

Jahan C. Sagafi (SBN 224887)
 OUTTEN & GOLDEN
 One California Street, Suite 1250
 San Francisco, CA 94111
 Telephone: (415) 638-8800
 Facsimile: (415) 638-8810
 jsagafi@outtengolden.com

Sabine Jean*
 Jarron D. McAllister*
 OUTTEN & GOLDEN
 685 Third Avenue, 25th Floor
 New York, New York 10017
 Telephone: (212) 245-1000
 Facsimile: (646) 509-2060
 sjean@outtengolden.com
 jmcallister@outtengolden.com

Gregg I. Shavitz**
 Camar R. Jones*
 SHAVITZ LAW GROUP, P.A.
 951 Yamato Road, Suite 285
 Boca Raton, Florida 33431
 Telephone: (561) 447-8888
 Facsimile: (561) 447-8831
 gshavitz@shavitzlaw.com
 cjones@shavitzlaw.com

*Attorneys for Plaintiffs and Proposed Class,
 Collective, and PAGA Action Members*

**Admitted pro hac vice*

***Pro hac vice motions forthcoming*

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

ALBERT PARIS SUAZO, ALEXA
 SUART, and LEEDA HABIBI, on behalf
 of themselves and all others similarly
 situated,

PLAINTIFFS,

vs.

BLUEMERCURY, INC. a Delaware
 corporation,

DEFENDANT.

Case No. 3:22-cv-06307-JD

**NOTICE OF MOTION AND MOTION FOR
 PRELIMINARY APPROVAL OF CLASS,
 COLLECTIVE, AND PAGA ACTION
 SETTLEMENT**

Hearing Date: November 3, 2023

Time: 9:00 a.m.

Courtroom: Courtroom 11 – 19th Floor

Judge: Hon. James Donato

NOTICE OF UNOPPOSED MOTION

To the Clerk of Court and all interested parties:

PLEASE TAKE NOTICE THAT on November 3, 2023, at 9:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 11 of this Court, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California 94102, before the Honorable James Donato, Plaintiffs Albert Paris Suazo, Alexa Suart, and Leeda Habibi hereby do and will move the Court to: (1) conditionally certify the Settlement Class; (2) preliminarily approve the Settlement pursuant to Fed. R. Civ. P. 23 and Section 216(b) of the FLSA; (3) appoint Plaintiffs as the Class Representatives, their counsel as Class Counsel, and CPT Group, Inc. as Settlement Administrator; (4) set appropriate deadlines; (5) approve the proposed class notice and forms; and (6) schedule a final approval hearing.

Plaintiffs make this unopposed motion on the grounds that the Settlement is the product of protracted, zealous, arm's-length, good-faith negotiations; the Settlement is fair, adequate, and reasonable and within the range of possible final approval; and should be preliminarily approved, as discussed in the attached memorandum.

This motion is based upon this Notice of Motion for Preliminary Approval of Class, Collective, and PAGA Action Settlement, Conditional Certification of Class, Approval of Class Notice, and Setting of Final Approval Hearing, and the following Memorandum; the accompanying Declarations of Jahan C. Sagafi and Camar R. Jones; and Proposed Order: (1) Preliminarily Approving Proposed Settlement, (2) Conditionally Certifying Settlement Class, (3) Appointing Class and PAGA Representative, Class and PAGA Counsel, and Settlement Administrator, (4) Approving Forms of Notice to Class and Aggrieved Employees of Settlement, and (5) Setting Hearing for Final Approval; the Court's record of this action; all matters of which the Court may take notice; and such oral or documentary evidence presented at the hearing on the motion.

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MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION

I. INTRODUCTION

Plaintiffs Albert Paris Suazo, Alexa Suart, and Leeda Habibi (“Plaintiffs”) respectfully seek preliminary approval of a \$437,500 common fund settlement of this class, collective, and PAGA action on behalf of approximately 83 individuals (“Class Members” and “PAGA Members,” as more fully defined below) as set forth in the parties’ Stipulation of Settlement and Release (“Settlement” or “Settlement Agreement”), attached as Exhibit 1 to the Declaration of Jahan C. Sagafi in Support of Plaintiffs’ Motion for Preliminary Approval (“Sagafi Decl.”). The Settlement will resolve all claims against Defendant Bluemercury, Inc. (“Defendant” or “Bluemercury”) in Plaintiffs’ First Amended Complaint (“FAC”). *See* ECF No. 54.

The proposed settlement readily satisfies Rule 23 and applicable authority. *See Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048-50, 1060 (9th Cir. 2019) (requirements of Fed. R. Civ. P. 23); *Williams v. Superior Court*, 3 Cal. 5th 531, 549 (2017) (requirements of Cal. Lab. Code § 2699(1)(2)); Northern District of California, *Procedural Guidance for Class Action Settlements*, <https://cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/> (last modified Aug. 4, 2022). The proposed settlement also satisfies the Fair Labor Standards Act’s collective action requirements and applicable authority. The Parties have zealously litigated the case, with litigation over the scope of the Court’s jurisdiction over Bluemercury’s workers, informal discovery for mediation purposes, a June 14, 2023 mediation session with the assistance of experienced mediator Michael J. Loeb, culminating with a fully executed settlement memorandum of understanding on August 1, 2023 and a fully executed Settlement Agreement on October 14, 2023. As described below, the Settlement merits preliminary approval.

II. BACKGROUND

A. Factual Background

Bluemercury is a retailer of beauty products which operates over 100 store locations nationwide, including 28 in California. Each store is staffed with an hourly Store Manager (“SM”), as well as aestheticians and salespeople. SMs report directly to District Managers (“DMs”), who supervise multiple store locations. Plaintiff Suazo was employed by Defendant as an SM from approximately

1 May 2019 to November 2019, and again from August 2020 to December 2020, in San Francisco,
2 California. Plaintiff Suart was employed by Defendant as an SM from approximately May 2019 to
3 August 2020 in Santa Monica, California. Plaintiff Habibi was employed by Defendant as an SM from
4 approximately March 2020 to July 2023 in one of Bluemercury's California locations.

5 Plaintiffs allege that Bluemercury failed to (a) reimburse them for out-of-pocket business
6 expenses reasonably necessary for the performance of their jobs as SMs; (b) pay them for off-the-clock
7 work; (c) provide legally compliant meal and rest breaks; (d) pay them proper meal and rest period
8 premiums; and (f) pay them for their sick time pursuant to Defendant's policies and/or practices.
9 Plaintiffs allege that Bluemercury committed these violations as to SMs across California.

10 Plaintiffs' and other SMs' job duties included customer service, selling beauty products,
11 cleaning, and stocking products in Defendant's stores. Plaintiffs allege that Bluemercury establishes
12 tight labor budgets for its stores. The budgets do not allow SMs sufficient time to perform customer
13 service and other tasks SMs are required to complete each day. As a result, to ensure they do not exceed
14 Bluemercury's established labor budgets, SMs, including Plaintiffs and the Settlement Class, are forced
15 to work off the clock before and after their shifts, and during their lunch breaks performing manual and
16 administrative tasks, such as customer service, unpacking shipments, merchandising, preparing reports,
17 and reading and responding to email. While Bluemercury asserts that all employees are paid for all
18 hours worked and that it provides employees with sufficient time to take breaks, Plaintiffs allege that
19 SMs are unable to take *bona fide*, uninterrupted meal breaks during their workday because there is
20 insufficient time and insufficient staff to complete the duties required to efficiently run a Bluemercury
21 store.

22 In addition, when SMs leave work each day, their job is not done. SMs routinely receive phone
23 calls, group messages, and text messages from their supervisors and store employees while they are off
24 the clock to which they have to respond. Plaintiffs and other SMs receive and respond to these
25 communications on their personal mobile phones. Despite Bluemercury acknowledging these
26 communications as compensable work, SMs are not compensated for this time.

27 Bluemercury denies these allegations, and the Court has not ruled on the merits.
28

1 **B. Procedural Background**

2 On October 20, 2022, Plaintiffs Albert Paris Suazo and Alexa Suart filed this action in the United
 3 States District Court, Northern District of California, San Francisco Division, on behalf of themselves
 4 and other SMs who worked in California and nationwide, except New York. *See* ECF No. 1. To
 5 effectuate the settlement, on July 31, 2023, Plaintiff Habibi sent a letter to California’s Labor and
 6 Workforce Development Agency (“LWDA”) alleging violations of California’s Private Attorneys
 7 General Act (“PAGA”) for the Released PAGA Claims, as defined in the Settlement Agreement.
 8 Plaintiff Habibi later filed a consent to join form and joined the case as a PAGA Representative. *See*
 9 ECF No. 45. Plaintiffs then filed their First Amended Complaint (“FAC”) to add Plaintiff Habibi as a
 10 named plaintiff and to add relevant claims under PAGA. *See* ECF No. 54. The FAC asserts class,
 11 collective, and PAGA claims for off-the-clock work, unlawful deductions of wages for late employees,
 12 unpaid minimum wages, wage statement violations, failure to pay wages each payday, failure to pay
 13 wages due on termination, and resulting Unfair Competition Law and PAGA claims.

14 **C. Negotiation and Settlement**

15 In addition to motion practice, the parties engaged in informal discovery, including the review
 16 and exchange of policy documents, payroll data, and other relevant documents. Sagafi Decl. ¶ 22. On
 17 June 14, 2023, the Parties mediated this case with the assistance of experienced mediator Michael J.
 18 Loeb, which resulted in a mediator’s proposal that was accepted by the Parties and resulted in the
 19 Settlement. *Id.* The Parties finalized and fully executed the Settlement Agreement on October 14, 2023.
 20 *Id.* ¶ 24.

21 **III. THE PROPOSED SETTLEMENT**

22 The details of the Settlement are set forth in the Settlement Agreement, attached as Exhibit 1 to
 23 the Sagafi Declaration. A summary is set forth below.

24 **A. Settlement Class**

25 Subject to Court approval, the Settlement Class comprises (a) “Participating Class Members,”
 26 defined as those individuals in the Class who have not timely and properly opted out of the Class, where
 27 “Settlement Class” means those individuals employed by Defendant as an SM in California from
 28 October 20, 2018 through September 12, 2023 (the “Class Period”), and (b) the “PAGA Members,”

defined as individuals employed by Defendant as an SM in California from July 31, 2022 through September 12, 2023 (the “PAGA Period”). Sagafi Decl., Ex. 1, § 7. Class Members are also FLSA Collective Members for the purposes of this settlement.

The Class size is estimated to be approximately 83 individuals. Sagafi Decl. ¶ 29. This estimate is based on data provided by Defendant during mediation discussions. *Id.*

B. Settlement Fund

The \$437,500 Gross Settlement Fund will cover: (a) the Class Fund for Settlement Payments to Participating Class Members; (b) the PAGA Fund of \$6,562.50 (with 75%, or \$4,921.88, paid to the California Labor and Workforce Development Agency (“LWDA”) and 25%, or \$1,640.62, paid to the PAGA Group); (c) Named Plaintiff Service Awards of up to \$2,500 for Plaintiffs Albert Paris Suazo, Alexa Suart, and Leeda Habibi, as awarded by the Court; (d) Class Counsel’s attorneys’ fees of up to 33% of the Settlement Amount (\$145,833.33), as awarded by the Court; (e) litigation costs and expenses up to \$6,000, as awarded by the Court; and (f) settlement administration costs expected to be \$10,347.40. *Id.* ¶ 25.

The Settlement Allocation of the Class Fund provides:

1. Class Portion. Each Participating Class Member’s share of the Class Fund shall be calculated as the number of workweeks the individual was employed by Bluemercury as an SM during the Class Period divided by the total aggregate workweeks worked by all Participating Class Members times the Class Fund.
2. PAGA Portion. Each Participating Class Member’s share of the PAGA Fund shall be calculated as the number of workweeks the individual was employed by Bluemercury as an SM during the PAGA Period divided by the total aggregate workweeks worked by all Participating PAGA Members times the PAGA Fund.

Sagafi Decl., Ex. 1, § 15(c)(i)-(ii).

In exchange for the monetary consideration described above, each Participating Class Member will release Defendant of all claims arising out of the dispute that is the subject of the Action or that could have been asserted in the Action based on the allegations in the pleadings regarding events that occurred or are alleged to have occurred, including allegations pertaining to minimum wage, off-the-clock work, overtime, hours of work, wage statements, record-keeping requirements, payment of wages, or payment of final wages, and including without limitation all federal claims (including FLSA), state

claims (including any claims under the California Labor Code and PAGA) (“Released Class Claims”), and local claims that were asserted or could have been asserted in this Action based on the allegations in the pleadings regarding events that occurred or are alleged to have occurred during the PAGA Period as to PAGA claims and the Class Liability Period as to Class claims (“Released PAGA Claims”). *Id.*, §§ 24-25.

The Settlement Administrator estimates that its fees and costs will be approximately \$10,347.40. Sagafi Decl. ¶ 36. Plaintiffs sought bids from four settlement administrators before selecting CPT Group, Inc., an administrator with significant expertise, skill, and experience. *Id.* ¶¶ 33-35.

C. Notice Procedure

Within thirty (30) calendar days of entry of the Preliminary Approval Order, Defendant shall provide the Settlement Administrator with all available contact information for all Class Members and PAGA Members (the “Class Data”). Sagafi Decl., Ex. 1, § 19(a). The Notice of Settlement shall be sent by the Settlement Administrator to the Class Members and PAGA Members, in English, by first-class mail, within fifteen (15) calendar days of receiving the Class Data. *Id.* To the extent that Defendant identifies a Class Member or PAGA Member but cannot find a mailing address for them, or to the extent a mailed Notice is returned, the Settlement Administrator will check the National Change of Address List and skip-trace (only once) the returned mail using the Class Member’s and PAGA Member’s, as applicable, Social Security Number and re-mail within five (5) calendar days of receipt. *Id.* Class Members will have sixty (60) calendar days from the Notice mailing date to object to the Settlement, and Class Members will have the same amount of time to opt out. *Id.* Consistent with PAGA procedures, PAGA Group Members will not be able to opt out, but they will be able to object. *Id.* § 22. All Settlement funds will be paid out, i.e., there is no reversion to Defendants. Sagafi Decl. ¶ 28.

D. Class Representative Service Awards to Be Requested in Fee Motion

Under the Settlement, each Plaintiff will request a Class Representative Service Award of \$2,500. Sagafi Decl., Ex. 1, § 15(c)(vi). Plaintiffs will present evidence and argument supporting this award as reasonable, beneficial to the Class, and supportive of law enforcement with the forthcoming fee motion.

Courts in this District traditionally approve service awards of this amount and more based on several factors: (1) the actions the plaintiff has taken to protect the interests of the class, (2) the degree to which the class has benefitted from those actions, (3) the time and effort that representatives put into the litigation, and (4) the reasonable fears of workplace retaliation. *See Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334-35 (N.D. Cal. 2014) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)); *see also Galeener v. Source Refrigeration & HVAC, Inc.*, No. 13 Civ. 04960, 2015 U.S. Dist. LEXIS 193092, at *11 (N.D. Cal. Aug. 20, 2015) (approving service awards of \$27,000, \$25,000, and \$15,000); *Walton v. AT&T Servs.*, No. 15 Civ. 03653, 2018 U.S. Dist. LEXIS 245928, at *8 (N.D. Cal. Feb. 14, 2018) (approving \$20,000 award); *Browner v. Bank of Am. N.A.*, No. 14 Civ. 02702-LB, 2016 U.S. Dist. LEXIS 4975, at *15-16 (N.D. Cal. Jan. 14, 2016) (approving \$15,000 award).

The proposed service awards here are reasonable in light of (a) the value created by Plaintiffs in initiating and prosecuting this action (factor two, above), (b) the effort and time they invested to pursue claims on behalf of all Class Members (factors one and three), and (c) the risks they incurred of adverse action from potential employers, business partners, landlords, and others by virtue of serving as the public face of adversarial litigation against his alleged employer (factor four, as well as broader considerations).

First, Plaintiffs made this Settlement possible. If they had not stepped forward, the litigation would not have occurred, and the Class Members likely would have received nothing. Second, Plaintiffs spent significant time providing information to assist Class Counsel with pre-suit investigation, providing Class Counsel with information throughout the litigation, and staying apprised of developments in the case. Sagafi Decl. ¶¶ 21, 32. Third, as the named plaintiffs, Plaintiffs' names are prominently visible in public records. For example, a Google search of "Suazo Bluemercury" yields several results on the first page describing this litigation. *Id.* ¶ 31. Finally, in contrast to other Class Members, Plaintiffs signed a general release of claims. Sagafi Decl., Ex. 1, § 26.

E. Attorneys' Fees and Costs to Be Requested in Fee Motion

Consistent with the Settlement Agreement, in their fee motion, Class Counsel will apply for attorneys' fees of 33% of the Gross Settlement Fund of \$437,500 (i.e., \$145,833.33), plus out-of-pocket costs incurred in prosecuting the action up to \$6,000.00. *Id.* § 17. As of October 12, 2023, Class

Counsel's lodestar is already over \$279,187.50, reflecting approximately 560 attorney and paralegal hours, in addition to litigation costs of over \$6,901.77. Sagafi Decl. ¶¶ 40, 45-47; Sagafi Decl., Ex. 2, Declaration of Camar R. Jones in Support of Plaintiffs' Motion for Preliminary Approval ("Jones Decl.") ¶ 7. These amounts do not account for future work to be performed to (1) secure preliminary approval, (2) oversee implementation of notice and respond to Class Member inquiries during the notice period, (3) brief and argue final approval, and (4) oversee implementation of the Settlement and report to the Court regarding the final steps in the litigation, including the Post-Distribution Accounting required by the District Court's Guidance. Sagafi Decl. ¶¶ 41, 46. Thus, the \$145,833.33 requested fee reflects a "negative" lodestar multiplier of approximately 0.52x, which will further decrease during the coming months while Class Counsel continues to work for Covered Workers' benefit. *See Johnson v. Triple Leaf Tea Inc.*, No. 14 Civ. 1570, 2015 U.S. Dist. LEXIS 170800, at *24 (N.D. Cal. Nov. 16, 2015) (accounting for "future attorney time" in decision whether attorneys' fees were reasonable).

F. Cy Pres Beneficiaries for Unclaimed Funds

The Settlement provides that any unclaimed funds from settlement checks that are not cashed after a reasonable time (despite Class Counsel's and the Settlement Administrator's efforts to reach class members and provide replacement checks where necessary) shall be provided to Koinonia Family Services and used solely for child advocacy programs within the state of California. Sagafi Decl., Ex. 1, § 21. This approach comports with federal law. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (*cy pres* distribution is appropriate "for the limited purpose of distributing the unclaimed funds"); *Romero v. Perryman (In re Easysaver Rewards Litig.)*, 906 F.3d 747, 760-61 (9th Cir. 2018) (same). Koinonia Family Services is a non-profit 501(c)(3) organization with child advocacy programs in California. Sagafi Decl. ¶ 28.

G. Appointment of Class Representative and Class Counsel

Plaintiffs propose that they be appointed Class Representatives and that their counsel – Jahan C. Sagafi, Sabine Jean, and Jarron D. McAllister of Outten & Golden LLP, and Gregg I. Shavitz and Camar R. Jones of the Shavitz Law Group, P.A. – be appointed Class Counsel.

1 IV. ARGUMENT

2 Settlement approval “involves a two-step process in which the Court first determines
3 whether a proposed class action settlement deserves preliminary approval and then, after notice is given
4 to class members, whether final approval is warranted.” *Nat’l Rural Telecomm. Coop. v.*
5 *DirecTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004); *see also* Manual for Complex Litigation
6 §§ 21.632-634 (4th ed. 2004). Preliminary approval requires two elements: first, the court must
7 determine that the settlement class meets the requirements for class certification if it has not yet been
8 certified, Fed. R. Civ. P. 23(a), (b), and second, the court must determine that the settlement
9 is fair, reasonable, and adequate, Fed. R. Civ. P. 23(e)(2). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
10 1025-26 (9th Cir. 1998).

11 A. Certification of the Rule 23 Classes Is Proper.

12 For settlement purposes only, the parties agree to certification of the Class. “The validity of use
13 of a temporary settlement class is not usually questioned.” Alba Conte & Herbert B. Newberg, 4
14 Newberg on Class Actions § 11:22 (4th ed. 2002). The relevant factors also weigh in favor of
15 conditional certification for purposes of settlement.

16 1. Rule 23(a) Is Satisfied.

17 First, numerosity is met because joinder of Class Members would be impractical. *See* Fed. R.
18 Civ. P. 23(a)(1). Defendant estimates that there are 83 SMs in the Settlement Class. Sagafi Decl. ¶ 29.

19 Second, commonality is met because “there are questions of law or fact common to the class.”
20 Fed. R. Civ. P. 23(a)(2). The Ninth Circuit “construe[s]” this requirement “permissively.” *Hanlon*,
21 150 F.3d at 1019. Even though proposed class members “may possess different avenues of redress,” so
22 long as “their claims stem from the same source,” there is sufficient commonality “to satisfy the
23 minimal requirements of Rule 23(a)(2).” *Id.* at 1019-20. Here, questions of law and fact common to
24 Plaintiffs and the Class Members predominate over any questions affecting only individual Class
25 Members. *See* FAC ¶ 70(b)(i)-(xvii).

26 Third, typicality is satisfied. Rule 23 typicality requires a finding that the “claims or defenses of
27 the representative parties [be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).
28 Under the rule’s “permissive” standard, “representative claims are ‘typical’ if they are reasonably co-

1 extensive with those of absent class members; they need not be substantially identical.” *Johnson*, 2015
 2 U.S. Dist. LEXIS 170800, at *7 (quoting *Hanlon*, 150 F.3d at 1020). Here, Class Representatives Suazo
 3 and Suart are typical of the Class they propose to represent because they assert that they were subject to
 4 the same policies and practices of Defendant regarding compensation for all hours worked, and other
 5 wage-related claims.

6 Fourth, Plaintiffs Suazo and Suart have fairly and adequately protected the interests of the class.
 7 *See* Fed. R. Civ. P. 23(a)(4). The adequacy requirement is met where class representatives: (1) have
 8 common, and not antagonistic, interests with unnamed class members, and (2) will vigorously prosecute
 9 the interests of the class through qualified counsel. *See Hanlon*, 150 F.3d at 1020; *cf. Amchem Prods.,*
 10 *Inc. v. Windsor*, 521 U.S. 591, 625-27 (1997) (adequacy not satisfied where named plaintiffs’ interests
 11 were in conflict with absent class members’). Here, Plaintiffs Suart and Suazo share a common interest
 12 with the Class Members they seek to represent, in that they all allege that they suffered the same type of
 13 injury, and they share an interest in vigorous prosecution. Plaintiffs Suart and Suazo have vigorously
 14 represented the interests of their fellow Class Members and devoted substantial time to the prosecution
 15 of this action, including by providing extensive information to counsel, making themselves available in
 16 advance of and during mediation, being prepared to sit for deposition, and having numerous phone calls
 17 with counsel. Sagafi Decl. ¶ 32.

18 In addition, Plaintiffs are represented by adequate counsel. Outten & Golden LLP and the
 19 Shavitz Law Group, P.A. have extensive experience litigating complex civil rights and employment
 20 class actions and have vigorously prosecuted this action on behalf of Plaintiffs Suart, Suazo, and Habibi
 21 and Class Members through extensive motion practice and fact discovery. *Id.* ¶¶ 6, 11-12 (collecting
 22 cases). For example, in one case, Judge Chhabria found that Outten & Golden “have capably and
 23 effectively represented the Settlement Class Members’ interests,” and praised them for “their
 24 outstanding work on this case.” *Zamora v. Lyft, Inc.*, No. 16 Civ. 02558, 2018 U.S. Dist. LEXIS
 25 166618, at *10, (N.D. Cal. Sep. 26, 2018); *see also, e.g., Walsh v. CorePower Yoga LLC*, No. 16 Civ.
 26 05610, 2017 U.S. Dist. LEXIS 20974, at *24-25 (N.D. Cal. Feb 14, 2017) (“[Outten & Golden] ha[s] a
 27 proven track record in the prosecution of class actions as they have successfully litigated and tried many
 28

major class action cases.”). For these reasons, Class Counsel satisfy the adequacy requirement of Rule 23(a).

2. Certification Is Proper Under Rule 23(b)(3).

Rule 23(b)(3) requires that common questions predominate over individual ones, and that a class action is superior to other available methods for adjudicating the controversy. *See* Fed. R. Civ. P. 23(b)(3). Both requirements are met here.

The proposed Class is sufficiently cohesive to satisfy predominance. *See Amchem*, 521 U.S. at 623 (Predominance “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”). Predominance does not require “that each element of [a plaintiff’s] claim [is] susceptible to classwide proof.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013) (internal quotation marks and citation omitted). Rather, “[t]he predominance inquiry ‘asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.’” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quotations omitted). Here, Plaintiffs challenge Defendant’s alleged common policies and practices, such as not reimbursing Class Members for business expenses reasonably necessary for them to perform their jobs as SMs and not failing to pay them for all hours worked. These and other facts, and the legal questions they raise, predominate over any individual issues. Superiority rests on factors like individual Class Members’ desire to bring individual actions and the utility of concentrating the litigation in one forum. *See* Fed. R. Civ. P. 23(b)(3). Here, “there is no indication[] that class members seek to individually control their cases, that individual litigation is already pending in other forums, or that this particular forum is undesirable for any reason.” *Tierno v. Rite Aid Corp.*, No. 05 Civ. 02520, 2006 U.S. Dist. LEXIS 71794, at *33 (N.D. Cal. Aug. 31, 2006); *see also Amchem*, 521 U.S. at 615 (internal citation omitted). Individual lawsuits from almost one hundred plaintiffs, for modest damages, would be wasteful and inefficient for the court system. *See, e.g., Whiteway v. FedEx Kinko’s Office & Print Servs., Inc.*, No. 05 Civ. 2320, 2006 U.S. Dist. LEXIS 69193, at *30 (N.D. Cal. Sept. 13, 2006). Because the class mechanism will achieve economies of scale for Class Members, conserve judicial

resources, and preserve public confidence in the system by avoiding repetitive proceedings and preventing inconsistent adjudications, superiority is met.

3. Plaintiffs' Counsel Should Be Appointed as Class Counsel.

Adequacy of class counsel depends on (1) work performed on the matter, (2) experience, (3) knowledge of the law, and (4) resources counsel can commit. *See* Fed. R. Civ. P. 23(g)(1)(A). Class Counsel readily satisfy these criteria, as set forth above. *See supra* § IV(A)(1); *see also* Sagafi Decl. ¶¶ 6, 11-12; Jones Decl. ¶ 4.

B. Collective Certification of the Putative Collective is Appropriate.

Employees alleging violation of their rights under the FLSA may bring a claim seeking relief on their own behalf and behalf of “other employees similarly situated.” 29 U.S.C. § 216(b). At the conditional certification stage, courts determine whether the proposed collective should be given notice. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1109 (9th Cir. 2018). This stage is lenient; loosely akin to a plausibility standard. *See Hernandez v. Dutton Ranch Corp.*, No. 19 Civ. 817 2020 U.S. Dist. LEXIS 47106, at *3 (N.D. Cal. Mar. 17, 2010) (quoting *Campbell*, 903 F.3d at 1109). Plaintiffs are similarly situated when they share “a similar issue of law or fact material to the disposition of their FLSA claims.” *Campbell*, 903 F.3d at 1117.

Here, Plaintiffs have demonstrated that conditional certification is appropriate alleging that Bluemercury did not compensate them for work completed off the clock and for hours worked over 40 per workweek, in violation of the FLSA. *See, e.g., Loera v. Cnty. Of Alameda*, No. 23 Civ. 00792, 2023 U.S. Dist. LEXIS 120800, at *12 (N.D. Cal. July 13, 2023) (conditionally certifying collective of safety aides that alleged they were victims of common policy where they were not paid for work completed before and after their shifts).

C. The Settlement Is Fair, Reasonable, And Adequate.

Once the Court has found class certification to be proper, the next step of the preliminary approval process is to assess whether the settlement is “fundamentally fair, adequate, and reasonable.” *Hanlon*, 150 F.3d at 1026. Typically, the first-stage analysis looks for “obvious deficiencies,” with preliminary approval being granted if the settlement is non-collusive and within the range of possible

1 final approval. *Walsh*, 2017 U.S. Dist. LEXIS 20974, at *19 (quoting *In re Tableware Antitrust Litig.*,
 2 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)).¹

3 When considering whether to grant approval, courts often “put a good deal of stock in the
 4 product of an arm[']s-length, non-collusive, negotiated resolution.” *Rodriguez v. W. Publ’g Corp.*,
 5 563 F.3d 948, 965 (9th Cir. 2009) (internal citations omitted). Courts may also assess the following
 6 factors, which are assessed in greater detail at final approval: (1) “the strength of the plaintiffs’ case,”
 7 “the risk, expense, complexity, and likely duration of further litigation,” and “the risk of maintaining
 8 class action status throughout the trial,”; (2) “the amount offered in settlement”; (3)
 9 “the extent of discovery completed and the stage of the proceedings”; and (4) “the experience and views
 10 of counsel.” *Hanlon*, 150 F.3d at 1026 (internal citation omitted).

11 **1. Plaintiffs Face Significant Hurdles on Class Certification.**

12 “Approval of a class settlement is appropriate when ‘there are significant barriers plaintiffs must
 13 overcome in making their case.’” *Betancourt v. Advantage Human Resourcing, Inc.*, No. 14 Civ. 01788,
 14 2016 U.S. Dist. LEXIS 10361, at *11 (N.D. Cal. Jan. 28, 2016). Here, Plaintiffs face substantial
 15 obstacles to class-wide recovery.

16 First, liability is far from guaranteed, because even if Plaintiffs could prove that Bluemercury
 17 failed to properly pay SMs for off-the-clock work and expense reimbursements, Bluemercury may be
 18 able to point to differences among the SMs across each location to explain away any differences.
 19 Bluemercury could also attempt to show that Plaintiffs’ experiences were individualized and localized
 20 rather than part of a statewide pattern or practice.

21 Second, Plaintiffs may face obstacles in winning class certification because of the multiple
 22 locations across California and different DMs responsible for each location. While wage and hour class
 23 actions are often certifiable, the details of each person’s circumstances may require individualized
 24 inquiries, including as to damages. *See, e.g., Berndt v. California Dep’t of Corr.*, No. 03 Civ. 3174-PJH,

25
 26 ¹ *See also Cancilla v. Ecolab, Inc.*, No. 12 Civ. 3001, 2015 U.S. Dist. LEXIS 106249, at *9 (N.D.
 27 Cal. Aug. 12, 2015) (focusing preliminary approval analysis on “noncollusive negotiations,” the lack of
 28 “obvious deficiencies” or “preferential treatment,” and being “with[in] the range of possible approval”) (internal citations omitted); Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions*, § 13.15 (5th ed.).

2012 U.S. Dist. LEXIS 37755, at *40 (N.D. Cal. Mar. 20, 2012) (noting that “the potential for multiple mini-trials, even solely as to damages, further weakens the case for a finding of superiority in this instance.”).

2. The Settlement Amount Is Appropriate.

“[P]erhaps the most important factor” courts consider in determining whether to grant preliminary approval is “plaintiffs’ expected recovery balanced against the value of the settlement offer.” *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (internal quotation marks omitted). Here, the monetary relief provides strong value to the Class Members.

Based on Plaintiffs’ estimated hours of overtime worked and on payroll data produced by Bluemercury before mediation, covering approximately 83 SMs, the maximum exposure for Class Members is approximately \$4,000,000, using an estimated 5 overtime hours worked per week during 90% of workweeks at issue. Sagafi Decl. ¶ 29. This figure includes all potential non-PAGA damages and penalties (for unpaid wages, wage statement penalties, waiting time penalties, and interest) as well as all potential PAGA penalties (for post-separation waiting time (Cal. Labor Code § 203), pre-separation waiting time (Cal. Labor Code § 204), wage statement violations (Cal. Labor Code § 226), record-keeping violations (Cal. Labor Code § 1174.5), and minimum wage violations (Cal. Labor Code § 1197)). *Id.*

In litigation, Plaintiffs would have faced significant challenges to recovering these amounts. First, Bluemercury would have argued that off-the-clock time was not actually worked, but if it was worked, that work was done in contravention of company policy. Second, Bluemercury would have argued that all overtime was paid for all hours recorded. Third, Bluemercury would have argued that many penalties were duplicative or inappropriately derivative and could not be awarded. Fourth, Bluemercury would have argued that the Court should award the initial violation amount for each PAGA violation, as opposed to the higher continuing violation amount. Fifth, Bluemercury would have argued that Plaintiffs would not have been able to certify the class claims. Sixth, Bluemercury would have argued that the Court should not authorize notice to the collective because it believes Plaintiffs are not similarly situated to other SMs, as required by the FLSA. Seventh, Bluemercury would have argued that the existence of arbitration agreements would reduce the size of the Settlement Class. Furthermore,

on the merits, Plaintiff may not have surmounted summary judgment, trial, and appellate challenges to any trial victory.

In light of the total exposure, the risks that Plaintiffs would face in attempting to win on all arguments, the \$437,500 Settlement amount is a strong recovery.

a. The PAGA Allocation Is Reasonable.

Finally, the PAGA allocation of \$6,562.50 represents 1.5% of the total \$437,500.00 Settlement amount. This comports with applicable precedent. *See, e.g., DiMercurio v. Equilon Enters. LLC*, No. 19 Civ. 04029-JSC, 2022 U.S. Dist. LEXIS 225426, at *14 (N.D. Cal. Dec. 14, 2022) (approving PAGA allocation of about 1.6% of overall recovery); *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016) (3.7%); *Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1329-30 (N.D. Cal. 2014) (1%); *Slavkov v. Fast Water Heater Partners I, LP*, No. 14 Civ. 04324-JST, 2017 U.S. Dist. LEXIS 116303, at *2 (N.D. Cal. July 25, 2017) (2.2%).

Given these considerations, Plaintiff submits that the \$437,500 settlement amount, including the \$6,562.50 PAGA amount, is fair, reasonable, and adequate, and that the Settlement is in the best interest of the SMs.

3. The Extent of Discovery Supports Settlement.

A settlement requires adequate discovery. The touchstone of the analysis is whether “the parties have sufficient information to make an informed decision about settlement,” including formal and informal discovery. *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (quoting *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998)). Here, Plaintiffs investigated these claims carefully and then zealously litigated them, efficiently moving into settlement discussions, supported by informal discovery, to reach a reasonable settlement. Specifically, Defendant produced relevant policies and procedures and representative payroll data regarding SMs. Sagafi Decl. ¶ 22. Thus, the Settlement results from Class Counsel’s informed judgment about the strengths and weaknesses of the claims.

4. Counsel's Experience and Views Support Approval.

“‘Great weight’ is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.” *DirecTV, Inc.*, 221 F.R.D. at 528. “[P]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *Rodriguez*, 563 F.3d at 967. Class Counsel are some of the most experienced class action litigators in the country. Sagafi Decl. ¶ 6; Jones Decl. ¶ 4. Class Counsel specialize in prosecuting complex employment class actions, and over many years have successfully—and unsuccessfully—litigated many such cases, putting them in a strong position to weigh the strengths and weaknesses of Plaintiffs’ claims and Bluemercury’s defenses. Sagafi Decl. ¶ 6; Jones Decl. ¶ 4. Based on their extensive experience, Class Counsel believe that the settlement is fair, reasonable, and adequate.

5. The Parties Participated in Arm’s-Length Negotiations Before Mediator Michael J. Loeb.

When parties reach a settlement in private mediation, that “support[s] the conclusion that the settlement process was not collusive.” *Tijero v. Aaron Bros.*, 301 F.R.D. 314, 324 (N.D. Cal. 2013). Here, the settlement easily meets the rigorous scrutiny required in this District for both substantive and procedural reasons. First, the settlement is substantively strong, providing meaningful monetary relief that Class Members likely would not have received otherwise. Second, the settlement is procedurally sound, (a) having been reached after hard-fought adversarial litigation, with informal mediation discovery and motion practice, and (b) after a mediation session with experienced class action mediator Michael J. Loeb. Sagafi Decl. ¶ 22.

D. The Proposed Notice Is Clear and Adequate.

The proposed Notice are the “best notice . . . practicable under the circumstances,” Fed. R. Civ. P. 23(c)(2)(B), and are “reasonable.” Fed. R. Civ. P. 23(e)(1). The proposed Notice is consistent with the Northern District of California’s Procedural Guidance for Class Action Settlements and modern best practices set forth by the Federal Judicial Center.² Sagafi Decl., Ex 1, Ex. A (Notice). “The notice must

² See *Illustrative Forms of Class Action Notices: Overview*, Fed. Judicial Ctr., <https://www.fjc.gov/content/301253/illustrative-forms-class-action-notices-introduction> (last

clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B). Notice is satisfactory if it “generally describes the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill Vill., LLC v. GE*, 361 F.3d 566, 575 (9th Cir. 2004). The Parties’ proposed Notice includes all required information. Sagafi Decl., Ex. 1, Ex. A (Notice).

The Parties have agreed, subject to Court approval, to have the Settlement Administrator mail notice via first class mail, postage prepaid, to the last-known address of the Class Members as updated through the United States Postal Service’s National Change of Address database. Sagafi Decl. Ex. 1, § 19(a). This method meets the requirements of due process. *See Overton v. Hat World, Inc.*, No. 11 Civ. 01645, 2012 U.S. Dist. LEXIS 144116, at *5 (E.D. Cal. 2012) (noting that individual notice to class members’ last known address meets the requirements of due process). Returned mail without forwarding addresses will be skip traced once to get an updated address and then re-mailed. Sagafi Decl. Ex. 1, § 19(b). Additionally, PAGA Members will be sent a letter that describes the settlement and that they will be receiving a payment, which includes Plaintiffs’ Counsel’s contact information in case employees have any questions. Accordingly, the proposed notice plan complies with Rule 23 and due process. *Id.*, § 19(a).

V. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED.

Plaintiff, after consultation with Defendants, proposes that the Court adopt the following schedule for effectuating the various steps in the settlement approval process described above.³

visited Oct. 2, 2023).

³ These are placeholder dates assuming preliminary approval is granted on November 10, 2023. Plaintiffs will supply the Court with an updated calendar if preliminary approval is granted on a different date.

Event	Proposed Date
Preliminary Approval Hearing	November 3, 2023
Entry of Preliminary Approval Order (assumed for purposes of calculating subsequent dates)	November 13, 2023
Defendants to provide class list data to Administrator	December 13, 2023
Notice disseminated by Settlement Administrator	December 28, 2023
Deadline for exclusions and objections	February 26, 2024
Final Approval Motion including motion for attorneys' fees, costs, and service awards	March 18, 2024
Final Approval Hearing	April 9, 2024

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court: (1) conditionally certify the Settlement Class; (2) preliminarily approve the Settlement pursuant to Fed. R. Civ. P. 23 and Section 216(b) of the FLSA; (3) appoint Plaintiffs as the Class Representatives, their counsel as Class Counsel, and CPT Group, Inc. as Settlement Administrator; (4) set appropriate deadlines; (5) approve the proposed class notice and forms; (4) set appropriate deadlines; and (6) schedule a final approval hearing.

Respectfully submitted,

Dated: October 20, 2023

By: /s/ Jahan C. Sagafi
Jahan C. Sagafi (SBN 224887)
OUTTEN & GOLDEN LLP
One California Street, Suite 1250
San Francisco, CA 94111
Telephone: (415) 638-8800
Facsimile: (415) 638-8810
jsagafi@outtengolden.com

Sabine Jean*
Jarron D. McAllister*
OUTTEN & GOLDEN
685 Third Avenue, 25th Floor
New York, New York 10017
Telephone: (212) 245-1000
Facsimile: (646) 509-2060

Gregg I. Shavitz**
Camar R. Jones*
SHAVITZ LAW GROUP, P.A.
951 Yamato Road, Suite 285

Boca Raton, Florida 33431
Telephone: (561) 447-8888
Facsimile: (561) 447-8831
gshavitz@shavitzlaw.com
cjones@shavitzlaw.com

*Attorneys for Plaintiffs and Proposed Class,
Collective, and PAGA Action Members*

**Admitted pro hac vice*

***Pro hac vices motions forthcoming*

Attestation re Electronic Signatures

I, Jahan Sagafi, attest pursuant to Northern District of California Local Rule 5-1(i)(3) that all other signatories to this document, on whose behalf this filing is submitted, concur in the filing's content and have authorized this filing. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: October 20, 2023

By: /s/ Jahan C. Sagafi
Jahan C. Sagafi