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13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF ALAMEDA**

16 CHERYL BURLEIGH and CHAD HARRIS,
individually and on behalf of all others
17 similarly situated,

18 Plaintiffs,

19 v.

20 WALDEN UNIVERSITY, LLC, a Florida
21 Limited Liability Company and LAUREATE
22 EDUCATION, INC., a Delaware Corporation,

23 Defendants.
24
25
26

Case No. RG21106062

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

ASSIGNED FOR ALL PURPOSES TO
JUDGE EVELIO GRILLO
DEPARTMENT 21

Date: June 7, 2022
Time: 10:00 a.m.
Reservation No.: 429533363155

Action Filed: July 22, 2021
Trial Date: None Set

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	OVERVIEW OF THE SETTLEMENT.....	1
III.	OVERVIEW OF THE LITIGATION.....	3
	A. Pleadings	3
	B. Discovery	5
	C. Mediation	6
IV.	CERTIFICATION FOR SETTLEMENT PURPOSES IS MERITED	6
	A. The Class Is Ascertainable and Sufficiently Numerous.....	6
	B. A “Community of Interest” Exists Among CMs	7
	1. Common Questions of Law and Fact Predominate.....	7
	2. Plaintiffs’ Claims Are Typical	7
	3. Plaintiffs and Their Attorneys Will Adequately Represent the Class.....	8
	C. A Class Action Is a Superior Method of Adjudication	8
V.	THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE	8
	A. The Two-Step Settlement Approval Process	8
	1. The Gross Settlement Amount Is Reasonable Compared to the Risk- Adjusted Potential Recovery	9
	2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation Support the Reasonableness of the Settlement.....	16
	3. The Settlement Is the Product of Informed, Non-Collusive Negotiations	16
	4. Views of Experienced Counsel Support the Settlement.....	16
	B. The Proposed Class Notice Content and Procedure Are Adequate.....	17
	C. The Class Representative Service Awards Are Preliminarily Reasonable	17
	D. The Requested Attorneys’ Fees and Costs Are Preliminarily Reasonable	18
VI.	CONCLUSION.....	18

TABLE OF AUTHORITIES

CASES

<i>Bernstein v. Virgin America, Inc.</i> , 990 F.3d 1157 (9th Cir. 2021).....	15
<i>Brinker Restaurant Corp. v. Superior Court</i> , 53 Cal. 4th 1004 (2012).....	6, 7
<i>Bufile v. Dollar Financial Group, Inc.</i> , 162 Cal. App. 4th 1193 (2008).....	8
<i>Caro v. Procter & Gamble Co.</i> , 18 Cal. App. 4th 644 (1993).....	8
<i>Cartt v. Superior Court</i> , 50 Cal. App. 3d 960 (1975).....	17
<i>Castillo v. ADT, LLC</i> , 2017 U.S. Dist. LEXIS 10579 (E.D. Cal. Jan. 25, 2017).....	15
<i>Cellphone Termination Fee Cases</i> , 186 Cal. App. 4th 1380 (2010).....	18
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43 (2008).....	9
<i>Cochran v. Schwan's Home Service, Inc.</i> , 228 Cal. App. 4th 1137 (2014).....	14
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996).....	8, 9
<i>Fireside Bank v. Superior Court</i> , 40 Cal. 4th 1069 (2007).....	7
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116 (2008).....	9, 17
<i>Laffitte v. Robert Half International Inc.</i> , 1 Cal. 5th 480 (2016).....	18
<i>Linder v. Thrifty Oil Co.</i> , 23 Cal. 4th 429 (2000).....	6
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	17
<i>Noel v. Thrifty Payless, Inc.</i> , 7 Cal. 5th 955 (2019).....	6

1	<i>North County Contractor’s Association v. Touchstone Insurance Services,</i> 27 Cal. App. 4th 1085 (1994).....	9
2	<i>O’Connor v. Uber Technologies, Inc.,</i> 201 F. Supp. 3d 1110 (N.D. Cal. 2016)	15
3		
4	<i>Raphael v. Tesoro Refining & Marketing Co.,</i> 2015 U.S. Dist. LEXIS 130532 (C.D. Cal. Sept. 25, 2015).....	15
5	<i>Reyes v. Board of Supervisors,</i> 196 Cal. App. 3d 1263 (1987).....	6
6		
7	<i>Robinson v. Open Top Sightseeing San Francisco, LLC,</i> 2018 U.S. Dist. LEXIS 24556 (N.D Cal. Feb. 14, 2018).....	11
8	<i>Rose v. City of Hayward,</i> 126 Cal. App. 3d 926 (1981).....	7
9		
10	<i>Sanchez v. Martinez,</i> 54 Cal. App. 5th 535 (2020).....	12
11	<i>Seastrom v. Neways, Inc.,</i> 149 Cal. App. 4th 1496 (2007).....	7, 8
12		
13	<i>Wershba v. Apple Computers, Inc.,</i> 91 Cal. App. 4th 224 (2001).....	17
14		
15	<u>STATUTES</u>	
16	Cal. Code of Civil Procedure § 384	3
17	Cal. Labor Code § 201	13
18	Cal. Labor Code § 203	4, 13
19	Cal. Labor Code § 204	11
20	Cal. Labor Code § 226	<i>passim</i>
21	Cal. Labor Code § 226.2	4, 9, 10, 12
22	Cal. Labor Code § 226.7	4
23	Cal. Labor Code § 1194	4
24	Cal. Labor Code § 1194.2	4, 18
25	Cal. Labor Code § 2699	15
26	Cal. Labor Code § 2802	4, 7, 14, 18

OTHER AUTHORITIES

Cal. Code Regs. tit. 8, § 13520(a)	13
Cal. Rules of Court, Rule 3.766	17
Cal. Rules of Court, Rule 3.769	6, 8, 9
IWC Wage Order No. 4-2001	3

1 **I. INTRODUCTION**

2 Plaintiffs Cheryl Burleigh and Chad Harris (“Plaintiffs”) seek preliminary approval of a non-
3 reversionary \$815,000 settlement of their class wage and hour claims against Walden University,
4 LLC and Laureate Education, Inc. (collectively, “Walden” or “Defendants”). This case was brought
5 on behalf of approximately 235 part-time faculty members teaching online for Walden. The Class is
6 defined as “part-time faculty members who were classified as Contributing Faculty or paid
7 according to the Faculty Compensation Schedule and who are or have been employed by
8 Defendants in California from January 25, 2017 to May 31, 2022” (the “Class,” “Class Members,”
9 or “CMs”). This Settlement was reached after a full-day mediation followed by a mediator’s
10 proposal that both sides accepted. In advance of the mediation, Walden produced extensive
11 informal discovery and class data. If approved, the Settlement will provide CMs with an average
12 gross recovery of \$3,468 per CM – an outstanding result.

13 The Settlement avoids significant risks posed by Defendants’ arguments with respect to class
14 certification and the merits. The terms of the SA are fair and reasonable. The Settlement was
15 negotiated by, and is supported by, proposed Class Counsel who have extensive experience
16 representing adjunct instructors in similar cases in California. Plaintiffs request that the Court certify
17 the Class for settlement purposes, grant preliminary approval of the Settlement, approve the proposed
18 Class Notice, and set a final approval hearing. The Settlement Agreement (“SA”) is attached as
19 **Exhibit 1** to the Proposed Order.

20 **II. OVERVIEW OF THE SETTLEMENT**

21 The Settlement resolves all claims of Plaintiffs and the proposed Class that were alleged or
22 could have been alleged based on the facts in the Complaint, including the primary rights asserted
23 in the case. The key Settlement terms are:

24 1. Gross Settlement Amount (“GSA”) – Walden will pay a non-reversionary sum of
25 \$815,000. SA §§ 1.11, 4. In addition, Walden will pay the employer’s share of payroll taxes on the
26 portion of the Settlement allocated as wages. *Id.* § 15.1.

27 2. Class Definition and Class Period – The Class is defined as “all part-time faculty
28 members who were classified as Contributing Faculty or paid according to the Faculty Compensation

1 Schedule and who are or have been employed by Defendants in California during the Class Period.”

2 *Id.* § 1.2. The Class Period is from January 25, 2017 to May 31, 2022 (“Class Period”). *Id.* § 1.5.

3 3. Escalator Clause – The Class consists of approximately 235 individuals. If the total
4 number of Class Members exceeds 235 by 5% or more (*i.e.*, more than 246), then the GSA will
5 increase by the same percentage by which the number of Class Members exceeds 246. *Id.* § 19.

6 4. Attorneys’ Fees, Costs, and Named Plaintiffs’ Service Awards – Class Counsel will
7 seek attorneys’ fees of up to one-third of the GSA (\$271,666.67), reimbursement of out-of-pocket
8 litigation costs up to \$25,000, and a Service Award of up to \$7,500 for each of the two named
9 Plaintiffs (up to \$15,000 total). *Id.* §§ 6, 7.

10 5. PAGA Penalties – The Settlement allocates \$25,000 to the PAGA claim. *Id.* § 8. The
11 LWDA will be paid 75% of that amount (\$18,750). *Id.* The remaining \$6,250 will be added to the
12 NSA for distribution pro rata to the CMs who worked during the PAGA Period. *Id.*

13 6. Settlement Administration Costs are estimated not to exceed \$20,000. *Id.* § 9. The
14 Parties selected Phoenix Settlement Administrators (“Phoenix”) as Administrator. *Id.* Phoenix is
15 deeply experienced in administering class settlements, and submitted the most competitive of three
16 bids. Decl. of Jodey Lawrence on Behalf of Phoenix (“Phoenix Decl.”) Ex. A (curriculum vitae) &
17 Ex. B (bid); Decl. of William C. Jhaveri-Weeks ISO Pls.’ Mot. for Prelim. Approval of Settlement
18 (“Jhaveri-Weeks Decl.”) ¶ 27.

19 7. The Net Settlement Amount (“NSA”) will total approximately \$474,583.33. Jhaveri-
20 Weeks Decl. ¶ 26. This is the amount remaining after subtracting from the GSA attorneys’ fees,
21 costs, class representative awards, the LWDA’s share of PAGA Penalties, and Settlement
22 Administration costs.¹ The NSA will be paid to CMs pro rata based on the amount paid to each CM
23 during the Class Period under the Faculty Compensation Schedule. *Id.* ¶ 26 (describing rationale for
24 allocation formula); SA § 5.1.1.

25
26 ¹ Phoenix has provided a bid of \$7,250 for estimated administration costs. Phoenix Decl. Ex. B.
27 Plaintiffs have calculated the estimated NSA by conservatively assuming administration costs of
28 \$10,000 (rather than the full \$20,000 authorized by the SA), which accounts for the possibility that
the Class size will be larger and administration costs will increase. Jhaveri-Weeks Decl. ¶ 26 n.1.

1 8. Class Notice – Within 10 business days of preliminary approval, Walden will provide
2 Phoenix with the Class Data List. SA § 10.1.1. Within 25 days of preliminary approval, after
3 accessing the National Change of Address Database and updating the addresses, Phoenix will mail
4 each CM a Notice substantially in the form attached to the Settlement Agreement as **Exhibit A**. *Id.*
5 §§ 10.1.2, 10.1.3. For all returned Notices, Phoenix will use skip tracing to update addresses and
6 initiate a second mailing. *Id.* § 10.1.4.

7 9. Automatic Participation – The Settlement is non-reversionary: each CM will receive
8 his or her share of the NSA, unless he or she opts out. *Id.* §§ 4, 11.3. CMs in the PAGA Period will
9 receive a PAGA allocation even if they opt out of the class settlement. *Id.* § 1.13.

10 10. Opting Out or Objecting – CMs who wish to opt out of the Settlement must send a
11 written Request for Exclusion to Phoenix within 60 calendar days of the date the Notices are mailed.
12 *Id.* §§ 1.19, 11. Any CM who properly requests to opt out will not receive any payment under the
13 Settlement and will not be bound by the Settlement. *Id.* § 11.2. Alternatively, a CM who remains
14 part of the Settlement may object to the terms of the Settlement by filing an objection with the Court
15 and mailing the objection to Phoenix within 60 days of the date the Notice is mailed out. *Id.* § 12.

16 11. Tax Consequences of Settlement Payments – For tax purposes, each CM’s payment
17 will be allocated 33% to wages and 67% to penalties and interest. *Id.* § 5.1.2.

18 12. Uncashed Checks – Settlement checks not cashed within 90 days from the day of
19 issuance by Phoenix will be voided and funds will be tendered to Bay Area Legal Aid as the *cy pres*
20 recipient under Cal. Code of Civ. Proc. § 384. *Id.* § 14.2; Jhaveri-Weeks Decl. ¶ 64 (explaining why
21 *cy pres* recipient meets statutory criteria).

22 13. Scope of Release and Final Judgment – The Class will release claims “which are
23 alleged, or could have been alleged based on the facts asserted in the Complaint, and arising during
24 the Class Period.” SA § 16.1. The named Plaintiffs will also give a general release. *Id.* § 16.2.

25 **III. OVERVIEW OF THE LITIGATION**

26 **A. Pleadings**

27 Plaintiffs filed this action on July 22, 2021, alleging that Defendants’ pay practices for part-
28 time Contributing Faculty violated the California Labor Code and IWC Wage Order No. 4-2001.

1 Jhaveri-Weeks Decl. ¶ 16. Specifically, Plaintiffs alleged that Walden paid CMs on a “piece-rate”
2 basis: a flat/ascertainable amount per “assignment” as specified on the Faculty Compensation
3 Schedule, with compensable assignments consisting of delivering a course or performing other
4 teaching-related tasks. *Id.* Plaintiffs alleged that because CMs are piece-rate workers, Walden was
5 required to pay them hourly for any “non-productive” time worked (*i.e.*, work not directly related to
6 producing the compensable pieces), such as faculty meetings and trainings, and was required to pay
7 them separately and hourly for their rest periods under Labor Code § 226.2 (requiring piece-rate
8 workers to be paid separately and hourly for rest periods). *Id.* Because Walden failed to do so,
9 Plaintiffs alleged that they were entitled to unpaid wages and missed-rest-break premiums. *Id.* In
10 the alternative, Plaintiffs alleged that Walden classified CMs as “exempt” employees but paid them
11 less than the minimum salary required for an employee to be “exempt” from various wage and hour
12 protections (*i.e.*, twice the state minimum wage based on a forty-hour week). *Id.* ¶ 17. Plaintiffs
13 alleged that this misclassification gave rise to violations for failure to provide paid rest breaks and
14 failure to pay for all hours worked under Labor Code §§ 226.7, 1194, and 1194.2. *Id.*

15 Plaintiffs also alleged that Walden, an online university that required CMs to deliver courses
16 via the internet, failed to reimburse CMs for necessary business expenses including, among other
17 expenses, the cost of internet and phone use in violation of Labor Code § 2802. *Id.* ¶ 18.

18 As a result of the unpaid wage violations, Plaintiffs asserted that Defendants owed them
19 waiting time penalties under Labor Code § 203 for failure to pay all wages due at the time of
20 discharge. *Id.* ¶ 19. Plaintiffs also alleged that when CMs completed an assignment without having
21 been issued another assignment, they were “discharged” for purposes of the obligation to
22 immediately pay all wages due, and that Walden owed waiting time penalties because in such
23 circumstances, it did not pay the wages due until the next regular scheduled payroll date. *Id.*

24 Plaintiffs also alleged that their wage statements did not contain required information,
25 including hours worked, hourly rates, rates for non-productive time, and information about the piece-
26 rate, giving rise to wage statement penalties under Labor Code § 226(e) and 226.2(a). *Id.* ¶ 20.

27 On the same day they filed the Complaint, Plaintiffs filed a PAGA Notice with the LWDA.
28 *Id.* ¶ 21. On September 9, 2021, Defendants filed a Demurrer to Plaintiffs’ claims (except the wage

1 statement violation). *Id.* Plaintiffs filed an Opposition on October 11, 2021. *Id.* On September 27,
2 2021, Plaintiffs filed an amended PAGA Notice noting that the statute of limitations had been
3 extended by 178 days due to the Judicial Council’s Emergency Rule 9 in response to COVID-19.
4 *Id.* On September 28, 2021, the Parties agreed that, rather than amend the Complaint to add the
5 PAGA cause of action and to amend the statutes of limitations for the other claims to account for the
6 178-day extension under Emergency Rule 9, any statutes of limitations would be paused until 14
7 days after the Court ruled on the pending Demurrer. *Id.* Before the Court ruled on the Demurrer,
8 the Parties agreed to stay the case and engage in mediation. *Id.*

9 After settlement was reached, and pursuant to the Settlement Agreement, Plaintiffs filed a
10 stipulation to file the First Amended Complaint (“FAC”) on April 8, 2022. *Id.* ¶ 22. The FAC
11 revised the complaint by: (1) adding the PAGA cause of action; (2) amending the Class Period to
12 account for Emergency Rule 9 (*i.e.*, extending it by 178 days); and (3) refining the wording of the
13 Class definition to ensure that it captured the approximately 235 CMs whose claims had been the
14 subject of the mediation (Plaintiffs had originally defined the Class as employees with the title
15 “Contributing Faculty,” but because that title is not uniformly used by Defendants, the Class
16 definition was revised to include all part-time faculty who have that title or who were paid under the
17 Faculty Compensation Schedule). *Id.*

18 **B. Discovery**

19 On August 30, 2021, Plaintiffs served separate sets of the following discovery requests on
20 Walden University and Laureate Education, Inc.: requests for production of documents, special
21 interrogatories, form interrogatories (general and employment), and requests for admission. Jhaveri-
22 Weeks Decl. ¶ 23. While the Demurrer was pending, the Parties agreed to stay discovery and focus
23 on producing documents and data needed for mediation. *Id.* Walden produced the following: (a)
24 spreadsheets consisting of an anonymized class list showing assignment and pay information during
25 Class Period; (b) the two named Plaintiffs’ personnel files; (c) the faculty and employee handbooks
26 in place during the Class Period; (d) representative examples of CMs’ “Assignment Letters” – *i.e.*,
27 the documents reflecting individual teaching assignments; (e) representative examples of CMs’ wage
28

1 statements; (f) all versions of the Faculty Compensation Schedule in place during the Class Period;
2 (g) CMs' job description; and (h) spreadsheets of training data and training descriptions. *Id.*

3 Plaintiffs retained an expert to assist in analyzing the raw data Walden produced for purposes
4 of calculating damages. *Id.* ¶ 24. Plaintiffs also gathered their own evidence, by designing and
5 sending out a survey and collecting responses from CMs, and by identifying and collecting publicly
6 available information about Defendants' businesses and Walden's policies and practices. *Id.*

7 **C. Mediation**

8 On January 24, 2022, the Parties attended a mediation with experienced mediator Lisa
9 Klerman. *Id.* ¶ 25. Plaintiffs submitted a detailed mediation brief with 18 exhibits. *Id.* The brief
10 described the facts and law and summarized the informal discovery exchanged in aid of mediation.
11 *Id.* The brief also detailed how Plaintiffs calculated Defendants' estimated liability exposure for
12 damages, interest, and PAGA penalties. *Id.* The mediation lasted a full day, and although the Parties
13 did not reach an agreement, the Mediator issued a mediator's proposal at the end of the day. *Id.* On
14 January 31, 2022, the mediator informed the Parties that both sides had accepted the proposal. *Id.*

15 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS MERITED**

16 When a negotiated class settlement is reached before certification, the Court may certify a
17 provisional settlement class. Cal. Rule of Ct. 3.769(d). This is a procedural decision based on the
18 allegations in the Complaint, not the perceived merit of the claims. *Linder v. Thrifty Oil Co.*, 23 Cal.
19 4th 429, 439-41 (2000). A Class is certifiable if (1) it is ascertainable and sufficiently numerous; (2)
20 there is a well-defined community of interest; and (3) a class action would be a superior method of
21 adjudication. *Id.* at 435; *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012).

22 **A. The Class Is Ascertainable and Sufficiently Numerous**

23 Whether a class is ascertainable is determined by examining the class definition, the size of
24 the class, and the means available for identifying CMs. *Reyes v. Bd. of Supervisors*, 196 Cal. App.
25 3d 1263, 1271 (1987). CMs are "ascertainable" if they may be readily identified without
26 unreasonable expense or time by reference to official records. *Noel v. Thrifty Payless, Inc.*, 7 Cal.
27 5th 955, 986 n.15 (2019). Here, the Class is ascertainable from Defendants' records. SA § 10.1.1;
28 Jhaveri-Weeks Decl. ¶ 28. The Class is sufficiently numerous because it has 235 members. *Id.*; see

1 also *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (much smaller class was numerous).

2 **B. A “Community of Interest” Exists Among CMs**

3 The “community of interest” requirement has three factors: (1) common questions of law or
4 fact that predominate; (2) class representatives with typical claims; and (3) class representatives who
5 can adequately represent the class. *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007).

6 **1. Common Questions of Law and Fact Predominate**

7 The ultimate question of predominance is whether “the issues which may be jointly tried,
8 when compared with those requiring separate adjudication, are so numerous or substantial that the
9 maintenance of a class action would be advantageous to the judicial process and to the litigants.”
10 *Brinker*, 53 Cal. 4th at 1021 (citations omitted). Whether common questions predominate depends
11 on whether plaintiff’s theory of recovery is “as an analytic matter, likely to prove amenable to class
12 treatment.” *Id.* If liability can be determined by common facts, the need to individually prove
13 damages does not prevent certification. *Id.* at 1022.

14 Common questions of law and fact predominate here. Whether Walden’s practice of paying
15 fixed payments for specified tasks constitutes a “piece-rate” is a legal question that drives the
16 resolution of the CMs’ claims for unpaid wages, rest-break premiums, and derivative waiting-time
17 and wage-statement penalties. *Jhaveri-Weeks Decl.* ¶ 29. If the piece-rate issue were resolved
18 against the Class, the Court would face the common question of whether CMs earned less than the
19 threshold salary for exemption – a question turning on common legal issues, such as whether the
20 threshold can be pro-rated for part-time workers. *Id.* Other common questions include: whether
21 Walden’s policy of not reimbursing for home internet or cell phones violates the duty to reimburse
22 expenses under Labor Code § 2802; whether faculty meetings and trainings were “nonproductive”
23 tasks separate from the Assignment rate; whether CMs were “discharged” when they completed an
24 Assignment without receiving another Assignment, such that final payment of wages was due; and
25 whether Walden’s failure to include hours-worked and hourly rates on CMs’ wage statements was
26 “knowing and intentional” and caused “injury” under Labor Code § 226(e). *Id.* ¶ 30.

27 **2. Plaintiffs’ Claims Are Typical**

28 Typicality asks whether Plaintiffs suffered a similar injury as the Class. *Seastrom v. Neways*,

1 *Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). Here, Plaintiffs, like the Class, were adjunct instructors
2 who allege that they taught remotely and were subject to the same alleged unlawful pay practices,
3 suffered the same injury, and seek the same relief as the Class. Jhaveri-Weeks Decl. ¶ 31.

4 **3. Plaintiffs and Their Attorneys Will Adequately Represent the Class**

5 “Adequacy of representation depends on whether the plaintiff’s attorney is qualified to
6 conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the interests of the
7 class.” *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669 n.21 (1993) (citations omitted).
8 Plaintiffs’ Counsel – HammondLaw, P.C. and The Jhaveri-Weeks Firm, P.C. – have extensive class
9 action litigation experience. Jhaveri-Weeks Decl. ¶¶ 6-15; Decl. of Julian Hammond ISO Pls.’ Mot.
10 for Prelim. Approval of Settlement (“Hammond Decl.”) ¶¶ 6-13. Plaintiffs’ Counsel together have
11 more experience representing adjunct instructors in California than any other firm and have been
12 appointed class counsel in at least 21 such cases over the past six years. Hammond Decl. ¶¶ 10-11;
13 Jhaveri-Weeks Decl. ¶¶ 14-15. Plaintiffs have undertaken to represent the interests of the Class,
14 their interests are virtually coextensive with those of the Class, and Counsel are not aware of any
15 conflicts between Plaintiffs and the Class. Jhaveri-Weeks Decl. ¶ 32; Hammond Decl. ¶ 5.

16 **C. A Class Action Is a Superior Method of Adjudication**

17 Plaintiffs’ claims depend on common evidence, including Walden’s uniform pay practices,
18 its standard assignment letters, the uniform Faculty Compensation Schedule, and its uniform
19 handbooks, payroll calendars, and standard wage statements. Jhaveri-Weeks Decl. ¶ 33. It would
20 be inefficient to resolve CMs’ claims at separate trials. *Id.*; *Bufil v. Dollar Fin. Grp., Inc.*, 162 Cal.
21 App. 4th 1193, 1208 (2008). The claims of each CM are relatively small, and would be impractical
22 to litigate on an individual basis. Jhaveri-Weeks Decl. ¶ 33; *Bufil*, 162 Cal. App. 4th at 1208.

23 **V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**
24 **BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE**

25 **A. The Two-Step Settlement Approval Process**

26 Court approval of a class settlement is a two-step process: first, a preliminary review of the
27 reasonableness of the settlement, and second, after notice has been distributed to the Class, a final
28 approval analysis that takes into account the Class’s response. Cal. Rule of Ct. 3.769; *Dunk v. Ford*

1 *Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). Courts analyzing whether a settlement is fair
2 and reasonable (either at the preliminary or final approval step) consider a number of factors: (1) the
3 strength of Plaintiffs' case balanced against the settlement amount; (2) the risk, expense, complexity,
4 and likely duration of further litigation and the risk of maintaining class action status through trial;
5 (3) the extent of discovery completed and stage of the proceedings; (4) the experience and views of
6 counsel; and (5) the reaction of the Class to the proposed settlement. *Kullar v. Foot Locker Retail,*
7 *Inc.*, 168 Cal. App. 4th 116, 128, 130 (2008). At preliminary approval, courts generally approve the
8 sending of notice if the settlement appears to be within the range of acceptable settlements. Cal.
9 Rule of Ct. 3.769(f); *N. Cty. Contractor's Ass'n v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085,
10 1089-90 (1994). A settlement is "presumed to be fair" when (1) it "is reached through arm's-length
11 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
12 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
13 small." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 52 (2008) (citation omitted).

14 As detailed below, the Settlement represents about **62%** of Defendants' realistic exposure
15 (excluding PAGA Penalties and interest) after adjusting the maximum potential exposure to reflect
16 the risks the Class would face on the merits and class certification. Jhaveri-Weeks Decl. ¶ 34. Given
17 the substantial relief obtained for the Class, and the certainty of receiving a settlement payment now
18 rather than years of uncertainty, the Settlement meets the criteria for preliminary approval. *Id.*

19 **1. The Gross Settlement Amount Is Reasonable Compared to the Risk-**
20 **Adjusted Potential Recovery**

21 A comparison of the recovery achieved by the Settlement to the strength of the Class's
22 claims is the most important factor in analyzing the fairness of the Settlement. *Kullar*, 168 Cal.
23 App. 4th at 130. Here, an examination of the likely recovery on each cause of action demonstrates
24 that the proposed Settlement of \$815,000 is reasonable.

25 **Unpaid Wages:** As piece-rate employees, CMs were entitled to be paid separately and
26 hourly for their "nonproductive time," which is defined as "time under the employer's control . . .
27 that is not directly related to the activity being compensated on a piece-rate basis." Lab. Code
28 § 226.2. Plaintiffs alleged that Walden required CMs to engage in certain trainings without

1 compensation, and suffered and permitted them to attend faculty and department meetings without
2 compensation. Jhaveri-Weeks Decl. ¶ 35. Plaintiffs argued that this work was uncompensated
3 nonproductive time because trainings and meetings were not directly related to teaching a course or
4 earning the Assignment rate. *Id.* CMs who responded to Plaintiffs' survey provided estimates of
5 the number of hours they spent attending faculty and department meetings and various trainings. *Id.*
6 Based on the survey responses and Defendants' pay data, Plaintiffs calculated Defendants' maximum
7 liability on this claim as \$211,038 (excluding interest and liquidated damages). *Id.* However,
8 documents produced by Defendants showed that some trainings were, in fact, paid separately. *Id.*
9 ¶ 36. In addition, each Assignment Letter specifically stated that, in exchange for compensation for
10 the Assignment, the CM would "accept[] [the] attendant duties and responsibilities ... in accordance
11 with the Walden Faculty Handbook," and the Handbook set forth trainings that CMs would be
12 required to take, giving Defendants an argument that the Assignment rate covered trainings. *Id.*

13 With respect to the risk of failing to win class certification, Plaintiffs applied a 40% discount,
14 given that individualized inquiries might have been needed to determine whether CMs attended *any*
15 department/faculty meetings, which were optional, and whether CMs were paid for various trainings.
16 *Id.* ¶ 37. With respect to the risk of prevailing on the merits, Plaintiffs applied a 40% discount
17 because (a) Walden had an argument that the Assignment letters included compensation for the tasks
18 in the handbook, including trainings, and (b) there was risk that the amount of unpaid hours CMs
19 could prove would be lower than Plaintiffs' survey results suggested. *Id.* After applying discounts,
20 Plaintiffs calculated Walden's realistic exposure on this claim as **\$75,974**. *Id.* ¶ 38.

21 **Inaccurate Wage Statements:** Plaintiffs alleged that Walden violated Labor Code § 226.2
22 by failing to issue accurate itemized wage statements because CMs, as piece-rate employees, were
23 entitled to wage statements containing the piece-rate and the number of pieces at that rate, in addition
24 to the total hours of compensable rest and recovery periods, the rate of compensation for those
25 periods, and the gross wages paid for those periods during the pay period. Jhaveri-Weeks Decl. ¶ 39.
26 Plaintiffs also argued that, even if CMs were not piece-rate workers, under Section 226(a) CMs were
27 entitled to wage statements stating total hours worked, applicable hourly rates, and the corresponding
28 number of hours worked at each hourly rate, yet Walden did not include this information. *Id.*

1 Plaintiffs therefore sought penalties under Section 226(e) of \$50 for each initial violation, and \$100
2 for each subsequent violation. *Id.* Also, because Walden only paid CMs once per month, rather than
3 twice per month as required by Labor Code § 204, Plaintiffs made the novel argument that Walden
4 was liable for two wage-statement penalties per month, even though there was only one non-
5 compliant statement per month. *Id.* Based on these assumptions, Plaintiffs calculated the maximum
6 statutory penalties on this claim as \$825,850. *Id.*

7 With respect to risk on class certification, Plaintiffs saw minimal risk based on their piece-
8 rate theory, but if Plaintiffs lost that issue and had to rely on the argument that CMs were not paid
9 enough to qualify for the professional exemption, there would be risk of maintaining class
10 certification because some percentage of CMs would have been paid enough to qualify as “exempt”
11 in some periods. *Id.* ¶ 40. Plaintiffs applied a 15% discount for the risk on class certification. *Id.*

12 On the merits, Walden could have argued that even if CMs were paid a piece-rate, there was
13 only a single piece (the course being delivered), so CMs could tell from the face of the wage
14 statement what the piece-rate was. *Id.* ¶ 41. Walden could further have argued that for those CMs
15 who did not work 3.5 hours or more in a row, there would likely be no rest break required, and thus
16 no need for the wage statement to provide information about hourly rates for rest breaks. *Id.* Thus,
17 there was risk of failing to prevail on the merits; but even if Plaintiffs succeeded, there was significant
18 risk that they would recover far less than the maximum exposure, for two reasons. *Id.* First, the
19 Court could have rejected Plaintiffs’ novel theory of seeking two wage statement penalties per month
20 even though there was only one wage statement, given that it appears to be a matter of first
21 impression, and the statutory language of Labor Code § 226(a) only requires a wage statement “at
22 the time of each payment of wages,” which was once per month in this case. *Id.* This could have
23 cut the penalty recovery in half. *Id.* Second, Defendants could also have argued that Labor Code
24 § 226(e) penalties should be calculated at \$50 for all violations, rather than \$50 for the first pay
25 period and \$100 for all subsequent pay periods, which would cut the penalty recovery in half again.
26 *Id.* (citing *Robinson v. Open Top Sightseeing S.F., LLC*, 2018 U.S. Dist. LEXIS 24556, at *51-58
27 (N.D Cal. Feb. 14, 2018) (awarding \$50 penalty for all wage statement violations)). Plaintiffs
28

1 applied a 50% discount for these risks on the merits. *Id.* After applying discounts, Plaintiffs
2 calculated Walden’s realistic exposure on this claim as **\$350,986**. *Id.* ¶ 42.

3 **Rest Break Claims:** Plaintiffs alleged that Defendants were required, but failed, to pay CMs
4 hourly and separately for rest break time under Labor Code § 226.2. *Id.* ¶ 43. For each day in which
5 a piece-rate worker works at least 3.5 hours and is not paid separately and hourly for a rest break, a
6 premium of one hour’s pay is owed, even if the rest break is provided. *See Sanchez v. Martinez*, 54
7 Cal. App. 5th 535, 545 (2020). Using Defendants’ payroll data and CMs’ survey responses, and
8 with assistance from their expert, Plaintiffs estimated the average number of days that CMs worked
9 3.5 hours straight without a rest break and then calculated the regular hourly rate of pay to determine
10 the premium pay owed. Jhaveri-Weeks Decl. ¶ 43. Plaintiffs calculated Defendants’ maximum
11 liability on the rest break premium pay claim as \$2,034,937 (excluding interest). *Id.*

12 As to class certification, Plaintiffs faced significant risk because of the potential that
13 individualized issues would be needed to determine whether CMs worked 3.5 hours straight in any
14 given day. *Id.* ¶ 44. Defendants argued that CMs were teaching remotely, and therefore, determined
15 their own schedules. *Id.* The case thus differed from other adjunct instructor cases in which course
16 schedules provide common proof concerning the days on which instructors were required to work at
17 least 3.5 hours. *Id.* Plaintiffs thus applied a 40% discount for certification risk. *Id.*

18 As to the merits, Defendants argued that no rest break premiums were owed because CMs
19 were free to set their schedules however they wished, including to refrain from working 3.5 hours in
20 any given day, or to take breaks whenever they wished for as long as they wished. *Id.* ¶ 45.
21 Defendants also could have distinguished this case from cases in which workers have an incentive
22 to work through their breaks to produce more pieces because, here, CMs would not have earned
23 more pieces if they spent more time working in any given day, so they did not have a financial
24 incentive to skip breaks. *Id.* In addition, Plaintiffs would almost certainly have faced stiff challenges
25 to their assumptions about how frequently CMs worked 3.5 hours, and even if Plaintiffs prevailed,
26 they might have succeeded in proving only a much smaller number of violations, thus potentially
27 reducing the recovery significantly. *Id.* Plaintiffs applied a 50% merits discount. *Id.*

1 After applying discounts, Plaintiffs calculated Defendants’ realistic exposure on the rest
2 break claims as **\$610,481**. *Id.* ¶ 46.

3 **Waiting Time Penalties:** Plaintiffs’ claim for waiting time penalties under Labor Code
4 § 203 due to Walden’s failure to pay all wages due at the time of discharge was derivative of
5 Plaintiffs’ claims for unpaid wages – *i.e.*, because such wages were not paid at the time of discharge,
6 waiting time penalties accrued. *Id.* ¶ 47. Plaintiffs determined that approximately 58 CMs ceased
7 working for Defendants during the relevant period, and Plaintiffs calculated that 30 days’ penalties
8 at CMs’ average daily rate of pay amounted to \$233,578. *Id.*²

9 Certification risk was the same as for the claim of which it is derivative – 40%. *Id.* ¶ 48.
10 Plaintiffs applied a 40% reduction on the merits for two reasons: first, to recover penalties under
11 Section 203, Plaintiffs would have had to prove that Defendants’ violation of Labor Code § 201 was
12 “willful.” *Id.*; Lab. Code § 203; Cal. Code Regs., tit. 8, § 13520(a) (“willfulness” lacking if
13 “employer presents a defense, based in law or fact which, if successful, would preclude any recovery
14 on the part of the employee”). Given Walden’s non-frivolous arguments on the merits of the unpaid
15 wage claim above, Plaintiffs saw risk in making a showing of “willfulness.” Jhaveri-Weeks Decl.
16 ¶ 48. Second, Plaintiffs calculated waiting time penalties using an “average daily rate” that assumed
17 all pay was for only 4 days per week (the number of days that Walden required CMs to log into the
18 online classroom, per the Faculty Handbook), but Defendants could have argued that the “average”
19 daily rate included the average rate for *all* days in a week that CMs worked, which could have
20 lowered the penalty even if Plaintiffs prevailed. *Id.* After applying discounts, Plaintiffs calculated
21 Walden’s realistic exposure on this claim as **\$84,088**. *Id.* ¶ 49.

22 **Expense Reimbursement Claim:** Plaintiffs alleged that Defendants required CMs, who
23 taught online courses, to use their home internet to work remotely, yet Walden did not reimburse
24 _____

25 ² Plaintiffs also alleged that CMs were “discharged” each time they completed an Assignment
26 without having a new Assignment. Jhaveri-Weeks Decl. ¶ 47 n.2. However, because CMs often
27 had overlapping assignments with different end-dates, or had already been assigned a new course
28 before the prior course ended, and because Walden had a written policy that employment continued
for six months from the last assignment, Plaintiffs concluded the value of this claim was
insignificant. *Id.*

1 them for the costs of internet and other necessary business expenses in violation of Labor Code
2 § 2802. *Id.* ¶ 50. Plaintiffs estimated that \$45 was a “reasonable percentage” of monthly business
3 expenses incurred by each CM. *Id.* (explaining the \$45 per month estimate); *Cochran v. Schwan’s*
4 *Home Serv., Inc.*, 228 Cal. App. 4th 1137, 1140 (2014) (requiring reimbursement of a “reasonable
5 percentage” of costs of personal cell phone service when phone is used for work). Plaintiffs
6 calculated Defendants’ maximum exposure as \$360,180. Jhaveri-Weeks Decl. ¶ 50.

7 Plaintiffs saw only minimal risk on class certification, although they applied a 10% discount
8 to account for the risk that individualized inquiries into each CM’s monthly expenses would defeat
9 certification. *Id.* ¶ 51. On the merits, Plaintiffs faced a risk that the assumption of \$45 per month as
10 a “reasonable percentage” might be reduced. *Id.* For example, Defendants took the position that,
11 given the part-time nature of CMs’ work, a much small percentage of their home internet costs (as
12 low as a few dollars per month for some CMs) should be reimbursed, and Defendants argued that
13 other expenses, such as printing or mobile phone use, were not necessary for CMs to incur. *Id.*
14 Plaintiffs therefore applied a 40% discount on the merits. *Id.* After applying discounts, Plaintiffs
15 calculated Walden’s realistic exposure on this claim as **\$194,497**. *Id.* ¶ 52.

16 **Defendants’ Total Exposure on All Class Claims:** Plaintiffs calculated the Class’s
17 maximum recovery before discounts, if they prevailed on every claim and recovered maximum
18 damages, as approximately **\$3,665,583** (excluding PAGA penalties, interest, and liquidated
19 damages). *Id.* ¶ 53. After applying the foregoing discounts for certification and merits risks on each
20 claim, Defendants’ realistic liability for settlement purposes is **\$1,316,026**. *Id.* The Settlement
21 reached by the Parties represents slightly more than 22% of Defendants’ maximum theoretical
22 exposure with no discounts for any of the risks explained above, and **62%** of Defendants’ realistic
23 exposure taking into account those risks. *Id.* This is an excellent result for the Class. *Id.*

24 **The PAGA Allocation Is Fair and Adequate:** The \$25,000 allocated to PAGA Penalties,
25 3% of the GSA and approximately 6% of the maximum PAGA exposure, is fair and adequate. *Id.*
26 ¶ 54. There were 4,173 pay periods in the PAGA Period. *Id.* Assuming the Court were to award
27 PAGA penalties at the “initial” violation rate of \$100 per pay period and were to decline to “stack”
28 PAGA penalties (*i.e.*, decline to award multiple penalties for each employee in each pay period), the

1 PAGA exposure was approximately \$417,350. *Id.* (citing *Castillo v. ADT, LLC*, 2017 U.S. Dist.
2 LEXIS 10579, at *11 (E.D. Cal. Jan. 25, 2017) (declining to stack PAGA penalties); *Bernstein v.*
3 *Virgin Am., Inc.*, 990 F.3d 1157, 1172-73 (9th Cir. 2021) (holding that all PAGA violations were
4 “initial” violations because court or Labor Commissioner had not previously imposed penalties)).

5 The PAGA allocation is reasonable for several reasons. First, the Court has discretion to
6 drastically reduce any award of PAGA penalties as “unjust, arbitrary and oppressive, or
7 confiscatory” under Labor Code § 2699(e)(2). *Id.* ¶ 55. This is especially the case when, as here,
8 the PAGA penalties are in conjunction with a significant settlement of underlying Labor Code
9 claims. *Id.*; *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016) (courts
10 reviewing PAGA awards in the context of class settlements consider the relief obtained for the class,
11 as well as the deterrent effect of the settlement). Here, the Settlement provides robust relief to the
12 Class, with an average gross payment of \$3,468 per CM, which reduces the need for PAGA penalties
13 to serve as punishment or a deterrent. Jhaveri-Weeks Decl. ¶ 55. For example, when Plaintiffs’
14 Counsel recently prevailed at trial on a class of adjunct instructors’ wage statement claims, the court,
15 as a matter of discretion, awarded only 15% of the PAGA penalties, noting that the defendant’s
16 payment of the wage statement penalties already largely satisfied PAGA’s goals of deterrence and
17 punishment. *Id.* This supports the reasonableness of the \$25,000 PAGA allocation. *Id.*

18 Second, Defendants contended that Plaintiffs’ claims for PAGA penalties would fail for the
19 same reasons as the underlying Labor Code claims, and the merits risks on the underlying claims
20 apply to the PAGA claims, as well. *Id.* ¶ 56.

21 Third, PAGA claims “can be stricken if they are found to be ‘unmanageable,’” and Plaintiffs
22 faced the risk that on certain claims with significant class certification risk, the Court would also find
23 a PAGA representative action to be unmanageable. *Id.* ¶ 57 (citing *Raphael v. Tesoro Ref. & Mktg.*
24 *Co.*, 2015 U.S. Dist. LEXIS 130532, at *6-7 (C.D. Cal. Sept. 25, 2015)).

25 And fourth, the percentage of the Settlement devoted to the PAGA allocation in this case is
26 comparable to PAGA allocations that have received final approval in similar wage and hour cases
27 on behalf of adjuncts. *Id.* ¶ 58 (citing examples).

28 For these reasons, the \$25,000 allocated to PAGA Penalties is adequate and fair. *Id.*

1 Plaintiffs submitted a copy of the SA to the LWDA on the date of this filing, along with information
2 about the date and time of the preliminary approval hearing, permitting the LWDA the option of
3 objecting to the PAGA allocation. *Id.*

4 **2. The Risk, Expense, Complexity, and Likely Duration of Further**
5 **Litigation Support the Reasonableness of the Settlement**

6 This case would take years to resolve at the trial phase absent settlement, as Plaintiffs’
7 Counsel know from recently trying a similar case. *Id.* ¶ 59; Hammond Decl. ¶ 15. Voluminous
8 evidence would be needed to prove damages; expert testimony and discovery would be required;
9 and trial would be complex given the number of violations alleged and the presence of undecided
10 legal issues. Jhaveri-Weeks Decl. ¶ 59. Neither side would likely prevail on all positions, and the
11 case raises issues that have not been decided by a Court of Appeal, making appeals likely. *Id.* Absent
12 a settlement, the Class would not receive relief for many years, if ever. *Id.* The delay would be
13 longer than typical litigation delays due to the continuing impact of COVID-19. *Id.* In addition, the
14 Parties strongly disagreed as to both the merits of Plaintiffs’ claims and their ability to certify the
15 claims. *Id.* This Settlement provides an early resolution of this dispute, and CMs will obtain a
16 substantial recovery now without the risks and delays that further litigation would entail. *Id.*

17 **3. The Settlement Is the Product of Informed, Non-Collusive Negotiations**

18 The Settlement is the result of arm’s-length negotiations between the Parties, reached after
19 mediation with an experienced mediator. *Id.* ¶ 60. Class Counsel engaged in significant informal
20 discovery, in addition to conducting their own investigation that included surveying and
21 interviewing CMs. *Id.* By analyzing (with expert assistance) the data and documents produced by
22 Walden, interviewing CMs, and preparing for a full-day mediation, Plaintiffs were well-informed
23 about the strengths and weaknesses of the Class’s claims. *Id.*

24 **4. Views of Experienced Counsel Support the Settlement**

25 Class Counsel have extensive experience in class litigation, particularly for adjunct
26 instructors. *Id.* ¶¶ 6-15; Hammond Decl. ¶¶ 10-13. Class Counsel consider the Settlement an
27 excellent result, with an average gross recovery per CM of \$3,468 and an average net recovery of
28 \$2,020, particularly given that CMs were part-time employees setting their own schedules. Jhaveri-

Weeks Decl. ¶ 61; Hammond Decl. ¶ 15. The Escalator Clause will ensure that the settlement amount increases in proportion to the Class size. *See* SA § 19; Jhaveri-Weeks Decl. ¶ 61.

* * *

The four foregoing *Kullar* factors weigh heavily in favor of preliminary approval.³

B. The Proposed Class Notice Content and Procedure Are Adequate

Constitutional due process requires that CMs be provided with notice sufficient to give them an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Proper notice must provide information to allow CMs to make an informed decision to accept or object to the settlement. *Id.*; *see also Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 251-52 (2001). Here, the proposed Notice provides: (1) the material terms of the Settlement, (2) the CM’s anticipated Settlement share, (3) how to object or opt out, (4) how to obtain more information about the claims, (5) the proposed fees and costs of Class Counsel and for settlement administration, (6) the proposed service award to each Class Representative, and (7) the date and time of the final approval hearing. *See Exhibit A* to the SA (Class Notice); *see also* Cal. Rule of Ct. 3.766.

The procedure for distribution of the Class Notice has “a reasonable chance of reaching a substantial percentage of the [CMs].” *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 974 (1975). The Notice will be sent by first class mail to the most recent address of each CM, updated using the National Change of Address Database. SA §§ 10.1.1-10.1.3. If a Notice is returned as undeliverable, Phoenix will perform a skip trace and resend it if a new address is identified. SA § 10.1.4. As such, the Notice is likely to reach most, if not all, CMs.

C. The Class Representative Services Awards Are Preliminarily Reasonable

In conjunction with seeking final approval, Plaintiffs will move for approval of a Service Award of up to \$7,500 for each of the two Class Representatives (up to \$15,000 total) to recognize the time and effort they expended for the Class, as well as the general release they are each giving Defendants. SA §§ 7, 16.2; Jhaveri-Weeks Decl. ¶ 62. That motion will be supported by declarations from the two named Plaintiffs describing their work for the Class. *Id.* The requested awards fall

³ The final prong of the *Kullar* test – the reaction of the Class – will be evaluated at final approval.

1 well within the range of incentive payments typically awarded to class representatives in similar
2 class actions. *See, e.g., Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010)
3 (affirming awards of \$10,000). Granting preliminary approval will provide the Class notice of the
4 requested Service Awards and the opportunity to object to them. *See* SA § 12, Ex. A (Notice).

5 **D. The Requested Attorneys' Fees and Costs Are Preliminarily Reasonable**

6 Also in conjunction with final approval, Plaintiffs will move for an award of attorneys' fees
7 of one-third of the GSA (*i.e.*, \$271,666.67). SA § 6. This is the benchmark award typically approved
8 in similar class actions by California courts. *See, e.g., Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th
9 480, 487 (2016) (affirming fee award representing one-third of the fund). Plaintiffs will also request
10 reimbursement of out-of-pocket litigation costs not to exceed \$25,000. SA § 6; Lab. Code §§ 226(e),
11 1194.2, 2802 (providing for recovery of fees and costs). The Court need not decide now the
12 attorneys' fees and expenses to approve – if the Court grants preliminary approval, Class Counsel
13 will file a fully-briefed motion for fees and costs, supported by detailed lodestar information, to be
14 heard concurrently with the motion or final approval of the Settlement. Jhaveri-Weeks Decl. ¶ 63.

15 **VI. CONCLUSION**

16 Plaintiffs respectfully request that the Court enter the proposed order certifying the settlement
17 Class, preliminarily approving the Settlement, and ordering distribution of the Notice to the Class.

18 DATED: April 12, 2022

Respectfully submitted,

20 THE JHAVERI-WEEKS FIRM, P.C.

21 

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