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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JALEEN ROBERTS, in a Representative capacity only, and on behalf of other members of the general public similarly situated,

Plaintiff,

v.

ENCONTRO NORTH PARK, LLC, a California Limited Liability Company; and DOES 1-10, inclusive

Defendants

CASE NO. 37-2022-00030477-CU-OE-CTL

MEMORANDUM IN SUPPORT OF PLAINTIFF'S *UNOPPOSED* MOTION FOR CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF GOOD FAITH DETERMINATION OF CLASS ACTION SETTLEMENT

Date: August 4, 2023
Time: 1:30 p.m.
Judge: Hon. Timothy Taylor
Dept.: C-72

I. SUMMARY OF MOTION

This matter is a “Wage and Hour” representative (*i.e.* “PAGA”) and *proposed* class action. Plaintiff JALEEN ROBERTS, in a Representative capacity only, and on behalf of other members of the general public similarly situated, (“Plaintiff”) bring Labor Code claims against Defendant ENCONTRO NORTH PARK, LLC. (hereinafter “Defendant” or “ENCONTRO”).

After nearly 1 and ½ years of extensive litigation, exchanges on at least 7 sets of formal discovery devices, and a full day Mediation, the parties have agreed to the terms of a proposed class action. The parties have drafted and executed a Joint Stipulation of Class and PAGA Action Settlement (the “Agreement”), lodged as **Exhibit A**¹ to the declaration of Eric Yaeckel. Briefly, the parties’ settlement figures are estimated as follows:

Approximate size of class:	400 individuals
Gross settlement amount (“GSA”):	\$120,000.00
Claims administration:	\$10,000.00 (or less)
Costs/expenses of litigation:	\$11,000.00 (or less)
Claims Period:	30 days from Mailing of Notice
Class representative incentive:	\$5,000.00
LWDA payment:	\$7,500.00 (75% Share of \$10,000 allocation)
Attorney's fees:	1/3 of GSA (\$40,000.00)

Estimated average payment (before taxes) to each Class Member based on the above figures will be **\$116.25**. These estimates are an “average” only, and do not account for the fact that class members will receive more or less than an “average” share, as the amounts owed are calculated based on the number of workweeks each individual worked for Defendant during the class period.

Please Note: This is a **non reversionary** settlement, in that the entire net settlement amount, after the awarded costs, taxes and fees are deducted, will be automatically disbursed to all class members who do not file a request to “opt-out” of participation in the lawsuit. (**Exhibit A** at ¶ 8.)

The parties now move the Court for an order: **(1)** provisionally certifying the proposed class;

¹ This Memorandum incorporates by reference the definitions in the Agreement and the terms used herein are intended to have the same meaning as set forth in the Agreement.

(2) preliminarily approving the proposed class action settlement; (3) directing that Notice (defined below) of the proposed settlement be provided to Class Members; and (4) scheduling a hearing for final approval of the proposed settlement and entry of the parties' proposed Final Order Approving Class Action Settlement.

II. FACTUAL AND PROCEDURAL HISTORY

The putative class is comprised of Defendant's California-based, nonexempt employees. The relevant procedural history is set forth below.

1. The Operative Claims, Investigation and Informal Discovery Conducted

On August 2, 2022, Plaintiff Roberts filed the Complaint in this matter. The original Complaint alleged PAGA representative claims, under the California Labor code involving, *inter alia*, (1) failure to pay minimum wages; (2) failure to pay off-the-clock wages; (3) failure to pay proper overtime compensation; (4) failure to provide meal breaks; (5) failure to provide rest breaks; (6) failure to reimburse employees for necessary business expenses; (7) failure to provide accurate itemized wage statements; and (8) failure to pay all wages to upon termination. (Yaeckel Decl. ¶ 3; ROA # 1.)

Please Note: As part of the Settlement, the parties have stipulated to a first Amended Complaint which adds class claims based on the same underlying conduct. (ROA # 22.)

On August 25, 2022, Plaintiff propounded discovery requests on Defendant, including requests for admission, special interrogatories, requests for production of documents, and general and employment form interrogatories. (Yaeckel decl. ¶ 4.) Through these requests, Plaintiff sought, among other information and documents, the identities of putative class members, Defendant's compensation policies, meal and rest period policies, employee handbooks, wage statements, payroll records, time records, job descriptions, and reimbursement policies. (*Id.*)

Defendant provided discovery responses, documents, and objections to Plaintiff's requests. After a meet and confer process, Defendant produced, *inter alia*, Plaintiff's time and wage records, copies of the relevant employee handbooks, copies of all other relevant employee policies, the contents of Plaintiff's employee file, Plaintiff's time records, and itemized wage statements. (Yaeckel decl. ¶ 5.)

Following substantive discovery, Defendant (through its counsel), reached out to attempt to

1 explore early resolution of this matter. As part of the settlement discussions, Defendant agreed to
2 voluntarily produce and additional information. The production included all relevant policies and
3 procedures. It also included large electronic sampling of other class members' time and wage data.
4 (Yaeckel decl. ¶ 6.)

5 Plaintiff also requested Defendant provide additional informal discovery so that the parties
6 could experience a meaningful mediation. (Yaeckel decl. ¶ 7.) Defendant provided informal discovery
7 which consisted of, *inter alia*, the number of current and former employees who worked for Defendant
8 during the limitations period, meal and rest period premiums paid, pay periods at issue, a redacted
9 sampling of employee time records and wage statements, as well as confirmation that various policies
10 and agreements were standard as to the class. (*Id.*)

11 **2. Settlement Discussions**

12 On May 10, 2023, the Parties attended a full day mediation before the experienced "Wage and
13 Hour" mediator, Michael Roberts. (Yaeckel decl. ¶ 8.) Prior to the mediation, counsel for both parties
14 agreed to the informal exchange of information pertinent to a class-wide settlement. Both parties
15 prepared and exchanged detailed mediation briefs. (*Id.*) At the conclusion of mediation, the parties
16 agreed on the key terms of a settlement that would globally resolve all class and representative wage
17 and hour claims asserted. (*Id.*)

18 The parties continued negotiation over final settlement terms. As of June 14, 2023, the parties
19 agreed on all final terms of the settlement which was memorialized in the Agreement, which is
20 attached to the declaration of Eric K. Yaeckel as **Exhibit A**. The parties now seek the Court's
21 preliminary approval of the Agreement.

22 **III. SETTLEMENT TERMS**

23 The Agreement includes the following key terms:

24 **1. Contingent Nature of the Settlement**

25 The parties entered into the Agreement exclusively for the purpose of resolving the action and
26 facilitating the negotiated settlement. Should the Court, for any reason, not preliminarily and/or finally
27 approve the Agreement, or if the Agreement is terminated for any reason, then the parties have agreed
28

1 that the Agreement will be null and void and this action will revert to its status with respect to any and
2 all matters as they existed prior to the parties signing the Agreement. (Ex. A at ¶ 32.)

3 **2. Description of the Settlement Classes**

4 Solely for the purposes of the Agreement, the parties have agreed that the term “Class
5 Member” is defined as:

6 all current and former non-exempt persons employees of Defendant who were
7 employed in California between June 7, 2019 through the date of Preliminary
Approval. (Exhibit A at ¶ Z.)

8 The parties agree that the Settlement Class consists of approximately four hundred (400)
9 individuals, as determined by Defendant’s employment records. (Yaeckel decl. ¶ 10.)

10 **3. Appointment of Settlement Administrator**

11 The parties agreed to use CAC Services, LLC, as the “Settlement Administrator” for purposes
12 of providing the Notice to Settlement Class Members, issuing payments pursuant to the Agreement,
13 and to administer the claims. (Ex. A at ¶ X.) CAC’s sole business has been the administration of class
14 action settlements and class action notices, and has extensive experience. (Yaeckel decl. ¶ 9.)

15 **4. Scope of the Release**

16 For purposes of the Agreement, Class Members release all “Wage and Hour” claims that are
17 either or both: (1) alleged in the First Amended Complaint; or (2) or which relate to or arise out of the
18 allegations and claims asserted in the First Amended Complaint and could have been alleged in the
19 complaint relating in any way to violations of the wage and hour provisions of the California Labor
20 Code or the California Wage Orders, or any other wage and hour provisions of California law. The
21 precise release language is reflected in Exhibit A at ¶ R.

22 **5. Cash Payment and Allocation**

23 The Agreement provides for an automatic cash payment to the members of the Class. No
24 claims need be submitted. Class Members will be entitled to an average share of approximately
25 **\$116.25**. (Yaeckel Decl. ¶10.) The actual share will depend on the amount of pay periods they were
26 employed during the limitations period. The Cash Payment will be allocated as follows: ten percent
27 (10%) constitutes wages (subject to withholdings and deductions and reported as wage income on a
28

Form W-2) and ninety percent (90%) constitutes non-wage penalties, and interest. (**Exhibit A** at ¶ 27.)

6. Proposed Settlement and Notice Program

Subject to Court approval, the Parties agree that, within ten (10) days after the Court enters any Order granting preliminary approval of the Settlement, Defendant will provide to the Settlement Administrator the following information for each Settlement Class Member in a reasonable format requested by the Settlement Administrator: class member names and last known home addresses, telephone numbers, social security numbers, weeks worked with Defendant based on Defendant's records, and last known mailing addresses for each member of the Class. (*See Exhibit A* at ¶ 13.) The Settlement Administrator will perform address updates and verifications, as necessary, prior to the first mailing. Within 10 days of receipt of the Class List, the Settlement Administrator will mail the Class Notice ("Notice") to each Class Member, by first class mail. (*See Exhibit A*, at ¶ 14.) The Notice is attached to the declaration of Eric Yaeckel as **Exhibit B**.

The Notice is designed to provide Class Members with detailed information about the lawsuit, the Agreement, their rights and the settlement benefits, and how to participate, exclude themselves, or object. (*See Exhibit B*.) From the date the Notices are mailed, the Class Members will have thirty (30) calendar days to request to be excluded, or file objections. (*See Exhibit "A,"* at ¶ V; **Exhibit B**.)

The Class members will be given notice of the release and information about their expected settlement amount based on the workweeks they were employed with Defendant during the Class period. If they wish to receive a share of the Settlement, class members need not take any additional action. Class Members are also given instructions on how to exclude themselves, file objections, or appear at the final approval hearing to state objections. (**Exhibit A** at ¶¶ 18 and 22 and **Exhibit B**.)

The Notice program also has additional safeguards. For instance, for Notices returned as non-deliverable, the Class Administrator will perform a skip-trace and mail or re-mail Notice to an updated address (if any), upon receipt of the returned mail. (*See Exhibit A* at ¶ 15.) It is the intent of the parties that all reasonable means be used to locate Class Members.

The Notice will inform Class Members of the number of weeks worked during the Class Period (according to Defendant's records) and their estimated settlement amounts. (*See Exhibit A* at ¶ 16.)

1 Class members will have the opportunity to dispute the workweek calculation by submitting written
2 documentation to the Claims Administrator. (**Exhibit B** at § IV.)

3 PAGA Members do **not** require notice prior to a settlement nor may they opt out of the PAGA
4 penalty portion of the settlement. *Robinson v. S. Ctys. Oil Co.*, (2020) 53 Cal. App. 5th 476, 482–83,
5 review denied (Nov. 24, 2020). However, all PAGA members are also Class Members and can opt-out
6 to retain their individual claims. This is explained in the Class Notice. (**Exhibit B** at § IV.)

7 **7. Contingent Costs**

8 Defendant agrees to pay Forty Thousand Dollars (\$40,000.00) in attorneys’ fees, which is
9 thirty-three and one-third (33 1/3%) of the total settlement, and up to Eleven Thousand Dollars
10 (\$11,000.00) in litigation costs. (See **Exhibit A** at ¶ 4.) For costs incurred in administrating the
11 settlement, Defendant will pay no more than Ten Thousand Dollars (\$10,000.00). (See **Exhibit A** at
12 ¶ 6.)

13 Defendant also agrees to allocate Ten Thousand Dollars (\$10,000.00) to Plaintiff’s PAGA
14 claims with 75% of the amount, or \$7,500.00, being paid to the LWDA, and 25%, or \$2,500.00, being
15 distributed amongst the class members. (See **Exhibit A** at ¶ 7.)

16 Defendant also agrees to allocate to Plaintiff Roberts Five Thousand Dollars (\$5,000.00), as
17 an enhancement award in consideration for her services as Class Representative. (See **Exhibit A** at ¶
18 5.) The enhancement awards were decided pursuant to good faith negotiations and is intended to
19 recognize that it was she who initiated the lawsuit, initiated the PAGA claims, provided critical
20 documents and witnesses to her attorneys, and worked with her attorney to propound and prepare
21 written discovery, all in an effort to obtain moneys allegedly owed not only to herself, but to hundreds
22 of other employees. (Yaeckel Decl. ¶12.)

23 **IV. SUMMARY OF CLAIMS AND ESTIMATES OF POTENTIAL DAMAGES**

24 Counsel hereby submits estimates and calculations for the total potential value of all claims
25 so this Court may evaluate if the amount to be paid to the class ultimately could be determined to be
26 fair and reasonable when balanced against the probable outcome of the future litigation. *Kullar v. Foot*
27 *Locker Retail, Inc.*, (2008) 168 Cal. App. 4th 116, 133.
28

Concerning the strength of the plaintiff's case, the California Court of Appeal has said that the "merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the operative word is 'settlement.'" *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1150 [citing, *inter alia*, *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d 448,455 ("The fact that a proposed settlement may only amount to a fraction the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); see also *Linney v. Cellular Alaska P'ship.* (9th Cir. 1998) 151 F.3d 1234, 1242 ("This court has aptly held that 'it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements'"); *Officers for Justice v. Civil Servo Com.* (9th Cir. 1982) 688 F.2d 615, 625 ("The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.")]

Each of the primary claims also had risks to obtaining both class certification and a finding of liability. If Defendant's asserted defenses were successful, the class would not receive anything. As is set forth below, Plaintiff submits that the most realistic "best case" scenario would be an average recovery per class member of approximately \$553.59 and a worst case scenario would be a recovery of \$0, by way of denial of class certification or defense verdict.

A. FAILURE TO PAY ALL COMPENSATION CLAIMS

Plaintiff' 'unpaid wages (and unpaid overtime) claims were based on the allegation that employees were performing unpaid work (1) due to ENCONTRO's failure to properly calculate employee's regular rate of pay in regards to the "Employee Discount Meal Policy"; (2) mandatory Covid-19 screenings prior to clocking in; and (3) transitional math errors. Plaintiff alleged this resulted in regular time and overtime pay being owed where Defendant was on notice of work being performed without pay.

Defendant argued that rounding of total hours worked has been recognized under California law. Defendant also denied that any unpaid work occurred, and even if some did occur, ENCONTRO claimed it was not on notice of these alleged Labor Code violations and had a strict written prohibition against off-the-clock work and a mandate that all time worked must be accurately recorded.

1 ENCONTRO asserted defenses that alleged violations would require individualized inquiries, which
2 could preclude class certification and make any PAGA claims unmanageable. (Yaeckel decl. ¶ 25.)

3 Based on Class Counsel's analysis, this claim was worth as little as \$0 (a defense verdict or
4 denial of class certification) or as much as \$48,825.00. (Yaeckel decl. ¶ 16.)

5 **B. MEAL AND REST PERIOD CLAIMS**

6 Plaintiff was able to identify hundreds of examples of missing or late meal periods without the
7 provision of a meal period penalty payment. However, Defendant argued that these records do not
8 conclusively show whether (1) ENCONTRO actually failed to provide the meal period, (2) there was
9 a voluntary waiver, (3) employees forgot to clock out, or (4) employees voluntarily chose to skip or
10 take them late even though they were provided. Additionally, in light of ENCONTRO's written meal
11 period policy and the wide variations in alleged violations, Defendant contended there was no uniform
12 policy or practice, requiring individualized inquiries that would preclude class certification and make
13 any PAGA claims unmanageable. (Yaeckel decl. ¶ 26.)

14 Plaintiff also alleged the ENCONTRO written policies improperly restricted class members
15 from leaving the premises during their rest breaks. Defendant pointed out that the policy contained no
16 such restriction and argued that witness testimony would demonstrate that in practice, no such "leave
17 the premises" restriction was ever enforced. Defendant also contended individualized inquiries will
18 abound as to why individual employees may have failed to take appropriate meal periods or rest
19 breaks. (Yaeckel decl. ¶ 27.)

20 While there are time records to support the existence of meal period violations, there are no
21 corresponding rest period records, making this aspect of the claim much harder to prove. Some Courts
22 have been disinclined to accept survey evidence that may have been needed to help establish rest
23 period violations. See e.g. *Duran v. U.S. Bank National Assn.* (2018) 19 Cal.App.5th 630.

24 Based on Class Counsel's analysis, this claim was worth as little as \$0 (a defense verdict or
25 denial of class certification) or as much as \$279,000.00. (Yaeckel decl. ¶ 16.)

26 **C. PLAINTIFF'S WAGE STATEMENT CLAIMS**

27 Plaintiff acknowledges that these claims are largely derivative, in that both the gross and net
28 wages could be found to be inaccurate, due to the above-referenced claims.

1 ENCONTRO argued that the failure to list gross and net wages are derivative of other claims
2 that may ultimately fail and as a result there is no “knowing and intentional failure” to list information,
3 which triggers liability under Labor Code §226(e). (Yaeckel decl. ¶ 28.)

4 The California Supreme Court has recently held that the failure to pay meal and rest period
5 premiums *may* give rise to a claim for inaccurate wage statements (or waiting time penalties).
6 However, such derivative liability is not automatic and the Plaintiff still must show a “knowing and
7 intentional” or “willful” failure to comply with the Labor Code. See *Naranjo v. Spectrum Security*
8 *Services, Inc.*, (2022) 2022 Cal. LEXIS 2878. Defendant (as with the underlying meal and rest period
9 claims) maintained individualized inquires would abound as to why breaks were missed and whether
10 meal period premiums should have been paid in the first place, requiring individualized inquiries that
11 would preclude class certification and make any PAGA claims unmanageable. (Yaeckel decl. ¶ 28.)

12 As is broken down further in the declaration of Eric K. Yaeckel, this claim was valued at as
13 little as \$0.00 and as much as \$99,000.00. (Yaeckel decl. ¶ 16.)

14 **D. PLAINTIFF’S REIMBURSEMENT CLAIMS**

15 Plaintiff contends that ENCONTRO violated Labor Code section 2802 by failing to reimburse
16 its employees for certain costs, including cellular phone costs.(Yaeckel decl. ¶ 29.)

17 ENCONTRO countered that it has a comprehensive written policy for expense reimbursements
18 in its employee handbook. ENCONTRO further contended that Roberts’s (and others’) positions did
19 not require the use of a cell phone. (*Id.*)

20 As is broken down further in the declaration of Eric K. Yaeckel, this claim was valued at as
21 little as \$0.00 and as much as \$40,000.00. (Yaeckel decl. ¶ 16.)

22 **E. OTHER DERIVATIVE CLAIMS (PAGA, LABOR CODE SECTION 203)**

23 The remaining claims are derivative in that PAGA and Labor Code § 203 penalties would only
24 be permissible if the above claims are proven.

25 The parties agreed to allocate \$10,000 to the PAGA claims, which is 8.33% of the total
26 settlement. This PAGA allocation is in the range routinely approved by California Courts. *See Garcia*
27 *v. Gordon Trucking, Inc.* (E.D. Cal., Oct. 31, 2012, No. 1:10-CV-0324 AWISKO) 2012 WL 5364575,
28 at *7 (approving \$10,000 PAGA penalty for a California class with a \$3.7 million gross settlement

1 payment); *Syed v. M-I, L.L.C.* (E.D. Cal., Feb. 22, 2017, No. 112CV01718DADMJS) 2017 WL
2 714367, at *13 (approving 2.53% of the estimated \$3.95 million gross settlement amount allocated
3 to the California class); *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No.
4 15-CV-02198-EMC) 2016 WL 5907869 (approving allocation of \$20,000 to the PAGA claim (**0.15%**
5 of its total value of \$12,952,000) as reasonable in the context of the settlement as a whole); *In re Uber*
6 *FCRA Litigation* (N.D. Cal., June 29, 2017, No. 14-CV-05200-EMC) 2017 WL 2806698 (approving
7 a settlement agreement of \$7.5 million, where the amount allocated to the PAGA claims was only
8 \$7,500 – .01% of the total settlement amount).

9 Based on Class Counsel's analysis, the PAGA and Labor Code § 203 and 226 claims were
10 worth as little as \$0 (a PAGA defense verdict or denial of certification of the § 203 and 226 claim) or
11 as much as \$1,296,000.00. (Yaeckel decl. ¶ 16.)

12 **F. CASE LAW SUPPORTS A FURTHER REDUCTION ON ANY RECOVERY**

13 Plaintiff concedes he would be highly unlikely to ever be awarded an amount approaching the
14 maximum damages set forth above. To wit, the majority of the recovery would be "derivative"
15 penalties under PAGA, Labor Code § 203 and Labor Code § 226. The Court would have great
16 discretion to mitigate any penalties awarded. *Thurman v. Bayshore Transit Management, Inc.* (2012)
17 203 Cal.App.4th 1112, 1135 (disapproved on other grounds).

18 In a recent trial involving Class Counsel, the Court found liability, but then significantly
19 reduced the PAGA penalties, down to \$5 a violation. See *Carrington v. Starbucks Corp.* (2018) 30
20 Cal.App.5th 504; See accord *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK(OPx), 2011 WL
21 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because
22 employer was "not aware" of violations). And in *Carrington*, the Court also noted that other trial courts
23 have declined to "stack" (impose multiple) penalties based on the same underlying Labor Code
24 violation. See *Ruelas v. Costco Wholesale Corporation* (N.D. Cal. 2014) 67 F.Supp.3d 1137.

25 Class Counsel believes a mitigation of the damages and potential PAGA penalties would be
26 warranted here. As in the *Carrington* case, there was evidence that ENCONTRO attempted to provide
27 meal and rest periods in practice, and the written policies contained no facially non-compliant terms.
28

1 Given this, it is likely that some of the violations by ENCONTRO were not "willful." Finally,
2 given the defenses raised by Defendant, there was a significant risk that many of the claims would not
3 have been certified or, if they were, certification could not have been maintained through trial and
4 appeal.

5 The Parties agree the failure to pay "ex employees" under § 203 is derivative of the other
6 claims. As ENCONTRO asserts a "good faith dispute" for withholding any unpaid wages, it would
7 be difficult to establish any liability for a "willful" failure to pay wages owed.

8 Based on the above, it would be likely that PAGA penalties would be reduced to approximately
9 \$5 per violation and the Court would find no basis for imposing Labor Code §§ 203 or 226 penalties.
10 If this occurred, the average class member's pre-tax share of a realistic best case recovery would be
11 \$553.59. (Yaeckel decl. ¶ 23.)

12 Accordingly, Class Counsel submits the **\$116.25** average recovery secured via this Settlement,
13 is a reasonable compromise and is in the best interests of the Class given all the risks of continued
14 litigation. (Yaeckel decl. ¶¶ 24-30.)

15 **V. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

16 Under California law, a class action is appropriate when the class is ascertainable and there is
17 "a well defined community of interest in the questions of law and fact involved affecting the parties
18 to be represented." Cal. Code Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34
19 Cal. 4th 319, 341. State law requirements under California Code of Civil Procedure § 382 for class
20 certification mirror those of federal law under Rule 23 of the Federal Rules of Civil Procedure:
21 numerosity, typicality of the class representatives' claims, adequacy of representation, predominance
22 of common issues, and superiority. See Fed. R. Civ. P. 23(a); see also *Hanlon v. Chrysler Corp.* (9th
23 Cir. 1998) 150 F.3d 1011, 1019. Thus, for settlement purposes, each of these elements must be
24 present. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 237-38.

25 **A. THE PROPOSED SETTLEMENT CLASS IS ASCERTAINABLE**

26 The proposed class is ascertainable because all Class Members currently or formerly worked
27 for Defendant as a nonexempt employee and will be identified through Defendant's employment
28 records. See *Rose v. City of Hayward*, 126 Cal.App.3d 926 (1981) (finding that "Class Members are

1 ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference
2 to official records”). Thus, the ascertainability requirement is met.

3 **B. THE PROPOSED SETTLEMENT CLASS IS SUFFICIENTLY NUMEROUS**

4 The numerosity requirement is met if the class is so large that joinder of all members would
5 be impracticable. *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 318. Here, Defendant’s records show
6 that approximately **400 class members** worked for the company during the limitations period.
7 (Yaeckel decl. ¶ 31.) Thus, joinder of all members of the class would be impracticable.

8 **C. THE COMMONALITY REQUIREMENT WAS MET**

9 The commonality requirement is met if there are questions of law and fact common to the class.
10 *See Hanlon, supra*, 150 F.3d at 1019.

11 Here, for purposes of the Settlement, the parties agree the claims of Class Members all involve
12 the same questions of law and fact. (See Ex. A at ¶ R; and section IV *supra*.) Namely, all class
13 members were subject to the same employment policies and practices of Defendant. (Yaeckel decl.
14 ¶ 32.) The common question exists as to whether the policies and practices Class Members were
15 subjected to are illegal. Under these circumstances, the commonality requirement is satisfied. See
16 *Hanlon, supra*, 150 F.3d at 1019-20.

17 **D. THE TYPICALITY REQUIREMENT IS MET**

18 The typicality requirement is met if the class representatives and class counsel have no interests
19 adverse to the interests of the proposed Class Members and are committed to vigorously prosecuting
20 the case on behalf of the class. See *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).

21 Here, there are no such adverse interests. Plaintiff has claims substantially the same as all the
22 other Class Members. (Yaeckel decl. ¶ 33.) Factual differences may exist between the class
23 representative and the Class Members so long as the claims arise from the same events or course of
24 conduct and are based on the same legal theories. See *Hanlon*, 150 F.3d at 1020; see also 1 *Newberg*
25 § 53.13 at 3-76-77 (“When it is alleged that the same unlawful conduct was directed at or affected both
26 the named plaintiff and the class sought to be represented, the typicality requirement is usually met
27 irrespective of varying fact patterns which under lie individual claims.”) Thus, the typicality
28 requirement is also satisfied.

1 **E. THE ADEQUACY REQUIREMENT IS MET**

2 The adequacy of representation component of the community of interest requirement for class
3 certification “comes into play when the party opposing certification brings forth evidence indicating
4 widespread antagonism to the class suit.” *Capitol People First v. Dep’t of Develop. Servs.* (2007) 155
5 Cal. App. 4th 676, 696-97. The adequacy inquiry “serves to uncover conflicts of interest between
6 named parties and the class they seek to represent.” *Id.* To assure “adequate” representation, the “class
7 representative’s [...] claim must not be inconsistent with the claims of other members of the class.” *Id.*

8 Here, no such “inconsistencies” exist. Plaintiff will be compensated based on the same “pay
9 period” formula as all other members of the Class. (Yaeckel decl. ¶ 33.)

10 Additionally, any Class Member who wishes to “opt out” of the Settlement may do so and
11 retain all of their individual rights. (Yaeckel decl. ¶ 34.) There is therefore no conflict of interest
12 between the Class Representatives and the Class Members. (*Id.*) Thus, at least for settlement purposes,
13 the adequacy prong is met. (*Id.*)

14 **F. COMMON ISSUES PREDOMINATE AND CLASS-WIDE SETTLEMENT IS**
15 **SUPERIOR TO OTHER AVAILABLE METHODS OF RESOLUTION**

16 Class certification is authorized where common questions of law and fact predominate over
17 individual questions, and where class-wide treatment of a dispute is superior to individual litigation.
18 See *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 469 (1981).

19 The proposed class in this case is sufficiently cohesive because, for purposes of the Settlement
20 only, the parties have stipulated that all class certification elements are met. (**Exhibit A** at ¶ 1.) All
21 members of the Class worked under the same conditions and experienced the same policies and
22 practices of Defendant. (See section IV, *supra*). Thus, the class is sufficiently cohesive.

23 Further, it would be preferable to resolve all of the Class Members’ claims by means of a class-
24 wide settlement than to require each Class Member to litigate individual claims. (Yaeckel decl. ¶ 35.)

25 **VI. PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT IS PROPER**

26 The trial court has broad discretion to determine whether a class action settlement is fair and
27 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. Fairness is presumed where
28 (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are

1 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
2 litigation; and (4) the percentage of objectors is small. *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th
3 43, 52; *Dunk v. Ford Motor Co.*(1996) 48 Cal.App.4th 1794, 1802. But, even where it appears the
4 settlement is fair, the court must still determine on the record before it whether the settlement should
5 be approved after considering “the strengths and weaknesses of the claims and risks of the particular
6 litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. The courts will
7 consider: (i) the strength of the plaintiff’s case; (ii) the risks, expense, complexity and likely duration
8 of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount
9 offered in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the
10 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any
11 reaction of putative class members to the proposed settlement. *Dunk*, 48 Cal.App.4th, at 1800-1801;
12 *In re Microsoft I-V Cases*, 135 Cal.App.4th, at 723.

13 When evaluating these factors, the court “must stop short of the detailed and thorough
14 investigation that it would undertake if it were actually trying the case,” but nonetheless it “must
15 eschew any rubber stamp approval in favor of an independent evaluation.” *Kullar*, 168 Cal.App.4th,
16 at 130. Ultimately, the court approves the proposed class action settlement when the settlement is fair
17 and falls “within the range of reasonableness.” *Hernandez v. Vitamin Shoppe Indus., Inc.* (2009) 174
18 Cal.App.4th 1441, 1446.

19 **A. FAIRNESS OF THE SETTLEMENT**

20 For preliminary approval purposes, a proposed class action settlement is *presumed* to be fair
21 where, as here, (1) the settlement is reached through arm’s-length bargaining; (2) investigation and
22 discovery are sufficient to allow counsel and the court to act intelligently; and (3) counsel is
23 experienced in similar litigation. *Chavez, supra*, 162 Cal.App.4th at 52.

24 The proposed settlement in this action meets these criteria, and merits preliminary approval.
25 As discussed above, the parties only entered into the Agreement after engaging in a full day of
26 mediation with experienced an mediator who routinely handles “wage and hour” class action litigation,
27 Michael Roberts. (Yaeckel Decl. ¶¶ 7-8.) The mediation was preceded by substantial discovery, motion
28 work, investigation into the claims at issue, interviews of numerous Class Members, disclosure and

1 review of documents detailing company-wide policies and practices, informal information exchanges
2 for mediation purposes, and ongoing discussions about the merits between the parties' counsel during
3 the span of the litigation. (Yaeckel Decl. ¶¶ 4-10.) Thereafter, the parties memorialized the details of
4 this settlement via the Agreement. (Ex. A.)

5 When negotiating the settlement, both sides took into account the strengths and weaknesses
6 of their opponent's positions as pointed out by Michael Roberts, the data available to evaluate liability
7 and damages, the lack of data or evidence on certain issues, and the substantial and evolving law
8 applicable to the merits of the claims. The Agreement was only agreed to after extensive arms-length
9 negotiations resulting in a unique compromise that permits all parties to move forward and bring this
10 action to close. In spite of a mutual desire to resolve this action, the negotiations remained at all times
11 adversarial. (Yaeckel Decl. ¶ 36.)

12 As set forth below in section H, *infra.*, counsel for both parties have extensive experience in
13 litigating wage and hour class action lawsuits. Based on this experience, counsel have determined that
14 the settlement is fair, adequate, and reasonable. (Yaeckel decl. ¶ 44.)

15 **B. STRENGTH OF PLAINTIFF'S CASE**

16 The most important factor courts consider when evaluating the fairness of the class action
17 settlement is the strength of the plaintiff's case balanced against the amount offered in settlement.
18 *Kullar*, 168 Cal.App.4th, at 130.

19 All of Plaintiff's claims – individual, PAGA, and class claims – presented hurdles including
20 obtaining class certification, in addition to a substantial risk of a defense verdict by way of summary
21 judgment motion or at trial. (Yaeckel Decl. ¶¶ 24-30.)

22 The exchange of mediation briefs, the assistance of an experienced “wage and hour” mediator,
23 and the parties' ongoing negotiations all helped the parties realize the strengths and weaknesses of
24 their case, as well as the risks and expenses of continuing litigation.

25 Additionally, as trial approaches, each party's monetary risk increases significantly as
26 substantial additional attorney hours and expert witness hours would have to be devoted to this case
27 by each party. Each party bears a real risk at trial, and considering the balance of the strengths of
28

1 Plaintiff's claims versus the risks inherent in trial and the consideration given to settle now, the
2 settlement reflects a fair and adequate resolution to this action.

3 **C. THE RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF FURTHER**
4 **LITIGATION**

5 Plaintiff's Counsel's effectiveness in prosecuting this case has translated into tangible monetary
6 and non-monetary benefits for the Settlement Class Members in the following respects: (1) a
7 guaranteed favorable result; (2) guaranteed monetary recovery over a reasonably short period of time,
8 as opposed to possibly waiting additional years for a potentially worse result; and (3) significant
9 savings in attorneys' fees and costs, which would have increased had the case progressed through trial
10 and possible appeals. (Yaeckel decl. ¶ 37.)

11 Without entering into the Agreement, there existed a significant chance that Defendant would
12 prevail on the merits of some or all claims and that Class Members would receive nothing. Through
13 the Agreement, participating Class Members receive guaranteed cash, and this action has also been
14 the catalyst for programmatic relief. (Yaeckel decl. ¶ 38.)

15 If the litigation were to proceed in lieu of settlement, additional and substantial attorneys fees
16 and costs, expert witnesses fees would quickly accumulate. Given the numerous claims being litigated,
17 the parties may be required to hire multiple experts each (as many as 6 total). This would result in not
18 only the production of six expert reports, but six depositions as well. And, based on previous
19 discussions between counsel regarding the remaining claims (including the PAGA claims), the parties
20 anticipated at least one motion to compel, a motion for class certification and two dueling motions for
21 summary judgment / adjudication (one from each side). (Yaeckel decl. ¶ 39.)

22 Importantly, even after engaging in all of the potential continued and protracted litigation set
23 forth above, the putative class would continue to have no guarantee of success on any of the claims
24 advanced in this case. Thus, the parties and their counsel believe in good faith that the proposed
25 resolution is a fair, reasonable, and adequate compromise. (Yaeckel decl. ¶ 40.)

26 **D. THE RISK OF MAINTAINING CLASS ACTION STATUS THROUGH THE TRIAL**

27 Plaintiff had not filed a Motion for Class Certification at the time settlement was reached.
28 (Yaeckel decl. ¶ 41.) Defendant presented multiple different defenses to certification during mediation

1 and throughout litigation. Even assuming Plaintiff did obtain class certification of the claims, each
2 claim is subject to substantial risk of a Defense verdict at trial. (*Id.*)

3 Regarding the representative (PAGA) claims, there is also a substantial risk that, at trial,
4 Plaintiff will either fail to obtain a favorable judgment on one or more of these claims, or that a
5 favorable award on one or more PAGA claims may be reduced. *See Thurman v. Bayshore Transit*
6 *Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reversed on other grounds).

7 **E. THE AMOUNT OFFERED IN THE SETTLEMENT**

8 After deduction from the total “Settlement Amount” of the projected costs of administration,
9 proposed class representative service awards, potential attorney fees and costs, the “Net Settlement
10 Amount” (“NSA”) will be distributed to all Class Members who do not file a request for exclusion.
11 Participating Class Members will receive their share of the NSA based on the total pay-periods they
12 worked during the Class Period. (**Exhibit A** ¶¶ 8-9.)

13 Based on the current proposed figures, each Participating Class Member will receive an
14 average of **\$116.25**, although the actual amount will vary based on the amount of pay periods they
15 were employed. The Class Notice will list each individual class member’s actual expected share. (See
16 **Ex. B.**) Plaintiff’s counsel maintains this recovery was significant in light of the circumstances of the
17 case. (Yaeckel Decl. ¶30.)

18 **F. THE EXTENT OF DISCOVERY COMPLETED**

19 Plaintiff propounded 7 sets of separate written discovery devices on Defendant, including
20 requests for admission, special interrogatories, requests for production of documents, and general and
21 employment form interrogatories. (Yaeckel Decl. ¶ 5.) Through these requests, Plaintiff sought, among
22 other information and documents, the identities of putative class members, Defendant’s compensation
23 policies, meal and rest period policies, employee handbooks, wage statements, time records, job
24 descriptions, and reimbursement policies. *Id.*

25 Defendant provided detailed substantive responses detailing all relevant employment policies,
26 in addition to producing hundreds of pages of responsive documents. The document production also
27 included a sampling of other putative class members time and wage records. (Yaeckel Decl. ¶ 6-8.)
28

1 Plaintiff's counsel has also interviewed several Class Members in the course of investigating
2 and litigating this matter. (Yaeckel decl. ¶ 42.) Counsel has also reviewed thousands of pages of
3 documents produced by Defendant, Plaintiff, and Class Members. (*Id.*)

4 This information, along with documents and information obtained through formal discovery
5 and from Class Members, allowed Plaintiff's counsel to prepare a detailed Mediation Brief. (*Id.*) The
6 Brief was provided to opposing counsel and contained a breakdown of potential damages based on all
7 of the information obtained. (*Id.*) ENCONTRO also provided a detailed mediation brief, outlining its
8 defenses to both class certification and liability. (*Id.*)

9 Thus, sufficient discovery, both formal and informal, has been conducted to allow the parties
10 to participate in an informed, arms-length negotiation process.

11 **G. THE STAGE OF THE PROCEEDINGS**

12 Plaintiff already had possession of all written discovery needed for a class certification motion.
13 Depositions would have followed and then a motion for class certification would have been filed.
14 Depending on that motion, Plaintiff may have lost her ability to negotiate a class-wide or
15 representative settlement agreement on certain issues. Alternatively, Defendant stood to lose a key
16 negotiating tool in the event the Motions were decided in Plaintiff's favor. Therefore, the parties
17 achieved a settlement agreement at a point when neither side had a stated advantage in the litigation.

18 **H. THE EXPERIENCE AND VIEWS OF COUNSEL**

19 Class Counsel has considerable experience in wage and hour and class action litigation.
20 William Sullivan has over 29 years of experience, 28 years of which has been devoted to both
21 prosecuting and defending class action litigation. Mr. Yaeckel has over 12 years of experience in "class
22 litigation." (Yaeckel Decl. ¶ 43.)

23 Plaintiff's counsel considers the Agreement to represent a fair, adequate and reasonable
24 settlement that is well within the accepted range of recoveries for similar cases. Counsel further
25 believes the Agreement is in the best interests of the Settlement Class Members. (Yaeckel Decl. ¶ 45.)

26 **I. PRESENCE OF A GOVERNMENTAL ACTOR**

27 Although the State is not directly involved in this action, Plaintiff "stands in the shoes" of the
28 Labor and Workforce Development Agency ("LWDA") by bringing her PAGA claims. Consideration

1 has been made to compensate to Labor Workforce Development Agency (“LWDA”) in the amount
2 of \$10,000, even though the LWDA declined to prosecute the claims itself. (*See* Exhibit “A,” at ¶ 7.)
3 To confirm, 75% of the total allocation of \$10,000 amount, or **\$7,500.00**, is being paid to the LWDA,
4 and 25%, or **\$2,500.00**, being distributed amongst the class members. (*Id.*, at ¶ 7.) Counsel for the
5 parties believe this is a fair, reasonable, and adequate allocation. (Yaeckel Decl. ¶ 45.)

6 **J. REACTION OF THE CLASS MEMBERS TO THE PROPOSED SETTLEMENT**

7 Prior to preliminary approval, what can be said of the reaction the class members is limited.
8 However, Plaintiff’s counsel has spoken to some Class Members since the parties reached a proposed
9 settlement agreement, and all were in favor of the settlement. (Yaeckel Decl. ¶ 46.)

10 As explained in the Agreement, the Settlement Claims Administrator will send a Notice to the
11 Settlement Class Members. (*See* Exhibit A at ¶ 16.) The negotiated Notice form is attached to the
12 declaration fo Eric K. Yaeckel as Exhibit B.

13 The proposed Notice Packet advises the Settlement Class Members of their anticipated
14 recovery under the Agreement, how they can object, how they can exclude themselves, the amount of
15 fees and costs sought by Settlement Class Counsel, the amount of enhancement payment sought on
16 behalf of the class representative, and the date of the final approval hearing. (*See* Exhibit “B.”) Thus,
17 the proposed Notice complies with the notice requirements set forth in CRC Rule 3.766(d) and Rule
18 3.769(f).

19 **VII. PROPOSED TIMELINE OF EVENTS AND FINAL APPROVAL**

20 Assuming the Settlement merits Preliminary Approval from the Court, Plaintiff requests that
21 the Court set a Final Approval Hearing in accordance with the chronology of events set forth in the
22 Agreement:

- 23 • Within 10 calendar days of the Court’s Preliminary Approval: ENCONTRO will provide to
24 the Settlement Administrator the Class List including Class Members’ names, last known
25 addresses, social security numbers, and the dates of employment during the Class Period;
26 • Within 10 calendar days after receipt of the class list: Settlement Administrator will mail the
27 Notice Packets to Class Members;
28

- 30 Calendar Days After Settlement Administrator has mailed the Notice Packets to Class Members: Deadline for Class Members to postmark and submit all disputes of pay period information, Requests for Exclusion, or to file written objections to the settlement;
- Approximately 5 Calendar days after the conclusion of the Notice and Claims Period: Plaintiff will file a Motion for Final Approval; and
- 16 Court days after the filing of the Final Approval motion: the Court can conduct the Final Approval Hearing.

Based on this timeline, Plaintiff requests a Final Approval hearing that is approximately 80 days (or the first available court date thereafter) after the date the Court enters an Order granting preliminary approval of the Settlement. Assuming Preliminary Approval is granted at the currently scheduled hearing, **Plaintiff requests October 27, 2023 for the Final Approval hearing.**

VI. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court issue an Order:

- i. Certifying the Proposed Settlement Class;
- ii. Preliminarily approving the settlement as set forth in the Agreement; and
- iii. Approving the proposed Notice Packet to be directed to the Settlement Class.

Dated: July 7, 2023

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Representative capacity only, and on behalf of other
members of the general public similarly situated