

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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DORCAS-COTHY KABASELE,  
an individual,<sup>1</sup>

Plaintiff,

v.

ULTA SALON, COSMETICS &  
FRAGRANCE, INC.; and DOES 1-100,  
inclusive,

Defendant.

No. 2:21-cv-1639 WBS CKD

MEMORANDUM AND ORDER RE:  
PLAINTIFF'S MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION AND PAGA SETTLEMENT

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Plaintiff Dorcas-Cothy Kabasele, individually and on behalf of similarly situated individuals, brought this putative class action against defendant Ulta Salon, Cosmetics, & Fragrance, Inc. ("Ulta"), alleging violations of California wage and hour laws. (See Third Am. Compl. ("TAC") (Docket No. 23).)

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<sup>1</sup> Although the caption on the operative complaint refers to plaintiff only as "an individual," plaintiff asserts claims both individually and on behalf of similarly situated Ulta employees.

Before the court is plaintiff's unopposed renewed motion for preliminary approval of a class action settlement. (See Mot. for Prelim. Approval ("Mot.") (Docket No. 44); Def.'s Notice of Non-Opp'n (Docket No. 45).)

I. Background and Proposed Settlement

Defendant Ulta employed plaintiff and other proposed class members as hourly-paid or non-exempt employees. (See TAC ¶ 10.) Plaintiff brought this action for (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal breaks; (4) failure to provide rest breaks; (5) failure to pay sick pay; (6) failure to furnish accurate itemized wage statements; (7) failure to pay wages due at end of employment; (8) failure to indemnify all necessary business expenditures; (9) violation of California's Unfair Competition Law, California Business & Professions Code § 17200 et seq.; and (10) penalties under California's Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 et seq. (See TAC.)

This is one of four actions against defendant Ulta covering similar class and PAGA claims. The other actions are Gonzalez v. Ulta Salon Cosmetics & Fragrance, Inc., No. 2:22-cv-00363 AB RAO (C.D. Cal.), a federal class and PAGA action; Arellano v. Ulta Salon, Cosmetics and Fragrance, Inc., No. 5:22-cv-00639 JGB KK (C.D. Cal.), a federal class action; and Arellano v. Ulta Salon, Cosmetics and Fragrance, Inc., No. CIVSB2209151 (San Bernardino Super. Ct.), a state PAGA action.

The proposed settlement disposes of all four actions.<sup>2</sup>

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<sup>2</sup> Plaintiff's motion seeks leave to amend the operative complaint to join the named plaintiffs from these other actions.

1 All parties agreed to seek settlement approval only in this  
2 action; once the settlement receives final approval in this  
3 action and all class payments are distributed, counsel in the  
4 Gonzalez and Arellano actions (state and federal) will  
5 voluntarily dismiss their cases. (See Settlement Agreement  
6 (Docket No. 34-2 at 18-53) ¶ 9.8.)

7           The putative class consists of all current and former  
8 hourly-paid or non-exempt employees who worked for defendant Ulta  
9 within California between October 12, 2019 and November 8, 2022.  
10 (Id. ¶ 1.6.) There are approximately 18,711 individuals in the  
11 putative class. (Mot. at 1; Decl. of Robert J. Wasserman  
12 ("Wasserman Decl.") ¶ 15.) The parties propose a gross  
13 settlement amount of \$1,500,000, which covers all four actions  
14 and includes the following: (1) \$5,000 incentive awards for the  
15 three lead plaintiffs and \$500 for each remaining named  
16 plaintiff, for a total of \$27,000 in plaintiff incentive awards;  
17 (2) maximum attorneys' fees of \$500,000, or 33.33% of the gross  
18 settlement amount; (3) settlement administration costs of  
19 approximately \$65,000; and (4) \$50,000 for PAGA penalties, of  
20 which 75% (i.e., \$37,500) will be distributed to the Labor and  
21 Workforce Development Agency ("LWDA") and the remaining 25% will  
22 be distributed to individual aggrieved employees. (See  
23 Settlement Agreement ¶¶ 1.5, 1.13, 1.16, 1.21, 1.31; Mot. at 7-  
24 9.) After deduction of the incentive awards, fees, costs, and  
25 the LWDA's share of penalties, the net settlement amount would be  
26 approximately \$870,500, to be distributed to class members pro  
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28 The court will grant leave to amend the operative complaint.

1 rata based on their number workweeks during the class period.  
2 (See id.)

3 The settlement would release defendant from any and all  
4 class claims that were pled or could have been pled based on the  
5 factual allegations in the operative or prior complaints, and any  
6 and all PAGA claims for civil penalties premised on the released  
7 class claims. (See id. ¶¶ 1.26, 1.27.)

8 A hearing on the first motion for preliminary approval  
9 was set for March 6, 2023. Due to an error in the briefing  
10 identified by counsel during the hearing, the court declined to  
11 hear further oral argument at that time. The court subsequently  
12 issued an order explaining its evaluation of the initial briefing  
13 and ordered the parties to submit supplemental briefing. See  
14 Kabasele v. Ulta Salon, Cosmetics, & Fragrance, Inc., No. 2:21-  
15 cv-01639 WBS CKD, 2023 WL 2842973, at \*2 (E.D. Cal. Mar. 14,  
16 2023). Following supplemental briefing, the court denied the  
17 motion, indicating that the parties needed to provide adequate  
18 factual support for the figures and calculations they relied upon  
19 in arguing that the settlement was fair and adequate. (See  
20 Docket No. 43.)

21 II. Discussion

22 Federal Rule of Civil Procedure 23(e) provides that  
23 “[t]he claims, issues, or defenses of a certified class may be  
24 settled . . . only with the court’s approval.” Fed. R. Civ. P.  
25 23(e). This Order is the first step in that process and analyzes  
26 only whether the proposed class action settlement deserves  
27 preliminary approval. See Murillo v. Pac. Gas & Elec. Co., 266  
28 F.R.D. 468, 473 (E.D. Cal. 2010) (Shubb, J.). Preliminary

1 approval authorizes the parties to give notice to putative class  
2 members of the settlement agreement and lays the groundwork for a  
3 future fairness hearing, at which the court will hear objections  
4 to (1) the treatment of this litigation as a class action and (2)  
5 the terms of the settlement. See id.; Diaz v. Tr. Territory of  
6 Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989). The court  
7 will reach a final determination as to whether the parties should  
8 be allowed to settle the class action on their proposed terms  
9 after that hearing.

10 Where the parties reach a settlement agreement prior to  
11 class certification, the court must first assess whether a class  
12 exists. Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003).  
13 "Such attention is of vital importance, for a court asked to  
14 certify a settlement class will lack the opportunity, present  
15 when a case is litigated, to adjust the class, informed by the  
16 proceedings as they unfold." Id. (quoting Amchem Prods. Inc. v.  
17 Windsor, 521 U.S. 591, 620 (1997)). The parties cannot "agree to  
18 certify a class that clearly leaves any one requirement  
19 unfulfilled," and consequently the court cannot blindly rely on  
20 the fact that the parties have stipulated that a class exists for  
21 purposes of settlement. See Amchem, 521 U.S. at 621-22.

22 "Second, the district court must carefully consider  
23 'whether a proposed settlement is fundamentally fair, adequate,  
24 and reasonable,' recognizing that '[i]t is the settlement taken  
25 as a whole, rather than the individual component parts, that must  
26 be examined for overall fairness . . . .'" Staton, 327 F.3d at  
27 952 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th  
28 Cir. 1998)), overruled on other grounds by Wal-Mart Stores, Inc.

1 v. Dukes, 564 U.S. 338 (2011). District courts “review and  
2 approve” settlement of PAGA claims under a similar standard. See  
3 Cal. Lab. Code § 2669(k)(2); Jordan v. NCI Grp., Inc., No. cv-  
4 161701 JVS SP, 2018 WL 1409590, at \*2 (C.D. Cal. Jan. 5, 2018)  
5 (collecting cases); Ramirez v. Benito Valley Farms, LLC, No. 16-  
6 cv-04708 LHK, 2017 WL 3670794, at \*2 (N.D. Cal. Aug. 25, 2017).

7 A. Class Certification

8 The putative class consists of all current and former  
9 hourly-paid or non-exempt employees who worked for defendant Ulta  
10 within California between October 12, 2019 and November 8, 2022.<sup>3</sup>  
11 (Settlement Agreement ¶ 1.6.)

12 To be certified, the putative class must satisfy the  
13 requirements of Federal Rules of Civil Procedure 23(a) and 23(b).  
14 Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2013).

15 1. Rule 23(a)

16 Rule 23(a) restricts class actions to cases where: “(1)  
17 the class is so numerous that joinder of all members is  
18 impracticable [numerosity]; (2) there are questions of law or  
19 fact common to the class [commonality]; (3) the claims or  
20 defenses of the representative parties are typical of the claims  
21 or defenses of the class [typicality]; and (4) the representative  
22 parties will fairly and adequately protect the interests of the  
23 class [adequacy of representation].” See Fed. R. Civ. P. 23(a).

24 a. Numerosity

25 “A proposed class of at least forty members  
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27 <sup>3</sup> For purposes of the PAGA claim, the relevant time  
28 period is August 24, 2020 through November 8, 2022 (“PAGA  
Period”).

1 presumptively satisfies the numerosity requirement.” Avilez v.  
2 Pinkerton Gov’t Servs., 286 F.R.D. 450, 456 (C.D. Cal. 2012),  
3 vacated on other grounds, 596 F. App’x 579 (9th Cir. 2015). See  
4 also, e.g., Collins v. Cargill Meat Sols. Corp., 274 F.R.D. 294,  
5 300 (E.D. Cal. 2011) (Wanger, J.) (“Courts have routinely found  
6 the numerosity requirement satisfied when the class comprises 40  
7 or more members.”). Here, plaintiff estimates that the proposed  
8 class contains 18,711 members. (See Mot. at 1; Wasserman Decl. ¶  
9 15.) This more than satisfies the numerosity requirement.

10 b. Commonality

11 Commonality requires that the class members’ claims  
12 “depend upon a common contention” that is “capable of classwide  
13 resolution -- which means that determination of its truth or  
14 falsity will resolve an issue that is central to the validity of  
15 each one of the claims in one stroke.” Wal-Mart Stores, 564 U.S.  
16 at 350. “[A]ll questions of fact and law need not be common to  
17 satisfy the rule,” and the “existence of shared legal issues with  
18 divergent factual predicates is sufficient, as is a common core  
19 of salient facts coupled with disparate legal remedies within the  
20 class.” Hanlon, 150 F.3d at 1019. “So long as there is even a  
21 single common question, a would-be class can satisfy the  
22 commonality requirement of Rule 23(a)(2).” Wang v. Chinese Daily  
23 News, Inc., 737 F.3d 538, 544 (9th Cir. 2013) (internal citation  
24 and quotation marks omitted).

25 Here, the claims implicate common questions of law and  
26 fact because they are premised on policies and practices that  
27 allegedly applied to all class members equally. All class  
28 members were hourly-paid or non-exempt employees who worked for

1 defendant Ulta within California between October 12, 2019 and  
2 November 8, 2022. (See Settlement Agreement ¶ 1.6.) As a  
3 result, the class members share several common factual questions  
4 surrounding the existence of alleged wage and hour policies  
5 (including, inter alia, failure to pay minimum wages, failure to  
6 provide overtime compensation, and deprivation of meal and rest  
7 periods), and several common legal questions concerning whether  
8 said policies violated California law. (See TAC ¶¶ 55-111.)

9           Generally, "challeng[ing] a policy common to the class  
10 as a whole creates a common question whose answer is apt to drive  
11 the resolution of the litigation." Ontiveros v. Zamora, No.  
12 2:08-cv-567 WBS DAD, 2014 WL 3057506, at \*5 (E.D. Cal. July 7,  
13 2014). Even if individual members of the class will be entitled  
14 to different amounts of damages because, for instance, they were  
15 denied fewer meal and rest breaks than other employees or had  
16 their time rounded down less often than other employees, "the  
17 presence of individual damages cannot, by itself, defeat class  
18 certification." Leyva, 716 F.3d at 514 (quoting Wal-Mart Stores,  
19 564 U.S. at 362). Accordingly, these common questions of law and  
20 fact satisfy the commonality requirement.

21           c. Typicality

22           Typicality requires that named plaintiffs have claims  
23 "reasonably coextensive with those of absent class members," but  
24 their claims do not have to be "substantially identical."  
25 Hanlon, 150 F.3d at 1020. The test for typicality "is whether  
26 other members have the same or similar injury, whether the action  
27 is based on conduct which is not unique to the named plaintiffs,  
28 and whether other class members have been injured by the same

1 course of conduct.” Hanon v. Dataproducts Corp., 976 F.2d 497,  
2 508 (9th Cir. 1992) (citation omitted).

3 The named plaintiff and the other class members were  
4 all hourly-paid or non-exempt employees of defendant. Plaintiff  
5 and the other class members were all allegedly subject to the  
6 same policies and practices in question, including failure to pay  
7 minimum wages, failure to provide overtime compensation, and  
8 deprivation of meal and rest periods. Although the facts might  
9 differ for individual class members, the basis for their alleged  
10 injuries and the parties purportedly responsible for those  
11 injuries are the same. The proposed class therefore meets the  
12 typicality requirement.

13 d. Adequacy of Representation

14 To resolve the question of adequacy, the court must  
15 consider two factors: (1) whether the named plaintiff and her  
16 counsel have any conflicts of interest with other class members,  
17 and (2) whether the named plaintiff and her counsel will  
18 vigorously prosecute the action on behalf of the class. In re  
19 Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 566 (9th Cir.  
20 2019).

21 i. Conflicts of Interest

22 There do not appear to be any conflicts of interest for  
23 purposes of preliminary approval. The named plaintiff's  
24 interests are generally aligned with those of the putative class  
25 members, who suffered injuries similar to those suffered by the  
26 named plaintiff. See Amchem, 521 U.S. at 625-26 (“[A] class  
27 representative must be part of the class and possess the same  
28 interest and suffer the same injury as the class members.”).

1           The settlement provides for \$5,000 incentive awards for  
2     the three lead plaintiffs and \$500 for each remaining named  
3     plaintiff. (Settlement Agreement ¶ 1.13.) While the provision  
4     of an incentive award raises the possibility that the named  
5     plaintiff's interest in receiving that award will cause their  
6     interests to diverge from the class's interest in a fair  
7     settlement, the Ninth Circuit has specifically approved the award  
8     of "reasonable incentive payments." Staton, 327 F.3d at 977-78.  
9     The court, however, must "scrutinize carefully the awards so that  
10    they do not undermine the adequacy of the class representatives."  
11    Radcliffe v. Experian Info. Sys., Inc., 715 F.3d 1157, 1163 (9th  
12    Cir. 2013).

13           Courts have found that "a \$5,000 incentive award is  
14    'presumptively reasonable' in the Ninth Circuit." See Roe v.  
15    Frito-Lay, Inc., No. 14-cv-00751, 2017 WL 1315626, at \*8 (N.D.  
16    Cal. Apr. 7, 2017); see also Hopson v. Hanesbrands Inc., 08-cv-  
17    0844 EDL, 2009 WL 928133, at \*10 (N.D. Cal. Apr. 3, 2009) (citing  
18    In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 463 (9th Cir.  
19    2000)); Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal.  
20    2008) (Shubb, J.). Here, the incentive awards are either \$500 or  
21    \$5,000, placing them within the range typically deemed reasonable  
22    within the Ninth Circuit.

23           The settlement results in an average of \$46.52 to be  
24    distributed to each class member. The court recognizes that this  
25    is significantly less than the proposed \$5,000 and \$500 incentive  
26    awards. However, incentive awards "are intended to compensate  
27    class representatives for work done on behalf of the class, to  
28    make up for financial or reputational risk undertaken in bringing

1 the action, and, sometimes, to recognize their willingness to act  
2 as a private attorney general.” Rodriguez v. West Publ’g Corp.,  
3 563 F.3d 948, 958-59 (9th Cir. 2009). Indeed, the Ninth Circuit  
4 has consistently recognized incentive awards are “fairly typical”  
5 way to “compensate class representatives for work done on behalf  
6 of the class” or “to make up for financial or reputational risk  
7 undertaken in bringing the action.” Id. Plaintiff’s counsel  
8 represents that the named plaintiff has expended significant time  
9 participating in this case and has exposed herself to  
10 reputational and professional risks by tying her name to a class  
11 action lawsuit against her former employer. (Wasserman Decl. ¶¶  
12 56-58.) The incentive payments thus appear appropriate at this  
13 stage. However, counsel should present further evidence of the  
14 efforts of all class representatives receiving incentive awards  
15 at final approval.

16 ii. Vigorous Prosecution

17 The second portion of the adequacy inquiry examines the  
18 vigor with which the named plaintiff and her counsel have pursued  
19 the class’s claims. “Although there are no fixed standards by  
20 which ‘vigor’ can be assayed, considerations include competency  
21 of counsel and, in the context of a settlement-only class, an  
22 assessment of the rationale for not pursuing further litigation.”  
23 Hanlon, 150 F.3d at 1021.

24 Here, class counsel appear to be experienced employment  
25 and class action litigators fully qualified to pursue the  
26 interests of the class. (See Wasserman Decl. ¶¶ 62-64; Decl. of  
27 Shawn Sassooness (“Sassooness Decl.”) (Docket No. 44-2) ¶ 3.)  
28 This experience, coupled with the work performed thus far (see

1 Wasserman Decl. ¶¶ 3-10; Sassooness Decl. ¶¶ 4-8), suggest that  
2 class counsel are well-equipped to handle this case. Further,  
3 plaintiff's counsel seem to have conducted thorough factual  
4 investigation and legal research, and fully considered the  
5 strengths and weaknesses of this case in deciding to accept the  
6 terms of the proposed settlement agreement. (See Wasserman Decl.  
7 ¶¶ 7-10; Sassooness Decl. ¶¶ 7-8.) The court finds no reason to  
8 doubt that plaintiff's counsel is well qualified to conduct the  
9 proposed litigation and assess the value of the settlement.  
10 Accordingly, the court concludes that Rule 23(a)'s adequacy  
11 requirement is satisfied for the purpose of preliminary approval.

12 2. Rule 23(b)

13 After fulfilling the threshold requirements of Rule  
14 23(a), the proposed class must satisfy the requirements of one of  
15 the three subdivisions of Rule 23(b). Leyva, 716 F.3d at 512.  
16 Plaintiff seeks certification under Rule 23(b)(3), which provides  
17 that a class action may be maintained only if (1) "the court  
18 finds that questions of law or fact common to class members  
19 predominate over questions affecting only individual members" and  
20 (2) "that a class action is superior to other available methods  
21 for fairly and efficiently adjudicating the controversy." Fed.  
22 R. Civ. P. 23(b)(3).

23 a. Predominance

24 "The predominance analysis under Rule 23(b)(3) focuses  
25 on 'the relationship between the common and individual issues' in  
26 the case and 'tests whether proposed classes are sufficiently  
27 cohesive to warrant adjudication by representation.'" Wang, 737  
28 F.3d at 545 (quoting Hanlon, 150 F.3d at 1022).

1           As discussed above, the claims brought by the proposed  
2 settlement class all arise from defendant's same conduct with  
3 respect to wage and hour policies for hourly-paid and non-exempt  
4 employees. The class claims thus demonstrate a "common nucleus  
5 of facts and potential legal remedies" that can properly be  
6 resolved in a single adjudication. See Hanlon, 150 F.3d at 1022.  
7 Although there are differences in the facts pertaining to  
8 individual class members and the amount of injury sustained,  
9 there is no indication that those variations are "sufficiently  
10 substantive to predominate over the shared claims." See Murillo,  
11 266 F.R.D. at 476 (quoting Hanlon, 150 F.3d at 1022).  
12 Accordingly, the court finds common questions of law and fact  
13 predominate over questions affecting only individual class  
14 members.

15                     b. Superiority

16           Rule 23(b)(3) sets forth four non-exhaustive factors  
17 that courts should consider when examining whether "a class  
18 action is superior to other available methods for fairly and  
19 efficiently adjudicating the controversy." Fed. R. Civ. P.  
20 23(b)(3). They are: "(A) the class members' interests in  
21 individually controlling the prosecution or defense of separate  
22 actions; (B) the extent and nature of any litigation concerning  
23 the controversy already begun by or against class members; (C)  
24 the desirability or undesirability of concentrating the  
25 litigation of the claims in the particular forum; and (D) the  
26 likely difficulties in managing a class action." Id. The  
27 parties settled this action prior to certification, making  
28 factors (C) and (D) inapplicable. See Murillo, 266 F.R.D. at 477

1 (citing Amchem, 521 U.S. at 620).

2 Rule 23(b)(3) is concerned with the “vindication of the  
3 rights of groups of people who individually would be without  
4 effective strength to bring their opponents into court at all.”  
5 Amchem, 521 U.S. at 617. When, as here, class members’  
6 individual recovery is relatively modest, the class members’  
7 interests generally favor certification. Zinser v. Accufix Res.  
8 Inst., Inc., 253 F.3d 1180, 1190 (9th Cir. 2001). Further, while  
9 similar actions have been filed in other courts, this global  
10 settlement disposes of the claims in those cases. Accordingly,  
11 the class action device appears to be the superior method for  
12 adjudicating this controversy.

13 3. Rule 23(c)(2) Notice Requirements

14 If the court certifies a class under Rule 23(b)(3), it  
15 “must direct to class members the best notice that is practicable  
16 under the circumstances, including individual notice to all  
17 members who can be identified through reasonable effort.” Fed.  
18 R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) governs both the form and  
19 content of a proposed notice. See Ravens v. Iftikar, 174 F.R.D.  
20 651, 658 (N.D. Cal. 1997) (citing Eisen v. Carlisle & Jacquelin,  
21 417 U.S. 156, 172-77 (1974)). Although that notice must be  
22 “reasonably certain to inform the absent members of the plaintiff  
23 class,” actual notice is not required. Silber v. Mabon, 18 F.3d  
24 1449, 1454 (9th Cir. 1994) (citation omitted).

25 Plaintiff’s counsel has provided the court with a  
26 proposed notice to class members. (See Docket No. 44-3 at 57-  
27 62.) It explains the proceedings, defines the scope of the  
28 class, and explains what the settlement provides and how much

1 each class member can expect to receive in compensation. (See  
2 id. at 1-5.) The notice further explains the opt-out procedure,  
3 the procedure for objecting to the settlement, and the date and  
4 location of the final approval hearing. (See id. at 5-6.) The  
5 content of the notice therefore satisfies Rule 23(c)(2)(B). See  
6 Fed. R. Civ. P. 23(c)(2)(B); Churchill Vill., L.L.C. v. Gen.  
7 Elec., 361 F.3d 566, 575 (9th Cir. 2004) ("Notice is satisfactory  
8 if it 'generally describes the terms of the settlement in  
9 sufficient detail to alert those with adverse viewpoints to  
10 investigate and to come forward and be heard.'") (quoting Mendoza  
11 v. Tucson Sch. Dist. No. 1, 623 F.2d 1338, 1352 (9th Cir. 1980)).

12 The parties have selected Simpluris, Inc. to serve as  
13 the Settlement Administrator. (See Mot. at 1.) Pursuant to the  
14 notice plan, the Settlement Administrator will provide direct  
15 mail notice to each class member at his or her last known address  
16 based upon defendant's records, performing additional skip traces  
17 to locate other mailing addresses as necessary. (See id. at 23.)

18 The court cautions counsel that a single mailed notice  
19 is unlikely to provide sufficient notice. See Roes, 1-2 v. SFBSC  
20 Mgmt., LLC, 944 F.3d 1035, 1045-46 (9th Cir. 2019). As discussed  
21 at the hearing on this motion, the court strongly advises that  
22 the Settlement Administrator undertake additional measures  
23 "reasonably calculated, under all the circumstances," to apprise  
24 all class members of the proposed settlement. See id. at 1047  
25 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306,  
26 315 (1950)).

27 Counsel represented at the hearing on this motion that  
28 they would investigate additional notice procedures, which will

1 be implemented prior to the motion for final approval, if  
2 available and appropriate. Given these representations, the  
3 court will not deny preliminary approval, notwithstanding its  
4 concerns about the parties' notice plan as set forth in the  
5 motion for preliminary approval.

6 B. Preliminary Settlement Approval

7 After determining that the proposed class satisfies the  
8 requirements of Rule 23(a) and (b), the court must determine  
9 whether the terms of the parties' settlement appear fair,  
10 adequate, and reasonable. See Fed. R. Civ. P. 23(e)(2); Hanlon,  
11 150 F.3d at 1026. This process requires the court to "balance a  
12 number of factors," including "the strength of the plaintiff's  
13 case; the risk, expense, complexity, and likely duration of  
14 further litigation; the risk of maintaining class action status  
15 throughout the trial; the amount offered in settlement; the  
16 extent of discovery completed and the stage of the proceedings;  
17 the experience and views of counsel; the presence of a  
18 governmental participant; and the reaction of the class members  
19 to the proposed settlement." Hanlon, 150 F.3d at 1026.

20 Because some of these factors cannot be considered  
21 until the final fairness hearing, at the preliminary approval  
22 stage "the court need only determine whether the proposed  
23 settlement is within the range of possible approval," Murillo,  
24 266 F.R.D. at 479 (quoting Gautreaux v. Pierce, 690 F.2d 616, 621  
25 n.3 (7th Cir. 1982)), and resolve any "glaring deficiencies" in  
26 the settlement agreement before authorizing notice to class  
27 members, Ontiveros, 2014 WL 3057506, at \*12 (citing Murillo, 266  
28 F.R.D. at 478). This generally requires consideration of

1 “whether the proposed settlement discloses grounds to doubt its  
2 fairness or other obvious deficiencies, such as unduly  
3 preferential treatment of class representatives or segments of  
4 the class, or excessive compensation of attorneys.” Murillo, 266  
5 F.R.D. at 479 (quoting West v. Circle K Stores, Inc., 04-cv-438  
6 WBS GGH, 2006 WL 1652598, at \*11-12 (E.D. Cal. June 13, 2006)).

7 Courts often begin by examining the process that led to  
8 the settlement’s terms to ensure that those terms are “the result  
9 of vigorous, arms-length bargaining” and then turn to the  
10 substantive terms of the agreement. See, e.g., Murillo, 266  
11 F.R.D. at 479-80; West, 2006 WL 1652598, at \*11-12; In re  
12 Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1080 (N.D. Cal.  
13 2007) (“[P]reliminary approval of a settlement has both a  
14 procedural and a substantive component.”).

15 1. Negotiation of the Settlement Agreement

16 Following months of investigations and informal  
17 discovery, the parties engaged in a full-day mediation on  
18 September 8, 2022 with an experienced wage and hour mediator.  
19 (See Wasserman Decl. ¶¶ 7-8.) The parties were unable to reach a  
20 settlement agreement at that time. (Id. ¶ 9.) The mediator  
21 facilitated continued negotiations over the next two weeks, and  
22 the parties accepted a mediator’s proposal on September 22, 2022.  
23 (Id.) Plaintiff’s counsel represents that the parties engaged in  
24 thorough informal discovery and discussion prior to settlement  
25 negotiations, which were adversarial and conducted at arms-  
26 length. (See id. ¶¶ 7, 11.)

27 Given the parties’ representation that the settlement  
28 reached was the product of arms-length bargaining following

1 thorough informal discovery, the court at this stage does not  
2 question that the proposed settlement is the result of informed  
3 and non-collusive negotiations between the parties. See La Fleur  
4 v. Med. Mgmt. Int'l, Inc., No. 5:13-cv-00398, 2014 WL 2967475, at  
5 \*4 (N.D. Cal. June 25, 2014) ("Settlements reached with the help  
6 of a mediator are likely non-collusive.").

7 2. Amount Recovered and Distribution

8 In determining whether a settlement agreement is  
9 substantively fair to the class, the court must balance the value  
10 of expected recovery against the value of the settlement offer.  
11 See Tableware, 484 F. Supp. 2d at 1080. This inquiry may involve  
12 consideration of the uncertainty class members would face if the  
13 case were litigated to trial. See Ontiveros, 2014 WL 3057506, at  
14 \*14.

15 "In determining whether the amount offered in  
16 settlement is fair, the Ninth Circuit has suggested that the  
17 Court compare the settlement amount to the parties' 'estimates of  
18 the maximum amount of damages recoverable in a successful  
19 litigation.'" Litty v. Merrill Lynch & Co., No. 14-cv-0425 PA  
20 PJW, 2015 WL 4698475, at \*9 (C.D. Cal. Apr. 27, 2015) (quoting In  
21 re: Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir.  
22 2000), as amended (June 19, 2000)); see also Almanzar v. Home  
23 Depot U.S.A., Inc., No. 2:20-cv-0699 KJN, 2022 WL 2817435, at \*11  
24 (E.D. Cal. July 19, 2022) (citing Rodriguez v. W. Publ'g Corp.,  
25 563 F.3d 948, 964 (9th Cir. 2009)) ("In determining whether the  
26 amount offered is fair and reasonable, courts compare the  
27 proposed settlement to the best possible outcome for the class.")

28 The parties propose a gross settlement amount of

1 \$1,500,000, which includes the following: (1) \$5,000 incentive  
2 awards for the three lead plaintiffs and \$500 for each remaining  
3 named plaintiff, for a total of \$27,000 in plaintiff incentive  
4 awards; (2) maximum attorneys' fees of \$500,000, or 33.33% of the  
5 gross settlement amount; (3) settlement administration costs of  
6 approximately \$65,000; and (4) \$50,000 for PAGA penalties, of  
7 which 75% (i.e., \$37,500) will be distributed to the LWDA and the  
8 remaining 25% will be distributed to individual aggrieved  
9 employees. (See Settlement Agreement ¶¶ 1.5, 1.13, 1.16, 1.21,  
10 1.31; Mot. at 7-9.) After deduction of the incentive awards,  
11 fees, costs, and the LWDA's share of penalties, the net  
12 settlement amount would be approximately \$870,500, to be  
13 distributed to class members pro rata based on their number  
14 workweeks during the class period. (See id.)

15 Based on these figures, the average payment per class  
16 member is \$46.52. Plaintiff estimates that the class claims are  
17 worth up to \$5,327,023.36. (See Wasserman Decl. ¶ 43.)  
18 Plaintiff has provided ample facts and calculations in support of  
19 this figure. (See id. ¶¶ 15-43.) The portion of the gross  
20 settlement amount allocated to class claims -- \$1,450,000 --  
21 constitutes approximately 27.22% of the \$5,327,023.36 maximum  
22 valuation. This amount is comfortably within the range of  
23 percentage recoveries that California courts have found to be  
24 reasonable. See Cavazos v. Salas Concrete, Inc., No. 1:19-cv-  
25 00062 DAD EPG, 2022 WL 2918361, at \*6 (E.D. Cal. July 25, 2022)  
26 (collecting cases).

27 Plaintiff faced numerous risks in the litigation,  
28 including proving all elements of the claims, obtaining and

1 maintaining class certification, establishing liability, and the  
2 costliness of litigation on these issues. Investigation  
3 uncovered specific factual weaknesses in plaintiff's case,  
4 including defendant's use of facially valid timekeeping policies  
5 and sophisticated timekeeping software; very low rates of unpaid  
6 wages and sick pay based on analyzed payroll records; high rates  
7 of meal and rest break premiums actually paid by defendant;  
8 facially valid policies for reimbursement of business expenses;  
9 significant reimbursements given to class members for cell phone  
10 usage; and large amounts of waiting time penalties paid to class  
11 members. (See Wasserman Decl. ¶¶ 17-41.) Plaintiff's counsel  
12 represents that, given the strength of plaintiff's claims and  
13 defendant's potential exposure, the settlement and resulting  
14 distribution provides a strong result for the class. (See id. ¶  
15 51.)

16           There does not appear to be any "glaring deficiency" in  
17 the amount of the common settlement fund reserved for PAGA  
18 penalties, see Syed, 2019 WL 1130469, at \*7, at least compared to  
19 settlements in other wage and hour and PAGA actions, where the  
20 parties tend to maximize the total amount of the settlement that  
21 is paid to aggrieved employees. See, e.g., Nen Thio v. Genji,  
22 LLC, 14 F. Supp. 3d 1324, 1330 (N.D. Cal. 2014) (granting  
23 preliminary approval of \$10,000 in PAGA penalties out of a total  
24 settlement amount of \$1,250,000); Garcia v. Gordon Trucking,  
25 Inc., No. 1:10-cv-0324 AWI SKO, 2012 WL 5364575 (E.D. Cal. Oct.  
26 31, 2012) (granting final approval of \$10,000 in PAGA penalties  
27 out of a total settlement amount of \$3,700,000).

28           In light of the risks associated with further litigation

1 and the relative strength of defendant's arguments and defenses, the  
2 court finds that the value of the settlement is within the range of  
3 possible approval such that preliminary approval of the settlement  
4 is appropriate. The court further finds the method of processing  
5 class member claims to be adequate, as each class member's  
6 individual share of the settlement is proportional to the number of  
7 weeks worked for defendant during the time period covered by the  
8 Settlement Agreement.

9 Counsel are cautioned that because this settlement was  
10 reached prior to class certification, it will be subject to  
11 heightened scrutiny for purposes of final approval. See In re  
12 Apple Inc. Device Performance Litig., 50 F.4th 769, 783 (9th Cir.  
13 2022). The recommendations of plaintiff's counsel will not be  
14 given a presumption of reasonableness, but rather will be subject  
15 to close review. See id. The court will particularly scrutinize  
16 "any subtle signs that class counsel have allowed pursuit of  
17 their own self-interests to infect the negotiations." See id. at  
18 782 (quoting Roes, 944 F.3d at 1043).

### 19 3. Attorney's Fees

20 If a negotiated class action settlement includes an  
21 award of attorney's fees, that fee award must be evaluated in the  
22 overall context of the settlement. Knisley v. Network Assocs.,  
23 312 F.3d 1123, 1126 (9th Cir. 2002); Monterrubio v. Best Buy  
24 Stores, L.P., 291 F.R.D. 443, 455 (E.D. Cal. 2013) (England, J.).  
25 The court "ha[s] an independent obligation to ensure that the  
26 award, like the settlement itself, is reasonable, even if the  
27 parties have already agreed to an amount." In re Bluetooth  
28 Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011).

1           The settlement agreement provides that plaintiff's  
2     counsel will seek a fee award not to exceed 33.33% of the gross  
3     settlement amount, or \$500,000. (Settlement Agreement ¶ 1.5.)  
4     If the court does not approve the fee award in whole or in part,  
5     that will not prevent the settlement agreement from becoming  
6     effective or be grounds for termination. (See id.)

7           In deciding the attorney's fees motion, the court will  
8     have the opportunity to assess whether the requested fee award is  
9     reasonable by multiplying a reasonable hourly rate by the number  
10    of hours counsel reasonably expended. See Van Gerwen v. Gurantee  
11   Mut. Life. Co., 214 F.3d 1041, 1045 (9th Cir. 2000). As part of  
12    this lodestar calculation, the court may consider factors such as  
13    the "degree of success" or "results obtained" by plaintiff's  
14    counsel. See Cunningham v. Cnty. of L.A., 879 F.2d 481, 488 (9th  
15    Cir. 1988). If the court, in ruling on the fees motion, finds  
16    that the amount of the settlement warrants a fee award at a rate  
17    lower than what plaintiff's counsel requests, then it will reduce  
18    the award accordingly. The court will therefore not evaluate the  
19    fee award at length here in considering whether the settlement is  
20    adequate.

21           IT IS THEREFORE ORDERED that plaintiff's motion for  
22    preliminary certification of a conditional settlement class and  
23    preliminary approval of the class action and PAGA settlement  
24    (Docket No. 44) be, and the same hereby is, GRANTED.

25           IT IS FURTHER ORDERED that plaintiff's request for  
26    leave to amend the operative complaint in order to join the named  
27    plaintiffs from the other actions covered by this settlement is  
28    GRANTED. Plaintiff has ten days from the date of this Order to

1 file the amended complaint.

2 IT IS FURTHER ORDERED THAT:

3 (1) the following class be provisionally certified for the  
4 purpose of settlement:

5 (a) All current and former hourly-paid or non-exempt  
6 employees who worked for defendant within the state of California  
7 during the time period from October 12, 2019 through November 8,  
8 2022;

9 (2) the proposed settlement is preliminarily approved as  
10 fair, just, reasonable, and adequate to the members of the  
11 settlement class, subject to further consideration at the final  
12 fairness hearing after distribution of notice to members of the  
13 settlement class;

14 (3) for purposes of carrying out the terms of the settlement  
15 only:

16 (a) Dorcas-Cothy Kabasele is appointed as the  
17 representative of the settlement class and is provisionally found  
18 to be an adequate representative within the meaning of Federal  
19 Rule of Civil Procedure 23;

20 (b) the law firms of Mayall Hurley, P.C., SW Employment  
21 Law Group, APC, and Lavi & Embrahimian, LLP, are provisionally  
22 found to be fair and adequate representatives of the settlement  
23 class and are appointed as class counsel for the purposes of  
24 representing the settlement class conditionally certified in this  
25 Order;

26 (4) Simpluris, Inc. is appointed as the Settlement  
27 Administrator;

28 (5) the form and content of the proposed Notice of Class

1 Action Settlement (Docket No. 44-3 at 57-62)) is approved, except  
2 to the extent that it must be updated to reflect dates and  
3 deadlines specified in this Order;

4 (6) no later than fifteen (15) calendar days from the date  
5 this Order is signed, defendant's counsel shall provide the  
6 Settlement Administrator with the following information about  
7 each class member: full name; last known address; last known  
8 telephone number; dates of employment with defendant as an  
9 hourly-paid or non-exempt employee; the number of workweeks  
10 worked during the Class Period; the number of workweeks worked  
11 during the PAGA Period; Social Security number; and the last  
12 known email address;

13 (7) no later than ten (10) calendar days from the date  
14 defendant submits the contact information to the Settlement  
15 Administrator, it shall mail a Notice of Class Action Settlement  
16 to all members of the settlement class via first class mail. If  
17 a Notice is returned to the Settlement Administrator with a  
18 forwarding address, the Settlement Administrator will re-send the  
19 Notice to the forwarding address. If no forwarding address is  
20 provided, the Settlement Administrator will attempt to locate a  
21 more current address within three (3) business days of receipt of  
22 the returned mail;

23 (8) no later than sixty (60) days from the date Settlement  
24 Administrator mails the Notice of Class Action Settlement, though  
25 in the case of a re-mailed notice the deadline will be extended  
26 by fifteen (15) days, any member of the settlement class who  
27 intends to dispute the number of workweeks credited to him or  
28 object to, comment upon, or opt out of the settlement shall mail

1 written notice of that intent to the Settlement Administrator  
2 pursuant to the instructions in the Notice of Class Action  
3 Settlement;

4 (9) A final fairness hearing shall be set to occur before  
5 this Court on **February 5, 2024 at 1:30 p.m.** in Courtroom 5 of the  
6 Robert T. Matsui United States Courthouse, 501 I Street,  
7 Sacramento, California, to determine whether the proposed  
8 settlement is fair, reasonable, and adequate and should be  
9 approved by this court; whether the settlement class's claims  
10 should be dismissed with prejudice and judgment entered upon  
11 final approval of the settlement; whether final class  
12 certification is appropriate; and to consider class counsel's  
13 applications for attorney's fees, costs, and an incentive award  
14 for the class representative. The court may continue the final  
15 fairness hearing without further notice to the members of the  
16 class;

17 (10) no later than twenty-eight (28) days before the final  
18 fairness hearing, class counsel shall file with this court a  
19 petition for an award of attorney's fees and costs. Any  
20 objections or responses to the petition shall be filed no later  
21 than fourteen (14) days before the final fairness hearing. Class  
22 counsel may file a reply to any objections no later than seven  
23 (7) days before the final fairness hearing;

24 (11) no later than twenty-eight (28) days before the final  
25 fairness hearing, class counsel shall file and serve upon the  
26 court and defendant's counsel all papers in support of the  
27 settlement, the incentive award for the class representative, and  
28 any award for attorney's fees and costs;

1           (12) no later than twenty-eight (28) days before the final  
2 fairness hearing, the Settlement Administrator shall prepare, and  
3 class counsel shall file and serve upon the court and defendant's  
4 counsel, a declaration setting forth the services rendered, proof  
5 of mailing, a list of all class members who have opted out of the  
6 settlement, a list of all class members who have commented upon  
7 or objected to the settlement;

8           (13) any person who has standing to object to the terms of  
9 the proposed settlement may appear at the final fairness hearing  
10 (themselves or through counsel) and be heard to the extent  
11 allowed by the court in support of, or in opposition to, (a) the  
12 fairness, reasonableness, and adequacy of the proposed  
13 settlement, (b) the requested award of attorney's fees,  
14 reimbursement of costs, and incentive award to the class  
15 representative, and/or (c) the propriety of class certification.  
16 To be heard in opposition at the final fairness hearing, a person  
17 must, no later than sixty (60) days from the date the Settlement  
18 Administrator mails the Notice of Class Action Settlement, (a)  
19 serve by hand or through the mails written notice of his or her  
20 intention to appear, stating the name and case number of this  
21 action and each objection and the basis therefore, together with  
22 copies of any papers and briefs, upon class counsel and counsel  
23 for defendant, and (b) file said appearance, objections, papers,  
24 and briefs with the court, together with proof of service of all  
25 such documents upon counsel for the parties.

26           Responses to any such objections shall be served by  
27 hand or through the mails on the objectors, or on the objector's  
28 counsel if there is any, and filed with the court no later than

1 fourteen (14) calendar days before the final fairness hearing.  
2 Objectors may file optional replies no later than seven (7)  
3 calendar days before the final fairness hearing in the same  
4 manner described above. Any settlement class member who does not  
5 make his or her objection in the manner provided herein shall be  
6 deemed to have waived such objection and shall forever be  
7 foreclosed from objecting to the fairness or adequacy of the  
8 proposed settlement, the judgment entered, and the award of  
9 attorney's fees, costs, and an incentive award to the class  
10 representative unless otherwise ordered by the court;

11 (14) pending final determination of whether the settlement  
12 should be ultimately approved, the court preliminarily enjoins  
13 all class members (unless and until the class member has  
14 submitted a timely and valid request for exclusion) from filing  
15 or prosecuting any claims, suits, or administrative proceedings  
16 regarding claims to be released by the settlement.

17 Dated: July 25, 2023

  
18 WILLIAM B. SHUBB  
19 UNITED STATES DISTRICT JUDGE  
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