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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

PABLO SANCHEZ, and VIOLET
ALVAREZ, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

HEARST COMMUNICATIONS, INC., and
DOES 1–10, inclusive,

Defendants.

Case No. 3:20-cv-05147-VC

**NOTICE OF MOTION AND UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION AND PAGA
SETTLEMENT, CONDITIONAL
CERTIFICATION OF CLASS, APPROVAL OF
CLASS NOTICE, AND SETTING OF FINAL
APPROVAL HEARING**

Hearing Date: November 10, 2022

Time: 10:00 A.M.

Courtroom: 4 – 17th Floor

Judge: The Honorable Vince Chhabria

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NOTICE OF UNOPPOSED MOTION

To the Clerk of Court and all interested parties:

PLEASE TAKE NOTICE THAT on November 10, 2022 at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 4 of this Court, located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California 94102, before the Honorable Vince Chhabria, Plaintiffs Pablo Sanchez and Violet Alvarez, hereby do and will move the Court to: (1) conditionally certify a settlement class; (2) preliminarily approve the parties' proposed class action settlement (the "Settlement"); (3) appoint Plaintiffs as the Class Representatives, their counsel as Class Counsel, and ILYM Group, Inc. as Settlement Administrator; (4) approve the forms of notice to the class; and (5) schedule a hearing on the final approval of the Settlement.

Plaintiffs make this unopposed motion on the grounds that the Settlement is fair, adequate, and reasonable and within the range of possible final approval.

This motion is based upon this Notice of Motion for Preliminary Approval of Class Action and PAGA Settlement, Conditional Certification of Class, Approval of Class Notice, and Setting of Final Approval Hearing and the following Memorandum; the accompanying Declaration of Jahan C. Sagafi; and proposed form of Order: (1) Preliminarily Approving Proposed Settlement; (2) Conditionally Certifying Settlement Class; (3) Appointing Class Representatives, Class Counsel, and Settlement Administrator; (4) Approving Forms of Notice to Class of Settlement, Class Member Settlement Information Sheet; and (5) Setting Hearing for Final Approval; the Court's record of this action; all matters of which the Court may take notice; and such oral or documentary evidence presented at the hearing on the motion.

MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION**I. INTRODUCTION**

Plaintiffs Pablo Sanchez and Violet Alvarez (“Plaintiffs”) respectfully seek preliminary approval of a \$950,000 common fund settlement of this class and representative action on behalf of the class of 57 individuals, as set forth in the parties’ Class Action Settlement Agreement and Release (“Settlement Agreement”), attached as Exhibit A to the Declaration of Jahan C. Sagafi (“Sagafi Decl.”). Subject to Court approval, the parties have settled all claims relating to Defendant Hearst Communications, Inc.’s (“Hearst” or “Defendant”) alleged misclassification of Plaintiffs and proposed Class Members and Aggrieved Individuals as independent contractors under *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d 341 (Cal. 1989).¹ The Settlement is inclusive of attorneys’ fees and costs, settlement administration costs, Class Representative Service Payments to the named Plaintiffs, and the Private Attorneys’ General Act (“PAGA”) Fund. In the face of significant risk to a classwide recovery, the settlement provides substantial monetary relief for the Settlement Class Members: a net average amount of over \$8,900 per person (a gross amount of over \$16,600 per person).

Plaintiffs request that the Court: (1) grant preliminary settlement approval; (2) preliminarily certify the Class for settlement purposes; (3) approve the form, content, and method of distribution of the Notice; (4) appoint ILYM Group, Inc. (“ILYM”) as the Settlement Administrator; (5) appoint Outten & Golden LLP and the Ottinger Firm, P.C. as Class Counsel; (6) appoint Plaintiffs as Class Representatives; and (7) schedule a final approval hearing.

¹ The ABC Test under *Dynamex Operations W. v. Super. Ct.*, 4 Cal. 5th 903 (Cal. 2018) does not apply to this case, because newspaper distributors are exempt from California Assembly Bill 5. *See also* ECF No. 103 (Order Denying Class Certification) (“All agree that the question whether Hearst misclassified Sanchez and Alvarez turns on an application of California’s *Borello* test.”).

II. BACKGROUND

A. Factual Background

The operative complaint alleges claims on behalf of dealers that contracted with Hearst in California between July 27, 2016, and the present. These contracts cover distribution of newspapers, including the *San Francisco Chronicle*, to Hearst’s subscribers at their homes. *See* Second Amended Complaint, ECF No. 78, (“SAC”) ¶ 46. Because Plaintiffs and Settlement Class Members had the ability to and did hire subcontractors to deliver the newspapers, Hearst refers to them as “Dealers.” Plaintiffs allege that Hearst misclassified them and Settlement Class Members as independent contractors, triggering Labor Code violations, including by failing to compensate Settlement Class Members for all hours worked, failing to compensate piece rate employees for rest and recovery periods and other non-productive time, failure to provide Settlement Class Members with meal periods and rest periods, failure to provide Class Members with minimum and overtime wages, failing to maintain accurate and complete employment records, failure to provide Class Members with accurate, itemized wage statements, failure to reimburse Class Members for business expenses, and failure to timely pay all wage earned. *See* SAC. ¶¶ 2-4. Plaintiffs allege that these acts also violate the California Unfair Competition Law. *Id.* ¶ 2. In addition, Plaintiff Sanchez also seeks PAGA penalties on behalf of himself and other aggrieved employees for resulting PAGA violations. *Id.* ¶¶ 105-113.

B. Procedural Background

On July 27, 2020, this action was filed on a classwide basis. *See* ECF No. 1. The Complaint was amended on April 1, 2021, ECF No. 31, and November 19, 2021, ECF No. 78. On May 18, 2021, following the exchange of informal discovery, the parties mediated before experienced mediator Mark Rudy, of Rudy Exelrod Zieff & Lowe LLP, but did not settle. *See* Declaration of Robert Ottinger

(“Ottinger Decl.”) ¶ 8.

For the remainder of 2021, the parties then engaged in extensive discovery, during which Plaintiffs produced 11 potential Class Member declarations, produced over 100,000 pages of documents on behalf of Plaintiffs and Class Member declarants, responded to six sets of interrogatories, and produced Plaintiffs and six potential Class Members for depositions. *See* Sagafi Decl. ¶ 17; Ottinger Decl. ¶ 9. Hearst has responded to requests for admission, four sets of document demands, and interrogatories, including by serving two sets of supplemental interrogatory responses. *See* Sagafi Decl. ¶ 18. Hearst produced approximately 5.3 gigabytes of electronically stored information (including an agreed-upon sample of Settlement Class Members’ Home Delivery Agreements (“HDAs”), invoices, Hearst e-mails to, from, and about Class Members, subscriber and delivery route data, and expense records) and one Rule 30(b)(6) deposition witness, its Senior Vice President of Print Operations, seven dealer declarations, and a Hearst employee declaration. *Id.* Hearst also engaged in third-party discovery, including serving document subpoenas to Plaintiff Pablo Sanchez’s employer and both Plaintiffs’ accountants. *Id.* ¶ 19.

During this discovery phase, the Court set a Rule 23 class certification deadline of August 23, 2021. ECF No. 36. Class Member Manuel Reyes sought to intervene, arguing that the Class Members’ interests were not being adequately represented. ECF Nos. 37, 39. After the Court denied Reyes’ motions and held a case management conference to discuss discovery progress, Plaintiffs retained Outten & Golden LLP to join the Ottinger Firm as co-counsel to prosecute these claims together. Sagafi Decl. ¶ 21. On August 25, 2021, the Court held another case management conference, at which it continued the Rule 23 motion deadline to November 19, 2021. ECF No. 69. Meanwhile, the Parties continued to engage in extensive discovery. Sagafi Decl. ¶ 22.

Plaintiffs moved for class certification, and on May 4, 2022, the Court denied the motion without prejudice. ECF No. 103. The Court held that “potentially significant variations in subcontracting

behavior preclude a finding that common issues predominate” but that “[t]here may be efficient way to handle the variations . . . such that certifying the class—or certifying defined subclasses—will prove appropriate.” ECF No. 103 at 2-3. The Court also concluded that there is a “reasonable possibility that a class could be certified on a stronger showing.” ECF No. 103 at 4.

The Parties reengaged Mr. Rudy to explore settlement. Sagafi Decl. ¶ 23. After extensive offers, counteroffers, and discussions overseen by Mr. Rudy, both sides accepted a mediator’s proposal to settle the entire action on August 10, 2022. Sagafi Decl. ¶ 24. The parties then vigorously negotiated the terms of the long-form Settlement Agreement, which is now fully executed and attached to the Sagafi Declaration as Exhibit A. Sagafi Decl. ¶ 25.

III. THE PROPOSED SETTLEMENT

A. The Settlement Class

The proposed Settlement Class comprises 57 Settlement Class Members.² Sagafi Decl. ¶ 57. The Settlement Class comprises the same group of individuals as the proposed class in the operative complaint, *see* ECF No. 78, and is defined as:

All persons who have entered into written contracts with Hearst solely pursuant to a home delivery agreement in the State of California regarding newspapers, including, but not limited to, the San Francisco Chronicle, at any time from July 27, 2016, through the date of the Preliminary Approval Order entered by the Court, and who do not submit a timely and valid Opt Out.

Sagafi Decl. Ex. A (Settlement Agreement) ¶ 1.4. If more than two Settlement Class Members (i.e., 4%) opt out, Hearst has the right to withdraw from this Settlement. *Id.* ¶ 4.4.

² The use of capitalized terms in this Memorandum is consistent with those used in the Settlement Agreement and are defined therein. *See* Sagafi Decl. Ex. A (Settlement Agreement).

B. Settlement Overview

1. Monetary Relief

The \$950,000 non-reversionary Gross Settlement Amount will cover (a) Settlement Class Member payments; (b) \$30,000 for PAGA penalties, 75% of which will be paid to the California Labor and Workforce Development Agency (“LWDA”) and 25% paid to Aggrieved Individuals, consistent with PAGA; (c) two Class Representative Service Awards of up to \$15,000 each; (d) Class Counsel’s attorneys’ fees not to exceed 35% of the Settlement Amount (\$332,500); (e) litigation costs up to \$40,000; and (f) settlement administration costs not expected to exceed \$6,750. Sagafi Decl. Ex. A (Settlement Agreement), ¶ 1.16. The Net Settlement Amount (the amount to be paid to Class Members) is defined as the Gross Settlement Amount minus items (b) through (f). *Id.* ¶ 1.19.

Within 51 days after preliminary approval, the Settlement Administrator will distribute the Settlement Notice by mail and by email for every Class Member for whom Hearst has an email address. *Id.* ¶ 3.3. Any mailing returned to the Settlement Administrator as undeliverable will be sent within five calendar days to the appropriate forwarding address or the correct address found using a computer-based skip-trace search. *Id.* ¶ 3.5.

The Notice will advise each Settlement Class Member of the action and their right, as well as the procedures, to opt out or object. Sagafi Decl. Ex. A (Settlement Agreement), ¶ 3; Ex. 1 (Notice). Settlement Class Members will have 45 days following the postmark date of the initial Notice mailing to opt out or object. *Id.* ¶ 4.1-4.2. Consistent with California law, Settlement Class Members cannot opt out of the PAGA portion of the Settlement. *Id.* ¶ 4.2.

Each Settlement Class Member’s Individual Class Payment will be calculated in proportion to the total compensation paid by Hearst during the Class Period. Sagafi Decl. Ex. A (Settlement Agreement), ¶ 1.17. Settlement Class Members who do not opt out will automatically receive their Individual Class Payment without submitting a Claim Form. *Id.* ¶ 5.9. Similarly, each Aggrieved

Individuals' Individual PAGA Payment will be calculated in proportion to the total number of Pay Periods under contract with Hearst during the PAGA Period. *Id.* ¶ 1.18.

The Release includes all claims that were or could have been asserted in the operative complaint that are based on or arise out of the facts alleged in the operative complaint. *Id.* ¶ 6.1. In addition, Plaintiffs, as Class Representatives, will generally release all claims, except those that as a matter of law, may not be released. *Id.* ¶ 6.2.

2. Class Representative Service Payments

The settlement provides that, subject to Court approval, Hearst will pay Plaintiffs Pablo Sanchez and Violet Alvarez Class Representative Service Payments of \$15,000 each (for a total of \$30,000). Sagafi Decl. Ex. A (Settlement Agreement), ¶ 5.2.

Courts in this District traditionally approve service awards of this amount and more based on several factors: (1) the actions the plaintiff has taken to protect the interests of the class, (2) degree to which the class has benefitted from those actions, (3) the time and effort that representatives put into the litigation, and (4) the reasonable fears of workplace retaliation. *See Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334-36 (N.D. Cal. 2014) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)). *See also Galeener v. Source Refrigeration & HVAC, Inc.*, No. 13-cv-04960-VC, 2015 U.S. Dist. LEXIS 193092, at *10-11 (N.D. Cal. Aug. 20, 2015) (approving service awards of \$27,000, \$25,000, and \$15,000); *Walton v. AT&T Servs.*, No. 15-cv-03653-VC, 2018 U.S. Dist. LEXIS 245928, at *8 (N.D. Cal. Feb. 14, 2018) (approving service award of \$20,000); *Brawner v. Bank of Am. N.A.*, No. 14-cv-02702-LB, 2016 U.S. Dist. LEXIS 4975, at *15-16 (N.D. Cal. Jan. 14, 2016) (approving service award of \$15,000).

The proposed service awards here are reasonable in light of (a) the value created by both Class Representatives in initiating and prosecuting this action (factor two, above), (b) the effort and time they invested to pursue claims on behalf of all Settlement Class Members and Aggrieved Individuals (factors

one and three), and (c) the risks they have incurred of adverse action from potential employers, business partners, landlords, and others by virtue of serving as the public face of adversarial litigation against their alleged employer (factor four as well as broader considerations).

First, Plaintiffs made this Settlement possible. If they had not stepped forward, the litigation would not have occurred, and the Settlement Class Members would likely be receiving nothing. Their courage has yielded substantial recoveries for each Settlement Class Member. Second, both Plaintiffs spent many hours providing information to assist Class Counsel with their pre-suit investigation, guiding Class Counsel's discovery requests, responding to document requests and interrogatories, sitting for day-long depositions, and staying apprised of developments in the case. Ottinger Decl. ¶¶ 12; Sagafi Decl. ¶ 27. Third, because of their work on behalf of the Class, Plaintiffs' names are prominently visible in public records. Specifically, a search of "Sanchez Hearst" and "Alvarez Hearst" yields results for this litigation on the first page of Google results. Ottinger Decl. ¶ 13. In addition, during the litigation, Hearst subpoenaed Plaintiff Sanchez's current employer and both Plaintiffs' accountants for documents. Sagafi Decl. ¶ 19. Finally, both Plaintiffs, in contrast to the other Settlement Class Members, will sign a general release of claims. Sagafi Decl. Ex. A (Settlement Agreement), ¶ 5.2.

3. Attorneys' Fees and Costs

As provided for in the Settlement Agreement, Class Counsel will file a separate motion for the requested attorneys' fees, plus actual litigation costs and expenses. Sagafi Decl. Ex. A (Settlement Agreement), ¶ 7.4. Class Counsel will not seek more than 35% of the Gross Settlement Amount of \$950,000 (i.e., \$332,500), plus costs incurred in prosecuting the action up to \$40,000.

Class Counsel's lodestar in this zealously litigated action is already over \$1,609,000, reflecting over 2,870 attorney and paralegal hours, in addition to litigation costs of over \$31,000. Sagafi Decl. ¶ 28-29; Ottinger Decl. ¶ 14-15. These amounts do not account for future work to be performed to (1) secure preliminary approval, (2) oversee implementation of notice and respond to Settlement Class

Member inquiries during the notice period, (3) brief and argue final approval, and (4) oversee implementation of the settlement and report to the Court regarding final steps in the litigation. Sagafi Decl. ¶ 30. Thus, the \$332,500 requested fee reflects a “negative” lodestar multiplier of 0.21x, which will further decrease during the coming months while Class Counsel continues to work for the Settlement Class Members’ benefit. *Id.* ¶¶ 31. *See Johnson v. Triple Leaf Tea Inc.*, No. 14-cv-1570, 2015 U.S. Dist. LEXIS 170800, at *24 (N.D. Cal. Nov. 16, 2015) (accounting for “future attorney time” in decision whether attorneys’ fees were reasonable).

Before the deadline for Class Member objections, Class Counsel will submit a detailed motion seeking approval of fees and costs and the Class Representative service awards.

4. Settlement Administration

The parties have jointly selected ILYM Group, Inc., as the Settlement Administrator out of a pool of three potential administrators who provided bids. Sagafi Decl. Ex. A (Settlement Agreement), ¶ 1.31. ILYM estimates total Settlement Administration costs of \$6,750. Declaration of Lisa Mullins ¶ 10. ILYM has substantial experience administering class settlements in this District and nationwide. *See id.* ¶¶ 3-7. In addition, ILYM has addressed the Data Protection Checklist provided by the District. *See id.* ¶ 9.

5. Cy Pres

To the extent that any monies are undeliverable, the parties have agreed to allocate the residue to the East Bay Community Law Center (“EBCLC”). Sagafi Decl. Ex. A (Settlement Agreement), ¶¶ 1.10; 5.10. This part of the Settlement comports with federal law. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (holding that *cy pres* distribution is appropriate “for the limited purpose of distributing the unclaimed funds”); *Romero v. Perryman (In re Easysaver Rewards Litig.)*, 906 F.3d 747, 761 (9th Cir. 2018) (same). EBCLC provides legal services to underserved communities, including workers asserting their rights under California’s employment laws.

Sagafi Decl. ¶ 32; *see also In re Easysaver*, 906 F.3d at 761-62 (*cy pres* recipients should be selected in light of the objectives of the underlying statute and the interests of the class).

IV. ARGUMENT

At the preliminary approval stage, “district courts should review class action settlements just as carefully . . . as they do at the final stage.” *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1036-37 (N.D. Cal. 2016); *see also Hunt v. VEP Healthcare, Inc.*, No. 16-cv-04790-VC, 2017 U.S. Dist. LEXIS 139700 (N.D. Cal. Aug. 22, 2017); *Eddings v. DS Services of America, Inc.*, No. 15-cv-02576-VC, 2016 U.S. Dist. LEXIS 84151 (N.D. Cal. May 20, 2016). The inquiry at preliminary approval “should be whether the settlement is ‘fair, reasonable, and adequate.’” *Cotter*, 193 F. Supp. 3d at 1037.

A. Certification of the Settlement Class Is Proper.

For settlement purposes only, the parties agree to certification of the settlement class. “The validity of use of a temporary settlement class is not usually questioned.” Alba Conte & Herbert B. Newberg, 4 Newberg on Class Actions § 11:22 (4th Ed. 2002); Manual for Complex Litigation, Fourth, § 21.612.

Conditionally certifying a class for settlement purposes differs from certifying a class in litigation. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556–57 (9th Cir. 2019) (“The criteria for class certification are applied differently in litigation classes and settlement classes. In deciding whether to certify a litigation class, a district court must be concerned with manageability at trial. However, such manageability is not a concern in certifying a settlement class where, by definition, there will be no trial.”). Indeed, courts approve settlement classes even after class certification was denied for trial purposes. *See, e.g., Romero v. Securus Technology, Inc.*, No. 16-cv-1283 JM (MDD), 2020 U.S. Dist. LEXIS 104857, at *4-5, *21-22 (S.D. Cal. June 16, 2020); *Pena v. Taylor Farms Pac., Inc.*, No. 13-cv-01282-KJM-AC, 2020 U.S. Dist. LEXIS 205468, at *2-3, *24 (E.D. Cal. Nov. 2, 2020).

All Rule 23 requirements are met for settlement. Indeed, in the Court's order denying class certification, the Court found no issues with any factors aside from predominance and superiority. *See* ECF No. 103.

First, numerosity is met because joinder of the 57 Settlement Class Members would be impractical. Fed. R. Civ. P. 23(a)(1). "Although the requirement is not tied to any fixed numerical thresholds, courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 605-06 (N.D. Cal. 2014). Here, the settlement class comprises 57 people.

Second, commonality is met because "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Ninth Circuit "construe[s]" this requirement "permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Even though proposed class members "may possess different avenues of redress," so long as "their claims stem from the same source," there is sufficient commonality "to satisfy the minimal requirements of Rule 23(a)(2)." *Id.* at 1019-20. Here, the common question is whether Plaintiffs and the Settlement Class Members were properly classified as independent contractors under California's *Borello* test.

Third, typicality is satisfied. Typicality is established if "representative claims are . . . reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. The Class Representatives and Settlement Class Members assert the same claims, so typicality is readily satisfied.

Fourth, Plaintiffs have fairly and adequately protected the interests of the Class and will continue to do so. Fed. R. Civ. P. 23(a)(4). The adequacy requirement is met where the class representative: (1) has common, and not antagonistic, interests with unnamed class members; and (2) will vigorously prosecute the interests of the class through qualified counsel. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Hanlon*, 150 F.3d at 1020. Here, each Class Representative shares a common interest

with the Settlement Class Members they seek to represent, in that they all suffered the same type of injury, and they share an interest in vigorous prosecution. The Class Representatives have retained adequate Class Counsel, who are highly qualified in terms of experience and expertise. Sagafi Decl. ¶¶ 4-13; Ottinger Decl. ¶¶ 4-7.

Fifth, the predominance test of Rule 23(b)(3) is met because the proposed Class is sufficiently cohesive to warrant adjudication on a classwide basis. *Amchem*, 521 U.S. at 623. Importantly, predominance does not require “that each element of [a plaintiff’s] claim [is] susceptible to classwide proof.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013) (internal quotation marks and citation omitted). Common questions may predominate “even though certain class members’ circumstances var[y] and some of the defendant’s practices would have to be proven by anecdotal testimony.” *Delagarza v. Tesoro Ref. & Mktg. Co.*, No. 09-cv-5803, 2011 U.S. Dist. LEXIS 101127, at *38 (N.D. Cal. Sept. 8, 2011). Here, common questions predominate because Plaintiffs and Settlement Class Members were subject to Hearst’s uniform practice of contracting dealers as independent contractors pursuant to the contractor home delivery agreements (“HDA”). These facts, and the legal questions they raise, predominate over any issues that affect class members individually.

Sixth, a class action is superior to individual suits, especially for settlement purposes. *Amchem*, 521 U.S. at 615. This requirement is satisfied because “there is no indication that class members seek to individually control their cases, that individual litigation is already pending in other forums, or that this particular forum is undesirable for any reason.” *Tierno v. Rite Aid Corp.*, No. 05-cv-02520, 2006 U.S. Dist. LEXIS 71794, at *33 (N.D. Cal. Aug. 31, 2006). Settlement Class Members likely lack the resources and incentives to secure experienced, qualified counsel, or to see litigation through to completion on their own, individually. Few individuals contract with for Hearst are able to invest the type of money such litigation requires and are willing to take on the scores of hours of time and stress inherent in litigation for a chance to recover the amount of lost pay at issue. In addition, individual

lawsuits from dozens of individuals would be wasteful and inefficient for both the court system and Hearst.³ See, e.g., *Whiteway v. FedEx Kinko's Office & Print Servs.*, No. 05-2320, 2006 U.S. Dist. LEXIS 69193, at *30 (N.D. Cal. Sep. 13, 2006). Accordingly, certification is superior to any other method of resolving this matter, as it will promote economy, expediency, and efficiency.

Finally, the Court should appoint Class Counsel pursuant to Rule 23(g). Rule 23(g) requires a court that certifies a class to appoint class counsel, taking into consideration four factors: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). Class Counsel satisfy these criteria. Class Counsel are experienced class action and wage and hour attorneys, including specifically with misclassification lawsuits, have the resources to prosecute the action to completion, and used their expertise to obtain a positive result for the class. Sagafi Decl. ¶¶ 4-13; Ottinger Decl. ¶¶ 4-7.

For these reasons, the proposed Class should be certified for settlement purposes.

B. The Proposed Settlement Is Fair, Reasonable, and Adequate, and Should Be Approved in All Respects.

Once the Court has found class certification proper, the next step of the preliminary approval process is to assess whether the settlement is “fundamentally fair, adequate, and reasonable.” *Hanlon*, 150 F.3d at 1026. Typically, the first-stage analysis looks for “obvious deficiencies,” with preliminary approval being granted if the settlement is non-collusive and within the

³ Plaintiffs are aware of only one pending misclassification lawsuit brought by a Class Member against Hearst, *Reyes v. Hearst Communications, Inc.*, No. 21-cv-03362-PJH (N.D. Cal.). Plaintiffs have been in communication with Mr. Reyes's counsel since he attempted to intervene here in mid-2021. Plaintiffs understand that Mr. Reyes intends to opt out so that he can continue his individual litigation. The parties are not aware of anyone else who intends to opt out or file a different lawsuit against Hearst.

range of possible final approval. *Walsh v. Corepower Yoga LLC*, No. 16-cv-05610-MEJ, 2017 U.S. Dist. LEXIS 20974, at *19 (N.D. Cal. Feb. 14, 2017) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)).⁴

When considering whether to grant approval, courts often “put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Courts may also assess additional factors, which are assessed in greater detail at final approval. These factors are: “the strength of the plaintiffs’ case,” “the risk, expense, complexity, and likely duration of further litigation,” “the risk of maintaining class action status throughout the trial,” “the amount offered in settlement,” “the extent of discovery completed and the stage of the proceedings,” “the experience and views of counsel,” “the presence of a governmental participant,” and “the reaction of the class members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026. These last two considerations are not significant here, as the former is not relevant, and the latter cannot be gauged yet, and it will be at final approval.

PAGA settlements are reviewed under a comparable standard. The LWDA has provided guidance for PAGA settlement approval, mirroring the standard for evaluating class action settlements. *See O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134-35 (N.D. Cal. 2016); *see also Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 77 (Cal. Ct. App. 2021) (“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.”). Courts must also evaluate these factors “‘in light of PAGA’s public policy goals’ of ‘benefitting the public by augmenting the state’s enforcement capabilities, encouraging compliance with

⁴ *See also Cancilla v. Ecolab, Inc.*, No. 12-cv-3001, 2015 U.S. Dist. LEXIS 106249, at *9 (N.D. Cal. Aug. 12, 2015) (focusing preliminary approval analysis on “noncollusive negotiations,” the lack of “obvious deficiencies” or “preferential treatment,” and being “with[in] the range of possible approval”); Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions*, § 13.15 (5th ed.).

Labor Code provisions, and deterring noncompliance.”” *Basiliali v. Allegiant Air, LLC*, No. 18-cv-3888, 2019 U.S. Dist. LEXIS 228250, at *8 (C.D. Cal. July 1, 2019) (quoting *Patel v. Nike Retail Servs., Inc.*, 14-cv-4781, 2019 U.S. Dist. LEXIS 77988, at *6 (N.D. Cal. May 8, 2019)).

Here, the above factors weigh heavily in favor of preliminary approval.

1. The Parties Participated in Arms-Length Negotiations Facilitated by an Experienced Neutral Mediator.

The parties agreed to the Settlement Amount only after two sets of settlement discussions: first, in May 2021, then over the course of several months in summer 2022. These negotiations were arms'-length and zealous, informed by robust discovery and facilitated by one of the preeminent private mediators in California. Sagafi Decl. ¶ 33. There was no competing class or representative litigation creating the risk of Hearst engaging in plaintiff shopping to pick the weaker negotiating partner (a “reverse auction”). *Id.* ¶ 34. In short, the legal system’s traditional assumption that two parties engaged in litigation will reach an optimal settlement by pursuing their self-interest holds, because of the absence of a third party who can kick off a race to the bottom between two competing plaintiffs selling the same good (a class release).

2. The Balance of Strengths and Weaknesses of Plaintiffs’ Case Supports the Settlement Amount.

When courts decide whether to give preliminary approval to a class action settlement, “perhaps the most important factor to consider is ‘plaintiffs’ expected recovery balanced against the value of the settlement offer.”” *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 931 (N.D. Cal. 2016) (citations omitted). Courts should also evaluate “the relative strengths and weaknesses of the plaintiffs’ case; it may be reasonable to settle a weak claim for relatively little, while it is not reasonable to settle a strong claim for the same amount.” *Id.*

While Plaintiffs believe that they can prevail on all issues, to recover full damages, they would have to surmount several hurdles, with loss on any one eliminating or significantly reducing the

recovery: (1) winning Rule 23 class certification after the Court has denied Plaintiffs' first such motion without prejudice; (2) surviving Hearst's likely eventual motion for decertification; (3) overcoming summary judgment; (4) prevailing at trial on the misclassification issue and the underlying Labor Code claims; (5) demonstrating damages; and (6) surviving appeal.

As to class certification, in litigation, and for trial purposes, this Court has already found that the Settlement Class Members' use of helpers provides Hearst an argument that secondary *Borello* factors such as whether the Settlement Class Members are engaged in the newspaper business or a distinct occupation weigh in favor of independent contractor status for at least some Settlement Class Members. And Hearst further contends that there is no single piece of evidence that establishes whether each Settlement Class Member uses helpers. Instead, Hearst contends that this inquiry can be answered only by deposing each Settlement Class Member. Introducing this requirement could significantly shrink the number of Class members willing to spend the time and subject themselves to the adversary process for the chance to recover money in the future.

But here, in the settlement context, class certification is appropriate because there is a reasonable basis for the parties to agree strictly for settlement purposes, and the court to find, that the primary *Borello* factor of control justifies classwide treatment for settlement purposes.

As to the merits, there is significant risk that the Court would find that the *Borello* factors weigh against employee status and that *Martel* does not apply here or was wrongly decided. *See* ECF No. 82 at 25 (Hearst opposition to class certification). Furthermore, at trial, notwithstanding Plaintiffs' arguments regarding their satisfaction of *Borello*, a jury might deem the fact that they and other Settlement Class Members consistently outsourced work to subcontractors to support independent contractor status. Even were they to win at trial, Plaintiffs would likely face skeptical appellate courts less receptive to their arguments regarding the importance of finding these Class Members to be employees entitled to the protections that status carries.

Lastly, as to damages, Plaintiffs and Settlement Class Members could have difficulty proving the hours they personally worked in the absence of regular corporate timekeeping and even proving the routes they personally worked, the miles they personally drove, and the costs they personally incurred. So far, discovery has not turned up any records from Hearst that track whether dealers personally perform any of the distribution work, let alone the number of hours amount of costs incurred to do so by each Settlement Class Member.

3. The Risk, Expense, Complexity, And Delay of Further Litigation Support Preliminary Approval.

The Settlement saves Settlement Class Members from significant risk of no recovery, the cost and burden of further litigation or individual litigation, and the delay inherent in litigation and appeals (that delay is an even greater risk while courts are backed up due to the pandemic). As detailed above, the litigation is highly complex, both procedurally and substantively. Absent settlement, the Parties would need to conduct further discovery, pre-trial motion practice, expert discovery, and trial preparations. Once liability had been established on a classwide basis, Class Members could likely be required to testify at individual damages minitrials. Some or many might determine that such minitrials were not worth the time, cost, and stress, especially given that dealers work the graveyard shift and are normally sleeping during court hours. Further litigation could easily last several more years and investment of hundreds of thousands of dollars more in costs, and a million dollars or more of attorney time. For these reasons, the law strongly favors settlements, particularly where complex class action litigation is concerned. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

4. The Settlement Provides Substantial Relief for Settlement Class Members.

The Court should approve the proposed settlement because it provides substantial relief to the settlement class relative to the theoretical maximum recovery. “[P]erhaps the most important factor” courts consider in determining whether to grant preliminary approval is “plaintiffs’ expected recovery

balanced against the value of the settlement offer.” *Cotter*, 176 F. Supp. 3d at 935 (internal quotation marks omitted). Here, the monetary relief is strong in light of the potential recovery and risks.

Based on a significant amount of data and reasonable assumptions, the total potential damages and penalties recoverable in a class trial would be \$12,432,757. Sagafi Decl. ¶ 35. This figure is based on the 57 Class Members having worked 9,503 workweeks during the liability period, through the date of the preliminary approval hearing (Nov. 10, 2022), at a \$40 regular hourly rate, 15 hours per week of overtime every week, three meal break violations every week, three rest break violations every week, and \$400 in unreimbursed expenses every week. *Id.* Yet, according to Hearst, some dealers have none of these violations, based simply on the fact that they never personally performed the distribution work. Plaintiffs have calculated damages for payment for nonproductive time (Cal. Lab. Code § 226.2), overtime violations, meal break violations (Cal. Lab. Code §§ 226.7, 512), rest break violations (Cal. Lab. Code §§ 226.7, 512), wage statement penalties (Cal. Labor Code § 226), waiting time penalties (Cal. Lab. Code §§ 201–203), unreimbursed expenses (Cal. Lab. Code § 2802), and interest where applicable, as well as PAGA penalties (Cal. Lab. Code § 2698 *et seq.*) for violations of protections regarding overtime, meal and rest breaks, wage statements, waiting time, unreimbursed expenses, and recordkeeping. *Id.* ¶ 35-36.

Plaintiffs estimate \$817,534 in PAGA penalties, which would be allocated 75% to the LWDA and 25% to the Aggrieved Individuals. *Id.* ¶ 36. This brings the total potential exposure to \$13,250,291, based on Plaintiffs overcoming all of Hearst’s defenses, and above assumptions regarding violation rates and all 57 Settlement Class Members personally performing the distribution work. *Id.* ¶ 37. Of course, there are many scenarios in which Plaintiffs could prevail on liability and recover far less in damages and penalties. This figure assumes no discretionary reduction of PAGA penalties by the Court.

The \$950,000 settlement amount represents 7.2% of that total exposure figure. Given the uncertainty of class certification, surviving summary judgment, prevailing at trial, proving all damages

and penalties sought, and defending a trial victory on appeal, the Settlement provides strong value for the Settlement Class Members. They stand to recover an average of over \$8,900 in net payments. Sagafi Decl. ¶ 38. This is a substantial recovery for these uncertain claims. Courts have approved settlements of strong claims with steeper discounts. *See Harvey v. Morgan Stanley Smith Barney LLC*, No. 18-cv-02835-WHO, 2019 U.S. Dist. LEXIS 159258, at *8 (N.D. Cal. Sep. 5, 2019) (approving class/PAGA settlement valued at 2% to 6.6% of total exposure, depending on different analyses of the value of the claims, over a class member's objection that the settlement amount was too low); *see also id.* (discussing *Tsyn v. Wells Fargo Advisors LLC*, No. 3:14-cv-02552-LB (N.D. Cal.) settlement valued at 5.75% of total exposure).

The allocation of \$30,000 to PAGA penalties (i.e., 3.2% of the total Settlement) is consistent with applicable precedent. *See, e.g., Cotter*, 193 F. Supp. 3d at 1037 (3.7%); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1329-30 (N.D. Cal. 2014) (0.8%).

Given these considerations, Plaintiffs submit that the \$950,000 settlement amount, including the \$30,000 PAGA amount, is fair, reasonable, and adequate, and that the Settlement is in the best interest of the Class.

5. The Extensive Discovery Supports Settlement.

Adequate discovery is required to justify any class or PAGA settlement. The touchstone of the analysis is whether “the parties have sufficient information to make an informed decision about settlement,” including formal and informal discovery. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, Plaintiffs have thoroughly probed the factual basis for Settlement Class Members' claims. Sagafi Decl. ¶¶ 17-20, 22; Ottinger Decl. ¶¶ 9-12. They interviewed a substantial portion of the entire Class and reviewed hundreds of thousands of pages of documents and data relevant to the claims. Ottinger Decl. ¶ 10. The Parties engaged in extensive formal discovery, including document requests, interrogatories, 18 written declarations of Plaintiffs and Class Members, and nine

depositions of Plaintiffs, Class Member declarants, and Hearst's 30(b)(6) corporate witness. *See* Sagafi Decl. ¶ 20. Hearst also engaged in third-party discovery, including serving document subpoenas to Plaintiff Pablo Sanchez's employer and both Plaintiffs' accountants. Sagafi Decl. ¶ 19. In sum, the substantial record supports this Settlement.

6. Counsel's Experience and Views Support Approval.

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (citations and internal quotations omitted). Class Counsel are highly experienced attorneys specializing in complex employment class actions, including misclassification claims. Sagafi Decl. ¶¶ 4-13; Ottinger Decl. ¶¶ 4-7. Over the past decades, Class Counsel have successfully – and unsuccessfully – litigated many such cases, enabling them to assess Plaintiffs' claims and the Settlement. *Id.*

In these, and all other respects, the Settlement is fair, reasonable, and adequate, falls within the range of possible approval, and is appropriate for preliminary approval and notice to Settlement Class Members.

C. The Proposed Notice Is Clear and Adequate.

The notice here is the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). The proposed Notice follows the District's Procedural Guidance for Class Action Settlements and modern best practices (including model forms of notice) set forth by the Federal Judicial Center.⁵ Sagafi Decl. Ex. A (Settlement Agreement), Ex. 1 (Notice). The Notice will inform Class Members of the nature of the Action; the Class definition, the Release, the procedures governing

⁵ *See Illustrative Forms of Class Action Notices: Overview*, Fed. Judicial Ctr., <https://www.fjc.gov/content/301253/illustrative-forms-class-action-notices-introduction> (last visited October 27, 2022).

approval, how to opt out or object, the date for the final approval hearing, and how to contact the Administrator and/or Class Counsel for assistance. *See id.* The Notice is written in plain language and is organized and formatted so as to be as clear as possible. The Notice provides a link to the settlement website maintained by the Settlement Administrator, as well as Class Counsel's and the Settlement Administrator's telephone, mail, e-mail, and web contact information. *Id.*

D. There Is No Related Case the Presence of Which Counsels Against Preliminary Approval.

With regard to the recommendations and requirements set forth in the Court's Procedural Guidance for Class Action Settlements that have not already been addressed above, Plaintiffs note that they are aware of only one pending case that could be affected by the Settlement: *Reyes v. Hearst Commc'ns Inc.*, No. 21-cv-03362-PJH (N.D. Cal.). This case is brought on behalf of a single potential Class Member. As stated above, Class Counsel are in touch with Mr. Reyes's counsel and understand that he plans to opt out of the settlement.

V. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED.

Plaintiffs, after consultation with Hearst, propose that the Court adopt the following schedule for purposes of effectuating the various steps in the settlement approval process described above.

Event	Proposed Date
Preliminary Approval Hearing	November 10, 2022
Entry of Preliminary Approval Order (assumed for purposes of calculating subsequent dates)	November 17, 2022
Hearst to provide class list data to Administrator	December 19, 2022
Notice disseminated by Settlement Administrator	January 9, 2023
Attorneys' Fees and Costs Motion filed	February 9, 2023
Deadline for opt outs and objections	February 23, 2023
Final Approval Motion filed	March 2, 2023
Final Approval Hearing	March 16, 2023

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) preliminarily approve the Settlement pursuant to Fed. R. Civ. P. 23; (2) preliminarily certify the proposed Settlement Class; (3) approve the proposed class notice and forms; (4) set appropriate deadlines; and (5) schedule a final approval hearing.

Respectfully submitted,

Dated: October 27, 2022

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