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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

REBECCA DE BENNING, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

Costco WHOLESALE CORPORATION, a
Washington Corporation; and Does 1
Through 10, Inclusive,

Defendants.

Case No. 34-2021-00309030
ASSIGNED FOR ALL PURPOSES TO:
The Honorable Jill H. Talley
Department 25

CLASS ACTION

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

Date: October 28, 2022
Time: 9:00 a.m.
Dept: 25
Judge: Honorable Jill H. Talley
Reservation: #2667995

Complaint filed: September 30, 2021
Trial date: Not set

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I. INTRODUCTION

Plaintiff seeks preliminary approval of a \$9,000,000 wage and hour class and Private Attorneys General Act (PAGA) settlement for an estimated 50,000 non-exempt California employees, for whom it was alleged Defendant Costco Wholesale Corporation (“Costco”), underpaid sick pay wages by failing to correctly calculate the regular rate. Declaration of Jeff Geraci, (“Geraci Decl.”), ¶11, Class and PAGA Action Settlement Agreement, Exh. 1 (“SA”).

II. THE PARTIES, CLASS, AND AGGRIEVED EMPLOYEES

A. Plaintiff and Defendant

Rebecca De Benning worked as a cashier at Costco’s Folsom, Roseville, and Citrus Heights, facilities from June 2013 to the present, with several periods off-work on disability. Geraci Decl. ¶12. Costco is a multinational corporation operating member-only stores selling merchandise and services and is one of the world’s largest retailers. *Id.*

B. Class and Aggrieved Employees

Class Members are all non-exempt Costco California employees who, during the period September 30, 2017, through July 6, 2022, (a) earned wages at more than one rate during a week they took paid sick leave, (b) took paid sick leave any time during the period March 2, 2020, through February 28, 2021, or (c) took sick leave any time during the six-month period before receiving an Extra Check. (Employees with seniority received an “Extra Check” every six months based on a formula crediting them for, among other things, sick pay hours.) Geraci Decl. ¶13.

Those who would otherwise be Class Members are excluded if they sued Costco on any claim released or precluded by the Settlement, or for time worked at Costco’s distribution centers (“Depots”), in Tracy and Mira Loma, California. Geraci Decl. ¶14; SA ¶¶ 1.9, 1.46.

Aggrieved Employees are members of the Class who took paid sick leave during the period September 30, 2020, to July 6, 2022 (“PAGA Period”). Geraci Decl. ¶15; SA ¶¶ 1.3, 1.34.

III. PROCEDURAL HISTORY

On August 30, 2021, Plaintiff filed charges with the California Labor and Workforce Development Agency (LWDA), and on September 30, 2021, a class action complaint alleging failure to pay all sick pay and final wages, and unfair business practices Geraci Decl. ¶16.

On November 8, 2021, Plaintiff filed a First Amended Complaint adding claims for PAGA civil penalties (Cal. Lab. Code § 2698, et seq.) for each alleged violation. Geraci Decl. ¶17.

IV. PLAINTIFF’S CONTENTIONS AND COSTCO’S DEFENSES

Employers may calculate sick pay each workweek in the same manner as overtime wages. Labor Code § 246 (l)(1). Plaintiff’s primary contention was that Costco failed to add all compensation to hourly wages, such as Extra Checks and Outstanding Service Bonuses, when calculating regular rate for sick pay; and, when employees earned two different rates during a workweek, Costco used the lower rate, rather than a blended rate, for sick pay. Geraci Decl. ¶18.

The “Extra Check” is paid every six months based on the number of hours employees are “credited” with, including vacation, holiday, sick, regular, and hours worked on Sundays. Costco paid a monthly “Outstanding Service Bonus” to employees who worked during the start of the pandemic, February 28, 2020 to March 2, 2021. Geraci Decl. ¶19.

Costco contended there was a high probability the sick pay claim under Labor Code § 246 might be dismissed. *Rudolph v. Herc Rentals*, 2021 U.S. Dist. LEXIS 244970, *7, 14 (C.D. Cal. August 27, 2021). (“This Court, too, finds that no private right of action exists for violations of California Labor Code section 246,” or as the basis for a PAGA claim). Plaintiff argued the claims would be allowed to proceed if not settled, at least under PAGA or as a predicate for a section 17200 claim. Geraci Decl. ¶20.

Costco contended 90% of its unionized employees were exempt from sick leave laws because they satisfy the requirement of earning more than 130% of minimum wage. § 245.5. Plaintiff argued this exemption is triggered only when all covered employees are exempt. *Div. of Labor Stds. Enf’t v. Save Mart Supermarkets*, 2022 U.S. Dist. LEXIS 50422, *14-15 (C.D. Cal. March 21, 2022). Geraci Decl. ¶21.

Plaintiff contended, although sick hours were included when calculating the Extra Check, (along with several other types of work and non-work hours), no part of the Extra Check could substitute for, or offset, the obligation to provide sick pay at the correct regular rate. Costco argued, because sick hours were included in the calculation, employees were already receiving additional compensation in the Extra Check for the number of sick hours taken. Geraci Decl. ¶22.

Plaintiff contended failure to pay all sick pay supported a claim for failure to pay all final wages. Costco correctly countered there are no cases finding this, and also argued it cannot be liable for waiting time penalties because, if found to have underpaid sick pay wages, its failure was not willful. Geraci Decl. ¶23.

V. DISCOVERY, INVESTIGATION, AND MEDIATION

Plaintiff conducted sufficient investigation and informal discovery to evaluate the strengths and weaknesses of her claims and Costco's defenses. Geraci Decl. ¶24.

For mediation, Defendant provided sick leave policies effective during the class period, formula used to calculate sick pay, random sample of complete data for 100 employees, aggregate data showing number of putative class members, total number of hours employees received sick pay, and number of pay periods sick leave was received and two different rates were paid, an Outstanding Service Bonus was paid, or to which an Extra Check could have applied. Counsel conferred extensively about data, claims and defenses, and issues for settlement. Geraci Decl. ¶25.

With significant investigation, research, discovery, and analysis of data by Plaintiff's damages consultant, the Parties mediated with Mark S. Rudy, Esq., perhaps the preeminent mediator of wage and hour class actions, on April 7, 2022. After a full day of arms'-length negotiations, the matter was settled in principle. The Parties negotiated all necessary terms and entered the Settlement Agreement presented for preliminary approval. Geraci Decl. ¶26, Exh. 1.

VI. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

Costco will pay a Gross Settlement Amount ("GSA") of \$9,000,000, which includes all the following: (a) settlement administration costs to Atticus Administration, LLC, ("Atticus") estimated at \$128,682; (b) attorneys' fees (up to \$3,000,000, one-third of the GSA) (apportioned 50/50 between Class Counsel with Plaintiff's consent. Geraci Decl. ¶28); (c) litigation costs, estimated at \$20,000; (d) Class Representative service payment (up to \$10,000); and (e) PAGA payment of \$300,000 (\$225,000 to the LWDA (75%), and \$75,000 (25%) to Aggrieved Employees). SA ¶3.1. Costco will pay the employer's share of payroll taxes in addition to the GSA. Geraci Decl. ¶27; SA ¶¶1(1.23), 1(1.33), 3(3.1).

After approved deductions, the estimated \$5,541,318 Net Settlement Amount (“NSA”) will be distributed pro rata to Settlement Class Members based on number of sick leave hours taken by each Class Member in relation to the total number of sick leave hours taken by all Class Members. Aggrieved Employees will receive payments based on the number of pay periods worked during the PAGA Period in relation to the total number of pay periods worked by all Aggrieved Employees during that Period. Geraci Decl. ¶29; SA ¶¶ 6.6.1, 6.6.3, 6.5.3.

Settlement payments are characterized as 60% penalties and interest (Form 1099), 40% wages (W-2), with PAGA Payments as penalties (Form 1099). Geraci Decl. ¶30; SA ¶ 6.8.1.

The Settlement distribution is fair and reasonable, does not give preferential treatment to any Class Member, can be made from data readily available from Costco, and the Administrator can apply the formula fairly and transparently. Geraci Decl. ¶31.

B. Released Claims

Settlement Class Members will release Costco, and its present and former subsidiaries, affiliates, and joint ventures, and all of Defendant’s shareholders, officers, directors, employees, agents, servants, registered representatives, attorneys, insurers, successors and assigns, and any other persons acting by through, under or in concert with any of them (“Releasees”) from any and all claims, debts liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorney’s fees, damages, action or causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, that were alleged or that reasonably could have been alleged based on the facts alleged in this Action, as amended, including, but not limited to, any claims for unpaid sick pay, “waiting time” penalties, and claims under the applicable Wage Order and Labor Code sections 201-203, 245-246, as well as claims under Business and Professions Code section 17200 et seq., and Labor Code section 2698 et seq. based on alleged violations of these Labor Code provisions. Geraci Decl. ¶32; SA ¶ 7.1.

C. Settlement Administration and Notice to the Class

Atticus will search the National Change of Address database, update Class Members’ addresses, and mail the Notice of Settlement (“Class Notice”) to each Class Member. Declaration of Atticus Administration LLC, by Chris Longley, ¶7; Geraci Decl. ¶33; SA ¶4.4.1.

The Notice of Settlement explains how to dispute the basis of an Individual Settlement Payment; object or opt-out; the release to be given; date of Final Approval hearing; how to get further information; and that no claim form is necessary. Geraci Decl. ¶34; SA ¶1.29, Exh. A.

VII. ARGUMENT

A. Class Settlements Are Subject to Court Review and Approval

“Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement.” CRC, Rule 3.769 (g). Where terms are agreeable to all Parties, a court should disapprove a settlement “only with considerable circumspection.” *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 481 (E.D. Pa. 1975). (State courts may be guided by federal authority in class settlements. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 239 (2001)).

At preliminary approval, a court limits its inquiry to the extent necessary to reach a reasoned judgment “the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.” *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006).

B. The Settlement is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement the Court must find a proposed settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). The trial court considers all relevant factors, such as: “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, [] and the reaction of the class members to the proposed settlement.” *Id.* The Court determines whether the Settlement is the product of fraud, overreaching, or collusion, and, taken as a whole, is fair, reasonable and adequate to all concerned. *Dunk, supra* at 1801.

A proposed settlement is presumed fair where: (1) parties agree after extensive arms’-length negotiations; (2) sufficient investigation and discovery allow counsel and the Court to act intelligently; (3) counsel is experienced; and, (4) percentage of objectors is small. *Id.* at 1802.

The Settlement is the product of informed, non-collusive negotiations with an experienced mediator; made after investigation of the facts and law allowed Plaintiff, counsel, and the Court

1 to make informed decisions; and the Class is represented by experienced counsel. The fourth *Dunk*
2 factor, percentage of objectors, cannot be known until the Class has notice and opportunity to
3 respond. The proposed Settlement is entitled to the presumption of fairness.

4 **1. Serious, Informed, Non-Collusive Negotiations Led to Settlement**

5 The Settlement was reached through arm's-length negotiations facilitated by Mark Rudy,
6 an experienced and respected mediator. Though cordial and professional, negotiations were at all
7 times adversarial and non-collusive. Geraci Decl. ¶¶26, 35.

8 **2. Discovery and Stage of the Proceedings Support Settlement**

9 Plaintiff's Counsel investigated all claims and defenses before filing. When the Parties
10 agreed to mediation, Plaintiff requested, and Defendant produced, all data and documents needed
11 to assess liability and calculate Class-wide damages. Geraci Decl. ¶¶24, 25, 36.

12 Investigation and informal discovery gave the Parties a clear understanding of their
13 strengths and weaknesses before negotiations. *Id.*, See *Munoz v. BCI Coca-Cola Bottling Co. of*
14 *Los Angeles*, 186 Cal. App. 4th 399, 410 (2010) (approving settlement where "considerable
15 information [exists] from which to assess the strength of the class claims" and litigation risks).

16 Proof of wage and hour class claims is based, at any stage, almost entirely on written
17 policies and pay records. Plaintiff's counsel obtained those records, and an expert analyzed them
18 and prepared a damage model before a settlement was negotiated. Geraci Decl. ¶37.

19 **3. Counsel are Highly Experienced in Similar Litigation**

20 Plaintiff's Counsel have significant experience in wage and hour class actions. Geraci
21 Decl. ¶¶3-10, 38; Majarian Decl. ¶¶2-3. This allowed Counsel to compare settlement with the
22 risks of further litigation, including trial and appeals. Defense counsel, David D. Jacobson, David
23 D. Kadue, and their colleagues at Seyfarth Shaw, are experienced wage and hour class action
24 litigators who defended vigorously, including through mediation and negotiation of all settlement
25 terms. Geraci Decl. ¶39.

26 Experienced counsel believes the Settlement is fair, reasonable, and in the Class' best
27 interest in light of the monetary recovery, risks of certification, summary adjudication, the lengthy
28 process of establishing damages, and uncertainty of appeals. Geraci Decl. ¶40.

The view of the attorneys actively conducting the litigation “is entitled to significant weight” in settlement approval. *Fisher Bros. v. Cambridge Lee Industries, Inc.*, 630 F.Supp. 482, 488 (E.D. Pa. 1985). The Settlement satisfies the three *Dunk* requirements, should be presumed fair, adequate, and reasonable, and preliminarily approved.

4. The Settlement is Fair, Adequate, and Reasonable

As described below, Plaintiff and counsel concluded the Settlement is reasonable.

C. The Settlement is a Reasonable Compromise of Claims

“[T]o ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation,” information is presented to the Court, as a fiduciary for absent class members. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129 (2008). *Kullar* does not require an illusory prediction of the outer reaches of exposure without taking account of the actual risks of certification, decertification, dispositive motions, and trial. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399, 408 (2010). *Kullar* also does not require an explicit statement of the maximum amount the class could recover if it prevailed on all claims, only a record which allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409.

Munoz examined the trial court record including number of class members and time and payroll data. It found this “an adequate basis from which to garner a reasonably adequate understanding of the amount that is in controversy within the meaning of *Kullar*.” *Id.*

In advance of mediation, Plaintiff’s Counsel evaluated the claims to determine Defendant’s exposure and a reasonable range of Class relief. Although Plaintiff believes the claims are strong, she recognizes if litigation were to continue, she may encounter significant legal and factual hurdles that could prevent the Class from obtaining any recovery.

Class Counsel relied on similar documents and data as in *Munoz*, including time and pay records. Plaintiff’s economist analyzed voluminous data and documents, and calculated Class-wide damages through the date of mediation. Geraci Decl. ¶¶25, 41.

Realistic damages and penalties considered the basis of the alleged violations: Both the Outstanding Service Bonus and Extra Check are payments employers are not required to make and likely to be considered to be made in good faith, if not as an act of generosity. To the extent legally possible, a trier of fact may have been motivated not to find liability, and a court to not award damages or penalties or at least reduce them.

The use of the lower, rather than blended rate, when two rates were earned, was arguably the strongest claim, but resulted in a very small amount of damages. [\$361,176, with interest].

1. Labor Code § 246 Sick Pay Wages

California employers may calculate sick pay wages in the same manner as overtime wages, using the “regular rate,” or “look back” 90 days, dividing the employee’s “total wages, not including overtime premium pay, by total hours worked in full pay periods of the prior 90 days.” § 246 (l)(1)(2). Costco used the “regular rate” option. Geraci Decl. ¶42.

Plaintiff calculated the amount of sick pay wages Costco would have paid if the regular rate for sick pay wages included the Outstanding Service Bonus and Extra Check, and if a blended, rather than the lower rate, was used for pay periods in which employees were paid two different hourly rates.

Plaintiff determined Costco could have underpaid sick pay by a maximum of \$9,525,379, including interest, by not adding the Outstanding Service Bonus and Extra Check to calculate the regular sick pay rate, and by not using a blended rate, when two rates were earned. [\$5,405,072 (OSB) + \$3,759,131 (Extra) + \$361,176 (Blended) = \$9,525,379]. This figure overstates potential recovery as it is extrapolated to the entire class, although a significant number of class members would not have worked long enough (accumulated 12,400 paid hours) to have been eligible for an Extra Check. Geraci Decl. ¶43.

Costco contended the court might dismiss these claims entirely. *Rudolph v. Herc Rentals, Id.*, at * 14. While Plaintiff believed the sick pay claim would survive, there was significant risk it could be dismissed, limited to PAGA penalties, or limited to equitable restitution claims under the Unfair Competition Laws. There was also risk the amount attributed to the Extra Check would not be included based on Costco’s argument that each Extra Check already included an additional

1 amount for sick pay because sick leave hours were included in the formula for the Extra Check.
2 For example, Costco contended that if an employee had 1,000 hours of paid time toward the Extra
3 Check, and received an Extra Check of \$2,500, and 20 of the Extra Check paid hours consisted
4 of sick leave, the employee had already been paid an extra \$2.50 per hour for the sick leave, and
5 no additional sums were due.

6 Plaintiff found realistic exposure was no more than 50% of maximum, or **\$4,762,690**.
7 Geraci Decl. ¶44.

8 **2. Labor Code § 203 Final Wages**

9 An employer must pay all wages due to an involuntarily terminated employee at the time
10 of termination, or within 72 hours after voluntary termination. If an employer willfully fails to
11 timely pay all wages to separated employees, the wages continue at the same rate for up to 30
12 days. § 203. Costco correctly pointed out there are no cases finding liability for final wages based
13 on underpaid sick pay, only a single case denying a motion to dismiss on that ground. *Powell v.*
14 *Walmart Inc.*, 2021 U.S. Dist. LEXIS 20777 (S.D. Cal. February 2, 2021). Costco also noted that
15 at least one Superior Court decision found that failure to pay sick pay does not trigger waiting
16 time penalties under § 203. *Liu v. Kaiser Permanente International*, Alameda County Superior
17 Court No. RG21093802, order dated November 17, 2021 (sustaining demurrer without leave to
18 amend because sick pay is not a “wage” that triggers waiting time penalties).

19 Multiplying the number of former employees during the statutory period produces
20 maximum exposure of \$49,077,171. [10,868 x 6.75 hr. avg shift x \$22.30 avg hr pay x 30 days]
21 Geraci Decl. ¶45.

22 Plaintiff considered there is not yet a case awarding waiting time penalties for
23 underpayment of sick pay and Costco’s argument that at least one court has found that
24 underpayment of sick pay does not trigger waiting time penalties. Plaintiff also considered this
25 derivative violation requires Plaintiff to prevail on the underlying wage claim and show the
26 violation was “willful.” Even if Costco were found to owe sick pay to some former employees, it
27 could be found to have a good faith belief it was paying wages properly, and “a good faith dispute
28 that any wages are due will preclude imposition of waiting time penalties under Section 203.” *Hill*

1 *v. Walmart Inc.*, 2021 U.S. Dist. LEXIS 20950, *17 (N.D. Cal. January 14, 2021) (triable issues
2 found as to whether Walmart actually misclassified employees as independent contractors, but
3 court found Walmart had a “good faith belief” it properly classified them and could not be liable
4 for waiting time penalties).

5 Based on the risk an underlying violation would not be proven, and if proven, the
6 likelihood Costco would be found to have a good faith belief it was providing sick pay wages
7 properly, Plaintiff believed realistic exposure was less than 10% of maximum exposure, or no
8 more than **\$4,907,717**. Geraci Decl. ¶46.

9 **3. Labor Code §§ 2699 PAGA Civil Penalties**

10 “PAGA penalties are paid 75% to the California Labor and Workforce Development
11 Agency and 25% to aggrieved employees. Thus, in wage and hour class action cases that settle, [
12] very little of the total settlement is paid to PAGA penalties in order to maximize payments to
13 class members.” *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1101 (2019); *Mejia v.*
14 *Walgreen Co.*, 2020 U.S. Dist. LEXIS 220685, *26 (E.D. Cal. Mar. 24, 2021) (“courts frequently
15 approve settlements in wage and hour class action and PAGA actions that minimize the total
16 amount of the settlement that is paid to PAGA penalties in order to maximize payments to class
17 members.”).

18 Based on Costco’s data, there were an estimated 117,171 pay periods from the start of the
19 PAGA period, September 30, 2020, through mediation. Geraci Decl. ¶47.

20 Using initial violation rates, maximum penalties were estimated at \$12,029,500 for two
21 violations: Section 246 (sick) – \$11,717,100; Section 203 (waiting time) – \$312,400 (estimated
22 3,124 former employees, penalties at \$100 per pay period). Geraci Decl. ¶48.

23 Maximum realistic exposure was discounted to 10%, or **\$1,202,950**. Even if the PAGA
24 claim is viable, there were risks Plaintiff would not prove the underlying violations; and, if proven,
25 the Court has authority to reduce penalties, as long as not to “zero.” *Thurman v. Bayshore Transit*
26 *Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012). *Carrington v. Starbucks Corp.*, 30 Cal.
27 App. 5th 504, 517 (2018) (4th DCA). (Plaintiff requested “nearly \$70 million in penalties,” trial
28 court’s \$150,000 award upheld on appeal). Geraci Decl. ¶49.

D. The Settlement is Fair, Adequate, and Reasonable

Plaintiff gave serious consideration to all facts and arguments and concluded the Settlement is fair and reasonable. The Gross Settlement Amount represents over 82% of the maximum reasonable value of the Class claims (\$4,762,690 + \$4,907,717 + \$1,202,950 = \$10,873,357) (\$9,000,000/\$10,873,357 = 82.77%). The proposed settlement is well within the “ballpark” of reasonableness. Geraci Decl. ¶50.

A settlement is not judged solely against what might have been recovered at trial, nor must a settlement provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998). Adequacy must be judged as “a yielding of absolutes. . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation . . .” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair.” *Id.* at 628.

E. The Proposed PAGA Settlement Is Reasonable

The \$300,000 PAGA settlement, will be paid \$225,000 (75%) to the LWDA, and \$75,000 (25%) to Aggrieved Employees. SA, ¶1.33. Where PAGA penalties are negotiated in good faith, with “no indication [the] amount was the result of self-interest at the expense of other Class Members,” such amounts are considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009).

The \$300,000 PAGA allocation is well within the range approved by California courts. *In re Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 589 (2010) (no abuse of discretion approving settlement attributing \$0 to PAGA.); *Alcala v. Meyer Logistics, Inc.*, 2019 LEXIS 166879, *26 (C.D. Cal. June 17, 2019) (PAGA penalties 1.25% of settlement, “falls within the zero to two percent range for PAGA claims approved by courts.”); *In re M.L. Stern Overtime Litig.*, 2009 LEXIS 31650, *1 (S.D. Cal. Apr. 13, 2009) (PAGA settlement of 2%). (The Motion and exhibits were provided to the LWDA on the date filed. Geraci Decl. ¶53 – Exh. 2).

VIII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

When an ascertainable and sufficiently numerous class exists, with a well-defined community of interest, and class litigation is superior to alternate means, certification is appropriate. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012).

Ascertainability is determined by examining class definition, size, and means for identifying class members. *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). The Class is ascertainable from Costco's records, and is so numerous joinder would be impracticable.

"Community of interest" embodies three factors: predominant common questions of law or fact; class representatives with claims typical of the class; and representatives who can adequately represent the class. *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1089 (2007).

Plaintiff alleges each Class Member was subject to the exact same policies which damaged her, including those which underpaid sick pay wages. Where the same alleged conduct forms the basis for Plaintiff and class claims, it is common for settlement purposes. *Id.*, at 1090.

Plaintiff can and will continue to protect the interests of the Class. *Wershba, Id.*, at 238. Plaintiff accepted the risks of serving as a class representative, spent significant time assisting in the prosecution of the action, and placed the interest of the class above her own. See Declaration of Rebecca De Benning, Geraci Decl. ¶51. *Clark v. American Residential Services, LLC*, 175 Cal.App.4th 785, 804-807 (2009).

Plaintiff's attorneys are qualified to conduct the litigation and Plaintiff's interests are not antagonistic to the interest of the Class. *McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976). Geraci Decl. ¶¶3-10, 52; Majarian Decl. ¶¶2-3, 6.

IX. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

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|--|--|
| 1. Class Data provided to Administrator: | Within 30 calendar days of Preliminary Approval |
| 2. Mail Notice Packet to the Class: | Within 21 calendar days of receiving Class Data from Defendant |
| 3. Notice Response Deadline: | On or before the 60th calendar day from mailing of Notice Packet |
| 4. File Motion for Final Approval and Administrator's Declaration: | 16 court days before the Final Approval Hearing |
| 5. Final Approval Hearing: | A date convenient for the Court's calendar |

X. CONCLUSION

Plaintiff requests the Settlement be preliminarily approved, Notice approved and ordered mailed to the Class, Atticus Administration appointed Settlement Administrator, Cohelan Khoury & Singer and Law Office of Sahag Majarian II appointed Class Counsel, Rebecca De Benning appointed Class Representative, and a Final Approval Hearing date be set.

**COHELAN KHOURY & SINGER
LAW OFFICE OF SAHAG MAJARIAN II**

Dated: August 16, 2022

By: _____



Jeff Geraci, Esq.

Attorney for Plaintiff REBECCA DE BENNING, on
behalf of herself and all others similarly situated