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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSHUA WRIGHT, LORETTA STANLEY, HALEY QUAM, and AIESHA LEWIS, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FRONTIER MANAGEMENT LLC, FRONTIER SENIOR LIVING, LLC, and GH SENIOR LIVING, LLC dba GREENHAVEN ESTATES ASSISTED LIVING,

Defendants.

Case No.: 2:19-cv-01767-JAM-CKD

Hon. John A. Mendez

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 1, 2023
Time: 1:30 p.m.
Ctrm.: 6, 14th Floor

Filed: September 6, 2019
Trial Date: None

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 1, 2023, at 1:30 p.m., before Judge John A. Mendez of the United States District Court, Eastern District of California, Plaintiffs Joshua Wright, Loretta Stanley, Haley Quam, and Aiesha Lewis ("Plaintiffs") move the Court for final approval of the Class Action Settlement Agreement and Release (the "Settlement Agreement" or the "Settlement," attached as **Exhibit 1** to the Declaration of Carolyn Hunt Cottrell, ECF 85-1) as to the California Class, the Oregon Class, the Washington Class, and the Illinois Class. The Settlement globally resolves all of the claims in these actions on a class and collective basis. In particular, Plaintiffs move for orders:

(1) Finally approving the Settlement as to the California, Oregon, Washington, and Illinois Classes ("State Classes");

(2) Finally approving the Settlement as to the Collective;

(3) Approving the proposed schedule and procedure for completing the final approval process for the Settlement as to the State Classes;

(4) Finally appointing and approving Schneider Wallace Cottrell Konecky LLP as Class and Collective Counsel;

(5) Finally appointing and approving Plaintiffs Wright, Stanley, Quam, and Lewis as Class Representatives for the California, Oregon, Washington, and Illinois State Classes, respectively;

(6) Finally approving payment to SSI Settlement Services Inc. ("SSI") for its services as the Settlement Administrator for the Class and Collective;

(7) Directing SSI to make the payments required under the Settlement, including the Settlement Awards to Class and Collective Members and all other payments;

(8) Entering a final judgment with the terms of the Settlement; and

(9) Finally approving the Implementation Schedule for to complete the settlement process as to the State Classes and Collective:

Effective Date	The latest of the following dates: (i) if there are one or more objections to the settlement that are not subsequently withdrawn, then the date after the expiration of time for filing a notice of appeal of the Court's Final Approval Order, assuming no appeal or request for review has been filed; (ii) if there is a timely objection and appeal by one or more objectors, then the date after such appeal or appeals are terminated (including any requests for rehearing) resulting in the final judicial approval of the Settlement; or (iii) if there are no timely objections to the settlement, or if one or more objections were filed but subsequently withdrawn before the date of Final Approval, then the first business day after the Court's order granting Final Approval of the Settlement is entered
Deadline for SSI to calculate the employer share of taxes and provide Defendants with the total amount of Defendants' Payroll Taxes	Within 5 business days after final Settlement Award calculations are approved
Deadline for SSI to make payments under the Settlement to Participating Individuals, the LWDA, Class Representatives, Plaintiffs' counsel, and itself	Within 30 days after the Effective Date or as soon as reasonably practicable
Deadline for SSI to send a reminder letter via U.S. mail and, if applicable, email to those Participating Individuals that have not cashed their settlement check	90 days before the check-cashing deadline
Deadline for SSI to place a call to Participating Individuals that have not cashed their settlement check, to promptly attempt to obtain a valid mailing addresses for such individuals, and to send second checks to such individuals	60 days before the check-cashing deadline
Check-cashing deadline	180 days after issuance
Deadline for SSI to provide written certification of completion of administration of the Settlement to counsel for all Parties and the Court	Within 10 business days after the check cashing period
Deadline for SSI to tender uncashed check funds to cy pres recipient Legal Aid at Work or redistribute such uncashed funds to Participating Individuals who cashed their Settlement Award checks	As soon as practicable after check-cashing deadline
Deadline for Plaintiffs to file a Post-Distribution Accounting	Within 21 days after the distribution of any uncashed funds

Plaintiffs bring this Motion pursuant to Fed. R. Civ. P. 23(e). The Motion is based on this notice, the following Memorandum of Points and Authorities, the Declaration of Carolyn H. Cottrell in Support of Plaintiffs' Motion for Final Approval of Class and Collective Action Settlement and Motion for Attorneys' Fees and Costs and for Service Awards, the Declaration of Aisha Lange, and all other records, pleadings, and papers on file in the consolidated and related actions and such other evidence or argument as may be presented to the Court at the hearing on this Motion. Plaintiffs also submit a Proposed Order Granting Final Approval of Class and Collective Action Settlement and a Proposed Judgment with their moving papers.

Date: January 24, 2023

Respectfully Submitted,

/s/ Carolyn H. Cottrell
Carolyn H. Cottrell
Ori Edelstein
Michelle S. Lim
SCHNEIDER WALLACE
COTTRELL KONECKY LLP

Attorneys for Plaintiffs, and the Classes and Collective

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I. INTRODUCTION

Plaintiffs achieved an excellent non-reversionary $9,500,000 class and collective action Settlement[1] on behalf of Defendants'[2] non-exempt employees. Notice has been disseminated pursuant to the Court's Preliminary Approval Order, and the response of the Class Members has been overwhelmingly favorable. Plaintiffs now seek final approval to effectuate the Settlement and bring closure to over three years of intensive litigation.

Plaintiffs pursued a hybrid Fair Labor Standards Act ("FLSA") and multi-state class action lawsuit alleging that Class and Collective Members endured a pattern of wage and hour violations, resulting in the underpayment of wages and the failure to provide compliant meal and rest periods to thousands of Class and Collective Members. These employees work at assisted senior living homes throughout the United States, including numerous locations in California, Oregon, Washington, and Illinois. After formal discovery, extensive motion practice, amendments to the complaint, conditional certification, multiple mediations and exhaustive pre-mediation discovery and outreach, appellate filings, and extensive arm's-length negotiations between counsel, the Parties have reached a global settlement of this class and collective action. Defendants, of course, have and continue to vigorously deny the claims alleged in this action.

The Settlement provides a strong recovery to resolve the claims of approximately 20,374 Class and Collective Members,[3] thereby providing a favorable result for thousands of wage and hour claims unlikely to have been prosecuted as individual actions. The Gross Settlement Amount of $9,500,000 provides substantial recoveries, including the largest individual award is $5,199.76 for the Class and Collective. On average, Class Members will receive an average recovery of approximately $299.52 per Class Member and $104.34 per Collective Member. Longer-term Caregivers will receive larger recoveries as the Settlement Awards are based on the number of workweeks — 1,113 Class Members will receive awards over $1,000, 297 Class Members will receive awards over $2,000, and 30 Class

[1] The Class Action Settlement Agreement and Release ("Settlement") is attached as **Exhibit 1** to the Declaration of Carolyn Hunt Cottrell in Support of Plaintiff's Motion for Preliminary Approval of Class and Collective Action Settlement ("Cottrell Decl."), ECF 85-1, at 22-157.
[2] "Defendants" refers to Defendants Frontier Management LLC; Frontier Senior Living, LLC; and GH Senior Living, LLC d/b/a Greenhaven Estates Living.
[3] For purposes of brevity, Class and Collective Members are collectively referred to as "Caregivers."

Members will receive awards over $3,000. These recoveries are particularly excellent in light of the Class Members' relatively short tenures, given that the majority of the Class worked 5 months or less.

These robust recoveries resulted in an overwhelmingly positive response to the Settlement and confirms that the Settlement is fair, reasonable, and adequate in all respects. No Class Members filed objections, only 0.03% of Class Members opted out of the Settlement, and no Class Members submitted disputes regarding their reported workweeks. Given the excellent benefits to the Class and Collective and the efficient outcome in the face of expanding litigation, the Court should grant final approval.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

The procedural and factual history of this action has been well documented in Plaintiffs' Motion for Preliminary Approval of Settlement, ECF 85, and in the accompanying Plaintiffs' Motion for Attorneys' Fees and Costs and for Service Awards. For purposes of this motion, Plaintiffs focus on the notice process.

A. Notice of Settlement.

The Court granted preliminary approval of the Settlement on August 29, 2022. ECF 89.

Plaintiffs served the preliminary approval order, the original version of the Settlement Agreement and all amendments, and other relevant documents on the LWDA. Declaration of Carolyn H. Cottrell in Support of Final Approval of Settlement and Attorneys' Fees and Costs and Service Awards ("Cottrell Decl."), ¶¶ 17, 40-41, 46-47. Pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. 1715 ("CAFA"), Defendants served CAFA notice on the U.S. Attorney General and all applicable state Attorney Generals on July 29, 2022. *Id.*, ¶ 42.

Following the Court's preliminary approval order, the Settlement Administrator, SSI, received the Class List from Defendants on September 28, 2022, and subsequently processed the Class List through the National Change of Address database to obtain the most current mailing addresses for Class and Collective Members. Declaration of Aisha Lange ("Lange Decl."), ¶¶ 3-4; *see also* ECF 90, ¶ 8. The data contained the names, last known mailing addresses, last known personal email addresses (to the extent available), workweeks, and other personal information for 20,420 Class and Collective members, of which 39 were determined to be duplicative. *See* Lange Decl., ¶ 3.

Pursuant to stipulated order, on October 31, 2022, SSI sent the Notices of Class Action

Settlement and Notices of Collective Action Settlement (together, the "Notices of Settlement"), as applicable, via U.S. Mail to 20,381 Class and Collective members. *See* ECF 91; ECF 85-1, Ex. D (Collective Notice); ECF 90-1, Ex.1 (Class Notice); Lange Decl., ¶ 5, Ex. A. SSI further sent the Notices of Settlement via email to 14,207 Class and Collective members. *See* Lange Decl., ¶ 6. SSI established a case website, https://frontiermanagementsettlement.com/, which provides Settlement documents and information, and allows for the submission of electronic inquiries. *Id*., ¶ 7. SSI finally established a toll-free call center to field questions, record any address updates, and other inquiries from Class and Collective members. *Id*., ¶ 8.

To include such information on the Notices of Settlement, SSI first calculated the individual Settlement Awards for each Class and Collective member by using workweek data provided by Defendants. Id., ¶ 16. The Notices of Settlement informed the Class Members of: the terms of the Settlement; their expected share based on their number of workweeks; the December 30, 2022 deadline to submit objections, requests for exclusion, or disputes; the March 1, 2023 final approval hearing date; and that Plaintiffs would seek attorneys' fees, costs, and service awards and the corresponding amounts. SSI included the URL for the case website, the toll-free call center number, and the names and contact information for Class Counsel in the Notices of Settlement. *Id*., Ex. A.

A total of 4,000 Notices of Settlement were returned to SSI without a forwarding address provided by USPS, 3,561 of which were remailed following a locator trace. *Id*., ¶ 9. A total of 59 Notices of Settlement were returned to SSI as undeliverable, with a forwarding address, and were subsequently remailed. *Id*., ¶ 11. A further 13 Notices of Settlement were remailed at the request of Class Counsel or Class or Collective Members. *Id*., ¶ 10. Following the remailing, 439 Notices of Settlement, or 2.15% of all Notices of Settlement initially sent to Class and Collective Members, were returned as undeliverable. *See id.*, ¶¶ 10-13. Of the email Notices of Settlement sent by SSI, approximately 741 were undeliverable. *See id*., ¶ 6.

The deadline for Class Members to opt-out, object, or dispute their workweeks expired on December 30, 2022. *Id*., ¶¶ 12-14; Cottrell Decl., ¶ 51. Not a single objection has been filed, no disputes to challenge workweeks shown on the Notices of Settlement were made, and only 7 Class members (i.e., 0.03%) have opted out of the Settlement. *See* Lange Decl., ¶¶ 12-14; Cottrell Decl., ¶¶ 51-52.

The Final Approval Hearing is currently set for March 1, 2023. ECF 89. Following an order by the Court on the pending motions, the Parties and SSI will execute the final steps of the settlement process, including sending individual checks to all Class Members for their Settlement Awards. Settlement, ¶¶ 33-38, 41, 43-46.

III. TERMS OF THE SETTLEMENT

A. Basic Terms of the Settlement.

Defendants have agreed to pay a non-reversionary Gross Settlement Amount of $9,500,000 to settle all aspects of this Action and the State Action. Settlement, ¶ 2.r. Defendants will pay $9,500,000 into an interest-bearing Qualified Settlement Fund ("QSF") thirty days following final approval of the Settlement. *Id.*, ¶¶ 2.r, 33, 41. Pursuant to the Settlement, Defendants may not access any portion of the Gross Settlement Amount once it has been deposited into the QSF. *Id.* Once the Court issues an order granting final approval of the Settlement, the Settlement Administrator will distribute all funds from the Qualified Settlement Fund; and if final approval is denied, then the Gross Settlement Amount will be returned to the Defendants. *Id.*, ¶¶ 33, 41, 52.

The Net Settlement Amount, which is the amount available to pay settlement awards to the Class Members, is defined as the Gross Settlement Amount less: the payments to the LWDA and to the aggrieved employees for their share of PAGA penalties ($95,000.00)[4]; any enhancement payments awarded to the Class Representatives (up to $10,000.00 for Plaintiff Wright and up to $5,000 each for Plaintiffs Stanley, Quam, and Lewis, and up to $5,000 to Emily Gracey);[5] the Settlement Administrator's costs (estimated to be $149,400); and any attorneys' fees and costs awarded to Plaintiff's counsel (fees of up to 35% of the Gross Settlement Amount, plus costs not to exceed $110,000, currently estimated to be $94,296.46). *Id.*, ¶¶ 2.e, 2.m, 2.t, 2.u, 2.dd, 2.ff, 34.c; Cottrell Decl., ¶ 54. Plaintiffs, however, are moving for attorneys' fees of a maximum of one-third of the Gross

[4] The Settlement Administrator shall pay 75%, or $71,250, of this amount to the LWDA, and 25%, or $23,750, the "Net PAGA Amount," to the Aggrieved Employees. *Id.*

[5] Pursuant to the Settlement, the was conditioned on the dismissal with prejudice of Defendants and the Releasees from the lawsuit entitled *Emily Gracey v. Frontier Management, LLC, et al*., Stanislaus Superior Court, Case No. CV-22-000990 (the "Gracey Action"). The Complaint incorporates Gracey's asserted PAGA claims pursuant to her complaint and pursuant to her letter to the LWDA. Following extensive meet and confer between Ms. Gracey's counsel, Defendants' counsel, and Plaintiffs, Ms. Gracey agreed to dismiss with prejudice Defendants and the Releasees from the *Gracey* Action and a general release in exchange for her incorporation into the Settlement. Cottrell Decl., ¶ 43.

Settlement Amount (*i.e.*, $3,166,663.50). Cottrell Decl., ¶¶ 121-122. The Net Settlement Amount to Participating Individuals, plus the Net PAGA Amount allocated to the aggrieved employees, is currently estimated to be $5,988,790.04. *Id.*, ¶ 54.

B. Class and Collective Definitions.

An individual who is eligible to share in the proposed Settlement is called a Settlement Class Member, which means he or she belongs to either of the following:

- The **California Class** means all persons who are employed, have been employed, or alleged in the Action to have been employed by Defendants as a non-exempt employee in the State of California between September 6, 2015 and March 1, 2022. Settlement, ¶ 2.c.
- The **Oregon Class** means all persons who are employed, have been employed, or alleged in the Action to have been employed by Defendants as a non-exempt employee in the State of Oregon between July 8, 2014 and March 1, 2022. *Id.*, ¶ 2.w.
- The **Washington Class** means all persons who are employed, have been employed, or alleged in the Action to have been employed by Defendants as a non-exempt employee in the State of Washington between July 8, 2017 and March 1, 2022. *Id.*, ¶ 2.kk.
- The **Illinois Class** means all persons who are employed, have been employed, or alleged in the Action to have been employed by Defendants as a non-exempt employee in the State of Illinois between July 8, 2017 and March 1, 2022. *Id.*, ¶ 2.s.
- The **Collective** or **Opt-In Plaintiffs** includes all individuals who have submitted Opt-In Consent Forms in this Action and worked for Defendants as non-exempt, hourly employees between March 13, 2017 and March 1, 2022. *Id.*, ¶ 2.g.
- The **Aggrieved Employees** includes all individuals who are employed, have been employed, or alleged in the Action to have been employed by Defendants as a non-exempt employee in the State of California at any time between July 7, 2018 and Preliminary Approval. *Id.* ¶ 2.b.

Id., ¶ 2.hh. Individuals belonging to the California, Oregon, Washington, and/or Illinois Classes are referred to as "State Class Members." *Id.* ¶ 2.hh.

C. Allocation and Awards.

Participating Individuals[6] will each receive a settlement award check and will not need to submit a claim form.[7] *See* Settlement, ¶¶ 33-34, 36-38. Each Participating Individual's settlement share will

[6] "Participating Individuals" refer to State Class Members who do not validly request for exclusion for the Settlement, all Opt-In Plaintiffs, all State Class Members who cash or deposit their Settlement Award checks, and all Aggrieved Employees. Settlement, ¶ 2.y. There are a total of 20,374 Participating Individuals. Cottrell Decl., ¶¶ 50, 52, 68.

[7] Class Members are not required to submit an Opt-In Form to receive payment under the Settlement for their work in California, Oregon, Washington, or Illinois during the relevant time periods. However,

be determined based on the total number of weeks that the respective Participating Individual was employed by Defendants during the applicable limitations period(s). *Id.*, ¶ 38. Participating Individuals who also worked for Defendants at any time from July 7, 2018 in California through the date of Preliminary Approval will also receive a *pro rata* portion of the Net PAGA Amount, based on the number of workweeks they were employed by Defendants during the PAGA period. *Id.*, ¶ 38.b.

Each workweek will be equal to one settlement share, but to reflect the increased value of state law claims and differing average rates of pay by state, workweeks during which work was performed in California, Oregon, Washington, and Illinois will be weighted more heavily. *Id.*, ¶ 38.a.iii. Specifically, each workweek during which work was performed in: California will be equal to 5 settlement shares; in Oregon or Washington will be equal to 3 settlement shares; and in Illinois will be equal to 2 settlement shares. *Id.*

The total number of settlement shares (as weighted) for all Participating Individuals will be added together and the Net Settlement Amount will be divided by that total to reach a per share dollar figure. Settlement, ¶ 38.a.iv. The resulting per share dollar figure will then be multiplied by each Participating Individual's number of settlement shares (as weighted) to determine his or her Individual Settlement Payment. *Id.*

Any funds from checks that are returned as undeliverable or are not negotiated within 180 calendar days after issuance will either: (a) if less than $95,000.00, revert to the Parties' agreed-upon *cy pres* beneficiary, Legal Aid at Work, or (b); if $95,000.00 or greater, be redistributed to the Participating Individuals who negotiated their checks on a *pro rata* basis. *Id.*, ¶ 46; Cottrell Decl., ¶¶ 55-56.

D. Scope of Release.

The releases contemplated by the proposed Settlement are dependent upon whether the Participating Individual is an Opt-In Plaintiff, aggrieved employee, and/or a State Class Member, and

only Opt-In Plaintiffs will be credited for work performed in states other than California, Washington, Oregon, and Illinois, as the damages for work performed in those states are attributable to FLSA claims only – however, the Released FLSA claims include any state law minimum wage and overtime wage claims to the extent they overlap with the FLSA release period. Class Members may opt out of the Fed. R. Civ. P. 23 component of the Settlement, but those Class Members who are Opt-In Plaintiffs may not opt out of the FLSA component of the Settlement. Settlement, ¶¶ 23.g, 23.h.

are tethered to the factual allegations in the pleadings. Settlement, ¶ 23.

- **Opt-In Plaintiffs** will release any and all claims under the FLSA that were or could have been pled arising out of the factual predicates and/or allegations pled of any complaints in this Action, between March 13, 2017 and March 1, 2022, as well as any state law minimum wage and overtime wage claims to the extent they overlap with the FLSA time period between March 13, 2017 and March 1, 2022. *Id.*, ¶ 23.a.
- **California Class Members** will release any and all claims under California law, that were or could have been pled arising out of the factual predicates and/or allegations pled in the complaints and PAGA letters in this Action, between September 6, 2015 and March 1, 2022. *Id.*, ¶ 23.b.
- **Oregon Class Members** will release any and all claims under Oregon law, that were or could have been pled arising out of the factual predicates and/or allegations pled in the complaints in this Action, between July 8, 2014 and March 1, 2022. *Id.*, ¶ 23.d.
- **Washington Class Members** will release any and all claims under Washington law, that were or could have been pled arising out of the factual predicates and/or allegations pled in the complaints in this Action, between July 8, 2017 and March 1, 2022. *Id.*, ¶ 23.c.
- **Illinois Class Members** will release any and all claims under Illinois law, that were or could have been pled arising out of the factual predicates and/or allegations pled in the complaints in this Action, between July 8, 2017 and March 1, 2022. *Id.*, ¶ 23.e.
- **Released PAGA Claims**: Under the Settlement, Plaintiff Wright further releases the claims and rights to recover civil penalties against the Releasees on behalf of the LWDA and Aggrieved Employees for any Labor Code or Wage Order violation alleged or could have been alleged in the complaints and PAGA letters filed in this Action, through the date of preliminary approval of the Settlement. *Id.*, ¶ 23.f. Aggrieved Employees may not opt out or otherwise exclude themselves from this release. *Id.*

As to State Class Members who are not Opt-In Plaintiffs, those who cash, deposit, or otherwise negotiate their Settlement Award checks will also release any and all claims under the FLSA arising from or related to their work in California, Washington, Oregon, and/or Illinois between March 13, 2017 and March 1, 2022. *Id.*, ¶ 23.g. If such a State Class Member does not cash, deposit, or negotiate his or her check, he or she will not release any claims under the FLSA, *Id.* ¶ 23.h.

The Class and Collective Representatives – Plaintiffs Wright, Stanley, Quam, and Lewis – and Emily Gracey also agree to a general release. *Id.*, ¶ 25.

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT AS TO THE STATE LAW CLASSES

A. The Ninth Circuit Precedent Favors and Encourages Class Settlements.

A class action may only be settled with Court approval. *See* Fed. R. Civ. P. 23(e). Approval of

a class action settlement requires three steps: (1) preliminary approval of the proposed settlement upon written motion; (2) dissemination of notice of the settlement to all class members; and (3) a final settlement approval hearing at which objecting class members may be heard, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is presented. Manual for Complex Litigation, *Judicial Role in Reviewing a Proposed Class Action Settlement*, § 21.61 (4th ed. 2004). The decision to approve or reject a proposed settlement is committed to the sound discretion of the court. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

Federal law strongly favors and encourages settlements, especially in class actions. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) ("[T]here is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits."). Moreover, when reviewing a motion for approval of a class settlement, the Court should give due regard to "what is otherwise a private consensual agreement negotiated between the parties," and must therefore limit the inquiry "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). The Court of Appeals will rarely overturn approval of a class action settlement unless "the terms of the agreement contain convincing indications that the incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of the negotiations and that the district court was wrong in concluding otherwise." *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003).

Applying this standard of review to other federal and California wage and hour class actions, this Court and others in this Circuit have previously approved settlements similar to that reached in this case.[8] Likewise, in its August 29, 2022 order, this Court conditionally certified the California, Oregon,

[8] *See, e.g., Andrews v. Prestige Care, Inc.*, No. 2:18-cv-00378-JAM-KJN, 2020 U.S. Dist. LEXIS 250905, at *3 (E.D. Cal. July 13, 2020) (Mendez, J.) (granting final approval of class and PAGA representative action settlement); *Hozi v. Integrated Energy Techs. Inc.*, No. 2:18-cv-02006-JAM-KJN, 2020 U.S. Dist. LEXIS 267303, at *7 (E.D. Cal. Apr. 20, 2020) (Mendez, J.) (same); *Smothers v. NorthStar Alarm Servs., LLC*, No. 2:17-cv-00548-KJM-KJN, 2020 U.S. Dist. LEXIS 56473, at *38 (E.D. Cal. Mar. 30, 2020) (final approval of wage and hour class and collective action settlement); *Figueroa v. Conner Logistics*, No. 1:19-cv-01004-, 2021 U.S. Dist. LEXIS 33816, at *3 (E.D. Cal. Feb.

Washington, and Illinois Classes and preliminarily approved the Settlement with respect to these Class Members, and approved the Settlement with respect the Collective Members. *See* ECF 89.[9] *Id.* Accordingly, the only step that remains is final approval. Consistent with the precedent of this Circuit and this Court's own decisions, the Settlement should be finally approved.

B. The Court Should Finally Certify the Class.

In its August 29, 2022 preliminary approval order, the Court granted conditional certification of the provisional State Classes.[10] ECF 89, ¶ 3. Now that notice has been effectuated, the Court should finally certify these Classes in its final approval order. The Classes meet all of the requirements for final approval as set forth below.

1. The State Classes Are Numerous and Ascertainable.

The numerosity prerequisite demands that a class be large enough that joinder of all members would be impracticable. Fed. R. Civ. P. 23(a)(1). While there is no exact numerical cut-off, courts have routinely found numerosity satisfied with classes of at least forty members. *See, e.g., Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 485 (E.D. Cal. 2006). There are approximately 19,787 members of the combined State Classes, each State Class exceeding well over 1,000 members each, thereby rendering the classes so large as to make joinder impracticable. Cottrell Decl., ¶ 57.

2. Plaintiffs' Claims Raise Common Issues of Fact or Law.

23, 2021) (adopting recommendation granting final approval of wage and hour class and collective action settlement); *Jones, et al. v. CertifiedSafety, et al.*, 3:2017-cv-02229, ECF 232 (N.D. Cal. June 1, 2020) (final approval of a settlement that included both FLSA and California Labor Code claims, with workweek weighting); *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 299 at 10:11-14, 305 (N.D. Cal. Oct. 23, 2019) (same); *O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2019 U.S. Dist. LEXIS 157070, at *12 (N.D. Cal. Sep. 13, 2019) (final approval of a settlement that included both FLSA and California Labor Code claims); *Viceral v. Mistras Grp., Inc.*, No. 15-cv-02198-EMC, 2017 U.S. Dist. LEXIS 23220, at *2 (N.D. Cal. Feb. 17, 2017) (same); *Guilbaud v. Sprint Nextel Corp.*, No. 3:13-CV-04357-VC, 2016 WL 7826649, at *1 (N.D. Cal. Apr. 15, 2016).

[9] Plaintiffs acknowledge that, in the event that the Settlement is not approved by the Court, class and collective certification would be contested by Defendants, and Defendants fully reserve and do not waive any arguments and challenges regarding the propriety of class and collective action certification. Settlement, ¶ 12.

[10] With regards to the Collective, this Court has already granted "approval of the terms and conditions contained in the Settlement . . . ." and "finally certifie[d] the Collective". ECF 89, ¶¶ 4-6. Accordingly, the only step that remains is final approval of the Settlement as to the State Classes. Consistent with the precedent of this Circuit and this Court's own decisions, the Settlement should be finally approved.

The commonality requirement of Rule 23(a)(2) "is met if there is at least one common question or law or fact." *Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461, 467 (E.D. Pa. 2000). Plaintiffs "need not show that every question in the case, or even a preponderance of questions, is capable of classwide resolution." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013). "[E]ven a single common question" can satisfy the commonality requirement of Rule 23(a)(2). *Id*.

Common questions of law and fact predominate here, satisfying Fed. R. Civ. P. 23(a)(2) and (b)(3), as alleged in the Complaint. Plaintiffs allege Defendants have uniform policies applicable to all State Class Members. Specifically, Plaintiffs allege that State Class Members all perform the same job duty to provide care and support to Defendants' residents pursuant to Defendants' standards and requirements. Cottrell Decl., ¶ 58. Plaintiffs allege that the wage and hour violations are in large measure borne of Defendants' standardized policies, practices, and procedures, creating pervasive issues of fact and law that are amenable to resolution on a class-wide basis. *Id.* These allegations are tied to common questions of law or fact as to whether, *inter alia*, State Class Members were required to – and should be paid for – unrecorded off the clock work, including time spent conducting pre-shift and post-shift work; whether carrying and/or responding to calls during meal and rest breaks were required and renders such breaks on-duty, untimely, or cut short; and whether State Class Members were required to purchase items for work and should be reimbursed for such purchases. *Id*. In particular, Plaintiffs allege that State Class Members are subject to the same: hiring and training process; timekeeping and rounding, payroll, and compensation policies and systems; meal and rest period policies and practices; and reimbursement policies. Plaintiffs' other derivative claims will rise or fall with the primary claims. *Id.* Because these questions can be resolved at the same juncture, Plaintiffs contend the commonality requirement is satisfied for the Classes.

3. Plaintiffs' Claims are Typical of the Claims of the Respective State Classes.

"Rule 23(a)(3) requires that the claims of the named parties be typical of the claims of the members of the class." *Fry*, 198 F.R.D. at 468. "Under the rule's permissive standards, a representative's claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Here, Plaintiffs' claims are typical of those of all other State Class Members. They were subject to the alleged illegal policies

and practices that form the basis of the claims asserted in this case. Interviews with State Class Members and review of timekeeping and payroll data confirm to Plaintiffs that the employees throughout the United States were subjected to the same alleged illegal policies and practices to which Plaintiffs were subjected. Cottrell Decl., ¶ 59. Indeed, interviews with State Class Members confirm that, like Plaintiffs, State Class Members were subject to similar rates of violations as to off-the-clock work, missed or otherwise non-compliant meal and rest breaks, and unreimbursed business expenses. *Id.* Thus, the typicality requirement is also satisfied.

4. Plaintiffs and Class Counsel Will Adequately Represent the State Classes.

To meet the adequacy of representation requirement of Fed. R. Civ. P. 23(a)(4), Plaintiffs must show "(1) that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously; (2) that he or she has obtained adequate counsel, and (3) that there is no conflict between the individual's claims and those asserted on behalf of the class." *Fry*, 198 F.R.D. at 469. Plaintiffs' claims are in line with the claims of the Class, and Plaintiffs' claims are not antagonistic to the claims of State Class Members. Plaintiffs have prosecuted this case with the interests of the State Class Members in mind. Moreover, Class Counsel has extensive experience in class action and employment litigation, including wage and hour class actions, and do not have any conflict with the classes. Cottrell Decl., ¶¶ 4-6, 60, 113-115.

5. The Rule 23(b)(3) Requirements for Class Certification are also Met.

Under Fed. R. Civ. P. 23(b)(3), Plaintiffs must demonstrate that common questions "predominate over any questions affecting only individual members" and that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." "The predominance analysis under Rule 23(b)(3) … 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Wang*, 737 F.3d at 545.

Here, the common questions raised in this action predominate over any individualized questions concerning the State Classes. The Class is entirely cohesive because resolution of Plaintiffs' claims hinge on the uniform policies and practices of Defendants, rather than the treatment the State Class Members experienced on an individual level. Cottrell Decl., ¶ 61. As a result, the resolution of these alleged class claims would be achieved through the use of common forms of proof, such as Defendants'

uniform policies, and would not require inquiries specific to individual class members.[11] *Id.*

Further, the class action mechanism is a superior method of adjudication compared to a multitude of individual suits. *Id.*, ¶ 62. To determine whether the class approach is superior, courts are to consider: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).

Here, the State Class Members do not have a strong interest in controlling their individual claims. The action involves thousands of workers with very similar, but relatively small, claims for monetary injury. Cottrell Decl., ¶ 62. If the Class Members proceeded on their claims as individuals, their many individual suits would require duplicative discovery and duplicative litigation, and each Class Member would have to personally participate in the litigation effort to an extent that would never be required in a class proceeding. *Id.* Thus, the class action mechanism would efficiently resolve numerous substantially identical claims at the same time while avoiding a waste of judicial resources and eliminating the possibility of conflicting decisions from repetitious litigation and arbitrations. *Id.*

The issues raised by the present case are thus much better handled collectively by way of a settlement. Manageability is not a concern in the settlement context. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 593 (1997). The Settlement presented by the Parties provides finality, ensures that workers receive redress for their relatively modest claims, and avoids clogging the legal system with numerous cases. Accordingly, class treatment is efficient and warranted, and the Court should conditionally certify the California Class for settlement purposes.

[11] Although the amount of time worked off-the-clock and number of missed meal and rest periods may vary, these are merits questions and should not impact class certification. *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). The fact that individual inquiry might be necessary to determine whether individual employees were able to take breaks despite a defendant's allegedly unlawful policy is not a proper basis for denying certification. *Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701 (Cal. Ct. App. 2014).

C. The Settlement Should Be Finally Approved as to the State Classes Because It Is Fair, Reasonable, and Adequate.

In deciding whether to approve a proposed class or collective settlement, the Court must find that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Officers for Justice*, 688 F.2d at 625; *Otey v. CrowdFlower, Inc.*, 2015 WL 6091741, at *4 (N.D. Cal. Oct. 16, 2015). Before making such a finding, the Court must consider whether (1) class representative and counsel have adequately represented the class; (2) the proposal was negotiated at arm's length; (3) the relief provided for the class is adequate in light of the costs, risks, and delay of trial and appeal; the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; the terms of any proposed award of attorney's fees, including timing of payment; and any agreement made in connection with the proposal; and (4) the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2); *see also In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 946 (9th Cir. 2011) (quoted source omitted) (enumerating additional non-exhaustive factors that are to be considered for purposes of granting final approval of a class settlement). "While Rule 23(e) does not mandate that courts consider these same factors for purposes of determining whether preliminary approval is warranted, doing so often proves useful given the role these factors play in final approval determinations." *Lusk v. Five Guys Enters. LLC*, No. 1:17-cv-00762-AWI-EPG, 2022 U.S. Dist. LEXIS 12812, at *6 (E.D. Cal. Jan. 22, 2022).

Included in this analysis are considerations of: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Churchill Village, LLC. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon*, 150 F.3d at 1026). Importantly, courts apply a presumption of fairness "if the settlement is recommended by class counsel after arm's-length bargaining." *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, at *6 (N.D. Cal. Apr. 1, 2011). There is also "a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*,

516 F.3d 1095, 1101 (9th Cir. 2008). In light of these factors, the proposed settlement is fair, reasonable, and adequate.

1. The Terms of the Settlement are Fair, Reasonable, and Adequate, and Were Reached Only After Months of Negotiations at Arm's Length.

In evaluating the fairness of a proposed settlement, courts compare the settlement amount with the estimated maximum damages recoverable in a successful litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Courts routinely approve settlements that provide a fraction of the maximum potential recovery. *See, e.g.*, *Officers for Justice*, 688 F.2d at 623.[12] Here, the negotiated non-reversionary Gross Settlement Amount of $9,500,000 represents approximately over 42% of the $22.3 million total that Plaintiffs calculated for unliquidated, core claims for unpaid wages, meal and rest breaks, and expense reimbursements. Cottrell Decl., ¶¶ 68-69. When adding derivative claims and potential penalties, the $9,500,000 million settlement amount represents approximately 14% of Defendants' total potential exposure of $69.4 million. *Id.*, ¶¶ 68, 70.[13] These calculations are

[12] *See, e.g., Andrews v. Prestige Care, Inc.*, Case No. 2:18-cv-00378-JAM-KJN (Dkt. No. 24, Mar. 24, 2020; Dkt. No. 32, July 14, 2020) (Mendez, J.) (preliminarily and finally approving settlement representing 17.54% to 69.74% of the realistic and maximum total damage calculations); *Viceral v. Mistras Grp., Inc.*, Case No. 15-cv-2198-EMC, 2016 WL 5907869, at *7 (N.D. Cal. Oct. 11, 2016) (approving wage and hour settlement which represented 8.1% of the total verdict value); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) ("10% gross and 7.3% net figures are 'within the range of reasonableness'"); *Balderas v. Massage Envy Franchising, LLP*, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (gross settlement amount of 8% of maximum recovery and net settlement amount of 5%); *Ma v. Covidien Holding, Inc.*, 2014 WL 360196, at *4-5 (C.D. Cal. Jan. 31, 2014) (9.1% of "the total value of the action" is within the range of reasonableness).

[13] The Net PAGA Amount of $95,000 represents 1% of the gross settlement amount, well within the PAGA settlements previously approved in this district and other California district courts. *See* Cottrell Decl., ¶ 47; *see, e.g., Ahmed v. Beverly Health & Rehab. Servs., Inc*., 2018 U.S. Dist. LEXIS 20460, 2018 WL 746393, at *10 (E.D. Cal. 2018) (approving PAGA settlement of $4,500, or 1% of the total settlement); *Schiller v. David's Bridal, Inc*., 2012 U.S. Dist. LEXIS 80776, at *35-36 (E.D. Cal. 2012) (approving PAGA settlement of $7,500 or 0.14% of the total settlement); *Franco v. Ruiz Food Prods., Inc*., 2012 U.S. Dist. LEXIS 169057, 2012 WL 5941801 at *14 (E.D. Cal. 2012) (approving PAGA settlement of $10,000, or 0.4% of total settlement); *Garcia v. Gordon Trucking*, 2012 U.S. Dist. LEXIS 160052, 2012 WL 5364575 at *3 (E.D. Cal. 2012) (approving PAGA settlement of $10,000 or 0.27% of the total settlement). Indeed, the LWDA has stated it "is not aware of any existing case law establishing a specific benchmark for PAGA settlements, either on their own terms or in relation to the recovery on other claims in the action." *Ramirez v. Benito Valley Farms, LLC*, No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *3 (N.D. Cal. Aug. 25, 2017)) (quoting from the LWDA response in *O'Connor v. Uber Technologies Inc*., 201 F.Supp.3d 1110 (N.D. Cal. 2016)). The reasoning for this approach is multifaceted; however, one of the major concerns regarding PAGA settlements is that PAGA penalties may be reduced at a court's discretion. *See Gonzales v. CoreCivic of Tennessee, LLC*, 2018 WL 4388425, at *6-9 (E.D. Cal. Sept. 13, 2018) ("A trial court's discretion to reduce PAGA penalties might be a reason to ultimately discount the value of PAGA claims, perhaps even significantly, in reaching a settlement.").

exclusive of attorneys' fees and costs.

Plaintiffs' counsel based their exposure analysis and settlement negotiations on formal and informal discovery (including payroll and timekeeping data), and nearly 300 interviews with Caregivers. *Id*., ¶ 65. Plaintiffs' counsel obtained average rates of pay for Caregivers, which were then used in conjunction with amounts of unpaid time to determine estimated damages for off-the-clock and overtime violations. *Id*. Based on interview analysis and cross-checked with Defendants' data, Plaintiffs applied a high-end damage assumption of 30 minutes of off-the-clock time per day, along with each Caregivers missing 79.3% of their meal periods (accounting for paid meal premium payments) and 86% of their rest periods, and an average of $50 out-of-pocket expenses per Caregiver. *Id*., ¶ 66.

Using these assumptions and further assuming that Plaintiff and the Caregivers would certify all of their claims and prevail at trial, Plaintiffs' counsel calculated the total potential substantive exposure if Plaintiffs fully prevailed on all of their claims at approximately $22.3 million and the total exposure (including liquidated damages, derivative claims, and stacked civil penalties) of $69.4 million. *Id*., ¶ 68.[14]

These figures are based on Plaintiffs' assessment of a best-case-scenario. To obtain such a result at trial, Plaintiffs would have to, at the minimum: (1) win on appeal before the Ninth Circuit and the California Court of Appeal; (2) certify all claims and withstand any decertification motions; (3) prevail on the merits on all claims; (4) prove that Defendants acted knowingly or in bad faith; and (5) prove that all Caregivers experienced the violations at the levels described above for every shift. *Id*., ¶ 48.

The Settlement provides robust average recoveries, and the largest recovery a Class Member will receive is an impressive $5,199.76. Lange Decl., ¶ 16. Approximately 1,113 Class Members will receive an average recovery $1,000 or more, of which approximately 297 Class Members will receive an average recovery of $2,000 or more and 30 Class Members will receive an average recovery of $3,000 or more. *Id*., ¶ 16. On average, Class Members will receive an average recovery of

[14] Due to a small increase in Caregivers provided in the class list, Plaintiffs adjusted their prior damages analysis to include them. Based on Plaintiffs' revised analysis, the total liquidated damages for all Caregivers – is increased from the $69.1 million, as estimated at preliminary approval, to $69.4 million. *See* Cottrell Decl., ¶¶ 67-68. The total substantive damages for all Caregivers was similarly increased from the estimated $22.2 million to $22.3 million. *Id.*

approximately $299.52 per Class Member and $104.34 per Collective Member. *See id*. These recoveries are particularly excellent in light of the Class Members' relatively short tenures, given that over 74% of the Class worked 1 year or less, which includes over 52% who worked 20 or fewer workweeks, and over 36% who worked a mere 10 or fewer workweeks. Cottrell Decl., ¶¶ 74-75; *see also,* Lange Decl., ¶ 16. Indeed, excluding Class Members who worked 10 weeks or fewer, the average recovery for Class Members is $409.23, and excluding Class Members who worked 52 weeks or fewer, the average recovery for Class Members is $714.83. Lange Decl., ¶ 16.

These results are well within the reasonable standard when considering the difficulty and risks presented by pursuing further litigation. Cottrell Decl., ¶¶ 74-75. The final settlement amount takes into account the substantial risks inherent in any class action wage-and hour case, as well as the procedural posture of the Action and the specific defenses asserted by Defendants, many of which are unique to this case. *Id.*; *see Officers for Justice*, 688 F.2d at 623. In light of all of the risks, the settlement amount is fair, reasonable, and adequate.

2. The Settlement Was Reached Only After the Parties Engaged in Substantial Investigation and Analysis of the Legal and Factual Issues.

The amount of discovery completed prior to reaching a settlement is important because it bears on whether the Parties and the Court have sufficient information before them to assess the merits of the claims. *See, e.g., Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617, 625 (N.D. Cal. 1979); *Lewis v. Starbucks Corp.*, No. 2:07-cv-00490-MCE-DAD, 2008 WL 4196690, at *6 (E.D. Cal. Sept. 11, 2008). Informal discovery also allows parties to "form a clear view of the strengths and weaknesses of their cases." *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 454 (E.D. Cal. 2013).

The Parties engaged in extensive formal and informal discovery, including nearly 300 class member interviews that have enabled Plaintiffs to assess the claims and potential defenses in this action. Cottrell Decl., ¶¶ 23-32, 65, 79. Plaintiffs were able to accurately assess the legal and factual issues that would arise if the cases proceeded to trial(s). *Id.*, ¶ 79. Plaintiffs' counsel's liability and damages evaluation was premised on a careful and extensive analysis of the effects of Defendants' compensation policies and practices on Class Members' pay. *Id*. In addition, in reaching this Settlement, Plaintiffs' counsel relied on their substantial litigation experience in similar wage and hour class and collective

actions. *Id*. Plaintiffs and their counsel considered the significant risks of continued litigation when considering the proposed Settlement. *Id*., ¶¶ 73, 76, 79-92. These risks were front and center, particularly given the appellate risk unique to this case, and the nature of the off-the-clock work, that the Caregivers work in numerous and varying locations often owned by various third-party entities, which could invariably complicate certification efforts and proving the claims on the merits. *Id*. In contrast, the Settlement will result in immediate and certain payment to Caregivers of meaningful amounts. *Id*., ¶ 74. Ultimately, facilitated by two, well-respected mediators, the Parties used this information and discovery to fairly resolve the litigation. *See id.*, ¶¶ 92-93.

3. The Settlement is the Product of Informed, Non-collusive, and Arm's-length Negotiations Between Experienced Counsel.

Courts routinely presume a settlement is fair where it is reached through arm's-length bargaining. *See Hanlon*, 150 F.3d at 1027; *Wren*, 2011 WL 1230826, at *14. Furthermore, where counsel are well-qualified to represent the proposed class and collective in a settlement based on their extensive class and collective action experience and familiarity with the strengths and weaknesses of the action, courts find this factor to support a finding of fairness. *Wren*, 2011 WL 1230826, at *10; *Carter v. Anderson Merchandisers, LP*, No. EDCV 08-0025-VAP OPX, 2010 WL 1946784, at *8 (C.D. Cal. May 11, 2010) ("Counsel's opinion is accorded considerable weight.").

Here, the settlement was a product of non-collusive, arm's-length negotiations. Cottrell Decl., ¶¶ 33-39, 65, 92. The Gross Settlement Amount is a negotiated amount that resulted only after months of substantial arm's-length negotiations, three separate mediation sessions, and significant investigation and analysis by Plaintiffs' counsel. The Parties participated in three separate mediation sessions before David Rotman and Steve Serratore, who are both skilled mediators with many years of experience mediating employment matters. *Id.* The Parties then spent several months negotiating the long-form Settlement Agreement, with several rounds of meet and confer and correspondence related to the terms and details of the Settlement. *See id.*, ¶ 39. Plaintiffs are represented by experienced and respected litigators of representative wage and hour actions, and these attorneys feel strongly that the proposed Settlement achieves an excellent result for the State Class Members. *Id*., ¶ 93.

4. Further Litigation Would Involve Risk, Expense, Delay, and Burden on State Class Members.

"Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class." *Eddings v. Health Net, Inc.*, No. CV 10-1744-JST RZX, 2013 WL 3013867, at *3 (C.D. Cal. June 13, 2013). The monetary value of the proposed Settlement represents a fair compromise given the risks and uncertainties posed by continued litigation. Cottrell Decl., ¶ 80. If this Action were to go to trial as a class, representative, and collective action, Class Counsel estimates that fees and costs would exceed $7,000,000. *Id.*

Litigating the Action further would require substantial additional preparation and discovery. *Id.*, ¶¶ 81-82. Plaintiffs Wright, Stanley, Quam, and Lewis would need to successfully win on appeal in the Ninth Circuit. *Id.*, ¶ 81. Following that, Plaintiffs would need to complete fact and expert discovery. This would include: (1) written discovery to Caregivers; (2) depositions of the Caregivers and Defendants' 30(b)(6) witnesses, managers, and executives; (3) third party discovery to the various facilities where Caregivers worked, and (4) expert discovery. *Id.* Plaintiffs would further need to obtain a ruling that Frontier Management LLC and Frontier Senior Living, LLC are indeed, employers of Caregivers at assisted senior living homes, an issue that Defendants have and would continue to vigorously contest, given that a large number of such locations are owned or jointly operated by other entities. If Frontier Management LLC and Frontier Senior Living, LLC are found not to be employers at such locations, the value of the case would likely plummet. *Id.*, ¶ 83.

Even if Plaintiffs successfully overcame these procedural obstacles, recovery of the damages and penalties previously referenced would also require complete success and certification of all of Plaintiffs' claims, a questionable feat in light of developments in wage and hour and class and collective action law as well as the legal and factual grounds that Defendants have asserted to defend this action. *Id.*, ¶ 84. Off-the-clock claims are difficult to certify for class treatment, given that the nature, cause, and amount of the off-the-clock work may vary based on the individualized circumstances of the

worker.[15] While Plaintiffs are confident that they would establish that common policies and practices give rise to the off-the-clock work for Caregivers, Plaintiffs acknowledged that the work was performed by hourly employees holding various job titles at dozens of different locations around the country, which were often owned and/or operated by numerous different companies. *Id*.[16]

Plaintiffs also recognized similar obstacles may hinder class certification and proving their claims on the merits of Plaintiffs' class claims regarding Caregivers' meal and rest breaks. *Id.*, ¶ 85. At the core of Plaintiffs' meal and rest break claims is Defendants' alleged common policy and practice of requiring Caregivers to carry communication devices and respond to work related calls during their breaks, rendering such breaks on-duty. *Id*. Although California, Oregon, and Washington, share similar meal and rest break policies against "on-duty" breaks, courts in Oregon and Washington lack the abundance of case law existing in California regarding whether being required to carry and respond to communication devices would suffice to show breaks were on duty in Oregon in Washington. *Id*. Defendants were poised to submit evidence and deposition testimony as to their defense, that communication devices were only provided to certain Caregivers, and among such Caregivers, only to Caregivers who were assigned to be on-call. *Id*. In the event Defendants' evidence proved to be true, Plaintiffs' meal and rest break claims could have potentially failed at the class certification stage. Further, given that the substantive damages are largely driven by the alleged off-the-clock work and meal and rest breaks, and that the derivative and penalty claims are tethered to off-the-clock claims, Plaintiffs recognized that their potential failure to obtain class certification on the off-the-clock work

[15] *See, e.g., In re AutoZone, Inc., Wage & Hour Emp't Practices Litig*., 289 F.R.D. 526, 539 (N.D. Cal. 2012), aff'd, No. 17-17533, 2019 WL 4898684 (9th Cir. Oct. 4, 2019); *Kilbourne v. Coca-Cola Co.*, No. 14CV984-MMA BGS, 2015 WL 5117080, at *14 (S.D. Cal. July 29, 2015); *York v. Starbucks Corp*., No. CV 08-07919 GAF PJWX, 2011 WL 8199987, at *30 (C.D. Cal. Nov. 23, 2011); *Forrester v. Roth's I. G. A. Foodliner, Inc.*, 475 F.Supp. 630, 634 (D Or 1979) (employees maybe estopped from "off-the-clock" claims when they have deliberately underreported their hours and/or routinely signed payroll records, certifying them to be true and accurate); *Hawkins v. Securitas Sec. Servs. USA, Inc*., 280 F.R.D. 388, 392 (N.D. Ill. 2011) (certifying Illinois Rule 23 subclass asserting off-the-clock work performed during training and orientation but denying certification of subclass asserting off-the-clock work performed pre- and post- shift).

[16] With differing facilities' policies and practices, physical layouts, and the nature of the work varying by location, Plaintiffs recognized that obtaining class certification would present a significant obstacle, with the risk that the Caregivers could only pursue individual actions in the event that certification was denied. Cottrell Decl., ¶ 85. Certification of off-the-clock work claims is complicated by the lack of documentary evidence and reliance on employee testimony, and Plaintiffs would likely face motions for decertification as the case progressed. *Id.*

and meal rest breaks could potentially result in the death knell of their derivative claims. *Id.*

Plaintiffs would also encounter difficulties in proving Defendants' liability on the merits for various other reasons. *Id.*, ¶¶ 86-87. For example, Section 260 of the FLSA reads in relevant part that, "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof." 29 U.S.C. 260. Defendants would no doubt be prepared to submit evidence showing that it had acted in good faith and on reasonable grounds that its actions were not in violation of the FLSA, and whether this Court agrees with Defendants would be a risk that Plaintiffs would necessarily undertake had litigation continued.

The path to an award of additional damages and penalties at trial for overlapping FLSA and state law claims was equally uncertain. Plaintiffs' recovery analysis above assumes Oregon, Washington, and Illinois class members could receive both liquidated damages under the FLSA, but also civil penalties or liquidated damages under applicable case law (e.g., penalties under Oregon law, treble damages under Washington law, 2% punitive damages under Illinois law) for the same underlying overtime and minimum wage claims. Cottrell Decl., ¶ 88. Although Plaintiffs are confident they would be able to succeed in arguing for these penalties and liquidated damages, Defendants would surely vehemently oppose such an approach. *Id.*

As to Plaintiff Wright's PAGA claims, Plaintiff Wright would first need to overcome similar procedural hurdles, including successfully defending against Defendants' petition for writ of mandate and completing substantial amounts of written discovery and depositions. *See Id.*, ¶¶ 81. Plaintiffs' exposure analysis assumes stacking under the PAGA; however, there is a significant chance that the Court would decline to stack on derivative violations for an employer that maintains comprehensive, facially compliant policies and training.[17] *Id.*, ¶ 89.

[17] *Smith v. Lux Retail N. Am., Inc.*, No. C 13-01579 WHA, 2013 U.S. Dist. LEXIS 83562, at *9 (N.D. Cal. June 13, 2013) ("For the single mistake of failing to include commissions in the overtime base, plaintiff has asserted five (count them, five) separate labor code violations that could lead to statutory penalties. One is a penalty for failure to pay overtime at the appropriate rate []. Another is for denying employees minimum wage and overtime []. But is it plausible that we would really pile one penalty on

Plaintiffs would further likely need to move for and defend against motions for summary judgment or adjudication, and would have been further required to take their claims to trial. *Id.,* ¶ 90. Finally, Plaintiff would need to prepare for trial, which would require the presentation of percipient and expert witnesses, as well as the consideration, preparation, and presentation of voluminous documentary evidence and the preparation and analysis of expert reports. *Id.* Trials are inherently risky for all parties. Although Plaintiffs believes that they could have been successful in proving these claims, and that Defendants' evidence would not have been as persuasive, a trial on the off-the-clock claims and meal and rest periods would have carried a high degree of risk.[18]

In contrast to litigating this suit, resolving this case by means of the Settlement will yield a prompt, certain, and very substantial recovery for the Class Members. *Id.*, ¶ 91. Such a result will benefit the Parties and the court system. *Id*. It will bring finality to over three years of arduous litigation and will foreclose the possibility of expanding litigation.

5. The Distribution of the Settlement Proceeds is Equitable and Tailored to the Respective Claims of the State Classes.

In an effort to ensure fairness, the Parties agreed to allocate the settlement proceeds amongst State Class Members in a manner that recognizes that amount of time that the particular individual was employed by Defendants in the applicable limitations period. The allocation method, which is based on the number of workweeks, will ensure that longer-tenured workers receive a greater recovery. Moreover, the allocation tracks the differences in substantive law and penalty claims by weighting the Workweek shares more heavily for work performed in California, Oregon, Washington, and Illinois.

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another for a single substantive wrong?"). Even without stacking derivative violations, a given employee may present multiple PAGA violations (*e.g.*, for meal and rest violations, off-the-clock work, and failure to reimburse) for a particular pay period. There is a chance that the Court would decline to assess multiple violations per pay period per employee.

[18] For example, on the California derivative claims, Defendants would argue that no penalties for waiting-time violations can be awarded unless the failure to pay wages is "willful," an element that Plaintiffs acknowledge given Defendants' policies and enforcement would have been difficult to prove. *See* Cal. Lab. Code § 203; 8 C.C.R. 13520 ("[a] willful failure to pay wages within the meaning of Labor Code section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages were due."); *Smith v. Rae Venter Law Group*, 29 Cal.4th 345, 354 n.2 (2002) (holding that a good faith dispute that any wages are due will preclude an award of waiting time penalties). Defendants would also have argued that an employer's failure to pay wages is not willful unless it reached the standard of "gross negligence or recklessness*." See Amaral v. Cintas*, 163 Cal.App.4th 1157, 1201 (2008).

Cottrell Decl., ¶ 77.[19] The allocation was made based on Class Counsel's assessment to ensure that employees are compensated accordingly and in the most equitable manner. *Id*. To the extent that any Class Member is *both* an Opt-In Plaintiff and a member of a State Class, these workers will only receive a recovery based on their workweeks as a State Class Member for their work in their respective state. *Id*., ¶ 78. Such workers will not receive a "double recovery." *Id*.

A class action settlement need not benefit all class members equally. *Holmes v. Continental Can Co.,* 706 F.2d 1144, 1148 (11th Cir. 1983); *cf. Reyes v. CVS Pharmacy, Inc.*, No. 1:14-cv-00964-MJS, 2016 U.S. Dist. LEXIS 17180, at *19-20 (E.D. Cal. Feb. 10, 2016) (noting equal distribution of settlement to class members may be appropriate where plaintiffs face difficulties prosecuting their individual claims). Rather, although disparities in the treatment of class and collective members may raise an inference of unfairness and/or inadequate representation, this inference can be rebutted by showing that the unequal allocations are based on legitimate considerations. *Holmes,* 706 F.2d at 1148. Plaintiffs provide rational and legitimate bases for the allocation method here, and the Parties submit that it should be approved by the Court.

6. State Class Members Approve of the Settlement.

The Ninth Circuit and other federal courts have made clear that the number or percentage of class members who object to or opt out of the settlement is a factor of great significance. *See Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 837 (9th Cir. 1976); *see also In re Am. Bank Note Holographics, Inc.*, 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy."). Courts have found that a relatively low percentage of objectors or opt outs is a very strong sign of fairness that factors heavily in favor of approval. *See, e.g., Cody v. Hillard*, 88 F.Supp.2d 1049, 1059-60 (D.S.D. 2000) (approving the settlement in large part because only 3% of the apparent class

[19] District courts in this circuit have granted final approval of hybrid FLSA/Rule 23 wage and hour settlement that incorporated greater workweek weighting for state law claims and lower workweek weighting for FLSA-only Workweeks. *See Villafan v. Broadspectrum Downstream Servs.*, No. 18-cv-06741-LB, 2020 U.S. Dist. LEXIS 218152, at *6 (N.D. Cal. Nov. 20, 2020); *Jones, et al. v. CertifiedSafety, et al.*, 3:2017-cv-02229, ECF 232 (N.D. Cal. June 1, 2020); *Soto, et al. v. O.C. Commc'ns, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 299 at 10:11-14, 305 (N.D. Cal. Oct. 23, 2019); *see also Loeza v. JP Morgan Chase Bank*, No. 13-cv-0095-L (BGS), 2015 U.S. Dist. LEXIS 196647, at *15 (S.D. Cal. Aug. 18, 2015) (granting preliminary approval where workweeks are weighted for different subclasses based on the chance of recovery of each class's claims).

had objected to the settlement).

To date, no State Class Members have objected to the Settlement, and only 0.03% of State Class Members have opted out of the Settlement. *See* Cottrell Decl. ¶ 52. In addition, all Class Representatives support the terms of the Settlement. *See id.*, ¶¶ 51-52; *see also,* accompanying Declarations of Plaintiffs Wright, Stanley, Quam, and Lewis in support of Plaintiffs' Motion for Attorneys' Fess and Costs and For Service AWards. This shows widespread support for the Settlement among Class Members, and gives rise to a presumption of fairness.

D. The Best Practicable Notice Was Provided to the Class Members in Accordance With the Process Approved by the Court.

Notice of a class action settlement is adequate where the notice is given in a "form and manner that does not systematically leave an identifiable group without notice." *Mandujano*, 541 F.2d at 835. The notice should be the best "practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993). Sending individual notices to settlement class members' last-known addresses constitutes the requisite effort. *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975); *Langford v. Devitt*, 127 F.R.D. 41, 45 (S.D.N.Y. 1989) ("[N]otice mailed by first class mail has been approved repeatedly as sufficient notice of a proposed settlement.").

SSI followed all of the procedures set forth in the Court-approved notice plan. Reasonable steps have been taken to ensure that all Class Members receive the Notice. *See supra*, Section II.A. Pursuant to the Court's August 29, 2022 preliminary approval order, SSI sent the Court-approved notices of settlement to the Class Members in accordance with the terms of the Settlement. Lange Decl., ¶ 2. The Notices were sent via U.S. Mail and email, and SSI maintained a case website where State Class Members can view the Settlement and accompanying court filings. *Id.*, ¶¶ 5-8.

Ultimately, of the 20,381 notices distributed via U.S. Mail, approximately 439 notices (i.e., 2.15%) were undeliverable following skip-tracing and other techniques. Lange Decl., ¶¶ 4, 10-12. Moreover, the dissemination of notice via email in addition to U.S. Mail increased the likelihood that Class Members successfully received the notice. The Notices further provided reasonable estimates of Class Members' recovery. *See Id.*, Ex. A. With these measures, the notice process satisfies the "best

practicable notice" standard.

E. The Class Representative Enhancement Payments and Attorneys' Fees and Costs are Reasonable.

In approving the Settlement, the Court must determine whether "the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625. In addition to the terms and details of the Settlement discussed above, the Settlement also provides for enhancement payments of up to $10,000 for Plaintiff Wright, $5,000 each for Plaintiffs Stanley, Quam, and Lewis, and $5,000 to Emily Gracey – who in dismissing the related PAGA-only, *Gracey* action against the Defendants, helped secure the Settlement – as well as attorneys' fees of up to $3,325,000 plus reimbursement of attorneys' costs of $110,000.

Plaintiffs set forth their arguments in support of the enhancement payments and the fee and costs request in full in their Motion for Attorneys' Fees and Costs and for Service Awards. ECF 155. Plaintiffs do not repeat those arguments here, but note that Class Counsel's lodestar is over approximately $2,167,230, based on over 3,351 total hours of attorney and staff time, which will continue to increase as a result of continued oversight of the settlement administration process and the final approval process. Cottrell Decl., ¶¶ 94-96. As explained in Plaintiffs' fee motion, the Court should grant final approval to the requested enhancement payments and fees and costs as reasonable.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant final approval of the Settlement Agreement and order the Parties and the Settlement Administrator to effectuate the Settlement in accordance with its terms and the schedule set forth herein.

Date: January 24, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document(s) with the Clerk of the Court for the United States District Court, Eastern District of California, by using the Court's CM/ECF system on January 24, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ *Carolyn H. Cottrell*
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