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Superior Court of California,
County of Alameda

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

ANDREA O'NEAL-ROBERTS on behalf of
herself, the putative class, and on behalf of the
general public,
Plaintiff,
v.
OFF THE GRID SERVICES, LLC, THE
WHOLE CART, LLC, and DOES 1-10,
inclusive.
Defendants.

) Case No. RG20075270
)
) Assigned for all purposes to:
) Judge: Hon. Brad Seligman
) Dept.: 23
)
) CLASS ACTION
) PLAINTIFF'S MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) SUPPORT OF MOTION FOR
) PRELIMINARY APPROVAL OF CLASS
) ACTION SETTLEMENT AND CLASS
) NOTICE, CERTIFICATION OF
) SETTLEMENT CLASS AND
) SUBCLASSES, AND APPROVING THE
) CLASS REPRESENTATIVE, CLASS
) COUNSEL, AND SETTLEMENT
) ADMINISTRATOR
)
) Ntc of Motion; Decls.; and Prop. Order
) submitted herewith
)
) Date: September 6, 2022
) Time: 3:00 p.m.
) Dept: 23
) Reservation No.: A-20075270-001
)
) Original Complaint Filed: Sept. 24, 2021

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1 **I. INTRODUCTION**

2 By this motion Plaintiff Andrea O’Neal-Roberts (“Plaintiff”) requests preliminary approval of
3 a class action settlement reached with Defendants Off the Grid Services, LLC and the Whole Cart,
4 LLC (“Defendants”). The settlement provides a non-reversionary settlement fund of \$800,000 and
5 other consideration for 23 Class Members who worked as Instrucktional Entrepreneurs, to resolve their
6 misclassification and associated wage and hour claims. The details of the Settlement are set forth in
7 the Parties’ Joint Stipulation of Settlement and Release (“Settlement Agreement”).¹

8 The proposed Settlement satisfies the criteria for preliminary approval under California law
9 and falls well within the range of possible final approval. The gross average settlement payment per
10 Class Member exceeds \$30,000 and – after deducting fees, costs, service awards, and PAGA
11 allocations – the average net share exceeds \$20,000.

12 For the reasons stated herein, Plaintiff requests the Court: grant preliminary approval of the
13 Settlement; provisionally certify the Settlement Class for settlement purposes; approve the form,
14 content, and method of notice to the Class; appoint Plaintiffs’ Counsel Darci E. Burrell of Levy Vinick
15 Burrell Hyams LLP and Rachel M. Terp of Terp Law as Class Counsel; appoint Plaintiff as Class
16 Representative; appoint Atticus Administration, LLC (“Atticus”) as Settlement Administrator; and set
17 a Final Approval Hearing time and date 120 days from the date of preliminary approval.

18 **II. FACTUAL AND PROCEDURAL BACKGROUND**

19 Defendants are companies that specialize in food truck events and previously did corporate
20 catering. ¶3, Terp Decl. Defendants employed Instrucktional Entrepreneurs in the Bay Area. *Ibid.*

21 Plaintiff and the other Instrucktional Entrepreneurs worked overtime and missed meal and rest
22 breaks in Defendants’ kitchens and food trucks. ¶5, Terp Decl.; Ex. B to Ex. 2; Ex. 3; Ex. 4. Defendants
23 classified Instrucktional Entrepreneurs as exempt from overtime and paid them salaries. ¶5, Terp Decl.;
24 Ex. A to Ex. 2. Defendants did not pay Instrucktional Entrepreneurs overtime or missed break premiums.
25 *Ibid.* Defendants expected Instrucktional Entrepreneurs to work more than 40 and as many as 60 hours in
26 a workweek, and Instrucktional Entrepreneurs did work overtime. ¶8, Terp Decl.

27
28 ¹ The Settlement Agreement is attached as Exhibit (“Ex.”) 1 to the Declaration of Attorney Rachel
Terp in Support of Preliminary Approval (“Terp Decl.”). Unless otherwise noted, exhibits referenced
in this motion are exhibits to the Terp Decl. 6

1 While the program involved developing a food truck concept, design, and business plan, in a
2 typical week Class Members spent most of their time performing the same job duties of the line cooks,
3 prep cooks, truck supervisors, and truck drivers who Defendants paid hourly to perform Defendants’
4 core services. ¶5, Terp Decl.

5 The COVID-19 pandemic impacted the Instrukktional’s operations, and the Instrukktional
6 program ended in September 2020. ¶8, Terp Decl.

7 Plaintiff’s Counsel’s analysis, after reviewing thousands of pages of documents produced in
8 discovery, and performing investigative communications with a dozen former Instrukktional
9 Entrepreneurs, indicates that Class Members were subject to the same: job title, job duties, and salaried
10 pay scheme; decision to misclassify workers as exempt-employees and deny them overtime and meal
11 and rest breaks; policies, procedures, and manuals; expectation of working more than 40 hours in a
12 workweek; and wage violations. ¶5, Terp Decl.

13 On September 24, 2020 and November 23, 2020 Plaintiff filed the original and amended
14 complaints respectively. *See* Sept. 24, 2020 & Nov. 23, 2020 Docket Entries. In mid-2021, Plaintiff
15 filed the operative Second Amended Complaint (“Complaint” or “SAC”). The Complaint slightly
16 amended the class definition to ensure no overlap existed between the definition for the instant lawsuit
17 and an off-the-clock case filed in San Francisco Superior Court, *Reyes, et al. v. The Whole Cart, LLC,*
18 *et al.*, (S.F. Sup. Ct., filed June 1, 2020) Case No. CGC20584861. *See* Jul. 7, 2021 Docket Entry; ¶4,
19 Terp Decl.

20 The Complaint alleges that Defendants misclassified Class Members and violated California
21 Labor Code and Industrial Wage Commission Orders by failing to: reimburse workers for all
22 necessary business expenses; pay workers overtime wages; provide, authorize, or pay premiums for
23 missed meal and rest breaks; pay all wages upon discharge; and provide accurate wage statements. *See*
24 Jul. 7, 2021 Docket Entry. Plaintiff further alleged that Defendants committed unlawful and unfair
25 business practices in violation of California Business and Professions Code section 17200, *et seq.*, and
26 asserted Private Attorney General Act of 2004 (PAGA) claims. *Ibid.* Defendants deny these claims.
27 ¶2.10, Ex. 1.

28 Plaintiff and Defendant The Whole Cart both propounded and responded to an initial round of

1 written discovery and the latter issued a second round. *See* ¶¶5, 6, Terp Decl. The Parties were meeting
2 and conferring about scheduling depositions when they agreed to mediate. ¶6, Terp Decl.

3 On November 18, 2021, the Parties attended a day-long Zoom mediation with experienced
4 mediator, Steve Pearl. ¶13, Terp Decl. While the mediation did not result in a settlement, the Parties
5 continued their arms-length negotiations in earnest. On January 28, 2022, the Parties executed a
6 Memorandum of Understanding (“MOU”). Negotiations continued regarding the long-form settlement
7 which was signed by all Parties and their counsel by June 3, 2022. *Ibid.*; Ex. 1.

8 **III. SUMMARY OF SETTLEMENT TERMS**

9 The key terms of the Settlement Agreement are set forth below.

10 **A. The Settlement Class and Subclasses**

11 The Settlement Agreement defines the **Settlement Class** as “All individuals who work or
12 worked as Instrucktional Entrepreneurs, who Defendants classified as exempt from overtime within
13 the State of California at any time from April 6, 2016 through the date of preliminary approval, except
14 for those who signed a general release of claims.” ¶1.3.a, Ex. 1. The Settlement Agreement lists the 23
15 individuals who fit the definition. ¶1.3.b, Ex. 1.²

16 The Settlement also includes: a **Waiting Time Penalties Subclass** comprised of “All Class
17 Members who no longer work for Defendants and have not been employed by Defendants for more
18 than 72 hours, from April 6, 2017 through the Date of Preliminary Approval” (¶1.3.b.i, Ex. 1); and an
19 **Itemized Wage Statement Subclass** comprised of “All Class Members who work or worked for
20 Defendants from April 6, 2019 through the Date of Preliminary Approval” (¶1.3.b.i, Ex. 1).

21 **B. Relief to the Settlement Class**

22 The settlement consists of a non-reversionary Gross Settlement Amount worth \$800,000, or
23 \$34,782.608 per Class Member (¶¶1.13, 6.2, Ex. 1), for which Plaintiff proposes the following distribution:

- 24 • attorneys’ fees of \$266,666.67 (¶¶1.4, 6.3.a, Ex. 1);
- 25 • attorneys’ costs not to exceed \$14,000 (*ibid.*);
- 26 • Settlement Administration Costs, estimated not to exceed \$9,000 (¶¶1.31, 1.32, 6.3.b, Ex. 1);

27
28 ² Defendants produced signed agreements containing general releases in exchange for monetary
consideration for two individuals who worked as Instrucktional Entrepreneurs within the Class Period.
See ¶11, Terp Decl. The Settlement Class definition excludes these individuals. *See ibid.*; ¶1.3, Ex. 1.

- Service Award/General Release Consideration to Plaintiff of \$10,000 (¶6.3.c, Ex. 1);
- PAGA Distribution Amount of \$22,000 with a 75% (\$16,500) paid to the LWDA as the PAGA LWDA Payment and 25% (\$5,500) distributed as the PAGA Aggrieved Employee Payment (¶¶1.22, 1.23, 1.25, 6.3.d, Ex. 1); and,
- after the above items are subtracted from the Gross Settlement Amount, 23 Class Members to receive pro rata payments from a Net Settlement Amount of approximately \$478,333.33, or \$20,797.10 per Class Member, (¶¶1.3, 6.3.e, Ex. 1; ¶14, Terp Decl).³

The Gross Settlement Amount excludes the employer's share of payroll taxes on amounts allocated to wages, which Defendants will pay separately, and which Defendants estimate will exceed \$11,000.00. ¶1.13, Ex. 1; ¶18, Terp Decl.

Additionally, Defendants have agreed to "make efforts to facilitate the release or license of Qualifying Class Members' brands, marketing materials, and recipes, by Defendants and/or any third party," whereby, during the notice period, "Class Members who developed mobile food concepts while working for Defendants" will receive an "intellectual property assignment and license back agreement" which each Qualifying Class Member can independently choose to accept or reject without otherwise impacting their rights under this Settlement. ¶6.5, Ex. 1.

Therefore, the value of the Settlement exceeds \$811,000.00 including the Gross Settlement Amount and estimated employers' share of the payroll taxes, before adding the value to Qualifying Class Members who choose to accept the intellectual property assignment and license back agreement.

C. Administration of the Settlement Notice Following Preliminary Approval

If the Court grants preliminary approval, Defendants will provide the Settlement Administrator with Class Member contact information. ¶9.1, Ex. 1. The Settlement Administrator will then use the United States Postal Service National Change of Address List to update each Settlement Class Member's last known mailing address. ¶10.1, Ex. 1. The Settlement Administrator will email and mail via first class mail the Notice to Class Members. ¶¶10.2, 10.3, Ex. 1. If any emailed or mailed Notice is returned as undeliverable, the Settlement Administrator will take steps to identify a valid address

³ Adding together the estimated Net Settlement Amount (\$478,333.33) and the PAGA Aggrieved Employee Payment (\$5,500), the 23 Class Members are eligible for an estimated average payment of \$21,036.23. ¶21, Terp Decl.

1 and resend. ¶10.3, Ex. 1. Plaintiff's Counsel will make a webpage available with information about the
2 Settlement. ¶10.4, Ex. 1.

3 The Notice will include information about the Settlement consideration and Class Members'
4 right to participate in or exclude themselves from the Settlement and associated release(s) of claims.
5 *Compare* Ex. A & B to Ex. 1 with ¶¶ 6.3, 10.1-12.1, Ex. 1.

6 Defendants will also provide the Settlement Administrator with Class Member start and end
7 dates, and workweek information during the Class Period. ¶9.1, Ex. 1. The Settlement Administrator
8 will calculate each Class Member's minimum estimated payment, and this calculation as well as
9 underlying start date, end date, and workweek data shall be included with the Notice. ¶¶6.2, 10.2,
10 Ex. 1; Ex. B, to Ex. 1. Class Members will have an opportunity to dispute the workweek and other
11 information used to estimate their Settlement Share and, if applicable, their PAGA Share. ¶¶9.2, 10.2,
12 Ex. 1; Ex. A to Ex. 1; Ex. B to Ex. 1.

13 **D. Process for Class Members to Opt-Out or Object to the Settlement**

14 As explained in the Notice, Class Members will also have the opportunity to submit objections
15 to the settlement or opt-out of participation in the Settlement altogether within a 60-day notice period.
16 ¶¶11.1-12.1, Ex. 1; Ex. A to Ex. 1. The Notice will explain that PAGA Aggrieved Employees cannot
17 opt out of the PAGA portion of the settlement. ¶¶ 11.2, Ex. 1; Ex. A to Ex. 1.

18 **E. Scope of Proposed Release for the Class, PAGA Aggrieved Employees, and**
19 **Plaintiff**

20 By choosing not to opt-out, Participating Class Members agree to release claims tied to the
21 facts and wage-and-hour claims alleged in the complaint, and Plaintiff agrees to a general release and
22 dismissal of claims. ¶¶1.28, 1.29, 11.1, 15.1, 15.3, Ex. 1. PAGA Aggrieved Employees will not have
23 the option to opt out of the PAGA settlement and will be bound by the settlement and release of
24 PAGA Claims and remedies. ¶¶11.2, 15.1, Ex. 1.

25 **F. Payment to Class Members and Cy Pres Designee**

26 Assuming the Court grants Final Approval, each Participating Class Member will be mailed
27 checks for their Settlement Share. Each Participating Class Member's Settlement Share shall be a
28 portion of the Net Settlement Fund, calculated based on that individual's relative number of

workweeks as a Class Member and Itemized Wage Statement Subclass member compared with all Participating Class Members, as well as a flat amount for Waiting Time Penalties Subclass members. ¶¶1.26, 6.3.e, Ex. 1. Each PAGA Aggrieved Employee will also be mailed a check for their PAGA Share – from the PAGA Aggrieved Employee Payment portion of the PAGA Distribution Amount – which will be based on the relative number of workweeks the employee worked during the PAGA Period compared with all PAGA Aggrieved Employees. ¶¶1.22, 1.24, 1.25, 6.3.d.ii, Ex. 1; ¶22, Terp Decl. After an opportunity for a second distribution if uncashed check funds total \$10,000 or more, the residue will be paid to a *cy pres* recipient. ¶14.6, Ex. 1.

IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE.

A. Legal Standard

Settlement and conciliation “are the preferred means of dispute resolution . . . in complex action litigation.” *7-Eleven Owners for Fair Franchising v. Southland Corp.*, (2000) 85 Cal.App.4th 1135, 1151. A court has broad discretion to approve a settlement the court determines is “fair, adequate, and reasonable” in light of the circumstances of the case. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, (2010) 186 Cal.App.4th 399, 407. To grant preliminary approval, the Court must merely find the settlement falls within the range of possible final approval. *Wershba v. Apple Comp., Inc.*, (2001) 91 Cal.App.4th 224, 234-235. In evaluating a settlement, courts consider relevant factors including:

the strength of the 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 presence of a governmental participant. *Kullar v. Foot Locker Retail, Inc.*, (2010) 168 Cal.App.4th 116, 128.

B. The Settlement Is the Presumptively Fair Product of Arm’s-Length Negotiations Conducted by Experienced Counsel.

California courts recognize that “a presumption of fairness exists where: (1) the settlement is reached through arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; [and] (3) counsel is experienced in similar litigation.” *Wershba*, 91 Cal.App.4th at 245 (quoting *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th 1794, 1807, n. 19). The Settlement is the result of an adversarial, arm’s-length negotiation between experienced

attorneys who are familiar with wage and hour class action litigation in general and the legal and factual issues of this case in particular, having reviewed and analyzed formal and informal discovery, class member investigative interviews and declarations, and having utilized a seasoned mediator. See ¶¶5, 13, Terp Decl. Under the circumstances, the proposed settlement is presumptively fair.

C. Risks of Further, Complex Litigation, Appeal, and Delayed Payment

The uncertainty of pursuing this lawsuit to a final judgment strongly favors settlement.

1. Risks Related to Exemptions

Plaintiff maintains Class Members spent the majority of time in a typical day on non-exempt job duties. ¶5, Terp Decl. To qualify for a white-collar exemption, an employee's "primary duty" must be the performance of exempt work. California courts apply a quantitative approach to assessing whether an employee's primary duty involves exempt work. IWC Wage Ord. No. 5-2001, 1 subds (B)(1)(e), (2)(f), (3)(a), (3)(b). "Primarily" means more than half the employee's work time. IWC Wage Ord. No. 5-2001, 2 subd. (O). Duties are exempt or non-exempt. *Heyen v. Safeway Inc.*, (2013) 216 Cal.App.4th 795.

Defendants would likely argue that Instrucktional Entrepreneurs were primarily engaged in exempt duties during most of their assignments and during most stages of the program. Defendants would likely have emphasized that individualized examinations of each Instrucktional Entrepreneur's actual work each week and performance would be relevant to determining whether a Class Member was appropriately classified as exempt (under the executive, administrative, and/or professional exemptions), and the measure of damages. ¶9, Terp Decl; see *Ramirez v. Yosemite Water Co.*, (1999) 20 Cal.4th 785, 802 (the trial court must inquiry into the realistic requirements of the job including both "how the employee actually spends his or her time" and "the employer's realistic expectations").

Defendants would argue that individualized factual issues would also impact the likelihood of class certification. *Ortiz v. Amazon.com LLC*, (N.D. Cal. Apr. 27, 2020, No. 17-CV-03820-JSW) 2020 WL 1984294, at *10 (denying certification of shift manager class, determining that individualized issues would predominate with respect to executive exemption defense); *Patel v. Nike Retail Services, Inc.*, (N.D. Cal., Mar. 29, 2016, No. 14-CV-04781-RS) 2016 WL 1241777, at *5 (denying certification for lack of predominance where three misclassification theories related to the administrative and/or

1 executive exemptions were advanced for assistant head coaches). Should the Court deny class
2 certification during the course of litigation, it is likely that some but not all Class Members would
3 choose to pursue their claims separately. ¶11, Terp Decl.

4 If litigation continues, the Parties will dispute the propriety of certification, file cross-motions
5 for summary adjudication on exemption defenses, and possible appeals. ¶12, Terp Decl.

6 **2. Risks Relating to Numerosity**

7 While California has no minimum requirement for class size, numerosity may have impacted
8 Plaintiff's success in obtaining or maintaining class certification. ¶11, Terp Decl. Plaintiff's Labor
9 Code section 203 and 226 claims only have a one-year statute of limitations, and the subclasses for
10 these claims would have included about 13 Class Members. One of these Class Members also signed
11 an agreement to arbitrate. Finally, investigation into the reimbursement claims indicates that there may
12 not have been numerosity as to those claims. *Ibid*.

13 **3. Defendants' Possible Good-Faith Defense**

14 Plaintiff can only succeed on Labor Code section 203 and 226 claims if Defendants' good-faith
15 defense fails, and PAGA penalties would be similarly impacted. *See, e.g.*, 8 Cal. C. Regs. § 13520;
16 *Armenta v. Osmose, Inc.*, (2005) 135 Cal.App.4th 314, 325 (good faith belief in legal defense
17 precludes willfulness finding necessary for Lab. C. § 203 penalties); *Price v. Starbucks Corp.*, (2011)
18 192 Cal.App.4th 1136, 1147 (PAGA claim fails if Lab. C. § 203 claims fails); *Cotter v. Lyft, Inc.*,
19 (N.D. Cal. June 23, 2016) 193 F.Supp.3d 1030, 1037 (lack of willfulness evidence warrants PAGA
20 penalties reduction); *Lopez v. Friant & Assocs., LLC*, (2017) 15 Cal.App.5th 773 (discussing
21 knowledge and intent requirements of Lab. C. § 226).

22 **D. The Settlement Provides Significant Relief for Class Members.**

23 Notwithstanding the challenges Plaintiff faces in certifying a class through trial, and
24 overcoming Defendants' asserted defenses, the Settlement commits Defendants to pay \$800,000.
25 ¶1.13, Ex. 1. The Settlement is worth even more as Defendants will cover payroll taxes for the portion
26 of the settlement allocated as wages. ¶6.1, Ex. 1. The Settlement provides these funds promptly,
27 avoiding the risks and delay of continued litigation and possible appeals. ¶12, Terp Decl. Finally, by
28 this settlement Defendants agreed to facilitate the release of creative materials developed by

1 Qualifying Class Members during the program, which will have value to those who elect to
2 participate. ¶6.5, Ex. 1. Qualifying Class Members would not have had any realistic opportunity to
3 obtain this intellectual property absent this settlement agreement. ¶18, Terp Decl.

4 Plaintiff's Counsel estimates that the Gross Settlement Amount of \$800,000 represents roughly
5 59% of the total pre-PAGA damages, penalties, and interest, and the expected Net Settlement Amount
6 of \$478,333.33 represents roughly 35% of that amount. ¶18, Terp Decl. This estimate includes
7 overtime damages (\$774,890.28), overtime damages interest at 10% (\$77,489.03), meal break
8 damages (\$172,197.84), rest break damages (\$172,197.84), interest on break damages at 7%
9 (\$24,107.70), waiting time penalties (\$109,369.56), itemized wage statement penalties (\$29,250.00)
10 for Class Members, and PAGA penalties. ¶17, Terp Decl.

11 The settlement relief, which will result in an average settlement payment to each class member
12 worth more than \$20,000, is favorable compared to other cases with respect to the average payment to
13 class members and the percentage of the potential recovery obtained. *See, e.g., Dixon v. Cushman &*
14 *Wakefield Western, Inc.*, (N.D. Cal., Apr. 21, 2022, No. 18-CV-05813-JSC) 2022 WL 1189883, at
15 **6-7 (approving \$15,166.31 average payments to misclassified appraisers with California-only
16 claims, worth an estimated 5.98% of maximum exposure). *Cf. Plancich & McIntosh*, "Trends in Wage
17 and Hour Settlements: 2019 Update," NERA Econ. Consulting (June 4, 2020) (available at:
18 https://www.nera.com/content/dam/nera/publications/2020/PUB_Wage_and_Hour_Settlements_060220.pdf
19 f) (analyzing settlements from 2010 to 2019: Figure 7 – average settlement value per plaintiff was
20 \$7,755; Fig. 10 – average settlement value per plaintiff per class year was typically less than \$1,500,
21 and never exceeded \$3,500; Fig. 11 – only 5% of cases settled for more than \$5,000 per plaintiff per
22 class year).

23 **E. Manner of Distribution Is Fair**

24 The use of subclasses to determine allocations is fair. *See* ¶6.3, Ex. 1. Class Members were
25 paid similarly and misclassified. ¶5, Terp Decl. All Class Members are eligible for allocations related
26 to lost wages during the Class Liability Period, and subclass members are eligible for allocations to
27 Labor Code section 203 and 226 statutory penalties during a shorter time window. *See* ¶6.3.e, Ex. 1;
28

¶14, Terp Decl. Further, the settlement distinguishes between funds for Class Members and funds for PAGA Aggrieved employees. See ¶6.3.d, Ex. 1.

F. The Stage of the Proceedings and the Extent of Discovery Support Approval

The investigation, exchange of responses to written discovery, and mediation helped Plaintiff's counsel gauge the strength of the claims, Defendants' possible defenses, and procedural risks associated with further litigation. As described above, litigating exemption defenses would be time consuming, expensive, and the outcome uncertain. ¶¶3-13, Terp Decl.

G. The LWDA Has Taken No Action Regarding This Case.

Plaintiff administratively exhausted the PAGA claims with the LWDA before filing this action, notified the LWDA of the filing of this action and amended complaints. Plaintiff will notify the LWDA of the Settlement Agreement at the time of filing this motion. ¶23, Terp Decl.

V. APPROVAL OF THE PAGA SETTLEMENT IS APPROPRIATE.

The PAGA settlement must be reviewed and approved by the Court. Lab. C. § 2699(l)(2). The Act does not address the standard of review for PAGA claims. *Moniz v. Adecco USA, Inc.*, (2021) 72 Cal.App.5th 56, 75. In *Moniz*, as a matter of first impression, the First District Court of Appeal adopted a standard for reviewing PAGA settlements: "a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." *Id.* at 77.

Here, the overall Settlement is fair for the reasons stated in Section IV of this brief, as it requires Defendants to pay significant monetary damages to Class Members, in addition to a PAGA Distribution Amount worth \$22,000, with 75% (\$16,500) paid to the LWDA, and 25% (\$5,500) paid to PAGA Aggrieved Employees. The PAGA Distribution Amount is genuine and meaningful in the context of this settlement, other settlements, and other trials. ¶21, Terp Decl.; See *Nordstrom Com'n Cases*, (2010) 196 Cal.App.4th 576, 589 (allocating \$0 to PAGA where overall settlement provided substantial relief).

The PAGA Distribution Amount is 20% of Plaintiff's full PAGA penalties estimate, assuming the Court would award full penalties for: overtime violations, meal and rest break violations, wage

statement violations, and waiting time penalties. ¶21, Terp Decl. The allocation is also worth 2.75% of Gross Settlement Fund. *Ibid.* This allocation is generous compared to ratios approved for other class actions and PAGA actions. *See, e.g., Roe v. Jose Torres L.D. Latin Club Bar, Inc.*, (N.D. Cal., Aug. 27, 2020, No. 19-CV-06088-LB) 2020 WL 5074392, at *6 (PAGA allocation worth 1.5% of settlement fund in misclassification case); *Van Kempen v. Matheson Tri-Gas, Inc.*, (N.D. Cal. Aug. 25, 2017, No. 15-cv-00660-HSG) 2017 WL 3670787, at *10 (PAGA allocation worth 1.3% of fund).

The valuation of PAGA claims must also be considered in light of the risk of losing or diminution in value of the claims at trial. Labor Code section 2699 subdivision (e) provides courts with discretion to award penalties and determine the amount to award. *See also Amaral v. Cintas Corp. No. 2*, (2008) 163 Cal.App.4th 1157 (PAGA penalties imposed may be subject to reduction by trial court).

VI. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

A. The Proposed Settlement Class Is Ascertainable and Sufficiently Numerous.

A class is ascertainable if people can “determine whether they are members of the class plaintiffs wish to represent.” *ABM Indus. Overtime Cases*, (2017) 19 Cal.App.5th 277, 302-303. Defendants identified 23 Class Members, by name, based on their job title, form of compensation, dates of employment, and absence of prior settlement and release. ¶1.3, Ex. 1.

Numerosity exists when “the parties are numerous, and it is impracticable to bring them all before the court.” Cal. Code Civ. Proc. § 382. “No set number is required as a matter of law for the maintenance of a class action.” *Hendershot v. Ready to Roll Transp., Inc.*, (2014) 228 Cal.App.4th 1213, 1222; *e.g., Hebbard v. Colgrove*, (1972) 28 Cal.App.3d 1017, 1030 (28 class members); *Bowles v. Super. Ct.*, (1955) 44 Cal.2d 574 (10 class members). “‘Impracticability’ does not mean ‘impossibility,’ but only the difficulty or inconvenience of joining all members.” *Id.* The inquiry involves class size, but also “the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other relevant factor.” *Id.*

Here, it would be impracticable to bring 23 separate lawsuits. Absent this lawsuit, Class Members, many of whom continue to work in the food service industry, likely would not have chosen

1 to pursue their individual claims. ¶11, Terp Decl. Those with a lower range of damages, especially,
2 may be unable to find representation. Other class members and witnesses have left the Bay Area and
3 the state. *See ibid.*; *Tom v. Com Dev USA, LLC*, (C.D. Cal., Sept. 18, 2017) 2017 WL 8236268, at *3
4 (numerosity satisfied for geographically dispersed group of 24).

5 **B. The Commonality Requirement Is Met.**

6 The commonality requirement is met if there are questions of law or fact common to the class.
7 *Williams v. Super. Ct.*, (2013) 221 Cal.App.4th 1353, 1369 (even a single common question can
8 suffice to create commonality) (citing *Wal-Mart Stores, Inc. v. Dukes*, (2011) 131 S.Ct. 2541, 2556). A
9 court's inquiry at the class certification stage may focus on the theory of recovery advanced, such as
10 the misclassification of workers. *Jaimez v. DAIHOS USA*, (2010) 181 Cal.App.4th 1286, 1296. For
11 example, a common question exists, and predominates, as to whether Defendants maintained a
12 uniform policy of classifying Class Members as exempt from California's overtime pay and meal and
13 rest break laws. *See also* ¶53, SAC (listing common questions).

14 "A class . . . may establish liability by proving a uniform policy or practice by the employer
15 that has the effect on the group of making it likely that the group members will work overtime hours
16 without overtime pay." *Kizer v. Tristar Risk Mgmt.*, (2017) 13 Cal.App.5th 830, 843 (quoting *Sotelo v.*
17 *MediaNews Group, Inc.*, (2012) 207 Cal.App.4th 639, 654). Here there was a uniform policy and
18 practice of scheduling Class Members to work in excess of 40 hours a week, a theory supported by
19 common evidence, including promotional materials describing 50 hours a week of scheduled work
20 (Ex. 3), job descriptions requiring ability to work a 60 hour week (Ex. B to Ex. 2), and curricula (¶5,
21 Terp Decl.).

22 Under these circumstances, the proposed Class satisfies the commonality requirement.

23 **C. The Typicality Requirement Is Met.**

24 The claims of Plaintiff are typical of the Class because she has the same interests and suffered
25 the same injuries as the class injuries. *See J.P. Morgan & Co. Ins. v. Sup. Ct.*, (2003) 113 Cal.App.4th
26 195, 212; *Caro v. Proctor & Gamble Co.*, (1993) 18 Cal.App.4th 644, 663-664 (typicality equates to
27 membership in the proposed class). "[I]t has never been the law in California that the class
28 representative must have *identical* interests with the class members. . . . [t]he only requirements are

1 that common questions of law and fact predominate and that the class representative be similarly
2 situated.” *Classen v. Weller*, (1983) 145 Cal.App.3d 27, 47.

3 Plaintiff served in the position plead in the class and subclass definitions, and was subject to
4 the same classification decisions, job duties, and scheduling requirements as other Instructional
5 Entrepreneurs. Defendants’ policies and practices denied Plaintiff and Class Members overtime
6 compensation and meal and rest breaks. ¶5, Terp Decl.; ¶22, Ex.2. She is a member of the derivative
7 Labor Code section 203 and 226 subclasses. Plaintiff satisfies Section 382’s “typicality” requirement.

8 **D. The Adequacy Requirement Is Met.**

9 The adequacy requirement is met by fulfilling two conditions: (1) the named representative is
10 represented by counsel qualified to conduct the pending litigation; and (2) the named representative’s
11 interests are not antagonistic to those of the class. *See Richmond v. Dart Indus. Inc.*, (1981) 29 Cal.3d
12 462, 470. Plaintiff satisfies both requirements. First, Plaintiff retained counsel experienced in wage
13 and hour class litigation (¶37, Terp Decl.; ¶¶2-10, Burrell Decl.), who have demonstrated their
14 commitment to litigating the case and obtaining a strong outcome on behalf of the Class. Second,
15 Plaintiff has diligently and responsibly represented the class in this litigation, understanding her
16 fiduciary obligations, actively participating in the prosecution of this case, and has no apparent
17 conflicts with the Class Members. ¶¶33-36, Terp Decl; Ex. 2.

18 **E. Common Issues Predominate Here.**

19 Certification is appropriate when common questions of law and fact predominate over
20 individual questions and when the use of the class device is superior to individual litigation.
21 *Richmond*, 29 Cal.3d at 470. When assessing predominance and superiority, courts may consider
22 whether the class will be certified for settlement purposes only, rendering trial manageability
23 irrelevant. *Amchem Prods. v. Windsor*, (1997) 521 U.S. 591, 620. The test for determining
24 predominance of common issues is whether the proposed class is sufficiently cohesive to warrant
25 class-wide adjudication. *Hanlon v. Chrysler Corp.*, (9th Cir. 1998) 150 F.3d 1011, 1022.

26 The proposed Class here is cohesive because Class Members share a “common nucleus of facts
27 and potential legal remedies.” *Ibid*. Plaintiff alleges and her investigations support that Defendants had
28 a policy and practice of misclassifying Instructional Entrepreneurs as exempt, and as a result,

Defendants failed to pay these employees overtime and authorize or provide breaks, etc. ¶53, SAC; ¶5, Terp Decl.

Class resolution is superior to other methods of adjudication. *See Hanlon*, 150 F.3d at 1023; *Dunk*, 48 Cal.App.4th at 1802. Here the alternative methods of adjudication would be repetitive individual cases relying on the same facts and legal arguments, amounting to a waste of judicial resources. *See Sav-On Drug Stores, Inc. v. Super. Ct.*, (2004) 34 Cal.4th 319, 340; *Bell v. Farmers Ins. Exchange*, (2004) 115 Cal.App.4th 715, 745. Using the class device will provide redress for former Instrucktional Entrepreneurs who would have been unwilling or unable to file an individual lawsuit, because, *e.g.*, their claims are small due to a short period of employment.

VII. PROPOSED CLASS NOTICE AND DISTRIBUTION METHOD ARE APPROPRIATE.

California law vests courts with discretion in fashioning an appropriate notice plan. *See Cal. Civ. Code* § 1781; *Cartt v. Super. Ct.*, (1975) 50 Cal.App.3d 960, 973-974. Notice must “have a reasonable chance of reaching a substantial percentage of the class members[.]” *See id.*, 50 Cal.App.3d at 974. Personal notification of this nature is the method preferred by the California Rules of Court. *See Cal. Rules of Ct.*, Rule 3.766(f). The notice plan proposed here entails taking pains to notify each Class Member by first class mail and email. ¶¶1.15, 9.1, 10.3, Ex. 1. ¶¶24, 25, Terp Decl.

The proposed Settlement Administrator, Atticus, is experienced in the field and was chosen after comparing bids from experienced administrators. ¶26, Terp Decl.; ¶4, Longley Decl.; *id.*, Ex. A.

The Notice invites Class Members to learn more about the case by visiting the Court’s website, or a Class website maintained by Class Counsel. Ex. A to Ex. 1, p. 8. The Class website will contain relevant information and documents. ¶10.4, Ex. 1.

The proposed Class Notice fairly apprises the Class of the Settlement’s terms and the options to participate in, object to, or opt out of the settlement, including those disclosures required by California Code of Civil Procedure, Rule 3.766(d). ¶24, Terp Decl.; Ex. A to Ex. 1 (a copy of the proposed notice); *see also Wershba*, 91 Cal.App.4th at 251-252. Here, the notice plan should be approved.

VIII. THE FINAL APPROVAL HEARING SHOULD BE SCHEDULED.

Plaintiff requests the Court schedule the Final Fairness Hearing within 120 days of its

preliminary approval order. Cal. Rules of Ct., Rule 3.769(e).

IX. CONCLUSION

For the foregoing reasons and based on the record in this litigation, Plaintiff requests the Court grant Plaintiff's motion and set a Final Approval Hearing time and date.

DATE: July 12, 2022

TERP LAW

By: 

Rachel M. Terp,
Attorney for Plaintiff Andrea O'Neal-
Roberts, Individually, as a Representative
Plaintiff, and for the Putative Class

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF ALAMEDA

3 I am over the age of 18 years and not a party to the within entitled action; my business address
4 is 180 Grand Ave., Suite 1300, Oakland, California 94612.

5 On July 13, 2022, I served the foregoing document, described as:

- 6 • Plaintiff's Notice of Motion & Motion for Preliminary Approval of Class Action Settlement
7 and Class Notice, Certification of Settlement Class and Subclasses, and Approving the Class
8 Representative, Class Counsel, and Settlement Administrator;
- 9 • Plaintiff's Memorandum of Points & Authorities in Support of Motion for Preliminary
10 Approval of Class Action Settlement and Class Notice, Certification of Settlement Class and
11 Subclasses, and Approving the Class Representative, Class Counsel, and Settlement
12 Administrator;
- 13 • Declaration of Attorney Rachel M. Terp in Support of Motion for Preliminary Approval of
14 Class Action Settlement and Class Notice, Certification of Settlement Class and Subclasses,
15 and Approving the Class Representative, Class Counsel, and Settlement Administrator;
- 16 • Declaration of Darci E. Burrell in Support of Motion for Preliminary Approval of Class Action
17 Settlement
- 18 • Atticus Administration Background and Cost of Administration by Declaration of Christopher
19 Longley;
- 20 • [Proposed] Order Granting Unopposed Motion for Preliminary Approval of Class Action
21 Settlement and Class Notice, Certification of Settlement Class and Subclasses, and Approving
22 the Class Representative, Class Counsel, and Settlement Administrator;

23 on the interested parties to said action, listed below, by the following means:

24 [xx] (Electronic Service) By authorizing eService through the Electronic Filing Service Provider at
25 the time of submission of documents for filing, to the electronic service addresses provided below.

26 I declare under penalty of perjury that the foregoing is true and correct, and that I am employed
27 in the office of a member of the Bar of this Court at whose direction the service was made.

28 Executed on July 13, 2022, at Moraga, California.



Gretchen Trupiano

Schriner Law Firm PC
Kyle L. Schriner
kyle@schrinerlaw.com
1936 University Avenue, Suite 110
Berkeley, CA 94704
Attorneys for Defendants Off the Grid Services, LLC & The Whole Cart

From: Dept. 23, Superior Court <dept23@alameda.courts.ca.gov>

Sent: Wednesday, July 13, 2022 9:35 AM

To: Kyle Schrinier <kyle@schrinerlaw.com>; Rachel Terp <rachel@terplaw.com>

Cc: Darci Burrell <darci@levyvinick.com>; David Faris <david@levyvinick.com>

Subject: Re: O'Neal-Roberts v. Off the Grid Services; Case No. RG20075270 - reservation number for preliminary approval

September 6, 2022, 3:00 p.m. has been reserved. Please reference the following reservation number on your Motion for Preliminary Approval of Settlement, **A-20075270-001**. Please have courtesy copies emailed and delivered to Department 23 upon filing of your motion.

The court will no longer be providing a court reporter. If you wish to have your proceedings transcribed you will need to make arrangements to have a court reporter present on the day of the hearing.

Please keep reset requests to a minimum, resources are limited.

Thank you,

Jhalisa Castaneda

Courtroom Clerk to the Honorable Judge Seligman

Superior Court of California | Alameda County

1221 Oak Street

Oakland, California 94612

510-267-6939

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