

HAMMONDLAW, P.C.
Julian Hammond (SBN 268489)
jhammond@hammondlawpc.com
Polina Brandler (SBN 269086)
pbrandler@hammondlawpc.com
Ari Cherniak (SBN 290071)
acherniak@hammondlawpc.com
1201 Pacific Ave Suite 600
Tacoma WA 98402
(310) 601-6766
(310) 295-2385 (Fax)

Attorneys for Plaintiff and the Putative Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

ALVALYN LUNDGREN, individually and
on behalf of all others similarly situated,

Plaintiff,

vs.

**OTIS COLLEGE OF ART AND
DESIGN**, a California Corporation,
Defendant.

CASE NO. 22STCV14633

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

Date: January 12, 2023
Time: 10:00 a.m.
Dept. 14

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	OVERVIEW OF THE SETTLEMENT TERMS	1
III.	OVERVIEW OF THE LITIGATION	3
	A. Pleadings.....	3
	B. Pre-Mediation Investigation and Discovery	4
	C. Mediation.....	5
IV.	CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE	7
	A. The Class Is Ascertainable and Sufficiently Numerous	7
	B. “Community of Interest” Exists Among CMs	8
	C. This Class Action Is a Superior Method of Adjudication	9
V.	THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT	9
	A. The Two Step Settlement Approval Process.	9
	B. The Settlement is Fair and Reasonable.....	10
	C. The Proposed Class Notice Content and Procedure Are Adequate	19
	D. The Service Award to the Class Representative Is Reasonable.....	19
	E. The Cy Pres Designee is Appropriate	19
	F. The Requested Attorneys’ Fees and Costs Are Reasonable	20
VI.	CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<i>Amaro v. Gerawan Farming, Inc.</i> , No. 1:14-cv-00147-DAD-SAB, 2016 U.S. Dist. LEXIS 112540 (E.D. Cal. Aug. 23, 2016).	12
<i>Barnhill v. Roberts Saunders & Co.</i> , 125 Cal. App. 3d 1 (1981)	14
<i>Bernstein v. Virgin Am., Inc.</i> , 2021 U.S. App. LEXIS 6641 (9th Cir. Mar. 8, 2021)	13, 16
<i>Brinker Restaurant Corp. v. Super. Ct.</i> , 53 Cal. 4th 1004 (2012)	7
<i>Bufil v. Dollar Fin. Grp., Inc.</i> , 162 Cal. App. 4th 1193 (2008)	9
<i>Caro v. Procter, & Gamble Co.</i> , 18 Cal. App. 4th 644 (1993)	9
<i>Cartt v. Superior Court</i> , 50 Cal. App. 3d 960 (1975)	19
<i>Castillo v. ADT, LLC</i> , No. 2:15-383 WBS DB, 2017 U.S. Dist. LEXIS 10579 (E.D. Cal. Jan. 24, 2017)	17
<i>Cellphone Termination Fee Cases</i> , 186 Cal. App. 4th 1380 (2010)	20
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43 (2008)	10
<i>Cotter v. Lyft, Inc.</i> , 193 F. Supp. 3d 1030 (2016)	17
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996)	10
<i>Elliot v. Spherion Pac. Work, LLC</i> , 572 F.Supp. 2d 1169 (C.D. Cal. 2008)	14
<i>Fireside Bank v. Super. Ct.</i> , 40 Cal. 4th 1069 (2007)	8
<i>Furry v. East Bay Publishing, LLC</i> , 30 Cal. App. 5th 1072 (2018)	13
<i>Hicks v. Kaufman & Broad Home Corp.</i> , 89 Cal. App. 4th 908 (2001)	7

1	<i>Kao v. Holiday</i> , 12 Cal. App. 5th 947 (2017).....	13
2	<i>Kettenring v. Los Angeles Unified School Dist.</i> , 167 Cal. App. 4th 507 (2008).....	6
3		
4	<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116 (2008).....	10, 11
5	<i>Lamps Plus, Inc. v. Varela</i> , 587 U.S. ___, 139 S. Ct. 1407 (2019).....	5
6		
7	<i>Linder v. Thrifty Oil Co.</i> , 23 Cal. 4th 429 (2000)	7
8	<i>Livadas v. Bradshaw</i> , 512 U.S. 107 (1994).....	5
9		
10	<i>Lubin v. The Wackenhut Corp.</i> , 5 Cal. App. 5th 926 (2016).....	13
11	<i>Mullane v. Central Hanover Bank & Trust</i> , 339 U.S. 306 (1950).....	19
12		
13	<i>Negri v. Koning Assocs.</i> , 216 Cal. App. 4th 392 (2013).....	6
14	<i>Noel v. Thrifty Payless, Inc.</i> , 7 Cal. 5th 955 (2019)	7
15		
16	<i>O'Connor v. Uber Techs., Inc.</i> , 201 F. Supp. 3d 1110 (N.D. Cal. Aug. 18, 2016).....	17
17	<i>Raphael v. Tesoro Ref & Mktg. Co.</i> , No. 2:15-cv-02862-ODW, 2015 U.S. Dist. LEXIS 130532 (C.D. Cal. Sept. 25, 2015)	18
18		
19	<i>Reyes v. Board of Supervisors</i> , 196 Cal. App. 3d 1263 (1987).....	7
20	<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462 (1981)	8
21		
22	<i>Robison v. Open Top Sightseeing San Francisco, LLC</i> , 2018 U.S. Dist. LEXIS 24556, (N.D. Cal. Feb 14, 2018).....	13
23	<i>Rodman v. Safeway, Inc.</i> , No. 11-cv-03003-JST, 2014 U.S. Dist. LEXIS 314438 (N.D. Cal. Mar. 9, 2014).....	14
24		
25	<i>Rose v. City of Hayward</i> , 126 Cal. App. 3d 926 (1981).....	7
26	<i>Sav-On Drugs Stores, Inc. v. Super. Ct.</i> , 34 Cal. 4th 319 (2004)	8
27		
28		

1	<i>Seastrom v. Neways, Inc.</i> , 149 Cal. App. 4th 1496 (2007).....	8
---	---	---

2	<i>Torres v. Air to Ground Services, Inc.</i> , 300 F.R.D. 386 (C.D. Cal. 2014).....	13
---	---	----

4 **DOCKETED CASES**

5	<i>Chindamo v. Chapman University</i> , Case No. 30-2020-01147814-CU-OE-CXC (Orange County Superior Court, April 15, 6 2022)	15
---	--	----

7	<i>Gola v. University of San Francisco</i> , No. CGC-18-565018 (San Francisco Cnty. Super. Ct. March 3, 2021)	17
---	--	----

9	<i>Harris-Foster v. University of Phoenix, Inc.</i> , Case No. 19019028 (Alameda County Superior Court) (March 17, 2021)	15
---	---	----

10	<i>Merlan et al. v. Alliant Int'l University</i> , Case No. 37-2019-00064053-CU-OE-CTL (San Diego Superior Court) (November 2, 11 2021)	15
----	---	----

12	<i>Mooiman et al. v Saint Mary's College of California</i> , Case No. C19-02092 (Contra Costa County Superior Court) (June 10, 2021)	17
----	---	----

14 **STATUTES**

15	Labor Code § 1194	3, 6
----	-------------------------	------

16	Labor Code § 201	4, 8, 14
----	------------------------	----------

17	Labor Code § 203	4, 14
----	------------------------	-------

18	Labor Code § 226.2	3, 4, 11, 12
----	--------------------------	--------------

19	Labor Code § 226.2(a).....	13
----	----------------------------	----

20	Labor Code § 226.7	4
----	--------------------------	---

21	Labor Code § 226(a).....	4, 6, 13
----	--------------------------	----------

22	Labor Code § 226(e).....	4, 13, 17
----	--------------------------	-----------

23	Labor Code § 2699(e)(2)	17
----	-------------------------------	----

24	Labor Code § 2802	4, 14
----	-------------------------	-------

25	Labor Code § 515	7
----	------------------------	---

26	Labor Code § 515.7	1, 6, 7
----	--------------------------	---------

27	Labor Code § 515.7(a).....	6
----	----------------------------	---

1	Labor Code § 515(a).....	6
---	--------------------------	---

2 **REGULATIONS**

3	Cal. Code Regs., tit. 8, § 13520	14
---	--	----

4	Wage Order No. 4-2001 § 4.....	3, 4
---	--------------------------------	------

5	Wage Order No. 4-2001, § 12.....	4
---	----------------------------------	---

7 **RULES**

8	Cal. Rules of Court, Rule 3.766	19
---	---------------------------------------	----

9	Cal. Rules of Court, Rule 3.769	7, 10
---	---------------------------------------	-------

10	Code of Civil Procedure § 382.4.....	20
----	--------------------------------------	----

11 **TREATISES**

12	1 Newberg on Class Actions § 3.12 (5th ed. 2011).....	7
----	---	---

13	1-3 California Class Actions Practice and Procedure (2007) § 3.02.....	8
----	--	---

14	4 Newberg on Class Actions § 11.25 (4th ed. 2002).....	10
----	--	----

15	Manual for Complex Litigation (Fourth) § 21.6	10
----	---	----

I. INTRODUCTION

Plaintiff Alvalyn Lundgren (“Plaintiff”) seeks preliminary approval of a \$990,000 settlement of her class wage and hour claims against Otis College of Art and Design (“Defendant” or “Otis”)¹ on behalf of approximately 665 adjunct lecturers employed by Otis in California (“Adjunct Class Members” or “Adjunct CMs”) between August 1, 2017 and August 3, 2022 (“Adjunct Class Period”); and 700 Otis employees in California who worked remotely (“Reimbursement Class Members” or “Reimbursement CMs”) between March 4, 2020 and August 3, 2022 (“Reimbursement Class Period”). This settlement was reached after a thorough and extensive investigation by Plaintiff’s Counsel, the exchange of documents and information for purposes of mediation, and a full-day mediation with a skilled mediator.

Plaintiff’s case faced major risks from Defendant’s contentions that his class claims were barred by an arbitration agreement it required Plaintiff to agree to in his Teaching Contracts as part of his employment; that Plaintiff’s claims were federally preempted by the Labor Management Relations Act (“LMRA”); and that Adjunct CMs were exempt under Labor Code § 515.7. Despite these and other risks, Plaintiff was able to negotiate a settlement that will provide meaningful recovery, with an average payment per Adjunct CM of \$687.80 net and \$1,203.04 gross; and an average recovery per Reimbursement CMs of \$155.56 net and \$271.40 gross.

As described in the Hammond Declaration, Plaintiff’s Counsel’s has substantial experience in the prosecution of class action litigation, and particularly in wage and hour class actions on behalf of adjunct instructors. *See* Declaration of Julian Hammond in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (“Hammond Decl.”), filed herewith. ¶¶ 6-7. This experience helped inform the settlement negotiations in this case.

The Settlement Agreement avoids all the typical risks associated with litigation and the atypical risks presented in this case. The terms of the Settlement Agreement are fair and reasonable and satisfy the criteria for judicial approval. Accordingly, the Court should grant preliminary approval, approve the proposed Notice, and set a date for a final approval hearing.

II. OVERVIEW OF THE SETTLEMENT TERMS

The Settlement Agreement resolves all claims of the Plaintiff and the proposed Class alleged in the Second Amended Complaint. A summary of the Settlement terms follows:

¹ The Class Action Settlement Agreement (“SA”) is attached as **Exhibit 1** to the Proposed Order filed herewith.

1 1. Gross Settlement Amount (“GSA”) – Otis will pay a non-reversionary sum of \$990,000
2 to settle this case. SA at § 1.11. Otis will also pay the employer’s share of payroll taxes separately from
3 the gross settlement. *Id.*

4 2. Class Definitions and Class Periods – The “Adjunct Class” consists of all non-exempt
5 part-time faculty and instructors employed by Defendant in California between August 1, 2017 through
6 August 3, 2022. SA § 1.4, 1.5. The “Reimbursement Class” consists of all current or former employees
7 of Defendant in California other than Adjunct Class Members who were required to work from home
8 between March 4, 2020 and August 3, 2022. SA § 1.15. 1.16.

9 3. Attorneys’ Fees, Costs, and Named Plaintiff’s Enhancement Award – Class Counsel will
10 seek attorneys’ fees of up to 35% of the GSA and up to \$25,000 to reimburse their out-of-pocket litigation
11 costs. SA § 5. The SA also provides for payment of \$7,500 to Plaintiff as her enhancement award,
12 subject to Court approval. SA § 6.

13 4. Administration Costs – The Parties have mutually agreed to use Simpluris, Inc., as the
14 Settlement Administrator. SA § 8. Simpluris is an experienced class action administrator and has
15 provided notification and/or claims administration services in thousands of cases. Hammond Decl. ¶ 102.
16 The Settlement Administrator’s expenses shall be reimbursed up to a cap of \$20,000. SA § 8.

17 5. PAGA Payment – The Settlement allocates \$25,000 to PAGA penalties, with \$18,750 to
18 be paid to the California Labor and Workforce Development Agency (“LWDA”) as its 75% share of
19 PAGA penalties, and \$6,250 to be distributed to Aggrieved Employees as their 25% share of the
20 settlement of civil penalties for PAGA claims. SA § 7.

21 6. Net Settlement Amount (“NSA”) – The Net Settlement Amount – the amount remaining
22 of the Gross Settlement Amount after deductions of attorneys’ fees, costs, enhancement award, settlement
23 administration costs, and LWDA’s share of the amount of the GSA allocated to PAGA penalties – will
24 total approximately \$566,000, if the Court grants the fees and costs requested by Plaintiff in full.
25 Hammond Decl. ¶ 54. From this amount \$108,615 will be allocated to the Reimbursement Class
26 (“Reimbursement NSA”) and each Reimbursement CM will receive a payment based on the number of
27 pay periods they worked as a Reimbursement CM during the Reimbursement Class Period. *Id.* ¶ 61. The
28 remainder of the NSA, approximately \$457,385, will be distributed to the Adjunct Class (the “Adjunct
NSA”) based on the number of pay periods they worked during the Adjunct Class Period as an Adjunct
Class Member. *Id.* ¶ 54. CMs are given an opportunity to dispute the number of pay periods included in
the notice. SA § 13.

1 7. Class Notice – Within 25 calendar days of the order granting preliminary approval, Otis
2 will provide the Settlement Administrator with the names, employment ID numbers, last known
3 addresses, last known telephone numbers, and Social Security numbers of all CMs; the dates of
4 employment for each CM; and the number of pay periods worked by each CM during the relevant Class
5 Period. SA § 10.1.1. Within 45 calendar days of preliminary approval, after updating addresses,
6 Simpluris will mail to each CM a Notice substantially in the form attached to the SA as **Exhibit A**. SA
7 § 10.1.3. For all returned Notices, Simpluris will use skip tracing to update addresses and initiate a
8 second mailing. SA § 10.1.4.

9 8. Automatic Participation – The Settlement is non-claims-made, and each CM will
10 automatically receive their share of the NSA unless s/he opts out. SA § 11.1.

11 9. Opting Out or Objecting – CMs who wish to opt-out of the Settlement must send a written
12 notice to the Settlement Administrator requesting to opt-out of the Class within 45 calendar days of the
13 date the Notices are mailed out. SA § 11.1. Any CM who properly requests to opt-out will not be entitled
14 to receive any payment under the settlement (except for his or her share of PAGA Penalties) and will not
15 be bound by the settlement (except for the release of PAGA claims). SA § 11.2. A CM may object to
16 the Settlement by sending the Settlement Administrator, within 45 calendar days of the Notice mailing
17 date, a written statement objecting to the Settlement. SA § 1.19, 12.

18 10. Tax Consequences of Settlement Payments – For tax purposes, 15% of each Adjunct
19 Settlement Payment will be allocated as wages and the remaining 85% of each Settlement Payment will
20 be allocated as penalties and interest. SA § 9.3.2. 100% of each Reimbursement Settlement Payment
21 will be deemed non-wage payments. SA § 9.3.3.

22 11. Scope of Release and Final Judgment – CMs will release any and all claims that are
23 alleged, or could reasonably have been alleged based on the facts and claims asserted in the Complaint
24 on their behalf and arising during the relevant Class Period; and claims for PAGA civil penalties based
25 on the Released Claims and arising during the PAGA Period. SA § 17.1. Named Plaintiff will also give
26 an additional general release against Defendant as consideration for his service award. SA § 17.3.

27 **III. OVERVIEW OF THE LITIGATION**

28 **A. Pleadings**

On October 8, 2021, Plaintiff filed a PAGA Notice with the LWDA seeking PAGA penalties for
Defendant's (1) failure to pay wages for all hours worked as required under Labor Code §§ 226.2 and
1194 and Wage Order No. 4-2001 § 4; (2) failure to authorize and permit paid rest breaks and pay

1 premium pay as required under Labor Code §§ 226.2 and 226.7 and Wage Order No. 4-2001, §§ 4, 12;
2 (3) failure to issue accurate itemized wage statements in violation of Cal. Labor Code §§ 226(a) and (e)
3 and 226.2; (4) failure to pay compensation due on discharge from employment in violation of Cal. Labor
4 Code §§ 201-203; and (5) failure to reimburse business expenses in violation of Cal. Labor Code § 2802.
5 Thereafter, the parties agreed to toll Plaintiff's PAGA and class claims in order to attend early mediation.
6 Hammond Decl. ¶ 8. Following a successful mediation, on May 3, 2022, Plaintiff filed her Complaint
7 alleging class claims for the labor code violations alleged in her PAGA Notice, as well as a claim for
8 PAGA penalties. Id. ¶ 8

9 **B. Pre-Mediation Investigation and Discovery**

10 Prior to mediation, Defendant produced key data and documents including Plaintiff's personnel
11 file, payroll calendars, versions of the faculty and employee handbooks in effect during the Class Period,
12 copies of the two Collective Bargaining Agreements ("CBA") applicable to some CMs during the Class
13 Period, and Defendant's expense reimbursement policy applicable to CMs. Defendant also produced
14 spreadsheets showing Adjuncts CMs' course assignments and pay information during the Class Period.
15 Hammond Decl. ¶ 9.

16 Plaintiff's counsel conducted their own investigation and gathered additional documents and
17 information. Plaintiff's counsel also conducted a survey regarding work performed prior to the first day
18 of classes, and expenses incurred in teaching online courses before and during Covid-19, the results of
19 which further inform Plaintiff's analysis of Otis' exposure. Id. ¶ 10.

20 From informal discovery, Plaintiff ascertained that Otis employed Adjunct CMs on a term-by-
21 term basis pursuant to uniform employment contracts providing the assignment start- and end-dates, the
22 flat-rate amount to be paid, and the applicable pay dates. The Contracts provided that Otis has the right
23 to terminate the Contracts including for insufficient enrollment. Otis generally did not issue the final
24 paycheck on the day the Contracts ended, but rather waited until the next regular pay date. Hammond
25 Decl. ¶ 11.

26 Plaintiff also ascertained that while the Contracts began on specific dates (*i.e.*, the first day of
27 classes), Otis required Adjunct CMs to perform work prior to the start of classes, including to prepare
28 syllabi and other course materials. *Id.* ¶ 12. From the exemplar wage statements, Plaintiff confirmed that
Otis did not include any entries for hours actually worked by Adjunct CMs. *Id.* ¶ 13. Beginning with the
fall semester 2021, Otis reclassified Adjuncts who worked as Continuing Education Faculty ("CEF") as

1 hourly employees; and began tracking their hours and including entries for total hours worked and hourly
2 rates on their wage statements. *Id.*

3 Finally, Plaintiff's Counsel also calculated necessary data points for the Reimbursement Class
4 claims, including the class size and the dates during which Reimbursement Class Members were required
5 to work remotely. Hammond Decl. ¶ 15.

6 **C. Mediation**

7 On February 22, 2022, the Parties participated in a mediation session with Ms. Lisa Klerman, an
8 experienced mediator who has mediated numerous wage-hour class and PAGA actions. Prior to the
9 mediation, the parties submitted detailed mediation briefs supported by documents obtained in informal
10 discovery. *Id.* ¶ 16. At the mediation, Defendant vigorously contended that Plaintiff would lose on some
11 or all of her class claims, as follows.

12 **1. Arbitration Defense:** At mediation, Defendant vigorously contended that Plaintiff's class
13 claims were barred by the arbitration agreement it required each employee to agree to in their Contracts
14 as part of their employment, which stated:

15 To the fullest extent permitted by law, both you and Otis College agree that any
16 dispute or controversy arising out of or in connection with this Agreement or
17 your employment with Otis College will be resolved exclusively by final and
18 binding arbitration in Los Angeles, California. Such arbitration shall be
19 conducted pursuant to the procedures required by California law. To the extent
20 they are not inconsistent with the procedures required by California law, the
21 procedures of the [JAMS] Employment Arbitration Rules shall apply in such
22 arbitration.

23 Hammond Decl. ¶ 18. Defendant contended that the Court would find its arbitration clause enforceable
24 and that Plaintiff had therefore waived her rights to pursue class claims. *Lamps Plus, Inc. v. Varela*, 587
25 U.S. ___, 139 S. Ct. 1407 (2019) (a court may not compel class arbitration unless agreement expressly
26 provides for it). Notwithstanding the possibility that Plaintiff could, in principle, file mass arbitrations
27 against Otis, Plaintiff believed a discount was warranted in settlement. Hammond Decl. ¶ 19.

28 **2. Preemption Defense:** Defendant contended that the Adjunct Class claims were
preempted by § 301 of the Labor Management Relations Act ("LMRA"). Defendant asserted that
Plaintiff's claims are inextricably intertwined with the collectively bargained CBAs, and that the LMRA
preempts state law that "conflicts or otherwise stands as an obstacle to the accomplishment and execution
of the full purposes and objectives of federal [labor] law." *Livadas v. Bradshaw*, 512 U.S. 107, 119-22
(1994). Defendant argued that although Plaintiff's California wage and rest break claims are purportedly

1 founded on state law rights, their success (or defeat) is necessarily dependent on the interpretation of the
2 CBAs and therefore are preempted under § 301 of the LMRA. Hammond Decl. ¶ 20.

3 Plaintiff contended that resolution of Plaintiff's state-law claims does not require interpretation
4 of the CBA because the CBA makes no mention of wage statement requirements, expense
5 reimbursement, or payment upon discharge, or any other claim alleged in the Complaint, and therefore
6 there is no provision of the CBA that could be interpreted to resolve these claims. Hammond Decl. ¶ 21.

7 3. **Exemption Defense:** Defendant contended that Adjuncts are exempt under Labor Code
8 § 515.7, effective September 9, 2020, and its predecessor, Labor Code § 515(a), which requires that part-
9 time adjuncts who meet the "duties test" and the "salary test" are exempt from Labor Code §§ 226(a)
10 and 1194. The "duties test" requires that part-time adjuncts are primarily engaged in a profession
11 requiring discretion and independent judgment. IWC Wage Order 4-2001, §1(c). The "salary test"
12 requires that the employee earn "[a] monthly salary equivalent to no less than two times the state
13 minimum wage for employment in which the employee is employed for at least 40 hours per week." §
14 515.7(a)(2)(A). Labor Code § 515.7 created two, new, alternative tests under which instructors who meet
15 the duties test and are paid on a salary basis may be classified as exempt professionals: (1) "classroom
16 hour" test wherein each "classroom hour" (including such activities as class preparation and grading) is
17 compensated at a minimum hourly rate specified in the statute; and (2) a new, "collective bargaining
18 agreement" test whereby the instructor is paid pursuant to a CBA and "the classification of employment
19 in a professional capacity is expressly included [in the CBA] in clear and unambiguous terms"
20 (hereinafter the "CBA test"). § 515.7(a)(2)(B), (C). Hammond Decl. ¶ 22-23.

21 Defendant could have contended that the course rate is a salary because Adjuncts received a
22 predetermined amount each pay period that was not subject to change within each pay period based on
23 the number of hours Adjuncts taught. Defendant also could have contended that Adjuncts were paid
24 pursuant to its CBA which classified them as exempt employees. Therefore, Adjuncts were exempt
25 employees under Labor Code § 515.7. Hammond Decl. ¶ 24.

26 Plaintiff argued that the course rate is a piece rate and not a salary because "salary" connotes a
27 "predetermined amount that is not subject to reduction based upon the quantity or quality of work." *Negri*
28 *v. Koning Assocs.*, 216 Cal. App. 4th 392, 399 (2013) (citing *Kettenring v. Los Angeles Unified School*
Dist., 167 Cal. App. 4th 507, 513-14 (2008)). Here, Otis retained the right to cancel classes if enrollment
did not meet predetermined targets and adjunct instructors' compensation could be reduced if courses
were cancelled due to low enrollment. These practices mean that adjunct instructors' pay was subject to

1 reduction based on quantity of work performed and, therefore, cannot be considered a salary, as required
2 under Labor Code § 515 as modified by Labor Code § 515.7. Hammond Decl. ¶ 25. Plaintiff further
3 argued that even the course rate was a salary, Class Members rarely (if ever) earned enough to meet the
4 salary test under Labor Code § 515; and were never compensated at the minimum classroom hour rate in
5 Labor Code § 515.7. Accordingly, Labor Code § 515.7 does not operate to shorten Defendant's liability.
6 Hammond Decl. ¶ 26-27.

7 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

8 When a negotiated class action settlement has been reached prior to certification, as here, the
9 Court may make an order approving or denying certification of a provisional settlement class. Cal. Rules
10 of Court, Rule 3.769(d). The decision to certify a class is purely a procedural one and should be based
11 on the allegations in the Complaint and not on the perceived factual or legal merit of the class claims.
12 *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-40 (2000).

13 In California, a Class is certifiable if (1) the class is ascertainable and sufficiently numerous; (2)
14 there exists a well-defined community of interest; and (3) class action is a superior method of
15 adjudication. *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012); *Linder*, 23 Cal. 4th
16 at 435. All class certification requirements are met in this case.

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

18 Whether a class is ascertainable is determined by examining the class definition, the size of the
19 class, and the means available for identifying class members. *See Reyes v. Board of Supervisors*, 196
20 Cal. App. 3d 1263, 1271 (1987). Class members are "ascertainable" when they may be readily identified
21 without unreasonable expense or time by reference to official records. *See Noel v. Thrifty Payless, Inc.*,
22 7 Cal. 5th 955, 980 (2019) ("We conclude that the objectives of this requirement are best achieved by
23 regarding a class as ascertainable when it is defined 'in terms of objective characteristics and common
24 transactional facts' that make 'the ultimate identification of class members possible when that
25 identification becomes necessary.'" (quoting *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th
26 908, 915 (2001))). These criteria are met here as Defendant's records are sufficient to permit identification
27 of the members of the Classes.

28 Both the Adjunct and Reimbursement Classes are sufficiently numerous because they consist of
665 and 700 members respectively. Hammond Decl. ¶ 3; *see also Rose v. City of Hayward*, 126 Cal.
App. 3d 926, 934 (1981); 1 Newberg on Class Actions § 3.12 (5th ed. 2011) ("[A] class of 40 or more
members raises a presumption of impracticability of joinder.").

1 **B. “Community of Interest” Exists Among CMs**

2 The “community of interest” requirement embodies three factors: (1) “predominant common
3 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3)
4 class representatives who can adequately represent the class.” *Fireside Bank v. Super. Ct.*, 40 Cal. 4th
5 1069, 1089 (2007) (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981)). Plaintiff
6 satisfies each of these elements.

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

8 Where the defendant employer’s policies or conduct is uniformly directed at a class or classes of
9 employees, as it is here, the class-wide impact of the defendant’s policies satisfies the commonality
10 requirement. *See Sav-On Drugs Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 331 (2004) (upholding class
11 certification, where the common issue was whether the employer properly classified grocery store
12 managers as exempt from California’s overtime requirements). With respect to the Adjunct Class,
13 Plaintiff challenges common classification and pay policies that raise predominant common questions of
14 law and fact, including: (1) whether Defendant misclassified Adjunct CMs as professional exempt; (2)
15 whether Otis’ per course pay constitutes a piece rate; and (3) even if the per course pay is not a piece rate,
16 whether the compensation set out in the Contracts covered work that Adjunct CMs performed prior to
17 the beginning of their contract period. This third question is common to the entire Adjunct Class because
18 Plaintiff alleges that Otis issued form contracts to all the Adjunct CMs (with the contract start date
19 corresponding to the first day of classes), and, yet, required Adjunct CMs to, or knew that Adjunct CMs
20 would, perform work prior to the first day of classes. Another common question is whether Adjunct CMs
21 were “discharged” for purposes of Labor Code § 201 on the end date specified in their contracts. With
22 respect to the Reimbursement Class, Plaintiff raises the common question of law and fact of whether Otis
23 timely reimbursed business expenses necessarily incurred by Reimbursement CMs as a result of working
24 from home during the COVID pandemic.

25 **2. Plaintiff’s Claims Are Typical of the Class Claims**

26 The test of typicality is whether Plaintiff and other CMs “have the same or similar injury,
27 whether the action is based on conduct which is not unique to the named plaintiffs, and whether other
28 class members have been injured by the same course of conduct.” *Seastrom v. Neways, Inc.*, 149 Cal.
App. 4th 1496, 1502 (2007) (internal citations and quotation marks omitted); *see also* 1-3 California
Class Actions Practice and Procedure (2007) § 3.02. Here, Plaintiff’s claims are typical of both Classes
that she seeks to represent because she was subject to the same compensation, classification, and expense

1 reimbursement policies and practices, suffered the same types of injury, and seeks the same types of
2 relief, as the putative Classes.

3 **3. Plaintiff and Her Attorneys Will Adequately Represent the Class.**

4 “Adequacy of representation depends on whether the plaintiff’s attorney is qualified to
5 conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the interests of the
6 class.” *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669, n.21 (1993) (citations and quotation
7 marks omitted). Both elements are satisfied here. Plaintiff’s Counsel are highly skilled and experienced
8 in similar cases and have extensive class action litigation experience. HammondLaw has been appointed
9 class counsel in numerous class actions and has represented thousands of adjunct instructors in similar
10 unpaid wage cases since 2016. Hammond Decl. ¶¶ 6-7. Plaintiff is committed to representing the
11 interests of the Classes, does not have any conflicts with any CM, and her interests are virtually
12 coextensive with those of the CMs. *Id.* ¶ 4.

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

14 Plaintiff and the CMs’ claims are based on Plaintiff’s contentions that Defendant had uniform
15 policies and/or practices of paying Adjunct CMs by the piece, of failing to compensate them for the time
16 spent working prior to the beginning of their contracts and for rest breaks, of paying their final wages
17 after their discharge date, of issuing inaccurate wage statements, and failing to reimburse business
18 expenses. All of these claims involve common evidence, including uniform employment contracts Otis
19 issued to CMs, compensation policies, payroll calendars, wage statements, and reimbursement policies.
20 Plaintiff and the Reimbursement CMs’ claims are based on Plaintiff’s contentions that Defendant had
21 uniform policies and/or practices of failing to timely reimburse Reimbursement CMs for business
22 expenses necessarily incurred as a result of working remotely during the COVID pandemic. Accordingly,
23 it would be inefficient to resolve CMs’ claims at separate trials. *See Bufile v. Dollar Fin. Grp., Inc.*, 162
24 Cal. App. 4th 1193, 1208 (2008). The class action mechanism in this case will also allow Plaintiff and
25 the class to obtain redress for their relatively small claims, which would otherwise be impractical to
26 litigate on an individual basis.

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

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

Court approval of a class action settlement is a two-step process: (1) a preliminary review and
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)

1 § 21.6 (“Manual”); Cal. Rules of Court, Rule 3.769(a); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794,
2 1800-1801 (1996). Thus, the trial court’s preliminary approval of the settlement is simply a conditional
3 finding that the settlement appears to be within the range of acceptable settlements. *See, e.g.*, 4 Newberg
4 on Class Actions § 11.25 (4th ed. 2002); Manual § 21.6. Applying the criteria for preliminary approval
in this case reveals a substantial basis for granting the preliminary approval this Motion seeks.

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

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

15 A discussed below, and as set out in detail in the Hammond Declaration, the proposed Settlement
16 is presumptively fair because (1) it was the product of serious, informed, and non-collusive negotiations;
17 (2) the putative Class is represented by experienced counsel; and (3) the Parties investigated the claims,
18 exchanged key information, and thus Plaintiffs’ Counsel was able to make an informed recommendation
19 about the proposed Settlement. In addition, the reasonableness of the Settlement is further supported by
20 the strengths and risk of the claims asserted, the risk of maintaining class action status, the amount offered
21 to settle, and the endorsement of experienced counsel. Together, all of these factors demonstrate that the
proposed Settlement is preliminarily fair, reasonable, and adequate.

22 The 80.81% of the Gross Settlement allocated to Adjuncts represents 17% of Otis’s maximum
23 exposure on the Adjunct class claims (excluding interest and PAGA penalties); and 70% of Defendant’s
24 realistic exposure (after taking appropriate discounts for Defendant’s actual and potential defenses on the
25 merits and class certification). Hammond Decl. ¶ 54. The 19.19% (\$189,981) of the Gross Settlement
26 allocated to Reimbursement CMs represents 65% of Otis’s maximum exposure on those claims
(excluding interest and PAGA penalties); and 80% of Defendant’s realistic exposure. *Id.* ¶ 61. Given the

substantial relief obtained for the Classes and the uncertainties and delays of litigation, the settlement meets the criteria for preliminary approval.

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

The settlement is the result of hard-fought extensive settlement negotiations between the parties conducted at arm's length and informed by substantial factual and legal investigation. Throughout this case, CMs 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. ¶¶ 6-7.

Class Counsel have spent a considerable amount of time prosecuting this case, including, but not limited to, drafting pleadings, investigating, researching applicable law, meeting and conferring with Defendant's counsel, analyzing documents and data produced by Defendant, preparing for and attending a full-day mediation, and negotiating the settlement agreement and related documents. Hammond Decl. ¶¶ 8-27. A well-respected and experienced mediator, Lisa Klerman, conducted the mediation session. *Id.* ¶ 16.

2. The Settlement Amount is Fair and Reasonable Considering Potential Recovery and the Risks of Litigating the Case

Comparison of the extent of the class recovery to the strength of Plaintiff's case is the most important factor in analyzing the fairness of the settlement. *Kullar*, 168 Cal. App. 4th at 130. The proposed settlement easily passes the *Kullar* test as it will provide the Adjunct class with 70% recovery and the Reimbursement Class with 80% of recovery (excluding interest and PAGA) that could realistically be achieved through further litigation. Although Plaintiff believes that the Classes have strong claims, she acknowledges the risks posed by certification and the merits of each claim, which warrant a settlement at less than "complete victory" value, as addressed below.

a. Unpaid Wages Claim (Labor Code § 1194): Plaintiff alleges that Adjunct CMs were paid on a piece-rate basis, with the piece being the course, and that as result CMs were paid for the hours of course instruction only and were not paid separately for non-teaching tasks, such as preparing for class, grading, office hours, attending department meetings, in violation of Labor Code § 226.2. During the discovery and investigation phase, however, Plaintiff concluded that Adjunct CMs' Contracts explicitly required that Adjunct CMs would "prepare the syllabus and any supporting materials" and to "be available to students outside of class hours regarding academic issues." As a result, for purposes of settlement, Plaintiff limited her claim only to work performed prior to the first day of classes on the basis that the only dates on the Contracts indicating the start of the contract were the first day of classes and, thus, compensation in the Contract was also only for that period, and not for work performed prior to that

1 period. Plaintiff calculated Otis's maximum exposure to the unpaid wages claim as **\$504,366** (excluding
2 interest). Hammond Decl. ¶ 29-31.

3 **Class Certification:** Defendant contended that this claim was not certifiable because there would
4 be variability in the amount of time actually spent, if any, in preparing to teach the course. In addition,
5 Defendant contended that Adjunct CMs compensation was a salary that incorporated all duties, including
6 prior to the first day of the course. Plaintiff applied a 25% discount for this risk. Hammond Decl. ¶ 32.

7 **Merits:** As to the merits, Plaintiff applied a 25% discount for the risk that CMs' per-course
8 compensation, whether a piece-rate or a salary, included the hours worked before the start of the Contracts
9 because those hours were spent on tasks directly related to the course teaching assignment set out in the
10 Contracts; and for Defendant's contention that Plaintiff's estimated number of hours worked prior to each
11 Contract was exaggerated, especially for those Adjunct CMs who taught the same course multiple times.
12 These discounts reduced Otis's realistic exposure on the unpaid wage claim to \$283,706. *Id.* ¶ 33.

13 **b. Rest Break Claim (Labor Code § 226.7):** Plaintiff alleges that Defendant compensated
14 Adjunct CMs on a piece-rate basis, and as such was required, but failed, to pay Adjunct CMs hourly and
15 separately from the piece for the time spent on rest breaks pursuant to Labor Code § 226.2. Thus, Adjunct
16 CMs who worked 3.5 hours or more were entitled to hourly and separate pay for rest breaks, and were
17 entitled to premium pay for each unpaid rest break. *Amaro v. Gerawan Farming, Inc.*, No. 1:14-cv-00147-
18 DAD-SAB, 2016 U.S. Dist. LEXIS 112540, at *5 (E.D. Cal. Aug. 23, 2016). Even if not piece-rate,
19 Plaintiff alleged that Adjunct CMs were entitled to off-duty rest breaks because they were non-exempt,
20 but Otis imposed uniform policies and procedures that impeded them from taking rest breaks. Hammond
21 Decl. ¶ 36. Plaintiff calculated Defendant's liability on the rest break claim, assuming a 100% violation
22 rate, as **\$1,620,495** (excluding interest). Hammond Decl. ¶ 34-35.

23 **Class Certification:** Defendant could have argued that even if Adjunct CMs were paid on a piece-
24 rate basis, that the piece-rate included time spent on rest breaks, and what was included in the piece-rate
25 would depend on each CM's understanding of what the course rate covered, and individualized issues
26 would predominate. As to Plaintiff's claim that CMs were entitled to rest breaks as non-exempt
27 employees but the nature of CMs employment and policies and/or practices of Otis impeded CMs from
28 taking rest breaks, Defendant argued that it did not maintain rest break records which would lead to
individualized issues of whether some CMs took rest breaks while others did not. Plaintiff applied a 20%
discount for these arguments. Hammond Decl. ¶ 36-37

Merits: Defendant contended that Plaintiff would lose on the merits because Adjunct CMs were

properly classified as exempt employees and were not entitled to rest breaks. Plaintiff gave some weight to Otis' argument that the course rate may be found to be a salary because it appeared that CMs did receive a predetermined amount each pay period that was not subject to change within each pay period based on the number of hours taught. Defendant also contended that even if Adjuncts were entitled to rest breaks, a 100% violation rate was highly unrealistic. Plaintiff applied a further 50% discount for these arguments, which reduced Otis' exposure to **\$648,198**. *Id.* ¶ 38.

c. **Wage Statement Claim (Labor Code § 226(a) and 226.2(a)):** Plaintiff alleges that during the Adjunct Class Period, Adjunct CMs, as non-exempt piece rate employees, were entitled to receive accurate itemized wage statements that listed their hours worked, hourly rate, and piece rate information, pursuant to Labor Code §§ 226(a) and 226.2(a). However, Plaintiff alleges that Otis failed to provide Adjunct CMs with accurate wage statements and that these failures were the result of Defendant's regular compensation policies and thus knowing and intentional. Plaintiff alleged that Adjunct CMs suffered injury because they could not determine from the wage statements alone the number of actual hours worked, or an applicable hourly rate. Plaintiff calculated Defendant's maximum liability under Labor Code § 226(e) as **\$578,000**. Hammond Decl. ¶¶ 39-41.

Class Certification: Plaintiff applied only a nominal discount of 10% for the certification risk because wage statement claims are particularly well-suited to class certification. See *Lubin v. The Wackenhut Corp.*, 5 Cal. App. 5th 926 (2016); see also *Torres v. Air to Ground Services, Inc.*, 300 F.R.D. 386, 403 (C.D. Cal. 2014). Hammond Decl. ¶ 42.

Merits: Plaintiff applied a 25% reduction for the risk of losing on the merits based on Defendant's contentions that there was no knowing and intentional violation or injury because Otis had a good faith defense that Class Members were exempt.² Defendant also could have contended that the maximum applicable statutory penalty was the initial penalty of \$50 per wage statement because Plaintiff had not established that Defendant ever received notice from the labor commissioner or a court, and so there are arguably no "subsequent" violations. *Robison v. Open Top Sightseeing San Francisco, LLC*, 2018 U.S. Dist. LEXIS 24556, at **52-58 (N.D. Cal. Feb 14, 2018); *Bernstein v. Virgin Am., Inc.*, 2021 U.S. App. LEXIS 6641, *35-36 (9th Cir. Mar. 8, 2021) (holding that "subsequent" violations for purposes of PAGA

² Although this argument has been recognized by the federal district courts, it has been rejected by California state courts. *Kao v. Holiday*, 12 Cal. App. 5th 947, 962 (2017) (finding employer's failure to include hours worked on wage statement as a result of misclassifying employee as exempt, was knowing and intentional because the employer knew the fact that the information was not provided); and *Furry v. East Bay Publishing, LLC*, 30 Cal. App. 5th 1072, 1085 (2018).

do not occur until employer has been notified that it is violating a Labor Code provision). After applying discounts, Defendant's realistic exposure was **\$390,150**. Hammond Decl. ¶ 43.

d. **Waiting Time Penalties (Labor Code § 203)**: Plaintiff alleges that Adjunct CMs were discharged on the last day of each term, upon completion of their Contract. Hammond Decl. ¶ 39. However, because Otis followed its regular payroll practices when paying Adjunct CMs, the final paycheck date generally fell after the end of Contract date, which Plaintiff alleges entitles CMs to waiting time penalties under Labor Code § 203. Plaintiff calculated that waiting time penalties are **\$1,890,956**. *Id.* ¶ 45.

Class Certification: Plaintiff applied a minimal 10% discount for the risk on class certification because her theory of liability rests on common legal and factual questions of what constitutes a discharge within the meaning of Labor Code § 201, whether Contracts are agreements for a definitive period of time, what is the end date of the Contract, and whether late payment was willful. *See Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2014 U.S. Dist. LEXIS 314438, at *25 (N.D. Cal. Mar. 9, 2014) (holding that "claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action") (citing cases). Hammond Decl. ¶ 46.

Merits: Plaintiff applied a further 50% discount on the merits because Plaintiff faced the following arguments: (1) there was no "discharge" at the end of each contract under *Elliot v. Spherion Pac. Work, LLC*, 572 F.Supp. 2d 1169, 1176-77 (C.D. Cal. 2008), because the employment of many Adjunct CMs' continued from term to term; and (2) Otis had a good faith dispute that Class Members were properly classified as exempt and were not owed any wages for non-teaching time or rest breaks. These defenses could negate the willfulness requirement of Labor Code § 203. *See Barnhill v. Roberts Saunders & Co.*, 125 Cal. App. 3d 1, 8-9 (1981) (an employer's failure to pay wages is not "willful," if the legal 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, Plaintiff determined that Otis's exposure on the waiting time penalties claim is **\$850,930**. Hammond Decl. ¶ 47.

e. **Adjunct Unreimbursed Expenses Claim (Labor Code § 2802)**: Plaintiff alleged that throughout the Class Period, Otis did not reimburse Adjunct CMs who taught online courses for their necessarily incurred home office expenses. Plaintiff further alleged that, starting in March 2020, as a result of COVID-19, Otis required all Adjunct CMs to teach courses remotely from home. Plaintiff contends that under Labor Code § 2802, Adjunct CMs were entitled to be compensated for business expenses, including the cost of home internet, necessarily incurred as a result of teaching courses online.

1 Plaintiff calculated the unreimbursed expenses of Adjunct CMs as **\$177,918** (excluding interest).
2 Hammond Decl. ¶ 48.

3 **Class Certification and Merits Risks:** Plaintiff acknowledges that there were varying practices
4 with regard to incurring expenses that pose an obstacle to class certification, and applied a 25% reduction
5 for class certification. Plaintiff applied a further 25% discount based on anticipated arguments that even
6 if expenses were incurred, they were voluntary and/or minimal, or that Adjuncts could have requested
7 reimbursement for such expenses pursuant to Otis' Travel and Business Expense Reimbursement Policy.
8 After applying these discounts, for settlement purposes, Plaintiff calculated Defendant's realistic
9 exposure as **\$100,079**. Hammond Decl. ¶¶ 51-52.

10 **The Gross Settlement Allocated to Adjunct Class Claims Is Fair and Reasonable:** Plaintiff
11 calculated Otis's maximum exposure on the Class claims (excluding interest and PAGA) as \$4,771,736.
12 After class certification and merits discounts, Plaintiff estimated Defendant's *realistic* exposure as
13 \$2,273,063. Plaintiff then applied a further 50% discount for the risk that the Court would find Otis'
14 arbitration agreement barred Plaintiff's class claims, which reduced its realistic liability to \$1,136,532.
15 Hammond Decl. ¶ 53. The \$800,019 of the Gross Settlement allocated to Adjuncts represents 17% of
16 Defendant's maximum exposure and 70% of its realistic exposure (excluding PAGA). Hammond Decl.
17 ¶ 54. Approximately \$457,385 will be paid to the Adjunct Class *pro rata* basis based on the number of
18 pay periods worked during the Adjunct Class Period. The recovery per Adjunct CM is \$687.80 net and
19 \$1,203.04 gross. *Id.* ¶ 55. An Adjunct CM who worked the entire Adjunct Class Period can expect to
20 receive approximately \$2,079.02. *Id.* These are substantial payments, especially in light of Defendant's
21 arbitration agreement, and compare favorably with similar cases where plaintiffs faced risk based on an
22 arbitration agreement including *Chindamo v. Chapman University*, Case No. 30-2020-01147814-CU-
23 OE-CXC (Orange County Superior Court, April 15, 2022) (finally approving wage and hour class action
24 settlement with an average recovery per adjunct of \$627.73 gross and \$361.69 net); *Merlan et al. v.*
25 *Alliant Int'l University*, Case No. 37-2019-00064053-CU-OE-CTL (San Diego Superior Court,
26 November 2, 2021) (finally approving wage and hour class action settlement with an average recovery
27 per adjunct of \$886 gross and \$511.62 net); *Harris-Foster v. University of Phoenix, Inc.*, Case No.
28 19019028 (Alameda County Superior Court, March 17, 2021) (finally approving wage and hour class
action settlement with an average recovery per adjunct average recovery of \$828 gross and \$516 net).
Hammond Decl. ¶ 56.

1 **h. Reimbursement Class Claims;** Plaintiff alleged that, as a result of the COVID-19
2 pandemic and the state of emergency declared in California, on or about March 4, 2020, and until June
3 30, 2021, Otis closed its campuses and required its employees to work from home. As a result, Otis’
4 employees incurred home internet and cellular phone costs, amongst other costs, in carrying out their job
5 duties for Otis, without any reimbursement. Plaintiff calculated Otis’ liability (excluding interest and
PAGA) as **\$292,500**. Hammond Decl. ¶ 57.

6 **Class Certification / Merits Risk:** Plaintiff applied a 10% discount based on the fact that there
7 were varying practices with regard to incurring expenses by Reimbursement CMs, which posed a risk to
8 class certification, as well as for the risk presented by Defendant’s arbitration agreement (which was a
9 smaller risk factor non-adjunct claims because Reimbursement CMs did not sign arbitration agreements).
10 Hammond Decl. ¶ 59. As to the merits, Defendant could have argued that even if expenses were incurred,
11 these were voluntary and/or minimal because Otis provided laptops and Voice Over Internet Protocol
12 (“VOIP”) software to Reimbursement CMs which reduced its liability at least as to cell phone expenses;
13 and because Reimbursement CMs have requested reimbursement for remote work expenses pursuant to
14 Otis’ Travel and Business Expense Reimbursement Policy. Plaintiff applied a further 10% discount for
the risks which reduced Defendant’s exposure to **\$236,925**. Hammond Decl. ¶ 60.

15 **The Allocation to the Reimbursement Class is Fair and Reasonable:** The \$189,981 of the
16 GSA allocated to Reimbursement Class represents 65% of Defendant’s maximum exposure and 80% of
17 its realistic exposure. Approximately \$108,615 will be distributed to Reimbursement Class Members *pro*
18 *rata* based on the number of pay periods worked by them during the Reimbursement Class Period. The
19 average net payment to Reimbursement Class Members is \$155.56 and the average gross is \$271.40. A
20 Reimbursement CM who worked for the entire Reimbursement Class Period can expect to receive
21 approximately \$434.46. These are substantial payments, especially in light of Defendant’s many
22 defenses. Hammond Decl. ¶ 61.

23 **i. The PAGA Allocation is Fair and Adequate:** Plaintiff calculates Otis’ maximum
24 liability for PAGA Penalties as \$566,500 for the adjunct claims (using a penalty of \$100 per pay period
25 for Adjunct CMs because Defendant never received notice from the Labor Commissioner or the Court
26 so there are arguably no “subsequent” violations, and assuming the Court would not allow “stacking” of
27 PAGA penalties for each separate Labor Code violations); and \$218,400 for the Reimbursement claims
28 (using a penalty of \$100 per month because remote work expenses are typically reimbursed once per
month). *Bernstein v. Virgin Am., Inc.*, Nos. 19-15382, 20-15186, 2021 U.S. App. LEXIS 6641, *35-36

1 (9th Cir. Mar. 8, 2021) (holding that “subsequent” violations for purposes of PAGA do not occur until
2 employer has been notified that it is violating a Labor Code provision). Hammond Decl. ¶ 62-63. The
3 \$25,000 allocated to PAGA penalties represents approximately 3% of Defendant’s exposure to PAGA
4 penalties, which is comparable to PAGA allocations in similar cases that received final approval from
5 California Superior Courts including. Hammond Decl. ¶ 64. This allocation is fair and reasonable for
6 several reasons.

7 First, the overall settlement resulted in significant relief, which is what courts look at when
8 assessing amount attributed to PAGA penalties. *O’Connor v. Uber Techs., Inc.*, No. 201 F. Supp. 3d
9 1110, 1134 (N.D. Cal. Aug. 18, 2016) (where settlement for the class claims is robust, the purpose of
10 PAGA may be fulfilled because by providing fair compensation to class members, the settlement has a
11 deterrent effect on defendant and other employers, thus fulfilling the purpose of PAGA). In *Gola v.*
12 *University of San Francisco*, No. CGC-18-565018 (San Francisco Cnty. Super. Ct. March 3, 2021) a
13 recent case brought by HammondLaw on behalf of adjunct instructors, the court found that substantial
14 monetary relief in form of statutory penalties under § 226(e) (and fees and costs plaintiff would seek)
15 acted as a sufficient punishment and deterrent, and awarded only 15% of the full PAGA penalties—and
16 this was a case where defendant did not have a good faith defense and did not change any practices to
17 comply after the lawsuit was filed. Hammond Decl. ¶ 66.

18 Second, the Court could reduce any award of PAGA penalties as “unjust, arbitrary and oppressive,
19 or confiscatory” under Labor Code § 2699(e)(2) on the theory that Otis operated in good faith and
20 reasonably believed it was in compliance with the Labor Code. *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030,
21 1037 (2016) (significant reduction to PAGA penalties appropriate because the law was not clear and there
22 was thus no deliberate violation); *Mooiman et al. v Saint Mary’s College of California*, Case No. C19-
23 02092 (Contra Costa County Superior Court) (June 10, 2021)(finally approving PAGA allocation
24 representing 1% of the maximum PAGA penalties including because “defendant changed many of the
25 policies at issue before the action was brought, that there is a substantial monetary award which in part
26 serves the deterrent function of a penalty, and that defendant had some arguments of “good faith,” that
27 would mitigate penalties”). Moreover, Otis argued that it was highly unlikely that the Court would award
28 \$218,000 in PAGA penalties to the Reimbursement Class where damages sustained by that Class were
only 25% more than that amount (i.e., approximately \$292,500). Hammond Decl. ¶ 67.

Third, in order to recover any PAGA penalties, Plaintiff would be required at trial to prove that
each Aggrieved Employee suffered a violation for each pay period the employee worked, which would

1 be difficult in light of Defendant's contentions discussed above. *Id.* ¶ 68.

2 Fourth, although class certification requirements do not apply to PAGA claims, "such claims can
3 be stricken if they are found to be 'unmanageable,'" and because only CMs who actually incurred unpaid
4 wages, unpaid premium pay, or unreimbursed expenses during a particular pay period could recover
5 PAGA penalties for those violations, Defendant could have disputed that there is a manageable way to
6 determine who was entitled to such penalties. *See, e.g., Raphael v. Tesoro Ref & Mktg. Co.*, No. 2:15-
cv-02862-ODW, 2015 U.S. Dist. LEXIS 130532, at *5 (C.D. Cal. Sept. 25, 2015). Hammond Decl. ¶ 69.

7 **3. The Risk, Expense, Complexity and Likely Duration of Further Litigation**
8 **Support the Fairness and Reasonableness of the Settlement**

9 Defendant strongly disagreed as to the merits of Plaintiff's claims and is convinced that Plaintiff
10 has no right to seek class-wide relief in court in light of its arbitration agreement. Assuming some of the
11 claims proceeded to trial, the losing party would likely appeal, given that some of the central legal issues
12 in this case have not been conclusively addressed by an appellate court. This process would take years to
13 resolve. Instead, this settlement provides an early resolution of this dispute, and CMs will obtain a
14 recovery in the relatively near future if the settlement is finally approved.

15 **4. The Extent of Discovery Completed and The Stage of the Proceedings**

16 As described in detail in Hammond Declaration, the parties have engaged in extensive
17 investigation and informal discovery and were adequately informed to make the decision to settle this
18 case on the proposed terms. Hammond Decl. ¶ 9-15.

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

20 As discussed above, Class Counsel has extensive experience in class action litigation, and, in
21 particular wage-and-hour class actions brought on behalf of adjunct instructors and have been determined
22 by numerous courts to be adequate class counsel. Hammond Decl. ¶¶ 6-7. Class Counsel has represented
23 thousands of adjunct instructors in similar unpaid wage cases since 2016. *Id.* Class Counsel considers
24 the settlement to be fair, reasonable and adequate. The average net recovery per Adjunct CM is \$687.80
25 and the average gross recovery is \$1,203.04. *Id.* ¶ 55. The average recovery per Reimbursement CMs
26 will be \$155.56 net and \$271.40 gross. *Id.* ¶ 61. This are very good results when considering Defendant's
27 many defenses discussed above.

28 **6. Reaction of The CMs to The Proposed Settlement**

It is premature to address this factor, since notice has not yet been sent out. The settlement,
however, confers substantial benefit on the CMs and reasonably tailors each CM's claim to the amount
he or she will receive. This promises an overall favorable response.

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

2 Constitutional due process requires that CMs be provided with notice sufficient to give them an
3 opportunity to be heard in the proceedings. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306,
4 314 (1950). Proper notice must provide CMs with sufficient information to make an informed decision
5 to accept or object to the settlement. *See id.*

6 In the instant case, the proposed Notice meets these standards since it provides all the information
7 a reasonable person would need to make a fully informed decision about the settlement. The proposed
8 Notice informs CMs of (1) the material terms of the settlement, (2) the proposed fees and costs of Class
9 Counsel and for settlement administration, (3) the proposed enhancement award to the Named Plaintiff;
10 (4) how CMs may opt out of, or object to the Settlement; (5) details about the court hearing on settlement
11 approval, and (6) how CMs can obtain additional information. *See* Cal. Rules of Court, Rule 3.766 and
12 **Exhibit A** to the Settlement Agreement. In addition, the proposed Notice contains information about
13 each Adjunct CM's estimated award under the distribution formula (and how Adjunct CMs can challenge
14 the data used in calculating their settlement awards), each Reimbursement CM's estimated award, and
15 the tax treatment and possible tax consequences of their awards. Therefore, the Court should approve
16 the Notice.

17 The procedure for distribution of notice meets the standard requiring that the notice has "a
18 reasonable chance of reaching a substantial percentage of the CMs." *Cartt v. Super. Ct.*, 50 Cal. App. 3d
19 960, 974 (1975). Here, the Notice will be sent by first class mail to the most recent address of each CM
20 (SA § 10.1.3) and skip tracing will be employed for all Notices returned as undeliverable. SA § 10.1.4.
21 As such, the Notice is likely to reach most, if not all, CMs. Therefore, the Court should approve the
22 procedure/method for distribution of Notice.

23 **D. The Service Award to the Class Representative Is Reasonable**

24 Plaintiff will request an enhancement award of \$7,500 to recognize the time and effort she
25 expended on behalf of the Class, the reputational risk associated with suing her employer, and the general
26 release she is giving Defendant. Hammond Decl. ¶ 76. The requested service award falls well within the
27 range of incentive payments typically awarded to Class Representatives in similar class actions. *See e.g.*,
28 *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (affirming incentive awards of
\$10,000).

E. The Cy Pres Designee is Appropriate

 The Settlement designates Bet Tzedek as the *cy pres* beneficiary and recipient of funds associated

1 with any uncashed checks. SA § 14.2. Bet Tzedek is a non-profit organization that provides free legal
2 services to people living in poverty and for communities victimized by discrimination and civil rights
3 abuses. Hammond Decl. ¶ 78. In compliance with Code of Civil Proc. § 382.4, Class Counsel certifies
4 that they have no connection to or relationship with Bet Tzedek that could reasonably create the
5 appearance of impropriety as between the selection of the recipient of the money or thing of value and
the interests of the class. Id.

6 **F. The Requested Attorneys' Fees and Costs Are Reasonable**

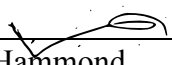
7 In addition, Plaintiff's Counsel will request attorneys' fees of not more than 35% of the GSA. SA
8 § 5. Plaintiff also requests reimbursement for out-of-pocket litigation costs and expenses incurred by
9 Class Counsel up to \$25,000. Id. If the Court grants preliminary approval and authorizes the
10 dissemination of notice of the settlement to the class, Class Counsel anticipates filing a Motion for
Attorneys' Fees and Costs that will be scheduled to be heard following the notice process. Id. ¶ 75.

11 **VI. CONCLUSION**

12 In summary, the settlement provides substantial relief for the Classes and is clearly within the
13 range of acceptable settlements. Accordingly, Plaintiff respectfully requests that the Court preliminarily
14 grant certification of the case as a class action and of Plaintiff and her attorneys as Class Representatives,
15 approve the settlement, and enter an order requiring notice procedures and a final approval hearing
16 consistent with Plaintiff's proposed schedule, as provided for in the proposed Order Granting Preliminary
Approval submitted with Plaintiff's Motion.

17
18 DATED: August 26, 2022

Respectfully submitted,

19
20 
Julian Hammond

Attorneys for Plaintiff and the Putative Class