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7
8 **SUPERIOR COURT OF CALIFORNIA**
9
10 **FOR THE COUNTY OF PLACER**

11 JESSE DOWNARD, individually and on
12 behalf of all other similarly situated
13 employees,

14 Plaintiff,

15 vs.

16 SIERRA MENTAL WELLNESS GROUP, a
17 California Corporation; and DOES 1 to 100,
inclusive,

18 Defendants.
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Case No. S-CV-0049587

CLASS ACTION

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

Date: January 16, 2024

Time: 8:30 a.m.

Dept.: 42

Judge: Hon. Trisha Hirashima

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Trial Date: None Set

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I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT

Plaintiff Jesse Downard (“Plaintiff”) seeks preliminary approval of a wage and hour class action and Private Attorneys General Act (“PAGA”) settlement in the gross amount of \$450,000. *See generally* Exhibit A (Joint Stipulation Regarding Class Action and PAGA Settlement and Release [“Agreement”]). Plaintiff brought this class action individually and on behalf of similarly situated employees who worked for Defendant Sierra Mental Wellness Group, (“Defendant”) (Plaintiff and Defendant sometimes collectively referred to as the “Parties”). *See generally* Exhibit B (Plaintiff’s Operative Complaint). There are approximately 302 Class Members.

Plaintiff has alleged that Defendant 1) failed to pay overtime wages, 2) failed to pay minimum wages, 3) failed to provide meal periods, 4) failed to provide rest periods, 5) failed to provide accurate wage statements, 6) failed to timely pay all final wages, 7) failed to reimburse employees for incurred expenses, and 8) engaged in unfair competition. *See generally* Exhibit B; *see also* Declaration of Justin P. Rodriguez (“Decl. Rodriguez”), ¶¶ 2, 9-10. Plaintiff has also alleged Defendant is liable for a civil penalties under the PAGA based on these violations. *See id.*; Exhibit C (Plaintiff’s Ltr. to the Labor and Workforce Development Agency [“LWDA”] Regarding PAGA Claims). Defendant has denied all of Plaintiff’s allegations in their entirety and any liability or wrongdoing of any kind. *See* Decl. Rodriguez, ¶ 5. Defendant has also denied that this case is appropriate for class certification other than for purposes of settlement. *See id.* However, subject to Court approval, the Parties have been able to compromise and settle all asserted claims as a result of extensive investigations, document and data exchanges, and extended negotiations. *See* Exhibit A. Plaintiff and Plaintiff’s counsel believe the proposed Agreement is fair, reasonable, and adequate based on the investigations, discovery, employee data exchanges, negotiations, and a detailed knowledge of the issues in this case. *See* Decl. Rodriguez, ¶¶ 6-7, 9-10.

It is well within the discretion of this Court to grant preliminary approval of the Agreement as it satisfied all applicable criteria under California law. Accordingly, Plaintiff requests that the Court: (1) certify the proposed settlement class on a preliminary and conditional basis; (2) grant preliminary and conditional approval of the proposed Agreement (Exhibit A); (3) approve the form and content of the Notice of Settlement (Exhibit F) and the method for providing notice to Class Members as set forth in

the Agreement; and (4) adopt the implementation schedule contained in the proposed order.

II. PROCEDURAL AND LITIGATION HISTORY

Plaintiff filed a class action complaint on approximately December 19, 2022, in PLACER County Superior Court against Defendant. Plaintiff exhausted administrative remedies under the PAGA by providing notice of the claims and violations to the LWDA. *See* Exhibit C; Cal. Lab. Code § 2699.3(a), (c); Decl. Rodriguez, ¶ 3. Then, Plaintiff filed a First Amended Class Action Complaint on approximately March 27, 2023, to include a PAGA claim. *See id.*; Exhibit B. There is no date set for a motion for certification or trial in this matter. *See* Decl. Rodriguez, ¶ 4.

III. INVESTIGATION AND DISCOVERY CONDUCTED

Plaintiff thoroughly investigated issues affecting certification, the merits of the class claims, and potential damages for such claims. *See id.* at ¶¶ 3, 6-10; Declaration of Jesse Downard (“Decl. Downard”) ¶¶ 5-7, 9-10. Plaintiff worked during the time all of Defendant's policies and practices at issue in the Complaint were in effect and provided information regarding these policies and practices, enabling pre-filing investigations to take place. *See* Decl. Downard, ¶ 2-3, 5-6. The Parties engaged in informal discovery and exchange of documents, including a representative sampling of employee data, such as timecards, paystubs, payroll data, and relevant policies for the entirety of the statute of limitations applicable to the asserted claims. The discovery covered all aspects of the asserted claims, including certification issues, merits issues, damages, the scope and configuration of Class Members, the content and implementation of the wage and hour policies at issue, issues relating to manageability concerns at trial, among other relevant areas. *See* Decl. Rodriguez, ¶¶ 6-7. The information allowed Plaintiff to determine the extent and frequency of any violations in accordance with Plaintiff's contentions and create an accurate damages model to assess the reasonableness of any settlement. *See id.* at ¶¶ 7, 9-10.

IV. NEGOTIATION AND PROPOSED SETTLEMENT

a. Plaintiff and Defendant Engaged in Extensive Arm's Length Negotiations

The final settlement occurred only after extended, arm's length negotiations. Over the course of approximately one (1) year, Plaintiff has been investigating the claims and discussing with Defendant's

1 counsel the merits of the claims and issues present in this case. *See id.* at ¶¶ 5-8. The Parties
2 exchanged substantial amounts of information and legal analysis in connection with these discussions.
3 *See id.* It was only after these extended discussions, which included a full day of mediation with Russ
4 J. Wunderli and several days after mediation of assessing the proposed settlement terms, that the Parties
5 were able resolve all claims and enter into the Agreement. *See id.* at ¶ 8.

6 **b. The Terms of the Agreement**

7 1. The following groups of individuals are covered by the Agreement: (a) Class Members,
8 which include all hourly non-exempt employees who have worked, or continue to work, for Defendant
9 in California as clinicians, nurses, psychologists, or similar positions responsible for providing care to
10 patients at any point between December 19, 2018, to (1) the date a signed order preliminarily
11 approving the settlement is filed by the Court, or (2) sixty (60) days after the Agreement is signed,
12 whichever is earlier; and (b) Aggrieved Employees, which include all hourly non-exempt employees
13 who have worked, or continue to work, for Defendant in California as clinicians, nurses, psychologists,
14 or similar positions responsible for providing care to patients at any point between December 16, 2021,
15 up to either (1) the date a signed order preliminarily approving the settlement is filed by the Court, or
16 (2) sixty (60) days after the Agreement is signed, whichever is earlier. *See Exhibit A, ¶¶ 1.2, 1.5.*
17 There are approximately 302 Class Members and 143 Aggrieved Employees. *See id.*

18 2. Defendant will pay the Gross Settlement Amount of \$450,000, which is exclusive of the
19 employer's share of payroll taxes. *See id.* at ¶ 5.1. Funding of the Gross Settlement Amount shall
20 occur in two installments of \$225,000. *See id.* The first installment shall be due on or before May 14,
21 2024. *See id.* The second installment shall be due by August 14, 2024. *See id.* No portion of the
22 Gross Settlement Amount will revert to Defendant. *See id.* at ¶ 5.6. Aggrieved Employees will still be
23 paid their share of the PAGA Payment regardless of whether they opt out of being Class Members. *See*
24 *id.* at ¶¶ 7.5.1, 7.8.3.

25 3. Up to \$15,000 will be paid to Plaintiff as an Enhancement Payment. This amount will
26 be in addition to any amount Plaintiff may be entitled to under the terms of the Agreement. *See id.* at ¶
27 5.4.

1 4. Subject to Court approval, the Parties have selected ILYM Group, Inc. to act as the
2 Settlement Administrator, who has provided a maximum cost estimate of \$7,750. See Exhibit D
3 (ILYM Group, Inc. Quote); Exhibit A, ¶ 1.33; Decl. Rodriguez, ¶ 20.

4 5. The Parties agree that \$20,000 of the Gross Settlement Amount shall be allocated to
5 resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to
6 the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees. See Exhibit A, ¶
7 5.5. Given the risk to proving the claims on the merits, the derivative nature of the penalties, the efforts
8 by Defendant to maintain compliant policies and take corrective action, the presence of what may likely
9 be deemed good faith disputes, and the Court's discretion to reduce any penalty award, Plaintiff
10 believes the \$20,000 PAGA Payment allocation represents a meaningful settlement aimed at deterring
11 non-compliance given the facts of this case. See Decl. Rodriguez, ¶¶ 5-10; see also *Nordstrom Com.*
12 *Cases*, 186 Cal.App.4th 576, 589 (2010) (approving \$0 allocation to the resolution of PAGA claims
13 based on their being disputed and being part of a class settlement which was evaluated based on the
14 terms of the agreement overall); *Junkersfeld v. Med. Staffing Sols., Inc.*, 2022 WL 2318173, at *8 n.2
15 (E.D. Cal. 2022) (collecting cases with PAGA settlement values ranging from .037%-1%); *Jennings v.*
16 *Open Door Marketing, LLC*, 2018 WL 4773057, *9 (N.D. Cal. 2018) (approving settlement of PAGA
17 claims at 0.6% of total estimated value due to risk of no recovery); *Ruch v. AM Retail Grp., Inc.*, 2016
18 WL 5462451, *7 (N.D. Cal. 2016) (approving \$10,00 PAGA settlement allocation where total PAGA
19 penalty exposure was approximately \$5.2 million, or 0.2% of total estimated value); *Davis v. Cox*
20 *Commc'ns California, LLC*, 2017 U.S. Dist. LEXIS 63514, *1 (S.D. Cal. 2017) (preliminarily
21 approving \$4,000 PAGA allocation in \$275,000 settlement); *Moore v. Fitness Int'l, LLC*, 2014 U.S.
22 Dist. LEXIS 8358, *5 (S.D. Cal. 2014) (approving \$2,500 PAGA allocation when attorneys' fees award
23 alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 118764, *6 (S.D.
24 Cal. 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson*
25 *& Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010) (approving \$3,000 PAGA allocation in
26 \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, *9 (N.D. Cal.
27 2009) (approving \$1,500 PAGA allocation in \$1,026,000 settlement); *Syed v. M-I, L.L.C.*, 2017 U.S.
28 Dist. LEXIS 24880, *34-35 (E.D. Cal. 2017) (approving \$100,000 PAGA allocation in a \$3,950,000

1 settlement even though PAGA exposure was calculated at \$53,600,000, or 0.2% of total estimated
2 value); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7 (E.D. Cal. 2012)
3 (approving \$10,000 PAGA allocation in a \$3,700,000 settlement); *Franco v. Ruiz Food Prod., Inc.*,
4 2012 WL 5941801, at *14 (E.D. Cal. 2012) (\$10,000 in PAGA payment from \$2,500,000 settlement
5 fund); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. 2011) (approving
6 PAGA settlement payment of \$7,500 to the LWDA out of \$6.9 million common-fund settlement).

7 6. The Parties agree that up to Thirty Five Percent (35%) of the Gross Settlement Amount
8 (\$157,500) will be paid for Plaintiff's attorneys' fees incurred in the litigation of this case. Defendant
9 will not oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ 5.2.
10 Additionally, the Parties agree that Plaintiff will also be entitled to the actual litigation costs as
11 approved by the Court in an amount not to exceed \$10,000. *See id.* The proposed notice to be sent to
12 Class Members will state this information. *See* Exhibit F.

13 7. Any allocated amounts under the Agreement for Settlement Administrator Costs, Class
14 Representative Enhancement Payment, and attorney's fees and costs that are not ultimately awarded by
15 the Court will remain part of the Net Settlement Amount and be paid out to Participating Class
16 Members on a pro rata basis as set forth in the Agreement. *See* Exhibit A, ¶¶ 5.1-5.5, 5.8. These
17 amounts will be paid out from the Gross Settlement Amount, not in addition to the Gross Settlement
18 Amount. *See* Exhibit A, ¶¶ 5.1-5.5.

19 8. Class Members who fail to timely opt-out of this settlement will waive all Released
20 Class Claims as set forth in the Agreement. *See* Exhibit A, ¶¶ 1.14, 1.26, 1.30, 1.32, 6.1. Aggrieved
21 Employees will waive all Released PAGA Claims as set forth in the Agreement regardless of whether
22 they opt out of being a Class Member. *See id.* at ¶¶ 1.2, 1.14, 1.31-1.32, 6.2, 7.5.1.

23 9. For any portion of the Net Settlement Amount or PAGA Payment allocated to
24 Participating Class Members and/or Aggrieved Employees that is not claimed by them by cashing their
25 respective settlement checks within 180 calendar days of issuance, that remaining amount shall be
26 donated equally, *i.e.*, 50/50 to Capital Pro Bono, Inc., and the Center for Workers' Rights under the
27 doctrine of *cy pres*. *See* Exhibit A, at ¶ 5.6. Because the Agreement provides for all funds such that
28 there is no residue, the provisions of California Civil Procedure Code section 384 are inapplicable. *See*

1 *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 718, 720 (2006). The designated beneficiaries clearly
2 promote the law consistent with the objectives and purposes underlying the lawsuit as they are non-
3 profits aimed at assisting employees with wage and hour claims who cannot afford legal representation,
4 including providing representation for employees in wage claims before the California Labor
5 Commissioner. *See id.* at 722-724; *see also* Decl. Rodriguez, ¶¶ 23-33.

6 **c. Allocation of Settlement Funds**

7 Payment to Participating Class Members and Aggrieved Employees will not require the
8 submission of a claim form. A Net Settlement Amount will be determined by subtracting from the
9 Gross Settlement Amount any attorneys' fees and costs, Enhancement Payment to the Class
10 Representative, Settlement Administrator Costs, PAGA Payment that are approved and/or awarded by
11 the Court. Each Class Member's share will be determined by dividing their total weeks worked within
12 the Class Period by the total weeks worked by all Class Members within the Class Period. That
13 fraction will then be multiplied by the Net Settlement Amount to arrive at the Class Member's
14 individual share of the Net Settlement Amount. Each Aggrieved Employee's share of the 25% portion
15 of the PAGA Payment will be determined by dividing their total weeks worked within the PAGA
16 Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period.
17 That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the
18 Aggrieved Employee's individual share. *See* Exhibit A, at ¶¶ 1.17, 5.5, 5.8.

19 **V. THE PROPOSED PROCEDURES TO NOTIFY CLASS MEMBERS SATISFY DUE**
20 **PROCESS AS THEY PROVIDE THE BEST NOTICE PRACTICABLE UNDER THE**
21 **CIRCUMSTANCES**

22 It is not required that Class Members be given actual notice of a class settlement; instead, the
23 best practicable notice under the circumstances is all that is required. *See Silber v. Mabon*, 18 F.3d
24 1449, 1453 (9th Cir. 1994); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017);
25 *Walsh v. CorePower Yoga LLC*, 2017 U.S. Dist. LEXIS 163991, at *12-14 (N.D. Cal. 2017); *Wright v.*
26 *Linkus Enters.*, 259 F.R.D. 468, 474-75 (E.D. Cal. 2009). In *Silber v. Mabon*, 18 F.3d 1449 (9th Cir.
27 1994), the Court rejected a class member's argument that he had not received due process because he
28 did not receive notice until after the opt out period, finding that, so long as the notice process utilized is
the best practicable under the circumstances, due process is satisfied even if there is no actual receipt of

1 the notice. *See Silber*, 18 F.3d at 1453-1454. A similar finding was made in *Briseno v. Conagra*
2 *Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). With regard to any potential for undeliverable notice
3 mailings, the Court in *Rannis v. Recchia*, 380 F. App'x 646 (9th Cir. 2010) found that class members
4 who did not receive actual notice due to their mailings being deemed undeliverable were still properly
5 held to be part of the class settlement because they received the best notice practicable under the
6 circumstances. *See Rannis v. Recchia*, 380 F. App'x at 650-651. In *Noel v. Thrifty Payless, Inc.*, 7
7 Cal.5th 955, 980-984 (2019), the California Supreme Court noted that California has adopted a similar
8 approach regarding providing notice to class members.

9 Under the proposed notice procedures, Class Members will have sixty (60) days from the date
10 of mailing to review and respond to the Notice of Settlement, which will also be available online. *See*
11 Exhibit A, ¶¶ 1.21, 7.2. The Notice of Settlement contains all information necessary for a Class
12 Member to assess the litigation, the settlement, and whether they want to participate, object, or opt-out.
13 *See id.* at ¶¶ 7.2, 7.5.1-7.5.3; Exhibit F. National change of address database searches, skip-traces, and
14 surveying of current employees will be utilized as set out in the Agreement to provide the best practical
15 means of ensuring Class Members receive the notice mailing. *See* Exhibit A, ¶¶ 7.3-7.4. Any
16 individual whose initial mailing was deemed undeliverable will have additional time to respond. *See*
17 *id.* at ¶ 7.4. Additional time to respond will also be provided to cure any deficiencies in opt-outs,
18 objections, or disputes. *See id.* ¶ 7.5.4. This notice method is regularly utilized in wage and hour class
19 actions and similar to the one approved in *Rannis*. Thus, the proposed procedures for notifying Class
20 Members satisfy due process and should be approved in this case.

21 **VI. THE AGREEMENT WARRANTS PRELIMINARY APPROVAL AS IT IS FAIR,**
22 **REASONABLE, AND ADEQUATE AS TO ALL CLASS MEMBERS BASED ON THE**
23 **FACTS OF THIS CASE**

24 A class action may not be dismissed, compromised, or settled without Court approval and the
25 decision to approve or reject a settlement is committed to the Court's sound discretion. *See* Cal. Rules
26 of Court, Rule 3.769; Fed. R. Civ. Proc., Rule 23(e)¹; *Wershba v. Apple Computer, Inc.*, 91 Cal. App.
27 4th 224, 234-35 (2001); *see also* Cal. Lab. Code §§ 2699(1)(2). However, "[d]ue regard should be given

28 ¹The California Supreme Court has authorized California's trial courts to rely on these federal resources to decide class certification issues. *See Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

1 to what is otherwise a private consensual agreement between the parties. The inquiry ‘must be limited to
2 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
3 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,
4 is fair, reasonable and adequate to all concerned.’” See *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794,
5 1801 (1996); see also *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009); *In re*
6 *Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *Nordstrom Com. Cases*, 186 Cal. App. 4th 576,
7 581 (2010). The law favors settlement of lawsuits, particularly class actions and other complex cases
8 where substantial resources can be conserved by avoiding the time, expense, and rigors of formal
9 litigation. See *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117-1118 (2009); *In re*
10 *Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 n.14 (2006); *Nordstrom Com. Cases*, 186 Cal. App. 4th
11 576, 581 (2010); see also *Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992).

12 **a. The Terms of The Settlement Are Fair and Within the Range of Reasonableness**

13 The purpose of the Court’s preliminary evaluation of a proposed class action settlement is to
14 determine only whether it is within the range of possible approval such that notice to the class of its
15 terms and conditions and the scheduling of a formal fairness hearing is warranted. See *Wershba*, 91 Cal.
16 App. 4th at 234-35. If the Court finds a proposed settlement falls within “the range of reasonableness,”
17 it should grant preliminary approval of the class action settlement. See, e.g., *North County Contr.’s*
18 *Assn., Inc. v. Touchstone Ins. Svcs.*, 27 Cal. App. 4th 1085, 1089-90 (1994); *Kullar v. Foot Locker*
19 *Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). Factors to consider in determining whether the
20 settlement is fair, reasonable, and adequate include the strength of the Plaintiff’s case, the risk, expense,
21 complexity and likely duration of further litigation, the risk of maintaining class action status through
22 trial, the amount offered in settlement, the extent of discovery completed and the stage of the
23 proceedings, the experience and views of counsel, the presence of a governmental participant, and the
24 reaction of the class members to the proposed settlement. See *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th
25 1794, 1801 (1996). However, this Court should begin its analysis with a presumption that the proposed
26 settlement is fair. “A presumption of fairness exists where: (1) the settlement is reached through arm’s
27 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
28 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is

small.” *Id.* at 1802.

i. The Agreement is a Result of Extensive, Non-Collusive Arm’s Length Negotiations Between the Parties

Settlement of this case was reached only after substantial litigation and extensive arm’s length negotiations lasting nearly one (1) year, which included a full day mediation and several days of assessment of the proposed settlement terms. *See* Decl. Rodriguez, ¶¶ 6-8. At all times, the negotiations were adversarial, although still professional in nature. *See id.*

ii. The Extent of Investigation and Discovery Completed Provided Ample Information to Enter Into an Informed and Reasonable Settlement

The Parties were in possession of all necessary information during the negotiations. The Parties engaged in substantial informal discovery, which included all necessary components for evaluating the class claims and creating an accurate damages model. *See id.* at ¶¶ 6-10. Plaintiff was in possession of this information prior to calculating any damages in this case. *See id.* As a result, Plaintiff was able to make a reasonable estimation of Defendant’s potential liability. *See id.* For these reasons, the settlement now before the Court was reached at a stage where “the parties certainly have a clear view of the strengths and weaknesses of their cases” sufficient to support the settlement. *See Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D. Cal. 1979).

iii. Plaintiff’s Counsel are Experienced in Similar Litigation

Plaintiff’s counsel have considerable experience in complex litigation such as class and PAGA actions. *See* Decl. Rodriguez, ¶¶ 12-18. Thus, Plaintiff’s counsel are qualified to evaluate the class claims, the value of settlement versus moving forward with litigation, and viability of possible affirmative defenses. Plaintiff’s counsel believe that the Agreement is fair, reasonable, and adequate in light of the risks associated with the claims, the uncertainties of complex litigation, and the secured benefit to Class Members. *See id.*

iv. The Settlement is Fair, Reasonable, and Adequate Based on the Strength of Plaintiff’s Case and the Risks and Costs of Further Litigation

Plaintiff’s claims and the ability to obtain and maintain certification all the way through trial were heavily disputed by Defendant. *See* Decl. Rodriguez, ¶¶ 5-9. Based on the records and facts of

1 this case, Plaintiff has secured a gross recovery of approximately 4% of the maximum value of the
2 claims in this matter and between 10% and 22% of the more realistic range of recovery. *See Decl.*
3 *Rodriguez*, ¶¶ 9-10. The net recovery represents approximately 2% of the maximum value of the
4 claims in this matter and between 5% and 12% of the more realistic range of recovery. The average net
5 award is approximately \$806.72. *See id.*

6 This settlement is a reasonable compromise of the class and PAGA claims, and is within the
7 percentile ranges of the total available damages that have been approved in other class settlements. *See*
8 *Wershba*, 91 Cal.App.4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1139
9 (1990); *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 628 (9th Cir. 1982); *see also In re*
10 *Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that certainty of recovery in
11 settlement of 6% of maximum potential recovery after reduction for attorney’s fees was higher than
12 median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from
13 2000 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS 77714 (C.D. Cal. 2017)
14 (approving a settlement where the net recovery to class members was approximately 7.5% of the
15 projected maximum recovery amount); *Avila v. Cold Spring Granite Co.*, 2017 U.S. Dist. LEXIS
16 130878 (E.D. Cal. 2017) (approving a settlement with a gross recovery of 11% of the projected
17 maximum damages available and a net recovery of approximately 6.7% of the projected maximum
18 recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal. 2015) (approving a
19 settlement where the gross recovery was approximately 8.5% of the projected maximum recovery);
20 *Schiller v. David’s Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776 at *48 (E.D. Cal. 2012) (“Class
21 Members will receive an average of approximately \$198.70, with the highest payment to a Class
22 Member being \$695.78 . . . Overall, the Court finds that the results achieved are good, which is
23 highlighted by the fact that there was no objection to the settlement amount or the attorneys’ fees
24 requested.”); *Gardner v. GC Servs., LP*, 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal. 2012) (“the
25 results achieved in this case were very favorable. Class members are provided with immediate
26 monetary relief, with an average award of around several hundred dollars and a minimum award of
27 \$50”).

28 **v. The Proposed Settlement is a Reasonable Compromise of Claims**

1 In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), the Court required additional
2 information be presented in class action settlements “to ensure that the recovery represents a reasonable
3 compromise, given the magnitude and apparent merit of the claims being released, discounted by the
4 risks and expenses of attempting to establish and collect on those claims by pursuing the
5 litigation” *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399
6 (2010), clarified that *Kullar* does not require an illusory prediction of the outer reaches of exposure
7 without taking into account the actual risks of litigation such as dispositive motions and trial. *Kullar*
8 also does not require an explicit statement of the maximum amount to be recovered if a plaintiff
9 prevailed on all the claims, provided there is a record that allows “an understanding of the amount that
10 is in controversy and the realistic range of outcomes of the litigation.” *Id.* at 409.

11 Plaintiff has thoroughly set forth the realistic range of outcomes in this litigation as well as the
12 data points relied upon in reaching these ranges. See Decl. Rodriguez ¶¶ 9-10. The record
13 demonstrates that the compromises made by Plaintiff was reasonable and have resulted in a settlement
14 with recovery percentage well within the range of what has been found to be sufficient in several other
15 cases. See, *supra*, Section VI.a.iv; see also *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th
16 Cir. 1998) (“The fact that a proposed settlement may only amount to a fraction of the potential recovery
17 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
18 disapproved”); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (“In fact there is no
19 reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a
20 thousandth part of a single percent of the potential recovery”).

21 **b. Provisional Certification of the Class is Appropriate**

22 Class certification is appropriate when (1) the class is ascertainable and (2) there is “a well-
23 defined community of interest in the questions of law and fact involved affecting the parties to be
24 represented.” *Dunk*, 48 Cal. App. 4th at 1806. The “community of interest” element “embodies three
25 factors: (1) common questions of law or fact predominate; (2) class representatives with claims or
26 defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Id.*
27 Here, the Parties agree that, for the purposes of settlement, these prerequisites are met. See Exhibit A.

28 **i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous**

1 The proposed settlement class is ascertainable because all putative Class Members can be
2 readily identified through employee personnel and payroll files. *See Noel v. Thrifty Payless, Inc.*, 7
3 Cal.5th 955, 980 (2019); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex*,
4 *Inc.*, 166 Cal. App. 4th 1325, 1334 (2008). The numerosity requirement is met because there are 302
5 individuals who fall within the definition of Class Member, which makes joinder of all members
6 impracticable. *See Gay v. Waiters' & Dairy Lunchmen's Union*, 489 F.Supp. 282 (N.D. Cal. 1980),
7 *aff'd* 694 F.2d 531 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal. App. 3d 1017, 1030 (1972) (noting no
8 set minimum to meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is
9 acceptable). Thus, these requirements are satisfied.

10 **ii. The Commonality, Predominance, and Typicality Requirements are Met**

11 The commonality requirement is met when there are questions of law or fact regarding the class
12 as a whole. *See Hanlon*, 150 F.3d at 1019. Commonality requires only that some common legal or
13 factual questions exist; Plaintiff need not show that all issues in the litigation are identical. *See*
14 *Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v. Superior Court*, 12 Cal.3d
15 447, 460 (1974). Common questions of law or fact must also predominate over individual questions
16 and class-wide treatment of a dispute must be superior to individual litigation.² *See Richmond*, 29
17 Cal.3d at 469. Predominance requires a putative class be sufficiently cohesive to warrant adjudication
18 by representation. *See Hanlon*, 150 F.3d at 1022. The typicality requirement is met when claims of the
19 named representative are typical of those of the class, though “they need not be substantially identical.”
20 *Id.* at 1020; *Classen v. Weller*, 145 Cal. App. 3d 27, 46-47 (1983).

21 The common questions of law and fact in this case stem from Plaintiff's contention that
22 Defendant violated California law by 1) failing to incorporate the value of on-call earnings when
23 calculating the regular rate of pay for premium purposes such as overtime, double time, sick leave, and
24 meal and rest period premiums, 2) failing to have enough staff to provide meal and rest periods to
25 Plaintiff and putative class members, 3) engaging in rounding practices, rounding of putative class
26 members' hours despite being able to record actual hours worked down to the minute, and lack of
27

28 ²When assessing predominance and superiority, a court may consider that the class will be certified for settlement purposes only and that manageability of trial is therefore irrelevant. *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).

rounding policy and its failure to inform Plaintiff and putative class members of its rounding practices, and 4) failing to reimburse Plaintiff and putative class members for use of their personal cell phone and internet for work purposes. *See* Exhibit B. The waiting time penalties, unfair competition, and PAGA claims are derivative of these violations. *See id.* Plaintiff and the Class Members seek the same remedies under state law. Under these specific circumstances, the commonality and predominance requirements are satisfied. Regarding the typicality requirement, Plaintiff contends he suffered from the same unlawful policies, treatment, and circumstances as Class Members did, will request the same remedies, and will rely on the same methods of proof to establish liability and damages. *See id.* Thus, the typicality requirement is also satisfied for settlement purposes.

iii. The Adequacy Requirement is Met

The adequacy of representation requirement is met if the named representative and counsel have no interests adverse to those of the putative class members and are committed to vigorously prosecuting the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60 Cal.App.3d 442, 450-51 (1976). Those standards are met here. Under the proposed Agreement, Plaintiff and the putative Class Members will receive a pro rata share of the settlement based on the number of workweeks they worked for Defendant. *See* Exhibit A. Finally, any settlement class member who wishes to opt-out of the settlement may do so, and he or she may also dispute the number of workweeks stated in the Notice of Settlement (Exhibit F).

There is no conflict of interest between Plaintiff and Class Members. Plaintiff and Plaintiff's counsel have pursued the claims made in the operative Complaint vigorously on behalf of the class. Plaintiff's counsel, with Plaintiff's assistance, thoroughly investigated the claims made in this case by speaking with Plaintiff and reviewing substantial amounts of documents. Plaintiff's counsel thereafter engaged Defendant's counsel in settlement discussions over the course of approximately one (1) year. Moreover, Plaintiff's counsel has experience defending and bringing wage and hour claims. Because Plaintiff's counsel has vigorously pursued Plaintiff's and the Class Members' claims, the adequacy requirement is met. *See generally* Decl. Rodriguez.

VII. ATTORNEYS FEES AND COSTS, ENHANCEMENT PAYMENT TO THE CLASS REPRESENTATIVE, AND SETTLEMENT ADMINISTRATOR COSTS TO BE REQUESTED IN CONNECTION WITH FINAL APPROVAL

1 Plaintiff is not requesting any determination with respect to attorney's fees and costs,
2 Enhancement Payment, or Settlement Administrator Costs at this time. Rather, should the Court grant
3 preliminary approval, Plaintiff will make the request for these amounts as set out in the Agreement as
4 part of their final approval briefing. Specifically, Plaintiff will request the Court award attorney's fees
5 in the amount of \$157,500 (35% of the Gross Settlement Amount), costs in an amount not to exceed
6 \$10,000, Settlement Administrator Costs in an amount not to exceed \$15,000, and an Enhancement
7 Payment for the Class Representative in the amount of \$15,000.

8 Plaintiff believes an award of attorney's fees under the common fund doctrine is appropriate in
9 this case as there is a sufficiently identifiable class of beneficiaries (*e.g.* the settlement class), the
10 benefits received can be accurately traced to the settlement Plaintiff and Class Counsel were able to
11 negotiate on behalf of Class Members, and the fee can be shifted with exactitude to those benefiting as
12 the fee request is a specific, lump-sum percentage of the fund. *See Laffitte v. Robert Half Internat.,*
13 *Inc.*, 1 Cal.5th 480, 506 (2016); *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 271 (9th Cir.
14 1989); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 477-478 (1980) ("A lawyer who recovers a common
15 fund for the benefit of persons other than . . . her client is entitled to a reasonable attorney's fee from
16 the fund as a whole."); *see also Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796, *22-23
17 (S.D. Cal. 2011) (collecting cases); *Birch v. Office Depot, Inc.*, USDC Southern District, Case No.
18 06cv1690 DMS (WMC) (awarding 40% fee on a \$16 million wage and hour class action settlement);
19 *Rippee v. Boston Mkt. Corp.*, USDC Southern District, Case No. 05cv1359 BTM (JMA) (awarding a
20 40% fee on a \$3.75 million wage and hour class action settlement); *West v. Circle K Stores, Inc.*, 2006
21 U.S. Dist. LEXIS 76558, at *7-*8, *12, *27 (E.D. Cal. 2006) (awarding a \$15,000 representative
22 enhancement where 10,000 class members were to receive a gross award of approximately \$500 each
23 from the \$5,000,000 settlement); *Dent v. ITC Serv. Croup*, 2013 U.S. Dist. LEXIS 139359, at *9-*10,
24 *15-*16 (D. Nev. Aug. 6, 2013) (awarding a \$15,000 representative enhancement out of a \$150,000
25 settlement for approximately 530 class members); *Patel v. Nike Retail Services, Inc.*, 2019 WL
26 2029061 at *2 (N.D. Cal. 2019) (\$5,261 for settlement administrator's fees was not excessive where
27 PAGA group consisted of 40 employees).

28 Plaintiff's final approval briefing will include information and analysis regarding the

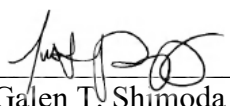
1 appropriateness of the fee percentage sought, a detailed declaration from Plaintiff regarding their time
2 spent on the case as well as any risks and burdens incurred as the Class Representative, an itemized
3 costs spreadsheet, and a declaration from the Settlement Administrator detailing the work performed
4 and Settlement Administrator Costs incurred. *See* Decl. Rodriguez ¶¶ 19. The Notice of Settlement
5 will state the amounts to be requested to provide Class Members the ability to comment thereon,
6 providing evidence of whether the requested amounts are reasonable. *See* Exhibit F at pg. 2, § II.A; *see*
7 *also In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, 71 (C.D. Cal. 2005) (“the absence of
8 objections or disapproval by class members to class counsel’s fee request further supports finding the
9 fee request reasonable”). Any allocated amounts not ultimately awarded by the Court will be
10 distributed to Class Members pro rata. *See* Exhibit A, ¶¶ 5.2-5.4, 5.8.

11 **VIII. CONCLUSION**

12 For all of the foregoing reasons, Plaintiff respectfully requests that this Court preliminarily and
13 conditionally certify the class for settlement purposes; grant preliminary and conditional approval of
14 the proposed settlement; approve the proposed notification procedures, including the Notice of
15 Settlement and proposed deadlines relating thereto; and schedule the final approval hearing. A copy of
16 Plaintiff’s proposed order is being filed concurrently herewith.

17
18 **Shimoda & Rodriguez Law, PC**

19
20 Dated: October 27, 2023

21 By: 
22 Galen T. Shimoda
23 Justin P. Rodriguez
24 Renald Konini
25 Attorneys for Plaintiff
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27
28