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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

DEAN PARSONS, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

LA SIERRA UNIVERSITY, a California Non-Profit Corporation,

Defendant.

CASE NO. CVRI2000104

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

Date: September 2, 2021
Time: 8:30 a.m.
Reservation No: RES248472
Dept. S302

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I. INTRODUCTION

Plaintiff Dean Parsons ("Plaintiff") seeks preliminary approval of a $550,000 settlement of his class wage and hour claims against La Sierra University ("Defendant" or "LSU").[1] This class action was brought on behalf of approximately 363 adjunct lecturers employed by LSU in California ("Adjunct Class Members" or "Adjunct CMs") from November 12, 2016 through the date of preliminary approval ("Adjunct Class Period"); and 176 LSU employees in California who worked remotely ("Reimbursement Class Members" or "Reimbursement CMs") from March 4, 2020 through the earlier of the preliminary approval date or the date when LSU stops making COVID reimbursement payments ("Reimbursement Class Period"). This settlement was reached after a thorough and extensive investigation by Plaintiff's Counsel, the exchange of documents and information for purposes of mediation, and a full-day mediation with a skilled mediator. Plaintiff's case faced a major risk based on Defendant's vigorous argument that the First Amendment's ministerial exception was a complete bar to Plaintiff's recovery given LSU's religious mission – a defense that, if litigated, would take years to resolve. Despite this and other risks, Plaintiff was able to negotiate a settlement that will provide meaningful recovery, with an average payment per Adjunct CM of $1,490.91 gross and $806.80 net. Declaration of Julian Hammond in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Hammond Decl."), filed herewith, ¶ 87. Reimbursement CMs will receive an average payment of $50. Id. In addition, the Classes will also benefit in that LSU has changed its practices challenged by Plaintiff, including by reclassifying Adjuncts as non-exempt hourly employees, retroactively reimbursing employees for their expenses incurred in working from home during the COVID pandemic, and reimbursing its employees going forward on a quarterly basis. *Id.* ¶ 35-36.

As described in the Hammond Declaration, Plaintiff's Counsel's has substantial experience in the prosecution of class action litigation, and particularly in wage and hour class actions on behalf of adjunct instructors. *See* Hammond Decl. ¶¶ 9-11. This experience helped inform the settlement negotiations in this case.

The Settlement Agreement avoids all the typical risks associated with litigation and the atypical risks presented in this case. The terms of the Settlement Agreement are fair and reasonable and satisfy the criteria for judicial approval. Accordingly, the Court should grant preliminary approval, approve the proposed Notice, and set a date for a final approval hearing.

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[1] The Class Action Settlement Agreement ("SA") is attached as **Exhibit 1** to the Proposed Order filed herewith.

II. OVERVIEW OF THE SETTLEMENT TERMS

The Settlement Agreement resolves all claims of the Plaintiff and the proposed Class alleged in the Second Amended Complaint. A summary of the Settlement terms follows:

1. Gross Settlement Amount ("GSA") – LSU will pay a non-reversionary sum of $550,000 to settle this case. SA at § 1.14. LSU will also pay the employer's share of payroll taxes separately from the gross settlement. *Id.* § 9.3.

2. Class Definitions and Class Periods – The "Adjunct Class" consists of all current or former employees who, during the Adjunct Class Period, performed the duties of an Adjunct Faculty for LSU in California while not classified as hourly non-exempt employees. SA § 1.2. The "Adjunct Class Period" is November 12, 2016 through to the date the Court grants preliminary approval. SA § 1.3. The "Reimbursement Class" consists of all current or former LSU employees in California, who, during the Reimbursement Class Period, worked remotely. SA § 1.20. The "Reimbursement Class Period" means the period between March 4, 2020 and the earlier of the date the Court grants preliminary approval or the date when LSU stops making the COVID reimbursement payments. SA § 1.21.

3. Attorneys' Fees, Costs, and Named Plaintiff's Enhancement Award – Class Counsel will seek attorneys' fees of up to $183,333.33 (33.33% of the GSA) and up $20,000 to reimburse their out-of-pocket litigation costs. SA § 4. The SA also provides for payment of $10,000 to Plaintiff as his enhancement award, subject to Court approval. SA § 5.

4. Administration Costs – The Parties have mutually agreed to use CPT, Inc., as the Settlement Administrator. SA § 7. CPT is an experienced class action administrator and has provided notification and/or claims administration services in thousands of cases. Hammond Decl. ¶ 102. The Settlement Administrator's expenses shall be reimbursed up to a cap of $20,000. SA § 7.

5. PAGA Payment – The Settlement allocates $15,000 to PAGA penalties, with $11,250 to be paid to the California Labor and Workforce Development Agency ("LWDA") as its 75% share of PAGA penalties, and $3,750 to be distributed to the Class as their 25% share of the settlement of civil penalties for PAGA claims. SA § 6.

6. Net Settlement Amount ("NSA") – The Net Settlement Amount – the amount remaining of the Gross Settlement Amount after deductions of attorneys' fees, costs, enhancement award, settlement administration costs, and PAGA penalties – will total approximately $301,667 if the Court grants the fees and costs requested by Plaintiff in full. Hammond Decl. ¶ 94. From this amount $8,800 will be allocated to the Reimbursement Class ("Reimbursement NSA") and each Reimbursement CM will receive a flat

$50 payment. SA § 8.1.3. The remainder of the NSA will be distributed to the Adjunct Class (the "Adjunct NSA") by dividing the number of credits taught by the Adjunct CM during the Adjunct Class Period by the number of all credits taught by Adjunct CMs during the Adjunct Class Period, and then multiplying the resulting figure by the Adjunct NSA. SA § 8.1.5. This formula relies on objective data from each Adjunct CM's employment history. Adjunct CMs are given an opportunity to dispute the number of credits included in the notice. SA § 14.

7. Class Notice – Within 10 calendar days of preliminary approval or Court approval of settlement notice to the class, whichever is later, LSU will provide the Settlement Administrator with the names, employment ID numbers, last known addresses, last known telephone numbers, and Social Security numbers of all CMs; and the number of credits being attributed to each Adjunct CM. SA § 10.1.1. Within 35 calendar days of the later of preliminary approval or Court approval of settlement notice to the Class, after updating addresses, CPT will mail to each CM a Notice substantially in the form attached to the SA as **Exhibit A**. SA § 10.1.3. For all returned Notices, CPT will use skip tracing to update addresses and initiate a second mailing. SA § 10.1.4.

8. Automatic Participation – The Settlement is non-claims-made, and each CM will automatically receive their share of the NSA unless s/he opts out. SA § 8.1.1.

9. Opting Out or Objecting – CMs who wish to opt-out of the Settlement must send a written notice to the Settlement Administrator requesting to opt-out of the Class within 60 calendar days of the date the Notices are mailed out. SA § 12.1. Any CM who properly requests to opt-out will not be entitled to receive any payment under the settlement (except for his or her share of PAGA Penalties) and will not be bound by the settlement (except for the release of PAGA claims). SA § 12.2. A CM may object to the Settlement by sending the Settlement Administrator, within 60 calendar days of the Notice mailing date, a written statement objecting to the Settlement. SA § 13. If a CM objects to the Settlement, s/he will remain a member of the Class, and if the Court approves the Settlement, s/he will be bound by the terms of the Settlement in the same way and to the same extent as a CM who does not object. SA § 12.3.

10. Tax Consequences of Settlement Payments – For tax purposes, 20% of each Adjunct Settlement Payment will be allocated as wages, 40% as penalties, and 40% as interest. SA § 9.1. 100% of each Reimbursement Settlement Payment will be deemed penalties. SA § 9.2.

11. Scope of Release and Final Judgment – Adjunct CMs will release all claims alleged against LSU in the Second Amended Complaint ("SAC") or that could have been alleged based on the facts and claims asserted in the SAC during the Adjunct Class Period. SA § 16.1. Reimbursement CMs

will release all reimbursement-related claims that could have been alleged based on the facts and claims asserted in the SAC during the Reimbursement Class Period. SA § 16.2. Named Plaintiff will also give an additional general release against Defendant as consideration for his service award. SA § 16.3.

III. OVERVIEW OF THE LITIGATION

A. Pleadings

On November 12, 2020, Plaintiff filed this lawsuit in Riverside County Superior Court for Defendant's (a) failure to pay wages for all hours worked as required under Labor Code §§ 226.2 and 1194 and Wage Order No. 4-2001 § 4; (b) failure to authorize and permit paid rest breaks and pay premium pay as required under Labor Code §§ 226.2 and 226.7 and Wage Order No. 4-2001, §§ 4, 12; (c) failure to pay compensation due on discharge from employment in violation of Cal. Labor Code §§ 201-203; (d) failure to issue accurate itemized wage statements in violation of Cal. Labor Code §§ 226(a) and (e) and 226.2; (e) failure to reimburse business expenses in violation of Cal. Labor Code § 2802; and (f) unfair, unlawful, and/or fraudulent business practices in violation of California Business & Professions Code § 17200, *et seq.* ("UCL"). Hammond Decl. ¶ 13.

On January 26, 2021 Plaintiff filed a First Amended Complaint ("FAC") adding a cause of action for Private Attorneys General Act ("PAGA") penalties under Cal. Labor Code §§ 2698 *et seq*. for the Labor Code violations alleged in the Complaint. Hammond Decl. ¶ 14.

On February 2, 2021, Defendant filed an Answer to the FAC generally denying the allegations therein and raising several affirmative defenses, including that Class Members are exempt employees, that Defendant acted in good faith with respect to its employment policies/practices, and that Plaintiff's claims are barred by the ministerial exception. *Id.* ¶ 15.

On June 14, 2021, the Parties participated in a mediation session with Louis Marlin, an experienced mediator who has mediated numerous wage-hour class and PAGA actions. There, the parties reached an agreement in principle. Id. ¶ 16. Subsequently, on July 2, 2021 Plaintiff filed a Second Amended Complaint, adding a cause of action for failure to provide meal breaks as required under Labor Code § 512 and Wage Order No. 4-2001, § 11. Hammond Decl. ¶ 17.

B. Pre-Mediation Investigation and Discovery

Shortly after Plaintiff filed his lawsuit, the parties agreed to attend a mediation and engage in informal discovery. Defendant produced key data and documents as part of informal discovery including: (a) exemplar Contract Teaching Agreements; (b) Plaintiff's personnel file; (c) exemplar wage statements; (d) LSU's Faculty Handbook; (e) payroll calendars; (f) a letter to adjuncts announcing their

reclassification as non-exempt and new time reporting and meal and rest break policies; (g) class scheduling data for the Adjunct Class Period, including the number of terms taught by Adjunct CMs, the number of courses taught by Adjunct CMs, and the number of classes of 3.5 hours or longer and 5 hours or longer; and (h) LSU's COVID expense reimbursement policy. Hammond Decl. ¶ 18.

Plaintiff's counsel conducted their own investigation and gathered additional documents and information. Plaintiff's counsel also conducted interviews and surveys of Adjunct CMs regarding unpaid wages. Id. ¶ 19. These interviews and surveys confirmed that adjunct instructors spent many hours working prior to the beginning of academic terms. *Id*.

From informal discovery, Plaintiff ascertained that LSU employed CMs on a term-by-term basis pursuant to uniform employment contracts (Contract Teaching Agreements or "Contracts"). Prior to the fall quarter 2020, LSU paid Adjunct CMs a fixed amount per course based on the number of units taught and/or students taught, or a combination of units and students taught. Hammond Decl. ¶ 20. During that period, LSU did not require Adjunct CMs to track their hours worked. *Id*. From documents produced, Plaintiff also ascertained that while the Contracts began on specific dates (*i.e.,* the first day of classes), LSU required Adjunct CMs to performed work prior to the start of classes, including to prepare syllabi and other course materials, plan lectures, assignments, and assessments, and generally prepare to teach their class before the start of classes. From the exemplar wage statements, Plaintiff confirmed that LSU did not include any entries for hours actually worked by Adjunct CMs prior to fall 2020. Rather, LSU simply inputted its own estimate for hours worked and an hourly rate which, multiplied by the estimated hours, produced the equal biweekly payment required to produce the flat rate per-course amount provided for in the respective Contract. *Id*.

From informal discovery, Plaintiff's Counsel also learned and calculated data points necessary to thoroughly evaluate his Adjunct Class claims, including the class size, the total number of courses taught during the Adjunct Class Period, number of wage statements issued, the effective average hourly rate paid and average daily rate, number of classes taught that were over 3.5 hours and 5 hours, and the total number of days that Adjunct CMs were allegedly paid late (*i.e.*, the total number of days between the end of the Contract and last paycheck) during the waiting times penalties statutory period. Hammond Decl. ¶ 21. Plaintiff's Counsel also learned and calculated necessary data points for the Reimbursement Class claims, including the class size, the date from which members of the class were required to work remotely, and LSU's policy regarding reimbursement. *Id*.

C. LSU Revised its Compensation System and Changed Its Practices

Beginning with the fall quarter 2020, LSU revised its compensation practices with respect to Adjunct CMs. LSU reclassified Adjunct CMs as hourly non-exempt employees and changed their compensation from per course/per unit to hourly. LSU also began tracking adjunct instructors' hours and including entries for total hours worked and hourly rates on their wage statements. Hammond Decl. ¶¶ 34-35. LSU also asked Adjunct CMs to track hours worked the week before classes and the week after finals and paid for these hours. *Id.* ¶ 36.

Also, after the filing of this lawsuit, in January 2021, LSU introduced a COVID Temporary Emergency Reimbursement under which it retroactively reimbursed its employees for their expenses incurred in working from home during the COVID pandemic at the rate of $25 per month for part-time employees and $50 per month for full-time employees, and has been reimbursing its employees in these amounts going forward. Hammond Decl. ¶ 36.

D. Mediation

On June 14, 2021, the Parties participated in a mediation session with Mr. Louis Marlin, an experienced mediator who has mediated numerous wage-hour class and PAGA actions. Prior to the mediation, the parties submitted detailed mediation briefs supported by documents obtained in informal discovery. At the mediation, the parties reached an agreement in principle. The parties subsequently reached a final agreement which is memorialized in a formal settlement agreement that is presented to the Court for approval. Hammond Decl. ¶ 37.

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

When a negotiated class action settlement has been reached prior to certification, as here, the Court may make an order approving or denying certification of a provisional settlement class. Cal. Rules of Court, Rule 3.769(d). The decision to certify a class is purely a procedural one and should be based on the allegations in the Complaint and not on the perceived factual or legal merit of the class claims. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-40 (2000).

In California, a Class is certifiable if (1) the class is ascertainable and sufficiently numerous; (2) there exists a well-defined community of interest; and (3) class action is a superior method of adjudication. *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012); *Linder*, 23 Cal. 4th at 435. All class certification requirements are met in this case.

A. The Class Is Ascertainable and Sufficiently Numerous

Whether a class is ascertainable is determined by examining the class definition, the size of the

class, and the means available for identifying class members. *See Reyes v. Board of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). Class members are "ascertainable" when they may be readily identified without unreasonable expense or time by reference to official records. *See Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019) ("We conclude that the objectives of this requirement are best achieved by regarding a class as ascertainable when it is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.'" (quoting *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 915 (2001)). These criteria are met here as Defendant's records are sufficient to permit identification of the members of the Classes. SA § 10.1.1.

Both the Adjunct and Reimbursement Classes are sufficiently numerous because they consist of 363 and 176 members respectively. Hammond Decl. ¶ 26; *see also Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981); 1 Newberg on Class Actions § 3.12 (5th ed. 2011) ("[A] class of 40 or more members raises a presumption of impracticability of joinder.").

B. "Community of Interest" Exists Among CMs

The "community of interest" requirement embodies three factors: (1) "'predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007) (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981)). Plaintiff satisfies each of these elements.

1. Common Questions of Law and Fact Predominate

Where the defendant employer's policies or conduct is uniformly directed at a class or classes of employees, as it is here, the class-wide impact of the defendant's policies satisfies the commonality requirement. *See Sav-On Drugs Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 331 (2004) (upholding class certification, where the common issue was whether the employer properly classified grocery store managers as exempt from California's overtime requirements). With respect to the Adjunct Class, Plaintiff challenges common classification and pay policies that raise predominant common questions of law and fact, including: (1) whether Defendant misclassified Adjunct CMs as professional exempt; (2) whether LSU's per course/unit pay constitutes a piece rate; and (3) even if the per course pay is not a piece rate, whether the compensation set out in the Contracts covered work that Adjunct CMs performed prior to the beginning of their contract period. This third question is common to the entire Adjunct Class because Plaintiff alleges that LSU issued form contracts to all the Adjunct CMs (with the contract start

date corresponding to the first day of classes), and, yet, required Adjunct CMs to, or knew that Adjunct CMs would, perform work prior to the first day of classes. Hammond Decl., ¶¶ 20, 29, 40-41. Another common question is whether Adjunct CMs were "discharged" for purposes of Labor Code § 201 on the end date specified in their contracts. These are questions common to the entire Adjunct Class because they turn on the legal interpretation of the professional exemption, the legal meaning of the term "discharge," and the interpretation of uniform contracts. *Id.* ¶ 30. With respect to the Reimbursement Class, Plaintiff challenges Defendant's common expense reimbursement policies which raise the common question of law and fact: whether LSU timely reimbursed business expenses necessarily incurred by Reimbursement CMs as a result of working from home during the COVID pandemic. *Id.* ¶ 83. This question is common to the entire Reimbursement Class because they were all required to work remotely after March 4, 2020 and were all subject to LSU's retroactive COVID expense reimbursement policy effective January 1, 2021. *Id.*

2. Plaintiff's Claims Are Typical of the Class Claims

The test of typicality is whether Plaintiff and other CMs "have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007) (internal citations and quotation marks omitted); *see also* 1-3 California Class Actions Practice and Procedure (2007) § 3.02. Here, Plaintiff's claims are typical of both Classes that he seeks to represent because he was subject to the same compensation, classification, and expense reimbursement policies and practices, suffered the same types of injury, and seeks the same types of relief, as the putative Classes.

3. Plaintiff and His Attorneys Will Adequately Represent the Class.

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669, n.21 (1993) (citations and quotation marks omitted). Both elements are satisfied here. Plaintiff's Counsel are highly skilled and experienced in similar cases and have extensive class action litigation experience. Hammond Law has been appointed class counsel in numerous class actions and has represented thousands of adjunct instructors in similar unpaid wage cases since 2016 including 13 cases that have receive final approval. Hammond Decl. ¶¶ 4-11. Plaintiff is committed to representing the interests of the Classes, does not have any conflicts with any CM, and his interests are virtually coextensive with those of the CMs. *Id.* ¶ 3.

C. This Class Action Is a Superior Method of Adjudication

Plaintiff and the Adjunct CMs' claims are based on Plaintiff's contentions that Defendant had uniform policies and/or practices of paying Adjunct CMs by the piece, of failing to compensate them for the time spent working prior to the beginning of their contracts and for rest break time, of paying their final wages after their discharge date, of issuing inaccurate wage statements, and failing to reimburse business expenses. All of these claims involve common evidence, including uniform employment contracts LSU issued to CMs, academic calendars, handbooks, compensation policies, payroll calendars, wage statements, and remote work and reimbursement policies. Plaintiff and the Reimbursement CMs' claims are based on Plaintiff's contentions that Defendant had uniform policies and/or practices of failing to timely reimburse Reimbursement CMs for business expenses necessarily incurred as a result of working remotely during the COVID pandemic. Accordingly, it would be inefficient to resolve the Adjunct or Reimbursement CMs' claims at separate trials. *See Bufil v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008). The class action mechanism in this case will also allow Plaintiff and the class to obtain redress for their relatively small claims, which would otherwise be impractical to litigate on an individual basis.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. The Two Step Settlement Approval Process.

Court approval of a class action settlement is a two-step process: (1) a preliminary review and contingent approval by the trial court, and (2) after notice has been distributed to the class members, a hearing and a detailed review that includes their responses. Manual for Complex Litigation (Fourth) § 21.6 ("Manual"); Cal. Rules of Court, Rule 3.769(a); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-1801 (1996). Thus, the trial court's preliminary approval of the settlement is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. *See, e.g.*, 4 Newberg on Class Actions § 11.25 (4th ed. 2002); Manual § 21.6. Applying the criteria for preliminary approval in this case reveals a substantial basis for granting the preliminary approval this Motion seeks.

B. The Settlement is Fair and Reasonable.

In analyzing whether a settlement is fair and reasonable, courts consider a number of factors: (1)the strength of the plaintiff's case balanced against the settlement amount; (2) the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial; (3) the extent of discovery completed and the stage of the proceedings; (4) the experience and view of counsel; and (5) the reaction of the class members to the proposed settlement. *Kullar v. Foot Locker*

Retail, Inc., 168 Cal. App. 4th 116 (2008) (quoting *Dunk*, 48 Cal. App. 4th at 1801). Indeed, a settlement is initially "presumed to be fair" when (1) it "is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 52 (2008) (quoting *Dunk*, 48 Cal. App. 4th at 1802).

The settlement here represents 55% of LSU's realistic exposure on the Adjunct class claims (including interest and excluding PAGA penalties) after considering Defendant's actual and potential defenses on the merits and risks on class certification; and provides a $50 payment to Reimbursement CMs whose maximum potential recovery is $41.48 in interest (since LSU retroactively reimbursed home office expenses) and potential PAGA penalties. Given the substantial relief obtained for the Classes and the uncertainties and delays of litigation, the settlement meets the criteria for preliminary approval.

1. The Settlement Was a Product of Informed, Non-Collusive Negotiations

The settlement is the result of hard-fought extensive settlement negotiations between the parties conducted at arm's length and informed by substantial factual and legal investigation. Throughout this case, CMs have been represented by counsel with extensive experience in wage and hour litigation, and, in particular, class actions alleging similar types of claims. Hammond Decl. ¶¶ 4-11.

Class Counsel have spent a considerable amount of time prosecuting this case, including, but not limited to, drafting pleadings, investigating, researching applicable law, meeting and conferring with Defendant's counsel, analyzing documents and data produced by Defendant, preparing for and attending a full-day mediation, and negotiating the settlement agreement and related documents. Hammond Decl. ¶¶ 12-21, 38. A well-respected and experienced mediator, Louis Marlin, conducted the mediation session. *Id.* ¶ 37.

2. The Settlement Amount is Fair and Reasonable Considering Potential Recovery and the Risks of Litigating the Case

Comparison of the extent of the class recovery to the strength of Plaintiff's case is the most important factor in analyzing the fairness of the settlement. *Kullar,* 168 Cal. App. 4th at 130. The proposed settlement of $541,200 allocated to the Adjunct class easily passes the *Kullar* test as it will provide the class with 55% of the recovery (including interest but excluding PAGA) that could realistically be achieved through further litigation. The $8,800 allocated to the Reimbursement Class is also significant in light of the fact that LSU retroactively reimbursed home office expenses starting January 2021 so Reimbursement CMs recovery is limited to potential interest and PAGA penalties (which

a Court may not award at all as discussed below).

Although Plaintiff believes that the Classes have strong claims, he acknowledges the serious obstacle presented to Plaintiff's Adjunct class claims by Defendant's ministerial exception defense, as well as the risks posed by certification and the merits of each claim, which warrant a settlement at less than "complete victory" value, as addressed below.

a. **Ministerial Exception**: Defendant vigorously contended that Plaintiff's wage and hour claims are barred by the First Amendment's "ministerial exception." The First Amendment protects the right of religious institutions to decide "matters of faith and doctrine" without government intrusion." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2055 (2020) (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952)); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 186 (2012)). Therefore, courts recognize a "ministerial exception" to the general rule that churches and religious institutions adhere to state and federal employment laws. *Alcazar v. Corp. of the Catholic Archbishop*, 627 F.3d 1288, 1290 (9th Cir. 2010). The ministerial exception applies to claims under state wage and hour law. *Id.* at 1293 (holding ministerial exception bars state wage and hour claims); *see also* Hammond Decl. ¶ 38.

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, the Supreme Court case addressing the ministerial exception, the Supreme Court held that the First Amendment's Establishment and Free Exercise clauses bar the government from interfering with the decisions of a religious group in employment issues. 565 U.S. at 195-96. The Supreme Court looked to numerous factors in assessing the application of the ministerial exception. On July 8, 2020, the Supreme Court issued *Our Lady of Guadalupe Sch.,* 140. S. Ct. 2049, reiterating that courts must look not just at an employee's title, but also his or her duties, in deciding whether religious instruction is an important function of the job and thus whether the "ministerial exception" applies. *See* Hammond Decl. ¶ 39-41.

Defendant also could have contended that even if the ministerial exception were not a complete defense to Plaintiff's wage and hour claims, it would still result in a denial of class certification. This argument is based on the argument that the various factors the Supreme Court looks to when deciding whether the exception applies raise a host of individual issues that would need to be resolved on an employee-by-employee basis, rendering this case unsuitable for prosecution on a class-wide basis. Hammond Decl. ¶ 43. If the parties litigated this point, however the trial court ultimately ruled on the applicability of the ministerial exception to California wage and hour laws and its impact on class certification, the losing party would appeal to the appellate court, then to the state Supreme Court, and

ultimately would seek *certiorari* from the U.S. Supreme Court. This process, which would take years to resolve under normal circumstances, would take even longer as a result of the backlog the courts face due to the Covid-19 shutdown and its aftermath. Hammond Decl. ¶ 45.

Based on this defense which, if successful, would have been a complete bar to recovery, Plaintiff believed a significant discount was warranted in settlement.

a. Other Merits and Certification Defenses

In addition to the major risks posed by the ministerial exception, Plaintiff also faced the following actual and potential arguments to each of his Adjunct claims.

b. Unpaid Wages Claim (Labor Code § 1194): Plaintiff alleges that Adjunct CMs were paid on a piece-rate basis, with the piece being the course, and that as result CMs were paid for the hours of course instruction only and were not paid separately for non-teaching tasks, such as preparing for class prior to and during the semester, grading, office hours, attending department meetings, in violation of Labor Code § 226.2. Hammond Decl. ¶ 47. During the discovery and investigation phase, however, Plaintiff concluded that Adjunct CMs' Contracts contemplated that Adjunct CMs would complete and submit grades; and that Defendant could reasonably argue that course preparation, meeting with students, and office hours were tasks directly related to and included in the course teaching assignment set out in the Contracts. *Id*. As a result, for purposes of settlement, Plaintiff limited his claim only to work performed prior to the first day of classes on the basis that the only dates on the Contracts indicating the start of the contract was the first day of classes and, thus, compensation in the Contract was also only for that period, and not for work performed prior to that period. *Id*. Plaintiff calculated LSU's maximum exposure to the unpaid wages claim as **$490,641** (including interest)**.** *Id.* ¶ 49.

Class Certification and Merits Risks: Plaintiff applied a minimal 10% discount for the risk for non-certification on the theory that the flat per course/unit rate included all the activities performed prior to the Course, that the amount of time each Adjunct CM spent on pre-Contract work would lead to individualized issues, and because of potentially individualized issues of whether the tasks performed pre-Contract were under LSU's control. Hammond Decl. ¶ 50. As to the merits, Plaintiff applied a further 30% discount for the risk that CMs' per-course compensation, whether a piece-rate or a salary, included the hours worked before the start of the Contracts because those hours were spent on tasks directly related to the course teaching assignment set out in the Contracts, and for a small risk that a court would find CMs are exempt. *Id.* ¶ 51. Applying the certification and merits discount, for settlement purposes, LSU's realistic exposure on the unpaid wage claim is reduced to **$309,104.** *Id.*

c. **Inaccurate Wage Statement Claim (Labor Code § 226(a)):** Plaintiff contends that Adjunct CMs, as non-exempt employees, were entitled to wage statements that listed their total hours worked and applicable hourly rates pursuant to Labor Code §§ 226 (a)(2) and (a)(9). Hammond Decl. ¶ 52. Moreover, as piece rate employees, Adjunct CMs were entitled to wage statements that included their piece rate, the number of pieces earned, and rest break and nonproductive time information pursuant to Labor Code §§ 226 (a) (3) and 226.2(a). *Id.* However, prior to September 2020, LSU did not track Adjunct CMs' hours worked and did not include on their wage statements any entries for hours actually worked or, accordingly, for actually applicable hourly rates. *Id.* ¶ 53. Moreover, LSU did not provide any of the required piece rate information. Plaintiff calculated Defendant's liability on this wage statement claim as **$311,750**. *Id.* ¶ 54.

Class Certification and Merit Risks: Plaintiff applied a minimal 10% discount for the risk of non-certification because wage statement claims are particularly well-suited to class certification. *See Lubin v. Wackenhut Corp.,* 5 Cal. App. 5th 926, 958-60 (2016). Hammond Decl. ¶ 55.

As to the merits, Plaintiff faced a risk that a court would find that only the initial $50 penalty applied to each violation because LSU did not receive notice from the labor commissioner or a court that its wage statements were noncompliant. *Robinson v. Open Top Sightseeing San Francisco, LLC,* No. 14-cv-00852, 2018 U.S. Dist. LEXIS 24556, at *52-58 (N.D Cal. Feb. 14, 2018) (finding that only the initial $50 Labor Code § 226(e) penalty applied because nothing in the recorded showed defendant as previously notified that its wage statements were noncompliant). Defendant also argued that CMs were non-exempt. In addition, Defendant in its Answer asserted the defense that it acted in good faith and thus did not "knowingly and intentionally" fail to provide compliant wage statements. *Id.*[2] Thus, all Plaintiff would need to show, which he can easily do, is that LSU knew that it provided wage statements that did not have all the required information or knew that it did not provide wage statements that covered work performed before the start of classes. *Furry*, 30 Cal. App. 5th at 1085; Hammond Decl. ¶ 56.

Despite Defendant's actual and potential arguments, Plaintiff believed the merits risk was small and accordingly applied a modest 10% discount. Thus, Plaintiff calculated LSU's realistic exposure for this claim, after applying discounts, as **$252,518.** Id.

d. **Rest Break Claim (Labor Code § 226.7):** Plaintiff alleges that Defendant compensated

[2] Although this argument has been recognized by the federal district courts, it has been rejected by California state courts. *See, e.g.*, *Kao v. Holiday*, 12 Cal. App. 5th 947, 962 (2017); *Furry v. East Bay Publishing, LLC*, 30 Cal. App. 5th 1072, 1085 (2018).

Adjunct CMs on a piece-rate basis, and as such was required, but failed, to pay Adjunct CMs hourly and separately from the piece for the time spent on rest breaks pursuant to Labor Code § 226.2 (a)(1). Hammond Decl. ¶ 57. Thus, Adjunct CMs who worked 3.5 hours or more (Lab. Code § 226.7) were entitled to hourly and separate pay for rest breaks. *Id.* ¶ 52. Even if not piece-rate, Plaintiffs allege Adjunct CMs were entitled to off-duty rest breaks because they were non-exempt. *Id.* ¶ 58. Plaintiff believed that could establish that Defendant did not pay hourly and separately for rest breaks in violation of Labor Code § 226.2, entitling Adjunct CMs to premium pay (at one hour of their average pay) for each unpaid rest break. *See Amaro v. Gerawan Farming, Inc*., No. 1:14-cv-00147-DAD-SAB, 2016 U.S. Dist. LEXIS 112540, at *5 (E.D. Cal. Aug. 23, 2016). Hammond Decl. ¶ 56.

Plaintiff calculated Defendant's liability on the rest break claim as **$222,156** (including interest). Hammond Decl. ¶ 63.

Class Certification: Defendant could have argued that even if Adjunct CMs were paid on a piece-rate basis, that the piece-rate included time spent on rest breaks, and what was included in the piece-rate would depend on each CM's understanding of what the course rate covered, and individualized issues would predominate. Hammond Decl. ¶ 64. Plaintiff applied a nominal 10% discount for this argument. *Id.* ¶ 65. As to Plaintiff's claim that CMs were entitled to rest breaks as non-exempt employees but the nature of CMs employment and policies and/or practices of LSU impeded CMs from taking rest breaks, Defendant argued Plaintiff would be unable to certify a class because individualized issues would predominate among putative class members in that LSU maintained a compliant rest break policy which would lead to individualized issues of why some CMs took rest breaks while others did not. Plaintiff applied a 30% discount for this argument. Overall, Plaintiff applied a 20% discount for the risk of certification. *Id.*

Merits: Defendant contended Plaintiff would lose on the merits because Adjunct CMs were properly classified as salaried non-exempt employees, and that LSU had a compliant rest break policy and that CMs were permitted and authorized to take rest breaks. Plaintiff gave some (but not much) weight to LSU's argument that CMs were properly classified as salaried non-exempt, but did give weight to LSU's argument that it had a compliant rest break policy and that the course rate may be found to be a salary because it appeared that CMs did receive a predetermined amount each pay period that was not subject to change within each pay period based on the number of hours taught. Plaintiff applied a 10% discount based on these arguments. After applying discounts, for settlement purposes, Plaintiff determined LSU's exposure on the rest break claim is **$159,952.** *Id.* ¶ 66.

e. Meal Break Claim (Labor Code § 512): As discussed above, Plaintiff alleged that CMs were non-exempt employees and were therefore entitled to an off-duty, unpaid 30-minute meal break before the end of the fifth hour of each shift pursuant to Labor Code § 512. Plaintiff alleged that Defendant imposed uniform policies and/or practices that impeded CMs' ability to take meal breaks, including the requirement and expectation that CMs be available to students immediately before and after class and during breaks in class to answer students' questions. Plaintiff calculated Defendant's liability on the meal break claim as $1,665 (including interest). Hammond Decl. ¶ 68.

Class Certification: Defendant could have argued that this claim would not be certified because CMs taught different courses on different days with different class lengths, and Defendant might successfully argue that individual inquiries would be necessary to determine whether CMs were able to take meal breaks. Plaintiff would have to rely more heavily on CM testimony than an analysis of common factual documents to prove this claim, which added to the certification risk. Therefore, Plaintiffs applied a 25% discount. Hammond Decl. ¶ 6169.

Merits: Defendant could have argued that CMs were exempt and therefore not entitled to meal breaks. Even if CMs were not exempt, Defendant argued that longer classes had breaks, and CMs were permitted to take compliant meal periods, and if they failed to do so it was as a matter of choice. Defendant therefore argued that Plaintiffs' assumed violation rate of 100% was highly unrealistic. Plaintiffs believed these arguments warranted a further 25% discount. After applying discounts, ULV's realistic exposure on the meal break claim was reduced to **$936.** Hammond Decl. ¶ 70.

f. Waiting Time Penalties (Labor Code § 203): Plaintiff alleges that Adjunct CMs were discharged on the last day of each term, upon completion of their Contract. Hammond Decl. ¶ 71. However, because LSU followed its regular payroll practices when paying Adjunct CMs, the final paycheck date generally fell after the end of Contract date, which Plaintiff alleges entitles CMs to waiting time penalties under Labor Code § 203. Plaintiff calculated that waiting time penalties are **$999,685**. *Id*. ¶ 72.

Class Certification: Plaintiff applied a minimal 10% discount for the risk on class certification because his theory of liability rests on common legal and factual questions of what constitutes a discharge within the meaning of § 201, whether Contracts are agreements for a definitive period of time, what is the end date of the Contract, and whether late payment was willful. *See Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2014 U.S. Dist. LEXIS 314438, at *25 (N.D. Cal. Mar. 9, 2014) (holding that "'claims

arising from interpretations of a form contract appear to present the classic case for treatment as a class action'") (citing cases); Hammond Decl. ¶ 73.

Merits: Plaintiff applied a further 25% discount on the merits because Plaintiff faced the following arguments: (1) there was no "discharge" at the end of each contract under *Elliot v. Spherion Pac. Work, LLC,* 572 F.Supp. 2d 1169, 1176-77 (C.D. Cal. 2008), because the employment of the majority of Adjunct CMs' continued from term to term; (2) LSU had a good faith dispute that there was not a discharge, and (3) LSU had a good faith dispute that Class Members were properly classified as exempt, or as salaried non-exempt, and were not owed any wages for non-teaching time or rest breaks. These defenses could negate the willfulness requirement of Labor Code § 203. *See Barnhill v. Roberts Saunders & Co.*, 125 Cal. App. 3d 1, 8-9 (1981) (an employer's failure to pay wages is not "willful," if the legal duty to pay them was unclear at the time of the violation.); *see also* Cal. Code Regs., tit. 8, § 13520. After applying discounts, for settlement purposes, Plaintiff determined that LSU's exposure on the waiting time penalties claim is **$674,788.** Hammond Decl. ¶ 74.

Adjunct Unreimbursed Expenses Claim (Labor Code § 2802): Plaintiff alleged that from the start of the Class Period until March 4, 2020, LSU did not reimburse Adjunct CMs who taught online courses for their necessarily incurred home office expenses. Plaintiff further alleged that as a result of the COVID-19 pandemic, LSU moved classes online and required all Adjuncts to work from home, but did not reimburse their necessarily incurred home office expenses until January 1, 2021. Plaintiff calculated the unreimbursed expenses of Adjunct CMs as $34,669 (including interest). Hammond Decl. ¶ 76.

Class Certification and Merits Risks: Plaintiff acknowledges that there were varying practices with regard to incurring expenses that pose an obstacle to class certification. Therefore, Plaintiff applied a 25% reduction for class certification; and a further 25% discount based on anticipated arguments that even if expenses were incurred, they were voluntary and/or minimal, and that LSU had a written expense reimbursement policy applicable to Adjunct CMs at all relevant times under which CMs were free and able to seek reimbursement for expenses incurred for remote work. Hammond Decl. ¶¶ 77-78. After applying these discounts, for settlement purposes, Plaintiff calculated LSU's realistic damages owed to the Adjunct Class as **$19,501.** *Id.* ¶ 78.

g. The Gross Settlement Allocated to Adjunct Class Claims Is Fair and Reasonable: Plaintiff calculated LSU's maximum exposure on the Class claims (including interest and excluding PAGA) as $2,060,565. After class certification and merits discounts, Plaintiff estimated Defendant's *realistic* exposure as $1,416,798. Plaintiff then applied a final 30% discount to the realistic exposure for

the major risk that Plaintiff's wage and hour claims are barred by the First Amendment's "ministerial exception" and would be subject to dismissal, which reduced Defendant's *realistic* exposure to **$991,759.** The $541,200 Gross Settlement allocated to the Adjunct class represents 26% of LSU's maximum exposure, and 55% of LSU's realistic exposure (excluding PAGA). Hammond Decl. ¶ 80.

h. **Reimbursement Class Claims**; As a result of the COVID-19 pandemic and the state of emergency declared in California, on or about March 4, 2020, all California Universities, including LSU, moved classes online and required all other (non-faculty) employees to work from home. As a result, LSU's employees incurred home internet and cellular phone costs in carrying out their job duties for LSU, without any reimbursement. As stated above, Plaintiff alleged that even if LSU's COVID Temporary Emergency Reimbursement policy adequately reimbursed expenses incurred by Reimbursement CMs since the start of the COVID pandemic, LSU would still be liable for a maximum of $7,300 in interest on the late payments made in 2021 for expenses incurred in 2020, or $41.48 per Class Member. *Id*. ¶ 82.

Class Certification and Merits Risk: Plaintiff acknowledges that there are risks as to class certification for the Reimbursement Class based on the fact that there was no written policy requiring Reimbursement CMs to use their cellular phones or incur home office expenses, and there were varying practices with regard to incurring expenses by Reimbursement CMs presents an obstacle to class certification as well. Further, because a timely reimbursement will incur no interest, and because Defendant can reasonably argue that at least some of the reimbursements made were timely (including reimbursement made for December 2020 expenses), the actual interest owing is a smaller amount. Because the interest recoverable by the Reimbursement Class was minimal and uncertain, Plaintiff did not apply specific reductions based on class certification and merits risks. Hammond Decl. ¶ 83.

i. **The Allocation to the Reimbursement Class is Fair and Reasonable:** With respect to the Reimbursement Class, Plaintiff calculated its share of the GSA as $50 for each of the approximately 176 Reimbursement CMs. *Id*. ¶ 84. Plaintiff believes that this more than covers the potential recovery on that Class's claims and appropriately acknowledges the fact that the Reimbursement Class claims all arose during the PAGA period and the Reimbursement CMs could, potentially, have recovered some amount in PAGA penalties in addition to interest. *Id.*

j. **The PAGA Allocation is Fair and Adequate**: Plaintiff calculates there were 3,850 pay periods with a Labor Code violation during the Adjunct PAGA Period (October 19, 2019 to September 21, 2020); and 3,520 pay periods with a Labor Code violation during the Reimbursement PAGA Period

(March 4, 2020 to December 31, 2020). Using a penalty of $100 per pay period (because Defendant never received notice from the Labor Commissioner or the Court so there are arguably no "subsequent" violations), Defendant's maximum exposure in PAGA Penalties is **$737,000** (assuming the Court would not allow "stacking" of PAGA penalties for each separate Labor Code violations). *Bernstein v. Virgin Am., Inc.,* Nos. 19-15382, 20-15186, 2021 U.S. App. LEXIS 6641, *35-36 (9th Cir. Mar. 8, 2021) (holding that "subsequent" violations for purposes of PAGA do not occur until employer has been notified that it is violating a Labor Code provision). *Castillo v. ADT, LLC,* No. 2:15-383 WBS DB, 2017 U.S. Dist. LEXIS 10579, at *11 (E.D. Cal. Jan. 24, 2017); Hammond Decl. ¶ 85. The $15,000 allocated to PAGA penalties represents approximately 2% of Defendant's exposure to PAGA penalties, which is fair and reasonable. Hammond Decl. ¶ 86.

First, LSU revised its compensation and reimbursement policies at issue in this lawsuit to bring them into compliance with the Labor Code, thus fulfilling the purpose of PAGA which is to 'remediate present violations and deter future ones,' not to redress employees' injuries." *Kim v. Reins International California, Inc.,* 9 Cal. 5th 73, 86 (2020); *Cotter v. Lyft, Inc.,* 193 F. Supp. 3d 1030, 1037 (2016) (significant reduction to PAGA penalties appropriate because the law was not clear and there was thus no deliberate violation). Indeed, in an *Amicus Curiae* Brief field June 16, 2017 in *Steven Price v. Uber Technologies*, No. BC554512 (Los Angeles Cnty. Super. Ct.), the Labor Commissioner stated that the main purpose of PAGA penalties is "in helping the Labor Commissioner discharge her mandate to: vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards. Cal. Labor Code §90.5(a)." In light of these changes, the Court would likely reduce any award of PAGA penalties as "unjust, arbitrary and oppressive, or confiscatory" under Labor Code § 2699 (i). Hammond Decl. ¶ 86.

Second, the overall settlement resulted in robust relief of $1,491 per Adjunct CM gross, and $806.80 net, and $50 per Reimbursement CM, which is what courts look at when assessing amount attributed to PAGA penalties. *O'Connor v. Uber Techs., Inc.*, No. 201 F. Supp. 3d 1110, 1134 (N.D. Cal. Aug. 18, 2016) (where settlement for the class claims is robust, the purpose of PAGA may be fulfilled because by providing fair compensation to class members, the settlement has a deterrent effect on defendant and other employers, thus fulfilling the purpose of PAGA). In *Gola v. University of San*

Francisco, No. CGC-18-565018 (San Francisco Cnty. Super. Ct. March 3, 2021) a recent case brought by HammondLaw on behalf of adjunct instructors, the court found that substantial monetary relief in form of statutory penalties under § 226(e) (and fees and costs plaintiff would seek) acted as a sufficient punishment and deterrent, and awarded only 15% of the full PAGA penalties—and this was a case where defendant did not have a good faith defense and did not change its practices to comply after the lawsuit was filed. Hammond Decl. ¶ 87.

Third, Defendant contended that Plaintiff's claims for PAGA Penalties would fail for the same reasons the underlying Labor Code claims would fail. Id. ¶ 88.

Fourth, although class certification requirements do not apply to PAGA claims, "such claims can be stricken if they are found to be 'unmanageable,'" and because only CMs who actually incurred unpaid wages, unpaid premium pay, or unreimbursed expenses during a particular pay period could recover PAGA penalties for those violations, Defendant could have disputed that there is a manageable way to determine who was entitled to such penalties. *See, e.g.*, *Raphael v. Tesoro Ref & Mktg. Co.*, No. 2:15-cv-02862-ODW, 2015 U.S. Dist. LEXIS 130532, at *5 (C.D. Cal. Sept. 25, 2015). Hammond Decl. ¶ 89.

Finally, Plaintiff's allocation of 2% of the maximum value of PAGA Penalties is comparable to PAGA allocations in similar cases that received final approval including *Mooiman et al. v. Saint Mary's College of California,* No. C19-02092 (Contra Costa Cnty. Super. Ct. June 10, 2021) (finally approving $30,000 carve out for PAGA Penalties, representing 1% of the maximum $649,200 in PAGA penalties, where "the record indicates that defendant changed many of the policies at issue before the action was brought, that there is a substantial monetary award which in part serves the deterrent function of a penalty, and that defendant had some arguments of "good faith," that would mitigate penalties"); and many other cases cited in the Hammond Decl. ¶ 90.

3. <u>The Risk, Expense, Complexity and Likely Duration of Further Litigation Support the Fairness and Reasonableness of the Settlement</u>

If the parties continued to litigate this case, Defendant would seek a ruling on the issue of ministerial exception. If Defendant succeeded, Plaintiff's claims would be completely barred as the ministerial exception is a complete defense to liability in this case. Although the parties disagreed about the application of this exception, the ultimate outcome was uncertain. Hammond Decl. ¶ 98. The losing party would appeal to the appellate court, then to the state Supreme Court, and ultimately would seek *certiorari* from the U.S. Supreme Court. While Plaintiff believed that he had a strong chance of succeeding in a state court on this issue, the outcome in the U.S. Supreme Court was much less certain. Moreover, the process of litigating this issue under normal circumstances would take years, and even

longer during the COVID-19 pandemic when many courts are backlogged. *Id*. Besides the significant risk associated with the ministerial exception, Plaintiff would have to clear other hurdles associated with certifying the Class claims and would potentially face pre-trial dispositive motions, and whichever claims cleared that hurdle would face trial. Regardless of the outcome at trial, the losing party would likely appeal, given that some of the central legal issues in this case have not been conclusively addressed by an appellate court. This process would take years to resolve under normal circumstances, and even longer as a result of the Covid-19 shutdown and aftermath. Instead, this settlement provides an early resolution of a dispute, and CMs will recover in the relatively near future if the settlement is finally approved. *Id*. ¶¶ 99-101.

4. The Extent of Discovery Completed and The Stage of the Proceedings

As described in detail in Hammond Declaration, the parties have engaged in extensive investigation and informal discovery, and were adequately informed to make the decision to settle this case on the proposed terms. Hammond Decl. ¶ 18-21.

5. Views of Experienced Counsel Support the Reasonableness of the Settlement

As discussed above, Class Counsel has extensive experience in class action litigation, and, in particular wage-and-hour class actions brought on behalf of adjunct instructors, and have been determined by numerous courts to be adequate class counsel. Hammond Decl. ¶¶ 4, 10. Class Counsel has represented thousands of adjunct instructors in over 20 similar unpaid wage cases since 2016, and recently litigated one such case all the way through trial. *Id*. Class Counsel considers the settlement to be fair, reasonable and adequate. The average net recovery is $806.80 per Adjunct CM and the average gross recovery is $1,490.91. *Id*. ¶ 87. These are substantial recovery amounts and compare favorably with recoveries in similar cases where defendants did not have a ministerial exception defense. *Id*. The average payment for Reimbursement CMs will be $50. *Id*. ¶ 96. As discussed above, this is more than the maximum interest potentially recoverable by Reimbursement CMs and adequately acknowledges their potential recovery of PAGA penalties. *Id*.

6. Reaction of The CMs to The Proposed Settlement

It is premature to address this factor, since notice has not yet been sent out. The settlement, however, confers substantial benefit on the CMs and reasonably tailors each CM's claim to the amount he or she will receive. This promises an overall favorable response.

C. The Proposed Class Notice Content and Procedure Are Adequate

Constitutional due process requires that CMs be provided with notice sufficient to give them an opportunity to be heard in the proceedings. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950). Proper notice must provide CMs with sufficient information to make an informed decision to accept or object to the settlement. *See id.*

In the instant case, the proposed Notice meets these standards since it provides all the information a reasonable person would need to make a fully informed decision about the settlement. The proposed Notice informs CMs of (1) the material terms of the settlement, (2) the proposed fees and costs of Class Counsel and for settlement administration, (3) the proposed enhancement award to the Named Plaintiff; (4) how CMs may opt out of, or object to the Settlement; (5) details about the court hearing on settlement approval, and (6) how CMs can obtain additional information. *See* Cal. Rules of Court, Rule 3.766 and **Exhibit A** to the Settlement Agreement. In addition, the proposed Notice contains information about each Adjunct CM's estimated award under the distribution formula (and how Adjunct CMs can challenge the data used in calculating their settlement awards), each Reimbursement CM's estimated award, and the tax treatment and possible tax consequences of their awards. Therefore, the Court should approve the Notice.

The procedure for distribution of notice meets the standard requiring that the notice has "a reasonable chance of reaching a substantial percentage of the CMs." *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 974 (1975). Here, the Notice will be sent by first class mail to the most recent address of each CM (SA § 10.1.3) and skip tracing will be employed for all Notices returned as undeliverable. SA § 10.1.4. As such, the Notice is likely to reach most, if not all, CMs. Therefore, the Court should approve the procedure/method for distribution of Notice.

D. The Service Award to the Class Representative Is Reasonable

Plaintiff will request an enhancement award of $10,000 for Plaintiff Parsons to recognize the time and effort he expended on behalf of the Class, the reputational risk associated with suing his employer, and the general release he is giving Defendant. Hammond Decl. ¶ 108. The requested service award falls well within the range of incentive payments typically awarded to Class Representatives in similar class actions. *See e.g.*, *Cellphone Termination Fee Cases,* 186 Cal. App. 4th 1380, 1393 (2010) (affirming incentive awards of $10,000).

E. The *Cy Pres* Designee is Appropriate

The Settlement designates the Interdisciplinary Center for Healthy Workplaces ("ICHW"), as the

cy pres beneficiary and recipient of funds associated with any uncashed checks. SA § 8.6. ICHW is a non-profit organization that is dedicated to reinventing workplaces by integrating and applying interdisciplinary sciences to achieve worker health and psychological well-being. Hammond Decl. ¶ 110. In compliance with Code of Civil Proc. § 382.4, Class Counsel certifies that they have no connection to or relationship with ICHW that could reasonably create the appearance of impropriety as between the selection of the recipient of the money or thing of value and the interests of the class. *Id.* ¶ 111.

F. The Requested Attorneys' Fees and Costs Are Reasonable

In addition, Plaintiff's Counsel will request attorneys' fees of not more than $183,333.33 (*i.e.*, 33.33% of the GSA). SA § 4. Hammond Decl. ¶ 102. This fee amount is fair, reasonable and represents the 33.33% typically approved in class actions by California courts. *See, e.g.*, *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 487, 596 (2016) (affirming a fee award representing 33.3% of the fund).[3] Plaintiff also requests reimbursement for out-of-pocket litigation costs and expenses incurred by Class Counsel up to $20,000. These costs include filing and process-serving fees, costs of data analysis, and Plaintiff's share of the professional fees paid to Louis Marlin for a full-day mediation session, which was instrumental to reaching the Settlement. *Id*. ¶ 105. If the Court grants preliminary approval and authorizes the dissemination of notice of the settlement to the class, Class Counsel anticipates filing a Motion for Attorneys' Fees and Costs that will be scheduled to be heard following the notice process. *Id.* ¶ 106.

VI. CONCLUSION

In summary, the settlement provides substantial relief for the Classes and is clearly within the range of acceptable settlements. Accordingly, Plaintiff respectfully requests that the Court preliminarily grant certification of the case as a class action and of Plaintiff and his attorneys as Class Representatives, approve the settlement, and enter an order requiring notice procedures and a final approval hearing consistent with Plaintiff's proposed schedule, as provided for in the proposed Order Granting Preliminary Approval submitted with Plaintiff's Motion.

DATED: August 11, 2021

Respectfully submitted,

Julian Hammond
Attorneys for Plaintiff and the Putative Class

[3] The Court need not decide now the amount of attorneys' fees and expenses or enhancement award to award. Rather, at the current preliminary approval stage, the Court need only satisfy itself that the overall settlement is within a range that could warrant final approval. That standard is met here.