

COHELAN KHOURY & SINGER

Michael D. Singer (SBN 115301)

msinger@ckslaw.com

Jeff Geraci (SBN 151519)

jgeraci@ckslaw.com

605 C Street, Suite 200

San Diego, CA 92101

Telephone: (619) 595-3001/Facsimile: (619) 595-3000

DAVTYAN LAW FIRM, INC.

Emil Davtyan (SBN 299363)

support@davtyanlaw.com

400 N. Brand Blvd, Suite 700

Glendale, CA 91203

Telephone: (818) 875-2008/Facsimile: (818) 722-3974

Attorneys for Plaintiff Daniel Marden, on behalf of himself
and all other similarly-situated and aggrieved employees

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
UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT**

Hearing: May 4, 2023

Time: 8:30 a.m.

Dept: 3

Judge: Michael Jones

Complaint filed: December 4, 2020

Trial date: Not set

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I. INTRODUCTION

Plaintiff Daniel Marden seeks preliminary 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.”), ¶ 11, Exh. 1- Class and PAGA Settlement Agreement and Release (“SA”).

II. THE PARTIES, CLASSES, AND AGGRIEVED EMPLOYEES

A. Plaintiff and Defendant

CVS Pharmacy, Inc. and Longs Drug Stores California LLC are retail healthcare companies owned by CVS Health, which operate in California. Plaintiff worked as a cashier in the Auburn store from September 2017 to May 2020 for CVS. Geraci Decl. ¶ 12.

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; SA ¶ 7.

Aggrieved Employees or “PAGA Employees” are Class Members who worked anytime September 17, 2019 to July 24, 2022 (“PAGA Period”). Geraci Decl. ¶ 14; SA ¶¶ 25, 28.

III. PROCEDURAL HISTORY

On September 17, 2020, Plaintiff filed charges with the California Labor and Workforce Development Agency (“LWDA”). On December 4, 2020, Plaintiff filed a PAGA action alleging CVS failed to provide: all overtime and sick pay wages by failing to include all non-hourly compensation in the regular rate; all rest and meal periods; accurate wage statements; and all final wages. SA ¶ 44.

Based on the existence of earlier filed cases containing overlapping claims, the Parties agreed, for settlement purposes, the complaint would be amended to limit claims to those arising from the alleged underpayment of sick pay wages, and adding class claims based on those same claims, which was filed on October 18, 2022. Geraci Decl. ¶ 15; SA ¶¶ 9, 44.

IV. PLAINTIFF’S CONTENTIONS AND CVS’S DEFENSES

An employer may calculate sick pay wages in the same manner as overtime wages, using the “regular rate,” or it may “look back” 90 days, dividing “total wages, not including overtime premium pay, by total hours worked in full pay periods of the prior 90 days.” Labor Code § 246 (l)(1)(2). CVS calculated sick pay wages in the same manner as overtime. CVS also paid separate “SSK Adjustments,” in later pay periods in an attempt to provide all sick pay wages owed. Geraci Decl. ¶ 16.

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

Plaintiff contended CVS underpaid sick pay by failing to include all non-hourly compensation in the regular rate, and dividing total compensation by all hours worked, rather than regular hours, to calculate the regular rate. Additional compensation was referred to as employee awards, incentive, LP Award, Lump Sum Merit, Other Functional Incentive Plan, Pandemic Flat Premium, Pharmacy Incentive Plans, 25 cent premiums, \$1 premiums, \$3 premiums, Rx Nite Rate, Store Team Leader Plan, and Sunday Premium. The payments not included were primarily “shift differentials,” and “Functional Incentive” pay (a fixed amount averaging \$10 per shift), Labor Code § 246(l)(1). Geraci Decl. ¶ 18.

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. ¶ 19.

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. There are no cases yet finding a private right of action for sick pay claims. *Id.* ¶ 20.

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. ¶ 21.

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. ¶ 22.

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. ¶ 23.

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 the number of pay periods employees sick pay was paid at less than regular rate through mediation, and the total wage underpayment, and extrapolated this for the Class period. Counsel conferred extensively about data, claims, defenses, and settlement issues. Geraci Decl. ¶ 24.

With significant investigation, research, discovery, and analysis of data by Plaintiff's damages consultant, the Parties mediated with Michael D. Young, Esq., a respected mediator of wage and hour class actions, on March 24, 2022. Before and during mediation, the Parties discussed negotiating a class settlement, and agreed to it during mediation. Geraci Decl. ¶ 25.

After a day of arms'-length negotiations, the Parties executed a Memorandum of Understanding (MOU), for \$625,000, based on 50,000 pay periods estimated in the class period,

1 with an escalator provision requiring, if actual pay periods increased by more than 10%, the
2 Gross Settlement Amount would increase proportionally (i.e., if pay periods increased 12%,
3 GSA increases by 2%). Geraci Decl. ¶ 26.

4 It was later determined there were an estimated 64,655 pay periods in the class period.
5 Based on this, the GSA was increased to \$745,678.50 [$64,655/50,000 = 1.2931$ (actual pp/est pp
6 in MOU) $29.31\% - 10\% = 19.31\%$; $\$625,000 + 19.31\% = \textbf{\$745,687.50}$]. Geraci Decl. ¶ 27.

7 The Parties negotiated all necessary terms, including agreeing to amend the Complaint
8 to allege only claims based on underpayment of sick pay wages. Geraci Decl. ¶ 28; Exh. 1.

9 **VI. SUMMARY OF PROPOSED SETTLEMENT**

10 **A. Settlement Terms**

11 CVS will pay the Gross Settlement Amount (“GSA”) of \$745,687.50, including:
12 (a) settlement administration costs to Atticus Administration, LLC (“Atticus”), of \$60,000;
13 (b) attorneys’ fees of \$248,562.50 (one-third GSA) (2/3 to Cohelan Khoury & Singer, 1/3 to
14 Davtayan Law Firm, with Plaintiff’s consent. Geraci Decl. ¶30); (c) litigation costs up to
15 \$20,000; (d) \$10,000 Class Representative Service Payment; and (e) PAGA Payment of \$30,000
16 [\$22,500 to LWDA (75%), and \$7,500 (25%) to PAGA Employees. SA ¶ 51. CVS will pay the
17 employer’s share of payroll taxes in addition to the GSA. Geraci Decl. ¶29; SA ¶ 18.

18 After Court-approved deductions, pro-rata share of the estimated Net Settlement
19 Amount (“NSA”), \$377,125, will be sent to Participating Class Members, and, the 25% portion
20 of the PAGA Payment will be sent to PAGA Employees, whether or not they request exclusion
21 from the settlement, and they will release PAGA claims. Geraci Decl. ¶ 31; SA ¶¶26, 63, 70, 83.

22 The Settlement distribution formula is fair and reasonable and does not give preferential
23 treatment to any Class Member and can be made from data readily available from CVS, and the
24 Settlement Administrator can apply the formula fairly and transparently. Geraci Decl. ¶ 32.

25 **B. Released Claims**

26 Participating Class Members will release “CVS Pharmacy, Inc., CVS Longs Drug Stores
27 California, LLC, and CVS Health Corporation, and their affiliates, divisions, subsidiaries,
28 parents,” and other related entities (“Released Parties”) (SA ¶ 35) from:

any and all claims, demands, rights, liabilities, and causes of action that have been or could have been asserted in the instant Action based on the allegations in the First Amended Complaint for the duration of the Class Period, including but not limited to, claims for (1) Failure to Pay Sick Leave, (2) Failure to Provide Accurate Wage Statements; (3) Failure to Timely Pay Final Wages; and (4) Unfair Competition. In addition, each Participating Class Member who cashes their settlement payment shall be deemed to have released all claims set forth above under the California Labor Code (“Released Class Claims”).

SA, ¶ 33.

PAGA Employees will release Released Parties only from “any and all claims for civil penalties under the Private Attorneys General Act, Labor Code § 2698 *et seq.*, that have been or could have been asserted” based on the claims above. SA ¶ 34.

C. Settlement Administration and Notice to the Class

Atticus will update Class Member addresses with the National Change of Address database and mail a proposed Notice of Settlement (“Class Notice”) to each. Declaration of Atticus by Christopher Longley, (“Atticus Decl.”), ¶ 8; SA ¶ 79.

The Class Notice explains how to dispute the basis of a Class Settlement Payment; object or opt out; scope of the release to be given; date of Final Approval hearing; how to get further information; and that it is unnecessary to submit a claim form to receive a Payment. Geraci Decl. ¶ 33; SA ¶¶ 6, 62-63, 71, Exh. A – Class Notice.

VII. ARGUMENT

A. Class Settlements Are Subject to Court Review and Approval

“Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement.” CRC, Rule 3.769(g). Where terms are agreeable to all Parties, a court should disapprove a class settlement “only with considerable circumspection.” *Jamison v. Butcher & Sherrerd* (E.D. Pa. 1975) 68 F.R.D. 479, 481. State courts may be guided by federal court authority when approving class settlements. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 239.

At preliminary approval, a court limits its inquiry to the extent necessary to reach a reasoned judgment “the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.” *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723.

B. The Settlement is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement the Court must find a proposed settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The trial court considers all relevant factors, such as: “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, [] and the reaction of the class members to the proposed settlement.” *Id.* The Court determines whether the Settlement is the product of fraud, overreaching, or collusion, and, taken as a whole, is fair, reasonable and adequate to all concerned. *Id.*

A court may presume a proposed settlement is fair where: (1) parties agreed after extensive arms’-length negotiations; (2) sufficient investigation and discovery allow counsel and Court to act intelligently; (3) counsel is experienced; and, (4) percentage of objectors is small. *Dunk, supra*, at p. 1802.

The proposed Settlement is entitled to a presumption of fairness if: (1) it is the product of serious, informed, non-collusive negotiations with an experienced mediator; (2) investigation of the facts and law allow plaintiff, their counsel, and the court to make informed settlement decisions; and, (3) the Class is represented by experienced counsel. The fourth factor, percentage of objectors, cannot be known until the Class has notice and an opportunity to respond. At this stage, the proposed Settlement is entitled to the presumption of fairness.

1. Serious, Informed, Non-Collusive Negotiations Led to Settlement

The Settlement was reached through arm’s-length negotiations facilitated by an experienced and respected wage and hour class action mediator. Though cordial and professional, negotiations were at all times adversarial and non-collusive. Geraci Decl. ¶ 34.

2. Discovery and Stage of the Proceedings Support Settlement

Plaintiff’s Counsel investigated all claims and defenses before filing. When the Parties agreed to mediation, Plaintiff requested, and Defendant produced, data and documents to allow liability to be assessed and damages to be calculated. Geraci Decl. ¶ 35.

Investigation and discovery gave the Parties a clear understanding of their strengths and weaknesses before negotiations. *Id.* at ¶¶ 23, 35; *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 410 (approving settlement where “considerable information [exists] from which to assess the strength of the class claims” and litigation risks).

Proof of wage and hour class claims is based, at any stage, almost entirely on written policies and pay records. Plaintiff’s counsel obtained those records, and an expert analyzed them and prepared a damage model, before a settlement was negotiated. Geraci Decl. ¶ 36.

3. Counsel are Highly Experienced in Similar Litigation

Plaintiff’s Counsel have significant experience in wage and hour employment class actions. Geraci Decl. ¶¶ 2-10; Declaration of Emil Davtyan, (“Davtyan Decl.”), ¶¶ 5, 6. This allowed Counsel to compare settlement of class claims with the risks of further litigation, including trial and appeals. Defense counsel, Jennifer Zargarof, Sonia Vucetic, and their firm, Morgan Lewis & Bockius LLP, are skilled and experienced wage and hour class action litigators who defended their client vigorously throughout, including during mediation and in negotiations of all terms of the settlement agreement. Geraci Decl. ¶ 37.

Experienced counsel believes the Settlement is fair, reasonable, and in the Class’ best interest in light of the monetary recovery, risks of certification, summary adjudication, the lengthy process of establishing damages, and uncertainty of appeals. Geraci Decl. ¶ 38.

The view of the attorneys actively conducting the litigation “is entitled to significant weight” in settlement approval. *Fisher Bros. v. Cambridge Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.Supp. 482, 488. The Settlement satisfies the three *Dunk* requirements, should be presumed fair, adequate, and reasonable, and preliminarily approved.

4. The Settlement is Fair, Adequate, and Reasonable

Plaintiff and his counsel concluded the proposed Settlement is reasonable. As noted, CVS strongly disputed certification, liability, and damages.

C. The Settlement is a Reasonable Compromise of Claims

“[T]o ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of

1 attempting to establish and collect on those claims by pursuing the litigation,” information is
2 presented to the Court, as a fiduciary for absent class members. *Kullar v. Foot Locker Retail,*
3 *Inc.* (2008) 168 Cal.App.4th 116, 129. *Kullar* does not require an illusory prediction of the outer
4 reaches of exposure without taking into account actual risks of certification, decertification,
5 dispositive motions, and trial. *Munoz, supra*, at p. 408. *Kullar* also does not require an explicit
6 statement of the maximum amount the class could recover if it prevailed on all claims, only a
7 record which allows “an understanding of the amount that is in controversy and the realistic
8 range of outcomes of the litigation.” *Munoz, supra*, at p. 409.

9 *Munoz* examined the trial court record including number of class members and time and
10 payroll data. It found this “an adequate basis from which to garner a reasonably adequate
11 understanding of the amount that is in controversy within the meaning of *Kullar*.” *Munoz,*
12 *supra*, at p. 409.

13 In advance of mediation, Plaintiff’s Counsel evaluated the claims to determine
14 Defendant’s exposure and a reasonable range of Class relief. Although Plaintiff believes the
15 claims are strong, he recognizes if litigation were to continue, he may encounter significant
16 legal and factual hurdles that could prevent the Class from obtaining any recovery. Geraci Decl.
17 ¶ 39.

18 Class Counsel relied on similar documents and data as in *Munoz*, including time and pay
19 records. Plaintiff’s economist analyzed voluminous data and documents, and calculated
20 damages through the date of mediation. Geraci Decl. ¶ 40.

21 **1. Labor Code § 246 Sick Pay Wages**

22 Plaintiff’s consultant calculated the amount of sick pay wages CVS would have paid if
23 all potentially includible additional amounts of compensation were added to calculate the
24 regular rate, and if total compensation were divided only by regular hours, rather than all hours
25 worked, then subtracted the amount actually paid, to determine exposure. Geraci Decl. ¶ 41.

26 Plaintiff determined CVS’ maximum exposure for underpaid sick pay wages was
27 \$255,989. This was a modest amount because the additional compensation increased the regular
28 rate only slightly, and damages only occurred when sick leave was taken. Even this may

1 overstate potential recovery in several ways. As CVS strongly argued, some pay codes included
2 were for discretionary bonuses, or other amounts not required to be included. CVS also strongly
3 argued shift differentials, the single most frequent additional amount paid, while it must be
4 added to calculate the regular rate, does not require division by only regular hours, but is
5 properly divided by all hours worked. Geraci Decl. ¶ 42.

6 Based on the lack of cases finding a private right of action to recover sick pay wages,
7 Plaintiff believed realistic exposure was 50% of maximum exposure, or no more than **\$127,995**.
8 Geraci Decl. ¶ 43.

9 **2. Labor Code § 226 Wage Statement Penalties**

10 Wage statements must show, among other things, “gross wages earned,” and “all
11 applicable hourly rates in effect.” Labor Code § 226(a)(1)(9).

12 Penalties were calculated starting one-year before the complaint was filed for the 59,806
13 pay periods, and 15,197 Class Members with at least one day of underpaid sick pay wages.
14 Code of Civil Procedure § 340(a). The initial pay periods, 15,197 were multiplied by \$50, and
15 the subsequent 44,609 pay periods by \$100 for maximum exposure of \$5,220,780.
16 Labor Code § 226(e). Geraci Decl. ¶ 44.

17 Plaintiff considered there is not yet a case awarding wage statement penalties for
18 underpayment of sick pay and CVS’ argument that at least one court has found that
19 underpayment of sick pay does not trigger waiting time penalties, and courts may reach the
20 same conclusion as to wage statement penalties. *Liu v. Kaiser Permanente International*,
21 Alameda County Superior Court No. RG21093802, order dated November 17, 2021 (demurrer
22 sustained without leave to amend, finding sick pay is not a “wage” which triggers liability for
23 waiting time penalties). Geraci Decl. ¶ 45.

24 Plaintiff also considered this derivative violation requires Plaintiff to prevail on the
25 underlying wage claim and show the violation was “willful.” Based on the risk an underlying
26 violation would not be proven, and if proven, the likelihood CVS would be found to have a
27 good faith belief it was providing sick pay wages properly, Plaintiff believed realistic exposure
28 was less than 5% of maximum exposure, or no more than **\$261,039**. Geraci Decl. ¶ 46.

1 **3. Labor Code § 203 Final Wages**

2 An employer must pay all final wages within a required time. Labor Code § 201. CVS
3 correctly pointed out there are no cases finding liability for final wages based on underpaid sick
4 pay, only a single case denying a motion to dismiss on that ground. *Powell v. Walmart Inc.*,
5 2021 U.S. Dist. LEXIS 20777 (S.D. Cal. February 2, 2021). CVS also noted that at least one
6 Superior Court decision found that failure to pay sick pay does not trigger waiting time penalties
7 under § 203. *Liu v. Kaiser Permanente International, supra*.

8 Multiplying the number of former employees by the average shift length and hourly rate
9 during the statutory period produces maximum exposure of \$27,717,925. [6,014 x 6.75 hr. avg
10 shift x \$22.76 avg hr pay x 30 days]. Geraci Decl. ¶ 47.

11 Plaintiff considered there is not yet a case awarding waiting time penalties for
12 underpayment of sick pay and CVS' argument that at least one court has found that
13 underpayment of sick pay does not trigger waiting time penalties. Plaintiff also considered this
14 derivative violation requires Plaintiff to prevail on the underlying wage claim and show the
15 violation was "willful." Even if CVS were found to owe sick pay to some former employees, it
16 could be found to have a good faith belief it was paying wages properly, and "a good faith
17 dispute that any wages are due will preclude imposition of waiting time penalties under Section
18 203." *Hill v. Walmart Inc.*, 2021 U.S. Dist. LEXIS 20950, *17 (N.D. Cal. January 14, 2021)
19 (triable issues found as to whether Walmart actually misclassified employees as independent
20 contractors, but court found Walmart had a "good faith belief" it properly classified them and
21 could not be liable for waiting time penalties).

22 Based on the risk an underlying violation would not be proven, and if proven, the
23 likelihood CVS would be found to have a good faith belief it was providing sick pay wages
24 properly, Plaintiff believed realistic exposure was less than 1% of maximum exposure, or no
25 more than \$277,179. Geraci Decl. ¶ 48.

26 **4. Labor Code §§ 2699 PAGA Penalties**

27 "PAGA penalties are paid 75% to the California Labor and Workforce Development
28 Agency and 25% to aggrieved employees. Thus, in wage and hour class action cases that settle,

[] very little of the total settlement is paid to PAGA penalties in order to maximize payments to class members.” *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1101 (2019); *Mejia v. Walgreen Co.*, 2020 U.S. Dist. LEXIS 220685, *26 (E.D. Cal. Mar. 24, 2021) (“courts frequently approve settlements in wage and hour class action and PAGA actions that minimize the total amount of the settlement that is paid to PAGA penalties in order to maximize payments to class members.”).

Using the initial violation rate for the estimated 64,655 pay periods during the PAGA period, maximum penalties were estimated at \$13,541,400 for three violations: Sec. 246 (sick) \$6,465,500; Sec. 226 (wage statements); \$6,465,500, Sec. 203 (final pay) – \$610,400 (final pay) (est. 6,104 formers). (\$100 per pay period). Geraci Decl. ¶ 49.

Maximum realistic exposure was discounted to 5% (\$677,070). Even if the PAGA claim had been clearly viable at the time of the settlement, there were risks Plaintiff would not prove the underlying violations; and, if proven, the Court has authority to reduce penalties, as long as not to “zero.” *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012). *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 517 (2018). (“nearly \$70 million in penalties,” requested, trial court’s \$150,000 award upheld on appeal). Geraci Decl. ¶ 50.

D. The Settlement is Fair, Adequate, and Reasonable

Plaintiff and his Counsel gave serious consideration to all facts and arguments and concluded the Settlement is fair and reasonable. The Gross Settlement Amount represents over 100% of the maximum reasonable value of the Class claims. ($\$127,955 + 261039 = \$277,179 = \$666,173 - \$725,687.50 / \$666,173 = 108.9\%$). The estimated Net Settlement Amount is nearly 150% of the sick pay wages. ($\$377,125 / \$255,989 = 147.3\%$) The proposed settlement is well within the “ballpark” of reasonableness. Geraci Decl. ¶ 51.

All Class Settlement Payments are allocated 10% wages, 45% penalties, 45% interest. PAGA Employee Payments are allocated to penalties. Geraci Decl. ¶ 53; SA ¶ 72.

A settlement is not judged solely against what might have been recovered at trial, nor must a settlement provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242. Adequacy must be judged as

1 “a yielding of absolutes. . . Naturally, the agreement reached normally embodies a compromise;
2 in exchange for the saving of cost and elimination of risk, the parties each give up something
3 they might have won had they proceeded with litigation . . .” *Officers for Justice v. Civil Serv.*
4 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624 (citation omitted). “It is well-settled law that a cash
5 settlement amounting to only a fraction of the potential recovery does not . . . render the
6 settlement inadequate or unfair.” *Id.* at p. 628.

7 **E. The Proposed PAGA Allocation Is Reasonable**

8 The Agreement allocates \$30,000 to resolution of the PAGA claims and, pursuant to
9 PAGA, \$22,500 (75%) will be paid directly to the LWDA, and the remaining \$7,500 (25%)
10 paid to PAGA Employees. SA ¶ 51(e). This result was reached after good-faith negotiation with
11 input from the mediator. Where PAGA penalties are negotiated in good faith, with “no
12 indication [the] amount was the result of self-interest at the expense of other Class Members,”
13 such amounts are considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844,
14 (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900, at *24; *see, e.g., Nordstrom Com.*
15 *Cases* (2010) 186 Cal. App. 4th 576, 579 (No abuse of discretion approving settlement which
16 allocates \$0 to the PAGA claims).

17 The \$30,000 PAGA allocation is well within the range approved by California courts.
18 *In Re Nordstrom Commission Cases* (2010) 186 Cal. App. 4th 576, 589 (no abuse of discretion
19 approving a class settlement attributing \$0 to PAGA penalties.); *Alcala v. Meyer Logistics, Inc.*
20 (C.D. Cal. June 17, 2019) 2019 LEXIS 166879, *26 (PAGA penalties 1.25% of settlement,
21 “falls within the zero to two percent range for PAGA claims approved by courts.”); *In re M.L.*
22 *Stern Overtime Litig.* (S.D. Cal. Apr. 13, 2009) 2009 LEXIS 31650, *1 (PAGA settlement, 2%).
23 (This Motion and its exhibits were provided to the LWDA on the date of filing.)
24 Geraci Decl. ¶ 53, Exh. 2 – LWDA Confirmation of Receipt.

25 **VIII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

26 When an ascertainable and sufficiently numerous class exists, with a well-defined
27 community of interest, and class litigation is superior to alternate means, certification is
28 appropriate. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021.

1 Ascertainability is determined by examining class definition, size, and means for
2 identifying class members. *Reyes v. Bd. of Supervisors* (1987) 196 Cal. App. 3d 1263, 1271.
3 The class is ascertainable from CVS's records, and joinder is impracticable.

4 "Community of interest" embodies three factors: (1) predominant common questions of
5 law or fact; (2) class representatives with claims typical of the class; and, (3) representatives
6 who can adequately represent the class. *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th
7 1069, 1089.

8 Plaintiff alleges each Class Member was subject to the exact same policies which
9 damaged him, including those which underpaid sick pay wages. Where the same alleged
10 conduct forms the basis for Plaintiff's claims and class claims, that conduct shows
11 commonality for settlement purposes. *Supra.*, at p. 1090.

12 Plaintiff can and will continue to adequately protect the interests of the Class. *Wershba*,
13 *supra*, at p. 238. Plaintiff accepted the risks of serving as a class representative, spent significant
14 time assisting in the prosecution of the action, and placed the interest of the class above his own.
15 Declaration of Daniel Marden ¶¶ 2, 4-6, 8-10; See *Clark v. American Residential Services, LLC*
16 (2009) 175 Cal.App.4th 785, 804-807.

17 Plaintiff's attorneys are qualified to conduct the litigation on behalf of the Class and
18 neither Plaintiff's interests, nor counsels, are antagonistic to the interest of the Class Members.
19 *McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450. Geraci Decl. ¶¶ 2-10, 53; Davtyan
20 Decl. ¶¶ 5-8; Marden Decl. ¶ 2.

21 **IX. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS**

- | | |
|---|--|
| 22 1. Class Data provided to Administrator: | Within 20 calendar days of Preliminary Approval |
| 23 2. Mail Settlement Notice to the Class: | Within 30 calendar days of Preliminary Approval |
| 24 3. Notice Response Deadline: | On or before the 45th calendar day from initial
25 date Administrator mails Class Notice to Class;
26 and 60 days after initial mailing of Class Notice
27 for re-mailed Class Notices |
| 26 4. File Motion for Final Approval and
27 Administrator's Declaration: | No sooner than 20 days after the close of the
28 Notice Response Deadline |
| 28 5. Final Approval Hearing: | A date convenient on the Court's calendar |

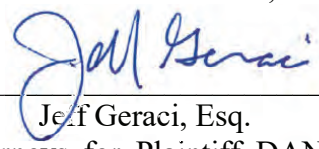
X. CONCLUSION

Plaintiff requests the Settlement be preliminarily approved, Notice approved and ordered mailed to the Class, Atticus be appointed Settlement Administrator, Cohelan Khoury & Singer and Davtyan Law Firm, Inc. be appointed Class Counsel, Daniel Marden be appointed Class Representative, and a Final Approval Hearing date be set.

Respectfully submitted,

COHELAN KHOURY & SINGER
DAVTYAN LAW FIRM, INC.

Dated: April 6, 2023

By: 

Jeff Geraci, Esq.

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