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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA**

CHAD HARRIS, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

**SOUTHERN NEW HAMPSHIRE
UNIVERSITY**, a New-Hampshire Non-Profit
Corporation,

Defendant.

Case No. RG21109745

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

ASSIGNED FOR ALL PURPOSES TO
JUDGE EVELIO GRILLO
DEPARTMENT 21

Date: November 15, 2022
Time: 10:00 a.m.
Reservation No.: 818792676239

Action Filed: August 18, 2021
Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiff Chad Harris (“Plaintiff”) seeks preliminary approval of a non-reversionary \$1,475,000
3 settlement of his class wage and hour claims against Southern New Hampshire University (“SNHU” or
4 “Defendant”). This case was brought on behalf of approximately 475 part-time adjunct instructors
5 teaching online for SNHU. The Class is defined as “all persons who are or have been employed by
6 Defendant in California as adjunct instructors from February 21, 2017 to July 30, 2022” (the “Class,”
7 “Class Members,” or “CMs”). This Settlement was reached after a full-day mediation followed by a
8 mediator’s proposal. In advance of the mediation, SNHU produced extensive informal discovery and
9 class data. If approved, the Settlement will provide CMs with an average gross recovery of \$3,105 and
10 net recovery of \$1,933 – an outstanding result.

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

17 **II. OVERVIEW OF THE SETTLEMENT**

18 The Settlement resolves all claims that were alleged or could have been alleged based on the facts
19 in the Complaint, including the primary rights asserted in the case. The key Settlement terms are:

20 1. Maximum Settlement Fund – A non-reversionary \$1,475,000, all of which will be paid out by
21 Defendant. SA §§ I(17); III(6). SNHU will also pay its share of payroll taxes on the portion of the
22 Settlement allocated as wages. *Id.* § III(6).

23 2. Class Definition – The Class is “all persons who are or have been employed by [SNHU] in
24 California as part-time adjunct instructors during the Settlement Period.” *Id.* § I(3). The Settlement
25 Period is February 21, 2017 to July 30, 2022 (“Settlement Period” or “Class Period”). *Id.* § I(35).

26 3. Plaintiff’s Option to Terminate – The Class consists of approximately 475 people. If the number
27 of CMs exceeds 475 by 24 or more, Plaintiff has the option to terminate the Settlement. *Id.* § III(19).

28 4. Defendant’s Option to Terminate – If 15 or more CMs submit timely and valid Requests for

1 Exclusion from the Class, Defendant has the option to terminate the Settlement. *Id.* § III(18).

2 5. Attorneys' Fees, Costs, and Named Plaintiff's Service Award – Class Counsel will seek fees of
3 up to one-third of the Maximum Settlement Fund (\$491,666.67), reimbursement of costs up to \$20,000,
4 and a Class Representative Enhancement of \$7,500 to the named Plaintiff. *Id.* § III(16)(c)-(d).

5 6. PAGA Penalties – \$30,000 is allocated to PAGA. *Id.* § III(16)(a). The LWDA will be paid 75%
6 (\$22,500). *Id.* The remaining \$7,500 will be distributed to CMs during the PAGA Period. *Id.*

7 7. Settlement Administration Costs are estimated not to exceed \$15,000. *Id.* § III(16)(e). The
8 Parties selected Phoenix Settlement Administrators (“Phoenix”) as Administrator. *Id.* § I(33). Phoenix
9 is well-qualified and submitted the lowest bid. Decl. of J. Lawrence on Behalf of Phoenix (“Phoenix
10 Decl.”) Ex. A (C.V.) & Ex. B (bid); Decl. of William Jhaveri-Weeks ISO Mot. for Prelim. Appr.
11 (“Jhaveri-Weeks Decl.”) ¶ 29.

12 8. The Net Settlement Amount (“NSA”) will total approximately \$918,333.33. Jhaveri-Weeks Decl.
13 ¶ 27. This is the Maximum Settlement Fund minus attorneys' fees, costs, class representative
14 enhancement, the LWDA's share of PAGA Penalties, and Settlement Administration costs. The NSA
15 will be paid out in two categories: (1) a “Waiting Time Penalty Payment” for CMs terminated during
16 the Class Period and (2) a “Per-Assignment Settlement Payment” for all CMs. The Per-Assignment
17 Settlement Payment will be paid pro rata based on the total number of “Compensable Assignments” that
18 the CM worked during the Class Period, which will be weighted depending on the duration of the
19 Assignment. *Id.* ¶ 28 (discussing rationale for allocation methodology); SA § III(16)(b).

20 9. Class Notice – Within 15 days of preliminary approval, SNHU will provide Phoenix with the
21 Class Data List. SA § III(15)(a). Within 15 days of receiving the Class Data List from SNHU, after
22 updating the addresses using the NCOA database, Phoenix will mail each CM a Notice substantially in
23 the form attached to the Settlement Agreement as **Exhibit A**. *Id.* §§ III(15)(b)-(c). For all returned
24 Notices, Phoenix will use skip-tracing to update addresses and initiate a second mailing. *Id.* § III(15)(d).

25 10. Automatic Participation – The Settlement is non-reversionary: each CM will receive his or her
26 share of the NSA, unless he or she opts out. *Id.* § III(15)(g). CMs in the PAGA Period will receive a
27 PAGA allocation even if they opt out of the class settlement. *Id.*

28 11. Opting Out or Objecting – CMs who wish to opt out must send a written Request for Exclusion

1 to Phoenix within 60 days of the date the Notices are mailed. *Id.* §§ I(32); III(15)(g)-(h). Any CM who
2 properly requests to opt out will not receive a payment under the Settlement and will not be bound by it.
3 *Id.* § III(15)(g). A CM who remains part of the Settlement may object to the terms of the Settlement by
4 mailing an objection to Phoenix within 60 days of the date the Notice is mailed out. *Id.* § III(15)(h).

5 12. Tax Consequences of Settlement Payments – For tax purposes, Waiting Time Penalty Payments
6 will be entirely allocated to penalties and interest and Per-Assignment Settlement Payments will be
7 allocated 10% to wages and 90% to penalties and interest. *Id.* § III(16)(b)(v); *see also* Declaration of R.
8 Brian Dixon, submitted herewith, explaining rationale for tax allocation.

9 13. Uncashed Checks – Checks not cashed 180 days from issuance by Phoenix will be voided and
10 funds will be tendered to Bay Area Legal Aid as the *cy pres* recipient under Cal. Code of Civ. Proc. § 384.
11 SA § III(16)(b)(vii); Jhaveri-Weeks Decl. ¶ 72 (explaining why *cy pres* recipient meets statutory criteria).

12 14. Scope of Release and Final Judgment – The Class will release claims “that were alleged in the
13 operative complaint in the Action, and/or claims which reasonably relate to or which reasonably arise out
14 of the same set of operative facts pled therein, whether such claims or forms of relief are known or
15 unknown during the Settlement Period.” SA § I(8); III(7). The LWDA will release claims “for civil
16 penalties under the Labor Code pursuant to the Private Attorneys General Act...or otherwise that were
17 alleged in the PAGA letters, operative complaint in the Action, and/or claims which reasonably relate or
18 reasonably arise out of the same set of operative facts pled herein.” *Id.* §§ I(26), III(7). The named
19 Plaintiff will also give a general release. *Id.* § III(8).

20 **III. OVERVIEW OF THE LITIGATION**

21 **A. Pleadings**

22 Plaintiff filed this action on August 18, 2021, alleging that Defendant’s pay practices for part-
23 time adjunct instructors violated the California Labor Code and Wage Order No. 4-2001. Jhaveri-Weeks
24 Decl. ¶ 18. Defendant is a university that employs CMs in California to teach exclusively online. The
25 Complaint alleges that Defendant paid CMs on a “piece-rate” basis: a flat/ascertainable amount per
26 “assignment” as specified on the “Assignment Letter” – *i.e.*, the documents reflecting individual teaching
27 assignments – with compensable assignments consisting of delivering a course or performing other
28 teaching-related tasks. *Id.* Plaintiff alleged that because CMs are piece-rate workers, SNHU was required

1 to pay them hourly for any “non-productive” time worked (*i.e.*, work not directly related to producing
2 the compensable pieces), such as trainings and other non-teaching tasks, and was required to pay them
3 separately and hourly for rest periods under Labor Code § 226.2. *Id.* Because SNHU failed to do so,
4 Plaintiff sought unpaid wages and missed-rest-break premiums. *Id.* In the alternative, Plaintiff alleged
5 that SNHU misclassified CMs as “exempt” employees and did not track their hours or pay them hourly
6 for all hours worked despite the fact that SNHU paid them less than the minimum salary required for
7 exemption (*i.e.*, twice the state minimum wage based on a forty-hour week). *Id.* ¶ 19. Plaintiff alleged
8 that this misclassification resulted in failure to provide paid rest breaks and meal breaks, to pay overtime,
9 and to pay for all hours worked under Labor Code §§ 226.7, 512, 510, 1194, and 1194.2. *Id.*

10 Plaintiff also alleged that SNHU failed to reimburse CMs for necessary business expenses
11 including the cost of internet and phone use in violation of Labor Code § 2802. *Id.* ¶ 20.

12 As a result of the unpaid wage violations, Plaintiff asserted that Defendant owed CMs waiting
13 time penalties under Labor Code § 203 for failure to pay all wages due at discharge. *Id.* ¶ 21.

14 Plaintiff also alleged that CMs’ wage statements did not contain information required under Labor
15 Code §§ 226(a) and 226.2(a), including all hours worked, hourly rates, and information about the piece-
16 rate, giving rise to wage statement penalties under Labor Code §§ 226(e). *Id.* ¶ 22.

17 On the day he filed the Complaint, Plaintiff filed a PAGA Notice with the LWDA. *Id.* ¶ 23. On
18 September 27, 2021, Plaintiff filed an amended PAGA Notice noting that the statute of limitations had
19 been extended by Judicial Council Emergency Rule 9 (re COVID-19). *Id.* On October 25, 2021, Plaintiff
20 filed a First Amended Complaint (“FAC”) adding PAGA claims. *Id.*

21 Defendant filed an answer to the FAC on November 9, 2021, asserting a general denial and forty-
22 seven affirmative defenses, including that CMs were exempt employees. *Id.*

23 **B. Discovery**

24 On October 1, 2021, Plaintiff served written discovery requests on SNHU, including requests for
25 production of documents, special interrogatories, form interrogatories, and requests for admission. *Id.*
26 ¶ 24. Before SNHU’s response deadline, the Parties agreed to stay the case and engage in mediation. *Id.*
27 Plaintiff served narrowed requests in aid of mediation. *Id.* SNHU produced: (a) Plaintiff’s Assignment
28 Letters and wage statements; (b) faculty and employee handbooks; (c) documents describing CM’s job

duties, including the “Faculty Fundamental Requirements”; (d) an academic calendar; (e) descriptions of various trainings; (f) the business and travel expense reimbursement policy; and (g) other H.R. related documents. *Id.* Defendant also produced spreadsheets containing individualized data showing each CM’s course assignments and payroll data during the Class Period. *Id.*

Plaintiff also gathered evidence through an online survey to CMs, and by identifying and collecting publicly available information about Defendant’s policies and practices. *Id.* ¶ 25.

C. Mediation

On June 1, 2022, the Parties attended a mediation with experienced mediator Tripper Ortman. *Id.* ¶ 26. Plaintiff submitted a detailed mediation brief with 22 exhibits. *Id.* At the conclusion of the mediation, no settlement was reached, but the Mediator issued a mediator’s proposal, which both Parties accepted. *Id.* The Parties then negotiated the details of a long-form settlement agreement. *Id.*

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS MERITED

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

A. The Class Is Ascertainable and Sufficiently Numerous

Whether a class is ascertainable is determined by examining the class definition, the size of the class, and the means available for identifying CMs. *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). CMs are “ascertainable” if they may be readily identified without unreasonable expense or time by reference to official records. *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 986 n.15 (2019). Here, the Class is ascertainable from Defendant’s records. SA §§ I(6); III(15)(a); Jhaveri-Weeks Decl. ¶ 30. The Class is sufficiently numerous because it has at least 475 members. *Id.*; *See also Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (much smaller class was numerous).

B. A “Community of Interest” Exists Among CMs

The “community of interest” requirement has three factors: (1) common questions of law or fact

1 that predominate; (2) a class representative with typical claims; and (3) a class representative who can
2 adequately represent the class. *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007).

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

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

10 Common questions of law and fact predominate here. Whether SNHU’s practice of paying a
11 fixed payment for each course constitutes a “piece-rate” is a legal question that drives the resolution of
12 the CMs’ claims for unpaid wages, rest-break premiums, and derivative claims. Jhaveri-Weeks Decl.
13 ¶ 31. If the piece-rate issue were resolved against the Class, the Court would face the common question
14 of whether CMs earned less than the threshold salary for exemption – a question turning on common
15 legal issues, such as whether the threshold can be pro-rated for part-time work. *Id.* Other common
16 questions include: whether SNHU’s policy of not reimbursing for home internet or cell phones violates
17 Labor Code § 2802; whether trainings and other non-teaching tasks were “nonproductive” tasks separate
18 from the Assignment rate; whether CMs were entitled to a meal break when they worked more than 5
19 hours per day; whether SNHU failed to pay overtime; and whether SNHU’s failure to include hours-
20 worked and hourly rates on wage statements was “knowing and intentional.” *Id.* ¶ 32.

21 **2. Plaintiff’s Claims Are Typical**

22 Typicality asks whether Plaintiff suffered a similar injury as the Class. *Seastrom v. Neways, Inc.*,
23 149 Cal. App. 4th 1496, 1502 (2007). Here, Plaintiff, like the Class, was a part-time adjunct instructor
24 who alleges that he taught remotely and was subject to the same alleged unlawful pay practices, suffered
25 the same injury, and seeks the same relief as the Class. Jhaveri-Weeks Decl. ¶ 33.

26 **3. Plaintiff and His Attorneys Will Adequately Represent the Class**

27 Adequacy depends on whether the plaintiff’s attorney is qualified and the plaintiff’s interests are
28 not antagonistic to those of the class. *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669 n.21

(1993) (citations omitted). Plaintiff's Counsel have extensive class action litigation experience. Jhaveri-Weeks Decl. ¶¶ 6-17; Decl. of Julian Hammond ISO Pls.' Mot. for Prelim. Appr. ("Hammond Decl.") ¶¶ 5-12. Plaintiff's Counsel together have more experience representing adjunct instructors in California than any other firm and have been appointed class counsel in at least 23 such cases and PAGA counsel in two such cases over the past six years. Hammond Decl. ¶¶ 9-10; Jhaveri-Weeks Decl. ¶¶ 16-17. Plaintiff has undertaken to represent the interests of the Class, his interests are virtually coextensive with those of the Class, and Counsel are not aware of any conflicts between Plaintiff and the Class. Jhaveri-Weeks Decl. ¶ 34; Hammond Decl. ¶ 4.

C. A Class Action Is a Superior Method of Adjudication

Plaintiff's claims depend on common evidence, including SNHU's uniform pay practices, assignment letters, handbooks, and wage statements. Jhaveri-Weeks Decl. ¶ 35. It would be inefficient to resolve CMs' claims at separate trials. *Id.*; *Bufile v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008). The claims of each CM are relatively small, and would be impractical to litigate on an individual basis. Jhaveri-Weeks Decl. ¶ 35; *Bufile*, 162 Cal. App. 4th at 1208.

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

A. The Two-Step Settlement Approval Process

Approval of a class settlement is a two-step process: *first*, a preliminary review of the reasonableness of the settlement, and *second*, after notice has been distributed to the Class, a final analysis that takes into account the Class's response. Cal. Rule of Ct. 3.769; *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). Courts analyzing whether a settlement is reasonable (either at the preliminary or final step) consider a number of factors: (1) the strength of Plaintiff's case balanced against the settlement amount; (2) the risk, expense, complexity, and likely duration of further litigation and the risk of maintaining class action status through trial; (3) the extent of discovery completed and stage of the proceedings; (4) the experience and views of counsel; and (5) the reaction of the Class to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128, 130 (2008). At preliminary approval, courts generally approve the sending of notice if the settlement appears to be within the range of acceptable settlements. Cal. Rule of Ct. 3.769(f); *N. Cty. Contractor's Ass'n v. Touchstone Ins. Servs.*,

27 Cal. App. 4th 1085, 1089-90 (1994). A settlement is “presumed to be fair” when (1) it “is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 52 (2008) (citation omitted).

As detailed below, the Settlement represents about **58%** of Defendant’s realistic exposure (excluding PAGA Penalties and interest) after adjusting the maximum exposure to reflect the risks the Class would face on the merits and class certification. Jhaveri-Weeks Decl. ¶ 36. Given the substantial relief obtained for the Class and the certainty of receiving a settlement payment now rather than years of uncertainty, the Settlement meets the criteria for preliminary approval. *Id.*

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

A comparison of the Settlement amount to the strength of the Class claims is the most important fairness factor. *Kullar*, 168 Cal. App. 4th at 130. Here, an analysis of the likely recovery on each cause of action demonstrates that the proposed Settlement of \$1,475,000 is reasonable.

Expense Reimbursement Claim: Plaintiff alleged that SNHU required CMs to use home internet but did not reimburse them in violation of Labor Code § 2802. Jhaveri-Weeks Decl. *Id.* ¶ 37. Plaintiff estimated \$45 as a “reasonable percentage” of monthly expenses incurred by each CM. *Id.* (explaining estimate); *Cochran v. Schwan’s Home Serv., Inc.*, 228 Cal. App. 4th 1137, 1140 (2014) (requiring reimbursement of a “reasonable percentage” of cost of personal cell phone used for work). Plaintiff calculated Defendant’s maximum exposure as \$784,025 (excluding interest). Jhaveri-Weeks Decl. ¶ 37.

Plaintiff saw minimal risk on class certification, but applied a 10% discount to account for the risk that individualized inquiries into each CM’s monthly expenses would defeat certification. *Id.* ¶ 38. On the merits, Plaintiff faced a risk that the assumption of \$45 per month as a “reasonable percentage” might be reduced. *Id.* Defendant took the position that, given the part-time nature of CM’s work, a much smaller percentage of their internet costs (*i.e.*, a few dollars per month) was all that need be reimbursed, and SNHU could have argued that it neither knew nor should have known of any other type of business expense. *Id.* Plaintiff therefore applied a 20% discount on the merits. *Id.* After applying discounts, Plaintiff calculated SNHU’s risk-adjusted exposure on this claim as **\$564,498**. *Id.* ¶ 39.

1 **Inaccurate Wage Statements:** Plaintiff alleged that SNHU violated Labor Code § 226.2 by
2 failing to issue accurate itemized wage statements because CMs, as piece-rate employees, were entitled
3 to wage statements containing the piece-rate and the number of pieces at that rate, the compensable rest
4 periods, the rate of compensation for those periods, and gross wages. *Id.* ¶ 40. Even if CMs were not
5 piece-rate workers, CMs were entitled to wage statements with their hours worked and hourly rates. *Id.*
6 Plaintiff sought penalties under Section 226(e) of \$50 for each initial violation and \$100 for each
7 subsequent violation. *Id.* Plaintiff calculated the maximum statutory penalties as \$1,676,600. *Id.*

8 With respect to risk on class certification, Plaintiff saw minimal risk based on his piece-rate
9 theory, but if Plaintiff lost that issue and had to rely on the argument that CMs were not paid enough to
10 qualify for the professional exemption, there would be risk of maintaining class certification because
11 some percentage of CMs may have been paid enough to qualify as “exempt” in some periods. *Id.* ¶ 41.
12 Plaintiff applied a 10% discount for the risk on class certification. *Id.*

13 On the merits, Plaintiff also saw little risk. SNHU could have argued that even if CMs were paid
14 a piece-rate, there was generally only a single piece (the course being delivered), so CMs could tell from
15 the face of the wage statement what the piece-rate was. *Id.* ¶ 42. SNHU could further have argued that
16 for those CMs who did not work 3.5 hours or more in a day, there would likely be no rest break required,
17 and thus no need for the wage statement to provide information about breaks. *Id.* Even if Plaintiff
18 prevailed, Defendant could have argued that Labor Code § 226(e) penalties should be calculated at \$50
19 for all violations, rather than \$50 for the first pay period and \$100 for all subsequent pay periods. *Id.*
20 (citing *Robinson v. Open Top Sightseeing S.F., LLC*, 2018 U.S. Dist. LEXIS 24556, at *51-58 (N.D. Cal.
21 Feb. 14, 2018)). However, Plaintiff saw little risk of the Court accepting this argument, given the
22 language of Section 226(e), which provides for a \$50 penalty “for the initial pay period in which a
23 violation occurs” and a \$100 penalty “for each violation in a subsequent pay period.” Plaintiff applied a
24 10% discount for these risks on the merits. *Id.* After applying discounts, Plaintiff calculated SNHU’s
25 realistic exposure on this claim as **\$1,358,046**. *Id.* ¶ 43.

26 **Unpaid Wages:** As piece-rate employees, CMs were entitled to be paid separately and hourly
27 for “nonproductive time,” defined as “time under the employer’s control . . . that is not directly related
28 to the activity being compensated on a piece-rate basis.” Lab. Code § 226.2. Plaintiff alleged that SNHU

1 required CMs to engage in occasional tasks without compensation, including trainings, preparing for
2 courses that were cancelled due to low enrollment, performance reviews, and writing student
3 recommendation letters. Jhaveri-Weeks Decl. ¶ 44. Plaintiff argued that this work was uncompensated.
4 *Id.* Plaintiff’s survey results provided estimates of the hours CMs spent on these tasks. *Id.* Based on
5 survey responses and Defendant’s pay data, Plaintiff calculated Defendant’s realistic maximum liability
6 on this claim as \$87,973 (excluding interest and liquidated damages). *Id.*

7 With respect to certification risk, Plaintiff applied a 50% discount because individual inquiries
8 would have been needed to determine which CMs engaged in which tasks. *Id.* ¶ 46. Some CMs have
9 had little or no claim for unpaid time: an “introductory training course” became a paid course during the
10 Class Period, some people who took that course did so outside of the Class Period; not all CMs prepared
11 for a class that was canceled; and not all CMs participated in certain trainings or wrote letters of
12 recommendation. *Id.* With respect to risk on the merits, Plaintiff applied a 50% discount because SNHU
13 might successfully argue that (a) the Assignment Letters required CMs to agree to policies and procedures
14 that, in turn, set forth the requirement of trainings and other allegedly non-teaching related tasks, giving
15 Defendant an argument that the Assignment rate covered those trainings and tasks, and (b) tasks like
16 writing recommendation letters and certain trainings were voluntary and not compensable. *Id.* ¶ 47.
17 There was also risk that (c) the amount of unpaid hours proven at trial would be lower. *Id.* Applying the
18 discounts, Plaintiff calculated SNHU’s realistic exposure on this claim as **\$21,993**. *Id.* ¶ 48.

19 **Rest Break Claims:** Plaintiff alleged that SNHU failed to pay CMs hourly and separately for
20 rest break time under Labor Code § 226.2. *Id.* ¶ 49. For each day in which a piece-rate worker works at
21 least 3.5 hours and is not paid separately and hourly for a rest break, a premium of one hour’s pay is
22 owed, even if the rest break is provided. *See Sanchez v. Martinez*, 54 Cal. App. 5th 535, 545 (2020).
23 Using Defendant’s payroll data and CMs’ survey responses, Plaintiff estimated the average number of
24 days per week that CMs worked 3.5 hours without a rest break and calculated the regular hourly rate of
25 pay to determine the premium pay owed. Jhaveri-Weeks Decl. ¶ 49. Plaintiff calculated Defendant’s
26 maximum realistic liability on the rest break premium pay claim as \$1,149,878 (excluding interest). *Id.*

27 As to class certification, Plaintiff faces the risk that individualized inquiries would be needed to
28 determine whether CMs worked 3.5 hours in any given day. *Id.* ¶ 50. Defendant argued that CMs

determined their own schedules. *Id.* The case thus differed from other adjunct instructor cases in which course schedules provide common proof concerning the days on which instructors were required to work at least 3.5 hours. *Id.* Plaintiff thus applied a 40% discount for certification risk. *Id.*

On the merits, Defendant argued that no rest break premiums were owed because CMs were free to set their schedules, including to refrain from working 3.5 hours in any given day, and to take breaks any time. *Id.* ¶ 51. This case differs from those in which workers have an incentive to work through their breaks to produce more pieces because CMs would not have earned more if they spent more time working in any given day. *Id.* In addition, the Class would have faced stiff challenges to its assumptions about how frequently CMs worked 3.5 hours, and even if the Class prevailed, it might have succeeded in proving only a much smaller number of violations, thus potentially reducing the recovery significantly. *Id.* Plaintiff applied a 50% merits discount. *Id.* After applying discounts, Plaintiff calculated Defendant's realistic exposure on the rest break claims as **\$344,963**. *Id.* ¶ 52.

Meal Break Claims: Plaintiff alleged that CMs did not receive off-duty meal breaks when they worked more than 5 hours each day under Labor Code § 512. *Id.* ¶ 53. Plaintiff alleged that CMs are owed one hour's pay for each missed break. *Id.* Using Plaintiff's survey responses, Plaintiff estimated the average number of days that CMs worked more than 5 hours without a meal break and calculated the regular rate of pay to determine the premium pay owed. *Id.* Plaintiff calculated Defendant's maximum realistic liability on the meal break premium pay claim as \$498,281 (excluding interest). *Id.*

As to class certification, the potential that individualized inquiries would be needed to determine when CMs worked more than 5 hours straight caused Plaintiff to apply a 50% discount. *Id.* ¶ 54.

On the merits, Defendant argued that CMs virtually never would have had reason to work over five hours in a single day, and that CMs were free to set their schedules, including to refrain from working more than 5 hours in any given day, or to take meal breaks any time. *Id.* ¶ 55. Plaintiff applied a 50% merits discount, calculating SNHU's realistic exposure on the meal break claims as **\$124,570**. *Id.*

Overtime Compensation: Plaintiff alleged that CMs were entitled to, but did not receive, overtime pay for hours worked above 8 in a day or 40 in a week pursuant to Labor Code § 510. *Id.* ¶ 56. Based on Plaintiff's survey responses and interviews with CMs, Plaintiff determined that approximately one-third of CMs worked overtime during the Class Period, and calculated Defendant's maximum

1 realistic liability on the overtime pay claim as \$119,778.50 (excluding interest). *Id.*

2 As to class certification, Plaintiff faced significant risk that individualized inquiries would be
3 needed to determine whether CMs worked overtime. *Id.* ¶ 57. Plaintiff thus applied a 50% discount for
4 certification risk. *Id.* On the merits, Defendant argued that CMs determined their own schedules and
5 virtually never would have incurred overtime, raising challenges in proving the claim. *Id.* Plaintiff
6 applied a 50% merits discount, calculating SNHU’s risk-adjusted exposure for overtime as **\$29,945**. *Id.*

7 **Waiting Time Penalties:** Plaintiff’s claim for waiting time penalties under Labor Code § 203
8 for failure to pay all wages due at discharge was derivative of the claim for unpaid wages. *Id.* ¶ 58.
9 Plaintiff determined that approximately 126 CMs ceased working for Defendant during the relevant
10 period, and that 30 days’ penalties at CMs’ average daily rate of pay amounted to \$290,228. *Id.*¹

11 Certification risk was the same as for the claim of which it is derivative – 40%. *Id.* ¶ 59. Plaintiff
12 applied a 50% reduction on the merits for three reasons: *first*, it faced the same merits risk as the claims
13 of which it was derivative. *Id.* Second, to recover penalties under Section 203, Plaintiff would have had
14 to prove that Defendant’s violation of Labor Code § 201 was “willful,” which might have been difficult
15 given SNHU’s merits defenses. *Id.*; Lab. Code § 203; Cal. Code Regs., tit. 8, § 13520(a) (“willfulness”
16 lacking if “employer presents a defense, based in law or fact which, if successful, would preclude any
17 recovery on the part of the employee”). And *third*, Plaintiff calculated waiting time penalties using an
18 “average daily rate” that assumed all pay was for only 5 days per week, but Defendant could have argued
19 that the “average” daily rate included the average rate for *all* days in a week that CMs worked, which
20 could have lowered the penalty even if Plaintiff prevailed. Jhaveri-Weeks Decl. ¶ 59. After applying
21 discounts, Plaintiff calculated SNHU’s realistic exposure on this claim as **\$87,068**. *Id.* ¶ 60.

22 **Defendant’s Total Exposure on All Class Claims:** Plaintiff calculated the Class’s maximum
23 realistic recovery before discounts as approximately **\$4,606,762** (excluding interest, liquidated damages,
24 and PAGA penalties). *Id.* ¶ 61. After applying the foregoing discounts for certification and merits risks
25 on each claim, Defendant’s realistic liability for settlement purposes is **\$2,531,084**. *Id.* The Settlement
26

27 ¹ Plaintiff also alleged CMs were “discharged” when they completed an Assignment, but based on
28 discovery, the value of this claim was insignificant. Jhaveri-Weeks Decl. ¶ 58 n.2. (explaining rationale).

reached by the Parties (\$1,475,000) represents 58% of Defendants’ realistic exposure taking into account those risks. *Id.* This is an excellent result for the Class. *Id.*

The PAGA Allocation Is Fair and Adequate: The \$30,000 allocated to PAGA Penalties, 2% of the Maximum Settlement Fund, is fair and adequate. *Id.* ¶ 62. There were 15,683 pay periods in the PAGA Period. *Id.* If the Court were to award PAGA penalties at the “initial” violation rate of \$100 per pay period and were to decline to “stack” PAGA penalties (*i.e.*, decline to award multiple penalties for each employee in each pay period), the PAGA exposure was approximately \$1,568,300. *Id.* (citing *Castillo v. ADT, LLC*, 2017 U.S. Dist. LEXIS 10579, at *11 (E.D. Cal. Jan. 25, 2017) (declining to stack PAGA penalties); *Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157, 1172-73 (9th Cir. 2021) (all PAGA violations were “initial” violations because court had not previously imposed penalties)).

The PAGA allocation is reasonable for several reasons. *First*, the Court can reduce any award of PAGA penalties as “unjust, arbitrary and oppressive, or confiscatory” under Labor Code § 2699(e)(2). *Jhaveri-Weeks Decl.* ¶ 63. This is a risk when, as here, the PAGA penalties are in conjunction with a settlement of underlying Labor Code claims. *Id.*; *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016) (courts consider relief obtained for the class, as well as the deterrent effect of the settlement). The relief provided by the Settlement reduces the need for PAGA to serve as a punishment or deterrent. *Jhaveri-Weeks Decl.* ¶ 63. When Plaintiff’s Counsel recently prevailed at trial of adjunct instructors’ wage statement claims, the court awarded only 15% of the PAGA penalties, noting that the defendant’s payment of wage statement penalties already largely satisfied PAGA’s goals. *Id.*; *Hammond Decl.* ¶ 11. Here, 15% of the non-stacked PAGA exposure is \$235,245. *Jhaveri-Weeks Decl.* ¶ 63.

Second, Defendant contended that Plaintiff’s claims for PAGA penalties would fail for the same reasons as the underlying claims, and the merits risks on the underlying claims apply to the PAGA claims. *Id.* ¶ 64. *Third*, PAGA claims can be stricken if “found to be ‘unmanageable,’” and Plaintiff faced that risk for the same reason he faced class certification risk. *Id.* ¶ 65 (citing *Raphael v. Tesoro Ref. & Mktg. Co.*, 2015 U.S. Dist. LEXIS 130532, at *6-7 (C.D. Cal. Sept. 25, 2015)). *Fourth*, the percentage of the Settlement devoted to the PAGA allocation is comparable to or greater than PAGA allocations that have received final approval in similar wage and hour cases on behalf of adjuncts. *Id.* ¶ 66 (citing examples). In light of these considerations, the PAGA allocation of \$30,000 is reasonable.

1 Plaintiff submitted the SA to the LWDA on the date of this filing, along with information about
2 the date and time of the preliminary approval hearing, giving the LWDA the opportunity to object. *Id.*

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

5 This case would take years to resolve absent settlement. *Id.* ¶ 67; Hammond Decl. ¶ 14.
6 Voluminous evidence would be needed to prove damages, expert testimony and discovery would be
7 required, and trial would be complex. Jhaveri-Weeks Decl. ¶ 67. Neither side would likely prevail on
8 all causes of action, making appeals likely. *Id.* Absent a settlement, the Class would not receive relief
9 for many years, if ever. *Id.* The delay would be exacerbated by the continuing impact of COVID-19.
10 *Id.* This Settlement provides an early resolution of this dispute, and CMs will obtain a substantial
11 recovery now without the risks and delays of further litigation. *Id.*

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

13 The Settlement is the result of arm's-length negotiations, reached after mediation with an
14 experienced mediator. *Id.* ¶ 68. Class Counsel engaged in significant informal discovery, in addition to
15 conducting their own investigation that included surveying and interviewing CMs. *Id.* By analyzing the
16 data and documents produced, interviewing CMs, and preparing for a full-day mediation, Plaintiff was
17 well-informed about the strengths and weaknesses of the Class's claims. *Id.*

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

19 Class Counsel have extensive class experience, including representing adjunct instructors. *Id.*
20 ¶¶ 6-17; Hammond Decl. ¶¶ 5-12. Class Counsel consider the Settlement an excellent result, with an
21 average gross recovery per CM of \$3,105 and net recovery of \$1,933, particularly given that CMs were
22 part-time employees setting their own schedules. Jhaveri-Weeks Decl. ¶ 69; Hammond Decl. ¶ 14.

23 **B. The Proposed Class Notice Content and Procedure Are Adequate**

24 Due process requires that CMs be provided with notice sufficient to give them an opportunity to
25 be heard. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Proper notice must
26 provide information to allow CMs to make an informed decision to accept or object to the settlement.
27 *Id.*; see also *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 251-52 (2001). Here, the proposed
28 Notice provides: (1) the material terms of the Settlement, (2) the CM's anticipated payment, (3) how to

object or opt out, (4) how to obtain more information, (5) the proposed fees, costs, settlement administration costs, and class representative enhancement, and (6) 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 § III(15)(c). If a Notice is returned as undeliverable, Phoenix will perform a skip trace and resend it if a new address is identified. SA § III(15)(d). As such, the Notice is likely to reach most, if not all, CMs.

C. The Class Representative Enhancement Is Preliminarily Reasonable

When seeking final approval, Plaintiff will move for approval of a Class Representative Enhancement of \$7,500 for the named Plaintiff to recognize his effort for the Class and his general release. SA §§ III(8); III(16)(c); Jhaveri-Weeks Decl. ¶ 70. That motion will be supported by a declaration from Plaintiff. *Id.* The requested enhancement falls within the range typically awarded. *See, e.g., Cellphone Term. Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (\$10,000 enhancement).

D. The Requested Attorneys’ Fees and Costs Are Preliminarily Reasonable

In conjunction with final approval, Plaintiff will move for an award of attorneys’ fees of one-third of the Maximum Settlement Fund (*i.e.*, \$491,666.67). SA § III(16)(d). This is the benchmark award typically approved in class actions. *See, e.g., Laffitte v. Robert Half Int’l Inc.*, 1 Cal. 5th 480, 487 (2016). Plaintiff will also request reimbursement of costs not to exceed \$20,000. SA § III(16)(d); Lab. Code §§ 226(e), 1194.2, 2802(c). If the Court grants preliminary approval, Class Counsel will file a fully-briefed and supported motion to be heard with the final approval motion. Jhaveri-Weeks Decl. ¶ 71.

VI. CONCLUSION

Plaintiff respectfully requests that the Court enter the proposed order certifying the settlement Class, preliminarily approving the Settlement, and ordering distribution of the Notice to the Class.

DATED: October 19, 2022

Respectfully submitted,



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Attorneys for Plaintiff and the Putative Class