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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

DANIEL MARDEN, on behalf of himself
and all other similarly-situated and
aggrieved employees,

Plaintiff,

v.

CVS PHARMACY, INC., a Rhode Island
Corporation; LONGS DRUG STORES
CALIFORNIA, L.L.C.; a California Limited
Liability Company; and DOES 1 through 10,
Inclusive,

Defendants.

Case No. S-CV-0045902

CLASS AND REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER GRANTING
FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
ENTERING JUDGMENT**

Hearing: October 5, 2023

Time: 8:30 a.m.

Dept: 3

Judge: Hon. Michael Jones

Complaint filed: December 4, 2020

Trial date: Not set

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I. INTRODUCTION

Plaintiff Daniel Marden seeks final approval of a \$745,687.50 wage and hour class and PAGA settlement for 16,428 non-exempt California employees, for whom it was alleged CVS Pharmacy, Inc. and Longs Drug Stores California, LLC (collectively “CVS”), did not calculate sick pay at the correct rate. Declaration of Jeff Geraci, (“Geraci Decl.”), ¶10.

On June 2, 2023, the Court-approved Notice of Class and Representative Action Settlement (“Class Notice”) was mailed to Class Members informing them of their rights and benefits under the Settlement, the number of credited pay periods, how to dispute those pay periods and the estimated settlement payment, and the right to request exclusion or objection to the Settlement by July 17, 2023. Declaration of Bryn Bridley on behalf of Atticus Administration, LLC, (“Atticus Decl.”), ¶6, Exh A.

Support for the Settlement is strong. As of filing this Motion, there are no objections and less than one-tenth of one per cent opted out (14). Participating Class Members, who represent 99.99% of the total possible Settlement Class, can expect to receive an average estimated payment of \$23, and highest payment of \$238. Geraci Decl. ¶11; Atticus Decl. ¶¶10, 15.

II. THE PARTIES, CLASSES, AND AGGRIEVED EMPLOYEES

A. Plaintiff and Defendant

Defendants are California retail healthcare companies owned by CVS Health. Plaintiff worked as a cashier in the Auburn store from September 2017 to May 2020 for CVS. Geraci Decl. ¶12, Exh. 1 - Declaration of Plaintiff Daniel Marden in support of Motion for Preliminary Approval of Class Action Settlement, filed April 6, 2023, (“Marden Decl.”), ¶3.

B. Non-Exempt California Class and Aggrieved Employees

“Class Members” are current and former non-exempt employees of CVS who worked in California who received sick pay and additional compensation in the same pay period, and the regular rate of their sick pay was not adjusted anytime from September 17, 2019 to July 24, 2022 (“Class Period”). Geraci Decl. ¶13.

Aggrieved Employees or “PAGA Employees” are Class Members who worked anytime September 17, 2019 to July 24, 2022 (“PAGA Period”). Geraci Decl. ¶14.

1 **III. PROCEDURAL HISTORY**

2 On September 17, 2020, Plaintiff filed charges with the California Labor and Workforce
3 Development Agency (“LWDA”). On December 4, 2020, Plaintiff filed a PAGA action alleging
4 CVS failed to provide: all overtime and sick pay wages by failing to include all non-hourly
5 compensation in the regular rate; all rest and meal periods; accurate wage statements; and all
6 final wages. Geraci Decl. ¶15.

7 Based on the existence of earlier filed cases containing overlapping claims, the Parties
8 agreed, for settlement purposes, the complaint would be amended to limit claims to those
9 arising from the alleged underpayment of sick pay wages, and adding class claims based on
10 those same claims, which was filed on October 18, 2022. Geraci Decl. ¶16.

11 **IV. PLAINTIFF’S CONTENTIONS AND CVS’S DEFENSES**

12 An employer may calculate sick pay wages in the same manner as overtime wages,
13 using the “regular rate,” or it may “look back” 90 days. Labor Code § 246 (l)(1)(2).
14 CVS calculated sick pay wages in the same manner as overtime. CVS also paid separate “SSK
15 Adjustments,” in later pay periods in an attempt to provide all sick pay wages owed. Geraci
16 Decl. ¶17.

17 CVS divided the total of all included compensation by all hours an employee worked to
18 determine the regular rate, rather than only by the “nonovertime hours” as Plaintiff contended is
19 required for certain types of “nonhourly compensation” pursuant to *Alvarado v. Dart Container*
20 *Corp.*, (2018) 4 Cal. 5th 542. Geraci Decl. ¶18.

21 Plaintiff contended CVS underpaid sick pay by failing to include all non-hourly
22 compensation in the regular rate, and dividing total compensation by all hours worked, rather
23 than regular hours, to calculate the regular rate. Additional compensation was referred to as
24 employee awards, incentive, LP Award, Lump Sum Merit, Other Functional Incentive Plan,
25 Pandemic Flat Premium, Pharmacy Incentive Plans, 25 cent premiums, \$1 premiums, \$3
26 premiums, Rx Nite Rate, Store Team Leader Plan, and Sunday Premium. The payments not
27 included were primarily “shift differentials,” and “Functional Incentive” pay (a fixed amount
28 averaging \$10 per shift), Labor Code § 246(l)(1). Geraci Decl. ¶19.

CVS contended the sick pay claim would be dismissed, along with all other claims, which were derivative of that claim. *Rudolph v. Herc Rentals*, 2021 U.S. Dist. LEXIS 244970, *7, 14 (C.D. Cal. August 27, 2021). (“This Court, too, finds that no private right of action exists for violations of California Labor Code section 246,” or as PAGA predicate). Plaintiff conceded the weight of authority favored CVS’ position, but contended a court might allow class and PAGA claims to proceed. Geraci Decl. ¶20.

A year after settlement, an appellate court found, for the first time, a sick pay claim could serve as a PAGA predicate. *Wood v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 742, 764. Geraci Decl. ¶21.

CVS contended even if the sick pay claim was viable, it added all required compensation when calculating sick pay, and, where necessary, paid additional Adjustments, which fully satisfied its obligation. CVS argued strongly it properly divided total pay by all hours worked to calculate the regular rate, and was not required to use only regular hours by *Alvarado v. Dart*. Plaintiff conceded the shift differentials were arguably not the type of additional compensation contemplated in *Dart*, but contended other amounts CVS paid required division by no more than regular hours. Geraci Decl. ¶22.

Plaintiff contended failure to pay all sick pay supported a claim for failure to provide accurate wage statements, and all final wages. Labor Code §§ 203, 226. CVS correctly countered that are currently no cases finding this. Geraci Decl. ¶23.

V. DISCOVERY, INVESTIGATION, AND MEDIATION

Plaintiff conducted sufficient formal and informal discovery to evaluate the strengths and weaknesses of his claims and CVS’s defenses, which included requests for production of documents and special interrogatories. After CVS responded to initial discovery, Plaintiff sought further responses and after extended meeting and conferring, the Parties agreed to mediate. Geraci Decl. ¶24.

For mediation, CVS provided a random sample of data for 15% of all employees, September 2019 to February 26, 2022, with a glossary of over 500 additional compensation pay codes. Plaintiff’s consultant determined the sample was statistically significant, and calculated

1 the number of pay periods employees sick pay was paid at less than regular rate through
2 mediation, and the total wage underpayment, and extrapolated this for the Class period. Counsel
3 conferred extensively about data, claims, defenses, and settlement issues. Geraci Decl. ¶25.

4 With significant investigation, research, discovery, and analysis of data by Plaintiff's
5 damages consultant, the Parties mediated with Michael D. Young, Esq., a respected mediator of
6 wage and hour class actions, on March 24, 2022. Before and during mediation, the Parties
7 discussed negotiating a class settlement, and agreed to it during mediation. Geraci Decl. ¶26.

8 After a day of arms'-length negotiations, the Parties executed a Memorandum of
9 Understanding (MOU), for \$625,000, based on 50,000 pay periods estimated in the class period,
10 with an escalator provision requiring, if actual pay periods increased by more than 10%, the
11 Gross Settlement Amount would increase proportionally (i.e., if pay periods increased 12%,
12 GSA increases by 2%). Geraci Decl. ¶27.

13 It was later determined there were an estimated 64,655 pay periods in the class period.
14 Based on this, the GSA was increased to \$745,678.50 [$64,655/50,000 = 1.2931$ (actual pp/est pp
15 in MOU) $29.31\% - 10\% = 19.31\%$; $\$625,000 + 19.31\% = \textbf{\$745,687.50}$]. Geraci Decl. ¶28.

16 The Parties negotiated all necessary terms and entered the Class and PAGA Action
17 Settlement Agreement, ("Agreement"), preliminarily approved by this Court on May 4, 2023.
18 Geraci Decl. ¶29.

19 **VI. SUMMARY OF PROPOSED SETTLEMENT**

20 **A. Settlement Terms**

21 Subject to Court approval, CVS will pay the Gross Settlement Amount ("GSA") of
22 \$745,687.50, including: (a) settlement administration costs to Atticus Administration, LLC
23 ("Atticus"), of \$58,983; (b) attorneys' fees of \$248,562.50 (one-third GSA) (2/3 to Cohelan
24 Khoury & Singer, 1/3 to D. Law, Inc. [formerly Davtyan Law Firm, Inc.], with Plaintiff's
25 consent. Geraci Decl. ¶31); (c) actual litigation costs up to \$13,540.00 (; (d) \$10,000 Class
26 Representative Service Payment; and (e) PAGA Payment of \$30,000 [\$22,500 to LWDA
27 (75%), and \$7,500 (25%) to PAGA Employees. CVS will pay the employer's share of payroll
28 taxes in addition to the GSA. Geraci Decl. ¶30.

After approved deductions, the estimated \$384,602 Net Settlement Amount (“NSA”) will be distributed pro rata to Participating Class Members based on number of pay periods worked by each in relation to total number of pay periods worked by all. Geraci Decl. ¶32.

The 16,414 Participating Class Members will receive an average estimated payment of \$23, and highest payment of \$238, upon Approval. Plaintiff’s estimated individual settlement amount is \$6. (rounded to nearest dollar) Geraci Decl. ¶33; Atticus Decl. ¶¶15, 17.

The 16,428 PAGA Employees will receive a share of the \$7,500 PAGA Employee Payment based on Pay Periods worked during the PAGA Period, even if they request exclusion, as no right exists to opt out of a PAGA Settlement. Geraci Decl. ¶34; Atticus Decl. ¶16.

No portion of the GSA will revert to CVS under any circumstances. After 180 days of issuance, the uncashed checks shall be voided and the principal for those uncashed checks shall be transmitted to Legal Aid at Work, a non-profit providing education and representation to employees throughout California. Geraci Decl. ¶35; Atticus Decl. ¶13.

Class Settlement Payments are characterized as 90% penalties and interest (Form 1099), 10% wages (W-2); PAGA Payments as penalties (Form 1099). Geraci Decl. ¶36; Atticus Decl. ¶13.

B. Preliminary Approval, Notice to the Class, and Its Response

1. Preliminary Approval and Class Notice

On May 4, 2023, the Court preliminarily approved the proposed Settlement. Geraci Decl. ¶37. On June 2, 2023, after searching the National Change of Address database, and updating Class Member addresses, the Settlement Administrator mailed a Class Notice to 16,428 Class Members. The Class Notice informed them of (1) the pendency of the Action; (2) proposed settlement terms; (3) automatic payment of Settlement shares if exclusion not requested; (4) released claims; (5) right to object or request exclusion, and (6) date, time and place of the final approval hearing. Geraci Decl. ¶38; Atticus Decl. ¶6, Exh. A.

2. The Class’ Response to the Notice

The Class response to the Settlement was extremely favorable. No objections and only fourteen requests for exclusion were received. Geraci Decl. ¶¶11, 39; Atticus Decl. ¶¶10, 11.

The Court determined the first three Dunk factors were met when it granted preliminary approval: (1) the settlement was reached through arm's-length bargaining; (2) investigation and discovery allowed counsel and the court to act intelligently; and, (3) counsel was experienced in similar litigation. The fourth factor could not be known until the Class had notice and an opportunity to respond. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801-1802 (1996).

The fourth *Dunk* factor was established when the Class, after receiving notice, and having an opportunity to respond, overwhelmingly approved the Settlement.

VII. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

The Preliminary Approval Motion thoroughly analyzed the terms of the proposed Settlement in light of *Dunk* and *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008), (establishing factors determining whether a settlement is in the Class' best interest, is adequate, and reasonable). The Court carefully reviewed and ruled on these analyses and they are fully incorporated here by reference. *See*, Preliminary Approval Motion, at 7:26 – 12:24.

Nothing has changed since Preliminary Approval to negate the presumption of fairness and Class Counsel remains convinced the Settlement is in the Class' best interest.

VIII. ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED

Class Counsel requests attorneys' fees of \$248,562.50, one-third of GSA, and litigation costs of \$13,540. Class Counsel have expended 248.9 hours, a lodestar of \$182,970. Geraci Decl. ¶40, Exh. 2 - Consolidated Summary of Class Counsel's Time & Costs; Exh. 3 - Costs; Declaration of Emil Davtyan, ("Davtyan Decl."), ¶¶11-13.

A. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS 13627, *27 (C.D. Cal. June 10, 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). An excellent result was achieved, enforcing the law and providing Class benefits.

The Class was provided notice of all settlement terms, including that Counsel would request an award of attorneys' fees up to one-third of the GSA, \$248,562.50. Atticus Decl. ¶6, Exh. A, ¶¶11, 14. No Class Member objected to the attorneys' fees award. *Id.* at ¶11.

B. A Fee Award Based on a Percentage of the Common Fund is Appropriate

The California Supreme Court recognized it is appropriate to award attorneys' fees based on a percentage of the total value of benefits to Class Members from the settlement, also known as the "common fund" method. *Laffitte v. Robert Half International, Inc.*, 1 Cal.5th 480, 503 (2016); *Serrano v. Priest*, 20 Cal.3d 25, 34 (*Serrano III*) (1977); *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977). (California courts look to federal courts analyzing class issues. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 239-40 (2001)).

"[T]he lodestar method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 27 (2000); *Dunk*, at 1808 (attorneys' fees may be percentage of common fund where settlement amount is certain or easily calculable).

The purpose of the common fund approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent, supra*, 557 F.2d at 769. "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." *Quinn v. State of California*, 15 Cal.3d 162, 167 (1995). The common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." *City and County of San Francisco v. Sweet*, 12 Cal.4th 105, 110 (1995).

A common fund fee award is especially appropriate here as it spreads the attorneys' fees among all beneficiaries of the fund; aligns incentives between counsel and the class; better approximates market conditions in a contingency case; and encourages class counsel to seek early settlement and avoid unnecessarily prolonging litigation, which prevents unnecessary use of judicial and party resources, and delay in compensating the class. *Laffitte*, 1 Cal.5th at 503.

With the guiding principle that early class action settlements are favored and may not diminish an award of attorneys' fees, Class Counsel submits the fee request should be awarded, based on the risks and complexities of prosecuting the action, the contingent nature of any fee, their experience in handling cases of this type, fees commonly awarded in these cases, and vindication of the Class' rights.

Class Counsel undertook representation at their own expense, with compensation wholly contingent upon providing a Class benefit. Class Members will benefit from the proposed Settlement and receive monetary payments. Although the ultimate monetary exposure to CVS was relatively modest given the nature of the claim and previous settlements, this action enforced an important employee protection - proper payment of sick pay wages. Based on the defined and clearly traceable Class benefit, the Court may award a percentage of the common fund as attorneys' fees.

C. One-Third of the Common Fund is a Reasonable Fee

"California courts routinely award attorneys' fees of one-third of the common fund." *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, *28 (S.D. Cal. Sept. 28, 2017). Several studies of class action fee awards have found the median common fund fee award is approximately one-third of the total settlement fund. See, e.g., *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("fee awards in class actions average around one-third of the recovery."); Reagan W. Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 546 (1998); T. Willging, L. Hooper and R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 90 (1996) (attorneys' fees in class litigation "were generally in the traditional range of approximately one-third of the total settlement").

Counsel's request for one-third of the common fund is in the mid-range of awards which commonly range from 20% to 50%, and is fair compensation for undertaking complex, risky, litigation on a contingent basis, and for the result achieved for the Class. Geraci Decl. ¶41.

Some courts have found an award of 33% of a common fund is the "benchmark" in California. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 U.S. Dist. LEXIS 6049, *14 (S.D. Cal. Jan. 14, 2013) ("These percentages compare favorably with" the California (33%) benchmark.); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMc), 2013 U.S. Dist. LEXIS 163118, at *7 (S.D. Cal. Nov. 14, 2013).

Class Counsel's fee request is consistent with market rates, awards in similar California cases, including to Class Counsel, is reasonable, and should be awarded. Geraci Decl. ¶42.

D. A Lodestar Cross-Check is Not Required

Many Courts decline to consider a lodestar cross-check. See, *Glass v. UBS Financial Services, Inc.*, No. 06-4066-MMC, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 26, 2007) (“no need to conduct a lodestar cross-check [as] [c]lass counsel’s prompt action in negotiating a settlement while the state of the law remained uncertain should be fully rewarded”); *Lopez v. Youngblood*, No. 07-0474-DLB, 2011 U.S. Dist. LEXIS 99289 (E.D. Cal. Sep. 1, 2011) (“lodestar cross-check is not required in this circuit, and in a case such as this, is not a useful reference.”)

Even when used, a cross-check “calculation need entail neither mathematical precision nor bean-counting,” is not a “full-blown lodestar inquiry,” and “can be performed with a less exhaustive cataloguing and review of counsel’s hours.” *Barbosa v. Cargill Meat Solutions Corp*, 297 F.R.D. 431, 451 (E.D. Cal. July 2, 2013).

Under the lodestar method, a base fee is calculated from compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorneys. *Serrano v. Priest*, *supra*, at 48. The court then enhances the lodestar by a “multiplier” to account for a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.*, at 49; see also *Ketchum v. Moses*, Cal.4th 1122, 1132-36 (2001).

If the fee award were calculated using the lodestar, rather than the common fund method, a 1.4 multiplier would be applied. ($\$248,562.50/\$182,970 = 1.358$). Geraci Decl. ¶48.

E. Counsel’s Hourly Rates Are Reasonable

Class Counsel are entitled to hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Ketchum, supra* at, 1133; *Children’s Hospital and Med. Center v. Bonta*, 97 Cal. App. 4th 740, 783 (2002) (affirming rates as “within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work”). When determining reasonable rates, Courts may consider attorney skill and experience, nature of the work performed, and the relevant area of expertise and the attorney’s customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998).

1 Class Counsel's skill and experience support their hourly rates and are in line with rates
2 typically approved in California wage and hour class actions. Cohelan Khoury & Singer's
3 practice is limited to litigating class and representative actions on behalf of employees and
4 consumers, and the firm has been appointed Class Counsel or co-Class Counsel in over 300
5 such cases. Geraci Decl. ¶¶2-9, 46. Mr. Davtyan has devoted a significant portion of his practice
6 to employment law and class and representative actions, and has been appointed counsel in
7 numerous class and representative wage and hour class actions. Davtyan Decl. ¶¶5-6.

8 Class Counsel's skill and experience support their hourly rates: **Cohelan Khoury &**
9 **Singer:** Founding Partner Isam C. Khoury - \$925; Managing Partner, Michael D. Singer - \$925;
10 Partner, Jeff Geraci - \$850; **Davtyan Law Firm, Inc.:** Founder and Managing Attorney, Emil
11 Davtyan - \$695. These rates are in line with those typically approved in California wage-and
12 hour class action litigation. Indeed, the Laffey Matrix would actually provide for a rate increase.
13 Geraci Decl. ¶¶2-9, 47, Exh. 4 - Laffey Matrix; Davtyan Decl. ¶¶5-6, 12.

14 **F. Class Counsel's Total Hours are Reasonable**

15 Hours are reasonable if, "at the time rendered, [they] would have been undertaken by a
16 reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. Jas. H.*
17 *Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). *Norman v. Housing Auth.*, 836 F.2d 1292,
18 1306 (11th Cir. 1988) ("The measure of reasonable hours is determined by the profession's
19 judgment of the time that may be conscionably billed and not the least time in which it might
20 theoretically have been done").

21 **G. A Multiplier of the Lodestar Would Be Awarded**

22 A lodestar may be enhanced by a multiplier for an appropriate fee award. *Serrano III*, 20
23 Cal.3d at 48. Factors determining level of enhancement include the difficulty of the questions
24 involved and the skill in presenting them, the contingent nature of the fee award, the extent to
25 which the litigation precluded other employment, and the percentage-of-the-fund the attorney
26 would have received on the fair market. *Lealao* at 49. The list is not exhaustive and the Court
27 may consider other factors it deems important in setting the multiplier. *Id.* at 40; *Ketchum*,
28 *supra* at 1139. "Multipliers ranging from one to four frequently are awarded in common fund

cases when the lodestar method is applied.” (Newberg on Class Actions §14.03 (4th ed. 2009)). Counsel pursued difficult claims, presented them with skill based on experience prosecuting employment class actions, and achieved an excellent result, on a contingent basis.

A 1.4 multiplier is reasonable and in line with those used in other cases, which may range “from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal. App. at 255; *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 U.S. Dist. LEXIS 10532, *16 (E.D. Pa. June 2, 2004) (finding the average multiplier awarded in common fund cases from 2001 to 200, was 4.35).

Cohelan Khoury & Singer has been awarded a greater multiplier in many cases: *McGrath v. Wyndham Resort Dev. Corp.*, (S.D.Cal. Jan. 30, 2018, No. 15cv1631 JM (KSC)) 2018 U.S.Dist.LEXIS 16095*24 [Hon. Jeffrey T. Miller – approving attorneys’ fees of \$2,416,666.67 and **4.8 multiplier**, one-third of \$7,250,000 settlement in a pre-certification wage and hour class action]; *Jones v. Abercrombie & Fitch Trading Co.*, (C.D.Cal. Nov. 19, 2018, No. CV 15-0105 JGB (Ex)) 2018 U.S.Dist.LEXIS 198001 *24-25 [Hon. Jesus G. Bernal – approving attorneys’ fees of \$2,400,000 and **3.7 multiplier**, one-third of \$9,600,000 settlement in a pre-certification wage and hour class action]; *Schaffer v. Rady Children’s Hospital – San Diego, et al.*, San Diego County Superior Court, Case No. 2015-00022978 (Hon. Joel R. Wohlfeil – approving attorneys’ fees of \$4,166,666 and **3.98 multiplier**, one-third of \$12,500,000 settlement in a certified wage and hour class action); *Rodriguez v. Healthcare Partner Medical Group, Inc.*, Los Angeles County Superior Court, Case No. BC541313] Hon. Kenneth Freeman – approving attorneys’ fees of \$2,000,000 and **5.05 multiplier**, one-third of \$6,000,000 settlement in a pre-certification wage and hour class action]; *De Benning v. Costco Wholesale Corporation*, Sacramento County Superior Court, Case No. 2021-00309030 [Hon. Jill H. Talley – approving attorneys’ fees of \$3,000,000 and **7.99 multiplier**, one-third of \$9,000,000 settlement in a pre-certification wage and hour class action]; and, *Tam v. Q Tech Corporation*, Los Angeles County Superior Court, Case No. 21STCV18635 [Hon. Elihu M. Berle – approving attorneys’ fees of 216,666.67 and **3.49 multiplier**, one-third of \$650,000 settlement in a pre-certification wage and hour class action]. Geraci Decl. ¶49.

1 In *Lealao*, the Court held a trial court's refusal to enhance the lodestar was an abuse of
2 discretion, opining a multiplier more than 3.5 was reasonable and not ruling out the original
3 request for 8.0. *Lealao, supra*, 82 Cal. App. 4th at 24, 52. See *SternwestCorp. v. Ash*, 183
4 Cal.App.3d 74, 76 (1986) (remanded with directions "to enhance the lodestar award by such
5 factor (two, three, four or otherwise) that the court, in its discretion shall deem proper");
6 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (multiplier of 3.65); *Keith v.*
7 *Volpe*, 501 F.Supp.403, 414 (C.D. Cal. 1980) (multiplier of 3.5).

8 To the extent a lodestar could be used to set the fee, a multiplier is supported by the
9 difficulty of the questions involved, the skill displayed by Class Counsel in addressing them, the
10 statutory employee protections enforced, and the contingent nature of any recovery.

11 **H. Litigation Expenses Are Reasonable**

12 The Settlement allows Class Counsel to recover up to \$20,000 in costs. Counsel seeks
13 \$13,540, in reasonable and necessary actual costs. Geraci Decl. ¶50, Exh. 3 – Costs.

14 **IX. THE PROPOSED PAGA PAYMENT IS REASONABLE**

15 The Agreement allocates \$30,000 to resolution of the PAGA claims and, pursuant to
16 PAGA, \$22,500 (75%) will be paid directly to the LWDA, and the remaining \$7,500 (25%)
17 paid to PAGA Employees. This result was reached after good-faith negotiation with input from
18 the mediator. Where PAGA penalties are negotiated in good faith, with "no indication [the]
19 amount was the result of self-interest at the expense of other Class Members," such amounts are
20 considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844, (N.D. Cal. Apr. 3,
21 2009) 2009 U.S. Dist. LEXIS 33900, at *24; *see, e.g., Nordstrom Com. Cases* (2010) 186 Cal.
22 App. 4th 576, 579 (No abuse of discretion approving settlement allocating \$0 to PAGA claims).

23 The \$30,000 PAGA allocation is well within the range approved by California courts.
24 *In Re Nordstrom Commission Cases* (2010) 186 Cal. App. 4th 576, 589 (no abuse of discretion
25 approving a class settlement attributing \$0 to PAGA penalties.); *Alcala v. Meyer Logistics, Inc.*
26 (C.D. Cal. June 17, 2019) 2019 LEXIS 166879, *26 (PAGA penalties 1.25% of settlement,
27 "falls within the zero to two percent range for PAGA claims approved by courts."); *In re M.L.*
28 *Stern Overtime Litig.* (S.D. Cal. Apr. 13, 2009) 2009 LEXIS 31650, *1 (PAGA settlement, 2%).

Class Counsel provided the LWDA with the Motion for Preliminary Approval and the Agreement. The LWDA did not object. Geraci Decl. ¶51, Exh. 5 - LWDA, April 6, 2023 Confirmation of Receipt. The LWDA was served with this Final Approval Motion when filed. Geraci Decl. ¶54, Exh. 6 - LWDA Confirmation.

X. THE SERVICE AWARD IS REASONABLE AND SHOULD BE AWARDED

Service awards “are fairly typical in class action[s],” “to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action.” *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394; *see also Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1433 (“Those who choose to take the risks of litigation should be the ones who bear the cost when they are unsuccessful [but] [w]hile imposition of the entire cost burden on the named plaintiffs may have a chilling effect on the willingness of plaintiffs to bring class action suits, this effect easily may be outweighed by the potential recovery”).

“Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.” *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807 (1971).

Enforcement of laws protecting California employees would be “random and fragmentary,” or non-existent, if no one was willing to come forward and spend time to work on behalf of others, and perhaps most importantly, take risks those others do not bear.

Courts have concluded class action plaintiffs, not class members, take the risk of a judgment for defendant’s costs. “Those who choose to take the risks of litigation should be the ones who bear the cost when they are unsuccessful.” *Earley v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000). The *Earley* court contended this risk was balanced by potential reward.

1 “While imposition of the entire cost burden on the named plaintiffs may have a chilling
2 effect on the willingness of plaintiffs to bring class action suits, this effect easily may be
3 outweighed by the potential recovery.” *Id.* The recovery for a plaintiff in a class action will
4 always be less than an individual action, take much longer to obtain, and have no potential for
5 early settlement, as individual cases do, which may settle even before filing a public complaint.

6 So, if “[t]hose who choose to take the risks of litigation should be the ones who bear the
7 cost when they are unsuccessful,” how can that risk be offset? *Id.* An adequate Service Award.

8 Mr. Marden more than satisfied his obligation to be available when asked and work with
9 counsel to protect the interests of the Class and place them above his own. Accepting the risk of
10 judgment for Defendant’s costs, the potential loss of employment opportunities, or achieving
11 compensation for the Class, are each sufficient to support a Service Award of \$10,000. Marden.
12 ¶¶2, 4-6. Together, they are more than sufficient.

13 It is impossible to know, or intervene, each time a class action plaintiff loses an
14 employment opportunity, making it essential to compensate them at final approval, the only
15 time the risk they took can be at least slightly offset and they can be adequately rewarded.

16 The Class received notice Plaintiff would request \$10,000. No Class Member objected.
17 Geraci Decl. ¶53; Atticus Decl. ¶¶, Exh. A, ¶11.

18 **XI. CONCLUSION**

19 The Settlement favorably resolves what would otherwise be uncertain litigation. Class
20 Counsel respectfully requests the Court grant final approval of the proposed Settlement, approve
21 the Service Award, attorneys’ fees and costs, and administration expenses as requested.

22 Respectfully submitted,

23 COHELAN KHOURY & SINGER
24 D. LAW, INC.

25 Dated: September 8, 2023

26 By: 
27 Jeff Geraci, Esq.
28 Attorneys for Plaintiff Daniel Marden