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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JOEL PASNO, JOHN KUNTZ, and RODELLA HURTADO, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

HIBU INC., a Delaware Corporation,

Defendant.

CASE NO. 22STCV01361

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

Date: March 23, 2023
Time: 9:00 a.m.
Dept. 17

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I. INTRODUCTION

Plaintiffs Joel Pasno, John Kuntz, and Rodella Hurtado ("Plaintiffs") seek preliminary approval of a non-reversionary $140,000 wage and hour settlement with Hibu Inc. ("Defendant" or "Hibu") on behalf of approximately 133 individuals who were employed by Defendant in California as Account Representatives, Account Executives, Digital Account Executives, or other non-management sales representatives ("Class Members" or "CMs") from January 12, 2018 through December 13, 2022 ("Class Period").[1]

Plaintiffs allege that Defendant required Class Members to incur home office and mileage expenses while performing their job duties for Hibu, but did not require Class Members to track and submit such expenses to Defendant for reimbursement. Rather, for most of the Class Period, Defendant reimbursed CMs a flat monthly stipend regardless of the expenses they actually incurred each month, which Plaintiffs allege was in violation of Labor Code § 2802. Plaintiffs also allege that Defendant failed to pay Class Members for overtime hours worked during the first three weeks of their employment when they were attending initial sales training, in violation of Labor Code § 510; and that as a result, Defendant also failed to issue itemized wage statements in violation of Labor Code § 226(a), and failed to pay all wages due at the time of discharge in violation of Labor Code § 203.

The settlement is an excellent result, especially when considering that Defendant paid out over $900,000 in reimbursement stipends during the Class Period, and in light of Defendant's contention that CMs were not scheduled or required to work any overtime during the initial sales training. The Gross Settlement represents 17% of Defendant's maximum exposure, and 70% of Defendant's realistic exposure. The average gross share (based on a class size of 133 CMs) is approximately $1,052.63, average net is $434.84, and the highest recovery will be approximately $2,408. Declaration of Julian Hammond In Support of Plaintiffs' Motion for Preliminary Approval ("Hammond Decl."), filed herewith, ¶ 36. The terms of the Settlement Agreement are fair and reasonable, and satisfy the criteria for judicial approval. Accordingly, the Court should grant preliminary approval, approve the proposed Notice, and set a date for a final approval hearing.[2]

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[1] As of July 31, 2022, there were 133 CMs. The number of CMs is subject to increase for individuals hired by Hibu after July 31, 2022 through the end of the Class Period. The parties will provide the Court with the exact class size prior to the hearing on Plaintiffs' Motion for Preliminary Approval.

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

II. OVERVIEW OF THE SETTLEMENT TERMS

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

1. Gross Settlement Amount ("GSA") – Hibu will pay a non-reversionary sum of $140,000 to settle this case. SA § 1.10. Hibu will also pay the employer's share of payroll taxes on the wage portion of the settlement, separately from the GSA. § 5

2. Attorneys' Fees, Costs, and Named Plaintiffs' Service Awards – Class Counsel will seek attorneys' fees of up to $46,666.67 (1/3 of the GSA) and reimbursement of reasonable out-of-pocket litigation costs in an amount not to exceed $15,000. SA § 6. The Settlement Agreement also provides for payment of $5,000 to Plaintiff Kuntz, $2,500 to Plaintiff Pasno, and $2,500 to Plaintiff Hurtado (for a total of up to $10,000) as their service awards, subject to Court approval, with $500 of each service award to be allocated and paid to each Plaintiff as consideration supporting their respective Individual Settlement Agreement and General Release of Claims. SA §§ 7, 21.

3. Administration Costs – The Parties have mutually agreed to use Phoenix Class Action Settlement Administrators ("Phoenix") as the Settlement Administrator. SA § 9. Phoenix is an experienced class action administrator and has provided notification and/or claims administration services in thousands of cases. Declaration of Mike Moore, filed herewith. The Settlement Administrator's expenses shall be reimbursed up to a cap of $7,000. SA §§ 1.18, 9.

4. PAGA Payment – The Settlement allocates $5,000 to Plaintiffs' PAGA claims, with $3,750 to be paid to the California Labor and Workforce Development Agency ("LWDA") as its 75% share of PAGA penalties, and the remaining $1,250 to be distributed to CMs who worked for Defendant during the PAGA Period, which is defined as the period between October 26, 2020 and December 13, 2022, *pro rata* based on the number of weeks worked in the PAGA Period. SA § 8. All CMs will be paid their share of PAGA Penalties whether or not they exclude themselves from the Settlement. SA § 12.2.

5. Net Settlement Amount ("NSA") – The Net Settlement Amount will total approximately $57,833.33, and will automatically be paid to CMs *pro rata* based on number of weeks worked for Defendant during the Class Period unless they exclude themselves from the Settlement. SA § 10.1.

6. Class Notice – Within 10 days following the Court's granting preliminary approval, Defendant will provide the Settlement Administrator with the Class List and the number of weeks worked during the relevant periods. SA § 11.1.1. Within 30 days of preliminary approval, after updating addresses, Phoenix will mail to each CM a Notice substantially in the form attached to the SA as **Exhibit**

A. SA § 11.1.3. For all returned Notices, Phoenix will use skip tracing to update addresses and initiate a second mailing. SA § 11.1.4. CMs who receive a re-mailed Notice will have an extra 14 days to respond. Id.

7. Opt Outs, Objections, and Disputes – CMs who wish to opt-out of the Settlement must mail, e-mail, or fax a written opt-out request within 45 calendar days of the date the Notices are mailed out. SA § 12.1. A CM may object to the Settlement by mailing, e-mailing, or faxing, within 45 calendar days of the Notice mailing date, a written statement objecting to the Settlement. SA § 13. Any CM may dispute the employment data included in their Notice by mailing, e-mailing, or faxing, within 45 calendar days of the Notice mailing date, a statement disputing their weeks worked. SA § 14.

8. Tax Consequences of Settlement Payments – For tax purposes, the monies paid to the Class will be allotted 10% to wages and 90% to penalties and interest. SA § 10.1.2. This mirrors Plaintiffs' estimates of the ratio of the amount of unreimbursed expenses (which are not wages) and the amount of unpaid wages allegedly incurred by CMs during the three-week period of initial sales training. Hammond Decl. ¶ 32.

9. Scope of Release and Final Judgment – Class Members will release all claims that are alleged against Defendant in the First Amended Complaint ("FAC") or that reasonably could have been alleged based on the facts asserted in the FAC on their behalves. SA §§ 18, 19. This Settlement will extinguish the claims alleged in *Lori Cruz v. Hibu, Inc., et al.,* United States District Court for the Eastern District of California, Case No. 2:22-cv-00959, under Labor Code § 1194, 510, 201, 202, 203, and 226(a) and (e), and 2699, only related to work performed during the first three weeks of CMs' employment (initial sales training). SA § 20. This Settlement will also extinguish claims for PAGA Penalties asserted in the FAC and claims for PAGA Penalties asserted in the *Cruz* case arising from work performed during the first three weeks of employment or from Hibu's alleged failure during the PAGA Period to reimburse business expenses in violation of Labor Code § 2802. Id.; Hammond Decl. Id. ¶ 54-55. Named Plaintiffs will also give additional general releases in favor of Defendant in consideration for a portion ($500) of each of their service awards. SA § 21.

III. OVERVIEW OF THE LITIGATION

A. Pleadings

Plaintiffs filed this action on January 12, 2022, and a First Amended Complaint on April 12, 2022, alleging that Defendant required Class Members to work from their home offices and incur home office expenses, including cell phones, printing supplies, utilities, internet, mobile apps, and software.

Hammond Decl. ¶ 8. Class Members were also required to use their personal vehicles in order to travel between their home office and Hibu's current and prospective clients' places of business in order to make sales. For most of the Class Period, rather than require Class Members to track and submit their actual expenses incurred each month to Defendant, Defendant reimbursed CMs a flat monthly stipend, in violation of California Labor Code § 2802. Id. In April 2022, Hibu changed its reimbursement practice from a stipend to reimbursement of business expenses based on monthly reporting by the CM. Hammond Decl. ¶ 12.

Plaintiffs also allege that CMs spent the first three weeks of their employment attending initial sales training. Plaintiffs allege that during this time, CMs were not spending more than 50% of their time away from the employer's place of business engaged in sales, and did not fall within the outside salesperson exemption. Hammond Decl. ¶ 9. As a result, Plaintiffs contend that during the initial training period, Defendant was required to pay CMs overtime pay pursuant to Labor Code § 510, which Defendant failed to do. Id. Plaintiffs contend that during the initial training weeks, CMs were also entitled to wage statements that listed their total hours worked and applicable hourly rates pursuant to Labor Code §§ 226(a)(2) and (a)(9). Id. ¶ 9. However, Defendant did not track their hours worked and did not include on their wage statements any entries for actual hours worked or applicable hourly rates. Plaintiffs allege that Defendant's practice with respect to CMs' wage statements was not a result of an unintentional payroll error, or clerical mistake, but rather a result of Defendant's regular policies and practices. Plaintiffs also alleged that CMs suffered injury because they could not determine from the wage statements alone the number of actual hours worked, or an applicable hourly rate. Id. ¶ 28. Finally, Plaintiffs allege that CMs were entitled to waiting time penalties under Labor Code § 203 as a result of Defendant's failure to pay overtime. Id. ¶ 9.

In its Answer, Defendant generally denied all Plaintiffs' allegations and raised 38 affirmative defenses, including that any violation of the Labor Code was not knowing and willful; that Defendant disputed in good faith that CMs were not owed overtime pay; that CMs' wage statements were compliant and CMs were not injured; that CMs were properly classified as exempt throughout their employment; and that Defendant did reimburse CMs for all of their reasonable and necessarily incurred business expenses. Hammond Decl. ¶ 10.

B. Pre-Mediation Investigation and Discovery

Shortly after the Complaint was filed, the parties agreed to engage in informal discovery and attend mediation. Defendant produced key data and documents as part of informal discovery including:

(a) dates of employment for each Class Member from the start of the Class Period through to July 31, 2022, including start date, end date, leaves of absences (if any), training dates for each Class Member who completed an initial sales training during the Class Period, and whether the training was in-person or virtual; (b) expense reimbursement policies in effect during the Class Period; and (c) Plaintiffs' personnel files. Hammond Decl. ¶ 11.

Plaintiffs' Counsel also conducted their own investigation, including in-depth discussions with each Plaintiff, and analyzed the data produced by Defendant to calculate the data points necessary to thoroughly evaluate their class claims, including the class size, the number of weeks worked by the Class, and number of weeks Class Members spent attending trainings, and extrapolated these data points out to the end of 2022. Id.

C. Mediation

On September 14, 2022, the Parties participated in a mediation session with the Hon. Brian C. Walsh, a former complex litigation judge on the Santa Clara County Superior Court and an experienced mediator who has mediated numerous wage-and-hour class and PAGA actions. Hammond Decl. ¶ 13. Prior to the mediation, the parties submitted detailed mediation briefs supported by documents obtained in informal discovery. Id. The parties reached an agreement at mediation via a Memorandum of Understanding, which was subsequently finalized in a formal settlement agreement that is presented 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, 439-40 (2000).

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

A. The Class Is Ascertainable and Sufficiently Numerous

Whether a class is ascertainable is determined by examining the class definition, the size of the class, and the means available for identifying class members. *See Reyes v. Board of Supervisors*, 196

Cal. App. 3d 1263, 1271 (1987). Class members are "ascertainable" when they may be readily identified without unreasonable expense or time by reference to official records. *See Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019). These criteria are met here as Defendant's records are sufficient to permit identification of the members of the Classes. The Class is sufficiently numerous because it consists of 133 Class Members as of July 31, 2022 (which will increase by the number of individuals hired by Defendant between July 31, 2022 and December 13, 2022). Hammond Decl. ¶ 3; *see also Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981); 1 Newberg on Class Actions § 3.12 (5th ed. 2011) ("[A] class of 40 or more members raises a presumption of impracticability of joinder.").

B. "Community of Interest" Exists Among CMs

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

1. Common Questions of Law and Fact Predominate

Where the defendant employer's policies or conduct is uniformly directed at a class or classes of employees, as it is here, the class-wide impact of the defendant's policies satisfies the commonality requirement. *See Sav-On Drugs Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 331 (2004) (upholding class certification, where the common issue was whether the employer properly classified grocery store managers as exempt from California's overtime requirements). Plaintiffs challenge Defendant's policies that raise predominant common questions of law and fact including whether Defendant reimbursed business expenses necessarily incurred by Class Members, whether CMs were required to work overtime, and whether Hibu issued inaccurate wage statements and failed to pay all wages at the time of discharge.

2. Plaintiffs' Claims Are Typical of the Class Claims

Plaintiffs' claims are typical of the Class that they seek to represent because they were subject to the same compensation and expense reimbursement policies and practices, suffered the same types of injury, and seek the same types of relief, as the putative Class. *See Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007); *see also* 1-3 California Class Actions Practice and Procedure § 3.02 (2007).

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 and quotation marks omitted). Both elements are satisfied here. Plaintiffs' Counsel are highly skilled and experienced in similar cases and have extensive class action litigation experience. Hammond Decl. ¶ 6 and **Exhibit 1.** Plaintiffs are committed to representing the interests of the Class, do not have any conflicts with any CM, and their interests are virtually coextensive with those of the CMs. *See* Declarations of named Plaintiffs, filed herewith.

C. This Class Action Is a Superior Method of Adjudication

Plaintiffs' claims are based on Plaintiffs' contentions that Defendant had uniform policies and/or practices of failing to reimburse Class Members' business expenses, failing to pay them overtime wages, issuing inaccurate wage statements, and failing to pay all wages upon discharge. All of these claims involve common evidence, including reimbursement policies, compensation policies, and wage statements. Accordingly, it would be inefficient to resolve the Class Members' claims at separate trials. *See Bufil v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008). The class action mechanism in this case will also allow Plaintiffs and the class to obtain redress for their relatively small claims, which would otherwise be impractical to litigate on an individual basis.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. The Two Step Settlement Approval Process

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

B. The Settlement is Fair and Reasonable

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

Retail, Inc., 168 Cal. App. 4th 116 (2008) (quoting *Dunk*, 48 Cal. App. 4th at 1801). This settlement meets all of the criteria for preliminary approval.

1. <u>The Strength of the Plaintiffs' Case Balanced Against The Settlement Amount</u>

Comparison of the extent of the class recovery to the strength of Plaintiffs' case is the most important factor in analyzing the fairness of the settlement. *Kullar,* 168 Cal. App. 4th at 130. The $140,000 of the GSA represents 17% of Defendant's maximum potential exposure to their claims and 70% of Defendant's realistic exposure (excluding PAGA). Hammond Decl. ¶ 35. The average payment per CM (based on the 133 CMs as of July 31, 2022) is $1,052.63 gross, and $434.84 net, and the highest estimated payment is approximately $2,408 net. Id. ¶ 36. Although Plaintiffs believe that the Class has strong claims, they acknowledge the serious obstacle presented to Plaintiffs' class claims by the risks posed by certification and the merits of each claim, which warrant a settlement at less than "complete victory" value, as addressed below.

a. **<u>Unreimbursed Expense Claim (Labor Code § 2802)</u>**: Plaintiffs calculated Defendant's maximum exposure for unreimbursed expenses as **$352,549**. Hammond Decl. ¶ 19.

i. **Class Certification Risk**: Defendant vigorously contended that Plaintiffs would be unable to certify their class claims, given the difficulty of determining the amount of reasonable and necessary business expenses actually incurred by the CMs and whether any CMs did, in fact, have unreimbursed business expenses; that CMs had different expenses and different work circumstances; that each CM's business expenses varied from day to day, from week to week and from month to month; and that the expenses that were reasonable for one CM might not have been reasonable for another. Defendant contended that, as a result, individualized issues would prevent class certification in this case. Plaintiffs applied a 50% reduction for this risk. Hammond Decl. ¶ 20.

ii. **Merits Risk**: Defendant contended that Plaintiffs' unreimbursed expense estimates were grossly inflated. Defendant contended that its own records indicated that CMs in fact drive on average less than 650 miles per month, as opposed to the 1,500 miles per month that Plaintiffs claim on average to have driven. Defendant further contended that only a fraction of the home office expenses Plaintiffs allege they incurred each month were attributable to working for Hibu. Thus, Hibu contended that the $900,000 it paid out to CMs for their expenses actually exceeded their out-of-pocket expenses. Hammond Decl. ¶ 21. Defendant Plaintiffs applied a 50% discount for the argument that a fact finder would find that Plaintiffs' estimated unreimbursed expenses were inflated, and that even if expenses were incurred, they were voluntary or minimal. After applying discounts, for settlement purposes, Defendant's

realistic exposure was **$88,137.** Id. ¶ 22.

b. Overtime Claim (Labor Code §§ 510, 1194): Plaintiffs calculated Defendant's maximum exposure to the unpaid wages claim as **$60,968.** Hammond Decl. ¶ 24.

i. Class Certification Risk: Defendant contended that CMs were properly classified as outside salespersons including during the initial training session, and that the question of whether CMs spent more than half their time away from Defendant's place of business making sales during this time would lead to manageability issues. Defendant also contended that CMs did not track their hours worked, leading to individualized issues as to whether CMs actually worked overtime, and whether any overtime worked was voluntary. Plaintiffs applied a 50% discount for this risk. Hammond Decl. ¶ 25.

ii. Merits Risk: Defendant contended that CMs were properly classified as outside salespersons including during initial sales training. Defendant further contended that even if the CMs were not properly classified as outside salespersons including during initial sales training, the schedule for initial sales training did not require them to work any overtime, especially from March 2020 onwards when Hibu changed to a completely virtual training format. Plaintiffs applied a 50% discount for the risk that Defendant would successfully argue that CMs worked no overtime during the initial training, which reduced Defendant's exposure to **$15,242**. Hammond Decl. ¶ 26.

c. Wage Statement Claim (Labor Code § 226(e)): Plaintiffs calculated Defendant's maximum liability on the wage statement claim as **$6,900.** Hammond Decl. ¶ 29.

i. Class Certification and Merits Risks: Plaintiffs applied the same 50% discount applied to the underlying claim for certification risk. Id. ¶ 30. Plaintiffs applied a further 50% discount for the risk that a court would find that only the initial $50 penalty applied to each violation because Defendant did not receive notice that its wage statements were noncompliant, and so there are arguably no "subsequent" violation; and for Defendant's affirmative defense that Plaintiffs did not suffer any injury as required under Labor Code § 226(e). Id.; *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 § 226(e) penalty applied because nothing in the recorded showed defendant had notice that its wage statements were noncompliant). This reduced Defendant's exposure to **$1,725**. Hammond Decl. ¶ 30.

d. Waiting Time Penalties (Labor Code §§ 201-203): Plaintiffs calculated Defendant's maximum liability on the waiting time penalties claim as **$382,234**. Hammond Decl. ¶ 32.

i. Class and Merits Certification: Plaintiffs applied the same 50% discount for the certification risk applied to the underlying overtime claim. Id. ¶ 33. Plaintiffs applied a further 50% discount for Defendant's affirmative defense that any alleged failure to pay all wages due upon discharge was not willful because there existed a good faith dispute that CMs were exempt, and therefore not entitled to overtime pay. Id. This reduced Defendant's exposure on the waiting time penalties claim to **$95,558.** Id.

e. **The Gross Settlement Is Fair and Reasonable:** Plaintiffs calculated Hibu's maximum exposure (excluding PAGA) as $802,652 and the realistic exposure as $200,663, as follows:

Labor Code Section	Maximum Exposure	Realistic Exposure
Unreimbursed Expenses (§ 2802)	$352,549	$88,137
Unpaid Overtime (§§ 510 / 1194)	$60,968	$15,242
Wage Statements (§§ 226(a), (e))	$6,900	$1,725
Waiting Time Penalties (§ 203)	$382,234	$95,558
Total	$802,652	$200,663

Hammond Decl. ¶ 34. The $140,000 GSA represents 17% of Defendant's maximum exposure, and 70% of Defendant's realistic exposure (excluding PAGA). Hammond Decl. ¶ 35. The Net Settlement Amount will total approximately $57,333 (if the Court grants the fees and costs requested by Plaintiff in full). The average payment per CM (based on the 133 CMs as of July 31, 2022) is $1,052.63 net and $434.84 net, and a CM who works for the entire 5-year Class Period will receive approximately $2,408. Id. ¶ 36. These are significant recoveries when considering the risk associated with Defendant's defenses, class certification, and when considering the fact that Defendant reimbursed over $900,000 in expenses during the Class Period. Id.

f. **The PAGA Allocation is Fair and Adequate**: Plaintiffs calculated Defendant's maximum exposure for PAGA, applying the initial $100 penalty per pay period, as **$91,400** (because Defendant never received notice from the Labor Commissioner or the Court so there are arguably no "subsequent" violations). *Bernstein v. Virgin Am., Inc.,* Nos. 19-15382, 20-15186, 2021 U.S. App. LEXIS 6641, *35-36 (9th Cir. Mar. 8, 2021) (holding that "subsequent" violations for purposes of PAGA do not occur until employer has been notified that it is violating a Labor Code provision). Hammond Decl. ¶ 37. The $5,000 allocated to PAGA represents approximately 5% of Defendant's exposure, which is more

than PAGA allocations in other cases that received final approval. ¶ 38. The PAGA allocation is fair and reasonable for several reasons.

First, the overall settlement resulted in robust relief for each Class Member 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). Hammond Decl. ¶ 39.

Second, Hibu contended that it complied at all times with the Labor Code, that its expense reimbursements and stipends to the CMs resulted in the over-reimbursement of expenses, and that it in April 2022, Hibu changed its reimbursement practice from a stipend to reimbursement of business expenses based on monthly reporting by the CM. Hammond Decl. ¶ 40. Thus, the lawsuit fulfills the purpose of PAGA which is to 'remediate present violations and deter future ones,' not to redress employees' injuries." *Kim v. Reins International California, Inc.*, 9 Cal. 5th 73, 86 (2020); *Cotter v. Lyft, Inc.,* 193 F. Supp. 3d 1030, 1037 (2016) (significant reduction to PAGA penalties appropriate because the law was not clear and there was thus no deliberate violation). In light of these changes, the Court would likely reduce any award of PAGA penalties as "unjust, arbitrary and oppressive, or confiscatory" under Labor Code § 2699(i) .

Third, Defendant contended that Plaintiffs' claims for PAGA Penalties would fail for the same reasons the underlying Labor Code claims would fail. Hammond Decl. ¶ 41.

Fourth, Hibu contended that PAGA claims would be found unmanageable because only CMs who actually incurred unpaid overtime 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. ¶ 42; *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, Plaintiff 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.

2. The Risk, Expense, Complexity and Likely Duration of Further Litigation Support the Fairness and Reasonableness of the Settlement

If the parties continued to litigate this case, Plaintiffs would have to clear hurdles including pre-trial dispositive motions and class certification. Whichever claims – if any – cleared these hurdles would

face trial. Regardless of the outcome at trial, the losing party would likely appeal. This settlement provides an early resolution of a dispute, and CMs will recover in the relatively near future if the settlement is finally approved. *Id*. ¶¶ 43-44.

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

As described in detail in the Hammond Declaration, the parties have engaged in extensive informal discovery and were adequately informed to make the decision to settle this case on the proposed terms. Hammond Decl. ¶¶ 11-12.

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

As discussed above, Class Counsel has extensive experience in class action litigation and have been determined by numerous courts to be adequate class counsel. Hammond Decl. ¶ 6. Class Counsel has represented thousands of employees in similar unpaid wage cases since 2016, and recently litigated one such case all the way through trial. Id. ¶ 6, 39. Class Counsel considers the settlement to be fair, reasonable and adequate. The average payment per CM (based on a class size of 133 CMs) is $1,052.63 gross and $434.84 net, and a Class Member who works for the entire Class Period will receive approximately $2,408 net. Id. ¶ 36. This is a robust recovery, especially given the defenses that Defendant asserted throughout the litigation.

5. Reaction of The CMs to The Proposed Settlement

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

C. The Proposed Class Notice Content and Procedure Are Adequate

The proposed Notice here meets the standards of constitutional due process since it provides all the information a reasonable person would need to make a fully informed decision about the settlement. *See Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950). The proposed Notice informs CMs of (1) the material terms of the settlement, (2) the proposed fees and costs of Class Counsel and for settlement administration, (3) the proposed service awards to the Named Plaintiffs; (4) how CMs may opt out of, or object to the Settlement; (5) details about the court hearing on settlement approval, and (6) how CMs can obtain additional information. *See* Cal. Rules of Court, Rule 3.766 and **Exhibit A** to the Settlement Agreement. In addition, the proposed Notice contains information about each settling class member's award under the distribution formula and how they can challenge the data used in calculating their settlement awards, and the tax treatment and possible tax consequences of their awards. Therefore,

the Court should approve the Notice.

The procedure for distribution of notice meets the standard requiring that the notice has "a reasonable chance of reaching a substantial percentage of the CMs." *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 974 (1975). Here, the Notice will be sent by first class mail to the most recent address of each CM (SA § 11.1.3) and skip tracing will be employed for all Notices returned as undeliverable (SA § 11.1.4). As such, the Notice is likely to reach most, if not all, CMs.

D. The Service Award to Each Class Representatives Is Reasonable

Plaintiffs will request a service award of $5,000 to Plaintiff Kuntz, and $2,500 each to Plaintiffs Hurtado and Pasno to recognize the time and effort they expended on behalf of the Class, the reputational risk associated with suing their employer, and the general release they are giving Defendant. Hammond Decl. ¶ 51. The requested service awards fall well within the range of incentive payments typically awarded to in similar class actions. *See e.g.*, *Cellphone Termination Fee Cases,* 186 Cal. App. 4th 1380, 1393 (2010) (affirming incentive awards of $10,000).

E. The Requested Attorneys' Fees and Costs Are Reasonable

In addition, Plaintiffs' Counsel will request attorneys' fees of not more than 1/3 of the GSA. SA § 6. This fee amount is fair, reasonable and represents an amount that is typically approved in class actions by California courts.[3] Plaintiffs also request reimbursement for reasonable out-of-pocket litigation costs and expenses incurred by Class Counsel up to $15,000. SA § 6. If the Court grants preliminary approval and authorizes the dissemination of notice of the settlement to the class, Class Counsel anticipates filing a Motion for Attorneys' Fees and Costs that will be scheduled to be heard following the notice process. *Id.* ¶¶ 50.

F. The *Cy Pres* Designee is Appropriate

The Settlement designates Bet Tzedek as the *cy pres* beneficiary and recipient of funds associated with any uncashed checks. SA § 15. Bet Tzedek is a non-profit organization that provides access to the civil justice system to clients that are low-income, and for communities victimized by discrimination and civil rights abuses. Hammond Decl. ¶ 52. In compliance with Code of Civil Proc. § 382.4, Plaintiffs and Plaintiffs' Counsel certifies that they have no connection to or relationship with Bet Tzedek that could reasonably create the appearance of impropriety as between the selection of the recipient of the money

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

or thing of value and the interests of the class. *Id.* ¶ 53; Declaration of Plaintiffs, filed herewith.

VI. CONCLUSION

The settlement provides substantial relief for the Class and is clearly within the range of acceptable settlements. Accordingly, Plaintiffs respectfully request that the Court preliminarily approve the settlement, approve the proposed Class Notice, and schedule a final approval hearing.

Dated: December 5, 2023

Respectfully submitted,

Julian Hammond

Attorneys for Plaintiffs and the Putative Class