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

PAUL FOSTER and ROY BLANCO,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

**EMBRY-RIDDLE AERONAUTICAL
UNIVERSITY, INC.,** a Florida Non-Profit
Corporation,

Defendant.

Case No. CVRI2202995

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

ASSIGNED FOR ALL PURPOSES TO
JUDGE HAROLD HOPP
DEPARTMENT 10

Date: July 13, 2023
Time: 8:30 a.m.
Reservation No.: 746466218315

Action Filed: July 20, 2022
Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiffs Paul Foster and Roy Blanco seek preliminary approval of a non-reversionary \$275,000
3 settlement of their class wage and hour claims against Embry-Riddle Aeronautical University, Inc. (“ER”
4 or “Defendant”). This case was brought on behalf of approximately fifty-eight (58) part-time faculty
5 teaching for ER in California. The Class is defined as “all persons who were employed by Defendant in
6 California as part-time adjunct instructors during the Class Period” (the “Class,” “Class Members,” or
7 “CMs”). The “Class Period” is the “period from January 21, 2018 through the earlier of July 17, 2023
8 or the date that preliminary approval of the settlement is granted.” This Settlement was reached after a
9 mediation followed by a mediator’s proposal. In advance of the mediation, ER produced extensive
10 informal discovery and class data. If approved, the Settlement will provide CMs with an expected
11 average gross recovery of \$4,741 and net recovery of \$2,325 – an outstanding result for instructors who
12 worked only part-time and intermittently during the Class Period.

13 The Settlement Agreement (“SA”), attached as Exhibit 1 to the Declaration of William Jhaveri-
14 Weeks in Support of this Motion (“Jhaveri-Weeks Decl.”), avoids significant risks posed by ER’s
15 arguments with respect to class certification and the merits. The terms of the SA are fair and reasonable.
16 The Settlement was negotiated by, and is supported by, proposed Class Counsel who have extensive
17 experience representing adjunct instructors in similar cases in California. Plaintiffs request that the Court
18 certify the Class for settlement purposes, grant preliminary approval of the Settlement, approve the
19 proposed Class Notice, and set a final approval hearing.

20 **II. OVERVIEW OF THE SETTLEMENT**

21 The Settlement resolves all claims that were alleged or could have been alleged based on the facts
22 in the Complaint. The key Settlement terms are:

- 23 1. Gross Settlement Amount (“GSA”) – \$275,000, non-reversionary. SA §§ 1.11, 4. ER will also
24 pay its share of payroll taxes on the portion of the Settlement allocated as wages. *Id.* §§ 4, 15.1.
- 25 2. Class Definition and Class Period – The Class is “all persons who were employed by Defendant
26 in California as part-time adjunct instructors during the Class Period.” *Id.* § 1.2. The Class Period is
27 “the period from January 21, 2018 through the earlier of July 17, 2023 or the date that preliminary
28 approval of the settlement is granted” (“Class Period”). *Id.* § 1.5.

3. Escalator Clause – The Class consists of 58 individuals. If that number goes up by 10% or more (*i.e.*, if there are 64 or more Class Members), the GSA will increase proportionately. *Id.* § 19.

4. Attorneys’ Fees, Costs, and Named Plaintiffs’ Service Awards – Class Counsel will seek fees of up to one-third of the GSA (\$91,666.67), reimbursement of out-of-pocket costs up to \$20,000, and a service award of \$7,500 for each of the two named Plaintiffs (\$15,000 total). *Id.* §§ 6, 7.

5. PAGA Penalties – \$10,000 shall be allocated to the PAGA claim. *Id.* § 8. The LWDA will be paid 75% (\$7,500). *Id.* The remaining 25% (\$2,500) will be added to the NSA. *Id.*

6. Settlement Administration Costs are estimated not to exceed \$6,000. *Id.* § 9. The Parties solicited three bids and selected ILYM Group, Inc. (“ILYM”), the lowest bidder. Decl. of Michael Sutherland on Behalf of ILYM Group (“ILYM Decl.”) Exs. A (CV), B (bid); Jhaveri-Weeks Decl. ¶ 29.

7. The Net Settlement Amount (“NSA”) will total approximately \$134,833.33. Jhaveri-Weeks Decl. ¶ 28. This is the GSA minus attorneys’ fees, costs, class representative awards, the LWDA’s share of PAGA Penalties, and Settlement Administration costs.¹ The NSA will be paid pro rata based on the number of pay periods each Class Member worked during the Class Period. SA § 5.1.1. The 25% of the PAGA Penalties allocated to the Aggrieved Employees shall become part of the NSA, to be paid pro rata based on the number of pay periods each Class Member worked during the PAGA Period. *Id.*

8. Class Notice – Within 20 business days of preliminary approval, ER will provide ILYM with the Class Data List. SA § 10.1.1. Within 25 business days of preliminary approval, after updating the addresses using the NCOA database, ILYM will mail each CM a Notice (with opt-out and objection forms) in the form attached to the SA as **Exhibit A**. *Id.* §§ 10.1.2, 10.1.3. For all returned Notices, ILYM will use skip tracing to update addresses and initiate a second mailing. *Id.* § 10.1.4.

9. Automatic Participation – The Settlement is non-reversionary: each CM will receive his or her share of the NSA unless he or she opts out. *Id.* §§ 4, 11.3. CMs in the PAGA Period will receive a PAGA allocation even if they opt out of the class settlement. *Id.* §§ 1.13, 11.2.

10. Opting Out or Objecting – CMs who wish to opt out must send a written Request for Exclusion to ILYM within 60 days of the date the Notices are mailed. *Id.* §§ 1.19, 11. Any CM who properly

¹ ILYM bid \$4,500. ILYM Decl. Ex. C. Plaintiffs conservatively assume \$6,000 in administration costs in case the Class size is significantly larger than assumed. Jhaveri-Weeks Decl. ¶ 28 n.1.

requests to opt out will not receive a payment under the Settlement and will not be bound by the SA. *Id.* § 11.2. A CM who remains part of the Settlement may object to the terms of the Settlement by mailing an objection to ILYM within 60 days of the date the Notice is mailed out. *Id.* § 12.

11. Tax Consequences of Settlement Payments – For tax purposes, each CM’s payment (excluding PAGA Penalties) will be allocated 20% to wages and 80% to penalties and interest. *Id.* § 5.1.2.

12. Uncashed Checks – Checks not cashed 90 days from issuance by ILYM will be voided and funds will be tendered to Legal Aid Foundation of Los Angeles as the *cy pres* recipient under Cal. Code of Civ. Proc. § 384. *Id.* § 14.2; Jhaveri-Weeks Decl. ¶ 70 (explaining why *cy pres* recipient meets statutory criteria). A *cy pres* recipient is reasonably necessary in this case because there may be unclaimed funds, and designating a *cy pres* recipient will allow those funds to be distributed to an organization that assists people who are similarly situated to the class (*i.e.*, California workers asserting wage and hour violations). *See* Decl. of Silvia Argueta of Legal Aid Foundation of Los Angeles (“LAFLA Decl.”). The Parties and Counsel in this case do not have any relationship with LAFLA. Jhaveri-Weeks Decl. ¶ 71.

13. Scope of Release – The Class will release claims “which are alleged, or could have been alleged based on the facts asserted in the operative complaint filed in this action, and arising during the Settlement Period.” SA § 16.1. The named Plaintiffs will also give a general release. *Id.* § 16.3.

III. OVERVIEW OF THE LITIGATION

A. Pleadings

Plaintiff Foster filed this action on July 20, 2022 alleging that ER’s pay practices for CMs violated the Labor Code and Wage Order. Jhaveri-Weeks Decl. ¶ 19. Plaintiff Foster alleged that ER paid CMs on a “piece-rate” basis: a flat/ascertainable amount per course delivered (a “course rate”), with the amount of pay increasing or decreasing based on the number of pieces delivered. *Id.* Plaintiff alleged that because CMs are piece-rate workers, ER was required to pay them hourly for any “non-productive” time worked (*i.e.*, work not directly related to producing the compensable pieces), such as time spent attending mandatory trainings and addressing grade disputes after the conclusion of the term, and was required to pay them separately and hourly for rest periods under Labor Code § 226.2 (requiring separate rest break pay for piece-rate workers). *Id.* Because ER failed to do so, Plaintiff sought unpaid wages and missed-rest-break premiums. *Id.* In the alternative, Plaintiff alleged that ER classified CMs as “exempt” but

1 paid them less than the minimum salary required for exemption (*i.e.*, twice the state minimum wage based
2 on a forty-hour week). *Id.* ¶ 20. Plaintiff alleged that this misclassification resulted in failure to provide
3 paid rest breaks and to pay for all hours worked under Labor Code §§ 226.7, 1194, and 1194.2. *Id.*

4 Plaintiff Foster also alleged that ER, which primarily employed CMs to teach courses from their
5 homes via the internet during the Class Period, failed to reimburse CMs for necessary business expenses
6 including the cost of internet and phone use in violation of Labor Code § 2802. *Id.* ¶ 21.

7 Plaintiff Foster also alleged that his wage statements did not contain required information,
8 including hours worked, hourly rates, rates for non-productive time, and information about the piece-
9 rate, giving rise to wage statement penalties under Labor Code §§ 226(e) and 226.2(a). *Id.* ¶ 22.

10 On July 21, 2022, Plaintiff Foster filed a PAGA Notice with the LWDA. *Id.* ¶ 23. On September
11 26, 2022, Plaintiff Foster filed a First Amended Complaint (“FAC”) adding a PAGA claim. In addition,
12 the FAC added Plaintiff Roy Blanco as a second named Plaintiff. Plaintiff Blanco, who had been
13 terminated by ER, alleged that because of the unpaid wage violations, ER owed him and a sub-class of
14 former employees waiting time penalties under Labor Code § 203. *Id.*

15 In March 2023, ER informed Plaintiff Foster that it had decided to shut down its adjunct program
16 in California, thereby effectively terminating Plaintiff Foster and all currently employed CMs. *Id.* ¶ 24.
17 At mediation, Plaintiffs asserted claims under the California WARN Act. *Id.* As part of the settlement,
18 the Class agreed to release those claims, and Plaintiffs filed the Second Amended Complaint (“SAC”) on
19 May 24, 2023 adding a California WARN Act claim. *Id.*

20 **B. Discovery**

21 The Parties agreed to attempt mediation and to stay the case (including formal discovery) to focus
22 on producing documents and data needed for mediation. *Id.* ¶ 25. Plaintiffs requested, and ER produced,
23 the following: (1) both Plaintiffs’ “Employment Agreement” for each course taught; (2) the faculty
24 handbook in place during the Class Period; (3) documents describing CMs’ job duties and the factors for
25 performance evaluation; (4) academic calendars; (5) descriptions of various required trainings;
26 (6) documents describing technology required to perform the job remotely; and (7) the adjunct pay scales
27 in effect during the Class Period. ER also produced spreadsheets containing individualized data showing
28 Class Members’ course assignments and payroll records during the Class Period.

1 Plaintiffs retained an expert to assist in analyzing the raw data ER produced for purposes of
2 calculating damages. *Id.* ¶ 26. Plaintiffs also gathered evidence by designing and sending a survey to
3 CMs, and by collecting publicly available information about ER’s policies. *Id.*

4 **C. Mediation**

5 On March 30, 2023, the Parties attended a mediation with experienced mediator Louis Marlin.
6 *Id.* ¶ 27. Plaintiffs submitted a detailed mediation brief with 23 exhibits. *Id.* The brief described the
7 facts and law and summarized the informal discovery exchanged in aid of mediation. *Id.* The brief also
8 detailed how Plaintiffs calculated ER’s estimated liability exposure. *Id.* The mediation did not result in
9 a settlement, but the mediator issued a mediator’s proposal, which both sides later accepted. *Id.*

10 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS MERITED**

11 When a negotiated class settlement is reached before certification, the Court may certify a
12 provisional settlement class. Cal. Rule of Ct. 3.769(d). This is a procedural decision based on the
13 allegations in the Complaint, not the perceived merit of the claims. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th
14 429, 439-41 (2000). A Class is certifiable if (1) it is ascertainable and sufficiently numerous; (2) there is
15 a well-defined community of interest; and (3) a class action would be a superior method of adjudication.
16 *Id.* at 435; *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012).

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 CMs. *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263,
20 1271 (1987). CMs are “ascertainable” if they may be readily identified without unreasonable expense or
21 time by reference to official records. *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 986 n.15 (2019). Here,
22 the Class is ascertainable from Defendants’ records. SA § 10.1.1; Jhaveri-Weeks Decl. ¶ 30. The Class
23 is sufficiently numerous because it has 58 members. *Id.*; see also *Rose v. City of Hayward*, 126 Cal. App.
24 3d 926, 934 (1981) (smaller class was numerous). Each sub-class is also numerous, with approximately
25 55 members. See Jhaveri-Weeks Decl. ¶ 30.

26 **B. A “Community of Interest” Exists Among CMs**

27 The “community of interest” requirement has three factors: (1) common questions of law or fact
28 that predominate; (2) class representatives with typical claims; and (3) class representatives who can

adequately represent the class. *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007).

1. Common Questions of Law and Fact Predominate

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

Common questions of law and fact predominate with respect to each claim in this case. Whether ER’s practice of paying fixed payments for specified tasks constitutes a “piece-rate” is a legal question that drives the resolution of the CMs’ claims for unpaid wages, rest-break premiums, and derivative waiting-time and wage-statement penalties. *Jhaveri-Weeks Decl.* ¶ 31. If the piece-rate issue were resolved against the Class, the Court would face the common question of whether CMs earned less than the threshold salary for exemption – a question turning on common legal issues, such as whether the threshold can be pro-rated for part-time workers. *Id.* Other common questions include: whether ER’s uniform policy of not reimbursing for home internet or cell phones violates Labor Code § 2802; whether trainings were “nonproductive” tasks separate from the course rate; whether ER’s failure to include hours-worked and hourly rates on CMs’ wage statements was “knowing and intentional” and caused “injury” under Labor Code § 226(e); and whether ER’s shuttering of its adjunct program was a “mass layoff” or “termination” under the CA WARN Act. *Id.* ¶ 32.

2. Plaintiffs’ Claims Are Typical

Typicality asks whether Plaintiffs suffered a similar injury as the Class. *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). Here, Plaintiffs, like the Class, were adjunct instructors who allege that they taught remotely and were subject to the same alleged unlawful pay practices, suffered the same injury, and seek the same relief as the Class. *Jhaveri-Weeks Decl.* ¶ 33.

3. Plaintiffs and Their Attorneys Will Adequately Represent the Class

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

(1993) (citations omitted). Plaintiffs' Counsel have extensive class action litigation experience. Jhaveri-Weeks Decl. ¶¶ 7-18; Decl. of Julian Hammond ISO Pls.' Mot. for Prelim. Appr. ("Hammond Decl.") ¶¶ 6-13. Plaintiffs' Counsel together have more experience representing adjunct instructors in California than any other firm and have been appointed class counsel or PAGA counsel in over 30 such cases over the past six years. Hammond Decl. ¶¶ 10-11; Jhaveri-Weeks Decl. ¶¶ 17-18. Plaintiffs have undertaken to represent the interests of the Class, their interests are virtually coextensive with those of the Class, and Counsel are not aware of any conflicts between Plaintiffs and the Class. Jhaveri-Weeks Decl. ¶ 3; Hammond Decl. ¶ 5.

C. A Class Action Is a Superior Method of Adjudication

Plaintiffs' claims depend on common evidence, including ER's uniform pay practices, standard faculty course employment contracts, handbooks, payroll calendars, and standard wage statements, and ER's decision to shut down its adjunct program in California. Jhaveri-Weeks Decl. ¶ 35. It would be inefficient to resolve CMs' claims at separate trials. *Id.*; *Bufile v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008). The claims of each CM are relatively small and would be impractical to litigate on an individual basis. Jhaveri-Weeks Decl. ¶ 35; *Bufile*, 162 Cal. App. 4th at 1208.

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

A. The Two-Step Settlement Approval Process

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

1 to be within the range of acceptable settlements. Cal. Rule of Ct. 3.769(f); *N. Cty. Contractor's Ass'n v.*
2 *Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1089-90 (1994). A settlement is "presumed to be fair"
3 when (1) it "is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to
4 allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4)
5 the percentage of objectors is small." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 52 (2008).

6 As detailed below, the Settlement represents about 67% of ER's realistic exposure (excluding
7 PAGA Penalties (discussed below), interest, and liquidated damages) after adjusting the maximum
8 potential exposure to reflect the risks the Class would face on the merits and class certification. Jhaveri-
9 Weeks Decl. ¶ 36. Given the certainty of receiving substantial relief now rather than years of uncertainty,
10 the SA meets the criteria for preliminary approval. *Id.*

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

13 A comparison of the recovery achieved by the Settlement to the strength of the Class's claims is
14 the most important fairness factor. *Kullar*, 168 Cal. App. 4th at 130. Here, an analysis of the likely
15 recovery on each cause of action demonstrates that the proposed Settlement of \$275,000 is reasonable.

16 **Expense Reimbursement Claim:** Plaintiffs alleged that ER required CMs, who taught online, to
17 use their home internet and equipment, yet Defendant did not reimburse CMs for such costs under Labor
18 Code § 2802. *Id.* ¶ 37. Plaintiffs estimated that their best-case outcome at trial was an award of
19 \$100/month of monthly business expenses incurred by each CM to be reimbursed by ER. *Id.*; *Cochran*
20 *v. Schwan's Home Serv., Inc.*, 228 Cal. App. 4th 1137, 1140 (2014) (requiring reimbursement of a
21 "reasonable percentage" of costs of personal cell phone service when phone is used for work). Plaintiffs
22 calculated Defendant's maximum exposure as \$258,500. Jhaveri-Weeks Decl. ¶ 37.

23 Plaintiffs saw minimal risk on class certification, applying a 10% discount to account for the risk
24 that individualized inquiries into each CM's monthly expenses would defeat certification. *Id.* ¶ 38. On
25 the merits, Plaintiffs faced the risk that a factfinder would award a much lower amount per month as a
26 "reasonable percentage" to reimburse. *Id.* Given the part-time, intermittent nature of CMs' work, ER
27 argued that a much smaller percentage of CMs' internet costs (a few dollars per month) should be
28 reimbursed. *Id.* In addition, Plaintiffs' full estimate assumed reimbursement for every month in which

1 CMs did any work, no matter how little. Plaintiffs therefore applied a 50% discount on the merits,
2 assuming that a reasonable trial victory would be \$50 per month for every month in which some work
3 was performed. *Id.* After the discounts, Plaintiffs calculated ER's realistic exposure on this claim as
4 **\$116,325**. *Id.* ¶ 39.

5 **Inaccurate Wage Statements:** Plaintiffs alleged that ER violated Labor Code § 226.2 by failing
6 to issue accurate itemized wage statements because CMs, as piece-rate employees, were entitled to wage
7 statements containing the piece-rate and the number of pieces at that rate, the total hours of compensable
8 rest and recovery periods, the rate of compensation for those periods, and the gross wages for those
9 periods. Jhaveri-Weeks Decl. ¶ 40. Plaintiffs also argued that, even if CMs were not piece-rate workers,
10 CMs were "non-exempt," and therefore were entitled to wage statements stating total hours worked,
11 applicable hourly rates, and hours worked at each rate. *Id.* Plaintiffs sought penalties under
12 Section 226(e) of \$50 for each initial violation, and \$100 for each subsequent violation. *Id.* Plaintiffs
13 calculated the maximum statutory penalties on this claim as \$150,650. *Id.*

14 With respect to risk on class certification, Plaintiffs saw minimal risk based on their piece-rate
15 theory, but if Plaintiffs lost that issue and had to rely on the argument that CMs were not paid enough to
16 qualify for the professional exemption, there would be risk of maintaining class certification because
17 some percentage of CMs may have been paid enough to qualify as "exempt" in some periods. *Id.* ¶ 41.
18 Plaintiffs applied a 15% discount for the risk on class certification. *Id.*

19 On the merits, Plaintiffs also saw little risk. ER could have argued that even if CMs were paid a
20 piece-rate, there was often only a single piece (the course), so CMs could tell from the face of the wage
21 statement what the piece-rate was. *Id.* ¶ 42. ER could further have argued that for those CMs who did
22 not work 3.5 hours or more in one day, there would likely be no rest break required, and thus no need for
23 the wage statement to provide information about breaks. *Id.* Even if Plaintiffs prevailed, ER could have
24 argued that Labor Code § 226(e) penalties should be calculated at \$50 for all violations, rather than \$50
25 for the first pay period and \$100 for all subsequent pay periods, which would cut the penalty recovery in
26 half again. *Id.* (citing *Robinson v. Open Top Sightseeing S.F., LLC*, 2018 U.S. Dist. LEXIS 24556, at
27 *51-58 (N.D. Cal. Feb. 14, 2018)). Plaintiffs saw some risk in recovering penalties for the two pay periods
28 prior to each term and pay period after each term, which would have required proof of the need to work

1 during all of those pay periods on either class preparation or post-term grading activities. *See* Jhaveri-
2 Weeks Decl. ¶ 42. Plaintiffs applied a 35% discount for these risks on the merits. *Id.* After applying
3 discounts, Plaintiffs calculated ER’s realistic exposure on this claim as **\$83,234**. *Id.* ¶ 43.

4 **Unpaid Wages:** As piece-rate employees, CMs were entitled to be paid separately and hourly
5 for “nonproductive time,” defined as “time under the employer’s control . . . that is not directly related
6 to the activity being compensated on a piece-rate basis.” Lab. Code § 226.2. Plaintiffs alleged that ER
7 required CMs to engage in trainings, performance reviews, and post-Term grade disputes. Jhaveri-Weeks
8 Decl. ¶ 44. Plaintiffs argued that this work was uncompensated because such tasks were not directly
9 related to producing the piece (*i.e.*, delivery of a course). *Id.* Plaintiffs’ survey results provided estimates
10 of the hours CMs spent on these tasks. *Id.* Based on survey responses and ER’s pay data, Plaintiffs
11 calculated ER’s maximum liability on this claim as \$125,295. *Id.*

12 With respect to risk on class certification, Plaintiffs applied a 50% discount because individual
13 inquiries would be needed to determine which CMs engaged in which tasks. *Id.* ¶ 45. With respect to
14 risk on the merits, Plaintiffs applied a 50% discount because (a) ER argued that the tasks at issue were
15 necessary parts of delivering a course and therefore compensated by the course rate, and (b) there was
16 risk that CMs would prove fewer unpaid hours than Plaintiffs’ survey results suggested. *Id.* ¶ 46 After
17 applying discounts, Plaintiffs calculated ER’s realistic exposure on this claim as **\$31,324**. *Id.* ¶ 47.

18 **Rest Break Claims:** Plaintiffs alleged that ER was required, but failed, to pay CMs hourly and
19 separately for rest breaks under Labor Code § 226.2. *Id.* ¶ 48. For each day in which a piece-rate worker
20 works at least 3.5 hours and is not paid separately and hourly for a rest break, a premium of one hour’s
21 pay is owed, even if the rest break is provided. *See Sanchez v. Martinez*, 54 Cal. App. 5th 535, 545
22 (2020). Using ER’s payroll data and CMs’ survey responses, Plaintiffs estimated the average number of
23 days CMs worked 3.5 hours without a rest break and then calculated the regular hourly rate of pay to
24 determine the premium pay owed. Jhaveri-Weeks Decl. ¶ 48. Plaintiffs calculated Defendant’s
25 maximum liability on the rest break premium pay claim as \$383,726. *Id.*

26 With respect to class certification, Plaintiffs faced significant risk because of the potential need
27 for individualized inquiries to determine when CMs worked 3.5 hours in a given day. *Id.* ¶ 49. CMs
28 largely determined their own schedules, and they were part-time workers teaching predominantly

1 asynchronous courses (*i.e.*, not a live course). *Id.* The case thus differed from other adjunct instructor
2 cases in which course schedules provide common proof concerning the days on which instructors are
3 required to work at least 3.5 hours. *Id.* Plaintiffs thus applied a 50% discount for certification risk. *Id.*

4 With respect to the merits, ER argued that no rest break premiums were owed because CMs were
5 almost always free to set their schedules, including to refrain from working 3.5 hours in any given day,
6 or to take breaks whenever they wished. *Id.* ¶ 50. ER also argued that for the few courses that are
7 synchronous (*i.e.*, live), no class lasted longer than 3 hours and 20 minutes, and CMs were given 10-
8 minute breaks every hour. *Id.* ER also could have distinguished this case from cases in which workers
9 have an incentive to work through their breaks to produce more pieces because, here, CMs would not
10 have earned more pieces if they spent more time working. *Id.* Plaintiffs would almost certainly have
11 faced stiff challenges to their assumptions about how frequently CMs worked 3.5 hours, so even if
12 Plaintiffs prevailed on the merits, they might have succeeded in proving only a much smaller number of
13 violations. *Id.* Plaintiffs applied a 60% merits discount. *Id.* After applying discounts, Plaintiffs
14 calculated Defendant's realistic exposure on the rest break claims as **\$76,745**. *Id.* ¶ 51.

15 **WARN Act Claim:** Plaintiffs alleged that ER violated the California WARN Act by shutting
16 down its adjunct program in California and laying off at least 50 employees within a 30-day period, yet
17 failing to provide at least 60 days' notice. Labor Code § 1400 *et seq.* An employer that fails to give
18 notice when statutorily required to do so is liable to each employee for up to 60 days of back pay. *Id.* §
19 1402. Using ER's data, Plaintiffs calculated that 60 days' of pay at CMs' average daily rate of pay
20 amounted to \$342,744. Jhaveri-Weeks Decl. ¶ 52.

21 As to class certification, Plaintiffs saw minimal risk because of a need for individualized inquiries
22 into when each CM was given notice of the termination and into the effective date of the termination
23 (CMs were notified at different times and their employment terminated on different dates). *Id.* ¶ 53.
24 Thus, Plaintiffs applied a 15% discount with respect to class certification. *Id.* However, on the merits,
25 Plaintiffs faced very high risks because the WARN Act applies only when a layoff occurs at a "covered
26 establishment," meaning an establishment that employs at least 75 employees. *Id.* ¶ 54. There are fewer
27 than 75 employees in California, and they arguably reported to ER locations in California with much
28 fewer than 75 employees. *Id.* Plaintiffs would have had to prevail on the untested theory that the relevant

“covered establishment” was ER’s headquarters in Florida, and that the layoff occurred at that “establishment” even though CMs worked from home throughout California. *Id.* Even if Plaintiffs prevailed, many CMs did receive considerable notice, so they would not have recovered the full 60 days of pay. *Id.* Because this theory was untested and because these facts are very different from the typical plant closing with which the WARN Act is typically concerned, Plaintiffs assigned a discount of 75% to this claim on the merits. *Id.* After applying discounts, Plaintiffs calculated ER’s realistic exposure on this claim as **\$72,833**. *Id.* ¶ 55.

Waiting Time Penalties: Plaintiffs’ claim for waiting time penalties under Labor Code § 203 for failure to pay all wages due at discharge was derivative of the claim for unpaid wages – *i.e.*, because such wages were not paid at the time of discharge, waiting time penalties accrued. *Id.* ¶ 56. ER has terminated every CM due to the shutdown of its adjunct program in California (*i.e.*, 58 CMs total). Plaintiffs calculated that 30 days’ penalties at CMs’ average daily rate of pay amounted to \$174,378. *Id.*²

Certification risk was the same as for the claim of which it is derivative – 50%. *Id.* ¶ 57. Plaintiffs applied a significant discount on the merits for three reasons: first, it faced the same merits risk as the claims of which it was derivative. *Id.* Second, to recover penalties under Section 203, Plaintiffs would have had to prove that Defendant’s violation of Labor Code § 201 was “willful,” which might have been difficult given ER’s merits defenses and the novel nature of Plaintiffs’ piece-rate theory. *Id.*; Lab. Code § 203; Cal. Code Regs., tit. 8, § 13520(a) (“willfulness” lacking if “employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee”). And third, Plaintiffs calculated waiting time penalties using an “average daily rate” that assumed all pay was for only 5 days per week, but Defendant could have argued that the “average” daily rate included the average rate for *all* days in a week that CMs worked, which could have lowered the penalty even if Plaintiffs prevailed. Jhaveri-Weeks Decl. ¶ 57. Thus, Plaintiffs applied a 65% discount on the merits. After applying discounts, Plaintiffs calculated ER’s realistic exposure on this claim as **\$30,516**. *Id.* ¶ 58.

Defendant’s Total Exposure on All Class Claims: Plaintiffs calculated the Class’s maximum

² Plaintiffs also alleged CMs were “discharged” when they completed an Assignment, but based on discovery, the value of this claim was insignificant. Jhaveri-Weeks Decl. ¶ 56 n.2. (explaining rationale).

1 recovery if they were to win full damages on every single claim as approximately **\$1,435,293** (excluding
2 PAGA penalties, interest, and liquidated damages). Jhaveri-Weeks Decl. ¶ 59. After applying the
3 foregoing discounts for certification and merits risks on each claim, Defendant’s realistic liability for
4 settlement purposes is **\$410,977**. *Id.* The Settlement reached by the Parties (\$275,000) represents **67%**
5 of Defendant’s realistic exposure. *Id.* Given the significant risks on many claims, this is an excellent
6 result for the Class. *Id.*

7 **The PAGA Allocation Is Fair and Adequate:** The \$10,000 allocated to PAGA Penalties, 3.6%
8 of the GSA, is fair and adequate. *Id.* ¶ 60. There were approximately 1,137 pay periods in the PAGA
9 Period. *Id.* If the Court were to award PAGA penalties at the “initial” violation rate of \$100 per pay
10 period and were to decline to “stack” PAGA penalties (*i.e.*, decline to award multiple penalties for each
11 employee in each pay period), the PAGA exposure was \$113,700. *Id.* (citing *Castillo v. ADT, LLC*, 2017
12 U.S. Dist. LEXIS 10579, at *11 (E.D. Cal. Jan. 25, 2017) (declining to stack PAGA penalties); *Bernstein*
13 *v. Virgin Am., Inc.*, 990 F.3d 1157, 1172-73 (9th Cir. 2021) (awarding only “initial” violation penalties)).

14 The PAGA allocation is reasonable for several reasons. First, the Court has discretion to reduce
15 any award of PAGA penalties as “unjust, arbitrary and oppressive, or confiscatory” under Labor Code
16 § 2699(e)(2). Jhaveri-Weeks Decl. ¶ 61. This is a risk when, as here, the PAGA penalties are sought
17 along with statutory penalties on the Labor Code claims. *Id.* When Plaintiffs’ Counsel prevailed at trial
18 several years ago on a class of adjunct instructors’ wage statement claims, the court awarded only 15%
19 of the PAGA penalties, noting that the defendant’s payment of the wage statement penalties already
20 largely satisfied PAGA’s goals of deterrence and punishment. *Id.* Here, 15% of the non-stacked PAGA
21 exposure is \$17,055, supporting the \$10,000 PAGA allocation. *Id.* Second, there is risk that Plaintiffs’
22 claims for PAGA penalties would fail for the same reasons as the underlying claims. *Id.* ¶ 62. Third,
23 PAGA claims can be stricken if “found to be ‘unmanageable.’” *Id.* ¶ 63 (citing *Raphael v. Tesoro Ref.*
24 *& Mktg. Co.*, 2015 U.S. Dist. LEXIS 130532, at *6-7 (C.D. Cal. Sept. 25, 2015)). Fourth, the percentage
25 of the Settlement devoted to the PAGA allocation is comparable to PAGA allocations that have received
26 final approval in similar wage and hour cases on behalf of adjuncts. *Id.* ¶ 64 (citing examples).

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

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

3 This case would take years to resolve absent settlement. Jhaveri-Weeks Decl. ¶ 65; Hammond
4 Decl. ¶ 15. Voluminous evidence would be needed to prove damages for the 58 CMs; expert testimony
5 and expert discovery would be required; and trial would be complex. Jhaveri-Weeks Decl. ¶ 65. Neither
6 side would likely prevail on all positions, making appeals likely. *Id.* Absent a settlement, the Class
7 would not receive relief for many years, if ever. *Id.* This Settlement provides an early resolution of this
8 dispute, and CMs will obtain a substantial recovery without the risks and delays of further litigation. *Id.*

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

10 The Settlement is the result of arm's-length negotiations, reached after mediation with an
11 experienced mediator. *Id.* ¶ 66. Class Counsel engaged in significant informal discovery, in addition to
12 conducting their own investigation that included surveying and interviewing CMs. *Id.* By analyzing
13 (with an expert) the data and documents produced, interviewing CMs, and preparing for mediation,
14 Plaintiffs were well-informed about the strengths and weaknesses of the Class's claims. *Id.*

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

16 Class Counsel have extensive class experience, including representing adjunct instructors. *Id.*
17 ¶¶ 7-18; Hammond Decl. ¶¶ 6-13. Class Counsel consider the Settlement an excellent result, particularly
18 given that CMs were part-time and intermittent employees setting their own schedules. Jhaveri-Weeks
19 Decl. ¶ 67. The average gross recovery per CM of \$4,741 and net recovery of \$2,325 compares favorably
20 to other adjunct class settlements that have been finally approved. *Id.*; Hammond Decl. ¶ 14.

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

22 Due process requires that CMs be provided with notice sufficient to give them an opportunity to
23 be heard. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Proper notice must
24 provide information to allow CMs to make an informed decision to accept or object to the settlement.
25 *Id.*; *see also Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 251-52 (2001). Here, the proposed
26 Notice provides: (1) the material terms of the Settlement, (2) the CM's anticipated payment, (3) how to
27 object or opt out, (4) how to obtain more information, (5) the proposed fees, costs, settlement
28 administration costs, and service awards, and (6) the date and time of the final approval hearing. *See*
Exhibit A to the SA (Class Notice); *see also* Cal. Rule of Ct. 3.766. The procedure for distribution of

1 the Class Notice has “a reasonable chance of reaching a substantial percentage of the [CMs].” *Cartt v.*
2 *Super. Ct.*, 50 Cal. App. 3d 960, 974 (1975). The Notice will be sent by first class mail to the most recent
3 address of each CM, updated using the National Change of Address Database. SA §§ 10.1.1-10.1.3. If
4 a Notice is returned as undeliverable, ILYM will perform a skip trace and resend it if a new address is
5 identified. SA § 10.1.4. In Class Counsel’s experience, this proposed method of providing notice has
6 been highly effective. In other adjunct instructor cases, the rate of notices being returned as undeliverable
7 has ranged from 0-1%. Thus, the Notice is likely to reach most, if not all, CMs.

8 In evaluating whether the contents of the Notice and related forms are likely to be readily
9 understood by CMs, this Court considers factors such as the age, education, and experience of CMs.
10 Here, CMs are adjunct instructors who teach college-level and/or higher-education courses. Hence, there
11 is no risk that CMs will lack the ability to read the Notice.

12 **C. The Class Representative Service Awards Are Preliminarily Reasonable**

13 In conjunction with seeking final approval, Plaintiffs will move for approval of a Service Award
14 of \$7,500 for each Class Representative to recognize their effort for the Class and the general release
15 they are giving. SA §§ 7, 16.3; Jhaveri-Weeks Decl. ¶ 68. That motion will be supported by declarations
16 from the Plaintiffs. *Id.* The requested awards fall well within the range of those typically awarded. *See,*
17 *e.g., Cellphone Term. Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (affirming awards of \$10,000).

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

19 In conjunction with final approval, Plaintiffs will move for an award of attorneys’ fees of one-third
20 of the GSA (\$91,666.67). SA § 6. This is the benchmark award in class actions. *See, e.g., Laffitte v.*
21 *Robert Half Int’l Inc.*, 1 Cal. 5th 480, 487 (2016) (affirming fee award of one-third). Plaintiffs will also
22 request reimbursement of litigation costs not to exceed \$20,000. SA § 6; Lab. Code §§ 226(e), 1194.2,
23 2802. If the Court grants preliminary approval, Plaintiffs will file a fully-briefed motion, supported by
24 detailed lodestar information, to be heard with the final approval motion. Jhaveri-Weeks Decl. ¶ 69.

25 **VI. CONCLUSION**

26 Plaintiffs respectfully request that the Court enter the proposed order certifying the settlement
27 Class, preliminarily approving the Settlement, and ordering distribution of the Notice to the Class.
28

1 DATED: June 20, 2023

Respectfully submitted,

2 

3 William C. Jhaveri-Weeks

4 Sarah Abraham

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