allocation is genuine, meaningful, and fair to those impacted. The settlement thus warrants
2 preliminary approval.

3 The Court retains an independent right and responsibility to review the requested attorney
4 fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles*
5 *Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) While 1/3 of the common fund
6 for attorney fees is generally considered reasonable, counsel shall submit lodestar information
7 prior to the final approval hearing in this matter so the Court can compare the lodestar
8 information with the requested fees. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th
9 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee
10 through a lodestar calculation].)

11 **VI. PROPOSED SETTLEMENT CLASS**

12 Plaintiff requests that the following settlement classes be provisionally certified:

- 13
14 • The Wage Statement Class of “all current and former non-exempt employees of
15 Defendant in California who were paid shift differential and/or shift premium wages,
16 including without limitation, ‘ShiftDiff’ and/or ‘ShiftPremPercent’ wages, at any time
17 during April 6, 2019, to and including February 6, 2021.
- 18
19 • The Sick Pay Class of “all non-exempt employees of Defendant in California who were
20 paid non-discretionary incentive remuneration, including without limitation, ‘ShiftDiff’
21 and/or ‘ShiftPremPercent’ wages, and sick pay in the same pay period, and whose
22 employment ended (either voluntarily or involuntarily) at any time from April 6, 2017,
23 through and including July 31, 2021” or the date of preliminary approval, whichever is
24 earlier.

25 26 **A. Legal Standard for Certifying a Class for Settlement Purposes**

27 Rule 3.769(d) of the California Rules of Court states that “[t]he court may make an order
28 approving or denying certification of a provisional settlement class after [a] preliminary

1 settlement hearing.” California Code of Civil Procedure Section 382 authorizes certification of a
2 class “when the question is one of a common or general interest, of many persons, or when the
3 parties are numerous, and it is impracticable to bring them all before the court”

4 Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence:
5 (1) an ascertainable class and (2) a well-defined community of interest among the class
6 members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On*
7 *Drug Stores*)). “Other relevant considerations include the probability that each class member
8 will come forward ultimately to prove his or her separate claim to a portion of the total recovery
9 and whether the class approach would actually serve to deter and redress alleged wrongdoing.”
10 (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of
11 establishing that class treatment will yield “substantial benefits” to both “the litigants and to the
12 court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

13 In the settlement context, “the court’s evaluation of the certification issues is somewhat
14 different from its consideration of certification issues when the class action has not yet settled.”
15 (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the
16 settlement-only context, the case management issues inherent in the ascertainable class
17 determination need not be confronted, and the court’s review is more lenient in this respect. (*Id.*
18 at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or
19 overbroad class definitions require heightened scrutiny in the settlement-only class context, since
20 the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

21 **B. Ascertainable Class**

22 A class is ascertainable “when it is defined in terms of objective characteristics and
23 common transactional facts that make the ultimate identification of class members possible when
24 that identification becomes necessary.” (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980
25 (*Noel*)). A class definition satisfying these requirements
26 puts members of the class on notice that their rights may be adjudicated in the
27 proceeding, so they must decide whether to intervene, opt out, or do nothing and
28 live with the consequences. This kind of class definition also advances due

1 process by supplying a concrete basis for determining who will and will not be
2 bound by (or benefit from) any judgment.

3 (*Noel, supra*, 7 Cal.5th at p. 980, citation omitted.)

4 “As a rule, a representative plaintiff in a class action need not introduce evidence
5 establishing how notice of the action will be communicated to individual class members in order
6 to show an ascertainable class.” (*Noel, supra*, 7 Cal.5th at p. 984.) Still, it has long been held
7 that “[c]lass members are ‘ascertainable’ where they may be readily identified ... by reference to
8 official records.” (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on
9 another ground by *Noel, supra*, 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178
10 Cal.App.4th 966, 975-976 [“The defined class of all HD Package subscribers is precise, with
11 objective characteristics and transactional parameters, and can be determined by DIRECTV’s
12 own account records. No more is needed.”].)

13 Here, the estimated 584 Wage Statement Class members and 150 Sick Pay Class
14 members are readily identifiable based on Defendant’s records, and the settlement class is
15 appropriately defined based on objective characteristics. The Court finds the settlement class is
16 numerous, ascertainable, and appropriately defined.

17 **C. Community of Interest**

18 The “community-of-interest” requirement encompasses three factors: (1) predominant
19 questions of law or fact, (2) class representatives with claims or defenses typical of the class, and
20 (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, supra*, 34
21 Cal.4th at pp. 326, 332.)

22 For the first community of interest factor, “[i]n order to determine whether common
23 questions of fact predominate the trial court must examine the issues framed by the pleadings
24 and the law applicable to the causes of action alleged.” (*Hicks v. Kaufman & Broad Home Corp.*
25 (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also examine evidence of any conflict
26 of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court*
27 (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be
28 jointly tried, when compared with those requiring separate adjudication, are so numerous or

1 substantial that the maintenance of a class action would be good for the judicial process and to
2 the litigants. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105
3 (*Lockheed Martin*).) “As a general rule if the defendant’s liability can be determined by facts
4 common to all members of the class, a class will be certified even if the members must
5 individually prove their damages.” (*Hicks, supra*, 89 Cal.App.4th at p. 916.)

6 Here, common legal and factual issues predominate. Plaintiff’s claims all arise from
7 Defendant’s wage and hour practices applied to the similarly-situated class members.

8 As to the second factor,

9 The typicality requirement is meant to ensure that the class representative is able
10 to adequately represent the class and focus on common issues. It is only when a
11 defense unique to the class representative will be a major focus of the litigation,
12 or when the class representative’s interests are antagonistic to or in conflict with
13 the objectives of those she purports to represent that denial of class certification is
14 appropriate. But even then, the court should determine if it would be feasible to
15 divide the class into subclasses to eliminate the conflict and allow the class action
16 to be maintained.

17 (*Medraza v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations,
18 brackets, and quotation marks omitted.)

19 Like other members of the class, Plaintiff was employed by Defendant as an hourly
20 employee, and he alleges that he experienced the violations at issue. The anticipated defenses
21 are not unique to Plaintiff, and there is no indication that Plaintiff’s interests are otherwise in
22 conflict with those of the class.

23 Finally, adequacy of representation “depends on whether the plaintiff’s attorney is
24 qualified to conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the
25 interests of the class.” (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class
26 representative does not necessarily have to incur all of the damages suffered by each different
27 class member in order to provide adequate representation to the class. (*Wershba, supra*, 91
28 Cal.App.4th at p. 238.) “Differences in individual class members’ proof of damages [are] not

1 fatal to class certification. Only a conflict that goes to the very subject matter of the litigation
2 will defeat a party's claim of representative status." (*Ibid.*, internal citations and quotation marks
3 omitted.)

4 Plaintiff has the same interest in maintaining this action as any class member would
5 have. Further, he has hired experienced counsel. Plaintiff has sufficiently demonstrated
6 adequacy of representation.

7 **D. Substantial Benefits of Class Certification**

8 "[A] class action should not be certified unless substantial benefits accrue both to
9 litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120,
10 internal quotation marks omitted.) The question is whether a class action would be superior to
11 individual lawsuits. (*Ibid.*) "Thus, even if questions of law or fact predominate, the lack of
12 superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a
13 class action is proper where it provides small claimants with a method of obtaining redress and
14 when numerous parties suffer injury of insufficient size to warrant individual action." (*Id.* at pp.
15 120–121, internal quotation marks omitted.)

16 Here, there are an estimated several hundred class members. It would be inefficient for
17 the Court to hear and decide the same issues separately and repeatedly for each class member.

18 Further, it would be cost prohibitive for each class member to file suit individually, as each
19 member would have the potential for little to no monetary recovery. It is clear that a class action
20 provides substantial benefits to both the litigants and the Court in this case.

21 **VII. NOTICE**

22 The content of a class notice is subject to court approval. (Cal. Rules of Court, rule
23 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures
24 for class members to follow in filing written objections to it and in arranging to appear at the
25 settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining
26 the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of
27 relief requested; (3) The stake of the individual class members; (4) The cost of notifying class
28 members; (5) The resources of the parties; (6) The possible prejudice to class members who do

1 not receive notice; and (7) The res judicata effect on class members.” (Cal. Rules of Court, rule
2 3.766(e).)

3 Here, the notice describes the lawsuit, explains the settlement, and instructs class
4 members that they may opt out of the settlement or object. The gross settlement amount and
5 estimated deductions are provided. Class members’ estimated payments are stated, and they are
6 informed of their qualifying pay periods as reflected in Defendant’s records and instructed how
7 to dispute this information. Class members are given 60 days to request exclusion from the class
8 or submit a written objection to the settlement. The notice makes it clear that class members
9 may appear at the final approval hearing to make an oral objection without submitting a written
10 objection.

11 The form of notice is generally adequate, but it must be updated to instruct class members
12 that they may request to be excluded from the class by simply providing their name, without the
13 need to provide their address or other identifying information.

14 With regard to appearances at the final fairness hearing, the notice shall be further
15 modified to instruct class members as follows:

16 Hearings before the judge overseeing this case are now being conducted in
17 person. However, remote appearances are still permitted, and are offered with the
18 assistance of a third-party service provider, CourtCall. If that remains the case at
19 the time of the final fairness hearing, class members who wish to appear at the
20 final fairness hearing remotely should contact class counsel to arrange an
21 appearance through CourtCall, at least three days before the hearing if possible.

22 Any CourtCall fees for an appearance by an objecting class member shall be paid
23 by class counsel.

24 Turning to the notice procedure, the parties have selected Phoenix Settlement
25 Administrators as the settlement administrator. The administrator will mail the notice packet
26 within five business days of receiving the class list. It will conduct a skip trace to locate a more
27 current address for class members whose notice packets are returned as undeliverable, and re-
28 mail such notices. Class members whose notices are re-mailed will have an additional 15 days to

1 submit a response. These notice procedures are appropriate and are approved, with the exception
2 that the administrator shall update class members' addresses using the National Change of
3 Address Database prior to the initial mailing of notices.

4 **VIII. CONCLUSION**

5 Plaintiff's motion for preliminary approval is GRANTED. The final approval hearing
6 shall take place on **December 16, 2021 at 1:30 p.m.** in Dept. 1. The following classes are
7 preliminarily certified for settlement purposes:

- 8
- 9 • The Wage Statement Class of "all current and former non-exempt employees of
10 Defendant in California who were paid shift differential and/or shift premium wages,
11 including without limitation, 'ShiftDiff' and/or 'ShiftPremPerct' wages, at any time
12 during April 6, 2019, to and including February 6, 2021.
- 13
- 14 • The Sick Pay Class of "all non-exempt employees of Defendant in California who were
15 paid non-discretionary incentive remuneration, including without limitation, 'ShiftDiff'
16 and/or 'ShiftPremPerct' wages, and sick pay in the same pay period, and whose
17 employment ended (either voluntarily or involuntarily) at any time from April 6, 2017,
18 through and including July 31, 2021" or the date of preliminary approval, whichever is
19 earlier.

20 **IT IS SO ORDERED.**

21
22 Date: August 13, 2021

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22 _____
23 The Honorable Sunil R. Kulkarni
24 Judge of the Superior Court
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