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12
13 **SUPERIOR COURT OF CALIFORNIA**
14 **COUNTY OF RIVERSIDE, HISTORIC COURTHOUSE**

15 CHASMINE SHAW, individually, and on behalf
16 of a Class of all other persons similarly situated,

17 Plaintiff,

18 v.

19 KAISER FOUNDATION HEALTH PLAN,
INC. a California corporation; and DOES 1
20 through 100, inclusive,

21 Defendant.

Case No.: CVRI2102203

**CLASS AND REPRESENTATIVE
ACTION**

Assigned for all purposes to:

Hon. Harold Hopp

Dept. 1

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS AND REPRESENTATIVE
ACTION SETTLEMENT**

24 Date: August 9, 2023

25 Time: 8:30 a.m.

26 RES ID: 527482854000

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I. INTRODUCTION

Plaintiff Chasmine Shaw (“Plaintiff”) seeks preliminary approval,¹ under Rule 3.769(c) of the California Rules of Court, of a \$975,000 non-reversionary Settlement on behalf of approximately 1,050² current and former Customer Service Representatives (“CSRs”) who worked for Defendant Kaiser Foundation Health Plan, Inc. (“Defendant”) in California between May 12, 2017 and the date this Settlement is preliminary approved by this Court (the “Class Period”).

This is a cash settlement and all Class Members who do not opt out will receive a payment, without a requirement to submit a claim form. The Gross Settlement Amount is \$975,000. Plaintiff alleges that she worked uncompensated overtime to complete customer calls due to Kaiser’s overtime pre-approval requirements, was not provided timely meal and rest breaks, nor paid premiums for non-complying breaks, and was not reimbursed for necessarily incurred cell phone and home-internet expenses. Plaintiff further alleges derivative claims for inaccurate wage statements and untimely paid wages at termination of employment. Plaintiff also alleges a cause of action for violations of Private Attorneys General Act (“PAGA”) and Business and Professions Code section 17200, *et seq.* (“UCL”).

This case resolved following mediation before an experienced wage and hour neutral, David A. Rotman, Esq. Plaintiff argues that Defendant’s maximum potential liability for all her claims, excluding PAGA penalties,³ is \$13,217,401.25. This assumes Plaintiff would collect meal break premiums for every instance where a time card shows a missed, late or short meal break, a rest break premium for 2 shifts per week, that Plaintiff and the class would be compensated for 10 minutes of off the clock work, every day, at an overtime rate, and that Plaintiff and class members incurred an average of \$40 of unreimbursed business expenses each month beginning when the COVID-19 pandemic began in approximately March 2020, and until approximately April 2022 when Kaiser streamlined its policy to ease the process of requesting reimbursement of up to \$40 of home internet unreimbursed expenses.

¹ This memorandum exceeds the 15-page limit set forth in CRC 3.1113, but because it seeks class certification as part of the settlement approval process (which has a 20-page limit), and because Plaintiff needed additional space to sufficiently present this Settlement for the Court’s approval, concurrent with filing this motion, Plaintiff submitted a stipulation for leave to exceed the page limit.

² There are approximately 848 class members employed since January 27, 2020, which is the applicable time period for Plaintiff’s claims (except for the reimbursement claim) due to the prior Kaiser class action settlement in *Williams v. Kaiser Foundation Health Plan* (Alameda County Superior Court Case No. RG18917898).

³ The settlement of Plaintiff’s PAGA penalties is discussed in section IV(A)(3), below.

1 The \$975,000 Gross Settlement Amount represents over 7% (7.4%) of Defendant's maximum
2 potential liability for all of Plaintiff's non-PAGA claims, and nearly 12% (11.67%) of Plaintiff's direct
3 unpaid overtime, meal and rest break, and unreimbursed business expense claims. This is an excellent
4 result in light of the risks of continued litigation, and within the range of typical class action settlement
5 recoveries.

6 Plaintiff seeks entry of an order: (1) preliminarily approving the proposed Settlement; (2)
7 approving the form and content of the proposed Class Notice; (3) directing that Class Notice be given to
8 Class Members; (4) provisionally certifying the Settlement Class and appointing Plaintiff as a Class
9 Representative and Plaintiff's counsel as Class Counsel; (5) preliminarily approving Settlement
10 administration services to be provided by the Settlement Administrator, and; (6) scheduling a Fairness
11 Hearing.

12 II. FACTUAL AND PROCEDURAL BACKGROUND

13 Plaintiff was employed by Defendant as a non-exempt, hourly-paid CSR at Defendant's call center
14 in Corona, California between February and April 2021. Declaration of Chasmine Shaw ("Shaw Decl."),
15 ¶3. Plaintiff's duties primarily included answering incoming telephone calls related to Defendant's
16 healthcare services, connecting callers within specific facilities, and handling inquiries about claim status
17 and payment. *Id.*, ¶3.

18 Plaintiff filed a complaint against Defendant on May 11, 2021 in Riverside Superior Court, alleging
19 that Defendant failed to pay her and other CSRs for all hours worked, failed to provide meal and rest
20 breaks, or pay premiums for non-compliant breaks, and failed to reimburse necessarily incurred business
21 expenses, including for home internet and cell phone expenses. Plaintiff also asserted claims for violation
22 of the UCL, claims for inaccurate wage statements, and untimely paid wages at termination of
23 employment. On August 8, 2021, Plaintiff amended her complaint to add claims for penalties under
24 PAGA. Declaration of David R. Markham ("Markham Decl."), ¶3.

25 Defendant sought removal of the action to federal court on November 15, 2021, citing the Labor
26 Management Relations Act (LMRA), on the basis of its CBA. *Id.*, ¶3. Plaintiff opposed and filed a motion
27 to remand. The Court denied removal and granted Plaintiff's motion to remand. Defendant also filed a
28 motion to dismiss and motion to strike in federal court, which were mooted when the Court granted the

1 motion to remand. This action was remanded back to state court on February 24, 2022. Defendant then
2 filed motions to strike and dismiss the operative complaint in state court, which Plaintiff opposed, and
3 on May 26, 2022, the Court granted the motion in part and denied in part, permitting Plaintiff an
4 opportunity to amend. Plaintiff filed the operative Second Amended Complaint (“SAC”) on June 13,
5 2022, to address concerns raised in the Court’s order.

6 Plaintiff’s investigation revealed that CSRs needed to complete calls and were unable to transfer or
7 end them, resulting in untimely and shortened breaks. Plaintiff also alleges that Defendant required overtime
8 to be pre-approved, but due to the nature of the customer calls, CSRs were unable to obtain overtime
9 approval in advance. *Id.*, ¶4. Plaintiff’s expert reviewed the sample of employee timecards for meal break
10 violations, which indicated approximately 6% of meal breaks were facially non-compliant. *Id.* However,
11 Plaintiff alleges that class members were often still required to record meal periods as compliant, whether
12 they were able to take them or not. *Id.* Plaintiff further alleges that Kaiser did not have a system in place
13 to pay – and that no premiums were paid – during the class period. Rest breaks are not recorded in the
14 time records. *Id.*

15 Regarding Plaintiff’s unreimbursed business expenses claim, Plaintiff alleges that Kaiser failed to
16 reimburse CSRs’ necessarily incurred home internet and cell phone expenses. *Id.*, ¶5. Plaintiff alleges that
17 CSRs worked from home and used their home internet in performance of their job duties. Further,
18 although CSRs used a phone through their computer to complete call center calls from home, Plaintiff
19 alleges that class members were required to communicate with their managers using their personal cell
20 phones, and also required to use their own cell phone when internet or other technical issues arose. *Id.*

21 Plaintiff further alleged derivative claims, stemming from Plaintiff’s primary unpaid wage, meal
22 and rest break, and unreimbursed business expense claims, including violation of Labor Code section
23 226(a) for inaccurate wage statements and Labor Code section 203 for waiting time penalties, and
24 violations of PAGA and UCL under the same predicate factual and legal theories. *Id.*, ¶6.

25 There is another pending class and representative action against Kaiser, filed seven months after
26 this action, on behalf of all non-exempt employees (*Jones v. Kaiser Foundation Health Plan*, Alameda County
27 Superior Court, Case No. 21CV003542, filed December 3, 2021), which has a similar claim for
28 unreimbursed business expenses. Declaration of Bailey K. Bifoss (“Bifoss Decl.”), ¶3; *see also* Markham

Decl., ¶7. To the extent this case overlaps with Plaintiff's reimbursement claim (which is only on behalf of the CSR Class Members in this action), this *Shaw* action is first filed. Thus, the unreimbursed business expense claim alleged in *Jones* is only subsumed in this action as to CSRs. *Id.*

III. VIGOROUS PROSECUTION OF THIS ACTION

A. Summary of Investigation and Discovery Conducted

The parties engaged in discovery prior to mediation. Plaintiff served on Defendant requests for production of documents, interrogatories, and requests for admission. Markham Decl., ¶8. Defendant served Plaintiff with requests for production of documents, and noticed Plaintiff's deposition. *Id.* The parties subsequently agreed to stay formal discovery in lieu of informal discovery prior to mediation. In advance of mediation, Defendant produced its applicable policies and handbooks in effect during the class period, time and payroll records for a 25% sample of class members, and a 25-person sample of class member "not ready" reports, which documented when CSRs marked their phones on "not ready" status, to prevent incoming calls. *Id.*, ¶9. Plaintiff retained an expert who reviewed the class data and prepared a damages model prior to mediation. *Id.*

The parties carefully investigated the claims and facts alleged in this action, and Plaintiff has made a thorough study of the legal principles applicable to the claims asserted against Defendant. As a result of careful investigation of the claims in this action, including review of documents and data produced through pre-mediation discovery, the parties had a clear understanding of their respective claims and defenses. *Id.*, ¶10.

B. Settlement Reached after Arms-Length Negotiations with Assistance of Experienced Mediator

Plaintiff retained counsel with extensive experience in prosecuting wage and hour class actions. Markham Decl., ¶¶31-38. Defendant was represented by seasoned attorneys at Seyfarth Shaw, LLP. *Id.*, ¶10. On May 8, 2023, the parties mediated this case before David A. Rotman, Esq., of Mediated Negotiations, a mediator vastly experienced in wage and hour class actions. At the conclusion of the mediation session, the parties reached the settlement in principle, and executed a Memorandum of Understanding. After additional weeks of arms'-length negotiations, the parties finalized the terms of the settlement agreement. *Id.*, ¶11. The executed version of the Settlement Agreement is attached as **Exhibit**

1 to Markham Declaration.⁴

C. Summary of the Risks to Further Litigation, and to Obtaining and Maintaining Class Certification

Although Plaintiff is confident in her position, she recognizes several risks to succeeding on the merits and obtaining certification. Markham Decl., ¶18. First, although Plaintiff alleges that Defendant's overtime pre-approval policy denied class members overtime wages, discovery showed that Defendant paid substantial overtime wages during the class period. *Id.*, ¶19. Further, Defendant will likely contend that where an employer provides a means to record work time, the employer is entitled to rely on those time records, and is not required to audit other available records to ascertain if any off-the-clock work is occurring. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004, 1051 (2012) ("that employees are clocked out creates a presumption they are doing no work"); *Hertz v. Woodbury County*, 566 F.3d 775, 781-782 (8th Cir. 2009) (no duty to audit other available records); *Jong v. Kaiser Found. Health Plan, Inc.*, 226 Cal.App.4th 391, 398-399 (2014) (same). Additionally, Kaiser presented evidence that it has a six-minute grace period policy, which provides CSRs flexibility with beginning and ending calls before and after shift times. Further, although Defendant's policy required overtime to be pre-approved, it did provide for payment for all hours worked, whether preapproved or not. In fact, Kaiser's timekeeping policy specifically forbids off-the-clock work. Markham Decl., ¶19. Additionally, because Kaiser has a Collective Bargaining Agreement ("CBA") that applies to class member's claims, Plaintiff's claim for unpaid overtime wages faces preemption arguments under the Labor Management Relations Act and California Labor Code. *See Vranish v. Exxon Mobil Corp.*, 223 Cal.App.4th 103, 112 (2014) (affirming that a valid CBA exempts an employer from complying with Labor Code sections 510 and 511). Finally, to the extent Plaintiff could allege that Kaiser unlawfully rounded class members' time, Kaiser would rely on cases where it prevailed on summary judgment on this very issue. Markham Decl., ¶20.

Second, Plaintiff would argue that Defendant did not appropriately reimburse home internet and personal cell phone expenses, and that the practices in place during the pandemic create a common question regarding the legality of Kaiser's reimbursement policy, an issue ripe for certification. *Brinker*,

⁴ The Settlement Agreement was submitted to the LWDA concurrent to the filing of this motion, and proof of submission is attached as **Exhibit 2** to Markham Declaration.

1 *supra*, 53 Cal.4th at 1051; *see also* Markham Decl., ¶21. However, Defendant would argue that it had lawful
2 reimbursement policies and practices in place throughout the class period, and that it has reimbursed
3 class members nearly \$30,000 in business expenses during the class period. Additionally, although the
4 statutory period for this claim begins on May 11, 2017, Defendant would argue that any expenses tied to
5 remote work were largely non-existent before the COVID-19 pandemic began in March 2020, limiting
6 the applicable time period for this claim. Further, to the extent that Plaintiff and other CSRs did not seek
7 reimbursement of these expenses, this claim would be susceptible to summary judgment, and she would
8 face hurdles in quantifying and proving commonality for certification purposes. *See e.g., Hammit v. Lumber*
9 *Liquidators*, 19 F. Supp. 3d 989, 1001 (S.D. Cal. 2014) (granting summary judgment when employee failed
10 to request reimbursement). Finally, regarding Plaintiff's claim for failure to reimburse for personal cell
11 phone expenses, Defendant presented evidence that calls were made through a phone-based computer
12 program, and that as call center-based customer service representatives, class members typically do not
13 need to answer questions with managers outside of work hours. *Id.* Further, Defendant would likely argue
14 that where a plaintiff seeks class certification based on allegations that the employer consistently imposed
15 a uniform policy on class members (such as the expense reimbursement policy), the plaintiff must still
16 demonstrate that the illegal effects of this policy can be proven efficiently and manageably within a class
17 setting. *Duran v. U.S. Bank Nat'l Assn.*, 59 Cal.4th 1, 29 (2014); *Payton v. CSI Elec. Contractors, Inc.*, 27
18 Cal.App.5th 832, 842 (2018).

19 Third, regarding Plaintiff's meal break claim, Plaintiff would argue that under *Donohue v. AMN*
20 *Servs., LLC*, 11 Cal.5th 58 (2021) when time records show meal break violations, the presumption arises
21 employees were not provided meal breaks. *Id.* at 675-76. However, here, the rate of facial timecard
22 violation is very low – 6% – significantly diminishing the likelihood Plaintiff would be successful to show
23 on a classwide basis that Defendant failed to provide meal breaks. Markham Decl., ¶23. Additionally,
24 Defendant would present evidence that the low instance of late meal periods is consistent with
25 Defendant's scheduling optimizer program, which is set to schedule meal periods not later than 4.5 hours
26 into a CSR's shift, and which gives automated pop-up reminders when breaks are approaching.
27 Notwithstanding, Defendant would likely argue that in the 6% of facial violation instances, rebutting the
28 presumption that meal breaks were not provided, evidence of individualized experiences would be

1 necessary, preventing the findings of commonality and predominance. *Id.*

2 Further, Defendant would assert that some Class Members might have been able to take
3 uninterrupted rest (and meal) breaks, while some might not have been able to (on different occasions and
4 for different reasons). This could create individualized issues defeating commonality and predominance,
5 and manageability. Markham Decl., ¶24. Additionally, pre-mediation discovery of phone log “not ready”
6 reports revealed that class members switched their phone to non-ready status during meal and rest
7 periods, so that calls would not be able to come in during breaks (calls are not routed to class members
8 who place themselves on “not ready” status). Further, even if the rest break class were certified, damages
9 and penalties calculations could present complicated issues, as Defendant’s employees did not have to
10 clock out to take rest breaks, or otherwise record them. *Id.*, ¶24.

11 Lastly, with respect to wage statement and untimely wages claims, they are derivative of Plaintiff’s
12 unpaid time, meal and rest break and unreimbursed business expense claims, so if Plaintiff does not
13 prevail on the underlying claims, her derivative claims would also fail. *See Gomez v. Lincare, Inc.*, 173
14 Cal.App.4th 508, 524-25 (2009). Also, Defendant will likely assert that wages that were not paid cannot
15 form the basis of these derivative claims based on *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308,
16 1336-37 (2018). Markham Decl., ¶25.

17 IV. SUMMARY OF SETTLEMENT TERMS

18 A. Settlement Relief

19 Gross Settlement Amount:	\$975,000. Settlement Agreement, ¶I(H).
20 Deductions from the Gross Settlement 21 Amount:	22 • Attorneys’ fees not to exceed 33.33% of the 23 Gross Settlement Amount (\$325,000); 24 • Out-of-pocket litigation costs not to exceed 25 \$20,000; 26 • Enhancement Award to Plaintiff not to 27 exceed \$10,000; 28 • PAGA penalties of \$48,750 (of which 75% or \$36,562.50 will be paid to the LWDA and 25% or \$12,187.50 to Aggrieved Employees, who are Settlement Class Members employed at any time from through the date of Preliminary Approval); • Administration costs of approximately \$11,475. <i>Id.</i> , ¶I(B), I(G), I(O), I(DD).

Net Settlement Amount:	Approximately \$571,962.50. <i>See id.</i> , ¶I(P).
Definition of the Settlement Class:	All non-exempt persons who were employed by Defendant in the State of California and who held the position of Customer Service Representative I, II, or III, Kaiser job code numbers 21121, 21122, 21123, or 24762, at any time during the Settlement Period (defined as May 12, 2017 through the date of Preliminary Approval). <i>Id.</i> , ¶I(E).
Class Period:	From May 12, 2017 until preliminary approval. <i>Id.</i> , ¶I(F).
The number of Class Members and workweeks worked during the Class Period	1,050 Settlement Class Members; 140,248 workweeks (from May 12, 2017); 848 Settlement Class Members; 67,145 workweeks (from January 27, 2020). Markham Decl., ¶14.
The average individual settlement payment	\$4.08 per workweek; or approximately \$545 per class member from May 12, 2017 (without accounting for the number of workweeks worked); \$8.52 per workweek, or approximately \$675 per class member from January 27, 2020 (without accounting for the number of workweeks worked). <i>Id.</i>

1. *Settlement Formula and Distribution*

Class Members who do not opt out of the Settlement will receive their respective Settlement Payments from the Net Settlement Amount based on the number of workweeks they worked during the Class Period, without the need to submit a claim form. Settlement Agreement, ¶I(B). Distribution amounts will be calculated and allocated as follows:

$$\frac{\text{Workweeks Worked by Class Member}}{\text{Total Workweeks Worked by all Class Members}} \times \text{Net Settlement Amount} = \text{Class Member's Payment}$$

Id., ¶I(B).⁵

Class Members who do not opt out of the Settlement will release Defendant from all claims that relate to the causes of action asserted in this action – or those that could have been asserted in this action based on the facts alleged in Plaintiff's complaints and her PAGA letter. *See id.*, ¶I(Z).

Settlement checks will be valid and negotiable for 180 days. *Id.*, ¶IX(2). After that time, the Parties will seek the Court's approval to donate the funds represented by uncashed checks from the class action settlement fund, plus interest, to California Rural Legal Assistance as the *cypres* beneficiary pursuant to California Code of Civil Procedure Section 384(b). *Id.*, at ¶IX(2); Declaration of Jessica Jewell on Behalf

⁵ The PAGA Penalty Payment allocated to Aggrieved Employees will be calculated similarly on a pro rata basis, based on the total amount of pay periods PAGA Employees worked during the PAGA Period. *Id.*, ¶VI(A).

1 of Proposed *Cy Pres* Recipient California Rural Legal Assistance (“Jewell Decl.”); *see also* Markham Decl,
2 ¶40; Declaration of Richard E. Quintilone (“Quintilone Decl.”), ¶13; Bifoss Decl., ¶2 (attesting to no
3 prior relationship with *cy pres* beneficiary); Declaration of Joshua Drainville, (“Drainville Decl”), ¶5.
4 California Rural Legal Assistance meets the criteria of California Code of Civil Procedure, section 384(b),
5 as a nonprofit organization providing civil legal services to the indigent throughout California, including
6 in Riverside, California. *See* Cal. Civ. Proc., § 384(b); *see also* Jewell Decl. Any uncashed checks from the
7 PAGA portion of the fund will be distributed to the LWDA. Settlement Agreement, ¶IX(2).

8 All Settlement Payments are subject to taxation and will be reported to the IRS and state tax
9 authorities. One-third (33.33%) of each Class Member’s Settlement Payment will be allocated as wages,
10 and two-thirds (66.67%) will be allocated as penalties and interest, with withholding to apply only to the
11 portion allocated to wages. *Id.*, ¶X. This allocation is reasonable and is based upon the nature of the
12 claims, with approximately half of Plaintiff’s claims resulting in recovery of unpaid wages. When allocating
13 a portion of recovery to interest, and accounting for the fact that the 2802 reimbursements are not wages,
14 the tax allocation of 66.67% to penalties and interest and 33.33% to wages, is reasonable. *Id.*, ¶X. Class
15 Members shall seek their own tax advice regarding this Agreement. *Id.*, ¶XI(2).

16 **2. Attorneys’ Fees and Costs**

17 The parties agreed that, subject to approval by the Court, up to \$325,000 or 33.33% of the Gross
18 Settlement Amount, may be allocated to attorneys’ fees, and up to \$15,000 may be allocated from the
19 Gross Settlement Amount to reimburse Class Counsel for litigation costs and expenses. Settlement
20 Agreement, ¶I(B). Courts in California wage and hour cases, where the common fund is under \$10
21 million, tend to award attorneys’ fees in the 30% - 40% range. *Vasquez v. Coast Valley Roofing, Inc.*, 266
22 F.R.D. 482, 491-92 (E.D. Cal. 2010) (citing to five wage and hour class actions where courts approved
23 fee awards ranging from 30 to 33%). The trial court has discretion to award attorneys’ fees based on either the
24 lodestar/multiplier calculation or the percentage-of-recovery method. *Laffitte v. Robert Half International Inc.*, 1
25 Cal.5th 480, 503 (2016). Class Counsel intends to brief the fee application using both methodologies, as
26 cross checks.⁶ Any portion of the requested attorneys’ fees and costs that is not awarded to Class Counsel

27
28 ⁶ 50% of the awarded attorneys’ fees will be allocated to the Markham Law Firm, and 50% to Quintilone & Associates.
Markham Decl., ¶39.

1 shall be part of the Net Settlement Amount and shall be distributed to Class Members as provided in the
2 Settlement Agreement. *Id.*, ¶B.

3 **3. *PAGA Payment to Labor Workforce Development Agency***

4 The Parties agreed \$48,750 of the Gross Settlement Amount will be allocated for payment under
5 the PAGA. 75% of this amount (\$36,562.50) will be paid to the LWDA, and 25% (\$12,187.50) to
6 Aggrieved Employees, who are those Class Members who worked for Defendant from May 11, 2020 and
7 until preliminary approval. *Id.*, ¶I(O). The PAGA penalties to be paid under this Settlement represent
8 approximately 1.24% of the total potential PAGA penalties for Plaintiff's direct claims, assuming class
9 members suffered four types of violations in every single pay period (830 initial pay periods times \$100,
10 plus 31,101 subsequent pay periods times \$100, multiplied by 4 penalties for unpaid time, meal breaks,
11 rest breaks and unreimbursed business expenses per pay period = \$3,940,100). Markham Decl., ¶14. The
12 subsequent penalties should be calculated at \$100, not \$200 per pay period because under *Amaral v. Cintas*
13 *Corp. No. 2*, 163 Cal.App.4th 1157 (2008), for a plaintiff to recover \$200 per subsequent violation an
14 employer must have been cited first, which has not occurred in this action. *Id.* at 1207-09; *see also Hernandez*
15 *v. Best Buy Stores, LP*, 2017 WL 2445438, 2 (S.D. Cal. June 6, 2017) (holding, based on *Amaral*, that \$100
16 penalty per pay period is warranted because “no court, commissioner, or any other authority had held
17 [that] Best Buy misclassified” the general managers.”); *Trang v. Turbine Engine Components Technologies Corp.*,
18 2012 WL 6618854, *5 (C.D. Cal. Dec. 19, 2012) (“courts have held that employers are not subject to
19 heightened penalties for subsequent violations unless and until a court or commissioner notifies the
20 employer that it is in violation of the Labor Code”); *Amalgamated Transit Union Local 1309, AFL-CIO v.*
21 *Laidlaw Transit Services, Inc.*, 2009 WL 2448430 at *9 (S.D. Cal. Aug. 10, 2009) (finding that California law
22 imposes the “subsequent violation penalty” only after an employer has been notified by “the court or
23 commissioner” that its conduct violates the Labor Code).

24 Such allocation of the PAGA penalties falls within the range of other approved PAGA
25 settlements, as courts frequently approve PAGA awards between 0.2% to 2.2% of the total potential
26 penalties. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018) (awarding PAGA penalties of
27 0.2% of the maximum, or \$5 per pay period); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, at *2, 7
28 (N.D. Cal. Sept. 28, 2016) (settlement allocating \$10,000 to PAGA penalties where potential value was

over \$5.2 million, resulting in 0.2 percent PAGA recovery approved); *Van Kempen v. Matheson Tri-Gas, Inc.*, 2017 WL 3670787, at *10 (N.D. Cal. Aug. 25, 2017) (granting final approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent); *Slavkov v. Fast Water Heater Partners I, LP*, 2017 WL 3834873, at *2 (N.D. Cal. July 25, 2017) (finding that “\$7,500 PAGA payment is reasonable when measured against the total overall settlement [of \$345,000] and the possible weaknesses in Plaintiffs' case,” or 2.2 percent); see also *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, at *19 (C.D. Cal. Feb. 16, 2017) (\$10,000 as PAGA penalties found reasonable).

4. *Settlement Administration Costs*

The parties selected ILYM Group, Inc. as the Settlement Administrator in this action. Settlement Agreement, ¶I(CC). The parties obtained bids from four settlement administrators, and ILYM was the most competitive bid. Markham Decl., ¶17. The costs of the Administrator, estimated at \$11,475, will be deducted from the Gross Settlement Amount. *Id.*, ¶17; Declaration of Kimberly Sutherland of ILYM Group, Inc., ¶10.

5. *Class Representative Service Incentive Award*

Defendant agreed, subject to Court approval, to pay up to \$10,000 from the Gross Settlement Amount as an incentive award to Plaintiff Shaw for her service as a class representative. Settlement Agreement ¶II(G). Any portion of the requested Class Representative Enhancement Payment not awarded to the Class Representative shall be part of the Net Settlement Amount, and shall be distributed to Settlement Class Members as provided in this Agreement. *Id.*, ¶II(G).

B. *Settlement Administration*

Within 21 calendar days after the preliminary approval, Defendant will provide ILYM Group, Inc. with a class list containing Class Members’ contact information and sufficient information to determine the total number of workweeks worked within the relevant time periods. Settlement Agreement, ¶VII(2). Within 14 calendar days thereafter, ILYM Group, Inc. will send Class Notice to each Class Member as provided in this Settlement, determine the eligibility for, and the amounts of, any Settlement Payments under the terms of this Agreement, process and distribute Class Members’ payments, and process and mail tax payments to the appropriate state and federal taxing authorities. *Id.*, ¶¶VII(3-8). Further, Class Members will also be able to contact the Settlement Administrator by

1 telephone or e-mail, or access the settlement website,⁷ if they have any Settlement questions or need
2 assistance. *See* Class Notice, **Ex. A** to the Settlement Agreement. Also, any objections to or opt-outs from
3 the Settlement must be delivered to the Settlement Administrator. Settlement Agreement, ¶¶I(AA).

4 **V. THE SETTLEMENT SATISFIES THE PRELIMINARY APPROVAL CRITERIA**

5 There is a strong judicial preference for pre-trial settlement of complex class actions. *Officers for*
6 *Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). The trial judge exercises
7 discretion in deciding whether to grant preliminary approval of a class action settlement and “great weight
8 is accorded to [the] judge’s views.” *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th
9 1135, 1145 (2000).

10 Preliminary approval is the first of three steps of the settlement approval process. Second is the
11 dissemination of a settlement notice to all class members. Third is a final approval hearing, where the
12 evidence concerning the fairness, adequacy, and reasonableness of the settlement may be presented, and
13 class members may be heard regarding the Settlement. *See* Manual for Complex Litigation, Second, ¶30A4
14 (1993). The court does not need to perform a final analysis of the settlement’s fairness to preliminarily
15 approve a proposed settlement. Rather, a more detailed assessment is reserved for the final approval
16 hearing, after class notice has been sent and class members have had the opportunity to object to or opt-
17 out of the settlement. *See* Moore’s Federal Practice, 23.165[3] (3d ed. 2005). Generally, there is an initial
18 presumption of fairness when a proposed settlement, which was negotiated at arms’-length by Class
19 counsel, is presented for court approval. 4 Newberg on Class Actions (4th ed. 2002), ¶11.41, p. 90. In
20 approving a settlement where the class has not yet been certified, the court must first determine that a
21 class exists. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 619-20 (1997) (commonality must be shown
22 at a preliminary approval stage, although not necessarily manageability). Then, the Court should examine
23 the settlement as a whole to determine if it is fair, adequate and reasonable. *Id.*

24 **A. Settlement Amount Calculations – Kullar analysis**

25 The settlement amount of \$975,000 derives primarily from Plaintiff’s unpaid overtime, meal and
26 rest break, and unreimbursed business expense claims. Markham Decl., ¶14. Defendant’s records indicate
27 there are 140,248 workweeks worked by all class members, from the start of the class period on May 12,

28 ⁷ The website will contain settlement-related documents, including notice of final judgment. C.R.C., Rule 3.771(b).

1 2017. *Id.* Plaintiff's meal, rest and overtime claims begin on January 11, 2020 due to prior class settlements,
2 resulting in 67,145 total workweeks for these claims. The average hourly rate for class members is \$31.74.
3 Class Members worked on average 8 hours per shift. Defendant produced a class sample data of pay and
4 time records for 25% of class members during the class period, and "not ready" status activity reports
5 for 25 class members. *Id.* The analysis of this data, and Plaintiff's investigation of the claims in this action,
6 reveal Defendant's maximum potential exposure is as follows:

7 Overtime claim: \$2,653,321.96. This is based on Plaintiff's assumption that class members
8 worked approximately 10 minutes of overtime off-the-clock each day, or .83 hours per week. Markham
9 Decl., ¶14. Thus, the total number of unpaid hours is 55,730.35 (67,145 workweeks x .83 hours per week).
10 Plaintiff multiplied the number of unpaid hours (55,730.35) by an average overtime rate of \$47.61,
11 because class members' average shift length was 8 hours, so any additional work would be at an overtime
12 rate, resulting in maximum unpaid overtime of **\$2,653,321.96.**

13 Meal break claim: \$639,354.69. This is based on the number of facial timecard violations analyzed
14 by Plaintiff's expert. Discovery and pre-mediation exchange of information in this action revealed that
15 there were approximately 6% unique meal break violations for all class members, or 0.3 violations per
16 week. Multiplying 0.3 times the workweeks applicable for this claim (67,145) by the hourly rate of \$31.74,
17 the amount of meal premiums owed is \$639,354.69. There is no record of Defendant paying any meal
18 break premiums to putative class members during the class period, so this amount is not discounted.
19 Markham Decl., ¶14.

20 Rest break claim: \$4,262,364.60. This is based on 2 violations per workweek, based on Plaintiff's
21 allegation that rest breaks were at times missed and interrupted due to customer calls. The 67,145
22 workweeks multiplied by the 2 per workweek violation rate, multiplied by \$31.74 hourly rate equals
23 \$4,262,364.60 in unpaid rest break premiums. There is no record of Defendant paying any rest break
24 premiums to putative class members during the class period, so this amount is not discounted. Markham
25 Decl., ¶14.

26 Unreimbursed Business Expense Claim: \$796,800. This is based on \$40 per month for
27 unreimbursed business expenses beginning in March 2020, when CSRs began working remotely due to
28 the COVID-19 pandemic. Discovery showed that the primary unreimbursed expense is home internet

1 and office supplies that occurred when CSRs began working from home. On April 1, 2022, Kaiser
2 streamlined its policy to ease the process of requesting reimbursement of up to \$40 of home internet
3 expenses. *Id.* Thus, this claim is based on \$40 per month between March 2020 and April 2022, or
4 approximately 24 months, times the approximately 830 class members employed during this time, equals
5 \$796,800. *Id.*, ¶14.

6 Wage statement penalties: **\$3,151,600**, based on the \$50 per pay period for the initial violation
7 (830 pay periods x 50 = \$41,500) and \$100 for the subsequent violations (\$100 x 31,101 pay periods =
8 \$3,110,100). Thus, the total penalties amount to \$3,151,600 (\$41,500 + \$3,110,100). This does not exceed
9 the \$4,000 cap per class period (it is approximately \$3,797 recovery per class member). Markham Decl.,
10 ¶14.

11 Waiting time penalties: Plaintiff calculated daily wages for 225 former employees at \$253.92 (8
12 hours at \$31.74), times 30 days, to amount to **\$1,713,960**. Markham Decl., ¶14.

13 Thus, Defendant's potential maximum liability for Plaintiff's direct claims is **\$8,351,841.25**, and
14 an additional **\$4,865,560** for Plaintiff's wage statement and waiting time penalties claims, possible only if
15 Plaintiff prevailed on her underlying claims, for a total of **\$13,217,401.25**. Thus, the Gross Settlement
16 Amount of \$975,000 represents nearly 12% (11.67%) of Defendant's maximum potential liability for
17 Plaintiff's direct claims, and over 7% (7.4%) of Defendant's maximum liability for all Plaintiff's claims.
18 *Id.*, ¶14. This is an excellent result, well within the range of settlements commonly approved by California
19 state and district courts. *Id.* See also section IV(B)(2) below for a detailed explanation.

20 **B. The Proposed Settlement is Fair, Adequate, and Reasonable**

21 The court must determine whether the settlement is fair, adequate, and reasonable. See *Dunk v.*
22 *Ford Motor Co.*, 48 Cal.App.4th at 1801, citing *Officers for Justice, supra*, 688 F.2d. at 625. The "fair, reasonable
23 and adequate" test stems from Rule 23 of the Federal Rules of Civil Procedure. *Consumer Advocacy Group,*
24 *Inc. v. Kintetsu Enters. of Am.*, 141 Cal.App.4th 46, 61 (2006). In the absence of California law, the court
25 might follow the federal authority. However, California courts have never adopted Rule 23 as "a
26 procedural strait jacket;" to the contrary, trial courts have been urged to be flexible in dealing with class
27 actions. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 240 (2001), citing *Cartt v. Super. Ct.*, 50
28 Cal.App.3d 960, 970, n.16 (1975). Generally, the opinions of counsel should be given considerable weight

1 because of counsel's familiarity with the litigation, and previous experience with cases such as this one.
2 *Officers for Justice, supra*, 688 F.2d at 625. "We note that... settlement [is] the preferred means of dispute
3 resolution...especially in complex class action litigation." *7-Eleven Owners, supra*, 85 Cal.App.4th at 1151.

4 At the preliminary approval stage, the Court considers if:

5 (1) the proposed settlement appears to be the product of serious, informed, noncollusive
6 negotiations, (2) has no obvious deficiencies, (3) does not improperly grant preferential
7 treatment to class representatives or segments of the class, and (4) falls with the range of
8 possible approval.

9 *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007) (citing Manual for Complex
10 Litigation, ¶ 30.44 (2d ed.1985)). This Settlement meets all of these criteria.

11 1. The Settlement is the Product of Serious, Informed and Noncollusive Negotiations

12 This Settlement is the result of extensive and hard-fought negotiations. Markham Decl., ¶12.
13 Plaintiff counsel's law firm specializes in wage and hour class action litigation, and Defendant was
14 represented by seasoned attorneys at Seyfarth Shaw, LLP. *Id.*, ¶10.

15 Class Counsel analyzed pre-mediation data and diligently investigated Class Members' claims. Markham
16 Decl., ¶¶8-10, section III(A), *supra*. Defendant produced policies and class data, including a 25% class sample of
17 time and pay records and a 25-person sample of "not ready" activity reports from the call program. Class Counsel
18 reviewed Defendant's timekeeping and meal and rest break policies, and engaged an expert to analyze the
19 electronic data sample. *Id.*, ¶¶8-9.

20 The vigorous litigation of this case gave both parties a clear view of the strengths and weaknesses
21 of their respective positions. *See Adams v. Inter-Con Sec. Sys., Inc.*, 2007 WL 3225466, at *3 (N.D. Cal. Oct.
22 30, 2007) (preliminarily approving the settlement agreement after finding it was reached through extensive
23 negotiations and plaintiff's counsel's thorough investigation of the claims); *Kullar v. Footlocker*, 168
24 Cal.App.4th 116, 129-130 (2008) (trial court should have sufficient information about the potential value
25 of the case and litigation issues to independently review the reasonableness of the settlement.)

26 Based on their knowledge of this action, Plaintiff determined that the Settlement would constitute
27 the best outcome for the Class Members. Markham Decl., ¶12. Likewise, Defendant concluded that this
28 action should be settled in the manner and upon the terms and conditions set forth in the Settlement
Agreement in order to avoid the expense, inconvenience, and burden of further legal proceedings, and
the uncertainties of trial and appeals. *Id.*

1 Before this action settled, the parties participated in mediation before a private neutral with
2 extensive experience in mediating wage and hour class actions. Markham Decl., ¶11; section III(B), *supra*.
3 That indicates the settlement was free of collusion. “The assistance of a well-respected mediator with
4 substantial experience in employment litigation...supports approval of the settlement.” *Murillo v. Pac.*
5 *Gas & Elec. Co.*, 266 F.R.D. 468, 479 (E.D. Cal. 2010); *Dunk*, *supra*, 48 Cal.App.4th at 1802-03.

6 The parties have been cooperative, yet aggressive, and displayed capable and experienced
7 advocacy on both sides. Accordingly, “[t]here is ... every reason to conclude that settlement negotiations
8 were vigorously conducted at arms’ length and without any suggestion of undue influence.” *In re Wash.*
9 *Public Power Supply Sys. Sec. Litig.*, 720 F.Supp. 1379, 1392 (D. Ariz. 1989).

10 2. The Settlement has no “Obvious Deficiencies” and Falls within the Approval Range

11 “[T]he very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of
12 highest hopes.’” *Officers for Justice*, 688 F.2d at 624 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir.
13 1977)). Thus, when evaluating the amount offered in settlement, the Court should consider “the complete
14 package taken as a whole,” and the amount should “not be judged against a hypothetical or speculative
15 measure of what might have been achieved by the negotiators.” *Id.* at 625-28.

16 (i) The Class Recovery Compares Favorably with Similar Wage and Hour Class Action Settlements

17 Courts routinely approve class action settlements where the settlement amount is a lower
18 percentage of the claimed amount of damages. *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 WL 3776765, at
19 *4 (N.D. Cal. June 17, 2015) (approving settlement representing 10% of potential value); *see also Thomas*
20 *v. Cognizant Tech. Sols. U.S. Corp.*, 2013 WL 12371622, at *6 (C.D. Cal. June 24, 2013) (granting final
21 approval in wage and hour action for settlement between 4.4% and 5% of maximum liability); *Villegas v.*
22 *J.P Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012); *In re MyFord Touch Consumer*
23 *Litig.*, 2019 WL 1411510, at *10 (N.D. Cal. Mar. 28, 2019) (6% of valuation); *Bellinghausen v. Tractor Supply*
24 *Co.*, 303 F.R.D. 611, 623-24 (N.D. Cal. 2014) (settlement between 9% and 27% of total potential liability
25 fair, adequate and reasonable given the uncertainty of continued litigation); *In re Mego Fin. Corp. Sec. Litig.*,
26 213 F.3d 454, 459 (9th Cir. 2000) (16.67% of potential recovery adequate in light of plaintiff’s risks).
27 Simply put, “the fact that a proposed settlement may only amount to a fraction of the potential recovery
28 does not mean that [it] should be disapproved.” *7-Eleven Owners*, *supra*, 85 Cal.App.4th at 1150, citing

1 *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

2 Here, the Settlement represents nearly 12% of Defendant's maximum potential liability for
3 Plaintiff's direct overtime, break and unreimbursed business expense claims, and over 7% of Defendant's
4 maximum liability for all Plaintiff's claims, without any risks, costs, and uncertainty of prolonged
5 litigation. Markham Decl., ¶14. Without accounting for the length of each class member's employment
6 with Defendant, a class member will recover nearly \$545 as a result of this settlement, or \$4.08 per
7 workweek. *Id.*, ¶15.⁸ Based on the average hourly rate of \$31.74, this amounts to recovery of
8 approximately 17 meal and rest break premiums, or approximately 12 hours of overtime wages per class
9 member. Under the settlement, the lowest potential recovery is for one workweek, and the highest
10 potential recovery would be approximately \$1,282 (for a class member who worked every workweek in
11 the class period). Markham Decl., ¶15. This is an excellent result when considering that Plaintiff could
12 face difficulties to establish liability and prevail at certification and trial, and is well within (or exceeds)
13 the range of approved settlement payments. *See e.g., Villegas v. J.P Morgan Chase & Co.*, 2012 WL 5878390,
14 at *2, 6 (N.D. Cal. Nov. 21, 2012) (approving settlement with approximately \$255 settlement payment
15 per class member).

16 (ii) *The Formula of Allocation based on Workweeks is Fair and should be Approved*

17 Class Members will receive a portion of the Gross Settlement Amount based on the number of
18 workweeks they worked for Defendant during the class period. This formula is realistic because Class
19 Members' individual recovery is proportionate to the amount of time the Class Members were employed
20 with Defendant. Markham Decl., ¶16. Plaintiff's primary claims include failure to pay all wages owed due
21 to inability to record overtime hours for calls that continued past the pre-scheduled shift times, failure to
22 provide all meal and rest periods and to pay required premiums, and unreimbursed expenses for personal
23 cell phone use and home internet expenses when class members worked remotely.

24 As discussed in section III(C), *supra*, considering the probability of lengthy litigation in the absence
25 of a settlement, the risk that Plaintiff and the Class Members might not have been able to succeed at trial,

27 ⁸ However, when accounting for the fact that the majority of Plaintiff's claims run from January 27, 2020 due to the prior class
28 action settlements, the average recovery per workweek increases to \$8.52 and average recovery per class member is \$675
(without accounting for length of employment).

1 and the risk that a jury could award damages less than \$975,000, the settlement amount is reasonable. *In*
2 *re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 458; *Sandoval*, 2010 WL 2486346, at *7.

3 3. The Settlement does not Improperly Grant Preferential Treatment to Class
4 Representatives or Segments of the Class

5 Class Representative Chasmine Shaw will receive \$10,000 for her time and efforts in representing
6 the Class. Settlement Agreement, ¶I(G). “Incentive awards [for class representatives] are fairly typical in
7 class actions.” *Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380, 1393 (2010), citing *Rodriguez v. West*
8 *Publ’g*, 563 F.3d 948, 958 (9th Cir. 2009). California courts agree that a class representative is entitled to
9 such an award. *Cellphone Termination*, *supra*, 186 Cal.App.4th at 1394. “Since without a named plaintiff
10 there can be no class action, such compensation as may be necessary to induce him to participate in the
11 suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as
12 long-distance phone calls, which are reimbursable.” *Clark v. Am. Residential Servs.*, 175 Cal.App.4th 785,
13 804 (2009), citing *Matter of Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992).

14 Here, the incentive award payment to Plaintiff is based on the extent of Plaintiff’s participation in
15 this action and not conditioned upon Plaintiff’s support of the settlement. *Cf. Radcliffe v. Experian Info. Solutions,*
16 *Inc.*, 715 F.3d 1157, 1165 (2013). Throughout this action, Plaintiff assisted in investigation, participated in
17 multiple call conferences with counsel, provided and reviewed documents and pleadings, and was on
18 standby during mediation. *See Shaw Decl.*, ¶¶11-12.

19 Courts award incentive awards in this range. *Ross v. U.S. Bank Nat’l Ass’n*, 2010 WL 3833922, at
20 *3 (N.D. Cal. Sept. 29, 2010) (approving an award of \$20,000 to each of four named plaintiffs based on
21 their contributions to litigation and the risk that being a class representative would harm their reputation);
22 *see also Ridgeway v. Wal-Mart Stores Inc.*, 2017 WL 4071293, at *19 (N.D. Cal., Sept. 14, 2017) (\$15,000
23 incentive awards for each of the named plaintiffs awarded); *Low v. Trump University, LLC*, 246 F.Supp.3d
24 1295, 1316 (S.D. Cal. 2017) (\$15,000 incentive award approved where plaintiffs “devoted significant
25 amounts of time and energy” to the action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862 at *17 (\$25,000 for
26 each class representative in wage and hour action). Thus, the proposed service award is reasonable.

27 4. The Stage of the Proceedings is Sufficiently Advanced to Permit Preliminary Approval of
28 the Settlement

“A court is more likely to approve a settlement if most of the discovery is completed because it
suggests that the parties arrived at a compromise based on a full understanding of the legal and factual

1 issues surrounding the case.” *Nat’l Rural Telecomms. Corp.*, *supra*, 221 F.R.D. at 527. However, the
2 settlement can be approved even in the absence of any discovery, if other factors are satisfied. *In re TD*
3 *Ameritrade Account Holder Litig.*, 2011 WL 4079226, at *6 (N.D. Cal. Sept. 13, 2011). The bottom line is
4 that “the parties have sufficient information to make an informed decision about the settlement.” *Durham*
5 *v. Cont’l Cent. Credit, Inc.*, 2011 WL 90253, at *3 (S.D. Cal. Jan. 10, 2011), citing *Linney v. Cellular Alaska*
6 *P’ship*, 151 F.3d at 1239.

7 Here, before settling this action, the parties had a thorough understanding of their respective
8 claims and defenses, as this action has been litigated for two years and the parties had engaged in motion
9 practice and pre-mediation discovery. *See* section III(A), *supra*; Markham Decl., ¶¶8-10. Before mediation,
10 Class Counsel had investigated class members’ claims, examined documents and data, and performed
11 damage calculations. *Id.*, ¶9. At the time the parties engaged in mediation, they knew and understood their
12 respective positions. *Id.*, ¶10. As a result of the work performed in this case, the real value of the class
13 claims was well known, and Class Counsel determined that the Settlement with Defendant is fair,
14 reasonable, adequate, and in the best interest of the Class. *Young v. Polo Retail, LLC*, 2007 WL 951821, at
15 *4 (N.D. Cal. Mar. 28, 2007).

16 **C. The Proposed Class Meets the Qualifications for Certification for Settlement**
17 **Purposes.⁹**

18 In California, to prevail on a motion for class certification, plaintiffs need to show that “the
19 question is one of a common or general interest, of many persons, or...the parties are numerous, and it
20 is impracticable to bring them all before the court.” Cal. Code of Civ. Proc. § 382. The party seeking
21 certification needs to prove that the class is both ascertainable and that there is a well-defined community
22 of interest among class members. *See Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319, 326 (2004). In
23 *Sav-On Drug Store*, the court adopted a test for “community of interest,” which consists of the following
24 prongs: (1) there are predominant common questions of law or fact; (2) class representatives have claims
25 typical to those of the class; and (3) class representatives can adequately represent the interests of the
26 class. *Id.*

27 **1. An Ascertainable and Numerous Class Exists that can be Determined from Payroll**
28 **Records**

⁹ Defendant agrees to certify a class for settlement purposes only, and their agreement to do so shall not be construed as an admission of the propriety of class certification outside of the settlement context. Settlement Agreement, at XIX(11).

1 A class is generally considered ascertainable when: (i) under the class definition the members are
2 clearly identifiable, and (ii) the members can be located and notified through a reasonable expenditure of
3 time and money. See *Reyes v. San Diego County Board of Supervisors*, 196 Cal.App.3d 1263, 1274-75 (1987);
4 *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919-20 (2010). Typically, class members are ascertainable
5 when they can be easily identified by reference to official or business records. *Archer v. United Rentals, Inc.*,
6 195 Cal.App.4th 807, 828 (2011); *Sevidal*, 189 Cal.App.4th at 919.

7 Here, the Class is composed of approximately 1,050 current and former CSR employees of
8 Defendant in California, who can be identified and located from Defendant's personnel and payroll
9 records. In California, as few as ten (10) or twenty-eight (28) members satisfied numerosity. *Bowles v.*
10 *Super. Ct.*, 44 Cal.2d 574 (1955); *Hebbard v. Colgrove*, 28 Cal.App.3d 1017, 1030 (1972). Defendant will
11 provide the Settlement Administrator with a database with all Class Members' names, contact
12 information, and the number of relevant workweeks within 21 calendar days of preliminary approval, and
13 further steps will be taken to locate the Class Members for whom the addresses are not current. Settlement
14 Agreement, ¶VII; see also section VI, *infra*. Numerosity is satisfied, and the class is ascertainable.

15 2. Common Issues of Law and Fact Predominate over any Individual Issues

16 "As a general rule if the defendant's liability can be determined by facts common to all members of
17 the class, a class will be certified even if the members must individually prove their damages." *Brinker*,
18 *supra*, 53 Cal.4th at 1022. The court only determines whether or not "the theory of recovery advanced by
19 the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment."
20 *Sav-On Drug Stores, supra*, 34 Cal.4th at 327.

21 Here, there are common questions of law and fact that apply to Class Members across the board,
22 because all Class Members were subject to Defendant's timekeeping, meal and rest break and business
23 expense policies and practices, and Plaintiff argues these policies and/or practices were unlawful. Those
24 common questions predominate over any individual inquiries, in that "determination of [their] truth or
25 falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-*
26 *Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). Those questions include: (i) Whether or not Class
27 Members were paid for all hours worked, including for overtime wages when customer calls extended
28 past the pre-scheduled shift; (ii) Whether or not Class Members were provided with off-duty,

1 uninterrupted meal and rest breaks or paid premium payments for non-compliant breaks; (iii) whether
2 Class Members were reimbursed necessarily incurred business expenses, including for home internet
3 while working remotely, and personal cell phone expenses; (iv) Whether or not Class Members were
4 provided with all wages due upon separation under Labor Code section 203; (v) Whether or not Class
5 Members were provided with accurate wage statements as required by Labor Code section 226; (vi)
6 Whether or not Defendant engaged in unfair business practices in violation of the UCL. *See also* Shaw
7 Decl., ¶¶4-7, attesting that her claims are common to the claims of the absent Class Members.

8 Because several issues are common to all Class Members, a class action is superior to numerous
9 individual actions, and the maintenance of this action as a class action will save judicial resources, and
10 help avoid inconsistent judgments. *See Savon Drugs, supra*, 34 Cal.4th at 326. Class Members' interests are
11 relatively small, so they are unlikely to prosecute separate actions. Plaintiff's claims arise from her
12 employment with Defendant in California.

13 3. Plaintiff's Claims are Typical of the Claims of Class Members

14 Typicality does not mean that the interests of representative plaintiffs must be identical to those of
15 the absent class members. *Classen v. Weller*, 145 Cal.App.3d 27, 46 (1983); *Staton v. Boeing Co.*, 327 F.3d
16 938, 957 (9th Cir. 2003). They only need to be "reasonably co-extensive with those of absent class
17 members." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014). Further, the representative plaintiff must be
18 a member of the class she seeks to represent. *La Sala v. American Sav. & Loan Assn.*, 5 Cal.3d 864, 875
19 (1971). "Typicality refers to the nature of the claims or defense of the class representative, and not to the
20 specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th
21 Cir. 1992).

22 Here, Plaintiff's claims arise from the same facts and legal theories as the Class Members' claims.
23 Plaintiff was a member of the class of CSRs in California, and subject to the same policies and practices
24 of Defendant with respect to timekeeping, meal and rest breaks, and unreimbursed business expenses.
25 *See also* Shaw Decl., ¶¶4-7, attesting that her claims are typical of the claims of the absent Class Members.
26 Thus, typicality is met.

27 4. Plaintiff and Class Counsel will Adequately Protect the Interests of the Class

28 The adequacy of representation involves two conditions: the named plaintiff must be represented

1 by counsel qualified to prosecute class actions of this type; and the named plaintiff's interests cannot be
2 antagonistic to those of the class. *See McGhee v. Bank of America*, 60 Cal.App.3d 442, 450 (1976).

3 Here, Plaintiff retained counsel with extensive experience in prosecuting wage and hour class
4 actions. Markham Decl., ¶¶28-34; Quintilone Decl., ¶¶3-4. In addition, Plaintiff has the same interests as
5 the rest of the Settlement Class, because she has allegedly been injured in substantially the same manner.
6 Shaw Decl., ¶¶4-7. Thus, the Court should certify Plaintiff's class claims for the purposes of this
7 Settlement.

8 **VI. THE PROPOSED NOTICE TO THE CLASS SHOULD BE APPROVED**

9 **A. Proposed Notice Plan**

10 Within 14 calendar days following receipt of Class Data from Defendant, the Settlement
11 Administrator will send Class Notice to Class Members via first class mail. Settlement Agreement,
12 ¶VII(3). Before mailing the Notice, the Settlement Administrator will run a check of the Class Members'
13 addresses against those contained in the USPS's National Change of Address database, and take any other
14 appropriate steps to validate the correctness of the addresses provided by the Defendant. *Id.*, ¶ VII(4). If
15 the Notice is returned with the forwarding address, the Settlement Administrator will use the forwarding
16 addresses to locate the missing Class Members, and re-mail the Notice to the correct address. *Id.*, ¶ VII(4).
17 If a Notice is returned as non-deliverable with no forwarding address, the Settlement Administrator shall
18 conduct an advanced skip trace to locate the most current address of the person to whom the Notice was
19 addressed, and shall resend the Notice to any updated address within five (5) business days. *Id.* Any
20 responses from the Class Member (*i.e.*, a dispute regarding calculation of workweeks, a Request for
21 Exclusion, or an objection) are due to the Administrator by the Notice Response Deadline, as defined in
22 the Settlement Agreement, or within fifteen (15) days from the date of re-mailing, whichever is later. *Id.*

23 The Class Notice will summarize the terms of the Settlement Agreement, advise the Class
24 Members of their estimated individual settlement payment, and inform Class Members of their right to
25 object to or exclude themselves from the Settlement within 45 days after the Notice mailing. **Ex. A.**
26 Because this is the California-only class, and the mailing will occur only in California, 45 days to opt out
27 from or object to the Settlement is sufficient. Markham Decl., ¶17. Further, because Class Members
28 worked as CSRs in California, communicating with customers on daily basis in English, English-only

1 notice is sufficient. *Id.*; *see also* Drainville Decl., ¶¶3-4 (describing composition of the class and
2 comprehension of English)).

3 **B. The Proposed Notice to the Class is Fair and Adequate**

4 The parties agreed on the language of the proposed class notice. *Id.* If the Court concludes after
5 a preliminary evaluation of the settlement that the relief offered and notice provided are fair and adequate,
6 the Court should order that the class notice be provided. Manual for Complex Litig., Second, § 21.632 at
7 321. The threshold requirement regarding the sufficiency of class notice is whether the means proposed
8 for distributing the notice are reasonably calculated to apprise the class of the pendency of the action, the
9 proposed settlement, and the right to opt out of or object to the settlement. *Eisen v. Carlisle & Jacquelin*,
10 417 U.S. 156, 173 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *see also* Cal.
11 Rules of Court, Rule 3.766.

12 Here, the Notice is more than sufficient, because it gives Class Members, in an easy to understand
13 and clear language: (1) basic information about this action and the Settlement; (2) an estimate of the weeks
14 Class Members worked during the Class Period, and an explanation how Class Members can dispute this
15 calculation; (3) an explanation how the payout from the Settlement will be calculated for each Class
16 Member, and an estimate of a Class Member's Settlement Payment; (4) an explanation how Class
17 Members can exercise their right to opt-out from, or object to, the Settlement, with objection and opt-
18 out forms provided along with the notice; (5) an explanation that any claims against the Defendant that
19 could have been litigated in this Action will be released if the Class Member does not opt out; (6) name
20 of Class Counsel and information regarding attorneys' fees and costs; (7) the date of the Fairness Hearing
21 and an explanation of eligibility to appear at the Fairness Hearing; and (8) the telephone and e-mail
22 number, as well as website address, where Class Members can obtain additional information. *See* Ex. A
23 (proposed Class Notice).

24 Thus, the Notice plan proposed by the Settlement is fair and adequate, and complies with the
25 California Rules of Court, Rules 3.766 and 3.769(f).

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VII. CONCLUSION

Counsel for the parties aggressively litigated and now settled this case. In the judgment of Plaintiff and Class Counsel, as well as Defendant, the proposed Settlement is a fair and reasonable compromise of the issues in dispute in light of the strengths and weaknesses of each party's case.

After weighing the substantial, certain and immediate benefits of this Settlement against the uncertainty of further trial and appeal, the parties believe the proposed Settlement is fair, reasonable and adequate. Thus, Plaintiff's motion should, respectfully, be granted.

Dated: July 18, 2023

Respectfully submitted,

THE MARKHAM LAW FIRM

/s/ Lisa Brevard

David Markham

Maggie Realin

Lisa Brevard

Attorneys for Plaintiff

Court Reservation Receipt

Reservation	
Reservation ID: 527482854000	Status: RESERVED
Reservation Type: Motion for Preliminary Approval of Class Action Settlement	Number of Motions: 1
Case Number: CVRI2102203	Case Title: SHAW vs KAISER FOUNDATION HEALTH PLAN INC
Filing Party: CHASMINE SHAW (Plaintiff)	Location: Historic Court House - Department 1
Date/Time: August 9th 2023, 8:30AM	Confirmation Code: CR-MN5F3APFS8QENMHR8

Fees			
Description	Fee	Qty	Amount
Reschedule Fee	20.00	1	20.00
Credit Card Percentage Fee (2.75%)	0.55	1	0.55
TOTAL			\$20.55

Payment	
Amount: \$20.55	Type: MasterCard
Account Number: XXXX9870	Authorization: 01195B

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