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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JANICE INSIXIENGMAY, individually and on behalf of all other similarly situated employees,

Plaintiff,

vs.

HYATT CORPORATION DBA HYATT REGENCY SACRAMENTO, a Delaware Corporation; and DOES 1 to 100, inclusive,

Defendants.

Case No. 2:18-cv-02993-TLN-DB

CLASS ACTION

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

Date:	November 16, 2023
Time:	2:00 p.m.
Courtroom:	2, 15th Floor
Judge:	Hon. Troy L. Nunley
Filed:	October 4, 2018
FAC Filed:	April 7, 2020
SAC Filed:	April 6, 2023
Trial Date:	None Set

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I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT

Plaintiff Janice Insixiengmay ("Plaintiff") seeks preliminary approval of a wage and hour class action and Private Attorneys General Act ("PAGA") settlement in the gross amount of $295,000. *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 Hyatt Corporation dba Hyatt Regency Sacramento, ("Defendant") (Plaintiff and Defendant sometimes collectively referred to as the "Parties"). *See generally* Exhibit B (Plaintiff's Operative Complaint). There are approximately 980 Class Members.

Plaintiff has alleged that Defendant failed to pay overtime wages, failed to provide meal and rest periods or premiums in lieu thereof, failed to provide accurate wage statements, failed to timely pay final wages, failed to pay paid sick time, and engaged in unfair competition. *See generally* Exhibit B; *see also* Declaration of Justin P. Rodriguez ("Decl. Rodriguez"), ¶¶ 2, 9. Plaintiff has also alleged Defendant is liable for a civil penalties under the PAGA based on these violations. *See id.*; Exhibit C (Plaintiff's Ltrs. 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, depositions, 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, ¶¶ 6-13.

It is well within the discretion of this Court to grant preliminary and conditional approval of the proposed settlement, which satisfies all of the criteria for preliminary settlement approval under federal law, and preliminarily and conditionally certify the settlement class. Accordingly, Plaintiff requests that the Court: (1) preliminarily approve the proposed settlement class; (2) preliminarily approve the proposed Agreement (Exhibit A) (3) set dates for distribution of the Notice of Settlement (Exhibit F); (4) set a final approval hearing and briefing schedule; (5) set a briefing schedule for Plaintiff's Motion for

Attorneys' Fees and Costs, Settlement Administrator Costs, and Class Representative Enhancement Payment that will be held concurrently with the final approval hearing; and (6) adopt the implementation schedule contained in the proposed order.

II. PROCEDURAL AND LITIGATION HISTORY

Plaintiff filed a class action complaint on approximately October 4, 2018, against Defendant in state court. Defendant removed the action to federal court on or about November 15, 2018. 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. Thereafter, Plaintiff filed a First Amended Class Action Complaint on approximately April 7, 2020, to include a PAGA claim. *See id*. Plaintiff filed a Second Amended Complaint on April 6, 2023, to clarify the correctly named defendant is Hyatt Corporation dba Hyatt Regency Sacramento and to modify the scope of the putative class to include all individuals within the scope of data and documents produced by Defendant through formal and informal discovery and to match the scope of Plaintiff's investigation during this lawsuit and the ultimate resolution reached by the parties at mediation. *See id.*; Exhibit B. After reaching a resolution at mediation on March 20, 2023, the parties stipulated to all certification related deadlines in the Court's Amended Pretrial Scheduling Order and amendment to the Amended Pretrial Scheduling Order being vacated while they memorialized the agreement in writing and finalized all terms for the Court's review and approval. *See* Decl. Rodriguez, ¶ 4.

III. INVESTIGATION AND DISCOVERY CONDUCTED

Plaintiff thoroughly investigated issues affecting certification, the merits of the claims, and potential damages for such claims. *See id.* at ¶¶ 6-13; Declaration of Janice Insixiengmay ("Decl. Insixiengmay") ¶¶ 3, 5-7. 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. Insixiengmay, ¶¶ 2, 5. The Parties engaged in written discovery and depositions, which involved a substantial amount of time meeting and conferring on discovery disputes as well as attending informal discovery conferences. *See* Decl. Rodriguez, ¶ 7. The formal discovery, as well as the informal discovery conducted in connection with mediation, included an exchange of documents, including an approximately 75% sample of Class

Members' wage and hour data, such as timecards, paystubs, payroll data, and relevant policies for the entirety of the statute of limitations applicable to the asserted claims. *See id*. Over 10,000 pages of documents were produced in discovery as well as numerous electronic payroll and time card report excel files, which contained a total of more than 300,000 rows of data. In conducting the merits and damages analysis, Plaintiff had to cross reference data from 1 to 4 different spreadsheets at a time for more than 50 different pay codes over the course of the statutory period and compare them to interrogatory and deposition responses. Plaintiff utilized several experts to help compile and analyze the data as well. 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 id*. 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* Decl. Rodriguez, ¶¶ 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 four years, Plaintiff has been investigating the claims and discussing with Defendant's counsel the merits of the claims and issues present in this case. *See id.* at ¶¶ 6-8. The Parties exchanged substantial amounts of information and legal analysis in connection with these discussions. *See id.* It was only after these extended discussions, which included a full day mediation with Gig Kyriacou, Esq., that the Parties were able resolve all claims and enter into the Agreement. *See id.*

b. The Terms of the Agreement

1. Class Members will include all non-exempt employees who are currently or were formerly employed by Defendant at the Hyatt Regency in Sacramento, California during the Class Period (*i.e.,* October 4, 2014 through June 1, 2023). Aggrieved Employees will include all non-exempt employees who are currently or were formerly employed by Defendant at the Hyatt Regency in Sacramento, California during the PAGA Claim Period (*i.e.,* October 4, 2017 through June 1, 2023). *See* Exhibit A, ¶¶ 1.2, 1.5, 1.6, 1.23. The settlement class shall not include any person who submits a

timely and valid request to opt-out as provided in the Agreement. *See id.* at ¶ 4.1. The estimated class size is approximately 980 individuals. *See id.* at ¶ 1.5.

2. Defendant will pay the Gross Settlement Amount of $295,000, which is exclusive of the employer's share of payroll taxes. *See id.* at ¶ 5.1. No portion of the Gross Settlement Amount will revert to Defendant. *See id.* at ¶ 5.6. Aggrieved Employees will still be paid their share of the PAGA Payment regardless of whether they opt out of being Class Members. *See id.* at ¶¶ 7.5.1, 7.8.3.

3. Up to $10,000 will be paid to Plaintiff as an Enhancement Payment. This amount will be in addition to any amount Plaintiff may be entitled to as a Class Member and Aggrieved Employee under the terms of the Agreement. *See id.* at ¶ 5.4.

4. Subject to Court approval, the Parties have selected CPT Group, Inc., to act as the Settlement Administrator, who has provided a maximum cost estimate of $12,750. *See* Exhibit D (CPT Group, Inc. Quote); Exhibit A, ¶ 1.32; Decl. Rodriguez, ¶ 24.

5. The Parties agree that $10,000 of the Gross Settlement Amount shall be allocated to resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees. *See* Exhibit A, ¶ 5.5. Given the risk to proving the claims on the merits, the derivative nature of the penalties, the efforts by Defendant to maintain compliant policies and take corrective action, the presence of what may likely be deemed good faith disputes, and the Court's discretion to reduce any penalty award, Plaintiff believes the $10,000 PAGA Payment allocation represents a meaningful settlement aimed at deterring non-compliance given the facts of this case. *See* Decl. Rodriguez, ¶¶ 6-13; *see also Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (approving $0 allocation to the resolution of PAGA claims based on their being disputed and being part of a class settlement which was evaluated based on the terms of the agreement overall); *Junkersfeld v. Med. Staffing Sols., Inc.*, 2022 WL 2318173, at *8 n.2 (E.D. Cal. 2022) (collecting cases with PAGA settlement values ranging from .037%-1%); *Jennings v. Open Door Marketing, LLC*, 2018 WL 4773057, *9 (N.D. Cal. 2018) (approving settlement of PAGA claims at 0.6% of total estimated value due to risk of no recovery); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, *7 (N.D. Cal. 2016) (approving $10,00 PAGA settlement allocation where total PAGA penalty exposure was approximately $5.2 million, or 0.2% of total estimated value); *Davis v. Cox*

Commc'ns California, LLC, 2017 U.S. Dist. LEXIS 63514, *1 (S.D. Cal. 2017) (preliminarily approving $4,000 PAGA allocation in $275,000 settlement); *Moore v. Fitness Int'l, LLC*, 2014 U.S. Dist. LEXIS 8358, *5 (S.D. Cal. 2014) (approving $2,500 PAGA allocation when attorneys' fees award alone amounted to $200,000); *Jack v. Hartford Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 118764, *6 (S.D. Cal. 2011) (approving $3,000 PAGA allocation in $1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010) (approving $3,000 PAGA allocation in $1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, *9 (N.D. Cal. 2009) (approving $1,500 PAGA allocation in $1,026,000 settlement); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 24880, *34-35 (E.D. Cal. 2017) (approving $100,000 PAGA allocation in a $3,950,000 settlement even though PAGA exposure was calculated at $53,600,000, or 0.2% of total estimated value); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7 (E.D. Cal. 2012) (approving $10,000 PAGA allocation in a $3,700,000 settlement); *Franco v. Ruiz Food Prod., Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. 2012) ($10,000 in PAGA payment from $2,500,000 settlement fund); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. 2011) (approving PAGA settlement payment of $7,500 to the LWDA out of $6.9 million common-fund settlement).

6. The Parties agree that up to thirty-five percent (35%) of the Gross Settlement Amount ($103,250) will be paid for Plaintiff's attorneys' fees incurred in the litigation of this case. Defendant will not oppose any application for attorneys' fees so long as it is within this threshold. *See id*. at ¶ 5.2. Additionally, the Parties agree that Plaintiff will also be entitled to the actual litigation costs as approved by the Court in an amount not to exceed $31,500. *See id.* The proposed notice to be sent to Class Members will state this information. *See* Exhibit F.

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

8. Class Members who fail to timely opt-out of this settlement will waive all Released Class Claims as set forth in the Agreement. *See* Exhibit A, ¶¶ 1.13, 1.25, 1.29, 1.31, 6.1. Aggrieved Employees will waive all Released PAGA Claims as set forth in the Agreement regardless of whether they opt out of being a Class Member. *See id.* at ¶¶ 1.2, 1.13, 1.30-1.31, 6.2, 7.5.1.

9. For any portion of the Net Settlement Amount or PAGA Payment allocated to Participating Class Members and/or Aggrieved Employees that is not claimed by them by cashing their respective settlement checks within 120 calendar days of issuance, that remaining amount shall be donated equally, *i.e.*, 50/50 to Capital Pro Bono, Inc., and the Center for Workers' Rights under the doctrine of *cy pres*. *See* Exhibit A, at ¶ 5.6. Because the Agreement provides for all funds such that there is no residue, the provisions of California Civil Procedure Code section 384 are inapplicable. *See In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 718, 720 (2006). The designated beneficiaries clearly promote the law consistent with the objectives and purposes underlying the lawsuit as they are non-profits aimed at assisting employees with wage and hour claims who cannot afford legal representation, including providing representation for employees in wage claims before the California Labor Commissioner. *See id.* at 722-724; *see also* Decl. Rodriguez, ¶¶ 28-38.

c. Allocation of Settlement Funds

Payment to Class Members and Aggrieved Employees of their Individual Settlement Amount will not require the submission of a claim form. A Net Settlement Amount will be determined by subtracting from the Gross Settlement Amount any amounts for approved attorneys' fees and costs, any Enhancement Payment to the Class Representative, the Settlement Administrator Costs, and the PAGA Payment. For payment allocation purposes only, Class Members will be divided into two subclasses: (1) Class Members who worked between October 4, 2018, and June 2, 2019, and (2) Class Members who worked between June 3, 2019, and June 1, 2023. Subclass 1 shall be allocated 70% of the Net Settlement Amount and Subclass 2 shall be allocated 30% of the Net Settlement Amount. Each Class Member's proportionate share will be determined by dividing their total Qualifying Workweeks worked within their respective subclass by the total Qualifying Workweeks worked by all Class Members within the subclass. A Class Member may be part of both subclasses if they worked during the time periods covering Subclass 1 and Subclass 2. That fraction will then be multiplied by the Net Settlement Amount to arrive at the Class

Member's individual share of the Net Settlement Amount. Each Aggrieved Employee's share of the 25% portion of the PAGA Payment will be determined by dividing their total Qualifying Workweeks within the PAGA Claim Period by the total Qualifying Workweeks by all Aggrieved Employees within the PAGA Claim Period. That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the Aggrieved Employee's individual share. *See id.* at ¶ 5.8. One third (1/3) of Class Members' Individual Settlement Amount will be allocated for payment of disputed wages and two thirds (2/3) for disputed statutory penalties and interest. *See id.* at ¶ 5.9.1-5.9.2. 100% of Aggrieved Employees' share of the 25% portion of the PAGA Payment will be allocated as penalties. *See* Exhibit A at ¶ 5.9.3.

V. ARGUMENT

a. Class Action Settlements and PAGA Settlements are Subject to Court Review and Approval

A class action may not be dismissed, compromised, or settled without Court approval and the decision to approve or reject a settlement is committed to the Court's sound discretion. *See* Fed. R. Civ. Proc. 23(e). Similarly, settlements under the PAGA require Court review and approval. *See* Cal. Lab. Code § 2699(l). Preliminary approval is appropriate when it has been shown that the Court will likely be able to (1) approve the proposed settlement under Rule 23(e)(2) as well as (2) certify the class. "Approval under Rule 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminarily approval and then, after notice is given to class members, whether final approval is warranted." *Martinez v. Knight Transportation, Inc.,* 2023 U.S. Dist. WL 2655541 at *6 (E.D. Cal. March 27, 2023). "Under Rule 23(e)(1), the court must direct notice to all class members who would be bound by the settlement proposal if the parties show that 'the court will likely be able to:' (i) approve the proposal under Rule 23(e)(2)'s fair, reasonable, and adequate standard; and (ii) certify the proposed class." *Martinez,* 2023 U.S. Dist WL 2655541 at *6; Fed. R. Civ. P. 23(e)(1). There is a "strong judicial policy that favors settlement, particularly where complex class action litigation is concerned." *In re Hyundai and Kia Fuel Economy Litigation,* 926 F.3d 539, 556 (9th Cir. 2019).

b. The Agreement Should Be Preliminarily Approved Because The Terms of The Agreement Are Fair, Reasonable and Adequate

A Court may grant preliminary approval of a proposed class settlement if it finds the settlement is "fair, reasonable, and adequate after considering whether: (1) the class representatives and class counsel have adequately represented the class; (2) the proposal was negotiated at arm's length; (3) the relief provided for the class is adequate; and (4) the proposal treats class members equitably relative to each other. *See* Fed. R. Civ. Proc. 23(e)(2).

i. The Class Representative and Class Counsel Adequately Represented the Class

Plaintiff's counsel has extensive experience and have been found by several Courts to be adequate class counsel in numerous complex wage and hour class actions. *See* Decl. Rodriguez ¶¶ 15-21. Because Plaintiff shares a common nexus of legal and factual issues with Class Members, she has the same interest in pursuing the most beneficial result and has assisted her counsel in obtaining this result over a period of nearly five (5) years. *See* Decl. Rodriguez, ¶ 7; Decl. Insixiengmay, ¶¶ 3-7. Plaintiff and her counsel do not have any conflicts with class members. Decl. Rodriguez, ¶ 3; Decl. Insixiengmay, ¶¶ 2-7. Plaintiff and her counsel have continually taken steps to investigate the claims in this case, analyze information and documents, and determine potential damages. Plaintiff and her counsel have thoroughly investigated the claims in this case through informal and formal discovery, including interviewing numerous Class Members, reviewing and analyzing pay records for a sample of approximately 75% of Class Members, reviewing over 10,000 pages of documents produced by Defendant and numerous payroll spreadsheets, and taking the deposition of Defendant's Person Most Knowledgeable. *See* Decl. Rodriguez, ¶¶ 6-7. It was only after nearly five (5) years of thorough investigation, discovery, an extensive damages analysis, and a full day mediation that this settlement was negotiated. *See* Decl. Rodriguez, ¶¶ 6-13. Thus, Plaintiff and her counsel have adequately represented the class.

ii. The Settlement is a Result of Serious, Informed, Non-Collusive Arm's Length Negotiations Between the Parties

The parties were in possession of all necessary information during the negotiations and mediation. Plaintiff's counsel conducted investigations and engaged in discovery, including an exchange of documents, records, and company policies that covered all aspects of the class claims and

sought information regarding the class members to ensure that Plaintiff could determine liability and create an accurate damages model. *See* Decl. Rodriguez ¶¶ 6-13. As a result, Plaintiff was able to make a reasonable estimation of Defendant's potential liability against which the results of any settlement could be compared. *See id.* For these reasons, the settlement now before the Court was reached at a stage where the parties had a clear view of the strengths and weaknesses of claims and defenses at issue sufficient to support the settlement. There was also no collusion in reaching the proposed class settlement as the negotiations were adversarial and contentious, although still professional in nature, at all times. *See* Decl. Rodriguez ¶ 8.

iii. The Relief Provided For the Class Is Adequate

To make this determination the Court should take into account: (1) the costs, risks, and delay of trial and appeal, (2) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims, (3) the terms of any proposed award of attorney's fees, including timing of payment, and (4) any agreement required to be identified under Rule 23(e)(3).

A. The Settlement Is Adequate In Light Of Potential Costs, Risks, and Delays

A review of the Agreement's terms in light of potential risks, costs, and delays does not give rise to any doubts about its fairness. Plaintiff's counsel carefully took into consideration risks involved with each of the claims, including but not limited to whether Plaintiff would be successful in proving certain premium pay should have been incorporated into the regular rate of pay, whether recovery of wage statement and waiting time penalties may be precluded by a good faith defense by Defendant, and the Court's discretion to reduce any PAGA penalties. *See* Decl. Rodriguez, ¶¶ 9-10. Plaintiff's counsel also carefully evaluated the prospect of potential class certification issues, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals in agreeing to the proposed settlement, and the potential PAGA manageability issues. *See id.* at ¶ 6. Moreover, because the overtime, paid sick time, and meal and rest premiums claims (post June 2019) relied on Plaintiff proving that the value of free meals should have been included in Defendant's regular rate of pay calculation, there was a substantial risk of receiving no recovery for those claims. *See id.* at ¶¶ 9-10. Based on the records and facts of this case, Plaintiff has secured a gross recovery of

approximately 10.8% to 24.9% and a net recovery of approximately 4.4% to 10.1% of the claims' maximum value. *See* Decl. Rodriguez at ¶ 10. Additionally, on average class members will receive a net award of approximately $122.70, which is 470% higher than the average net recovery in a related case against Defendant. *See id.* at ¶ 12. This settlement is a reasonable compromise of the claims and is within the percentile ranges of the total available damages that have been approved in other class settlements. *See Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982); *see also In re Omnivision Technologies, Inc*., 559 F.Supp.2d 1036, 1042 (2007) (noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorney's fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2000 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS 77714 (C.D. Cal. 2017) (approving a settlement where the net recovery to class members was approximately 7.5% of the projected maximum recovery amount); *Avila v. Cold Spring Granite Co.*, 2017 U.S. Dist. LEXIS 130878 (E.D. Cal. 2017) (approving a settlement with a gross recovery of 11% of the projected maximum damages available and a net recovery of approximately 6.7% of the projected maximum recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal 2015) (approving a settlement where the gross recovery was approximately 8.5% of the projected maximum recovery);); *Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776 at *48 (E.D. Cal. 2012) ("Class Members will receive an average of approximately $198.70, with the highest payment to a Class Member being $695.78 . . . Overall, the Court finds that the results achieved are good, which is highlighted by the fact that there was no objection to the settlement amount or the attorneys' fees requested."); *Gardner v. GC Servs., LP,* 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal. 2012) ("the results achieved in this case were very favorable. Class members are provided with immediate monetary relief, with an average award of around several hundred dollars and a minimum award of $50").

B. Plaintiff's Method of Distributing Relief Will Be Effective

It is not required that Class Members be given actual notice of a class settlement; instead, the best practicable notice under the circumstances is all that is required. *See Silber v. Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017);

Walsh v. CorePower Yoga LLC, 2017 U.S. Dist. LEXIS 163991, at *12-14 (N.D. Cal. 2017); *Wright v. Linkus Enters.*, 259 F.R.D. 468, 474-75 (E.D. Cal. 2009). In *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), the Court rejected a class member's argument that he had not received due process because he 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 the notice. *See Silber*, 18 F.3d at 1453-1454. A similar finding was made in *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). With regard to any potential for undeliverable notice mailings, the Court in *Rannis v. Recchia*, 380 F. App'x 646 (9th Cir. 2010) found that class members who did not receive actual notice due to their mailings being deemed undeliverable were still properly held to be part of the class settlement because they received the best notice practicable under the circumstances. *See Rannis v. Recchia*, 380 F. App'x at 650-651.

Under the Agreement, Plaintiff proposes using an exhaustive method to ensure the best practical means possible is used to provide notice and payment to the class. Defendant will provide the Settlement Administrator with Class Members' names, last known address, and social security numbers. The Settlement Administrator will then update this information by doing an address trace for each individual. The notices will be sent to Class Members via first class mail. If any notices are returned as undeliverable, further investigation will be performed and the notices will be re-mailed. The Settlement Administrator will also maintain a website that includes a copy of the notice, the Second Amended Complaint, a copy of the Agreement, and Plaintiff's Motion for Preliminary Approval, and Plaintiff's motion for attorneys fees and costs, Settlement Administrator Costs, and Enhancement Payment to the Class Representative. The notice also provides that case documents are available to be viewed at Court or through PACER. Checks will be sent to the addresses obtained through the notice process and after class members have had an opportunity to update their addresses with the Settlement Administrator if necessary. *See* Exhibit A, ¶¶ 7.2-7.4; Exhibit F. This notice method is regularly utilized in wage and hour class actions and similar to the one approved in *Rannis*. Thus, the proposed procedures for notifying Class Members satisfy due process and should be approved in this case.

C. The Relief Is Adequate In Light of The Proposed Award of Attorneys' Fees And Timing of Payment

The amount allocated for attorneys' fees is within the ranges approved by other District Courts and the Agreement is not contingent on the full fee allocation being awarded. *See Yanez v. HL Welding, Inc.*, 2022 WL 788703, at *12 (S.D. Cal. 2022) (collecting California District Court wage and hour class action cases awarding 1/3 of the gross settlement for attorneys fees). Plaintiff's counsel will provide a lodestar analysis and additional informal to justify the request for fees in the attorneys' fees and costs motion to be heard concurrently with the final approval motion. *See* Decl. Rodriguez, ¶ 23. However, the attorney's fees incurred to date are approximately $376,855 based on 642.2 total hours and at rates that have been approved by Sacramento County Superior Court in November 2022, which exceeds the full value of any substantive wage loss. Moreover, the net recovery per class member is 470% higher than the net recovery per class member in a recent, related action. *See id.* at ¶¶ 12, 22. Thus, Plaintiff's counsel anticipates the lodestar analysis will result in a substantial negative multiplier. *See id.* Additionally, any fees not awarded will be distributed to the class pro rata. *See* Exhibit A at ¶ 5.2. Any attorney's fees will be distributed at the same time as payments to Class Members. *See* Exhibit A at ¶ 7.8. Based on these facts, it is clear the relief is adequate in light of the proposed award of attorneys' fees

D. Individual Agreement Waiving Plaintiff's Claims

As part of the settlement of this lawsuit, Plaintiff has entered into an individual settlement agreement with Defendant providing a general release of any and all of her individual claims beyond those asserted in this lawsuit. No separate or additional consideration is being paid to Plaintiff for that release beyond what is identified in the Agreement (*i.e.* the Individual Settlement Amount and the Class Representative Enhancement). All terms, definitions, and conditions for payment within the Agreement are incorporated into the individual settlement agreement. The purpose of the individual settlement agreement is simply to effectuate Plaintiff's general waiver of her individual claims beyond the Released Class Claims.

iv. The Settlement Treats Class Members Equitably Relative to Each Other

The Agreement proposes allocation of the Net Settlement Amount using two subclasses to ensure Class Members are treated equitably based on the relative strength of their claims. The two subclasses are: (1) Class Members who worked between October 4, 2018 and June 2, 2019 and (2) Class Members who worked between June 3, 2019 and June 1, 2023. Subclass 1 will be allocated 70% of the Net Settlement Amount and Subclass 2 will be allocated 30% of the Net Settlement Amount. This allocation is appropriate because the strongest claim in the action is for amounts owed for meal and rest premiums prior to June 2019 when Defendant did not incorporate the value of various types of premium pay (*e.g.,* nondiscretionary bonuses, incentives, etc.) when calculating Class Members' meal and rest period premiums. Based on the Supreme Court's decision in *Naranjo v. Spectrum Security Services, Inc.,* 13 Cal.5th 93 (2022), this arguably was a clear violation. The other claims for overtime wages, paid sick time, and meal and rest premiums (post June 2019) are much less certain because they depend on Plaintiff prevailing on her argument that the value of free meals should have been included in the regular rate of pay, which is disputed by Defendant and hinges on whether Plaintiff could rebut Defendant's contention that its policy was to provide one (1) meal a day. *See* 29 C.F.R. § 548.3(d); 29 C.F.R. § 548.304. In the event a determination was made that the value of free meals did not need to be included in the regular rate of pay, there would be no recovery for overtime, paid sick time, meal and rest premiums, and derivative penalties post-June 2019. Although class members may ultimately receive different amounts under the Agreement, this is not a sufficient reason to deny settlement approval as it is appropriate to account for potential differences in the amount of damages suffered by class members and the risks associated with the various asserted claims. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 823-825 (9th Cir. 2012). Based on the extensive informal and formal discovery completed, a review of applicable case law, and taking into consideration the respective risks for the claims, Plaintiff's counsel believes the 70% versus 30% allocation is equitable. *See* Decl. Rodriguez, ¶¶ 9-11; Exhibit A at ¶ 5.8.

c. <u>Preliminary and Conditional Approval of the Settlement Class is Appropriate</u>

To proceed as a class action it must be found that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or

defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Proc. 23(a). Additionally, in cases seeking certification under Federal Rules of Civil Procedure 23(b)(3), the questions of law or fact must predominate over questions affecting individual members and a class action must be superior to other methods for fairly and efficiently adjudicating the controversy. *See* Fed. R. Civ. Proc. 23(b)(3); *Sciortino v. PepsiCo, Inc.*, 2016 U.S. Dist. LEXIS 83937, *10 (N.D. Cal. 2016). Public policy favors the use of class actions such that "[a]ny doubts regarding the propriety of class certification should be resolved in favor of certification." *Wixon v. Wyndham Resort Dev. Corp.*, 2009 U.S. Dist. LEXIS 100451, *5 (N.D. Cal. 2009); *Allen*, 787 F.3d at 1223. It is a procedural question; it does not ask whether an action is legally or factually meritorious. *See Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-1195 (2013); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). The parties agree that, for the purposes of settlement, the class should be certified. *See* Exhibit A, ¶ 5.12.

i. Numerosity

A class with more than forty putative members is presumed to satisfy the numerosity prerequisite. *See Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 485 (E.D. Cal. 2006); *In re Scorpion Techs., Inc. Sec. Litig.*, 1994 U.S. Dist. LEXIS 21413, *10 (N.D. Cal. 1994). In the present case, there are approximately 980 class members, which exceeds what other Courts have found to be sufficient for satisfying the numerosity requirement. *See id.* Thus, this requirement is satisfied.

ii. Commonality, Typicality, and Predominance

The commonality element is construed liberally, not requiring every issue of law or fact to be common. *See In re Conagra Foods, Inc.*, 90 F.Supp.3d 919, 972-73 (C.D. Cal. 2015); *Hanlon*, 150 F.3d at 1019-20; *Jimenez v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 65328, *17 (C.D. Cal. 2012). Similarly, the typicality element is permissively construed, only requiring the representative's claims to be "reasonably co-extensive with those of absent class members; they need not be substantially identical." *See Hanlon*, 150 F.3d at 1020.

The question of predominance begins with the elements of the underlying cause of action and then considers whether those elements are capable of being proven by answers to questions common to

the class. *See Rica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011); *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 241 (N.D. Cal. 2014); *Wixon*, 2009 U.S. Dist. LEXIS 100451, *20-21. The existence of "some variation among the individual employees . . . do not defeat predominance." *See Alba v. Papa John's USA*, 2007 U.S. Dist. LEXIS 28079, *30 (C.D. Cal. 2007). This is especially true where the focus of the conduct alleged to be unlawful is on the defendant. *See Alba*, 2007 U.S. Dist. LEXIS 28079, *31 (finding that while an overtime exemption was a fact intensive inquiry, it does not defeat predominance due to the actual focus on defendant's conduct). For example, the presence of unlawful policies or practices will support a finding of predominance. *See, e.g., Tierno v. Rite Aid Corp.*, 2006 U.S. Dist. LEXIS 66436 (N.D. Cal. 2006). Challenges to the plaintiff's legal theories and doubts regarding the plaintiff's ability to prove the claims at trial are irrelevant to determining predominance. *See United Steel, Paper & Forestry, Rubber, Mfg. v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010). Similarly, Courts have found that "individual questions about the number of hours worked, wages earned, and compensation paid . . . will not defeat certification." *Gomez v. Rossi Concrete, Inc.*, 270 F.R.D. 579, 595 (S.D. Cal. 2010). Nor will individualized damages issues act as a basis to deny certification. *See Leyva v. Medline Industries, Inc.*, 716 F.3d 510, 513-514 (9th Cir. 2013) (reversing a denial of certification based on individual issues in determining damages).

In the present case, questions of law or fact are common to the class and also predominate over any potential individualized issue. Plaintiff's theory of recovery is based on an alleged common policy and practice of Defendant, *i.e.,* its policy and practice regarding calculating Class Members' regular rates of pay for the purpose of paying overtime, paid sick time, and meal and rest period premiums. Plaintiff alleges Defendant's policy and practice unlawfully failed to include all types of premium pay (*e.g.,* nondiscretionary bonuses, incentives, the value of free meals provided, etc.) it paid to Class Members into their regular rates of pay. The waiting time penalty and wage statement penalty claims are entirely derivative.

Claims similar to Plaintiff's have been found to be sufficient for class certification in several cases. *See, e.g., See Magadia v. Wal-Mart Assocs.*, 2018 U.S. Dist. LEXIS 4715 (N.D. Cal. 2018) (certifying a class action for meal period premiums paid at an employee's regular rate of pay); *Leyva v. Medline Indus.,* 716 F.3d 510, 513 (9th Cir. 2013); *Snipes v. Dollar Tree Distrib.,* 2017 U.S. Dist.

LEXIS 195460, at *14-16 (E.D. Cal. Nov. 27, 2017). Certification on this theory will also support certification of waiting time penalty and wage statement claims as derivative violations. *See, e.g. Jimenez*, 2012 U.S. Dist. LEXIS 65328, *67-68; *Lubin v. Wackenhut Corp.,* 5 Cal.App.5th 926, 958-960 (2016) ("First, the question whether Wackenhut's wage statements contained the required elements under Labor Code section 226, subdivision (a) is a common question, and Labor Code section 226, subdivision (e)(2)(B)(i) clarifies that injury arises from defects in the wage statement, rather than from a showing that an individual experienced harm as a result of the defect . . . Second, because plaintiffs' meal and rest period claims are suitable for class treatment, their theory that the wage statements failed to include premium wages earned for missed meal and rest periods also is suitable for class treatment"); *Pena v. Taylor Farms Pac., Inc.,* 305 F.R.D. 197, 223 (E.D. Cal. 2015) ("Because the claims of this subclass [regarding waiting time penalties] that may proceed are entirely derivative of the meal break claims of the mixed hourly worker subclass, they meet or fail to meet the commonality and predominance requirements to the same extent"). It is the lawfulness of Defendants' policies and practices themselves that are at issue, which renders certification appropriate. *See Brinker Restaurant Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1033 (2012) (finding such determinations to be "the sort routinely, and properly, found suitable for class treatment").

Plaintiff's claims are typical of the class members claims. *See* Exhibit B; Decl. Insixiengmay ¶ 3. Plaintiff was subjected to, and experienced, the same policies and practices being alleged to be unlawful. *See id.* Defendant's Person Most Knowledgeable stated at deposition with respect to meal and rest period premiums, for Class Members their premiums were paid at their base hourly rate of pay until 2019 and that Defendant updated their meal and rest period policy in June 2019. *See* Exhibit H, 110:14-25 (Excerpts from Deposition of Valerie Saito). In addition, it was stated that Defendant did not incorporate the value of free meals provided to Class Members when calculating the regular rate of pay. *See* Exhibit H at 21:23-23:17. As a result, the basis for Plaintiff's claims and the types of remedies sought will be similar amongst all Class Members. Plaintiff's claims are, therefore, reasonably co-extensive with those of absent class members. *See* Exhibit B; Decl. Insixiengmay ¶ 3.

iii. The Adequacy Requirement is Met

To determine adequacy, answers to the following questions must be given: "(1) do the named

plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *See Resnick v. Frank (In re Online DVD-Rental Antitrust Litig.)*, 779 F.3d 934, 943 (9th Cir. 2015) (finding no conflict because there were no structural differences in the claims of the representative and other class members under the settlement agreement and the enhancement awards were not conditioned on the representative's approval of the settlement). As to the second question, "[t]he relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation." *See id.* In the present case, Plaintiff and Class Members are subject to the same distribution formula based on weeks worked. The allocation between two subclasses was determined based on relative strength of claims and does not structurally favor Plaintiff in any way. *See* Decl. Rodriguez, ¶ 11; Exhibit A at ¶ 5.8. Neither Plaintiff nor her counsel have any conflicts with Class Members and have conducted an exhaustive review and analysis of the claims to obtain a beneficial result for the class. *See* Decl. Insixiengmay ¶¶ 2-7; Decl. Rodriguez ¶¶ 3, 6-13. For the same reasons discussed above regarding typicality, Plaintiff shares a common nexus of legal and factual issues with the class ensuring they have the same interest in pursuing the most beneficial results possible in this case. Additionally, Plaintiff's counsel are experienced and have been found by several Courts to be adequate class counsel in numerous complex wage and hour class actions. *See* Decl. Rodriguez ¶¶ 15-21. Thus, Plaintiff and Plaintiff's counsel are adequate representatives of the settlement class members.

iv. Superiority

Factors relevant to determining whether the class action is superior includes "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; [and] (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum . . . ." Fed. R. Civ. Proc. 23(b)(3). Where certification is for settlement purposes only, considerations regarding manageability are irrelevant. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). Additionally, where there is relatively few or no other individual lawsuits concerning the same issues being litigated by members of the putative class, this favors a finding that a class action is superior. *See Dirks v. Layton Brokerage Co. of St. Louis, Inc.*, 105 F.R.D. 125 (D. Minn. 1985). In the

present case, class certification would be superior to alternative forms of adjudication. Plaintiff has uncovered no evidence of any separate individual lawsuits being filed by Class Members against Defendant litigating the same regular rate of pay issue. *See* Decl. Rodriguez ¶ 13. Second, there may be only relatively small awards at stake for class members if they were to attempt individual litigation, which supports a superiority finding. *See Leyva*, 716 F.3d 510. Third, the class is composed of individuals working in California, asserting claims based on California substantive law, and Defendant was located within Sacramento, California, including the Eastern District, which supports the desirability of concentrating the litigation in the Eastern District. *See* Decl. Insixiengmay ¶ 2; Exhibit B; Exhibit A ¶ 1.5.

For the reasons set forth above, the Court should preliminarily and conditionally approve the settlement class, subject to a final fairness hearing, as all the prerequisites of Rule 23(a) and the additional requirements of Rule 23(b)(3) are satisfied.

VI. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully request that this Court preliminarily and conditionally approve the proposed settlement class, grant preliminary approval of the Agreement, approve the proposed form and content, and set dates for distribution of, the Notice of Settlement, set a final fairness and settlement class certification hearing and briefing schedule therefor, set a hearing for Plaintiff's Motion for Attorneys' Fees, Costs and Representative Enhancement and briefing schedule therefor that will be heard at the same time as the final fairness and certification hearing, and adopt the implementation schedule contained in the proposed order filed concurrently herewith.

Shimoda & Rodriguez Law, PC

Dated: October 5, 2023

By: /s/ Justin P. Rodriguez
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