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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE

LARISSA MARANTZ and **MORGHAN GILL**, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

LAGUNA COLLEGE OF ART AND DESIGN, a California Non-Profit Corporation,

Defendant.

CASE NO. 30-2021-01194814-CU-OE-CXC

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

Date: August 26, 2022
Time: 9:00 a.m.
Dept. CX104
Reservation No. 73808713

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I. INTRODUCTION

Plaintiffs Larissa Marantz and Morghan Gill seek preliminary approval of a non-reversionary $825,000 settlement of their wage and hour class and PAGA claims against Laguna College of Art and Design ("Defendant" or "LCAD") individually and on behalf of two classes: (1) 295 "Adjunct Class Members" who were employed by Defendant in California as part-time faculty at any time during the period from April 9, 2017 until February 23, 2022; (the "Adjunct Class Period"); and (2) 191 "Reimbursement Class Members" ("Reimbursement Class Members") who are all current and former employees of Defendant other than Adjunct Class Members employed by Defendant in California during the period from March 23, 2020 through February 23, 2022 (the "Reimbursement Class Period") and who worked remotely. Adjunct Class Members and Reimbursement Class Members are collectively referred to as "Class Members" or "CMs".

Plaintiffs allege that LCAD misclassified Adjunct CMs as exempt; failed to pay separately and hourly for nonproductive time and/or all hours worked, in violation of Labor Code §§ 226.2, 1194, and Wage Order No. 4-2001, § 4; failed to authorize and permit rest breaks and failed to pay missed rest period premiums, in violation of Labor Code §§ 226.2, 226.7 and Wage Order No. 4-2001, § 12; failed to provide meal periods in violation of Labor Code §§ 226.7, 512 and Wage Order No. 4-2001, § 11; failed to pay compensation due upon discharge in violation of Labor Code §§ 201-203; failed to issue accurate itemized wage statements in violation of Labor Code §§ 226(a) and 226.2(a); and failed to reimburse necessarily incurred business expenses, in violation of Labor Code § 2802. Plaintiffs further allege that during the Reimbursement Class Period, LCAD required Reimbursement Class Members to incur home office expenses as a result of working from home, but did not reimburse them for these expenses, in violation of Labor Code § 2802.

After a full-day mediation session with highly respected mediator Lou Marlin, the parties entered into a Class Action and PAGA Settlement and Release Agreement ("Settlement Agreement" or "SA"), which is now presented to the Court for preliminary approval.[1] Under the SA, if approved, the average share per Adjunct CM will be $2,461.01 gross and $1,439.32 net, and an Adjunct who worked during the entire Adjunct Class Period can expect to receive approximately $5,259.33. Each Reimbursement Class Member's share will be $518.32 gross and $303.14 net and a Reimbursement Class Member who worked during the entire Reimbursement Class Period can expect to receive approximately $583.06.

These are excellent results in light of the fact that Plaintiffs entered into arbitration agreements with class action waivers with LCAD that, if enforced, could render all or part of their class claims

[1] **Exhibit 1** to Proposed Order filed herewith.

essentially worthless or difficult to certify. Moreover, in March 2020, LCAD provided Adjuncts with remote work stipends which could substantially reduce Defendant's liability for Plaintiffs' Adjunct Labor Code § 2802 claims.

Plaintiffs now present the SA to the Court for approval and respectfully request that the Court: (1) conditionally certify the proposed Classes, (2) conditionally appoint Plaintiffs and Plaintiffs' Counsel as Class Representatives and Class Counsel, (3) grant preliminary approval of the proposed Settlement, including the amount and the plan for allocation and distribution of settlement funds, (4) preliminarily approve the requested attorneys' fees and costs to Class Counsel and enhancement awards to the Named Plaintiffs, (5) approve the proposed Notice, and (6) schedule a final approval hearing.

II. OVERVIEW OF THE SETTLEMENT

The Settlement Agreement resolves all claims of the Plaintiffs and the proposed Classes. A summary of the Settlement terms is as follows:

1. Gross Settlement Amount ("GSA") – LCAD will pay a non-reversionary sum of $825,000 to settle all claims alleged in the operative Complaint. SA §§ 1.2. In addition, LCAD will pay the employer-side payroll tax payments due and payable as a result of this Settlement. Id.

2. Attorneys' Fees, Costs, and Service Awards – Class Counsel will seek attorneys' fees of up to 1/3 of the GSA, up to $25,000 to reimburse out-of-pocket litigation costs, and Service Awards of up to $7,500 for the Plaintiff Marantz and $2,500 for Plaintiff Gill. SA §§ 8, 9.

3. PAGA Award – The Settlement allocates $20,000 for the PAGA claims, to be divided 75/25 between the LWDA and the Settlement Class. SA § 10.

4. Settlement Administrator and Administration Costs – The Parties have mutually agreed to use CPT, Inc. as the Administrator. SA § 11. Administration Costs are capped at $15,000. Id.

5. Net Settlement Amount ("NSA") – The NSA – the amount remaining of the GSA after deductions of attorneys' fees, costs, enhancement awards, settlement administration costs, and LWDA's 75% share of PAGA penalties – will total approximately $482,500. Hammond Decl. ¶ 61. The NSA will be allocated as follows: (1) 12 % of the NSA (approximately $57,900) will be allocated to Reimbursement Class Members and paid to them *pro rata* based on the number of pay periods they worked during the Reimbursement Class Period; and (2) 88% of the NSA (approximately $424,600) will be allocated to Adjunct Class Members and paid to them *pro rata* based on number of pay periods they worked during the Adjunct Class Period. SA §§ 6.1.1, 6.1.2.

6. Disputes – If any Class Member disagrees with the pay periods information on their Notice, they may dispute such information. SA § 15. CPT will resolve challenges based on Defendant's

records and any documents or information presented by the CMs. *Id.* The Court shall have the right to review any decision made by the Settlement Administrator regarding a claim dispute. Id.

7. Class Notice – Within 21 business days after the Court grants preliminary approval, LCAD will provide CPT with a list of all CMs and the number of pay periods each worked during the relevant Class Period. SA § 12.1. Within 30 calendar days after the Court grants preliminary approval, CPT will mail the Notice Packet substantially in the form attached to the Settlement Agreement as **Exhibit A,** and will use skip trace procedures for returned mail. S.A. § 12.4.

8. Opting Out or Objecting – CMs who wish to opt-out of the Settlement must send a written notice to CPT within 60 days of the mailing of the Notices. SA § 13, 14. Any CM who properly requests to opt-out will not be entitled to receive any payment under the settlement and will not be bound by the settlement. SA § 13. A CM may object to the Settlement by mailing an objection to CPT within 60 days of the mailing of the Notices. SA at § 14.

9. Tax Consequences of Settlement Payments – For tax purposes, Adjunct CMs payment will be allocated 20% to wages and 80% to penalties and interest. Payments to the Reimbursement Class will be allocated 100% to non-wage payments. SA § 6.1.3.

10. Scope of Release and Final Judgment – CMs will release all claims alleged, or that could have been alleged, in the operative Complaint, and arising during the Class Periods. SA §§ 19.1, 19.5. Named Plaintiffs will also give a general release. *Id*. § 19.8.

III. OVERVIEW OF THE LITIGATION

A. Pleadings

Plaintiff Marantz filed her complaint on April 9, 2021, alleging that Adjunct CMs were non-exempt employees because they did not earn "a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment" required under the professional exemption, Wage Order No. 4-2001, § 1(a)(3)(a)-(d). Plaintiff Marantz also alleged that Adjuncts were piece-rate workers because LCAD compensated them a set amount of money per Course, which is a form of piece-rate compensation. Therefore, LCAD was required – but failed – (i) to pay wages for all hours worked as required under Labor Code §§ 226.2 and 1194 and Wage Order No. 4-2001 § 4 ; (ii) to pay hourly and separately for rest breaks and to authorize and permit paid off-duty rest breaks in violation of Labor Code §§ 226.2, 226.7, and IWC Wage Order No. 4-2001; (iii) to provide meal breaks as required under Labor Code § 512 and Wage Order No. 4-2001, § 11; (iv) to issue accurate itemized wage statements in violation of Labor Code §§ 226(a) and 226.2(a)(2); and, (v) to pay compensation due on discharge from employment in violation of Cal. Labor Code §§ 201-203. Plaintiff Marantz also alleged that LCAD failed

to reimburse CMs for necessarily incurred business expenses in violation of Labor Code § 2802. On June 28, 2021, Plaintiff Marantz filed a first Amended Complaint adding a PAGA claim for the Labor Code violations alleged in the initial Complaint. Hammond Decl. ¶¶ 13-14.

On August 13, 2021, Defendant filed its Answer, generally denying the allegations and raising forty-seven affirmative defenses, including that Adjunct CMs are subject to binding individual arbitration agreements; that Adjunct CMs were exempt; that LCAD's failure to pay all wages owed upon discharge was not willful; and that any violation of Labor Code § 226(e) was not knowing and intentional. Hammond Decl. ¶ 15. On July 13, 2022, after reaching Settlement, Plaintiff stipulated to file a Second Amended Complaint ("SAC") adding Morghan Gill as a named plaintiff and amending the definition of the Reimbursement Class. Hammond Decl. ¶ 16. Defendant filed its Answer on July 18, 2022. Id.

B. Pre-mediation Investigation and Discovery

Following the filing of Plaintiff's FAC, the parties agreed to attend mediation and engage in informal document and data exchange in preparation for the mediation. Hammond Decl. ¶ 17. LCAD produced extensive informal discovery, including (a) scheduling data for each semester from Fall 2017 to Spring 2021 including the courses taught by each Adjunct CM; time and date of each class; and the start time and end time for each class; and start date and end date of each Adjunct contract; (b) exemplar Teaching Contracts; (c) Plaintiffs' wage statements; (d) Reimbursement policies applicable to Class Members; (e) the Collective Bargaining Agreement ("CBA") effective August 1, 2018; (f) class sizes; and (h) the number of pay periods worked during the Wage Statement Class Period and PAGA Period. *Id*.

Plaintiffs also conducted their own investigation and gathered additional documents from LCAD's website. Plaintiffs also performed a detailed analysis of the documents and data produced by Defendant and ascertained that Defendant employed Adjuncts on a semester-by-semester basis pursuant to standardized Teaching Contracts. The Contracts incorporated the Faculty Handbook by reference until August 31, 2018, when the Adjunct Faculty at LCAD unionized and the Teaching Contracts policies referenced the CBA. Throughout the Adjunct Class Period, all adjunct instructors were paid on a flat per-course basis stated in their respective Teaching Contracts ("Course Rate"). Hammond Decl. ¶ 20. The Teaching Contracts, Faculty Handbook, and CBA, provided that if a class was canceled due to low enrollment the Adjunct would receive a flat payment plus an additional prorated amount if a class was cancelled after the first session. *Id*. ¶ 21. Plaintiffs believed they would be able to establish that the form of compensation was not a salary because a "salary" is a "predetermined amount that is not subject to reduction based upon the quantity or quality of work" whereas Adjuncts compensation was subject to

reduction based on enrollment. *Negri v. Koning & Associates*, 216 Cal. App. 4th 392, 399 (2013). Plaintiffs believed that the Course Rate more closely resembled a piece rate. *Id.* ¶ 21.

Plaintiffs also alleged that Adjunct instructors were also expected to perform work prior to the start of the Teaching Contracts, which was not covered by the Course Rate and was therefore unpaid. Hammond Decl. ¶ 22. From the wage statements provided by LCAD, Plaintiffs confirmed that Adjunct wage statements did not list any hours, hourly rates, or piece rate information. Hammond Decl. ¶ 23.

Finally, Plaintiffs alleged that LCAD did not reimburse Adjunct CMs for the course materials they purchased during the Adjunct Class Period. Plaintiffs also alleged that starting March 23, 2020, all Class Members were required to work remotely, and incur home-office expenses, but LCAD did not reimburse these expenses. Although LCAD provided a one-time stipend to Adjuncts in March 2020, Plaintiffs considered these one-off reimbursements insufficient to fully reimburse the home office expenses incurred by the Adjunct Class. Hammond Decl. ¶ 24.

C. Mediation

On October 26, 2021, the parties attended a full-day mediation with Lou Marlin, a highly respected mediator. Hammond Decl. ¶ 25. Prior to the mediation, the parties submitted detailed briefs, supported by the documents obtained in informal discovery. *Id.* After a full day of mediation, and after a mediator's proposal, the parties reached agreement on the basic terms of the settlement, and in due course entered into the formal settlement agreement that is now submitted to the Court for approval. *Id.*

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, 439-41 (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. Superior Court*, 53 Cal. 4th 1004, 1021 (2012); *Linder,* 23 Cal. 4th at 435. All class certification requirements are met in this case for the reasons set forth below.

A. The Classes Are Ascertainable and Sufficiently Numerous

Class Members are "ascertainable" where 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); *Reyes v. Board of Supervisors,* 196 Cal. App. 3d 1263, 1271 (1987). These criteria are met here

as Defendant's records are sufficient to permit identification of the Class Members. SA § 10.1.1.

The Adjunct and Reimbursement Classes are sufficiently numerous since they have approximately 295 members and 191 members, respectively. *See Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (42 people "is quantitatively sufficient for class action").

B. "Community of Interest" Exists Among Class Members

A "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. Superior Court*, 40 Cal. 4th 1069, 1089 (2007) (citations and internal quotations omitted). Each factor to establish a community of interest exists among the Class Members.

1. Common Questions of Law and Fact Predominate

Where an employer's policies or conduct are uniformly directed at a class of employees, like here, the class-wide impact of the defendant's policies satisfies the commonality requirement. *See Sav-On Drug Stores, Inc. v. Superior Court,* 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). Here, Plaintiffs challenge common pay policies raising predominant common questions of law and fact. Some of these common questions include: (1) whether Defendant misclassified Adjuncts as exempt; (2) whether the course rate constitutes a piece rate; (3) whether the compensation set out in the Contracts covered work that Adjunct CMs performed prior to the beginning of their contract period; (4) whether Adjunct CMs were "discharged" for purposes of Labor Code § 201 on the end date specified in their contracts; (5) whether LCAD timely reimbursed out-of-pocket business expenses necessarily incurred by CMs.

2. Plaintiffs' Claims Are Typical of the Class Claims

The "test of typicality 'is whether other members 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.'" *See Seastrom v. Neways, Inc.,* 149 Cal. App. 4th 1496, 1502 (2007); 1-3 California Class Actions Practice and Procedure (2007) § 3.02 Here, Plaintiffs' claims are typical of the Class that they seek to represent because they were subject to the same compensation policies/practices, suffered the same type of injury, and seek the same types of relief.

3. Plaintiffs and Their 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 omitted). Both elements are satisfied here. Plaintiffs' Counsel are highly skilled and have extensive class action litigation experience. Plaintiffs' Counsel have been appointed class counsel in numerous class action suits and have represented thousands of adjunct instructors in similar unpaid wage cases since 2016, including numerous cases that were certified for settlement purposes. Hammond Decl. ¶¶ 6-12. Plaintiffs are committed to representing the interests of the Classes, do not have any conflicts with any CMs, and their interests are virtually coextensive with those of the CMs. *Id*. ¶¶ 4, 85.

C. This Class Action Is a Superior Method of Adjudication

Plaintiffs' and the Class' claims are based on the contention that Defendant had uniform policies and/or practices of paying Adjuncts by the piece, of failing to issue accurate wage statements; failing to pay hourly and separately for rest breaks and to authorize and permit paid off-duty rest breaks; failing to provide meal periods; failing to pay all wages due upon discharge; and failing to reimburse CMs for necessarily incurred business expenses. All these claims involve common evidence including uniform Contracts LCAD issued to Adjuncts, compensation policies, payroll calendars, and wage statements; and remote work policies and expense reimbursement policies. *See Bufil v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008). The class action mechanism in this case will also allow Plaintiffs and Settlement CMs 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, 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. *C.f. North Cnty. Contractor's Ass'n v. Touchstone Ins. Services,* 27 Cal. App. 4th 1085, 1094-1095 (1994). 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 including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further

litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, and . . . the reaction of the class members to the proposed settlement." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (quoting *Dunk,* 48 Cal. App. 4th at 1801). 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).

As discussed below, and as set out in the Hammond Declaration, the proposed Settlement is presumptively fair because (1) it was the product of serious, informed, and non-collusive negotiations, (2) the putative Class is represented by experienced counsel; and (3) the Parties investigated the claims, exchanged key information, and thus Plaintiffs' Counsel was able to make an informed recommendation about the proposed Settlement. In addition, the reasonableness of the Settlement is further supported by the strengths and risk of the claims asserted, the risk of maintaining class action status, the amount offered to settle, and the endorsement of experienced counsel. Together, all of these factors demonstrate that the proposed Settlement is preliminarily fair, reasonable, and adequate.

1. <u>The Settlement Was a Product of Informed, Non-Collusive Negotiations</u>

California courts recognize that "a presumption of fairness exists where … [a] settlement is reached through arms-length bargaining." *Wershba v. Apple Computer, Inc.,* 91 Cal. App. 4th 224, 245 (2001) (citation omitted); *see also Cho v. Seagate Tech. Holdings, Inc.,* 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's determination that settlement was "fair, reasonable and adequate" where the settlement "provided valuable benefits to the class … that were 'particularly valuable in light of the risks plaintiff would have faced if she proceeded to litigate her case.'").

Here, the settlement is a result of extensive settlement negotiations between the parties conducted at arm's length and informed by substantial factual and legal investigation. Throughout this case, the Classes 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. ¶¶ 6-12. Class Counsel have spent a considerable amount of time prosecuting this case, including, but not limited to, drafting pleadings, meeting and conferring with Defendant's counsel, researching California law, analyzing documents and data produced by Defendant, preparing for and attending a full-day mediation, and negotiating and finalizing the settlement agreement and related documents. Hammond Decl., ¶¶ 78-82. As discussed above, the mediation session was with a skilled, experienced mediator Lou Marlin. *Id.* ¶ 25.

2. The Settlement Amount is Fair and Reasonable Considering the Risks

The amount of the settlement in light of the strength of the plaintiff's case is the most important "reasonableness" factor. *See Kullar,* 168 Cal. App. 4th at 130. In determining whether a settlement is fair, the court must "independently satisfy[] itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Id.* at 129. This requires a record that "allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.'" *Munoz v. BCI Coca-Cola Bottling Co. of L.A.,* 186 Cal. App. 4th 399, 409 (2010) (quoting *Kullar,* 168 Cal. App. 4th at 120).

The $825,000 Settlement will provide CMs with significant payments. The average gross recovery for an Adjunct CM is $2,461.01 and the average net recovery is $1,439.32. The estimated maximum recovery is approximately $5,259.33. Hammond Decl. ¶ 62. The average gross recovery for a Reimbursement CM is $518.32, the average net recovery $303.14, and the estimated maximum recovery is approximately $583.06. *Id*. ¶ 66. Checks will be automatically mailed to all CMs who do not opt out. SA § 13.

The settlement amount compares favorably with Plaintiffs' Counsel's estimated exposure and value of CMs' claims, as discussed below and in greater detail in the Hammond Declaration. Although Plaintiffs believe that the Classes have strong claims, they also acknowledge there are obstacles as to both the certification and the merits of each claim, which warrant a settlement at less than "complete victory" value. The major risks applicable to the claims are addressed in the discussion below, which includes a claim-by-claim comparison of the estimated potential recovery and discounted settlement amount attributable to each claim for each class.

a. Arbitration Defense

In its Answer, Defendant contended that the "Court lacks jurisdiction over this Action and the Complaint…as there is a valid, enforceable and mandatory Arbitration Agreement that governs the adjudication of Plaintiff's and/or the putative class members' claims against Defendant. The Arbitration Agreement requires individual arbitration of Plaintiff's claims and thus Plaintiff may not proceed with her claims on behalf of the putative class members." The Arbitration Agreement referenced by LCAD was included in the Faculty Handbook and provided as follows:

> To the fullest extent allowed by law, any controversy, claim or dispute between Employee and Employer (and/or any of its affiliates, shareholders, directors, trustees, officers, employees, faculty members, students, volunteers or agents) relating to or arising out of Employee's employment or the cessation of that employment will be submitted to final and binding arbitration in Orange County, California, for determination in accordance with the JAMS Employment Arbitration Rules & Procedures (the "Rules") as the exclusive remedy for such controversy, claim or

> dispute…The arbitrator may not consolidate more than one party's claims, and may not otherwise preside over any form of a representative or class proceeding.

Defendant could have contended that the Court would find its arbitration agreement, including the class action waiver, enforceable and that Plaintiffs' class claims would be barred. Defendant further could have contended that, even if the Court found that the CBA's grievance procedure superseded the arbitration agreement, at a minimum, it would find the arbitration agreement enforceable as to Plaintiffs' pre-CBA claims (i.e., claims accruing between April 9, 2017 and August 31, 2018 when the CBA became effective) which represented approximately 25% of the Adjunct Class Period. Hammond Decl. ¶¶ 27-29.

b. Exemption Defense:

In its Answer, LCAD contends that "Plaintiff and other members of the putative classes were exempt from minimum wage, overtime requirements, and/or meal and rest break requirements pursuant to the exemptions set forth in the Wage Order issued by the Industrial Welfare Commission and the Labor Code." Defendant could base this contention on the argument that Adjuncts were not piece-rate workers but rather salaried professional employees and therefore exempt from certain protections of the Labor Code under Wage Order No. 4-2001 § 1(a)(3); or on Labor Code § 515.7 which provides certain circumstances under which Adjuncts are exempt. Hammond Decl. ¶ 30.

As to Defendant's contention that Adjuncts were exempt, LCAD could argue that Adjuncts, as teachers in an accredited university, fell under the "professional employee" exemption of Wage Order No. 4-2001 § 1(a)(3) and are therefore not subject to California's rest breaks or minimum wage requirements. Further, LCAD could have argued that Adjuncts meet the salary test requirement under Wage Order No. 4-2001, 1(d) ("a monthly salary equivalent to no less than two (2) times the state minimum wage for full time employment") because compensation can be "pro-rated" for part-time employees – an issue that has not been decided by any appellate court. Hammond Decl. ¶ 31.

Plaintiffs recognized that the course rate may be found to be a salary because it appeared that Adjuncts did receive a predetermined amount each pay period that was not subject to change within each pay period based on the number of hours Adjuncts taught. However, as stated above, Plaintiffs believed they would be able to establish that the form of compensation was not a salary because a "salary" is a "predetermined amount that is not subject to reduction based upon the quantity or quality of work" whereas Adjunct compensation was subject to reduction based on enrollment. *Negri*, 216 Cal. App. 4th at 399; *Lucero v. Regents of Univ. of Cal.*, 1993 U.S. Dist. LEXIS 12208, *17 (N.D. Cal. 1993) (stating that "an exempt employee's must 'not [be] subject to reduction" and finding that "the University's policies permitting, suspension without pay for disciplinary reasons other than safety violations, standing

alone, preclude a salaried basis status.") As to Defendant's contention that compensation can be "pro-rated" for part-time employees, Plaintiffs' Counsel recently litigated this very issue at a bench trial and won. (Final Statement of Decision in *Gola v. University of San Francisco,* No. CGC-18-565018 (San Francisco Super. Cty. Ct.). Hammond Decl. ¶ 32.

Defendant also could have contended that Adjuncts were exempt under Labor Code § 515.7, effective September 9, 2020, providing that Adjuncts employed by private non-profit universities are exempt from Labor Code §§ 226(a) and 512 if they are paid on a salary basis, and (1) the salary for the course is calculated based on a number of classroom hours (and a minimum classroom hour per rate); or (2) if they are employed under a CBA, and the CBA provides in clear and unambiguous terms that adjunct instructors are professionally exempt. Plaintiffs contended that Labor Code § 515.7 does not apply to adjuncts because (1) adjuncts are not salaried; (2) the CBA specifically states that adjunct pay is based on the number of units (not on the number of classroom hours); and (3) the CBA effective August 1, 2018 did not provide in clear and unambiguous terms that adjunct instructors are professionally exempt. Plaintiffs further contended that even if the Court found that Labor Code § 515.7 applies to Adjuncts, that section is not retroactive and does not apply to claims that accrued prior to the effective date of September 9, 2020. Nonetheless, Plaintiff recognized that there was some risk that the Court would find Labor Code § 515.7 applies to Plaintiff's claims under Labor Code §§ 226(a) and 512 arising after September 9, 2020; or that the Court could find that Adjuncts are salaried (not piece rate) employees. Hammond Decl. ¶¶ 33-34.

c. <u>Salary Defense</u>:

Finally, LCAD could have argued that whether or not Adjuncts are exempt, they were salaried, not piece-rate, employees and therefore not entitled to separate and hourly pay for rest breaks or non-teaching tasks under Labor Code § 226.2. LCAD could have argued that Adjuncts were paid a set amount to teach each scheduled course and received the full amount of pay each week regardless of the quantity or quality of the work performed (i.e., even if the Adjunct missed a class or ended a class early he or she was still paid). Indeed, the Teaching Contracts provided that Adjuncts were paid on a bi-weekly basis, not per course, and payments were spread evenly across all the pay periods of the semester. LCAD also could have argued that Adjuncts' pay lacked characteristics of a piece-rate system where employees typically produced multiple units or piece per day and can increase their pay by working harder or more efficiently. Therefore, Adjuncts were salaried, not piece rate, employees, and have no claims under Labor Code § 226.2. Hammond Decl. ¶ 35.

d. Other Defenses

In addition to the major risks posed by the arbitration agreement, and Defendant's other actual or potential defenses discussed above, Plaintiffs also faced the following risks on each of their claims.

Unpaid Wages Claim (Labor Code § 1194): Plaintiffs allege that Adjunct CMs were paid on a piece-rate basis, with the piece being the course, and that as a result Adjunct CMs were paid for the hours of course instruction only and were not paid separately for non-teaching tasks, such as preparing for class, grading, office hours, attending meetings, in violation of Labor Code § 226.2. Hammond Decl. ¶ 37. During the discovery and investigation phase, however, Plaintiffs concluded that Defendant could reasonably argue that course preparation, meeting with students, office hours, and other tasks performed during the Teaching Contract period were directly related to and included in the course teaching assignment set out in the Teaching Contract. *Id*. ¶¶ 22, 39. As a result, for purposes of settlement, Plaintiffs limited their claims to work performed prior to the first day of classes on the basis that the compensation in the Teaching Contract was only for work performed after the start of the contract and not for work performed prior to that period. *Id*. ¶¶ 22, 37-39. Plaintiffs calculated LCAD's maximum exposure to the unpaid wages claim as **$330,509** (including interest)**.** *Id.* ¶ 37.

Class Certification Risks: Plaintiffs 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 LCAD's control. Hammond Decl. ¶ 38.

Merits Risk: As to the merits, Plaintiffs applied a further 50% 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; for a risk that a court would find Adjuncts are exempt; and for the risk that Plaintiffs' damages are overinflated, given that many courses are taught by Adjuncts who taught the course in previous semesters and therefore have to perform little preparation work prior to the first class. *Id.* ¶ 51. Applying the certification and merits discount, for settlement purposes, LCAD's realistic exposure on the unpaid wage claim is reduced to **$148,729.** *Id.* ¶ 39.

Rest Break Claim (Labor Code § 226.7): Plaintiffs allege that Defendant compensated 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. ¶ 40. Thus, Adjunct CMs who worked 3.5 hours or more were entitled to hourly and separate pay for rest

breaks. *Id.* ¶ 52. Plaintiffs also allege that Adjuncts were entitled to rest breaks as non-exempt employees but LCAD imposed uniform policies and procedures that impeded them from taking rest breaks during classes that were 3.5 hour or longer, in violation of IWC Wage Order No. 4-2001 §12. Plaintiffs allege 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). *Id*. Assuming a 100% violation rate, Plaintiff calculated Defendant's liability on the rest break claim as $871,210 (including interest). *Id*. ¶ 41.

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. ¶ 42. Plaintiffs applied a nominal 10% discount for this argument (because California law prohibits an employer from building rest break pay into piece-rate). *Id.* ¶ 43. As to Plaintiffs' claim that Adjuncts were non-exempt employees but LCAD imposed uniform policies that impeded them from taking rest breaks, LCAD could have argued that individualized issues would predominate in that LCAD did not maintain rest break records, and some Adjuncts took rest breaks, while others did not. LCAD also could have argued that Adjuncts could have taken a timely off-duty rest break had they chosen to, and any missed rest breaks were voluntary. Plaintiffs applied a more substantial 30% discount for their non-exempt rest break claim (which was riskier because it would rely more heavily on testimony than contract interpretation). *Id*.

Merits: Defendant could have contended that Plaintiffs would lose on the merits because Adjunct CMs were exempt; that Adjunct CMs were paid a salary and therefore not entitled to separate and hourly pay for rest breaks under Labor Code § 226.2; and because Adjunct CMs were permitted and authorized to take rest breaks if they wanted to; and because a 100% violation rate was highly unrealistic. Plaintiffs recognized some risk on the argument CMs was a salary because it appeared that Adjunct 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. Plaintiffs applied a 50% discount based on these arguments, which reduced LCAD's exposure on the rest break claim is **$348,484.** *Id.* ¶ 44.

Meal Break Claim (Labor Code § 226.7, 512): Plaintiffs 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. Plaintiffs 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. Assuming a 100% violation rate, Plaintiffs calculated Defendant's liability on the meal break claim as $636,216 (including interest). Hammond Decl. ¶ 45.

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. Plaintiffs 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 30% discount. Hammond Decl. ¶ 46.

Merits: Defendant could have argued that Adjunct CMs were exempt and therefore not entitled to meal breaks. Even if CMs were not exempt, Defendant could have 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 also could have argued that Plaintiffs' assumed violation rate of 100% was highly unrealistic. Plaintiffs believed these arguments warranted a further 50% discount which reduced LCAD's realistic exposure to **$222,676.** Hammond Decl. ¶ 47.

Inaccurate Wage Statement Claim (Labor Code § 226(a), 226.2(a)): Plaintiffs contend 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. ¶ 48. 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, LCAD did not track Adjunct CMs' hours worked and did not include on their wage statements any entries for hours actually worked, applicable hourly rates, or piece rate information. Plaintiffs calculated Defendant's liability on this wage statement claim as **$320,000**. *Id.* ¶ 49.

Class Certification Risks: Plaintiffs 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. ¶ 50.

Merits Risks: As to the merits, Plaintiffs faced a risk that a court would find that only the initial $50 penalty applied to each violation because LCAD 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). In addition, Defendant asserted in its Answer that it "acted reasonably and in good faith, at all times" and "Plaintiff and the alleged putative class did not suffer injury as a result of a knowing and intentional failure" to provide compliant wage statements as required under Labor Code § 226(e). [2] Defendant also could have contended that Adjuncts were exempt under Labor Code § 515.7 so it had no liability at least since September 9, 2020. Hammond Decl. ¶ 51. Plaintiff applied a 25% discount for these risks. Thus, Plaintiff calculated LCAD's realistic exposure for this claim, after applying discounts, as **$215,996.** *Id*.

Waiting Time Penalties (Labor Code § 203): Plaintiffs allege that the Teaching Contracts were for a definitive period of time, which ended on the last day of the semester, and therefore Adjunct CMs were discharged for purposes of Labor Code § 201 upon completion of their Teaching Contract. Hammond Decl. ¶ 52. However, because LCAD followed its regular payroll practices when paying Adjunct CMs, the final paycheck date generally fell after the end of Contract date, which entitles Adjuncts to waiting time penalties under Labor Code § 203. Plaintiff calculated that waiting time penalties are **$1,268,967**. *Id*. ¶ 53.

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. ¶ 54.

Merits: Plaintiff applied a further 50% discount on the merits based on the potential arguments that (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) especially for those Adjunct CMs' who taught the same courses each term; (2) LCAD's failure to pay wages upon discharge was not willful because had LCAD had a good faith dispute that there was not a discharge or that Adjuncts were exempt, or salaried, and not owed any wages for non-teaching time or rest breaks. *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

[2] Although this argument has been recognized by the federal district courts, it has been rejected by California state courts. *Kao v. Holiday*, 12 Cal. App. 5th 947, 962 (2017) (finding employer's failure to include hours worked on wage statement as a result of misclassifying employee as exempt, was knowing and intentional because the employer knew the fact that the information was not provided); and *Furry v. East Bay Publishing, LLC*, 30 Cal. App. 5th 1072, 1085 (2018).

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 LCAD's exposure on the waiting time penalties claim is **$571,035.** Hammond Decl. ¶ 55.

Adjunct Unreimbursed Expenses Claim (Labor Code § 2802): Plaintiffs alleged that LCAD did not reimburse Adjunct CMs for their necessarily incurred expenses such as art supplies and software in violation of Labor Code § 2802. *Cochran v. Schwan's Home Service, Inc*., 228 Cal.App.4th 1137 (2014). Plaintiffs further allege that as a result of the COVID-19 pandemic, LCAD moved classes online and required Adjuncts to teach from home, but did not reimburse their necessarily incurred home office expenses, other than a one-time stipend paid to each Adjunct in March 2020 (which were for one-time purchases of home-office equipment and did not reimburse Adjuncts' recurring monthly expenses). Plaintiff calculated the unreimbursed expenses of Adjunct CMs as $305,318 (including interest). Hammond Decl. ¶¶ 56-57.

Class Certification Risks: Plaintiffs acknowledge that there was no written policy requiring Adjuncts purchase art supplies and subscription services, and that there were varying practices with regard to incurring expenses, that pose a substantial obstacle to class certification. Plaintiff applied a 50% reduction for class certification. Hammond Decl. ¶ 58.

Merits Risk: Plaintiffs applied a further 50% discount based on anticipated arguments that even if expenses were incurred, they were voluntary and/or minimal; that LCAD had a written expense reimbursement policy applicable to Adjunct CMs under which they could seek reimbursement for at least some out-of-pocket expenses; and that the LCAD paid out to stipends to Adjuncts in March 2020 which would significantly reduce LCAD's liability Hammond Decl. ¶¶ 77-78. After applying these discounts, for settlement purposes, Plaintiffs calculated LCAD's realistic damages owed to the Adjunct Class as **$76,329.** Hammond Decl. ¶ 59.

Allocation to the Adjunct Class is Fair and Reasonable: Plaintiffs calculate LCAD's maximum exposure on the Adjunct Class claims (excluding PAGA penalties) as $3,732,215 and realistic exposure as $1,583,250. Hammond Decl. ¶ 60. Plaintiffs then applied a further 25% discount to the realistic exposure for the risk that the Court would find LCAD's arbitration agreement applicable to Plaintiffs' pre-CBA claims (i.e., claims accruing between the start of the Adjunct Class Period and August 31, 2018) which represented approximately 25% of the Adjunct Class Period which reduced LCAD's realistic liability to $1,187,437 as follows:

Labor Code Section	Maximum Damages	Realistic Exposure
Unpaid Wages (§§ 226.2/ 1194)	$330,509	$148,729
Rest Breaks (§ 226.7)	$871,210	$348,484
Meal Breaks (§ 512)	$636,216	$222,676
Wage Statements (§§ 226(a), (e))	$320,000	$215,996
Waiting Time Penalties (§ 203)	$1,268,967	$571,035
Unreimbursed Expenses (§ 2802)	$305,318	$76,329
TOTAL	$3,732,215	$1,583,250
After 25% Arbitration discount		**$1,187,437**

The $726,000 of the Gross Settlement allocated to Adjuncts represents 19% of Defendant's maximum exposure, and 61% of its realistic exposure. Id. ¶ 61. The average net recovery per Adjunct CM is $1,439.32 and the average gross recovery is $2,461.01. Id. ¶ 62. An Adjunct CM who worked the entire 58-month Adjunct Class Period can expect to receive approximately $5,259.33. Id. These are significant recoveries when considering Defendant's arbitration defense and many other defenses discussed above.

Reimbursement Class Claims (Lab. Code § 2802): Plaintiffs alleged that, starting March 23, 2020, as a result of COVID-19, LCAD required and expected all Reimbursement Class Members to work remotely from home. LCAD knew or should have known that its employees would incur business expenses (i.e., home internet and cell phone costs) in order to carry out their job duties from home, yet did not adequately reimburse Reimbursement CMs for business expenses in violation of Labor Code § 2802. Hammond Decl. ¶ 63. Plaintiffs calculated Defendant's maximum liability for unreimbursed business expenses as **$199,850** (including interest). *Id*. ¶ 64.

Class Certification / Merits Risk: Plaintiffs recognized risks to class certification and the merits including the potential contention that Reimbursement CMs had varying practices with regard to incurring expenses; and that not all expenses incurred by each Reimbursement CM were "necessary" or "reasonable". However, in light of the fact that LCAD allegedly required Reimbursement CMs to work from home, and did not reimburse them for the expenses they incurred each month, Plaintiffs thought this claim was particularly well-suited for class certification and trial. Plaintiffs therefore applied a 10% reduction for class certification and a 10% reduction for the merits, which reduced LCAD's liability to $161,878. Hammond Decl. ¶ 65.

The Allocation to the Reimbursement Class is Fair and Reasonable: The $99,000 of the Gross Settlement attributable to Reimbursement Class Members represents 50% of Defendant's estimated maximum exposure and 61% of its realistic exposure. Hammond Decl. ¶ 66. The average payments per

Reimbursement Class Member is $518.32 gross and $303.14 net. Id. A Reimbursement Class Member who worked for the entire 23-month Reimbursement Class Period can expect to receive approximately $583.06. These are significant recoveries when considering Defendant's contentions on class certification and the merits. Id.

PAGA Penalties: Plaintiffs calculated Defendant's maximum liability for PAGA penalties using a penalty amount of $100 per pay period (because LCAD never received notice from the Labor Commissioner or the Court so there are arguably no "subsequent" violation). Hammond Decl. ¶ 67-68. Defendant's maximum exposure in PAGA Penalties is $804,700 (assuming the Court would not allow "stacking" of PAGA penalties for each separate Labor Code violation). *Id*. ¶ 69; *Castillo v. ADT, LLC*, 2017 U.S. Dist. LEXIS 10579, at *11 (E.D. Cal. Jan 24, 2017). The $20,000 allocated to PAGA penalties in this case represents 2% of Defendant's total exposure which is comparable to (or even more than) PAGA allocations in many similar cases that received final approval from California Superior Courts. *Id*. ¶ 74.

Several factors significantly mitigate assessment of PAGA penalties in this case. First, the overall settlement resulted in robust relief for each Class which is what courts look at when assessing amount attributed to PAGA penalties. *See 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. Hammond Decl. ¶ 70.

Second, LCAD could have contended that it operated in good faith and reasonably believed it was in compliance with the Labor Code and the Court would likely reduce any award of PAGA penalties as "unjust, arbitrary and oppressive, or confiscatory" under Labor Code § 2699(i). Hammond Decl. ¶ 71. Thus, the lawsuit fulfills the purpose of PAGA which is to 'remediate present violations and deter future ones,' not to redress employees' injuries." *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); *Magadia v. Wal-Mart Assocs., Inc.,* 384 F. Supp. 3d 1058, 1101 (N.D. Cal. 2019) (noting awards of 30% of the maximum sought where defendants attempted to comply with the law, 28%

and 18% (where defendants were not aware they were violating the law and took prompt steps to correct once notified)); *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (affirming award of 10% of the maximum penalty because there were "good faith attempts to comply with meal break obligations and because the court found the violations were minimal"*)*.

Third, Defendant could have contended that Plaintiffs' claims for PAGA Penalties would fail for the same reasons the underlying Labor Code claims would fail. Hammond Decl. ¶ 72.

Fourth, Defendant could have contended that PAGA claims would be found unmanageable because only CMs who actually incurred unpaid wages, unpaid premium pay, or unreimbursed expenses during a particular pay period could recover PAGA penalties, and there is no manageable way to determine who was entitled to penalties. Hammond Decl. ¶ 73. *See Raphael v. Tesoro Ref & Mktg. Co.,* 2015 U.S. Dist. LEXIS 130532, at *5 (C.D. Cal. Sept. 25, 2015). Further, in order to recover any PAGA penalties, Plaintiffs would be required at trial to prove that each Aggrieved Employee suffered a violation for each pay period the employee worked, which would be difficult in light of Defendant's contentions on the merits discussed above. *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant.").

3. The Risk, Expense, Complexity and Likely Duration of Further Litigation

The fact that Plaintiffs entered into arbitration provisions that precluded class action claims presented a considerable risk that Plaintiffs would be unable to sustain class claims on behalf of Adjunct Class Members for at least 25% of the Adjunct Class Period, which would have significantly reduced the value of this case as a whole. Hammond Decl. ¶¶ 27-29. Further, Defendant strongly disagreed as to the merits of Plaintiffs' claims. *Id.* ¶¶ 36-66. Assuming some of the claims proceeded to 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. *Id.* ¶ 76. Instead, this settlement provides an early resolution of this dispute, and CMs will obtain a recovery in the relatively near future if the settlement is finally approved. *Id*. ¶ 77.

4. Extent of Discovery Completed and Stage of the Proceedings

As described in the Hammond Decl. and above, the parties have engaged in extensive discovery, and were adequately informed to make the decision to settle this case on the proposed terms. Hammond Decl. ¶¶ 17-24.

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

As discussed above, Class Counsel have extensive experience in class action litigation, and, in

particular wage-and-hour class actions on behalf of adjunct instructors, and have been determined by numerous courts to be adequate class counsel. Hammond Decl. ¶¶ 11-12. Class Counsel have represented thousands of adjunct instructors in over 20 similar unpaid wage cases since 2016, and recently successfully litigated one such case all the way through trial. *Id*. ¶ 11. These cases – challenging the long-standing industry-wide practice of classifying adjuncts as non-exempt and not paying them for all hours worked – have led to an overhaul of these practices in the industry. *Id*. Class Counsel considers the settlement to be fair, reasonable and adequate. *Id*. ¶ 75.

6. Reaction of the Class Members 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 the settlement agreement reasonably tailors each CM's payment amount to the number of pay periods they worked for LCAD. S.A. §§ 5.2.1, 5.2.2.

C. The Proposed Class Notice Content and Procedure Are Adequate

Constitutional due process requires that class members 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 class members with sufficient information to make an informed decision to accept, opt out or object to the settlement. *See Wershba,* 91 Cal. App. 4th at 251-252. Here, 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: (1) the material terms of the settlement, (2) the proposed fees and costs of Class Counsel and costs of settlement administration, (3) the proposed Service Awards; (4) how CMs may opt out of, or object to the Settlement; (5) the fact that the Judgment will bind CMs who do not opt out, (6) each CM's proposed allocation; (7) details about the court hearing on settlement approval, and (8) how CMs can obtain additional information. *See* Cal. Rules of Court, Rule 3.766 and **Exhibit 1** to the SA. Therefore, the Court should approve the Notice.[3]

D. The Service Award for Each Class Representative Is Reasonable

Plaintiffs will request a Service Award of $5,000 for Plaintiff Marantz and $2,500 for Plaintiff Gill, to recognize the time and effort expended by each Plaintiff, respectively, on behalf of the Class, and the general releases they are giving to Defendant. Hammond Decl. ¶ 84. The requested awards fall well within the range of incentive payments typically awarded in similar class actions. *Cellphone Termination*

[3] The procedure for distribution of notice by first class mail with skip tracing for returned mail (SA § 10.1.4) meets the standard of having "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Superior Court*, 50 Cal. App. 3d 960, 974 (1975); *see also Wershba,* 91 Cal. App. 4th at 251. As such, the Notice is likely to reach most, if not all, Class Members.

Fee Cases, 186 Cal. App. 4th 1380, 1393 (2010) (affirming incentive awards of $10,000).

E. The Requested Attorneys' Fees and Costs Are Reasonable

In addition, Plaintiffs' counsel will request attorneys' fees of 1/3 of the GSA. SA § 8. This fee percentage amount is fair, reasonable and is within the range typically approved in similar class actions by California courts. *See, e.g.*, *Laffitte v. Robert Half Internat'l Inc.*, 1 Cal. 5th 480, 487, 596 (2016) (affirming a fee award representing 33% of the fund). Hammond Decl. ¶¶ 78-80. Plaintiffs will also request reimbursement of up to $25,000 for actual out-of-pocket litigation costs incurred by Class Counsel. SA § 8. If the Court grants preliminary approval, Class Counsel anticipates filing a Motion for Attorneys' Fees and Costs that will be scheduled to be heard following the notice process. *Id*. ¶¶ 82-83.

VI. CONCLUSION

The settlement provides substantial relief for the Classes and easily passes the *Kullar* analysis. Accordingly, Plaintiffs respectfully request that the preliminarily approve the settlement, approve the proposed Class Notice, and schedule a final approval hearing.

DATED: July 22, 2022

Respectfully submitted,
HAMMONDLAW, P.C.

s/ Julian Hammond
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