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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA**

KHAYO SISHI, SANDEEP PUREWAL,
VANESSA BARBER, and CHERRA REDD on
behalf of the Putative Class, the State of
California and Aggrieved Employees;

Plaintiffs,

v.

ESKATON PROPERTIES INCORPORATED,
CALIFORNIA HEALTHCARE
CONSULTANTS, INC., and DOES 1-100,
inclusive;

Defendants.

Case No.: RG21100764

Hon. Eumi Lee
Dept. 512

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT,
CERTIFICATION OF SETTLEMENT
CLASS, APPROVAL OF NOTICE OF
SETTLEMENT, AND SETTING OF
HEARING FOR FINAL APPROVAL**

Date: January 20, 2023

Time: 9:00 a.m.

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1 **I. INTRODUCTION**

2 Plaintiffs Khayo Sishi, Sandeep Purewal, Vanessa Barber, and Cherra Redd, on behalf of
3 themselves and all others similarly situated, the State of California, and the Aggrieved Employees
4 (“Plaintiffs”), seek preliminary approval of the Settlement¹ of this wage-and-hour class and
5 representative action against Defendants Eskaton Properties Incorporated and California Healthcare
6 Consultants, Inc. (“Defendants”).

7 Through early informal discovery, intensive mediations, and months of arm’s-length
8 negotiations by the Parties with the assistance of a respected wage-and-hour mediator, the Parties have
9 resolved the claims of approximately 5,759 current and former hourly, non-exempt workers (“Class
10 Members”) for a total non-reversionary total settlement amount of \$5,500,000.00 (the “Gross
11 Settlement Amount”), of which approximately \$3,511,173.70 will be available for distribution to Class
12 Members and Aggrieved Employees.

13 The proposed Settlement provides an excellent benefit to the Class Members and an efficient
14 outcome in the face of expanding litigation. The proposed Settlement satisfies all of the criteria for
15 preliminary settlement approval under California law and falls well within the range of reasonableness.
16 The Parties are resolving numerous claims that almost certainly never would have been prosecuted as
17 individual actions, and in so doing provide substantial benefit to the members of the Class and to the
18 State of California.

19 Accordingly, Plaintiffs request that the Court (1) grant preliminary approval of the proposed
20 Settlement; (2) appoint Settlement Services, Inc. (“SSI”) as Settlement Administrator and approve the
21 estimated costs of settlement administration (approximately \$60,000); (3) appoint Schneider Wallace
22 Cottrell Konecky LLP, Lawyers for Justice PC, and Capstone Law APC as Class Counsel (“Class
23 Counsel”); (4) appoint Plaintiffs Sishi, Purewal, Redd, and Zenaya White as Class Representatives;
24 (5) provisionally certify the Settlement Class; (6) preliminarily approve service awards totaling
25 \$25,000 to Plaintiffs Khayo Sishi, Sandeep Purewal, Cherra Redd, and Zenaya White (the “Class
26 Representatives”) for their efforts on behalf of the Class; (7) preliminarily approve an award of
27 \$55,000 for penalties under California Private Attorneys General Act of 2004 (“PAGA”); (8)
28 preliminarily approve an award of attorneys’ fees to Class Counsel in the amount not to exceed one-
29 third of the Gross Settlement Amount (\$1,833,333.33), plus reimbursement of actual out-of-pocket
30

31 ¹ The “Settlement” hereinafter refers to the Class and PAGA Action Settlement Agreement and
32 Release and Addendum A to Class Action Settlement Agreement and Release (“Addendum A”),
attached as **Exhibit 1** and **Exhibit 2** to the Declaration of Carolyn Hunt Cottrell (“Cottrell Decl.”). It
also refers to an Addendum B, which is forthcoming. Cottrell Decl. ¶ 5.

1 expenses, which were are currently estimated at \$29,242.97; (9) approve the Settlement Notice²; and
2 (10) approve the proposed implementation schedule, set forth in the Notice of Motion.

3 **II. FACTUAL AND PROCEDURAL BACKGROUND**

4 **A. The Pleadings.**

5 On March 15, 2021, Plaintiff Khayo Sishi submitted a letter to the Labor & Workforce
6 Development Agency (“LWDA”), notifying the agency of his intent to file a lawsuit for penalties
7 under the PAGA. Cottrell Decl. at ¶ 10. He later submitted an amended letter on May 18, 2021 and
8 Plaintiffs further supplemented their letters to the LWDA on August 12, 2022. *Id.* The LWDA did not
9 issue any response. *Id.*

10 On June 2, 2021, Plaintiff Sishi filed his Complaint for Penalties Pursuant to Sections 2699(a)
11 and (f) of the California Private Attorneys General Act against Defendant Eskaton Properties
12 Incorporated, and then filed a First Amended Complaint to add Defendant California Healthcare
13 Consultants, Inc. as an additional Defendant on July 28, 2021. *Id.* at ¶ 11. Defendants filed their
14 Answers on August 6, 2021 and September 15, 2021. *Id.* at ¶ 12. Following further investigation,
15 Plaintiffs filed a Second Amended Complaint (“SAC”) on September 13, 2022, which added claims
16 asserted in related actions filed by Plaintiffs Sandeep Purewal, Vanessa Barber, and Cherra Redd. *Id.*
17 at ¶¶ 13-14, 16.

18 Defendants are part of the nursing homes and long-term care facilities industry and provide
19 memory care, assisted living and skill nursing services. SAC ¶ 28. Plaintiffs and putative Class
20 Members are current and former hourly, non-exempt employees of Defendants throughout California.
21 *Id.* at ¶¶ 13-15, 29, 57. Plaintiffs allege that while their shifts may have varied in length, they were
22 scheduled to work at least eight hours per shift, approximately five shifts per week, for approximately
23 40 hours or more per week. *Id.* at ¶ 30. Plaintiffs allege that Class Members are routinely denied
24 payment for all hours worked, including at the required minimum wage and overtime rates, are
25 routinely denied compliant meal and rest periods, are not properly reimbursed for necessary business
26 expenditures, are not paid for costs of medical examinations, do not have their sick time properly
27 calculated, and are not provided written notice of materials terms of their employment. *See, generally,*
28 SAC. Plaintiffs also allege derivative violations for failure to provide accurate, itemized wage
29 statements, waiting time penalties, and violations of Cal. Bus. & Prof. Code § 17200. *Id.* Defendants
30 deny these allegations. Settlement, at ¶ 45.

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² Hereinafter, “Notice,” attached as **Exhibit 3** to the Cottrell Decl.

1 **B. Pre-Mediation Efforts and Settlement.**

2 Following the filing of this action, the Parties agreed to participate in early mediation efforts.
3 Cottrell Decl. at ¶ 17. The Parties engaged in extensive informal discovery leading up to mediation,
4 wherein Defendants produced documents and information on an informal basis to facilitate mediation.
5 *Id.* at ¶ 18. Defendants produced hundreds of pages of documents including, but not limited to,
6 applicable written policies, Plaintiff Sishi's personnel file and time and pay records, a 10% sampling
7 of employee payroll data, and payroll calendars for the PAGA period. *Id.* Class Counsel completed an
8 exhaustive review of such documents, and used the information and data from Defendants to prepare
9 for mediation, including in the preparation of a detailed damages analysis. *Id.*

10 On February 15, 2022, the Parties conducted a full day mediation session, which was remotely
11 held before well-respected and highly-skilled employment law mediator Jeffrey Krivis. *Id.* at ¶ 20.
12 The case did not settle, but the Parties agreed to continue negotiations and scheduled a second
13 mediation for March 4, 2022. *Id.* In the interim, Defendants produced additional documents, including
14 but not limited to meeting agendas and sign in sheets, timestamp question and answer detail reports,
15 additional policies and training materials, and other pertinent documents. *Id.* at ¶ 21. Again, Class
16 Counsel completed an exhaustive review of the documents, and used the information and data from
17 Defendants and its own interviews with Class Members to prepare for mediation, including in the
18 preparation of its detailed damages analysis. *Id.* at ¶¶ 19, 21. On March 4, 2022, after the second
19 mediation session, the mediator issued a mediator's proposal, after which the Parties continued to
20 negotiate the scope of the release to ensure a fair recovery for the Class. *Id.* at ¶ 22. The Parties
21 accepted the mediator's proposal on March 30, 2022 and executed a term sheet memorializing the
22 major terms of the Parties' agreement on April 8, 2022. *Id.* Over the next several months, the Parties
23 extensively met and conferred over the detailed terms of the settlement through intensive, arm's-length
24 negotiations, and executed the finalized long-form settlement agreement on November 22, 2022. *Id.*
25 at ¶ 23; see Settlement. The Parties later agreed to an Addendum A to the Settlement to exclude
26 Plaintiff Barber as a class representative, which was fully executed on December 12, 2022. *Id.* at ¶ 24;
27 see Addendum A. The Parties are in the process of obtaining signatures for an Addendum B to Class
28 Action Settlement Agreement and Release, which memorializes the Parties' agreement to include
29 Zenaya White as an additional Class Representative, and Lawyers for Justice PC and Capstone Law
30 APC as additional Class Counsel. *Id.* at ¶ 25.

III. TERMS OF THE SETTLEMENT

A. Monetary Terms.

The Settlement provides for a non-reversionary Gross Settlement Amount of \$5,500,000.00. Cottrell Decl. at ¶ 26. Defendants agree to pay the employer's share of payroll taxes separately. *Id.* This Settlement covers approximately 5,759 Class Members. *Id.* at ¶ 30; *see also* Settlement, at ¶ 2.b. With the Motion for Final Approval, to be filed in advance of the Final Approval hearing, Class Counsel will seek fees of no more than one-third (1/3) of the Gross Settlement Amount, or \$1,833,333.33, and actual costs, which are currently estimated to be \$29,242.97 Cottrell Decl. at ¶ 28. The Settlement also sets aside \$60,000.00 for the estimated costs of settlement administration; \$10,000 to Plaintiff Khayo Sishi and \$5,000.00 each to Plaintiffs Sandeep Purewal, Cherra Redd, and Zenaya White for their service to the Class, and \$55,000.00 for PAGA penalties.³ *Id.*

Defendants will fund the Gross Settlement Amount within 20 business days after the Effective Date. *Id.* at ¶ 27. The payment will be used to pay 100% of the Settlement Awards to Settlement Class Members, the Service Awards, the PAGA payment, Class Counsel's reasonable fees and costs, and the Settlement Administration costs, upon approval by the Court. *Id.*

B. Settlement Awards for Eligible Class Members.

The estimated Net Settlement Amount available to Class Members is approximately \$3,497,423.70 and the Net PAGA Amount available to Aggrieved Employees is \$13,750.00 (for a total of \$3,511,173.70). *Id.* at ¶ 31. The Net Settlement Amount is to be allocated among and paid to Settlement Class Members (i.e., those Class Members who do not timely opt out of the Settlement) proportionally based on the number of workweeks the Class Member worked. *Id.* Aggrieved Employees will also receive a *pro rata* share of the Net PAGA Amount. *Id.* at ¶ 34.

Any funds from uncashed checks will be redistributed either to Settlement Class Members who cashed their checks if the total residual amount is equal to or greater than \$75,000, or revert to *cy pres* if the total residual amount is less than \$75,000. *Id.* at ¶ 40. The Parties propose Legal Aid at Work as the *cy pres* recipient. *Id.* at ¶ 41.

C. Settlement Administration.

The Parties selected SSI as the Settlement Administrator. *Id.* at ¶ 47. SSI will satisfy due process requirements in notifying Class Members of the settlement and distributing Settlement Awards according to the Settlement. *Id.*; *see infra*, Section VII. If the Settlement is finally approved, SSI will

³ Pursuant to the PAGA, 25% of the total \$55,000.00 PAGA award to be allocated to the Aggrieved Employees, with the remaining 75% of the total PAGA award, or \$41,250.00, to be remitted to the State of California.

1 administer payments to Settlement Class Members, including calculation of payroll taxes and
2 preparation of tax reporting documents. Cottrell Decl. at ¶¶ 47-59.

3 **IV. CLASS ACTION SETTLEMENT APPROVAL PROCEDURE**

4 A class action may not be settled without the approval of the court.⁴ There are three distinct
5 steps for approval of class action settlements by California courts: (1) preliminary approval of the
6 proposed settlement after submission of a written motion for preliminary approval, the proposed
7 settlement, and the proposed class notice; (2) mailing of notice of the settlement to all affected
8 settlement class members; and (3) a final settlement approval hearing at which settlement class
9 members may be heard regarding the settlement, and at which evidence and argument concerning the
10 fairness, adequacy, and reasonableness of the settlement is presented.⁵ Cal. Rules of Court, Rule 3.769.

11 With this Motion, the Parties request the Court take the first step and grant preliminary approval
12 of the Settlement. A preliminary review of the Settlement reveals the fairness of its terms. The
13 Settlement proposed is based on arm's-length negotiations that were guided by Class Counsel's
14 investigation and the evaluation of informal discovery. Cottrell Decl. at ¶ 60. The negotiations
15 included extensive communications between counsel and mediation conferences supervised by an
16 experienced and respected mediator. *Id.* The proposed Settlement provides substantial monetary
17 recovery for the Settlement Class, and it satisfies all of the required due process protections. *Id.* Thus,
18 the proposed Settlement is fair, reasonable, and adequate, and Plaintiffs therefore requests that this
19 Court grant preliminary approval.

20 **V. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE.**

21 The decision to approve or reject a proposed settlement is committed to a court's broad
22 discretion. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35. To grant preliminary
23 approval of a class action settlement, courts need find only that the settlement falls within the range
24 of possible final approval, also described as "the range of reasonableness." *See, e.g., North County*
25 *Contractor's Assn., Inc. v. Touchstone Ins. Svcs.* (1994) 27 Cal.App.4th 1085, 1089-90; *see also*
26 *Newberg on Class Actions* at §11:25.

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29 ⁴ *See* Cal. Code Civ. Proc. § 1781(f); Cal. Rules of Court, Rule 3.769; *see also* Fed. R. Civ. P. 23(e).
30 The California Supreme Court has authorized and urged California's trial courts to use Fed. R. Civ. P.
31 23 and federal case law for guidance in class action issues. *Green v. Obledo* (1981) 29 Cal.3d 126,
145-46.

32 ⁵ This procedure is similar to the procedure and criteria for approval of class actions under federal law
and is also endorsed by the nation's leading class action commentator, Professor Herbert Newberg.
See Newberg on Class Actions, § 11:24 (4th Ed. 2002); *Manual for Complex Litigation* (4th Ed. 2006).

1 To make this determination, courts must consider several relevant factors, including “the
2 strength of [the] plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation,
3 the risk of maintaining class action status through trial, the amount offered in settlement, the extent of
4 discovery completed and the stage of the proceedings, [and] the experience and views of counsel.”
5 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. “The list of factors is not exclusive and
6 the court is free to engage in a balancing and weighing of the factors depending on the circumstances
7 of each case.” *Wershba, supra*, at 245.

8 **A. The Proposed Settlement is Fair, Reasonable, and Adequate.**

9 Courts make an initial evaluation of the fairness, reasonableness, and adequacy of the proposed
10 settlement on the basis of information already known, supplemented as necessary by briefs, motions,
11 or information presented by the settling parties. *See Manual for Complex Litigation* at § 21:632. Courts
12 must ensure that “the agreement is not the product of fraud or overreaching by, or collusion between,
13 the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
14 concerned.” *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1027. A presumption of fairness
15 exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and
16 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced
17 in similar litigation; and (4) the percentage of objectors is small. *Dunk v. Ford Motor Co., supra*, at
18 1802. The first three of these conditions are satisfied here, and Plaintiff expects that the fourth
19 condition will also be satisfied.

20 **i. The proposed Settlement is well within the range of reasonableness.**

21 A preliminary review of the Settlement reveals the fairness of its terms. The estimated amounts
22 to be distributed to the Settlement Class Members, including the Net Settlement Amount
23 (\$3,497,423.70) and Net PAGA Amount (\$13,750.00) (for a total of \$3,511,173.70), will result in fair
24 and just relief to all Members of the Settlement Class. *Id.* at ¶ 61. This amount will be available to
25 approximately 5,759 Class Members, exclusive of attorneys’ fees and costs, administrative costs and
26 other expenses, payment to the LWDA, and the service awards. *Id.* at ¶ 62. The Net Settlement Amount
27 together with the Net PAGA Amount, provides an estimated average recovery of \$609.68 per
28 Settlement Class Member, assuming full participation of all Class Members. *Id.* at ¶ 63. Considering
29 the difficulty and risks presented by continuing this litigation, the result is within the reasonable
30 standard. *Id.* This is a recovery that easily falls within the range of reasonableness. *Kullar v. Foot*
31 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116 at 133 (“*Kullar*”) (citing *Tech-Bilt, Inc. v. Woodward-*
32

1 *Clyde & Associates* (1985) 38 Cal.3d 488, 499–500 [“the court must at least satisfy itself that the class
2 settlement is within the “ballpark” of reasonableness”]).

3 This amount provides significant compensation to the Class Members. This is particularly true
4 here, when compared to Defendants’ potential exposure. Class Counsel determined based on its
5 investigation, interviews, and analysis of data, that Class Members worked off the clock an average of
6 4.5 minutes per day, were subject to a 45% violation rate for meal breaks and 57% violation rate for
7 rest breaks per shift, were required to pay approximately \$129.26 for necessary business expenses
8 and/or medical testing on average without reimbursement; and where Class Members worked an
9 average of 4 hours per shift. *Id.* at ¶¶ 66-71.

10 Based on this assessment, the Settlement represents 43% of the Defendants’ total substantive
11 potential exposure estimated at \$12.6 million, which represents Defendants’ exposure for claims for
12 unpaid wages, meal and rest breaks, and expense reimbursements that would have been owed to the
13 Class Members. *Id.* at ¶ 72. The Gross Settlement Amount further represents approximately 13% of
14 the estimated Defendant’s total potential exposure of \$43.3 million, including derivative and PAGA
15 claims. *Id.* at ¶ 73. To obtain such amounts, Plaintiffs and the putative Class would have been required
16 to fully prevail on all causes of action and can prove that Plaintiffs and the Class indeed were subject
17 to the assumed violation rates noted above. *Id.* at ¶74.

18 A recovery of approximately 13% of the total estimated exposure easily falls within the range
19 of reasonableness. *See In Re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 (“It is
20 well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not
21 per se render the settlement inadequate or unfair.”) (citation omitted)).⁶

22 **ii. The Settlement is presumptively fair because it was reached after extensive**
23 **investigation, discovery, and analysis of the claims.**

24 California courts recognize that “a presumption of fairness exists where . . . [a] settlement is
25 reached through arm’s-length bargaining.” *Wershba, supra*, at 245. Preliminary approval is warranted
26 where the Court is provided sufficient information regarding the discovery process and facts
27 developed. *See Kullar, supra*, at 129-31, so that the Court may form “an understanding of the amount
28

29 ⁶ *Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016) Case No. 15-cv-2198-EMC, 2016 WL
30 5907869, at *7 (approving wage and hour settlement representing 8.1% of the total verdict value);
31 *Stovall-Gusman v. W.W. Granger, Inc.* (N.D. Cal. June 17, 2015) 2015 WL 3776765, at *4 (“10%
32 gross and 7.3% net figures are ‘within the range of reasonableness’”); *Balderas v. Massage Envy*
Franchising, LLP (N.D. Cal. July 21, 2014) 2014 WL 3610945, at *5 (gross settlement amount of 8%
of maximum recovery and net settlement amount of 5%); *Ma v. Covidien Holding, Inc.* (C.D. Cal. Jan.
31, 2014) 2014 WL 360196, at *4-5 (9.1% of “the total value of the action” is within the range of
reasonableness).

1 that is in controversy and the realistic range of outcomes of the litigation.” *Clark v. Am. Residential*
2 *Servs. LLC* (2009)175 Cal.App.4th 785, 801.

3 The Settlement was agreed upon following an extensive review of the facts and law in this case.
4 Cottrell Decl. at ¶¶ 18-19, 21, 64-65; *Kullar, supra*, at 129-31. Class Counsel investigated applicable
5 law and facts in this case and extensively analyzed the potential damages that might be recovered
6 following the exchange of documents and information. *Id.* Defendants provided substantial informal
7 discovery including, but not limited to, applicable written policies, Plaintiff Sishi’s personnel file and
8 time and pay records, a sampling of employee payroll data, and payroll calendars for the PAGA period.
9 *Id.* Class Counsel used this information, in conjunction with their interviews with numerous Class
10 Members, to perform a careful and extensive analysis of the effects of Defendants’ compensation
11 policies and practices on Class Members’ pay. *Id.*

12 **B. Litigation of this Action Not Only Would Delay Recovery, But Would be**
13 **Expensive, Time-Consuming, and Would Involve Substantial Risk.**

14 Absent this Settlement, it is estimated that Class Counsel’s fees and costs would far exceed
15 \$2,000,000.00 to pursue these claims on behalf of Class Members. Cottrell Decl. at ¶ 75. Litigating
16 the class claims in this action would require substantial discovery including the depositions of current
17 and former employees and experts, and consideration, preparation, and presentation of voluminous
18 documentary evidence and the preparation and analysis of expert reports. *Id.*

19 In contrast, the Settlement will yield a prompt, certain, and substantial recovery for Settlement
20 Class Members. *Id.* at ¶ 76. Such a result will benefit the Parties and the court system. *Id.* The proposed
21 \$5,500,000.00 Settlement achieves a just and beneficial result. *Id.* In light of the challenges that
22 Plaintiffs would likely face, the proposed Settlement is extremely reasonable. *Id.*

23 **i. Plaintiffs face substantial risks of continuing to litigate these claims.**

24 The reasonableness of the Settlement is further underscored by the fact that Defendants have
25 legal and factual grounds available to defend this action. *Id.* at ¶ 77. Defendants posit that this case is
26 not suitable for class treatment, that they fully complied with their obligations under the Labor Code,
27 and that Plaintiffs and the Class are not entitled to damages, penalties, or other relief sought. *Id.* These
28 defenses must be accounted for in considering the reasonableness of the Settlement.

29 Plaintiffs would face significant risks if the litigation were to proceed to trial. *Id.* at ¶ 78.
30 Plaintiffs would need to establish class-wide liability and prove up various issues regarding damages
31 and penalties. *Id.* Such efforts would likely take many more months, if not years, and would necessitate
32 expert witness testimony and significant additional litigation. *Id.* Even if Plaintiffs successfully

1 overcame these procedural obstacles, full recovery of Plaintiffs' claims would also require complete
2 success and certification of all of Plaintiffs' claims, a questionable feat in light of developments in
3 wage and hour and class action law as well as the legal and factual grounds that Defendants have
4 asserted to defend this action.

5 Off-the-clock claims are difficult to certify for class treatment, given that the nature, cause, and
6 amount of the off-the-clock work may vary based on the individualized circumstances of the worker.⁷
7 While Plaintiffs are confident that they would establish that common policies and practices give rise
8 to the off-the-clock work for Class Members, Plaintiffs acknowledged that the off-the-clock work was
9 performed by hourly employees holding various job titles at dozens of different locations around
10 California, and whether all such work was under the control of Defendants would be heavily
11 contested.⁸ *Id.* at ¶ 79. With differing facilities' physical layouts, supervisors, and the nature of the
12 work varying by location, Plaintiffs recognized that obtaining class certification would present a
13 significant obstacle, with the risk that the Class Members could only pursue individual actions in the
14 event that certification was denied. *Id.* Certification of off-the-clock work claims is further
15 complicated by the lack of documentary evidence and reliance on employee testimony, and Plaintiffs
16 would likely face motions for decertification as the case progressed. *Id.*

17 Plaintiffs' claims regarding business expense reimbursements and for unpaid medical or
18 physical examinations would be equally difficult to certify for class treatment, given that the nature
19 and amounts of such expenses may vary based on the individualized circumstances of each worker,
20 and given that evidence of such expenses would be complicated by the lack of documentary evidence
21 and reliance on employee testimony. *Id.* at ¶ 80.

22 Additionally, Plaintiffs' derivative claims rise and fall with Plaintiffs' other claims. *Id.* at ¶ 82.
23 While Plaintiffs believe that they would prevail on these issues, they recognize the risk that a fact
24 finder may find for Defendants on one or more issues and may find damages to be significantly less

26 ⁷ See, e.g., *In re AutoZone, Inc., Wage & Hour Emp't Practices Litig.* (N.D. Cal. 2012) 289 F.R.D.
27 526, 539, *aff'd*, (9th Cir. Oct. 4, 2019) No. 17-17533, 2019 WL 4898684 ; *Kilbourne v. Coca-Cola*
28 *Co.* (S.D. Cal. July 29, 2015) No. 14CV984-MMA BGS, 2015 WL 5117080, at *14; *York v. Starbucks*
Corp. (C.D. Cal. Nov. 23, 2011) No. CV 08-07919 GAF PJWX, 2011 WL 8199987, at *30.

29 ⁸ See, e.g., *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 578 (employees must be
30 compensated for all time "during which an employee is subject to the control of an employer" under
31 California law); *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1051 (Liability for off-
32 the-clock work claims "is contingent on proof [that the employer] knew or should have known off-
the-clock work was occurring" and "that employees are clocked out creates a presumption they are
doing no work, a presumption [the plaintiffs] have the burden to rebut"); *White v. Starbucks Corp.*
(N.D. Cal. 2007) 497 F.Supp.2d 1080, 1083 ("To prevail on his off-the-clock claim, [plaintiff] must
prove that [the employer] had actual or constructive knowledge of his alleged off-the-clock work.").

1 than what Plaintiffs claim. *Id.* For example, Defendants would likely argue that no penalties for
2 waiting-time violations can be awarded unless the failure to pay wages is “willful,” an element that
3 Plaintiffs acknowledge would have been difficult to prove given Defendants’ policies and
4 enforcement.⁹

5 There is also the risk that even before Plaintiffs successfully prevailed in proving liability as to
6 all of their claims, the Court would strike Plaintiffs’ PAGA claims for lack of manageability, a
7 requirement now affirmed by one California appellate court ruling in *Wesson v. Staples the Off.*
8 *Superstore, LLC* (2021) 68 Cal.App.5th 746, *reh’g denied* (Sept. 27, 2021), *rev’w denied* (Dec. 22,
9 2021) (“courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried
10 and, if necessary, may strike a claim that cannot be rendered manageable”).¹⁰

11 Plaintiffs would further likely need to move for and defend against motions for summary
12 judgment or adjudication, and would have been further required to take their claims to trial. Cottrell
13 Decl., ¶ 82. Trials are inherently risky for all parties. Although Plaintiffs believe they could have been
14 successful in proving these claims, and that Defendants’ evidence would not have been as persuasive,
15 a trial on off-the-clock claims and meal and rest periods would have carried a high degree of risk.
16 After all, Defendants, represented by experienced employment lawyers, raised many of the above
17 arguments, and more, in mediation and would have done so in continued litigation. *Id.* at ¶ 83. Despite
18 Plaintiffs’ confidence in their ability to prove their claims on a Class-wide basis, any of the defenses,
19 if decided in Defendants’ favor, could have reduced or even eliminated any potential damages award.
20 *Id.* Given all these risks, Class Counsel believes that this settlement is reasonable, and indeed excellent,
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22

23 ⁹ See Cal. Lab. Code § 203; 8 C.C.R. 13520 (“[a] willful failure to pay wages within the meaning of
24 Labor Code section 203 occurs when an employer intentionally fails to pay wages to an employee
25 when those wages were due.”); *Smith v. Rae Venter Law Group* (2002) 29 Cal.4th 345, 354 n.2
26 (holding that a good faith dispute that any wages are due will preclude an award of waiting time
penalties). Defendants would also have argued that an employer’s failure to pay wages is not willful
unless it reached the standard of “gross negligence or recklessness.” See *Amaral v. Cintas* (2008) 163
Cal.App.4th 1157, 1201.

27 ¹⁰ Even assuming Plaintiffs would prevail against a motion to strike Plaintiffs’ PAGA claims for lack
28 of manageability, further risks would complicate Plaintiffs’ claims. For example, the majority of courts
29 have found there is no private right of action under the PAGA - if at all - for violations of Labor Code
30 Sections 246 and 248.5 for violations of California sick pay laws. See, e.g., *Rudolph v. Herc Rentals*
31 (C.D. Cal. Aug. 27, 2021) No. 2:20-cv-05412-ODW (Ex), 2021 U.S. Dist. LEXIS 244970, at *14
32 (joining *Stearne v. Heartland Payment Sys. LLC* (E.D. Cal. Feb. 6, 2018) No. 2:17-cv-01181-MCE-
CKD, 2018 U.S. Dist. LEXIS 20679, 2018 WL 746492, at *2 (dismissing PAGA claims based on sick
leave violations)); *Segal v. Aquent LLC* (S.D. Cal. Sept. 24, 2018) No. 18cv346-LAB (JLB), 2018 WL
4599754, at *7 (striking references to Cal. Lab. Code sections 246.5 and 247.5 as bases for PAGA
penalties); *Titus v. McLane Foodservice, Inc.* (E.D. Cal. Sep. 13, 2016) No. 2:16-cv-00635-KJM-EFB,
2016 U.S. Dist. LEXIS 125116, at *16 (noting there is no private right of action under § 246 in dicta.)

1 based on the strength of the claims, the size of the group of Class Members, and the risks of going to
2 trial.

3 **C. Class Counsel are experienced class action litigators.**

4 Class Counsel are experienced and respected class action litigators. *See Id.* at ¶¶ 6-9. Based on
5 Class Counsel's knowledge and expertise in this area of law, Class Counsel believes this Settlement
6 will provide a substantial benefit to the Class Members. *Id.* at ¶ 84.

7 **D. The Service Awards Are Reasonable and Should Be Preliminarily Approved.**

8 Courts award service payments to advance public policy by encouraging individuals to come
9 forward and perform their civic duty in protecting the rights of the class, as well as to compensate
10 class representatives for their time, effort, inconvenience, and for any expense or risk incurred. *Munoz*
11 *v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412.

12 The unopposed payments to Plaintiff Sishi in the amount of \$10,000.00, and \$5,000 each to
13 Plaintiffs Sandeep Purewal, Cherra Redd, and Zenaya White are reasonable in light of the efforts they
14 made and the risks they took in filing and prosecuting the action(s) as Class Representatives to obtain
15 this Settlement. Cottrell Decl. at ¶ 94. The Class Representatives have committed their time to the
16 case(s) and assumed significant risk to obtain the result. *Id.* at ¶ 96. Throughout this litigation, the
17 Class Representatives worked with counsel and assisted in the development of the case, including
18 providing documents and pivotal information relied upon by Class Counsel in mediation, answering
19 Class Counsel's questions in developing its position for mediation, taking part in the Settlement
20 decision; remaining apprised of the case at all times. *See Id.* ¶ 97. Moreover, the Class Representatives
21 have all agreed to a broader, general releases. *Id.* ¶¶ 46, 97. Due to the Class Representatives' efforts
22 and their willingness to step forward, the Class Members will receive significant recoveries if the
23 Settlement is approved. *Id.* at ¶ 95. Had they not done so, the matter may never have been brought
24 and the Class Members would not get any recovery while Defendants' alleged conduct would have
25 gone unchecked. *Id.*

26 **E. The Proposed Payment of Attorneys' Fees and Costs is Reasonable.**

27 Plaintiffs seeks reasonable attorneys' fees and expenses from the \$5,500,000.00 Gross
28 Settlement Amount. *Id.* at ¶ 99. Under the terms of the Settlement, Class Counsel may seek an award
29 of up to one-third of the Gross Settlement Amount, or \$1,833,333.33, plus reimbursement of actual
30 costs, which are currently estimated at \$29,242.97, and will do so in their fee motion to be submitted
31 with the final approval papers. *Id.* at ¶ 100. Plaintiffs believe this amount is reasonable, and will
32 provide further support in conjunction with their motion for final approval. *Id.* at ¶ 101.

1 In this case, there was no guarantee of compensation or reimbursement. *Id.* at ¶ 103. Rather,
2 Class Counsel have undertaken all the risks of this litigation on a completely contingent basis. *Id.* The
3 inherent risk of proving liability and damages on a Class-wide basis and Defendants' representation
4 by skillful counsel confront Class Counsel with the prospect of recovering nothing or close to nothing
5 for their commitment to and investment in the case. *Id.* Nevertheless, the Class Representatives and
6 Class Counsel have committed themselves to developing and pressing Plaintiffs' legal claims to
7 enforce the employees' rights and maximize the Class recovery. *Id.* at ¶ 105. This commitment and
8 the risks involved are precisely the reasons for multipliers in contingency fee cases.¹¹ *Id.* As Settlement
9 Class Members will receive significant payments if the Settlement is approved, Class Counsel seek a
10 reasonable fee award for their efforts and the risk they have assumed. *Id.*

11 Class Counsel's requested fee is well within the range customarily approved by California and
12 federal courts in comparable class actions. *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn.
13 11 (recognizing one-third as the average fee award in class actions); *Laffitte v. Robert Half Int'l Inc.*
14 (2014) 180 Cal.Rptr.3d 136, 149, *as modified* (Nov. 21, 2014) ("...the trial court's use of a percentage
15 of [one-third] of the common fund is consistent with, and in the range of, awards in other class action
16 lawsuits."); *see also, e.g., Ojito v. Robertson's Ready Mix Concrete, Inc.*, No. RIC420994 (Super. Ct.,
17 Riverside County, Jan. 16, 2007) (approving 30% fee award with no mention of lodestar crosscheck);
18 *Ochoa v. Haralambos Beverage Co.*, No. BC319588 (Los Angeles Super. Ct., Feb. 1, 2007)
19 (approving 33.3% fee award with no mention of lodestar crosscheck); *Big Lots Overtime Cases*, JCC
20 Proceeding No. 4283 (San Bernardino Super. Ct., Feb. 4, 2004) (approving award of attorneys' fees
21 of 33% of the recovery).

22 Further, reasonable litigation expenses are ordinarily included in an award of attorneys' fees
23 pursuant to California wage and hour law. Class Counsel's litigation costs are currently estimated at
24 \$29,242.97. Cottrell Decl. at ¶108. All expenses were reasonable, necessary to the prosecution of the
25 action, and are customarily billed to fee-paying clients. *Id.* Class Counsel's efforts resulted in an
26 excellent settlement, and the requested fee award is reasonable under the circumstances. *Id.* at ¶ 109.
27 The fee and costs award should be preliminarily approved as fair and reasonable. *Id.*

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31 ¹¹ See Posner, *Economic Analysis of the Law*, 534, 567 (4th ed. 1992) ("A contingent fee must be
32 higher than a fee for the same legal services paid as they are performed... because the risk of default
(the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of
conventional loans").

1 **VI. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS FOR**
2 **SETTLEMENT PURPOSES.**

3 This Court should certify the proposed Class pursuant to California Code of Civil Procedure §
4 382. California has a strong public policy in favor of broad enforcement of wage and hour laws for
5 the benefit of workers and in favor of using the class action device. *Sav-on Drug Stores, Inc. v.*
6 *Superior Court* (2004) 34 Cal.4th 319, 340. The party seeking certification has the burden to establish
7 the existence of both an ascertainable class and a well-defined community of interest among class
8 members. *Id.* at 326 (citations omitted). The ‘community of interest’ has three factors: (1) predominant
9 common questions of law or fact; (2) class representatives with claims or defenses typical of the class;
10 and (3) class representatives who can adequately represent the class.” *Id.*

11 The benefits and efficiencies of this proposed Settlement, when compared to continued
12 litigation on either a class basis or through multiple individual suits, justifies certification of the
13 proposed Class. Cottrell Decl. at ¶ 96. Applying the standards outlined herein, the Court should certify
14 the proposed Class.

15 **A. Plaintiffs Satisfy the Ascertainability and Numerosity Requirements for**
16 **Settlement.**

17 In determining whether a class is “ascertainable,” courts “examine the class definition, the size
18 of the class, and the means of identifying the class members.” *Reyes v. Board of Supervisors* (1987)
19 196 Cal.App.3d 1263, 1274-75. Plaintiffs defined the Class according to objective criteria. The
20 Members are easily identifiable and can be easily located. Cottrell Decl. at ¶ 86. Plaintiffs satisfy the
21 numerosity element as well with approximately 5,759 Class Members. *Rose v. City of Hayward* (1981)
22 126 Cal.App.3d 926, 934; *Collins v. Rocha* (1972) 7 Cal.3d 232, 238; Cottrell Decl. at ¶ 87.

23 **B. Common Questions of Law and Fact Predominate in this Action for Settlement**
24 **Purposes.**

25 “[T]he focus in a certification dispute is on what type of questions – common or individual –
26 are likely to arise in the action[.]” *Sav-on*, 34 Cal.4th at 327. The California Supreme Court has
27 expressly held that predominance does not require that all questions of law and fact be uniform for all
28 class members. *Id.* at 338. Here, Defendants’ class-wide policies and procedures raise common issues
29 of law and fact that are applicable to the claims of the Class Representatives and Class Members.
30 Cottrell Decl. at ¶ 88. Where, as in this case, uniform policies and procedures apply on a class-wide
31 basis, “the legal question to be resolved is not an individual one. To the contrary, the common legal
32 question remains the overall impact of [Defendant’s] policies on its [employees]...” *Jaimez v. Daiohs*

1 *USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299. Plaintiffs allege that Defendants have uniform
2 timekeeping, payroll, compensation, overtime, minimum wage, reimbursement, sick time, meal and
3 rest period, overtime, and other policies and practices applicable to all non-exempt hourly employees.
4 Cottrell Decl. at ¶ 88.

5 There are common factual issues that apply to the Class Members, such as Defendants' alleged
6 failures to pay for all hours worked (including minimum wage and overtime), provide uninterrupted
7 meal and rest breaks, pay for all necessarily business expenses, provide accurate itemized wage
8 statements, and provide all wages at separation of employment, among others. *Id.* These standardized
9 policies and procedures are dictated by Defendants and apply to all Class Members. *Id.*

10 **C. The Typicality Requirement is Satisfied for Settlement Purposes.**

11 The Class Representatives also must establish that they are typical members of the Class they
12 seek to represent. *Chern v. Bank of America* (1976) 15 Cal.3d 866, 874. A representative plaintiff's
13 claims are "typical" if they arise from the same event, practice, or course of conduct that gives rise to
14 the claims of the other class members and if their claims are based on the same legal theory. *Classen*
15 *v. Weller* (1983) 145 Cal.App.3d 27, 46-47. The typicality requirement is not onerous and does not
16 require the claims to be identical. *Id.*

17 Here, the Class Representatives, like Class Members, were subject to the policies and practices
18 that form the basis of the claims asserted. Cottrell Decl. at ¶ 89. The Class Representatives claim they
19 were denied meal and rest breaks, compensation for all hours worked (including overtime and
20 minimum wages), compliant meal and rest breaks, costs for medical examination and other necessary
21 expenses, proper calculation of sick time, written notice of material terms of employment, accurate
22 itemized wage statements, and payment at separation of employment. *Id.* Like the Class
23 Representatives, Class Members were subjected to the same allegedly illegal policies and practices to
24 which the Class Representatives were subjected and the Class claims are based on the same legal
25 theory. *Id.* Interviews with Class Members and review of timekeeping and payroll data confirm that
26 the employees throughout California were subjected to the same alleged illegal policies and practices
27 to which the Class Representatives were subjected. *Id.* Accordingly, the Class Representatives are
28 members of the Class they seek to represent, and their claims are "typical" of those asserted by other
29 Class Members. *Id.*

30 **D. The Adequacy Requirement is Satisfied for Settlement Purposes.**

31 A plaintiff is an adequate class representative if his or her claims are not inconsistent with or
32 antagonistic to the claims of the class members. *See Johnson v. GlaxoSmithKline, Inc.* (2008) 166

1 Cal.App.4th 1497, 1509. Here, there is no conflict between the Class Representatives and the Class.
2 Cottrell Decl. at ¶ 90. The Class Representatives' claims are in line with those of the Class, and the
3 Class Representatives have prosecuted this case with the interests of the Class in mind. *Id.* The Class
4 Representatives selected counsel with extensive experience in class action and employment litigation,
5 including wage and hour class actions, who do not have any conflict with the Class. *Id.* As such, the
6 Class Representatives are adequate class representatives, and Schneider Wallace Cottrell Konecky
7 LLP, Lawyers for Justice PC, and Capstone Law APC are appropriate Class Counsel. *Id.* at ¶¶ 91.

8 **VII. THE PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS.**

9 “Adequate notice is critical to court approval of a class settlement under Rule 23(e).” *Hanlon*,
10 150 F.3d at 1025. Class notice “is satisfactory if it ‘generally describes the terms of the settlement in
11 sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be
12 heard.’” *Churchill Village LLC v. General Electric* (9th Cir. 2004) 361 F.3d 566, 575.

13 All Class Members will be identified, and the Notice will be mailed directly to each Class
14 Member, and emailed to those for whom Defendants has an email address. Cottrell Decl. at ¶ 111. SSI
15 will establish a toll-free number for inquiries from Class Members as well as a settlement website that
16 provides a generic form of the Notice, the Settlement, and other case related documents and contact
17 information. *Id.* at ¶¶ 112. Prior to the mailing, SSI will check the addresses provided by Defendants
18 through the National Change of Address System, if necessary. *Id.* at ¶ 113. If a Notice is returned as
19 undeliverable, SSI will perform a skip trace and resend the notice. *Id.*

20 The proposed Notice is clear and straightforward, and provides information on the case, the
21 meaning and nature of the proposed Settlement, its terms and provisions, the rights of the Class
22 Members to participate, opt out, and object, the monetary awards that the Settlement will provide to
23 Settlement Class Members, the Class release, the date, time, and location of the Final Approval
24 hearing, and contact information for Class Counsel. *Id.* at ¶¶ 114-116. The Notice also fulfills the
25 requirement of neutrality in class notices. *See Newberg on Class Actions* at § 8:21; *Manual for*
26 *Complex Litig.* at §§ 21:311 and 21:312; Cottrell Decl. at ¶ 115. Based on the foregoing, the Notice
27 complies with the standards of fairness, completeness, and neutrality required of a settlement class
28 notice disseminated under authority of the Court. *Id.* at ¶ 117.

29 **VIII. CONCLUSION**

30 For the foregoing reasons, Plaintiffs respectfully requests that the Court grant this Motion for
31 Preliminary Approval and enter an Order consistent with the Proposed Order submitted herewith.
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Respectfully Submitted,

Dated: December 22, 2022

**SCHNEIDER WALLACE
COTTRELL KONECKY LLP**



Carolyn Hunt Cottrell
Ori Edelstein
Michelle S. Lim
Kristabel Sandoval

*Attorneys for Plaintiffs, on behalf of the
Putative Class, the State of California, and
Aggrieved Employees*



Reschedule a Reservation

Reservation

Reservation ID:
677085749399

Reservation Type:
Motion re: (Preliminary Approval of Settlement)

Case Number:
RG21100764

Case Title:
Sishi VS Eskaton Properties Incorporated

Filing Party:
Khayo Sishi (Plaintiff)

Location:
Hayward Hall of Justice - Department 512

Date/Time:
February 15th 2023, 1:30PM

Status:
RESERVED

Number of Motions:
1

Motions to Reschedule

Motion re: (Preliminary Approval of Settlement)

Reschedule To:

Date: 01/20/2023 9:00 AM

Location: Hayward Hall of Justice - Department 512

Fees

Description	Fee	Qty	Amount
Reschedule Fee	1.00	1	1.00
TOTAL			\$1.00

Payment

Amount:
\$1.00

Type:
MasterCard

Account Number:
[REDACTED]

Authorization:
09697S

Payment Date:
1969-12-31

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