

AEGIS LAW FIRM, PC

SAMUEL A. WONG, State Bar No. 217104

KASHIF HAQUE, State Bar No. 218672

JESSICA L. CAMPBELL, State Bar No. 280626

STEVEN A. MCNICHOLL, State Bar No. 323191

9811 Irvine Center Drive, Suite 100

Irvine, California 92618

Telephone: (949) 379-6250

Facsimile: (949) 379-6251

Attorneys for Plaintiff Kayla Bereal-Murray, individually,
and on behalf of all others similarly situated

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A Professional Law Corporation

Brian D. Martin State Bar No. 199255

Brian.Martin@aalrr.com

Geoffrey D. La Val State Bar No. 279987

Geoffrey.LaVal@aalrr.com

4275 Executive Square, Suite 700

La Jolla, CA 92037-1477

T: (858) 485-9526

F: (858) 485-9412

Attorneys for Defendant, The Boys' and Girls'
Aid Society of Los Angeles

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KAYLA BEREAL-MURRAY, individually
and on behalf of all others similarly situated,

Plaintiff,

vs.

FIVE ACRES – THE BOYS' AND GIRLS'
AID SOCIETY OF LOS ANGELES
COUNTY; and DOES 1 through 20,
inclusive,

Defendants.

Case No. 21STCV20832

*Assigned for all purposes to
Hon. Judge Stuart M. Rice
Dept. 1*

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

Date: February 8, 2023

Time: 10:00 A.M.

Dept: 1

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SUMMARY OF THE LITIGATION	2
III.	SUMMARY OF THE SETTLEMENT	3
	A. Terms of Settlement	2
	B. Proposed Opt-Out and Exclusion Process	4
	C. Proposed Release	5
IV.	LEGAL ARGUMENTS SUPPORTING PRELIMINARY APPROVAL	6
	A. Provisional Certification of the Class is Appropriate	6
	1. The Proposed Class is Numerous and Ascertainable	6
	2. A Well-Defined Community of Interest Exists Among Class Members	6
	a. Common Questions Predominate	6
	b. Plaintiff; Claims are Typical of the Class Claims	7
	c. Plaintiff and Plaintiff's Counsel Will Adequately Represent the Interests of the Proposed Class	7
	3. A Class Action is Superior to a Multitude of Individual Lawsuits	8
	B. The Settlement Meets the Standards for Preliminary Approval	8
	1. The Settlement is Entitled to a Presumption of Fairness	9
	a. The Settlement is the Result of Arm's Length Negotiations	9
	b. Plaintiff's Counsel Conducted Sufficient Investigation and Discovery	9
	c. Plaintiff's Counsel is Experienced in Similar Litigation	9
	2. The Settlement is Reasonable Given the Strengths of Plaintiff's Claims and the Risks and Expense of Litigation	10
	a. Exposure Analysis	10
	C. The Requested Incentive Award for Plaintiff	12
	D. The Requested Attorneys' Fees and Costs	13
V.	CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Bell v. Farmers Ins. Exch.</i> , 115 Cal. App. 4th 715 (2004)	12
<i>Brinker Restaurant Corp. v. Superior Court</i> , 53 Cal. 4th 1004 (2012)	6
<i>Capitol People First v. State Dep't of Developmental Servs.</i> , 155 Cal. App. 4th 676 (2007)	7
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43 (2008)	13
<i>Classen v. Weller</i> , 145 Cal. App. 3d 27 (1983).....	7
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996)	9
<i>Fireside Bank v. Superior Court</i> , 40 Cal. 4th 1069 (2007)	6
<i>Ghazaryan v. Diva Limousine, Ltd.</i> , 169 Cal. App. 4th 1524 (2008)	8
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116 (2008)	10
<i>Linder v. Thrifty Oil Co.</i> , 23 Cal. 4th 429 (2000)	8
<i>Munoz v. BCI Coca-Cola Bottling Co. of L.A.</i> , 186 Cal. App. 4th 399 (2010)	10, 12
<i>North County Contractor's Ass'n., Inc. v. Touchstone Ins. Servs.</i> , 27 Cal. App. 4th 1085 (1994)	8
<i>Rebney v. Wells Fargo Bank</i> , 220 Cal. App. 3d 1117 (1991).....	10
<i>Reyes v. Bd. of Supervisors</i> , 196 Cal. App. 3d 1263 (1987).....	6
<i>Sav-On Drug Stores, Inc. v. Superior Court</i> , 34 Cal. 4th 319 (2004)	6, 13

1	<i>Wershba v. Apple Computer, Inc.</i> ,	
2	91 Cal. App. 4th 224 (2001)	10

Statutes

3	Business and Professions Code § 17200, <i>et seq.</i>	2, 5
4	Civ. Code § 1542	5
5	Lab. Code § 201.3	3
6	Lab. Code § 203	11
7	Lab. Code § 226	11
8	Lab. Code § 2698, <i>et seq.</i>	
9	(.California Private Attorneys General Act of 2004-PAGA).....	<i>passim</i>
10	Lab. Code § 2699(e)(2)	12
11	Lab. Code § 2699(f)	12
12	Lab. Code § 2699(l)(2).....	3
13	Lab. Code § 2699.3(a).....	2

Other Authorities

15	Cal. R. Ct. 3.766(d)	5
16	Cal. R. Ct. 3.766 (d)-(f).....	5
17	Cal, R. Ct. 3.769 (d) and (e).....	1

Treatises

20	Conte & Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)	8
----	---	---

1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court 3.769 (d) and (e), Plaintiff Kayla Bereal-Murray
3 (“Plaintiff”) requests that the Court grant preliminary approval of a class action settlement of wage and
4 hour claims, including claims under the California Private Attorneys General Act of 2004, codified at
5 Lab. Code § 2698, *et seq.* (“PAGA”), against Defendant Five Acres – The Boys’ and Girls’ Aid Society
6 of Los Angeles (“Defendant” or “Five Acres”) (collectively, Plaintiff and Defendant referred to as, the
7 “Parties”). The putative class consists of approximately 271 residential treatment counselors and crisis
8 intervention specialists employed by Defendant in California (individually, “Class Member”;
9 collectively, the “Class”) from December 7, 2016, through preliminary approval (the “Class Period”).
10 The basic terms of the Joint Stipulation of Settlement (“Settlement Agreement” or “Settlement”)¹
11 provide for the following:

- 12 (1) A non-reversionary Gross Settlement Amount of \$235,000 allocated to
13 approximately 271 Class Members on a pro rata basis according to the number of
14 weeks each Class Member worked during the Class Period;
- 15 (2) An award of up to one-third of the Gross Settlement Amount (currently
16 \$78,333.33) and up to \$20,000 in reimbursement of costs to Plaintiff’s Counsel for
17 services rendered as counsel on this matter;
- 18 (3) Service Award of up to \$5,000.00 to Plaintiff;
- 19 (4) Settlement Administration fees and costs of up to \$8,000; and
- 20 (5) Payment to the California Labor and Workforce Development Agency (“LWDA”)
21 of \$16,000 for civil penalties pursuant to PAGA. Seventy-five percent (75%) of this
22 payment will be paid to the California Labor and Workforce Development Agency
23 (“LWDA Payment”), and twenty-five percent (25%) will be paid to the Net
24 Settlement Amount for distribution to Class Members.

25 _____
26 ¹ A true and correct copy of the fully-executed “Joint Stipulation of Settlement” is attached as **Exhibit 1**
27 to the Declaration of Steven A. McNicholl in Support of Plaintiff’s Motion for Preliminary Approval of
28 Class Action Settlement (“McNicholl Decl.”), filed concurrently herewith. Unless otherwise defined
herein, all capitalized terms in this Motion will be used as such terms are defined and used in the
Settlement.

1 With each Class Member allocated an average recovery of approximately \$400 from the Net
2 Settlement Amount, the Settlement satisfies the criteria for preliminary approval and falls well within
3 the range of reasonableness given the risks and costs of continued litigation. The Settlement was reached
4 through informed, arms-length bargaining and after mediation between experienced attorneys. As such,
5 Plaintiff requests that the Court grant preliminary approval of the Settlement, conditionally certify the
6 Class for settlement purposes only, appoint Plaintiff as the Class Representative, appoint Plaintiff's
7 Counsel as Class Counsel, appoint ILYM Group, Inc as the Settlement Administrator, authorize the
8 Settlement Administrator to send notice of the Settlement, and set a final approval hearing date.

9 **II. SUMMARY OF THE LITIGATION**

10 On June 1, 2019, Plaintiff Bereal-Murray filed this action on behalf of Defendant's non-exempt
11 employees and claim and on the same day, Plaintiff Bereal Murray provided written notice to the LWDA
12 and Defendant as required by Lab. Code § 2699. McNicholl Decl. at ¶ 3. Plaintiff alleges the following
13 causes of action in the operative Complaint: (1) failure to pay overtime wages; (2) failure to provide meal
14 periods; (3) failure to permit rest breaks; (4) failure to provide accurate wage statements; (5) failure to pay
15 all wages timely and upon separation of employment; (6) failure to reimburse necessary business
16 expenses; and (7) violation of Business and Professions Code § 17200, *et seq.*, based on the preceding
17 claims. On January 7, 2022, Plaintiff filed a First Amended Complaint adding a PAGA. *Id.* at ¶ 3.

18 The Parties attended mediation session with mediator Hon. Steven R. Denton (Ret.), a respected
19 mediator, on May 24, 2022. *Id.* at ¶ 4. Prior to mediation, Defendant produced a representative sampling
20 of time and pay records for Class Members for the Class Period. The Parties were able to settle the matter.
21 The Parties spent the next several months negotiating the terms of the Settlement, which was finalized in
22 September of 2022. *Id.* at ¶ 5. Plaintiff submitted the Settlement to the LWDA pursuant to Lab. Code §
23 2699(l)(2). *Id.* at ¶ 6, Ex. 2 (Confirmation of Submission of Settlement to LWDA).

24 **III. SUMMARY OF THE SETTLEMENT**

25 **A. Terms of Settlement**

26 Plaintiff and Defendant agreed to settle the class claims in exchange for a Gross Settlement
27 Amount of \$235,000. Settlement Agreement, § III. The Gross Settlement Amount will be used to make
28 payments for the following: (1) Individual Settlement Payments to Participating Class Members; (2)

attorneys' fees to Class Counsel of up to one-third of the Gross Settlement Amount; (3) reimbursement of Class Counsel's litigation costs of up to \$20,000; (4) Service Award to Plaintiff Kayla Bereal-Murray of up to \$5,000; (5) Settlement Administration fees and costs of \$8,000; and (6) a payment to the LWDA of \$16,000 pursuant to PAGA. *Id.* Class Members' Individual Settlement Payments will be distributed after final approval of the Settlement and Defendant funds the Gross Settlement Amount. *Id.* at § III, ¶ 42. Individual Settlement Payments will be calculated by comparing the total Qualifying Workweeks for the Class to each individual Class Member's Qualifying Workweeks. Settlement Agreement, § III, ¶ 67. With approximately 271 Class Members, the Gross Settlement Amount allocates an average of \$400 per Class Member. The Settlement Administrator will calculate the actual estimated recovery to include in the Class Notice and provide the estimated low and high range of possible recovery at final approval. *Id.*; Settlement Agreement, Ex. A (Notice of Class Action Settlement).

The Individual Settlement Payments to Class Members will be allocated for tax purposes as follows: 90% to wages; 10% to penalties and interest. The employer-side payroll taxes on the portion allocated to wages will be paid by Defendant separately from, and in addition to the Gross Settlement Amount. *Id.* at § I, ¶ 41. No portion of the Gross Settlement Amount will revert to Defendant. *Id.* at § III, ¶ 42. Funds from uncashed or undeliverable checks will be tendered by the Settlement Administrator to the State Controller Unclaimed Property Fund in the name of the Class Member for whom the funds are designated. *Id.* at § VI, ¶ 67.

B. Proposed Opt-Out and Objection Process

The Settlement Administrator will send Class Members the Notice of Class Action Settlement ("Class Notice") by first-class mail after checking for updated addresses through the National Change of Address database. Settlement Agreement, § VI, ¶ 55. The Class Notice provides information regarding the nature of the lawsuit, a summary of the substance of the settlement terms, the formula for calculating Individual Settlement Payments, the individual's estimated payout, a statement that Class Members who take no action will release their claims and receive settlement checks, instructions regarding how to dispute the calculations, instructions regarding how to request exclusion or object to the Settlement, the date for the final approval hearing, the amounts sought for attorneys' fees and costs, the Settlement Administration Costs, the class representative's Service Awards, the PAGA allocation, and information

1 on how to access the court’s website to view the case records. *See* Settlement Agreement, Ex. A (Class
2 Notice).

3 The Class Notice provides instructions for Class Members who choose to exclude themselves
4 from the Settlement. *See* Settlement Agreement § VI, ¶ 56. To opt out, Class Members are instructed to
5 submit a Request for Exclusion to the Settlement Administrator by a specified date (60 days after the date
6 of mailing of the Class Notice). *Id.* at pp. 1, 6-7. Class Members do not need to submit a claim form to
7 participate in the Settlement. *See* Settlement Agreement, Ex. A (Class Notice), p. 1. Class Members are
8 informed of how they can object to the Settlement, and the Class Notice informs Class Members of the
9 date, time, and location of the final fairness and approval hearing so that they can appear in person. *Id.* at
10 pp. 1, 6-7. Accordingly, the content of the Class Notice complies with the requirements of Cal. R. Ct.
11 3.766(d).

12 If Class Notice packets are returned as undeliverable, the Settlement Administrator will perform a
13 skip-trace or other search, and re-mail the Class Notice with an extended deadline, to opt out or object, of
14 15 days from the date of mailing or the original deadline, whichever is later. Settlement Agreement, § VI,
15 ¶ 55. The initial 60-day notice period and extension process ensures the notice program provides due
16 process by giving Class Members enough time to determine whether they want to participate in the
17 Settlement. This means of notice is reasonably calculated to apprise Class Members of the pendency of
18 the action. *See* Cal. R. Ct. 3.766 (d)-(f).

19 **C. Proposed Release**

20 Class Members will release Released Parties (ie., “FIVE ACRES, its past, present, and/or future
21 owners, officers, directors, managing agents, donors, funders, state agencies, trustees, payroll
22 processors, independent contractors, members, managers, shareholders, employees, attorneys, insurers,
23 assigns, shareholders, successors, predecessors and agents, FIVE ACRES’s past, present, and/or future
24 parent, subsidiary, or affiliated entities, DBAs and franchisors, and each of their owners, officers,
25 directors, managing agents, trustees, payroll processors, independent contractors, members, managers,
26 employees, attorneys, insurers, assigns, shareholders, successors, predecessors and agents”) from the
27 following “Released Claims” against the Released Parties during the period of December 10, 2016
28 through preliminary approval:

any and all claims, damages, or causes of action alleged in, or arising out of, the allegations in the COMPLAINT and FAC filed in the Action and the PAGA NOTICE submitted by PLAINTIFF to the LWDA on or around June 1, 2021 and which were alleged or that could have been alleged by PLAINTIFF and/or any Participating Class Member in such complaints and/or the PAGA NOTICE based on any of the factual allegations contained in such complaints and/or the PAGA NOTICE, including, but not limited to, claims under state, federal (i.e., Fair Labor Standards Act (“FLSA”)) or local law, including, but not limited to claims for unpaid wages, claims for the failure to pay minimum wages, claims for the failure to pay overtime wages, claims related to missed meal and rest breaks or periods and nonpayment of premium pay for such, failure to comply with itemized employee wage statement provisions, failure to pay wages due at separation, failure to timely pay wages during employment, failure to keep requisite payroll records, the failure to reimburse for business expenses, unfair competition, the payment of any penalties (including PAGA). The Released Claims specifically include, but are not limited to, all claims arising under California Labor Code sections 201, 202, 203, 204, 210, 218.5, 226, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2698 *et seq.*, 2800 and 2802, the Wage Orders of the California Industrial Welfare Commission, California Business and Profession Code sections 17200, *et seq.*, California Code of Civil Procedure section 1021.5, and California common law of contract, interest and claims for attorney’s fees relating in any way to those claims alleged and mentioned in the complaint(s) and/or PAGA NOTICE.

Id. at ¶¶ 23-24. Additionally, “A Participating Class Member’s cashing of the settlement check will be considered a consent and opt-in to the settlement of all federal wage and hour claims under the FLSA which are encompassed within these Released Claims, and each Participating Class Member who cashes his or her settlement check will waive his or her rights to bring such claims under the FLSA which arose during the Class Period. A Participating Class Member who does not cash his or her settlement check will retain all rights and claims under the FLSA. However, the settlement will still discharge and extinguish the claims described herein under California law, including those for Participating Class Members who do not cash their settlement checks or who do not opt out of the settlement.” *Id.* at ¶ 69.

PAGA Group Members, regardless of whether they opt-out from the Class Settlement, will be bound by the Parties’ PAGA release and shall be deemed to have released or waived the following against the Released Parties during the period of December 7, 2019, through preliminary approval upon the date of funding the GSA: any and all claims for civil penalties under PAGA based on the California Labor Code violations alleged in the PAGA NOTICE sent by Plaintiff to the LWDA; those being California Labor Code sections 201, 202, 203, 204, 210, 218.5, 226, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2800, 2802, 2698, *et seq.*, the IWC Wage Orders, as

well as all facts, theories, or claims for civil penalties that would be considered administratively exhausted under applicable law by the PAGA NOTICE PLAINTIFF sent to the LWDA. *Id.* at ¶ 25.

Only Plaintiff will agree to a general release of any and all claims, whether known or unknown, which exist or may exist as of the date of the Settlement, and a waiver of Civ. Code § 1542. *Id.* at § VI, ¶ 71.

IV. LEGAL ARGUMENTS SUPPORTING PRELIMINARY APPROVAL

A. Provisional Certification of the Class is Appropriate

Class certification is appropriate when there exists (1) an ascertainable and sufficiently numerous class, (2) a well-defined community of interest among class members, and (3) when certification would be a fair and efficient means of adjudicating the action, rendering class litigation superior to alternative means. *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012).

1. The Proposed Class is Numerous and Ascertainable

Whether a class is “ascertainable” is “determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members.” *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). Here, the Class consists of all residential treatment counselors and crisis intervention specialists employed by Defendant in California at any time from December 7, 2016, through preliminary approval. Settlement Agreement, § I, ¶ 2. As of February 28, 2022, Defendant’s records showed the Class consisted of approximately 271 individuals, making joinder of all Class Members impracticable. McNicholl Decl. ¶ 7. Further, the Class is readily ascertainable from Defendant’s business records because all Class Members are current or former employees of Defendant. *Id.*

2. A Well-Defined Community of Interest Exists Among Class Members

“[T]he ‘community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’” *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1089 (2007) (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981)).

a. Common Questions Predominate

1 To assess whether common questions predominate, courts focus on whether the theories of
2 recovery advanced are likely to prove amenable to class treatment. *See Sav-On Drug Stores, Inc. v.*
3 *Superior Court*, 34 Cal. 4th 319, 327 (2004). In other words, courts determine whether the elements
4 necessary to establish liability are susceptible of common proof, even if the class members must
5 individually prove their damages. *Brinker, supra*, 53 Cal. 4th at 1021-1022, 1024.

6 Plaintiff alleged that Defendant maintained uniform employment policies and/or practices that
7 illegally deprived Class Members of lawful meal periods, rest breaks, expense reimbursements, accurate
8 wage statements, and waiting time pay. McNicholl Decl. ¶ 8. Plaintiff's allegations present common legal
9 and factual questions of, *inter alia*, whether Defendant applied the same scheduling, timekeeping, expense
10 reimbursement, meal period, and rest break policies to all Class Members; whether these policies and
11 practices resulted in Labor Code violations; whether Defendant's conduct was intentional; and whether
12 Class Members are entitled to penalties. *Id.*

13 These common questions could be resolved using Class Members' schedules, time punches, and
14 payroll records, Defendant's corporate representative's testimony, written communications between
15 Defendant and Class Members, and Class Member declarations. McNicholl Decl. ¶ 9. Thus, the Court can
16 and should exercise its discretion to grant conditional class certification for settlement purposes.

17 *b. Plaintiff's Claims are Typical of the Class Claims*

18 The typicality requirement is satisfied when the legal theories and facts supporting Plaintiff's
19 claims are substantially similar to other class members. *See Classen v. Weller*, 145 Cal. App. 3d 27, 46
20 (1983). Here, Plaintiff alleges that she and other Class Members were employed by Defendant and
21 similarly injured by Defendant's common wage and hour policies and practices, including Defendant's
22 scheduling, timekeeping, meal period, and rest break. McNicholl Decl. ¶¶ 10. Through documents and
23 information exchanged in informal discovery, including production of Class Members' pay stubs, time
24 card punches, and policies by Defendant, Plaintiff confirmed that these common policies and practices
25 affected Plaintiff and the Class similarly. *Id.* Thus, Plaintiff's claims arise from the same employment
26 practices and are based on the same legal theories as those applicable to other Class Members, as further
27 explained in Plaintiff's exposure analysis below.

c. Plaintiff and Plaintiff's Counsel Will Adequately Represent the Interests of the Proposed Class

Certification requires adequacy of both the proposed class representative(s) and proposed class counsel. With respect to the class representative, a plaintiff must adequately represent and protect the interests of other members of the class and demonstrate that his or her claim is not inconsistent with the claims of other members of the class. *See Capitol People First v. State Dep't of Developmental Servs.*, 155 Cal. App. 4th 676, 696-697 (2007). Here, Plaintiff's interests are coextensive with the interests of the Class. Plaintiff demonstrated an ability to advocate for the interests of the Class by initiating this litigation, gathering documents and information, being available on the day of mediation to answer questions, meeting with her attorneys on several occasions to understand the claims and theories of liability at issue, assisting her attorneys in preparing for mediation, reviewing the proposed settlement agreement to understand its legal effect, and obtaining a fair settlement on behalf of Class Members who stand to recover a substantial amount under the Settlement. Accordingly, Plaintiff should be appointed Class Representative, and Plaintiff's Counsel should be appointed Class Counsel.

3. A Class Action is Superior to a Multitude of Individual Lawsuits

Class treatment is superior to other methods of adjudication when the probability is small that each class member will come forward to prove his or her claim and when the class approach would deter and redress the alleged wrongdoing. *See Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435, 446 (2000); *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1537-1538 (2008). Here, none of the other 271 Class Members had shown any interest in bearing the expense and burden of litigating their own claims. McNicholl Decl. ¶ 11. Thus, a class action is the superior method for seeking relief.

B. The Settlement Meets the Standards for Preliminary Approval

Preliminary approval is warranted if the settlement falls within a "reasonable range." *See North County Contractor's Ass'n., Inc. v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1089-90 (1994); Conte & Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002). In reviewing the fairness of a class action settlement, due regard should be given to what is "otherwise a private consensual agreement between the parties." *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010). The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the

1 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties,
2 and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Id.*

3 Reasonableness and fairness are presumed where (1) the settlement is reached through “arms-
4 length bargaining”; (2) investigation and discovery are “sufficient to allow counsel and the court to act
5 intelligently”; (3) counsel is “experienced in similar litigation”; and (4) the percentage of objectors “is
6 small.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1802 (1996). The Settlement satisfies the first
7 three factors. Plaintiff will analyze the fourth factor at the final approval stage.

8 **1. The Settlement is Entitled to a Presumption of Fairness**

9 *a. The Settlement is the Result of Arm’s-Length Negotiations*

10 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
11 evidence to the contrary is offered. Thus, there is a presumption that settlement negotiations are
12 conducted in good faith. Here, the Settlement was the product of a full day mediation session with a
13 respected mediator after substantial informal discovery and investigation. McNicholl Decl. ¶¶ 4. The
14 negotiations were adversarial, conducted at arm’s length, and tempered by the efforts of both sides to
15 serve the interests of their clients. *Id.* at ¶ 5. The amounts of Plaintiff’s requested Service Award were
16 not negotiated until after the Parties agreed to the Gross Settlement Amount and many other terms. *Id.*
17 at ¶ 22.

18 *b. Plaintiff’s Counsel Conducted Sufficient Investigation and Discovery*

19 Plaintiff’s Counsel thoroughly investigated the class claims, applicable law, and potential
20 defenses. *See generally*, McNicholl Decl. In particular, Plaintiff’s Counsel assessed the value of the
21 class claims using Defendant’s data and documents produced through informal discovery. McNicholl
22 Decl. ¶¶ 4, 8, 9, 10, and 13-21. Plaintiff’s counsel personally reviewed time records and compared them
23 to payroll documents to identify potential violations. *Id.* Accordingly, Plaintiff’s Counsel fully
24 understood the strengths and weaknesses of the claims before the Parties reached a settlement. *Id.*

25 *c. Plaintiff’s Counsel is Experienced in Similar Litigation*

26 Plaintiff is represented by Aegis Law Firm (“Class Counsel”). Class Counsel prosecute wage and
27 hour class actions on behalf of employees and others who have had their rights violated. McNicholl
28 Decl. ¶¶ 24-38; *see generally* McNicholl Decl. The attorneys working on this case have been appointed

1 class counsel in many cases, through both contested motions and settlement approval motions. *Id.* Thus,
2 Plaintiff's Counsel has extensive experience in similar litigation and should be appointed as Class
3 Counsel.

4 **2. The Settlement is Reasonable Given the Strengths of Plaintiff's Claims and**
5 **the Risks and Expense of Litigation**

6 Courts have discretion to approve class settlements by assessing several factors, including the
7 "strength of plaintiff's case, risk, expense, complexity and likely duration of further litigation and risk
8 of maintaining the class action through trial." *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal.
9 App. 4th 399, 407 (2010); *see Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 129 (2008).

10 While Plaintiff and her counsel believed and continue to believe this is a strong case for
11 certification, the significant risks and expenses associated with class certification and liability
12 proceedings were taken into account. McNicholl Decl. ¶ 12. To determine if the amount offered at
13 mediation was reasonable, Plaintiff's Counsel weighed that figure against many risk factors. If Plaintiff
14 continued to prosecute the claims rather than accept a settlement, Plaintiff would have faced deadlines
15 to file a motion for class certification, had to have engaged in more formal written discovery and taken
16 depositions, expended time and resources to resolve disputes, prepared and filed potential dispositive
17 motions and/or discovery motions, and engaged in extensive trial preparation. An adverse ruling at any
18 one of these stages could have prevented the Class from obtaining any recovery. *Id.* ¶¶ 13-14.

19 **a. Exposure Analysis**

20 A settlement does not have to provide 100% of the damages sought to be considered a fair and
21 reasonable settlement. *See Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1139 (1991). Rather,
22 compromise is expected:

23 Compromise is inherent and necessary in the settlement process . . . even if "the relief afforded
24 by the proposed settlement is substantially narrower than it would be if the suits were to be
25 successfully litigated," this is no bar to a class settlement because "the public interest may indeed
be served by a voluntary settlement in which each side gives ground in the interest of avoiding
litigation."

26 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001) (citation omitted). Here, Plaintiff
27 contends that her claims are based on Defendant's common, class-wide policies and procedures, and
28 that liability could be determined on a class-wide basis without dependence on individual assessments

1 of liability. McNicholl Decl. ¶¶ 12. Although the amount of Defendant’s potential exposure – if proven
2 – is substantial, the legitimate and serious risks of succeeding at class certification and trial compelled
3 a serious consideration of the benefit of a settlement. *Id.* at ¶¶ 13-21.

4 Unpaid Wage Claims: Plaintiff’s unpaid wage claims focused on the theory that Defendant paid
5 for straight time worked but did not pay overtime. Plaintiff’s expert calculated that the unpaid wage
6 claims were worth approximately \$108,625 based on the time and pay records. However, Defendant
7 argued and demonstrated it paid workers for all time worked, including overtime, and residential care
8 employees were exempt from overtime under the foster care exemption in Wage Order 5. McNicholl
9 Decl. ¶ 18. Consequently, Plaintiff discounted these claims, to \$21,000 to account for a 0% risk of
10 failing to prevail on those claims. McNicholl Decl. ¶ 15.

11 Rest Break Claims: Plaintiff alleged Defendant failed to provide rest breaks at all. Plaintiff
12 calculated the damages for all shifts of at least 3.5 hours assuming 100% violation rate, which resulted
13 in about \$3.5 million in exposure for this claim. However, Defendant argued and demonstrated that
14 Class Members were authorized and permitted to take all rest periods to which they were eligible and
15 the same Wage Order exemption for foster care workers applied to this claim, and Plaintiff is unsure if
16 they could certify this claim since it would depend heavily on class member testimony. In addition,
17 testimony will likely not establish a 100% violation rate. Consequently, Plaintiff discounted these
18 claims, to about \$350,000 to account for a 90% risk of failing to prevail on those claims. McNicholl
19 Decl. ¶ 16.

20 Meal Break Claims: Plaintiff mainly alleged Defendant subjected residential and crisis care
21 employees to on-duty meal periods for all shifts that failed to comply with Wage Order 5. Plaintiff’s
22 expert found \$1,218,980 in premium payments owed. Defendant argued that they complied with Wage
23 Order 5 by providing food and a chance to eat with the residents during the meal period in compliance
24 with the Wage Order off-duty meal period exemption. As such, Plaintiff discounted these claims, to
25 \$244,000 to account for an 80% risk of failing to prevail on the claims if Defendant defeated class
26 certification or Plaintiff failed to convince the trier of fact to find in their favor at trial. McNicholl Decl.
27 ¶ 17.

1 Derivative Waiting Time and Wage Statement Penalty Claims: Plaintiff’s Counsel also considered
2 the arguable presence of various penalties, and weighed the potential recoveries against probable defenses.
3 Specifically, Defendant could argue that Plaintiff could not prove the “willful” prong needed to obtain
4 waiting time penalties under Lab. Code § 203. Additionally, Defendant could argue that Plaintiff could
5 not show that Class Members suffered an “injury” as a result of knowing and intentional wage statement
6 violations, as required by Cal. Lab. Code § 226. Although the Class arguably could have seen a payout of
7 approximately \$712,440 for waiting time penalties and about \$667,200 for wage statement penalties,
8 Plaintiff would not recover any of these derivative penalties if they failed to prove the underlying claims.
9 Consequently, Plaintiff discounted these claims, assigning about \$71,000 to the waiting time claim and
10 \$67,000 to the wage statement claim, to account for a 90% risk of failing to prevail on the underlying
11 claims and overcome defenses to the penalty claims. McNicholl Decl. ¶ 18.

12 PAGA Claim: The PAGA claim presented even higher hurdles. Although Plaintiff’s Counsel
13 found Defendant’s exposure could potentially reach approximately \$682,000 under Lab. Code §
14 2699(f), assuming the initial penalty rate of \$100 for each pay period (\$100 x 6820 pay periods), Plaintiff
15 would have to prove a violation in every pay period. Most importantly, the Court would have discretion
16 to reduce the PAGA award based on whether the amount of the award would be “unjust, arbitrary and
17 oppressive, or confiscatory.” Lab. Code § 2699(e)(2). In theory, the Court could reduce the award by
18 99% if it so wished. Given the severe financial issues described below, Plaintiff was doubtful they could
19 recover any PAGA penalties, especially if a large class judgment was entered for the same violations.
20 Accordingly, Plaintiff could not place a high value on the PAGA penalties, and therefore allocated
21 \$16,000 of the Gross Settlement Amount to settle these claims. McNicholl Decl. ¶ 19.

22 Financial Condition: All of the exposure analysis in this case was overshadowed by Five Acre’s
23 financial ability to pay a large judgment. Five Acre is a 501(c)(3) organization that does not have profits
24 or retained funds that can readily be made available for a large judgment. For example, publicly-
25 available documents show Five Acre has donor restrictions on their assets, which limit how they can
26 use available funds. Ultimately, Plaintiff determined that the settlement amount would compensate
27 employees for violations but also allow Five Acre to continue operating to provide vital care for foster
28 children. Plaintiff further discounted the overall value of the claims by about 70% to account for this

1 financial risk. Thus, Plaintiff believes the settlement amount is fair in light of these circumstances.
2 McNicholl Decl. ¶ 20.

3 **C. The Requested Service Award for Plaintiff**

4 Plaintiff seeks a Service Award of up to \$5,000 for accepting the responsibilities of representing
5 the interests of the Class and assuming risks and potential costs that were not borne by any other Class
6 Members. Settlement Agreement, § III, pp. 10-11. A named plaintiff is eligible for payment that
7 reasonably compensates him or her for undertaking and fulfilling a fiduciary duty to represent absent
8 class members. *See Cellphone Termination Fee Cases, supra*, 186 Cal. App. 4th at 1393; *Bell v. Farmers*
9 *Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004).

10 Here, Plaintiff had the option to pursue her claims individually, but instead chose to pursue this
11 class action, delaying individual recovery until approval of a class action settlement. McNicholl Decl.
12 ¶ 21. Throughout the case, Plaintiff assisted counsel in gathering the evidence necessary to prosecute
13 the class claims, maintained regular contact with counsel, was available on the day of mediation and
14 communicated with their attorneys during the day of mediation to answer critical questions, and
15 reviewed the Settlement to make sure it was fair to the Class. *Id.* No action would likely have been taken
16 by Class Members individually, and no compensation would have been recovered for them, but for
17 Plaintiff's services on behalf of the Class. *Id.*

18 By actively pursuing this action, Plaintiff furthered the California public policy goal of enforcing
19 the State's wage and hour laws. *See Sav-On Drug Stores, Inc., supra*, 34 Cal. 4th at 340. The requested
20 Service Award for Plaintiff's service as the class representative and for her general release of all
21 employment claims is reasonable and should be preliminarily approved. At the final approval stage,
22 Plaintiff will further support the request for Incentive Awards by declarations addressing the factors for
23 the award. McNicholl Decl. ¶ 23.

24 **D. The Requested Attorneys' Fees and Costs**

25 The purpose of an attorneys' fee award in class action litigation is to reward counsel who invested
26 in a case despite the risk of non-payment and achieved a substantial positive result for the class.
27 Attorneys' fees are awarded as a matter of equity. California courts routinely award attorneys' fees
28 equaling one-third or more of the potential value of the common fund. *See Chavez v. Netflix, Inc.*, 162

1 Cal. App. 4th 43, 66, n.11 (2008) (“Empirical studies show that, regardless of whether the percentage
2 method or the lodestar method is used, fee awards in class actions average around one-third of the
3 recovery”).

4 Plaintiff seeks appointment of Aegis Law Firm, PC as Class Counsel. The attorneys performed
5 significant work and expended litigation costs in prosecuting the matter with no guarantee of any
6 payment. McNicholl Decl. ¶ 37. Plaintiff’s Counsel seeks preliminary approval for \$78,333.33 in
7 attorneys’ fees, which is up to one-third of the Gross Settlement Amount, and up to \$20,000 in
8 reimbursement of litigation costs. Given the work performed in this matter, the extensive information
9 exchange, and substantial recovery obtained on behalf of Plaintiff and the Class, Plaintiff’s Counsel
10 achieved a settlement through efficient and diligent work. *See generally*, McNicholl Decl. At final
11 approval, Plaintiff’s Counsel will fully brief the merits of its request for the award of attorneys’ fees
12 and litigation costs. *Id.* at ¶ 38.

13 **V. CONCLUSION**

14 The Parties have negotiated a fair and reasonable Settlement of the class claims in light of the
15 risks present in this case. Plaintiff has appropriately presented the materials and information necessary
16 for preliminary approval, and therefore, respectfully requests that the Court preliminarily approve the
17 Settlement and schedule a date to conduct the final approval hearing.

18
19 Dated: January 17, 2023

AEGIS LAW FIRM, PC

20
21 By: Steven McNicholl
22 Steven A. McNicholl
23 Attorneys for Plaintiff
24
25
26
27
28