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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

HUGH BEHM-STEINBERG and **ARTHUR KENZO**, individually and on behalf of all others similarly situated, Plaintiffs, vs. **CALIFORNIA COLLEGE OF THE ARTS,** a California Non-Profit Corporation, Defendant.	CASE NO. RG20081590 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: October 15, 2024 Time: 1:30 p.m. Dept. 21; Hon. Noël Wise Reservation ID: 271390350574

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I. INTRODUCTION

Plaintiffs Behm-Steinberg and Arthur Kenzo ("Plaintiffs") seek preliminary approval of a non-reversionary $1,250,000 settlement of their class and PAGA wage and hour claims against California College of the Arts ("Defendant" or "CCA") on behalf of approximately 1,700 unique class members, consisting of 718 part-time adjunct professors employed by Defendant in California during the Adjunct Class Period (November 20, 2016 to September 8, 2020) ("Adjunct Class Members") and 1,222 employees (including part-time adjunct professors) employed by Defendant in California during the Reimbursement Class Period (March 11, 2020 to May 21, 2024) ("Reimbursement Class Members").

The Settlement Agreement readily satisfies the standard for preliminary approval. The settlement was reached after a thorough and extensive investigation by Plaintiffs' Counsel, motion practice, the exchange of documents and information as part of both formal and informal discovery, and an arm's-length settlement negotiation session between the Parties. The settlement is an excellent result for the Classes with average gross and net recoveries per Adjunct Class Member ("Adjunct CMs") of $1,392.76 and $785.52, respectively; and average gross and net recoveries per Reimbursement Class Member ("Reimbursement CMs") of $204.58 and $115.38, respectively. Adjunct CMs who are also members of the Reimbursement Class will receive an average of $1,597.34 gross and $900.90 net. Declaration of Julian Hammond in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Hammond Decl."), filed herewith, ¶ 63.

The settlement avoids all the risks typically associated with the litigation of class and PAGA actions, as well as significant risks posed by Defendant's specific defenses to Plaintiffs' claims, discussed below. Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval, approve the proposed Class Notice, and set a date for a final approval hearing.[1]

II. OVERVIEW OF THE SETTLEMENT TERMS

A summary of the Settlement terms is as follows:

1. <u>Gross Settlement Amount ("GSA")</u> – CCA will pay a non-reversionary sum of $1,250,000 to settle this case. SA §§ 1.23, 3.1. CCA will also pay the employer's share of payroll taxes separately from the GSA. *Id.* §§ 1.20, 3.1.

2. <u>Class Definitions and Class Periods</u> – The settlement covers two classes: (a) the Adjunct Class consisting of all part-time adjunct instructors who worked for Defendant in California at any time during the Class Period (November 20, 2016 through to September 8, 2020), and (b) the Reimbursement

[1] The Class Action Settlement Agreement ("SA") is attached as **Exhibit 1** to the Hammond Decl.

Class consisting of all employees who worked for Defendant in California at any time from Reimbursement Class Period (March 11, 2020 through May 21, 2024). SA §§ 1.3-1.4, 1.34-1.35.

3. Attorneys' Fees, Costs, and Plaintiffs' Service Payments – Class Counsel will seek attorneys' fees of up to $437,500 (35% of the GSA) and up $40,000 in litigation costs. SA § 3.3.2. Plaintiffs will also seek Class Representative Service Payments of $10,000 to Plaintiff Behm-Steinberg and $7,500 to Plaintiff Arthur Kenzo. SA § 3.3.1.[2]

4. Administration Costs – The Parties have mutually agreed to use Apex Class Action ("Apex") as the Settlement Administrator. Apex is an experienced class action administrator and has provided one of the lowest bids for notice and administration. Hammond Decl. ¶ 83. The Settlement Administrator's expenses shall be reimbursed up to a cap of $15,000, except for a showing of good cause and as approved by the Court. SA § 3.3.3.

5. PAGA Payment – The Settlement allocates $35,000 of the GSA to PAGA penalties, with $26,250 to be paid to the California Labor and Workforce Development Agency ("LWDA") as its 75% share of PAGA penalties, and the remaining $8,750 to be distributed to the members of the Class who worked during the PAGA Period. SA §§ 1.30, 3.3.7, 3.3.8.

6. Net Settlement Amount ("NSA") – The NSA will total approximately $705,000. Hammond Decl. ¶ 63, fn. 4. This is the amount remaining after subtracting attorneys' fees, litigation costs, Class Representative Service Payments, settlement administration costs, and PAGA Payment from the GSA. The NSA will be allocated as follows: 80% will be allocated to the Adjunct Class and will be distributed to Adjunct CMs on a pro-rata basis based on the number of pay periods he/she worked during the Class Period as an Adjunct CM; and 20% will be allocated to the Reimbursement Class and will be distributed to Reimbursement CMs pro-rata based on the number of pay periods he/she worked during the Reimbursement Class Period, with a 4.0 multiplier applied to the pay periods worked prior to January 1, 2022 (the date campuses fully reopened). SA §§ 1.27, 3.3.4. All CMs who worked during the PAGA Period will be paid their per capita share of the amount of PAGA Penalties allocated to aggrieved employees. SA § 3.3.8.

7. Class Notice – Within 30 days of preliminary approval, CCA will provide Apex with the Class List, including the number of pay periods worked by each CM in California during the relevant

[2] If the Court grants preliminary approval, Class Counsel will file a fees motion that will be heard concurrently with the Motion for Final Approval, and that will include a detailed discussion of their lodestar, costs, and each Plaintiffs' time and efforts on this case.

periods. SA §§ 1.12, 8.2. Within 10 business days thereafter, Apex will mail to each CM a Notice substantially in the form attached to the SA as **Exhibit A**. SA § 8.3.2. For all returned Notices, Apex will re-mail the Notice to any forwarding address provided or, if none is provided, Apex shall conduct a search and re-mail the Notice to the most current address obtained. SA § 1.13, 8.3.3.

8. <u>Automatic Participation</u> – The Settlement is non-claims-made, and each CM will automatically receive their share of the NSA unless they opt out. *See* SA §§ 8.4.1, 8.4.3.

9. <u>Opting Out or Objecting</u> – CMs who wish to opt-out of the Settlement must send a written notice to Apex within 60 days of the date the Notices are mailed out. SA § 8.4.1. Any CM who properly requests to opt-out will not be entitled to receive any payment under the settlement (except for their share of PAGA Penalties) and will not be bound by the settlement (except for the release of PAGA claims). SA § 8.4.4. A CM may object to the Settlement by sending Apex a written objection, within 60 calendar days of the Notice mailing date, or by appearing in Court and making an oral objection. SA § 8.6. If a CM objects to the Settlement, they will remain a member of the Class, and if the Court approves the Settlement, they will be bound by the terms of the Settlement in the same way and to the same extent as a CM who does not object. SA §§ 8.4.3, 8.6.3.

10. <u>Tax Consequences of Settlement Payments</u> – For tax purposes, the monies paid to the Adjunct Class Members will be allotted 25% to wages, which will be reported on IRS W-2 Forms, and 75% to expenses, interest, and penalties, which will be reported on IRS 1099 Forms, and the monies paid to the Reimbursement Class Members will be allotted 100% to non-wage income and interest and will be reported on IRS 1099 Forms. SA § 3.3.5.

11. <u>Scope of Release and Final Judgment</u> – Class Members will release all claims that are alleged against CCA in the Second Amended Complaint or that could have been alleged based on the facts asserted therein on their behalf. SA §§ 5.1-5.4. The Named Plaintiffs will also give an additional general release against Defendant. SA § 5.5.

III. OVERVIEW OF THE LITIGATION

A. <u>Pleadings</u>

On November 20, 2020, Plaintiff Behm-Steinberg filed this lawsuit alleging that Defendant failed to issue accurate itemized wage statements to Adjunct CMs in violation of Labor Code §§ 226(a) and (e), and failed to reimburse Reimbursement CMs for business expenses in violation of Labor Code § 2802. On April 8, 2021, Plaintiff amended the Complaint to add Arthur Kenzo as a named Plaintiff, to add that the wage statements issued to Adjunct CMs also violated Labor Code § 226.2, and to add causes of action on behalf of Adjunct CMs for Defendant's alleged failure to permit and authorize paid rest breaks in violation of Labor Code §§ 226.2, 226.7, pay wages for all hours worked in violation of Labor Code §§ 226.2, 1194 and Wage Order No. 4-2001, § 4, pay all wage due upon discharge from employment in violation of Labor Code §§ 201-203, and a cause of action for unfair, unlawful, and/or fraudulent business practices in violation of Bus. & Prof. Code §§ 17200, et seq. and PAGA, Labor Code §§ 2698 et seq. penalties for the labor code violations alleged in the Complaint. Hammond Decl. ¶¶ 10-11.

Specifically, Plaintiffs alleged that adjunct instructors were non-exempt because they were paid on a "piece-rate" basis i.e., a flat amount per course taught, and/or because they did not earn the minimum required to be exempt under Labor Code § 515(a)[3] of two times the state minimum wage for full time employment. As a result, Plaintiff alleged CCA was required but failed to provide them with itemized wage statements that included their hours worked, hourly rates and applicable piece rate; was required, but failed to pay them separately from the piece rate and hourly for rest breaks and/or was required but failed to provide them with off-duty rest breaks, and was required by failed to provide them with off-duty meal breaks. In addition, Plaintiffs alleged that CCA failed to pay Adjunct CMs for the work performed prior to the start of the academic term, which was prior to their "Contract Effective Date" and failed to pay them for the many hours they spent converting courses to an online format during the COVID-19 pandemic, which was not part of the duties covered by their contracts. Thus, Plaintiffs alleged CCA owed Adjunct CMs unpaid wages, including unpaid premium pay, and thus was liable for waiting time penalties. Finally, Plaintiffs alleged that CCA violated § 2802 because it required and/or expected Reimbursement CMs to work and teach remotely as a result of the COVID-19 pandemic and related shutdowns, and did not reimburse them enough to recover their home office expenses, including the cost of home internet, personal cellphones and utilities. Hammond Decl. ¶ 12.

On September 28, 2023, following the Court's denial of Plaintiffs' Motion for Summary Adjudication as to Defendant's two affirmative defenses that Plaintiffs' Adjunct Class claims were barred by § 515.7,[4] Plaintiffs filed a Second Amended Complaint amending the class period for all claims other than for failure to reimburse business expenses, to end on September 8, 2020 (one day prior to the effective date of Labor Code § 515.7). Hammond Decl. ¶ 16.

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[3] All further statutory references are to the Labor Code, unless otherwise specified.

[4] *See* Hammond Decl. ¶¶ 14-15 for the factual and legal basis for Plaintiffs' Motion, and the grounds on which the Court denied it.

B. Discovery and Investigation

Plaintiffs conducted both formal and informal discovery, including taking a limited Person Most Knowledgeable deposition of Defendant's Associate Provost for Faculty and Academic Partnership on the topic of compensation and expense reimbursement policies and practices. Based on responses and documents obtained in discovery, Plaintiffs were able to calculate data points necessary to evaluate Plaintiffs' Class claims, including the class sizes, the number of inaccurate wage statements issued, the number of class sessions that were 3.5 hours or longer and 5 hours or longer, and the number of employees subject to the work-from-home requirement during the Reimbursement Class Period. Defendant also admitted that it classified Adjunct CMs as exempt, and did not pay them anything other than the course rate specified in their contracts. Plaintiffs also were able to confirm that CCA issued standardized wage statements to Adjunct CMs, and employed Adjunct CMs pursuant to standardized contracts the majority of which (90%) were offered on a term-by-term basis, that typically began on the first day of the academic term. Hammond Decl. ¶¶ 17-20.

Plaintiffs also ascertained that CCA suspended all in-person classes on March 12, 2020 and faculty and staff continued to work remotely until January 2022, at which campus was fully reopened. Hammond Decl. ¶ 21. In February or March 2021, CCA implemented a wifi and cellphone reimbursement policy, which included retroactive reimbursements (back to March 2020) to employees who worked remotely. *Id.* Pursuant to its policy, CCA reimbursed full-time employees and Adjunct CMs who taught more than three courses per term \$100 per spring/fall term, and \$50 per term to part-time employees and Adjunct CMs who taught fewer than three courses. *Id.* Based on this information and analysis Plaintiffs were able to evaluate his claims for settlement. *Id.* ¶ 22.

C. Mediation Sessions

On July 1, 2021, the parties participated in a mediation but were unable to settle. Plaintiffs then continued to litigate the case, engaging in discovery and motion practice. Following the Court's denial of Plaintiffs' Motion for Summary Adjudication on October 11, 2022, the parties agreed to stay the case pending the outcome of another case on appeal (*Gola v. University of San Francisco*)[5] that raised issues as to the retroactive effect of § 515.7, potentially dispositive of key issues raised in the instant case.

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[5] *Gola* was a class action on behalf of part-time adjunct instructors employed by the University of San Francisco. Following trial in that case, which resulted in a verdict in favor of the class on the inaccurate wage statement claim, based on the theory that part-time adjuncts were non-exempt because they did not earn the minimum salary required under Labor Code § 515(a), the University appealed. Among other things, the University argued on appeal that Gola's claims were barred by Labor Code § 515.7 because (footnote continued)

After the Court of Appeal issued its decision in *Gola*, finding that § 515.7 did not apply retroactively and did not abated violations that accrued prior to its enactment on September 8, 2020, the parties agreed to return to mediation. On May 20, 2024, the parties participated in an arm's-length mediation with an experienced wage-and-hour mediator Louis Marlin, following which, the parties reached an agreement to resolve the case on the proposed terms. Hammond Decl. ¶ 25-26.

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

When a negotiated class action settlement has been reached prior to certification, as here, the Court may make an order approving or denying certification of a provisional settlement class. Cal. Rules of Court, rule 3.769(d). The decision to certify a class is purely a procedural one and should be based on the allegations in the Complaint and not on the perceived factual or legal merit of the class claims. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-40 (2000). In California, a Class is certifiable if (1) the class is ascertainable and sufficiently numerous; (2) there exists a well-defined community of interest; and (3) class action is a superior method of adjudication. *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012); *Linder*, 23 Cal. 4th at 435. All class certification requirements are met in this case.

A. <u>The Classes Are Ascertainable and Sufficiently Numerous</u>

The Classes are ascertainable here because Defendant's records are sufficient to permit identification of the members of each Class. SA §§ 1.12, 8.2. *See Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019). The Classes are sufficiently numerous because the Adjunct CMs class consists of 718 members, and the Reimbursement Class consists of 1,222 members. Hammond Decl. ¶ 3; *see also Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981).

B. <u>"Community of Interest" Exists Among CMs</u>

The "community of interest" requirement embodies three factors: (1) "'predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007) (citation omitted). Plaintiffs satisfy each of these elements.

1. <u>Common Questions of Law and Fact Predominate</u>

With respect to the Adjunct Class, Plaintiffs challenge common classification and pay policies that raise predominant common questions of law and fact, including: (1) whether Defendant misclassified Adjunct CMs as exempt; (2) whether Adjunct CMs' contracts covered course preparation work completed prior to their Contract Effective Date; (3) whether CCA's per course/unit pay to adjunct

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it applied retroactively and abated violations that occurred prior to its enactment on September 9, 2020.

instructor constituted a piece rate; and (4) whether Defendant failed to issue accurate itemized wage statements and whether its failure was "knowing and intentional." With respect to the Reimbursement Class, Plaintiffs challenged the sufficiency of the reimbursement provided by Defendant's common reimbursement policy. Thus, commonality requirement is satisfied. *See Sav-On Drugs Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 331 (2004).

2. <u>Plaintiffs' Claims Are Typical of the Class Claims</u>

Plaintiffs' claims are typical of the Class that they seek to represent because they were subject to the same compensation, classification, rest break and expense reimbursement policies and practices, suffered the same types of injury, and seek the same types of relief, as the putative Class. *See Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007).

3. <u>Plaintiffs and Their Attorneys Will Adequately Represent the Classes.</u>

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669, n.21 (1993) (citations and quotation marks omitted). Both elements are satisfied here. Plaintiffs' Counsel is highly skilled and experienced in similar cases and has extensive class action litigation experience. HammondLaw has been appointed class counsel in numerous class actions and has represented thousands of adjunct instructors in similar unpaid wage cases since 2016 including over 35 cases that have received final approval. Hammond Decl. ¶¶ 7-8. Plaintiffs are committed to representing the interests of the Classes, do not have any conflicts with any CM, and their interests are virtually coextensive with those of the CMs. *Id.* ¶ 4.

C. <u>This Class Action Is a Superior Method of Adjudication</u>

Plaintiffs' Class claims are based on their contentions that Defendant had uniform policies and/or practices of misclassifying adjunct instructors as exempt, paying them by the piece, failing to compensate them for work outside their contracts, failing to pay them for rest breaks separately from the piece, failing to provide them with off-duty meal and rest breaks, failing to paying Adjunct CMs their final wages after their discharge date, issuing inaccurate wage statements, and failing to reimburse Reimbursement CMs' business expenses. All of these claims involve common evidence, including Adjunct CMs' uniform employment contracts, academic calendars, handbooks, compensation scheme, payroll calendars, wage statements, and remote work and reimbursement policies. Accordingly, it would be inefficient to resolve the claims of each Class Member at separate trials and a class action mechanism is superior. *See Bufil v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008).

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. <u>The Two Step Settlement Approval Process</u>

Court approval of a class action settlement is a two-step process: (1) a preliminary review and contingent approval by the trial court, and (2) after notice has been distributed to the class members, a hearing and a detailed review that includes their responses. Manual for Complex Litigation (Fourth) § 21.6 ("Manual"); Cal. Rules of Court, Rule 3.769(a). Thus, preliminary approval of the settlement is simply a conditional finding that the settlement is within the range of acceptable settlements. *See, e.g.*, 4 Newberg on Class Actions § 11.25 (4th ed. 2002); Manual § 21.6. Applying the criteria for preliminary approval in this case reveals a substantial basis for granting the preliminary approval.

B. <u>The Settlement is Fair and Reasonable</u>

In analyzing whether a settlement is fair and reasonable, courts consider a number of factors: (1) the strength of the plaintiff's case balanced against the settlement amount; (2) the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial; (3) the extent of discovery completed and the stage of the proceedings; (4) the experience and view of counsel; and (5) the reaction of the class members to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008) (quoting *Dunk v. Ford*, 48 Cal. App. 4th 1794, 1801 (1996)). Indeed, a settlement is initially "presumed to be fair" when (1) it "is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 52 (2008) (quoting *Dunk*, 48 Cal. App. 4th at 1802).

1. <u>The Settlement Was a Product of Informed, Non-Collusive Negotiations</u>

The settlement is the result of hard-fought extensive settlement negotiations between the Parties conducted at arm's length and informed by substantial factual and legal investigation. Class Counsel has extensive experience in wage and hour litigation, and, in particular, class actions alleging similar types of claims. Hammond Decl. ¶¶ 7-8. Class Counsel's experience meant that they were well-positioned to evaluate the strengths and weaknesses of the defenses and arguments made by CCA in the instant case and were able to compare the facts underlying the claims in the instant case with those of the numerous other cases they have handled in order to determine the relative strengths of Plaintiffs' claims. *Id.* ¶ 28.

Class Counsel has spent a considerable amount of time prosecuting this case, including, but not limited to, investigating the case, including communicating with putative Class Members and obtaining documents from them to support the claims alleged in this case, drafting pleadings, researching applicable law, meeting and conferring with Defendant's counsel, analyzing documents and data produced by Defendant as part of formal and informal discovery, taking a PMK deposition of Defendant's Associate Provost for Faculty and Academic Partnership on the topic of compensation and expense reimbursement policies and practices, preparing for and attending two mediations, and negotiating the settlement agreement. *See Id.* ¶¶ 10-27.

2. <u>The Strength of Plaintiffs' Case and Complexities of Further Litigation</u>

The most important factor in analyzing the fairness of the settlement is the comparison of the extent of the class recovery to the strength of Plaintiffs' case. *Kullar,* 168 Cal. App. 4th at 130. The proposed settlement of $1,250,000 represents 17.3% of CCA's maximum potential damages in this case and 47% of CCA's realistic damages (not including interest and PAGA). The allocation of the settlement funds between the two classes is also reasonable and corresponds to the realistic value of each set of claims. Hammond Decl. ¶ 62. While Plaintiffs believe that they have strong claims, they faced considerable litigation risks. *Id.* ¶¶ 30-59, 70-71.

i. <u>Inaccurate Wage Statement Claim (Labor Code §§ 226(a)), 226.2)</u>

As discussed above, Plaintiffs alleged that as a result of misclassifying Adjunct CMs as non-exempt and paying them on a piece-rate basis, Defendant failed to list on their wage statements their total hours worked, applicable hourly rates, and piece rate information pursuant to §§ 226(a)(2), (a)(3), (a)(9), and 226.2(a). Hammond Decl. ¶¶ 30-31. Plaintiffs alleges that Defendant's violation of § 226(a) was knowing and intentional (s*ee Furry v. East Bay Publishing, LLC*, 30 Cal. App. 5th 1072, 1085 (2018)) because it was a result of a policy of misclassification and CMs suffered injury within the meaning of § 226(e)(2)(B), because they could not determine from their wage statements alone their number of hours worked or applicable hourly rates. *Id.* ¶ 32. Based on information provided by Defendant, Plaintiffs calculated CCA's maximum exposure to this claim as **$346,450.** Hammond Decl. ¶ 33.

Class Certification and Merits Discounts: Plaintiffs applied a minimal 5% discount for class certification because wage statement claims are particularly well-suited to class certification. *See Lubin v. The Wackenhut Corp.,* 5 Cal. App. 5th 926 (2016). Here, throughout the relevant period, Defendant issued uniform wage statements to Adjunct CMs that all failed to include the same information – hours, hourly rates, and piece-rate information, which was a result of Defendant's common policy and practice of misclassifying Adjunct CMs as exempt and not tracking their hours worked (and not treating them as piece rate workers). Hammond Decl. ¶ 34.

On the merits, Defendant could have contended that only the initial $50 penalty applied to each violation because CCA did not receive notice that its wage statements were noncompliant. *See Robinson v. Open Top Sightseeing San Francisco, LLC,* 2018 U.S. Dist. LEXIS 24556, at *52-58 (N.D. Cal. Feb 14, 2018). In addition, Defendant in its Answer asserted the defense that it acted in good faith and thus did not "knowingly and intentionally" violate any state law. At the time Plaintiffs filed their case, the courts were split on the question of whether a good faith belief defense barred penalties under § 226(e), with the California state courts holding that a good faith belief defense, while a bar to penalties under § 203, did not apply to § 226(e) penalties. Approximately two weeks before the parties agreed to a settlement in principle, the California Supreme Court issued its decision in *Naranjo v. Spectrum Security Services, Inc.*, 15 Cal. 5th 1056, 1065 (2024) resolving the split in authority by holding that an employers' good faith belief *does* bar § 226(e) penalties. Thus, if CCA succeeded in proving its good faith belief defense, Plaintiffs would recover nothing as to this claim. Plaintiffs thus applied a 40% reduction for these risks, reducing Defendant's potential exposure on this claim to **$197,476.50**. Hammond Decl. ¶ 35.

ii. <u>Unpaid Wages Claim (Labor Code §§ 1194, 226.2)</u>

Plaintiffs alleged that their contracts had a Contract Effective Date that was the first day of the academic term, however, CCA required and/or expected them to complete their course preparation work (e.g. prepare syllabi, and build out their course website) before the effective date of their contracts, which therefor fell outside their contracts and was not covered by the compensation set out in their contracts and for which CCA did not pay separately, in violation of §§ 1194, 226.2. Hammond Decl. ¶ 37. In addition, Plaintiffs fleshed out their allegations at mediation, and contended that CCA failed to pay Adjunct CMs for the many hours they spent converting their courses to an online format due to the shift to online learning as a result of the COVID-19 pandemic and resulting campus closures. *Id.* Based on Plaintiffs' analysis of the number of courses and academic terms taught by Adjunct CMs, and interviews of Adjunct CMs, Plaintiffs calculated unpaid wages as **$2,581,544**. *Id.*

Preemption, Certification, and Merits Discounts: Plaintiffs applied a 30% discount for the risk of non-certification on the theory that whether the course compensation included activities performed before the Contract Effective Dates and the time spent converting courses to an online format depended on each Adjunct CMs' understanding. Plaintiffs applied a further 50% discount for the risk that the Court would find (as the trial court did in *Gola* with respect to a similar claim) that the claim for unpaid wages for work performed prior to the Contract Effective Date is preempted under the LMRA based on CCA's CBA that went into effect on May 1, 2017. Plaintiffs could also lose on the merits or recovery significant less if the Court were to find their contracts covered all course related work, that they could not claim unpaid wages at their regularly hourly rate for work performed outside the contracts, and/or that their damages calculation was based on overinflated number of unpaid hours. Thus, Plaintiffs calculated CCA's potential exposure on the unpaid wage claim as **$903,540.40.** Hammond Decl. ¶¶ 38-40.

iii. <u>Rest Break Claim (Labor Code §§ 226.2, 226.7)</u>

Plaintiffs also alleged that CCA was required but failed to pay Adjunct CMs' separately and hourly for rest break time (on the theory that they were piece-rate workers) and/or to permit and authorize off-duty rest breaks or pay premium pay for missed breaks each time they worked at least 3.5 hours, pursuant to §§ 226.2, 226.7. Hammond Decl. ¶ 41. Plaintiffs calculated CCA's maximum potential exposure to the rest break claims as **$451,248.** *Id.* ¶ 42.

Class Certification and Merits Risks: Plaintiffs applied a 25% discount for the risk on class certification based on the risk that the Court would find that what was included in the piece-rate depends on each CM's understanding of what the course rate covered, or that individualized inquiries would be necessary to determine whether Adjunct CMs were precluded from taking rest breaks or *chose* not to take them. Plaintiffs applied a further 50% discount based on the risk that the Court would find that Adjunct CMs were not piece-rate workers, that they could have taken breaks at least some of the time, and that not every class scheduled to meet for 3.5 hours actually met for that long. As discussed above, Plaintiffs' piece-rate theory appeared to be somewhat weakened by the Court's denial of Plaintiffs' Motion for Summary Adjudication. Thus, Plaintiffs estimated CCA's realistic exposure on the rest break claim as **$169,218.** Hammond Decl. ¶¶ 43-44.

vi. <u>Meal Break Claim (Labor Code §§ 226.7, 512)</u>

Plaintiffs also alleged that CCA was required, but failed, to provide non-exempt Adjunct CMs' with off-duty meal periods, pursuant to §§ 226.7, 512. Plaintiffs calculated CCA's maximum exposure on the meal break claim as **$364,280**. Hammond Decl. ¶ 46.

Class Certification and Merits Risks: Plaintiffs applied a 35% discount for the risk of non-certification on the meal break claim because individualized issues could arise as to whether Adjunct CMs could have taken meal breaks if they wanted to even if there was no official meal break policy that applied to them. Plaintiffs applied a further 50% discount for the risks on the merits based on Defendant's potential arguments that even if Adjunct CMs missed meal breaks, they did so on their accord because classes that were 5 hours or longer had built in lunch breaks, and that many Adjunct CMs did take breaks; and its contentions that Plaintiffs' assumption that 100% of the meal-break eligible days actually had a missed meal break significantly overstated the number of missed breaks. Thus, Plaintiffs determined

CCA' potential exposure on the rest break claim is **$112,541.** Hammond Decl. ¶¶ 47-49.

vii. <u>Waiting Time Penalties (Labor Code §§ 201-203)</u>

Plaintiffs' waiting time penalties claim is derivative of their claims that CCA failed to pay Adjunct CMs wages for all hours worked, including rest break time and premium pay, and, as a result, failed to pay all formerly employed Adjunct CMs wages due at the time of their discharge from employment, in violation of §§ 201-202. Hammond Decl. ¶ 50. Based on Plaintiffs' analysis of the data, there were approximately 400 Adjunct CMs whose employment terminated during the relevant statutory period. Plaintiffs calculated Defendant's exposure on this claim is **$2,016,000.** *Id.* ¶ 51.

Class Certification and Merits Discount: Plaintiffs applied a 25% discount for the risk on class certification because their theory of liability is dependent on the success of certification of their underlying wage claims. Hammond Decl. ¶ 52. Plaintiffs applied a further 50% discount on the merits because Plaintiffs faced the argument that CCA had a good faith dispute that Adjunct CMs were not owed any wages which could negate the willfulness requirement of § 203 and bar recovery of penalties. *See Barnhill v. Roberts Saunders & Co.,* 125 Cal. App. 3d 1, 8-9 (1981); *see also* Cal. Code Regs., tit. 8, § 13520. Hammond Decl. ¶ 53. Thus, Plaintiffs determined that CCA's potential exposure on the waiting time penalties claim is **$756,000.** *Id.* ¶ 54.

viii. <u>Unreimbursed Expenses Claim (Labor Code § 2802)</u>

On March 12, 2020, CCA suspended all in-person classes and instructed its non-essential employees to work remotely from home, due to the COVID-19 pandemic. Most employees continued to work and teach remotely until the beginning of 2022, and some continued to work remotely in 2022 and 2023. In addition, CCA requires their employees to use their cellphones for two-factor authentication to access their work emails and other work resources. In 2021, CCA adopted a work from home expense reimbursement policy, pursuant to which CCA also provided retroactive reimbursements for remote work in 2020. The reimbursements amounted to approximately $22/month for full-time employees and $11/month for part-time employees. Plaintiffs contended that these amounts were insufficient to cover Reimbursement CMs' expenses and only partially off-set CCA's liability. Hammond Decl. ¶ 55. For settlement purposes, Plaintiffs' Counsel estimated that Reimbursement CMs incurred approximately $50 per month in business related expenses that included the cost of home internet and cellular phone service, and $10 per month on cellular phone expenses in connection with the two-factor authentication. *Id.* ¶ 55. Plaintiffs calculated CCA's exposure on this claim as **$1,493,116**. *Id.* ¶ 57.

Class Certification and Merits Discounts: Plaintiffs applied a 30% discount for class certification based on the fact that CMs incurred different types of expense and the issue of whether those expenses were reasonable and/or necessary (given that some Reimbursement CMs could have worked from campus at least during some parts of the Reimbursement Class Period) could lead to individualized issues. Hammond Decl. ¶ 58. As to the merits, Plaintiffs applied a further 50% discount based on Defendant's arguments that the expense reimbursement it provided was sufficient to cover Reimbursement CMs' expenses, that Reimbursement CMs were not required to use their cellphones for work, and that Reimbursement CMs could have worked from campus during at least some portions of the Reimbursement Class Period. *Id.* 59. Applying these discounts, CCA's potential exposure on the unreimbursed expense claim is reduced to **$522,590.60**. *Id.* ¶ 60.

ix. **<u>The Settlement is Fair and Reasonable:</u>** Based on the foregoing analysis, Plaintiffs calculated CCA's maximum exposure (excluding interest and PAGA) as $7,252,638. Hammond Decl. ¶ 61. After class certification and merits discounts, Plaintiffs estimated Defendant's *realistic* exposure as $2,661,366.50. *Id.* The $1,250,000 GSA represents 17.3% of CCA's maximum exposure, and 47% of CCA's realistic exposure (excluding interest and PAGA). *Id.* ¶ 62. As stated above, the settlement represents an average gross and net recovery per Adjunct CM of $1,392.76 and $785.52, respectively, and an average gross and net recovery per Reimbursement CM of $204.58 and $115.38, respectively. *Id.* ¶ 63. A member of both classes will receive on average $1,597.34 gross and $900.90 net. *Id.*

Based on Class Counsel's experience with similar class actions and investigation, research, and knowledge of the specific facts and legal issues in this case, Class Counsel believes that the Settlement is an excellent result, and is fair, adequate, reasonable, and appropriate. Hammond Decl. ¶ 68. This conclusion is based on Class Counsel's knowledge of the strength and weaknesses of the claims asserted by the Plaintiffs (having represented adjunct instructors in over 35 similar cases, and having litigated the *Gola* class action through to trial and appeal), Defendant's defenses in this case, as well as the typical risks associated with litigation such as changes in the law (as happened while this case was pending) or other unpredictable developments. Thus, Class Counsel was well-positioned to evaluate the strengths and weaknesses of the defenses and arguments made by CCA in this case. Class Counsel was also able to compare the facts underlying the claims in this case with those of the numerous other cases Class Counsel has handled in order to determine the relative strengths of Plaintiffs' claims. Class Counsel's experience in cases involving adjunct faculty was critical to Class Counsel's ability to reach this settlement for the Class, which is an excellent result. *Id.*

a. The PAGA Allocation is Fair and Adequate:

Plaintiffs calculated Defendant's realistic potential exposure to PAGA penalties as $652,515 based on the initial $100 penalty per pay period (for adjunct PAGA claims) and $100 per month (for Reimbursement PAGA claims because Defendant could have argued it was not required to reimburse more frequently than on a monthly basis). Plaintiffs also assumed that the Court would award no more than 15% of total penalties (as the trial Court did in *Gola*) and would not allow "stacking" of PAGA penalties. *Bernstein v. Virgin Am., Inc.,* 2021 U.S. App. LEXIS 6641, *35-36 (9th Cir. Mar. 8, 2021) (holding that "subsequent" violations for purposes of PAGA do not occur until employer has been notified that it is violating a Labor Code provision). *Castillo v. ADT, LLC,* 2017 U.S. Dist. LEXIS 10579, at *11 (E.D. Cal. Jan. 24, 2017); Hammond Decl. ¶ 64.

The $35,000 allocated to PAGA penalties represents approximately 5% of Defendant's exposure to PAGA penalties, which is fair and reasonable. *First,* the overall settlement resulted in robust relief, which is what courts look at when assessing the amount attributed to PAGA penalties. *See O'Connor v. Uber Techs., Inc.,* 201 F. Supp. 3d 1110, 1134 (N.D. Cal. Aug. 18, 2016). In *Gola v. University of San Francisco*, No. CGC-180565018 (San Francisco Superior Cnty. Ct. Mar. 15, 2018), a case brought by Plaintiffs' Counsel on behalf of adjunct instructors, the trial court found that substantial monetary relief in form of penalties under § 226(e) (and fees and costs plaintiff would seek) acted as a sufficient punishment and deterrent, and awarded only 15% of the full PAGA penalties, despite its finding that defendant's violation was "worse than innocent." Hammond Decl. ¶ 64. *Second,* Defendant contended that Plaintiffs' claims for PAGA Penalties would fail for the same reasons the underlying Labor Code claims would fail. *Id.* ¶ 66. *Third,* Plaintiffs' allocation of 5% of Defendant's exposure to PAGA penalties is in line with, or more than, PAGA allocations in similar cases that received final approval. *See* Hammond Decl. ¶ 67 (citing cases).

3. The Risk, Expense, Complexity and Likely Duration of Further Litigation

If the Parties continued to litigate this case, Plaintiffs would have to clear hurdles including potential pre-trial dispositive motions and class certification. Whichever claims – if any – cleared these hurdles would face trial. Regardless of the outcome at trial, the losing party would likely appeal. Litigation therefore could take years and there is a risk that at the end Plaintiffs would recover less than the settlement amount or nothing. This settlement provides a certain resolution of a dispute, and CMs will recover in the relatively near future if the settlement is finally approved. Hammond Decl. ¶¶ 70-71.

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4. The Extent of Discovery Completed and The Stage of the Proceedings

As described in detail in Hammond Decl., the Parties have engaged in extensive investigation and both formal and informal discovery, including a PMK deposition, and were adequately informed to make the decision to settle this case on the proposed terms. Hammond Decl. ¶¶ 17-22.

5. Views of Experienced Counsel Support the Reasonableness of the Settlement

As discussed above, Class Counsel has extensive experience in class action litigation, and, in particular, similar class actions brought on behalf of adjunct faculty and for unreimbursed expenses, and has been determined by numerous courts to be adequate class counsel. Hammond Decl. ¶¶ 7-8. In light of the robust recoveries for the classes and the risks Plaintiffs faced if they continued to litigate, Class Counsel considers the settlement to be fair, reasonable and adequate. *Id.* ¶¶ 63, 70-71.

6. Reaction of the Class Members to The Proposed Settlement

It is premature to address this factor, since notice has not yet been sent out. The settlement, however, confers substantial benefit on the CMs and reasonably tailors each CM's claim to the amount they will receive. This promises an overall positive response.

C. The Proposed Class Notice Content and Procedure Are Adequate

The proposed Notice provides all the information a reasonable person would need to make a fully informed decision about the settlement: the material terms of the settlement; the proposed attorneys' fees and costs, costs of settlement administration, the proposed service awards to the Named Plaintiffs; how CMs may opt out of, or object to the Settlement; details about the final fairness hearing, and how CMs can obtain additional information. *See* Cal. Rules of Court, rule 3.766 and **Exhibit A** to the SA. In addition, the proposed Notice contains information about each settling CM's award under the distribution formula and how they can challenge the data used in calculating their settlement awards, and the tax treatment and possible tax consequences of their awards. The Notice will be sent by first class mail to the most recent address of each CM (SA § 8.3.2) and skip tracing will be employed for all Notices returned as undeliverable (SA § 8.3.3). As such, the Notice is likely to reach most, if not all, CMs. *See Cartt v. Super. Ct*., 50 Cal. App. 3d 960, 974 (1975). Therefore, the Court should approve the Notice and the manner of its distribution.

VI. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant preliminary approval, approve the proposed Class Notice, and schedule a final approval hearing.

Dated: September 20, 2024

Respectfully submitted,

s/ Julian Hammond

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