

1 JULIAN HAMMOND (SBN 268489)  
jhammond@hammondlawpc.com  
2 ADRIAN BARNES (SBN 253131)  
abarnes@hammondlawpc.com  
3 POLINA BRANDLER (SBN 269086)  
pbrandler@hammondlawpc.com  
4 ARI CHERNIAK (SBN 290071)  
acherniak@hammondlawpc.com  
5 HAMMONDLAW, P.C.  
1201 Pacific Ave. Suite 600  
6 Tacoma WA 98402  
(310) 807-1666  
7 (310) 295-2385 (Fax)

8  
9 *Attorneys for Plaintiffs and the Putative Classes*

10  
11 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
12 **COUNTY OF LOS ANGELES**

13 **ADAM FLIGSTEN and JONATHAN WANG,**  
14 individually and on behalf of all others similarly  
situated,

15 Plaintiffs,

16 vs.

17  
18 **MUSICIANS INSTITUTE, INC.,** a California  
19 Corporation,

20 Defendant.  
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CASE NO. 21STCV38365

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

Date: September 1, 2023  
Time: 11:00 a.m.  
Dept. 6

## TABLE OF CONTENTS

Page(s)

|                                                                                    |    |
|------------------------------------------------------------------------------------|----|
| I. INTRODUCTION .....                                                              | 1  |
| II. OVERVIEW OF THE SETTLEMENT.....                                                | 2  |
| III. OVERVIEW OF THE LITIGATION .....                                              | 3  |
| A. Pleadings .....                                                                 | 3  |
| B. Discovery, Mediation and Further Litigation.....                                | 4  |
| IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE.....                      | 4  |
| A. The Classes are Ascertainable and Sufficiently Numerous .....                   | 5  |
| B. “Community of Interest” Exists Among Class Members .....                        | 5  |
| 1. Common Questions of Law Predominate .....                                       | 5  |
| 2. Plaintiff’s Claims Are Typical of The Class Claims .....                        | 6  |
| 3. Plaintiffs and Their Attorneys Will Adequately Represent the Class .....        | 6  |
| C. This Class Action Is a Superior Method of Adjudication .....                    | 6  |
| V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT .....                     | 6  |
| A. The Two Step Settlement Approval Process.....                                   | 6  |
| B. The Settlement Is Fair and Reasonable .....                                     | 7  |
| 1. The Settlement Was a Product of Informed, Non-Collusive Negotiations .....      | 7  |
| 2. The Settlement Amount is Fair and Reasonable Considering the Risks .....        | 8  |
| 3. The Risk, Expense, Complexity and Likley Duration of Further Litigation .....   | 14 |
| 4. Extent of Discovery Completed and Stage of the Proceedings .....                | 14 |
| 5. Views of Experienced Counsel Support the Reasonableness of the Settlement ..... | 14 |
| 6. Reaction of the Class members to The Proposed Settlement .....                  | 14 |
| C. The Proposed Class Notice Content and Procedure Are Adequate.....               | 14 |
| D. The Service Awarded for Each Class Representative Is Reasonable .....           | 15 |
| E. The Requested Attorneys’ Fess and Costs Are Reasonable .....                    | 15 |
| V. CONCLUSION.....                                                                 | 15 |

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

|                                                                                                                    |    |
|--------------------------------------------------------------------------------------------------------------------|----|
| <i>Barnhill v. Roberts Saunders &amp; Co.,</i><br>125 Cal. App. 3d 1 (1981).....                                   | 11 |
| <i>Brinker Restaurant Corp. v. Superior Court,</i><br>53 Cal. 4th 1004 (2012) .....                                | 5  |
| <i>Bufile v. Dollar Fin. Grp., Inc.,</i><br>162 Cal. App. 4th 1193 (2008) .....                                    | 6  |
| <i>Burleigh v. National University,</i><br>Case No. MSC21-00939 (Contra Costa Cty. Sup. Ct.) (Aug. 26, 2022) ..... | 15 |
| <i>Cardenas v. McLane Foodservice, Inc.,</i><br>2011 U.S. Dist. LEXIS 13126 (C.D. Cal. 2011).....                  | 13 |
| <i>Caro v. Procter &amp; Gamble Co.,</i><br>18 Cal. App. 4th 644 (1993) .....                                      | 6  |
| <i>Cartt v. Superior Court,</i><br>50 Cal. App. 3d 960 (1975).....                                                 | 15 |
| <i>Castillo v. ADT, LLC,</i><br>2017 U.S. Dist. LEXIS 10579 (E.D. Cal. Jan 24, 2017).....                          | 12 |
| <i>Chavez v. Netflix, Inc.,</i><br>162 Cal. App. 4th 43 (2008) .....                                               | 7  |
| <i>Cho v. Seagate Tech. Holdings, Inc.,</i><br>177 Cal. App. 4th 734 (2009) .....                                  | 7  |
| <i>Cochran v. Schwan's Home Service, Inc.,</i><br>228 Cal.App.4th 1137 (2014) .....                                | 11 |
| <i>Cotter v. Lyft, Inc.,</i><br>193 F. Supp. 3d 1030 (2016) .....                                                  | 13 |

**TABLE OF AUTHORITIES (CONT'D.)**

**Page(s)**

**CASES**

|                                                                                                                                           |          |
|-------------------------------------------------------------------------------------------------------------------------------------------|----------|
| <i>Dunk v. Ford Motor Co.</i> ,<br>48 Cal. App. 4th 1794 (1996) .....                                                                     | 6        |
| <i>Fireside Bank v. Superior Court</i> ,<br>40 Cal. 4th 1069 (2007) .....                                                                 | 5        |
| <i>Gola v. University of San Francisco</i> ,<br>No. CGC-18-565018 (San Francisco Cnty. Super. Ct. March 3, 2021) .....                    | 13       |
| <i>Kullar v. Foot Locker Retail, Inc.</i> ,<br>168 Cal. App. 4th 116 (2008) .....                                                         | 7, 8, 15 |
| <i>Linder v. Thrifty Oil Co.</i> ,<br>23 Cal. 4th 429 (2000) .....                                                                        | 5        |
| <i>Mayton et al v. Konica Minolta Business Solutions USA, Inc.</i> ,<br>Case No. RG12657116 (Alameda Cty. Sup. Ct.) (June 22, 2015) ..... | 15       |
| <i>Mullane v. Central Hanover Bank &amp; Trust</i> ,<br>339 U.S. 306 (1950).....                                                          | 14       |
| <i>Munoz v. BCI Coca-Cola Bottling Co. of L.A.</i> ,<br>186 Cal. App. 4th 399 (2010) .....                                                | 8        |
| <i>Naranjo v. Spectrum Security Services, Inc.</i> ,<br>88 Cal. App. 5th 937 (2023) .....                                                 | 10       |
| <i>Noel v. Thrifty Payless, Inc.</i> ,<br>7 Cal. 5th 955, 980 (2019) .....                                                                | 5        |
| <i>North Cnty. Contractor's Ass'n v. Touchstone Ins. Services</i> ,<br>27 Cal. App. 4th 1085 (1994) .....                                 | 6        |
| <i>O'Connor v. Uber Techs., Inc.</i> ,<br>No. 201 F. Supp. 3d 1110 (N.D. Cal. Aug. 18, 2016) .....                                        | 12       |
| <i>Reyes v. Board of Supervisors</i> ,<br>196 Cal. App. 3d 1263 (1987).....                                                               | 5        |

|    |                                                                             |       |
|----|-----------------------------------------------------------------------------|-------|
| 1  | <i>Robinson v. Open Top Sightseeing San Francisco, LLC,</i>                 |       |
| 2  | No. 14-cv-00852, 2018 U.S. Dist. LEXIS 24556 (N.D Cal. Feb. 14, 2018) ..... | 10    |
| 3  | <i>Rose v. City of Hayward,</i>                                             |       |
| 4  | 126 Cal. App. 3d 926 (1981).....                                            | 5     |
| 5  | <i>See v. Tesoro Ref &amp; Mktg. Co.,</i>                                   |       |
| 6  | 2015 U.S. Dist. LEXIS 130532 (C.D. Cal. Sept. 25, 2015) .....               | 13    |
| 7  | <i>Sav-On Drug Stores, Inc. v. Superior Court,</i>                          |       |
| 8  | 34 Cal. 4th 319 (2004) .....                                                | 5     |
| 9  | <i>Seastrom v. Neways, Inc.,</i>                                            |       |
| 10 | 149 Cal. App. 4th 1496 (2007) .....                                         | 5     |
| 11 | <i>Wershba v. Apple Computer, Inc.,</i>                                     |       |
| 12 | 91 Cal. App. 4th 224 (2001) .....                                           | 7, 14 |

## **STATUTES**

|    |                                        |    |
|----|----------------------------------------|----|
| 13 | Cal. Code Regs., tit. 8, § 13520 ..... | 11 |
| 14 | Lab. Code § 2699(e)(2) .....           | 13 |
| 15 | Lab. Code § 2699(f) .....              | 13 |

## **RULES**

|    |                                          |    |
|----|------------------------------------------|----|
| 16 | Cal. Rules of Court, Rule 3.766 .....    | 15 |
| 17 | Cal. Rules of Court, Rule 3.769(a) ..... | 6  |
| 18 | Cal. Rules of Court, Rule 3.769(d) ..... | 5  |

## **TREATISES**

|    |                                                         |      |
|----|---------------------------------------------------------|------|
| 19 | 4 Newberg on Class Actions § 11.25 (4th ed. 2002) ..... | 6    |
| 20 | Manual for Complex Litigation (Fourth) § 21.6 .....     | 6, 7 |

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## I. INTRODUCTION

Plaintiffs Adam Fligsten and Jonathan Wang (“Plaintiffs”) seek preliminary approval of a non-reversionary \$900,000 settlement of their wage and hour class and PAGA claims against Musicians Institute (“Defendant” or “MI”) on behalf of two non-overlapping classes: (1) 452 “Class Members” who were employed by Defendant in California as instructors at any time during the period from October 19, 2017 through the date of preliminary approval (“Class Period”); and (2) 134 “Reimbursement Class Members” who are non-Class Member employees who worked remotely for Defendant in California during the Class Period.

The settlement reached on behalf of Class Members overlaps with a previous claims-made settlement alleging identical claims in *Tagliarino v. Musician’s Institute, Inc.*, Judicate West Case No. A268536-46, for (a) unpaid wages under Labor Code §§ 1194 and 510; (b) meal and rest breaks under Labor Code §§ 226.7 and 512; (c) wage statement penalties under Labor Code § 226; (d) waiting time penalties under Labor Code § 203; (e) unreimbursed expenses under Labor Code § 2802; and (f) PAGA penalties (“*Tagliarino* Settlement”). According to Defendant, 255 Class Members received payments from the *Tagliarino* Settlement, effectively extinguishing their claims arising before December 28, 2020. Declaration of Julian Hammond In Support of Plaintiffs’ Motion for Order Granting Preliminary Approval (“Hammond Decl.”), filed herewith, ¶ 16.

In addition to their claims on behalf of Class Members, Plaintiffs allege that MI required Reimbursement Class Members to work from home during the Class Period but failed to fully reimburse their remote work expenses in violation of Labor Code § 2802. *Id.* ¶ 17.

After a full-day mediation session with highly respected mediator Lisa Klerman, and after engaging in class certification discovery for nearly a year, the parties entered into a Class Action Settlement Agreement (“Settlement Agreement” or “SA”), which is now presented to the Court for preliminary approval. Under the SA, if approved, the average net payment per Class Member will be \$1,050.88 and the average gross recovery is \$1,891.59. *Id.* ¶ 58. These are excellent results in light of MI’s contention that CMs entered into arbitration agreements that barred Plaintiffs’ class claims; and that over half of the Class already received payment from the *Tagliarino* Settlement for the same claims now alleged on their behalves. *Id.* ¶¶ 16, 24, 70-71.

Reimbursement Class Members will receive on average \$186.57 net and \$335.82 gross. *Id.* ¶ 62. These are also excellent results in light of the fact that CMs could request a one-time \$400 stipend for internet expenses, and MI approved over \$100,000 in reimbursement requests during the Reimbursement Class Period, which substantially reduced Defendant’s liability for Labor Code § 2802 claims. *Id.* ¶ 61.

1 Plaintiffs now present the Settlement Agreement to the Court for approval and respectfully  
2 request that the Court: (1) conditionally certify the proposed Classes, (2) conditionally appoint Plaintiffs  
3 and Plaintiffs' Counsel as Class Representatives and Class Counsel, (3) grant preliminary approval of  
4 the proposed Settlement, including the amount and the plan for allocation and distribution of settlement  
5 funds, (4) preliminarily approve the requested attorneys' fees and costs to Class Counsel and  
6 enhancement awards to the Named Plaintiffs, (5) approve the proposed Notice, and (6) schedule a final  
approval hearing.

## 7 **II. OVERVIEW OF THE SETTLEMENT**

8 The Settlement Agreement resolves all claims of the Plaintiffs and the proposed Classes. A  
9 summary of the Settlement terms is as follows:

10 1. Gross Settlement Amount ("GSA") – MI will pay a non-reversionary sum of \$900,000 to  
11 settle all claims alleged in the operative Complaint. SA § 1.13. In addition, MI will pay the employer-  
12 side payroll tax payments due and payable as a result of this Settlement. *Id.*

13 2. Attorneys' Fees, Costs, and Service Awards – Class Counsel will seek attorneys' fees of  
14 up to 35% of the GSA, up to \$25,000 to reimburse out-of-pocket litigation costs, and Service Awards of  
up to \$7,500 for each Plaintiff. SA §§ 5, 6.

15 3. PAGA Award – The Settlement allocates \$30,000 to PAGA, to be divided 75/25 between  
16 the LWDA and the Class Members who worked during the PAGA Period. SA § 7.

17 4. Settlement Administrator and Administration Costs – The Parties have mutually agreed  
18 to use ILYM Group, Inc. ("ILYM") as the Administrator. SA § 8. Administration Costs are capped at  
\$20,000. *Id.*

19 5. Net Settlement Amount ("NSA") – will total approximately \$500,000 and will be  
20 allocated as follows: (a) 95% of the NSA will be allocated to the Class and paid to them *pro rata* based  
21 on the number of pay periods they worked during the Class Period, with pay periods that were paid by  
22 the *Tagliarino* settlement subject to a 0.05 multiplier; and (b) 5% of the NSA will be allocated to  
23 Reimbursement Class Members and paid to them *pro rata* based on the number of pay periods they  
worked during the Class Period. SA §§ 9.1.1, 9.2.

24 6. Opting Out, Objecting, and Disputes – CMs who wish to opt-out, object, or dispute their  
25 pay periods must do so within 45 days of the mailing of the Notices. SA §§ 1.22, 11, 12, 13. Class  
26 Members whose Class Notice is re-mailed will have an additional 14 calendar days to Respond. SA §  
27 10.1.4.

1           7.     Class Notice – Within 10 business days after the Court grants preliminary approval, MI  
2 will provide ILYM with a list of all CMs and their pay periods. SA § 10.1.1. Within 30 business days  
3 after the Court grants preliminary approval, ILYM will mail the Notice Packet substantially in the form  
4 attached to the Settlement Agreement as **Exhibit A**, and will use skip trace procedures for returned mail.  
5 S.A. § 10.1.3

6           8.     Tax Consequences of Settlement Payments – For tax purposes, CMs payment will be  
7 allocated 1/3 to wages and 2/3 to penalties and interest. Payments to the Reimbursement Class will be  
8 allocated 100% to non-wage payments. SA §§ 9.3.2, 9.3.3.

9           9.     Scope of Release and Final Judgment – CMs and Reimbursement CMs will release all  
10 claims alleged, or that could have been alleged based on the facts in the operative Second Amended  
11 Complaint, on their behalves and arising during the Class Period. SA §§ 17.1, 17.3. Aggrieved  
12 Employees will release any and all claims for PAGA penalties that were alleged, or could have been  
13 alleged in the Second Amended Complaint and PAGA Notices, on their behalves and arising during the  
14 PAGA Period. SA §§ 17.2, 17.4. Named Plaintiffs will also give a general release. *Id.* § 17.5.

### 13                               III.     OVERVIEW OF THE LITIGATION

#### 14           A.     Pleadings

15           Plaintiffs filed their complaint on October 19, 2021, alleging that CMs were non-exempt  
16 employees who were entitled to (i) wages for all hours worked under Labor Code § 1194 and Wage  
17 Order No. 4-2001 § 4; (ii) paid off-duty rest breaks under Labor Code § 226.7 and IWC Wage Order No.  
18 4-2001, §§ 4, 12; and (iii) accurate itemized wage statements under Labor Code § 226(a), (e). Plaintiffs  
19 also alleged that MI failed to reimburse CMs and Reimbursement CMs for necessarily incurred business  
20 expenses in violation of Labor Code § 2802. Hammond Decl. ¶ 15. On November 5, 2021, Plaintiffs  
21 filed a First Amended Complaint adding a PAGA claim. Hammond Decl. ¶ 18. On October 21, 2022,  
22 Defendant filed an Answer asserting 52 affirmative defenses, including that (a) the “Court lacks subject  
23 matter jurisdiction to adjudicate this action because all disputes arising out of or related to Plaintiffs’  
24 employment are subject to Plaintiffs’ agreement to submit such disputes to binding individual contractual  
25 arbitration, and any contrary state laws operating to defeat such arbitration are preempted by the Federal  
26 Arbitration Act, 9 U.S.C. section 1, *et seq.*”; that (b) Plaintiffs’ class and PAGA claims “are barred by  
27 the settlement and release approved in *Vincent B. Tagliarino, et al. v. Musician’s Institute, Inc. et al.*  
28 (Judicate West Case No. A268535)”; and numerous other defenses to class certification and the merits  
including (c) Plaintiffs are not entitled to statutory penalties because Defendant did not “knowingly and  
intentionally fail to comply with Labor Code section 226”; (d) Class Members were not injured by

1 Defendant's alleged failure to comply with Section 226(a); (e) Defendant did not suffer or permit Class  
2 Members to perform off-the-clock work; (f) Defendant did authorize and permit Class Members to take  
3 timely off-duty rest breaks and if any Class Member missed rest breaks they did so of their own volition;  
4 and (e) the class is not certifiable because it would be unmanageable and there is not sufficient  
5 commonality. Hammond Decl. ¶ 25.

6 On July 27, 2023, Plaintiffs filed their Second Amended Complaint, adding class causes of action  
7 for overtime, meal breaks, and waiting time penalties. Id. ¶ 26.

#### 8 **B. Discovery, Mediation and Further Litigation**

9 Following the filing of the First Amended Complaint, the parties agreed to mediate and engage  
10 in informal discovery. Hammond Decl. ¶ 19. MI produced class sizes, Plaintiffs' personnel files, Faculty  
11 Handbooks, Employee Handbooks, reimbursement policies, and spreadsheets showing the amount and  
12 type of reimbursements made to the Class. Id. Defendant also produced documents and data from the  
13 *Tagliarino* Settlement. Id. Plaintiffs also conducted their own investigation, performed an online survey  
14 of Class Members, and gathered additional documents and data, including MI's policy regarding pay for  
15 testing and grading, exemplar time sheets and wage statements, directions provided to Class Members  
16 for completing paysheets, and MI's reimbursement policies. Id. ¶ 20. Plaintiffs performed a detailed  
17 analysis of the documents and data which was included in their mediation brief. Id. On April 6, 2022,  
18 the parties attended a full-day mediation with Lisa Klerman, a highly respected mediator, but were unable  
19 to reach settlement. Id. ¶ 21.

20 On July 18, 2022, Defendant filed its Motion to Strike on the basis that the final approval order  
21 entered by in the *Tagliarino* Settlement had *res judicata* effect and barred Plaintiffs from litigating any  
22 claims that were raised or could have been raised in the *Tagliarino* case. Id. ¶ 23. On September 22,  
23 2022, the Court denied Defendant's Motion in its entirety. Id.

24 In May 2022, Plaintiffs served formal discovery necessary for class certification including  
25 Special Interrogatories, Requests for Production, Requests for Admission, and Form Interrogatories.  
26 Defendant responded on August 18, 2022, and over the following months, the parties entered into a  
27 Stipulated Protective Order, met and conferred extensively over Defendant's responses including over  
28 1,400 pages of documents, and completed the *Belaire West* Notice process. Id. ¶ 22.

While engaging in discovery, the parties also continued settlement discussions, and ultimately  
entered into the Settlement Agreement now presented to this Court for approval. Id. ¶ 26.

#### 27 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

28 When a negotiated class action settlement has been reached prior to certification – as here – the

1 court may make an order approving or denying certification of a provisional settlement class. Cal. Rules  
2 of Court, Rule 3.769(d). The decision to certify a class is purely a procedural one and should be based  
3 on the allegations in the Complaint and not on the perceived factual or legal merit of the class claims.  
4 *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-41 (2000).

5 In California, a Class is certifiable if (1) the class is ascertainable and sufficiently numerous; (2)  
6 there exists a well-defined community of interest; and (3) class action is a superior method of  
7 adjudication. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012); *Linder*, 23  
8 Cal. 4th at 435. All class certification requirements are met in this case for the reasons set forth below.

9 **A. The Classes Are Ascertainable and Sufficiently Numerous**

10 Class Members are “ascertainable” where they may be readily identified without unreasonable  
11 expense or time by reference to official records. *See Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980  
12 (2019); *Reyes v. Board of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). These criteria are met here  
13 as Defendant’s records are sufficient to permit identification of the Class Members and Reimbursement  
14 Class Members.

15 The Classes are sufficiently numerous since according to Defendant they have approximately  
16 452 members and 134 members, respectively. *See Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934  
17 (1981) (42 people “is quantitatively sufficient for class action”).

18 **B. “Community of Interest” Exists Among Class Members**

19 A “community of interest” requirement embodies three factors: (1) predominant common  
20 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3)  
21 class representatives who can adequately represent the class. *Fireside Bank v. Superior Court*, 40 Cal.  
22 4th 1069, 1089 (2007) (citations and internal quotations omitted). Each factor to establish a community  
23 of interest exists among the Class Members and Reimbursement Class Members.

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

25 Where an employer’s policies or conduct are uniformly directed at a class of employees, like  
26 here, the class-wide impact of the defendant’s policies satisfies the commonality requirement. *See Sav-  
27 On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 331 (2004) (upholding class certification, where  
28 the common issue was whether the employer properly classified grocery store managers as exempt from  
California’s overtime requirements). Here, Plaintiffs challenge common pay policies raising predominant  
common questions of law and fact including whether MI compensated its employees for all hours worked  
and whether MI reimbursed its employees for their out-of-pocket business expenses.

///

1                   **2. Plaintiffs' Claims Are Typical of the Class Claims**

2           The “test of typicality ‘is whether other members have the same or similar injury, whether the  
3 action is based on conduct which is not unique to the named plaintiffs, and whether other Class Members  
4 have been injured by the same course of conduct.’” *See Seastrom v. Neways, Inc.*, 149 Cal. App. 4th  
5 1496, 1502 (2007). Here, Plaintiffs’ claims are typical of the Class that they seek to represent because  
6 they were subject to the same compensation policies/practices, suffered the same type of injury, and seek  
7 the same types of relief.

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

9           “Adequacy of representation depends on whether the plaintiff’s attorney is qualified to conduct  
10 the proposed litigation and the plaintiff’s interests are not antagonistic to the interests of the class.” *Caro*  
11 *v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669, n.21 (1993) (citations omitted). Both elements are  
12 satisfied here. Plaintiffs’ Counsel have extensive class action litigation experience and have been  
13 appointed class counsel in numerous class action settlements. Hammond Decl. ¶¶ 6-13. Plaintiffs are  
14 committed to representing the interests of the Classes, do not have any conflicts with the members of the  
15 Classes, and their interests are virtually coextensive with those of the Classes. *Id.* ¶ 4.

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

17           Plaintiffs’ claims are based on the contention that Defendant had uniform policies and/or  
18 practices of failing to pay for all hours worked; failing to issue accurate wage statements; failing to  
19 provide rest and meal breaks; and failing to reimburse necessarily incurred business expenses. All these  
20 claims involve common evidence including uniform compensation policies, wage statements, remote  
21 work policies and expense reimbursement policies. *See Bufil v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th  
22 1193, 1208 (2008). The class action mechanism in this case will also allow Plaintiffs and the classes to  
23 obtain redress for their relatively small claims, which would otherwise be impractical to litigate on an  
24 individual basis.

25                   **V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**

26                   **A. The Two Step Settlement Approval Process**

27           Court approval of a class action settlement is a two-step process: (1) a preliminary review and  
28 contingent approval by the trial court, and (2) after notice has been distributed to the class members, a  
hearing and a detailed review that includes their responses. Manual for Complex Litigation (Fourth)  
§ 21.6 (“Manual”); Cal. Rules of Court, Rule 3.769(a); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794,  
1800-1801 (1996). Thus, preliminary approval of the settlement is simply a conditional finding that the  
settlement appears to be within the range of acceptable settlements. *See, e.g.*, 4 Newberg on Class

1 Actions § 11.25 (4th ed. 2002); Manual § 21.6. *C.f. North Cnty. Contractor's Ass'n v. Touchstone Ins.*  
2 *Services*, 27 Cal. App. 4th 1085, 1094-1095 (1994). Applying the criteria for preliminary approval in  
3 this case reveals a substantial basis for granting the preliminary approval this Motion seeks.

4 **B. The Settlement is Fair and Reasonable**

5 In analyzing whether a settlement is fair and reasonable, courts consider a number of factors  
6 including “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further  
7 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the  
8 extent of discovery completed and the stage of the proceedings, the experience and views of counsel,  
9 and . . . the reaction of the class members to the proposed settlement.” *Kullar v. Foot Locker Retail, Inc.*,  
10 168 Cal. App. 4th 116, 128 (2008) (quoting *Dunk*, 48 Cal. App. 4th at 1801). A settlement is initially  
11 “presumed to be fair” when (1) it “is reached through arm’s length bargaining; (2) investigation and  
12 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in  
13 similar litigation; and (4) the percentage of objectors is small.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th  
14 43, 52 (2008) (quoting *Dunk*, 48 Cal. App. 4th at 1802).

15 As discussed below, and as set out in the Hammond Declaration, the proposed Settlement is  
16 presumptively fair because (1) it was the product of serious, informed, and non-collusive negotiations,  
17 (2) the putative Classes are represented by experienced counsel; and (3) the Parties investigated the  
18 claims, exchanged key information, and thus Plaintiffs’ Counsel was able to make an informed  
19 recommendation about the proposed Settlement. The reasonableness of the Settlement is further  
20 supported by the risk of maintaining class action status, the amount offered to settle, and the endorsement  
21 of experienced counsel.

22 **1. The Settlement Was a Product of Informed, Non-Collusive Negotiations**

23 California courts recognize that “a presumption of fairness exists where ... [a] settlement is  
24 reached through arms-length bargaining.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224,  
25 245 (2001) (citation omitted); *see also Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-  
26 45 (2009) (upholding trial court’s determination that settlement was “fair, reasonable and adequate”  
27 where the settlement “provided valuable benefits to the class ... that were ‘particularly valuable in light  
28 of the risks plaintiff would have faced if she proceeded to litigate her case.’”).

Here, the settlement is a result of extensive settlement negotiations between the parties conducted  
at arm’s length and informed by substantial factual and legal investigation. Throughout this case, the  
Classes have been represented by counsel with extensive experience in wage and hour litigation, and, in  
particular, class actions alleging similar types of claims. Hammond Decl. ¶¶ 6-13. Class Counsel have

1 spent a considerable amount of time prosecuting this case, including, but not limited to, drafting  
2 pleadings, engaging in informal and formal discovery, analyzing documents and data produced by  
3 Defendant, preparing for and attending a full-day mediation, briefing and arguing Defendant's Motion  
4 to Strike, and negotiating and finalizing the settlement agreement and related documents. Hammond  
5 Decl. ¶ 75.

6 **2. The Settlement Amount is Fair and Reasonable Considering the Risks**

7 The amount of the settlement in light of the strength of the plaintiff's case is the most important  
8 "reasonableness" factor. *See Kullar*, 168 Cal. App. 4th at 130. In determining whether a settlement is  
9 fair, the court must "independently satisfy[] itself that the consideration being received for the release of  
10 the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the  
11 risks of the particular litigation." *Id.* at 129. This requires a record that "allows 'an understanding of the  
12 amount that is in controversy and the realistic range of outcomes of the litigation.'" *Munoz v. BCI Coca-*  
13 *Cola Bottling Co. of L.A.*, 186 Cal. App. 4th 399, 409 (2010) (quoting *Kullar*, 168 Cal. App. 4th at 120).

14 The Settlement will provide CMs with significant payments. The average recovery for a CM is  
15 \$1,050.88 and the average gross recovery is \$1,891.59. Hammond Decl. ¶ 58. The average recovery for  
16 a Reimbursement CM is \$335.82 gross and \$186.57 net, and the estimated highest recovery is  
17 approximately \$249.29. *Id.* ¶ 62. The settlement amount compares favorably with Plaintiffs' Counsel's  
18 estimates of the maximum and realistic value of Plaintiffs' class claims as follows.

19 **Maximum and Realistic Value of the Class Claims:** Plaintiffs calculate MI's maximum exposure  
20 on the Class claims as \$5,382,102, and realistic exposure as \$1,433,388 (Hammond Decl. ¶ 57), as  
21 follows:

| Labor Code Section               | Maximum Damages       | Realistic Exposure    |
|----------------------------------|-----------------------|-----------------------|
| Unpaid Wages (§1194)             | \$2,186,800           | \$546,700             |
| Rest Breaks (§226.7)             | \$1,555,752           | \$388,938             |
| Meal Breaks (§512)               | \$468,600             | \$117,150             |
| Wage Statements (§§ 226(a), (e)) | \$702,500             | \$175,625             |
| Waiting Time Penalties (§ 203)   | \$567,000             | \$141,750             |
| Unreimbursed Expenses (§ 2802)   | \$252,900             | \$63,225              |
| <b>TOTAL</b>                     | <b>\$5,382,102.00</b> | <b>\$1,433,388.00</b> |

22 **Unpaid Wages Claim (Labor Code § 1194):** Plaintiffs alleged that MI failed to pay CMs for  
23 tasks performed outside of their time spent teaching classes, such as class preparation, attending  
24  
25  
26  
27  
28

1 meetings, continuing education, and other administrative tasks. Hammond Decl. ¶ 35. Plaintiffs allege  
2 that, although MI allowed CMs to seek preapproval for time spent performing non-teaching tasks, and  
3 forbade CMs from working unapproved hours, CMs rarely sought preapproval because it was too  
4 difficult to predict the tasks they would need to perform and the time these tasks would take. Plaintiffs  
5 also allege that, throughout the Class Period, MI only paid CMs a fixed amount of time for grading tests  
6 and quizzes but these tasks frequently took more than the time allotted by MI. *Id.* Plaintiffs calculated  
MI's maximum exposure to the unpaid wages claim as \$2,186,800. *Id.*

7 **Class Certification Risks:** Plaintiffs applied a 50% discount for MI's contention that  
8 individualized issues would predominate because determining whether, and how much, unrecorded time  
9 CMs worked, would vary widely depending on what classes and how many classes CMs taught, and  
10 whether they had previously taught that class; and how many quizzes and tests each CM graded, often  
CMs graded, how much time each quiz or test took to grade. Hammond Decl. ¶ 37.

11 **Merits Risk:** Plaintiffs applied a further 50% discount for the risk that Plaintiffs' estimated  
12 number of unpaid hours was inflated, given that many courses are taught by CMs repeatedly and therefore  
13 have to perform little preparation work and spent little time grading quizzes and tests; and for MI's  
14 contention that its timekeeping policy forbade working "off the clock" and required advance pre-  
15 approval for any overtime or off-schedule hours, so any unpaid work was not performed under MI's  
16 control. *Id.* ¶ 38. Applying the certification and merits discount, for settlement purposes, MI's realistic  
17 exposure on the unpaid wage claim is \$546,700. *Id.*

18 **Rest Break Claim (Labor Code § 226.7):** Plaintiffs allege that although MI maintained a valid  
19 rest break policy, MI imposed uniform policies and procedures that impeded Class Members from taking  
20 rest breaks during classes that were 3.5 hour or longer, in violation of Labor Code § 226.7 and applicable  
21 Wage Order. Plaintiffs calculated Defendant's maximum liability on the rest break claim as \$1,555,752.  
Hammond Decl. ¶ 39.

22 **Class Certification:** Plaintiffs applied a 50% discount to MI's maximum exposure for rest breaks  
23 for MI's contention that individualized issues would predominate in that MI maintained a compliant rest  
24 break policy, and CMs could have taken a timely off-duty rest break had they chosen to, so any CMs  
25 who did not take breaks were not following policy. MI also contended that it did not maintain break  
records, and some CMs took breaks, while others did not. *Id.* ¶ 40.

26 **Merits:** MI also contended that given that it had a compliant rest break policy applicable to CMs,  
27 any missed rest breaks were the results of the CMs choice and not MI's policies requiring CMs to work  
28 through any class break times. Plaintiffs applied a further 50% discount based on these arguments, which

1 reduced MI's exposure on the rest break claim is \$388,938. *Id.* ¶ 41.

2 **Meal Break Claim (Labor Code §§ 512, 226.7):** As stated above, although MI maintained a  
3 valid meal break policy, MI imposed uniform policies and procedures that impeded Class Members from  
4 taking meal breaks. Plaintiffs calculated Defendant's maximum exposure on this claim as \$468,600.  
Hammond Decl. ¶ 42.

5 **Class Certification/ Merits Discount:** Defendant could have argued that this claim would not  
6 be certified because CMs taught different courses on different days with different class lengths, and  
7 Defendant might successfully argue that individual inquiries would be necessary to determine whether  
8 CMs were able to take meal breaks. Defendant also argued that longer classes had breaks, and CMs were  
9 permitted to take compliant meal periods, and if they failed to do so it was as a matter of choice. Plaintiffs  
10 applied the same 50% discount for the risk of non-certification, and a further 50% discount for the risk  
11 on the merits, which reduced MI's realistic exposure to \$117,150. *Id.* ¶ 43.

12 **Inaccurate Wage Statement Claim (Labor Code § 226(a), (e)):** Plaintiffs allege that, as a result  
13 of MI's failure to track all time worked by CMs, including time actually spent grading, and preparation  
14 time, the wage statements issued to Class Members did not include the accurate number of hours worked  
15 during each period. Plaintiffs also allege that, until April 2021, MI failed to include all of the hours  
16 recorded each pay period in the "total work hours" column; rather, MI only included hours on certain  
17 tasks (such as teaching and prep time) but not other tasks (such as private lessons or admin work).  
Plaintiffs calculated Defendant's liability on this wage statement claim as \$702,500. Hammond Decl. ¶¶  
18 44-47.

19 **Class Certification Risks:** Plaintiffs applied a 50% discount for class certification because the  
20 wage statement claims were largely derivative of Plaintiffs' off-the-clock work claims. *Id.* ¶ 48.

21 **Merits Risks:** As to the merits, Plaintiffs faced a risk that a court would find that only the initial  
22 \$50 penalty applied to each violation because MI did not receive notice from the labor commissioner or  
23 a court that its wage statements were noncompliant. *Robinson v. Open Top Sightseeing San Francisco,*  
24 *LLC*, No. 14-cv-00852, 2018 U.S. Dist. LEXIS 24556, at \*52-58 (N.D Cal. Feb. 14, 2018) (finding that  
25 only the initial \$50 Labor Code § 226(e) penalty applied because nothing in the recorded showed  
26 defendant as previously notified that its wage statements were noncompliant). In addition, Defendant  
27 asserted in its Answer that it did not "knowingly and intentionally fail to comply with Labor Code § 226"  
28 because CMs were required to record all of their hours worked and MI never knowingly and intentionally  
failed to provide accurate wage statements. If successful, this defense could bar Plaintiffs' recovery under  
*Naranjo v. Spectrum Security Services, Inc.*, 88 Cal. App. 5th 937 (2023) (recognizing that employer's

1 good faith belief that it is not violating Section 226 precludes a finding of knowing and intentional  
2 violation required for awarding penalties under Section 226(e)). Plaintiffs applied a 50% discount for  
3 these risks which reduced MI's realistic exposure to **\$175,625**. Hammond Decl. ¶ 49.

4 **Waiting Time Penalties (Labor Code § 203)**: Plaintiffs allege that as a result of its failure to  
5 pay for hours worked, and failure to pay premium pay, MI owes CMs waiting time penalties pursuant to  
6 Labor Code § 203. Plaintiffs calculated MI's maximum exposure as \$567,600. Hammond Decl. ¶ 50.

7 **Class Certification/ Merits Risks**: Plaintiff applied a 50% discount for the risk on class  
8 certification because this claim is derivative of the unpaid wage claims, Hammond Decl. ¶ 51. Plaintiff  
9 applied a further 50% discount on the merits based on MI's assertion that any failure to pay wages upon  
10 discharge was not willful because had MI had a good faith dispute that CMs were not owed any wages  
11 which could negate the willfulness requirement of Labor Code § 203. *See Barnhill v. Roberts Saunders*  
12 *& Co.*, 125 Cal. App. 3d 1, 8-9 (1981) (an employer's failure to pay wages is not "willful," if the legal  
13 duty to pay them was unclear at the time of the violation.); *see also* Cal. Code Regs., tit. 8, § 13520.  
After applying discounts, for settlement purposes, Plaintiffs determined MI's exposure as \$141,750.  
Hammond Decl. ¶ 52.

14 **Unreimbursed Expenses Claim (Labor Code § 2802)**: Plaintiffs alleged that MI did not  
15 reimburse CMs for their necessarily incurred remote work expenses Labor Code § 2802. *Cochran v.*  
16 *Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (2014). Plaintiffs allege that although MI allowed  
17 CMs to request reimbursement for out-of-pocket expenses, and notified CMs that they could seek a one-  
18 time stipend of up to \$400 for home internet, in practice, few CM submitted reimbursements, and the  
19 stipend amount was insufficient to cover all of the home office expenses incurred by CMs. Plaintiffs  
calculated the unreimbursed expenses of CMs as \$252,900. Hammond Decl. ¶¶ 33, 53-54.

20 **Class Certification/Merits Risks**: Plaintiffs applied a 50% discount for the argument that  
21 individualized issues would predominate as to Plaintiffs' unreimbursed expense claims as well because  
22 there varying practices with regard to which expenses CMs incurred, whether such expenses were  
23 "necessary" or "reasonable", whether CMs sought reimbursement for such expenses, and whether MI  
24 approved such requests. Hammond Decl. ¶ 55. Plaintiffs applied a further 50% discount based on  
25 anticipated arguments that even if expenses were incurred, they were voluntary and/or minimal; that MI  
26 had a written reimbursement policy applicable to CMs under which CMs could seek a one-time \$400  
27 stipend for internet expenses, and could request and receive reimbursement for other expenses; and that  
MI in fact approved over \$100,000 in reimbursement requests. Hammond Decl. ¶ 56. After applying

1 these discounts, for settlement purposes, Plaintiffs calculated MI's realistic damages owed to the Adjunct  
2 Class as **\$63,225**. *Id.*

3 **Allocation to the Adjunct Class is Fair and Reasonable:** The \$855,000 of the Gross Settlement  
4 allocated to Adjuncts represents 16% of Defendant's maximum exposure, and 60% of its realistic  
5 exposure. Hammond Decl. ¶ 58. The average net recovery per CM is \$1,050.88 and the average gross  
6 recovery is \$1,891.59. *Id.* These are significant recoveries when considering the fact that, according to  
7 Defendant, over half of the Class already received payments from the *Tagliarino* Settlement; and  
8 Defendant's many other contentions on class certification and the merits. *Id.*

9 **Reimbursement Class Claims (Lab. Code § 2802):** Plaintiffs alleged that, starting March 4,  
10 2020, as a result of COVID-19, MI required and expected all Reimbursement Class Members to work  
11 remotely from home, and incur business expenses (i.e., home internet and cell phone costs) in order to  
12 carry out their job duties from home, yet did not fully reimburse Reimbursement CMs for business  
13 expenses in violation of Labor Code § 2802. Hammond Decl. ¶ 59. Plaintiffs calculated Defendant's  
14 maximum liability for Reimbursement CMs' unreimbursed business expenses as \$252,720. *Id.* ¶ 60.

15 **Class Certification / Merits Risk:** Plaintiffs applied a 50% discount for the risk that varying  
16 practices with regard to incurring expenses by Reimbursement CMs presents an obstacle to class  
17 certification. Plaintiff applied a further 50% discount on the merits for the risks that: not all expenses  
18 incurred by each Reimbursement CM were "necessary" or "reasonable"; that MI had a written  
19 reimbursement policy applicable to CMs under which CMs could seek a one-time \$400 stipend for  
20 internet expenses, and could request and receive reimbursement for other expenses; and that MI in fact  
21 approved over \$100,000 in reimbursement requests. Hammond Decl. ¶ 61. This reduced MI's realistic  
22 exposure to \$63,180. *Id.*

23 **The Allocation to the Reimbursement Class is Fair and Reasonable:** The \$45,000 of the Gross  
24 Settlement attributable to Reimbursement Class Members represents 18% of Defendant's estimated  
25 maximum exposure and 71% of its realistic exposure. Hammond Decl. ¶ 62. The average gross recovery  
26 per Reimbursement Class Member is \$335.82 and the average net recovery is \$186.57. *Id.* These are  
27 significant recoveries when considering Defendant's contentions on class certification and the merits. *Id.*

28 **PAGA Penalties:** Plaintiffs calculated Defendant's maximum liability for PAGA penalties using  
a penalty amount of \$100 per pay period (because MI never received notice from the Labor  
Commissioner or the Court so there are arguably no "subsequent" violation), and assuming the Court  
would not allow "stacking" of PAGA penalties for each separate Labor Code violation, as \$1,006,200.  
*Id.* ¶ 63; *Castillo v. ADT, LLC*, 2017 U.S. Dist. LEXIS 10579, at \*11 (E.D. Cal. Jan 24, 2017); *See* Lab.

1 Code § 2699(f) (stating “a civil penalty for a violation”) (emphasis added). The \$30,000 allocated to  
2 PAGA penalties in this case represents 3% of Defendant’s total exposure (Id. ¶ 64) which is comparable  
3 to (or even more than) PAGA allocations in many similar cases that received final approval from  
4 California Superior Courts. *Id.* ¶ 69.

5 Several factors significantly mitigate assessment of PAGA penalties in this case. First, the overall  
6 settlement resulted in robust relief for each Class which is what courts look at when assessing amount  
7 attributed to PAGA penalties. *O’Connor v. Uber Techs., Inc.*, No. 201 F. Supp. 3d 1110, 1134 (N.D.  
8 Cal. Aug. 18, 2016) (where settlement for the class claims is robust, the purpose of PAGA may be  
9 fulfilled because by providing fair compensation to class members, the settlement has a deterrent effect  
10 on defendant and other employers, thus fulfilling the purpose of PAGA). In *Gola v. University of San*  
11 *Francisco*, No. CGC-18-565018 (San Francisco Cnty. Super. Ct. March 3, 2021), a case brought by  
12 HammondLaw on behalf of instructors, the court found that substantial monetary relief in form of  
13 statutory penalties under § 226(e) (and fees and costs plaintiff would seek) acted as a sufficient  
14 punishment and deterrent, and awarded only 15% of the full PAGA penalties—and this was a case where  
15 defendant did not have a good faith defense. Hammond Decl. ¶ 65.

16 Second, MI could have contended that it operated in good faith and reasonably believed it was in  
17 compliance with the Labor Code and the Court would likely reduce any award of PAGA penalties as  
18 “unjust, arbitrary and oppressive, or confiscatory” under Labor Code § 2699(e)(2). Hammond Decl. ¶  
19 66. *See Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (2016) (significant reduction to PAGA penalties  
20 appropriate because the law was not clear and there was thus no deliberate violation).

21 Third, Defendant could have contended that Plaintiffs’ claims for PAGA Penalties would fail for  
22 the same reasons the underlying Labor Code claims would fail. Hammond Decl. ¶ 67.

23 Fourth, Defendant could have contended that PAGA claims would be found unmanageable  
24 because only CMs who actually incurred unpaid wages, unpaid premium pay, or unreimbursed expenses  
25 during a particular pay period could recover PAGA penalties, and there is no manageable way to  
26 determine who was entitled to such penalties. *Id.* ¶ 68. *See v. Tesoro Ref & Mktg. Co.*, 2015 U.S. Dist.  
27 LEXIS 130532, at \*5 (C.D. Cal. Sept. 25, 2015); *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist.  
28 LEXIS 13126, \*10 (C.D. Cal. 2011) (“Given the statutory language [of PAGA], a plaintiff cannot recover  
on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the  
defendant.”). Further, Plaintiffs’ allocation of 3% of the PAGA penalties is comparable to (or more than)  
PAGA allocations in similar cases that received final approval. Hammond Decl. ¶ 69.

///

1                   **3. The Risk, Expense, Complexity and Likely Duration of Further Litigation**

2                   The fact that over half of the Class already received payments as part of a prior overlapping  
3 settlement significantly reduced the value of this case as a whole. Hammond Decl. ¶¶ 58; 71. Further,  
4 Defendant contended that CMs entered into arbitration agreements that barred Plaintiffs' class claims,  
5 and strongly disagreed as to Plaintiffs ability to certify their claims, or win on the merits. *Id.* ¶¶ 70-71.  
6 Assuming some of the claims proceeded to trial, the losing party would likely appeal. This process would  
7 take years to resolve. *Id.* ¶ 71. Instead, this settlement provides an early resolution of this dispute, and  
8 CMs will obtain a recovery in the relatively near future if the settlement is finally approved. *Id.* ¶ 72.

9                   **4. Extent of Discovery Completed and Stage of the Proceedings**

10                  As described in the Hammond Decl. and above, the parties have engaged in informal and formal  
11 discovery, and were adequately informed to make the decision to settle this case on the proposed terms.  
12 Hammond Decl. ¶¶ 19-20, 22.

13                   **5. Views of Experienced Counsel Support the Reasonableness of the Settlement**

14                  As discussed above, Class Counsel have extensive experience in class action litigation, and, in  
15 particular wage-and-hour class actions on behalf of adjunct instructors, and have been determined by  
16 numerous courts to be adequate class counsel. Hammond Decl. ¶¶ 6-13. Class Counsel considers the  
17 settlement to be fair, reasonable and adequate. *Id.* ¶¶ 58, 62, 70.

18                   **6. Reaction of the Class Members to The Proposed Settlement**

19                  It is premature to address this factor since notice has not yet been sent out. The settlement,  
20 however, confers substantial benefit on the CMs and the settlement agreement reasonably tailors each  
21 CM's payment amount to the number of pay periods they worked for MI. SA §§ 9.1.1, 9.2.

22                   **C. The Proposed Class Notice Content and Procedure Are Adequate**

23                  Constitutional due process requires that class members be provided with notice sufficient to give  
24 them an opportunity to be heard in the proceedings. *Mullane v. Central Hanover Bank & Trust*, 339 U.S.  
25 306, 314 (1950). Proper notice must provide class members with sufficient information to make an  
26 informed decision to accept, opt out or object to the settlement. *See Wershba*, 91 Cal. App. 4th at 251-  
27 252. Here, the proposed Notice meets these standards since it provides all the information a reasonable  
28 person would need to make a fully informed decision about the settlement: (1) the material terms of the  
settlement, (2) the proposed fees and costs of Class Counsel and costs of settlement administration, (3)  
the proposed Service Awards; (4) how CMs may opt out of, or object to the Settlement; (5) the fact that  
the Judgment will bind CMs who do not opt out, (6) each CM's proposed allocation; (7) details about

1 the court hearing on settlement approval, and (8) how CMs can obtain additional information. *See* Cal.  
2 Rules of Court, Rule 3.766 and **Exhibit A** to the SA. Therefore, the Court should approve the Notice.<sup>1</sup>

3 **D. The Service Award for Each Class Representative Is Reasonable**

4 Plaintiffs will request a Service Award of \$7,500 for each plaintiff, to recognize the time and  
5 effort expended by them on behalf of the Class, and the general releases they are giving to Defendant.  
6 Hammond Decl. ¶ 79. The requested awards fall well within the range of incentive payments typically  
7 awarded in similar class actions. *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010)  
(affirming incentive awards of \$10,000).

8 **E. The Requested Attorneys' Fees and Costs Are Reasonable**

9 In addition, Plaintiffs' counsel will request attorneys' fees of 35% of the GSA. SA § 5. This fee  
10 percentage amount is fair, reasonable and is within the range typically approved in similar class actions  
11 by California courts. *Burleigh v. National University*, Case No. MSC21-00939 (Contra Costa Cty. Sup.  
12 Ct.) (Aug. 26, 2022) (approving fees of 40% of \$925,000 class settlement); *Mayton et al v. Konica*  
13 *Minolta Business Solutions USA, Inc.*, Case No. RG12657116 (Alameda Cty. Sup. Ct.) (June 22, 2015)  
14 (approving fees of 40% of \$1,225,000 class wage and hour settlement). Plaintiffs will also request  
15 reimbursement of up to \$25,000 for actual out-of-pocket litigation costs incurred by Class Counsel. SA  
16 § 5. If the Court grants preliminary approval, Class Counsel anticipates filing a Motion for Attorneys'  
Fees and Costs that will be scheduled to be heard following the notice process. Hammond Decl. ¶ 77.

17 **VI. CONCLUSION**

18 The settlement provides substantial relief for the Classes and passes the *Kullar* analysis.  
19 Accordingly, Plaintiffs respectfully request that the Court preliminarily approve the settlement, approve  
20 the proposed Class Notice, and schedule a final approval hearing.

21 Dated: August 2, 2023

Respectfully submitted,

HAMMONDLAW, P.C.

23 s/ Julian Hammond

Julian Hammond

24 *Attorneys for Plaintiffs and the Putative Classes*

25 \_\_\_\_\_  
26 <sup>1</sup> The procedure for distribution of notice by first class mail with skip tracing for returned mail (SA §  
27 10.1.4) meets the standard of having “a reasonable chance of reaching a substantial percentage of the  
28 class members.” *Cartt v. Superior Court*, 50 Cal. App. 3d 960, 974 (1975); *see also Wershba*, 91 Cal.  
App. 4th at 251. As such, the Notice is likely to reach most, if not all, Class Members.