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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ORANGE

11 JAMES LAWSON, individually and on behalf of
all others similarly situated,

12 Plaintiff,

13 vs.

14 CONSUMER PORTFOLIO SERVICES, INC., a
California Corporation; and DOES 1-50, inclusive

15 Defendants.
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Case No.: 30-2018-01021149-CU-OE-CXC

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

Date: August 25, 2023
Time: 1:30 pm
Dept: CX 103
Before: Hon. Lon Hurwitz

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1 **I. INTRODUCTION**

2 If this proposed class action settlement is ultimately approved, class members will receive
3 checks for, on average, \$15,000, with some class members receiving more than \$30,000. Class
4 members will receive these significant awards without having to file individual arbitrations even
5 though Defendant Consumer Portfolio Services, Inc. (“CPS”) has arbitration agreements with most of
6 them and this Court already found one of these standardized arbitration agreements valid. This
7 proposed settlement agreement was reached after almost five years of substantial litigation, including
8 cross-motions for summary adjudication, two mediations, extensive discovery, and with trial scheduled
9 for early 2024.

10 Plaintiff James Lawson thus requests preliminary approval of this California class and
11 California Private Attorneys General Act (“PAGA”) settlement.¹ Under the agreement, CPS will pay
12 \$1,100,000, plus the employer’s share of payroll taxes, to resolve the California wage and hour claims
13 and Fair Labor Standards Act (“FLSA”) claims of the California class members, and the individual
14 claims of a former employee in Louisiana who filed a Consent to Join his FLSA claim in this case.

15 This settlement is non-reversionary, and checks will be mailed to all 30 class members, unless
16 an opt-out form is submitted. The proposed class includes all non-exempt Marketing Representatives,
17 Field Sales Representatives, Regional Sales Managers, or Field Marketing Sales Representatives
18 (“Reps”) working for CPS in the state of California at any time between September 24, 2014, and
19 August 29, 2023, or the date of preliminary approval, whichever occurs first.

20 The claims released under the agreement track the claims in this action. Those claims include
21 failure to pay overtime wages because CPS misclassified Reps as exempt from overtime, reimburse
22 business expenses, provide meal and rest periods, provide accurate wage statements, and pay all wages
23 due at time of discharge. Based on these Labor Code violations, Plaintiff alleges violations of the
24 California Unfair Competition Law, California Business and Professions Code section 17200 *et seq.*

25
26 _____
27 ¹ The proposed settlement is attached to the Declaration of Byron Goldstein (“Goldstein Decl.”),
28 submitted herewith, at Ex 1 (“Settlement Agreement” or “Settlement”).

1 (“UCL”) and the California Private Attorneys General Act, California Labor Code section 2698 *et seq.*
2 (“PAGA”). CPS contends that its employment policies and practices are lawful and appropriate.

3 On June 21, 2023, the parties participated in a mediation session with respected mediator
4 Jeffrey Ross. Following the mediation, the parties accepted a mediator’s proposal on June 28, 2023
5 and signed a Memorandum of Understanding on July 10, 2023. The Parties then negotiated over the
6 details of the Settlement Agreement, which is now presented to the Court for preliminary approval.

7 In this Motion, Plaintiff requests the Court to (1) grant preliminary approval of the proposed
8 Settlement, including the settlement amount and the plan for allocation and distribution of settlement
9 funds, (2) approve the proposed notice plan and the dates by which Settlement Class Members must
10 opt out or object to the Settlement, (3) appoint Atticus Administration, LLC as Settlement
11 Administrator, (4) conditionally certify the proposed Settlement Class, (5) conditionally appoint
12 Plaintiff James Lawson as Class Representative and Plaintiff’s Counsel, Goldstein, Borgen, Dardarian
13 & Ho, as Class Counsel for the Settlement Class, and (6) schedule a hearing date for Plaintiff’s Motion
14 for Final Approval of Class and Representative Action Settlement, Motion for Attorneys’ Fees and
15 Costs, and Motion for Service Award. CPS does not oppose this motion.

16 **II. BACKGROUND**

17 **A. Factual Background and Parties’ Positions**

18 CPS is a California corporation engaged in the business of purchasing and servicing subprime
19 automobile loan contracts originated primarily by franchised and independent dealerships.

20 Plaintiff and putative class members are current and former CPS employees in California who
21 worked as Reps at any time between September 24, 2014, and August 29, 2023, or the date of
22 preliminary approval, whichever occurs first. Reps visit auto dealerships, where they seek to increase
23 the number of auto loan contracts CPS purchases or loans CPS provides for the purchasing of
24 automobiles.

25 Plaintiff alleges CPS misclassified Reps as non-exempt under California and federal law, Reps
26 worked overtime hours, and CPS failed to pay Reps overtime wages. CPS argues Reps are entitled to
27 no overtime wages because they fall under the California and federal “outside sales exemption.”
28

1 Plaintiff also alleges that CPS did not reimburse Reps for business expenses related to the use
2 of their cars, phones, home internet, and an App (Autoniq) for CPS work. CPS contends that Reps
3 were properly reimbursed for their business expenses.

4 Next, Plaintiff alleges meal period and rest period violations because CPS requires Reps to
5 constantly be on call to answer questions from dealers over the phone and on email unless they are
6 meeting with a dealer. CPS has no written policies providing meal and rest periods to Reps. CPS
7 contends that Reps had adequate time off during their shifts to take meal and rest breaks.

8 Plaintiff alleges that CPS' wage statements fail to accurately reflect the total hours worked and
9 do not show the premium wages owed for missed meal and rest periods. Because CPS contends that
10 they will win on the underlying Labor Code violations and are thus not liable for these wage statement
11 violations.

12 Plaintiff also alleges waiting time violations against CPS for failure to pay overtime wages and
13 meal and rest period premiums to employees who left their position at CPS. CPS again argues that
14 they will win on the underlying Labor Code claims, and that they had have a good-faith defense to any
15 waiting time claims.

16 CPS has produced arbitration agreements for most putative class members. Plaintiff filed
17 analogous PAGA claims for each of the above alleged violations, which cannot be waived through
18 arbitration. *See Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 383 (2014) (“an employee’s right
19 to bring a PAGA action is unwaivable”); *Adolph v. Uber Techs., Inc.*, No. S274671, 2023 WL
20 4553702 (Cal. July 17, 2023) (plaintiff can pursue non-individual PAGA claims in court even if
21 compelled to arbitration on individual claims).

22 **B. Procedural Background**

23 On June 4, 2018, Plaintiff Lawson gave written notice by certified mail of CPS' alleged
24 violations of various provisions of the California Labor Code to the Labor and Workforce
25 Development Agency (“LWDA”) and to CPS pursuant to PAGA. Goldstein Decl. ¶ 4. The LWDA
26 did not indicate an intention to investigate the alleged violations following the PAGA notice letter. *Id.*

1 Plaintiff Lawson filed the original complaint in this Court on September 24, 2018 (ROA 2),
2 followed by a First Amended Complaint on November 5, 2018 (ROA 15). CPS answered the First
3 Amended Complaint on December 4, 2018 (ROA 20). Sarah Brown filed a Consent to Join the FLSA
4 collective action on January 17, 2019 (ROA 31) and Christopher J. Daniels filed a Consent to Join the
5 FLSA collective action on April 9, 2019 (ROA 53).

6 The parties engaged in substantial litigation. Shortly after Brown filed her Consent to Join, on
7 CPS filed a motion to compel Brown to individual arbitration (ROA 55). Plaintiff disputed the factual
8 bases CPS relied on, providing three declarations from Plaintiff to show CPS failed to enter a valid
9 contract with Brown requiring individual. CPS responded with additional evidence, Plaintiff filed
10 objections to CPS' evidence and a sur-reply. The Court found CPS and Brown entered a valid contract
11 that required Brown to pursue her individual FLSA claim, which was the only claim Brown had with
12 the Court since a class was not certified, in arbitration (ROA 87).

13 The Parties then engaged in extensive discovery. CPS deposed Lawson on November 18,
14 2019. Plaintiff deposed CPS' person most qualified witness, John Harton, senior vice president of
15 program development, on November 19, 2019. Goldstein Decl. ¶ 8.

16 Plaintiff served four sets of special interrogatories, two sets of form interrogatories, one set of
17 requests for admission, and six sets of requests for production. Likewise, CPS severed numerous sets
18 of interrogatories and requests for production. CPS produced over 12,000 pages of documents,
19 including policy documents, job descriptions, timesheets, schedules, paystubs, contracts,
20 communications, and training documents. Plaintiff produced over 400 pages of documents including
21 expense bills, wage statements, time records, job descriptions, and company investigation documents.
22 Goldstein Decl. ¶ 8.

23 Throughout the discovery process, the Parties had dozens of written and phone meet and confer
24 communications. These discussions were productive, leading to a more efficient and effective
25 discovery process. For example, these discussions clarified the Reps' job duties, Reps' compensation
26 plans, CPS' decision to classify them as non-exempt, CPS' reliance on the outside sales exemption,
27
28

1 CPS' policy on business expense reimbursements, and CPS' wage statement exemplars. Goldstein
2 Decl. ¶ 9.

3 In addition to formal exchanges of discovery with CPS, Plaintiff's Counsel undertook
4 independent investigation, including in-depth discussions with Reps and other CPS employees in
5 California. Goldstein Decl. ¶ 10. CPS provided additional information before the Parties' two
6 mediations, an unsuccessful mediation with Jeff Krivis in July 2021 and then a successful mediation
7 with Jeff Ross on June 21, 2023. Goldstein Decl. ¶ 11.

8 Two months after the unsuccessful first mediation, in September 2021, the parties filed cross-
9 motions for summary adjudication on whether CPS correctly classified the aggrieved employees and
10 Plaintiff as exempt outside salespeople under California law and whether Plaintiff was correctly
11 classified under federal law. Goldstein Decl. ¶ 13. CPS changed counsel in April 2022. *Id.* After the
12 briefing, with its substantial amount of supporting evidence, Judge Glenda Sanders held a hearing on
13 May 17, 2022. Based on the Parties' arguments at the hearing, Judge Sanders scheduled a second date
14 for oral argument on September 1, 2022. *Id.* The court denied both parties' motions on September 1,
15 2022. *Id.*

16 After the summary adjudication motions were denied, litigation resumed, with Plaintiff
17 pursuing the remaining discovery they needed for trial and seeking to schedule the trial for as soon as
18 possible. Goldstein Decl. ¶ 14. After this Court set the trial for March 11, 2024, the parties scheduled
19 their second mediation. Goldstein Decl. ¶ 15.

20 On June 21, 2023, the parties engaged in a mediation with experienced mediator Jeffrey Ross.
21 Goldstein Decl. ¶ 16. The parties did not reach a settlement at the end of the day, but Mr. Ross
22 prepared a mediator's proposal. *Id.* Both parties considered the proposal and agreed to accept it on
23 June 28, 2023. *Id.* The Parties signed a Memorandum of Understanding on July 10, 2023 and
24 negotiated the long-form Settlement Agreement. *Id.*

25 **C. The Terms of the Settlement**

26 This Settlement resolves Plaintiff's and the Proposed Class's claims against CPS. The basic
27 terms of the Settlement are:

1 **1. Gross Settlement Amount**

2 CPS has agreed to pay a Gross Settlement Amount of \$1.1 million dollars (\$1,100,000) that
3 includes all settlement payments to Class Members, Class Administration Costs, Class Counsel fees
4 and costs/expenses, Service Payment to the Class Representative, the FLSA Individual Settlement, and
5 a \$100,000 PAGA Fund (75% to be paid to the State of California). Settlement Agreement ¶ 24, 51(a).
6 The Gross Settlement Amount is non-reversionary, and it does not include CPS' share of payroll taxes,
7 which CPS will pay separately. Settlement Agreement ¶ 24.

8 **2. Class Definition and Class Period**

9 The Class is defined as all persons employed as non-exempt Reps by CPS in the state of
10 California at any time between September 24, 2014 and August 29, 2023 or the date of preliminary
11 approval, whichever first occurs. *Id.* ¶¶ 3, 11.

12 **3. Attorneys' Fees, Costs, Named Plaintiff's Service Payment, and FLSA Individual**
13 **Settlement**

14 The Settlement provides for up to \$440,000 in attorney's fees as well as reimbursement of out-
15 of-pocket litigation costs and expenses, estimated at \$65,000, to be subject to separate motion and
16 substantiated through attorney declaration. *Id.* ¶ 51(e)-(f). Up to \$30,000 is allocated to payment to
17 the Class Representative as Service Payment and as consideration for the general releases with CPS.
18 *Id.* ¶ 51(b). The Settlement also allocates up to fifteen thousand dollars (\$15,000) as the FLSA
19 Individual Settlement to Christopher Daniels in exchange for a general release with CPS. *Id.* ¶ 51(c).

20 **4. Settlement Administrator and Administration Costs**

21 The Settlement proposes the appointment of Atticus Administration, LLC as Settlement
22 Administrator and allocates up to \$10,000 for payment of administration expenses. *Id.* ¶¶ 4, 6.
23 Plaintiff's Counsel sought bids from different administrators and selected what they viewed as the best
24 option for the Class. Goldstein Decl. ¶ 18.

25 **5. PAGA Allocation**

26 The Settlement allocates \$100,000 to PAGA penalties, with 75% of that amount (\$75,000) to
27 be paid to the LWDA. *Id.* ¶ 51(a). The LWDA shall receive notice of the settlement at the same time
28

1 the Settlement is provided to the Court, as well as notice of the date, time, and location of the
2 preliminary approval hearing prior to the date set for the preliminary approval hearing. Goldstein
3 Decl. ¶ 35. Plaintiff’s Counsel will notify the LWDA of the date, time, and location of the final
4 approval hearing. *Id.* Opting out of the Settlement does not opt the Settlement Class Member out of
5 the PAGA payment or release. Settlement Agreement ¶ 45(b).

6 **6. Net Settlement Fund**

7 The Net Member Settlement Fund—*i.e.*, the amount remaining of the Settlement Fund after
8 deductions for attorneys’ fees and costs, the PAGA Fund, settlement administration expenses, the
9 FLSA Individual Settlement, and the Class Representative Service Award—will be distributed based
10 on each Eligible Class Member’s Work Weeks in relation to the total Eligible Class Member Work
11 Weeks. Settlement Agreement ¶ 51(g).

12 **7. Settlement Administration and Notice Procedures**

13 The Settlement Administrator will, among other tasks, distribute a Notice Packet to each Class
14 Member, and use skip-tracing and remailing when necessary for delivery; calculate payouts for each
15 Settlement Class Member and disclose this amount along with each Settlement Class Member’s total
16 number of Work Weeks and dates of employment during the Class Period; draw and distribute checks
17 to Settlement Class Members who do not opt-out; administer the Settlement Fund; mail any necessary
18 tax reporting forms to Settlement Class Members and the Parties; and report to the Court on the
19 notice/opt out process and payment of the Settlement Fund. *Id.* ¶ 6.

20 Within fourteen (14) calendar days of entry of Preliminary Approval, CPS shall cause to be
21 delivered by email or otherwise to the Class Administrator an Excel spreadsheet of the Class Members
22 that includes their (a) names, (b) last known home address(es), (c) full social security numbers, (d) last
23 known personal phone numbers, (e) last known personal email addresses (if known), (f) number of
24 Work Weeks for the Class Period, and (g) start and end dates of employment in a Class Position. *Id.* at
25 ¶ 42. At the same time, CPS shall provide Class Counsel the same information as that contained in (a),
26 (f), (g). *Id.* The Class Administrator and Class Counsel shall keep the Class List and any other
27
28

1 information regarding Class Members obtained through this Settlement confidential, and shall use and
2 disclose such information only for purposes of this Settlement and for no other purpose. *Id.*

3 **8. Class Notice**

4 The proposed Class Notice explains the terms of the Settlement and how to receive a
5 Settlement Payment, object, or opt out. *Id.* ¶ 44. All requests for exclusion must be submitted by mail
6 to the Court no later than 60 days after the Class Administrator’s mailing of the Class Notice or 15
7 days after a re-mailing of Notice, whichever is later. *Id.* ¶ 45(a). Class Notice will also inform
8 Settlement Class members of how to submit disputes regarding their dates worked or job position. *Id.*
9 ¶ 45(d).

10 **9. Tax Consequences of Settlement Payments**

11 The Parties agree that 33% of each Class Member Award shall be allocated to Form W-2
12 wages, and 67% to penalties, interest, and other non-wages subject to Form 1099 reporting. *Id.* at ¶ 53.
13 Each PAGA Award shall be treated as 100% penalties subject to Form 1099 reporting. *Id.* The Class
14 Administrator will calculate from the Net Settlement Fund each Eligible Class Member’s share of the
15 settlement, employee taxes, deductions, contributions and other amounts required to be paid to
16 government agencies and/or tax authorities, which amounts then shall be paid by the Class
17 Administrator from the Qualified Settlement Fund. *Id.* CPS is responsible for payment of all
18 employer payroll taxes (including but not limited to payroll taxes) and its own share of withholdings,
19 fees, deductions, contributions and other amounts to be paid to government agencies and/or tax
20 authorities. *Id.* The Class Administrator shall also advise CPS as to the amounts that CPS is required
21 to remit in terms of employer payroll taxes and its own shares of other taxes, deductions, fees,
22 contributions and other amounts required to be paid to government agencies and/or tax authorities.
23 The Class Administrator shall provide, as appropriate, an IRS Form W-2 and Form 1099, and any
24 other tax documentation required by law, to each Eligible Class Member, Plaintiff and Opt-in Plaintiff,
25 and Class Counsel. *Id.*

1 The Claims Administrator shall be solely responsible for complying with the reporting and any
2 payment obligations imposed by federal, state, and local tax agencies, and preparing, filing, and
3 issuing any required tax forms related to payments under this Settlement. *Id.*

4 **10. Scope of Release and Final Judgment**

5 The release contemplated by the proposed Settlement is based on the claims and allegations in
6 the First Amended Complaint. *Id.* ¶ 36-37. The Released Claims include all claims that were or could
7 have been raised arising from or based on facts alleged in the complaints or PAGA notices. *Id.* The
8 Plaintiff and Opt-in Plaintiff additionally agree to a general release of all potential claims against CPS,
9 as part of the consideration for their proposed service award or FLSA Individual Settlement,
10 respectively. *Id.* ¶ 50.

11 **III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**
12 **BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE.**

13 **A. The Two-Step Settlement Approval Process**

14 A class action settlement requires “approval of the court after a hearing.” Cal. Rule of Court
15 3.769(a). Court approval is a two-step process: (1) the court undertakes a preliminary review of the
16 fairness, reasonableness, and adequacy of the settlement, and (2) the court conducts a detailed review
17 after notice has been distributed to Class Members for their comments or objections. *Id.* at 3.769(c)-
18 (g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009).

19 After notice of settlement has been distributed, then the court considers the extent of opt-outs,
20 evaluates any objections, and makes a final determination whether to approve the settlement. Cal.
21 Rule of Court 3.769(f), (g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1118. In deciding
22 whether a settlement is reasonable at the final fairness stage courts consider: (1) the strength of the
23 plaintiff’s case balanced against the settlement amount; (2) “the risk, expense, complexity and likely
24 duration of further litigation, including the risk of maintaining class action status through trial;” (3)
25 “the extent of discovery completed and the stage of the proceedings;” (4) “the experience and view of
26 counsel” and (5) “the reaction of the class members to the proposed settlement.” *Kullar v. Foot Locker*

1 *Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (citing *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794,
2 1801 (1996)) (internal quotations omitted).

3 The trial court has broad discretion in determining whether a settlement is fair. *See In re Sutter*
4 *Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 504-05 (2009). A “presumption of fairness”
5 exists when: (1) a settlement is reached through arm’s length bargaining; (2) investigation and
6 discovery are sufficient to allow counsel and the Court to act intelligently; (3) counsel is experienced
7 in similar litigation; and (4) the percentage of objectors is small.² *Wershba v. Apple Computer, Inc.*, 91
8 Cal. App. 4th 224, 245 (2001), *disapproved of on another ground by Hernandez v. Restoration*
9 *Hardware, Inc.*, 4 Cal. 5th 260, 269 (2018) (internal citation omitted).

10 **B. The Settlement Merits a Preliminary Finding of Reasonableness.**

11 Preliminary approval is appropriate because the Settlement is well within the range of
12 reasonableness for each factor that the Court will consider at the final approval hearing.

13 **1. In Light of Significant Litigation Risks, the Settlement Provides Reasonable**
14 **Compensation for Class Members’ Damages.**

15 The amount of the settlement in light of the strength of the plaintiff’s case is the most important
16 “reasonableness” factor. *See Kullar*, 168 Cal. App. 4th at 130. Plaintiff believes the case has
17 significant strengths, but that there are also considerable risks to further litigation. This \$1.1 million,
18 non-reversionary Settlement will provide Class Members with a substantial payment for their claims
19 without the risks of continued litigation. Based on class data that ended in July 2023, Plaintiff
20 calculated rough average awards of about \$15,500 for each Class Member. Goldstein Decl. ¶ 26. The
21 maximum award is estimated to be approximately \$38,000, and the minimum award is estimated to be
22 \$1,900. Plaintiff Lawson is expected to receive an award of \$5,500. Goldstein Decl. ¶ 27.

23 The Settlement’s monetary relief compares favorably with Plaintiff’s Counsel’s calculations of
24 the realistic value of the class claims. Goldstein Decl. ¶ 28. Plaintiff provides below a summary of the
25 value of each claim that is being settled. The risks of each claim will be addressed in turn, along with

26 _____
27 ² The factor regarding percentage of objectors is not pertinent at the preliminary approval stage since
28 notice has not yet been distributed.

1 a comparison of the estimated potential recovery at trial on each claim compared to the discounted
2 settlement amount attributable to each claim. As explained below, when accounting for the various
3 litigation risks on CPS' various arguments regarding the merits of each claim, the settlement amount is
4 reasonable.

5 **a. The Overtime Claims**

6 Plaintiff's claim that CPS failed to pay overtime wages to Reps comprises a substantial portion
7 of the estimated damages to the Class. The significant risks for this claim include the arbitration
8 agreements with a class waiver that CPS has for most putative class members. Judge Sanders already
9 found one of these agreements enforceable. It is thus nearly impossible, if this case was litigated to
10 judgment, to obtain a class recovery for the overtime claim.

11 This claim also entirely hinges on whether the outside sales exemption applies to Reps.
12 Goldstein Decl. ¶ 28(a). Each reason that Plaintiff provides supporting why Reps are *not* outside
13 salespeople is contested by CPS and will require extensive fact-finding to be resolved. Both parties
14 lost their motion for summary adjudication on the issue, so there are significant factual disputes and
15 the risk of going to the jury on the issue.

16 Based on deposition testimony, job postings, and dealer agreements, Plaintiff contends that
17 Reps are not outside salespeople because CPS does not sell loans at all; rather, CPS purchases loan
18 contracts from dealers and then pools and securitizes them for profit. *See Salvador v. Brico, LLC*, No.
19 0:17-cv-61508-RLR, 2018 WL 1202823, at *1-3 (S.D. Fla. Mar. 8, 2018) (plaintiff was an outside
20 purchaser who acquired automobile inventory for his employer, which the company then sold for
21 profit, so the outside sales exemption did not apply).

22 CPS will likely argue that the sale is between CPS and car buyers, with CPS selling financing
23 to car buyers, akin to mortgage loan officers selling mortgages to home buyers. Goldstein Decl.
24 ¶ 28(a)(i).³ CPS will likely analogize Reps' work to that of mortgage loan officers who were found to

25
26 ³ In its Motion for Summary Adjudication, CPS argued that it is selling financial services to dealers.
27 With that Motion denied, CPS redefined the sale as between Reps and car buyers. This new theory
28 has been untested in court, which adds to the litigation risk. Goldstein Decl. ¶ 28(a)(i).

1 be outside salespeople. *See, e.g., Chao v. First Nat'l Lending Corp.*, 516 F. Supp. 2d 895, 901 (N.D.
2 Ohio 2006) (“[t]here is no question that the primary purpose of loan officers employed by FNL is to
3 make sales or obtain orders or contract for services”). Plaintiff is not aware of authority that directly
4 answers the question of whether companies like CPS are buying or selling loans. A jury would need to
5 make a fact-intensive decision on the issue.

6 Further, Plaintiff contends that even if CPS makes sales, Reps promote company sales, not their
7 own sales. *See Stickle v. Atria Senior Living, Inc.*, No. 3:20-cv-09220-WHA, 2022 WL 17178307, at
8 *1 (N.D. Cal. Nov. 23, 2022) (finding plaintiff community sales directors (“CSDs”) did *not* meet the
9 outside sales exemption even though they attracted seniors to their communities by making calls to
10 potential residents and maintained relationships by conducting on-going field visits); *Campanelli v.*
11 *Hershey Co.*, 765 F. Supp. 2d 1185, 1191 (N.D. Cal. 2011) (emphasizing important distinction
12 between individual sales and company sales). Because CPS retains discretion to reject credit
13 applications from dealers, Reps do not make sales because the link between the non-binding
14 commitment and commission is too attenuated. *See Ferguson v. Tex. Farm Bureau*, No. 6:17-cv-
15 00111-ADA-JCM, 2021 WL 2349340, at *18 (W.D. Tex. May 19, 2021) (finding solicitation of
16 policies did not meet the making sales element because defendants had “the authority to reject
17 applications”).

18 However, CPS is likely to argue that Reps are often involved in “working the deal,”
19 communicating with dealers and CPS to determine what CPS can do to capture the deal and have the
20 ability to affect the dealers’ decision to use CPS to fund contracts over its competitors. Goldstein
21 Decl. ¶ 28(a)(ii). CPS is likely to argue that the Supreme Court emphasized in *Christopher v.*
22 *SmithKline Beecham Corp.*, 567 U.S. 142, 165 n.23 (2012) that an employee who functions in all
23 relevant respects as an outside salesman should not be excluded from that category based on
24 technicalities. CPS is likely to argue that the requirement of “making sales” “is met whenever an
25 employee ‘in some sense make[s] a sale,’” such that Reps working the deal constitutes making sales.
26 *See id.* at 149. CPS will also argue that courts have determined that the primary duty of employees in
27 various industries that do not have regulatory laws preventing direct sales—like the utilities industry
28

1 (*Flood v. Just Mktg. Corp.*, 904 F.3d 219 (2d Cir. 2018)), retail of consumer goods (*Modeski v. Summit*
2 *Retail Sols., Inc.*, 470 F.3d 93 (D. Mass. 2020)), and insurance (*Martinez v. Superior HealthPlan, Inc.*,
3 371 F. Supp. 3d 370 (W.D. Tex. 2019))—were nonetheless engaged in “making sales” even though
4 their employer still had discretion to ultimately approve or deny the final sale to the customer, and the
5 customer could decide not to go through with the sale after making a non-binding commitment. *See*
6 *Flood*, 904 F.3d at 230-33; *Modeski*, 470 F. Supp. 3d at 103-09; *Martinez*, 371 F. Supp. 3d at 379-86.

7 The Parties also disagree about whether Reps spent more than 50 percent of their time making
8 sales, as required for the California outside sales exemption. CPS is likely to argue Reps spend nearly
9 all their time on activities related to increasing the number of contracts CPS funds for dealers within
10 their particular territories. Goldstein Decl. ¶ 28(a)(iii). But CPS’ “everything is sales” view fails to
11 present the court with any basis for finding that over 50 percent of the Reps’ time is spent on sales-
12 related tasks. *See Ross v. Ecolab Inc.*, No. 4:13-cv-5097-PJH, 2015 WL 5681323, at *6 (N.D. Cal.
13 Sept. 28, 2015) (granting summary judgment against defendant on outside sales exemption where
14 defendant failed to present evidence that quantified and distinguished what was sales and what was not
15 sales).

16 The question of whether the outside sales exemption applies to Reps thus requires extensive
17 fact-finding and numerous applications of law to a unique and untried set of facts. Plaintiff’s
18 calculations of CPS’ maximum exposure for overtime damages is roughly \$4.6 million. The
19 maximum exposure assumes 17.6 hours of overtime, which is based on time records of a sample of the
20 class members. CPS is likely to argue that Reps only clock in and out to track which days they
21 worked, rather than for accurate time-keeping. In addition, class members would only recover the full
22 amount if they pursued individual arbitration and won. Analogizing to the FLSA context, where the
23 typical opt-in rate is 14% to 25%, Plaintiff’s Counsel estimates that only 25% of class members would
24 have pursued individual arbitration. *See, e.g., Gutierrez-Bejar v. SOS Int’l, LLC*, No. 2:16-cv-09000-
25 JAK-JEM, 2019 WL 5683901, at *9 (C.D. Cal. Nov. 1, 2019) (noting that a 14.2% opt-in rate for the
26 FLSA action “is consistent with the typical opt-in rate for non-union-backed FLSA actions.”) (citation
27 omitted); *Bautista v. Harvest Mgmt. Sub LLC*, No. 2:12-cv-10004-FMO-CW, 2013 WL 12125768, at
28

1 *15 (C.D. Cal. Oct. 16, 2013) (“assuming a 20% to 25% opt-in rate” when preliminary approving a
2 FLSA collective action settlement); Goldstein Decl. ¶ 28(a)(iv). Based on the denial of both motions
3 for summary adjudication on the outside sales assumption, Plaintiff’s Counsel assumes a 50% success
4 rate for the overtime claims in arbitration, so the total value of the overtime claims would be roughly
5 \$570,000. *Id.*

6 **b. The Business Expense Claim**

7 Plaintiff alleges that CPS did not reimburse Reps for business expenses related to the use of
8 their cars, phones, home internet, and an App (Autoniq) for CPS work. This claim is not dependent on
9 the outside sales exemption, but the maximum exposure of \$167,000 is discounted 75% to account for
10 CPS’ contention that the majority of Class Members signed enforceable arbitration agreements, and
11 only 25% of class members would likely pursue individual arbitration, for a value of roughly \$42,000.
12 Goldstein Decl. ¶ 28(b)(i).

13 **c. Meal Period and Rest Period Claims**

14 Plaintiff calculates that CPS’ maximum exposure for the meal and rest period claims, including
15 interest, is \$651,084.49 for meal breaks and \$651,084.49 for rest breaks. CPS has no written policies
16 providing meal and rest periods to Reps, but CPS will argue that it is not required to have written
17 policies. CPS will argue that Reps had control over their schedule and enough downtime during their
18 workday to take uninterrupted meal and rest breaks, and that whether each class member was able to
19 take meal and rest breaks will result in fact-intensive determinations. Plaintiff expects CPS to claim
20 that individualized evidence, such as personal cell phone and financial records, can show that Plaintiff
21 was able to take breaks for personal tasks throughout the workday. Goldstein Decl. ¶ 28(c).
22 Considering these litigation risks and the arbitration agreements, Plaintiff believes that the meal and
23 rest period claims are properly discounted 75% to account for 25% of class members pursuing
24 individual arbitration and another 50% to account for litigation risk, for a total value of roughly
25 \$163,000 for the meal and rest break violations. *Id.* ¶ 28(c)(ii).

1 **d. Wage Statement and Waiting Time Claims**

2 Plaintiff further claims that the wage statements produced by CPS for Reps are incorrect
3 because they only show 40 hours per workweek and do not show the actual hours worked, even though
4 CPS has detailed time clock entries for Reps. Further, the wage statements do not show the premium
5 wages owed for missed meal and rest periods. *See Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th
6 93, 102 (2022) (violation of Cal. Lab. Code § 226 if meal and rest break premiums are not included in
7 wage statement). Plaintiff contends that Reps suffered injury for purposes of California Labor Code
8 section 226(e) because they are unable to easily determine the total hours worked. If CPS intentionally
9 classified Reps as exempt and failed to track overtime hours—a knowing and intentional failure by
10 CPS to provide accurate itemized wage statements—then Reps are entitled to statutory penalties under
11 section 226(e). Plaintiff further alleges that CPS owes waiting time penalties under California Labor
12 Code section 203 for unpaid overtime wages and meal and rest break premiums to employees who left
13 their position at CPS. Goldstein Decl. ¶ 28(d).

14 Plaintiff’s wage statement claims and waiting time claims are derivative of the alleged
15 violations discussed above and are therefore subject to same litigation risks. CPS will likely argue that
16 even if a violation did result, it was not the result of a “knowing and intentional” failure. CPS will
17 argue that they are not liable for penalties under the “subsequent pay periods” rate in California Labor
18 Code section 226(e)(1). For waiting time penalties under California Labor Code section 203, CPS will
19 assert that there is a “good faith dispute” that wages were due for daily overtime, and meal and rest
20 break premiums, and that no penalties should be imposed. Goldstein Decl. ¶ 28(d).

21 Plaintiff estimates that CPS’ full exposure for wage statement penalties is \$93,600. Plaintiff
22 applied a 75% discount to account for 25% of class members pursuing individual arbitration, and an
23 additional 90% discount to account for risk of loss on the derivative violations, risk that the Court will
24 not apply penalties for subsequent pay periods, and CPS’ good faith defense, for a value of roughly
25 \$2,000. Goldstein Decl. ¶ 28(d)(i).

26 For the estimated 25 former Reps in the Class Period, CPS’ estimated total exposure for
27 waiting time penalties is roughly \$320,000. Plaintiff applied a 75% discount to account for 25% of
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1 class members pursuing individual arbitration, and an additional 90% discount for the risk of loss on
2 the underlying claims and CPS' good faith dispute argument, resulting in a value of \$8,000. Goldstein
3 Decl. ¶ 28(d)(ii).

4 **e. PAGA Penalties**

5 The maximum exposure for PAGA penalties is \$2.2 million. As explained in more detail
6 below, the likelihood of recovering the full penalty amount is low. See Section III.C, *infra*. Thus,
7 Plaintiff applied a 85% discount for a realistic value of \$330,000. Goldstein Decl. ¶ 28(e). The total
8 value of the claims settled is thus approximately \$1.1 million. Goldstein Decl. ¶ 28(f).

9 **f. Allocation of Net Settlement**

10 The Parties agree that for taxation purposes, one-third of the settlement payment will be
11 considered wages, and the other two-thirds will be considered non-wage income. This estimate is
12 reasonable because interest on overtime claims is at a 10% rate, interest on meal and rest period
13 premiums is 7%, and waiting time and wage statement penalties are a significant portion of CPS'
14 maximum estimated exposure. See *Bell v. Farmers Ins. Exch.*, 135 Cal. App. 4th 1138, 1150 (2006)
15 (affirming 10 percent prejudgment interest rate on unpaid wages); *Naranjo*, 13 Cal. 5th at 121
16 (applying 7 percent interest on meal and rest premiums); Goldstein Decl. ¶ 30.

17 **2. The Class Would Face Considerable Risks and Delays Absent Settlement.**

18 As the preceding section describes, Plaintiff and the Class face significant risks on the merits,
19 particularly for their largest-value claims. Without the Settlement, Plaintiff and the Class would
20 experience a lengthy delay before receiving any recovery. If CPS is correct about the arbitration
21 agreements, Plaintiff likely would not succeed in moving for class certification and would proceed to
22 trial on an individual basis. Plaintiff would need to complete merits discovery, potentially defeat
23 another motion for summary adjudication based on CPS' revised definition of the sale as between car
24 buyers and CPS, and prepare for and prevail at trial. If Plaintiff prevails on any claims, CPS is likely
25 to appeal some or all of them, particularly for the outside sales exemption. Plaintiff's Counsel
26 estimates that even if the Class won at every stage, the class would not receive relief for many more
27 years given CPS' stated commitment to appeal an adverse judgments. Continued litigation will also
28

1 result in additional expenses, including attorneys’ fees, costs of depositions, and expert fees. Thus, this
2 Settlement provides substantial benefits to Class Members by ensuring timely and meaningful
3 monetary relief. Goldstein Decl. ¶ 29.

4 **3. The Settlement is the Result of Arm’s-Length, Informed Negotiation.**

5 This Settlement was negotiated with the assistance of experienced mediator, Jeffrey Ross. In
6 determining that a settlement represents an arm’s-length transaction, courts give “considerable weight”
7 to the “involvement of a neutral mediator.” *Kullar*, 168 Cal. App. 4th at 129; see also *In re Sutter*
8 *Health Uninsured Pricing Cases*, 171 Cal. App. 4th at 504.

9 Prior to mediation, the parties exchanged substantial amounts of information in formal
10 discovery. CPS responded to multiple sets of written discovery requests and produced wage
11 statements and timekeeping records for many Class Members, along with employee manuals, pay
12 policies, position descriptions, and other policy documents related to the claims in this case. Plaintiff
13 took the deposition of CPS’ person most qualified witness and CPS took the deposition of Plaintiff
14 Lawson. The parties set forth the main arguments and all their evidence on the central issue in this
15 case in the summary adjudication briefing, which allowed the parties to evaluate the settlement value
16 of the case. Goldstein Decl. ¶ 31. CPS provided updated workweeks information prior to mediation so
17 that Plaintiff could update his damages analysis. Goldstein Decl. ¶ 32. CPS represented that there are
18 30 class members with 2,670 workweeks as of June 7, 2023. *Id.*

19 Plaintiff was also a significant source of information. Plaintiff responded to document requests
20 and interrogatories, and was deposed. In addition to the information Named Plaintiff provided,
21 Plaintiff’s Counsel interviewed other Reps to gather details on the nature of their duties, meal and rest
22 break practices, on-call requirements, and wage statements. Goldstein Decl. ¶ 33.

23 Plaintiff has obtained substantial and adequate information to arrive at a reliable estimate of the
24 risk facing Plaintiff’s claims and the exposure CPS faces.

25 **4. The Views of Experienced Counsel Support the Reasonableness of Settlement.**

26 Plaintiff’s Counsel has extensive experience in class action litigation and has been appointed as
27 Class Counsel in many class-action lawsuits involving wage-and-hour violations in California.

1 Drawing on their experience, Plaintiff’s Counsel believes that the Settlement is reasonable considering
2 the litigation risks described above. Goldstein Decl. ¶ 31.

3 **C. Settlement of Penalties under the Private Attorneys General Act of 2004 Is Reasonable.**

4 The estimated PAGA penalties in this case stem from overtime violations, unreimbursed
5 business expenses, meal and rest period violations (including both the failure to provide off-duty meal
6 and rest breaks and the failure to pay premiums), failure to pay wages twice a month, wage statement
7 violations, and failure to pay all wages owed at separation. Plaintiff estimates the maximum exposure
8 on their PAGA claim is roughly \$2.2 million. Goldstein Decl. ¶ 34.

9 Plaintiff acknowledges that the likelihood of recovering that full penalty amount is low. Courts
10 have discretion to reduce the amount of PAGA penalties if the full award would be “unjust, arbitrary
11 and oppressive, or confiscatory” under California Labor Code section 2699(e)(2). Courts have, for
12 example, reduced PAGA penalties where the class is otherwise being compensated for their Labor
13 Code claims on the same facts and theories underlying PAGA violations. Such is the case here, where
14 the Class’s Labor Code damages are significant. *See Carrington v. Starbucks Corp.*, 30 Cal. App. 5th
15 504, 529 (2018). Courts will also reduce PAGA penalties where there is evidence that a defendant
16 made a “good faith effort” to comply with the underlying Labor Code requirements. *See id.* at 529
17 (affirming trial court’s reduction of PAGA penalties from the \$50 maximum per initial violation to \$5
18 per initial violation due to defendant’s good faith attempts to comply with the Labor Code).

19 The Court might also decide that no penalties for “subsequent” violations may be awarded
20 absent evidence that another court or the Labor Commissioner decided against CPS on the same facts.
21 *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008) (applying PAGA penalties to
22 initial violations but not to subsequent violations where the employer was not yet notified that they
23 were violating the Labor Code); *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021)
24 (reversing district court’s imposition of penalties for subsequent violations where neither the Labor
25 Commissioner nor the court notified defendant of California Labor Code violations).

26 The Court may also decline to impose multiple PAGA penalties for the same underlying
27 violation or for the same pay period when a statute is violated under different theories of liability (i.e.,
28

1 “stacking”). *See, e.g., Snow v. United Parcel Serv., Inc.*, No. 5:20-cv-00025-PSG-AFM, 2020 WL
2 1638250, at *3 (C.D. Cal. Apr. 1, 2020) (suggesting that plaintiffs may recover only a single penalty
3 for each type of violation, regardless of how many provisions are being cited as having been violated).

4 The PAGA allocation in this case is appropriate given all of the merits risks on the claims as
5 discussed above, the open legal questions about the calculation of PAGA penalties, and the likelihood
6 that a court would exercise its discretion to reduce PAGA penalties after trial. The PAGA allocation
7 from the settlement fund is \$100,000, which represents roughly 9% of the gross settlement fund. Of
8 the PAGA allocation, 75% will be distributed to the LWDA and 25% will be distributed to Class
9 Members who worked during the PAGA period. Plaintiff’s Counsel will notify the LWDA of the
10 preliminary approval hearing prior to the hearing date. Goldstein Decl. ¶ 35.

11 This allocation also falls within the approved settlement ranges of other cases involving both
12 damages and PAGA penalties. *See, e.g., Request for Judicial Notice in Support of Plaintiffs’ Motion for*
13 *Preliminary Approval of Class and Representative Action Settlement (“RJN”), filed herewith, Exs. 1 (Trinh*
14 *v. Golden State Overnight Delivery Serv. Inc.*, No. 30-2017-00961719-CU-WT-CXC, 2022 WL
15 18716125, at *1 (Cal. Super. Ct. Nov. 9, 2022)) (approving \$75,000 PAGA allocation from \$2.2
16 million fund; amount sent to the LWDA is 75% of the total PAGA amount); 2 (*Crandall v. Maxim*
17 *Healthcare Servs., Inc.*, No. 30-2017-00940239-CU-OE-CXC, 2022 WL 18861308, at *3 (Cal. Super.
18 Ct. July 14, 2022)) (approving \$250,000 PAGA allocation from \$5.5 million fund; amount sent to the
19 LWDA is 75% of the total PAGA amount); 3 (*Turner v. Plant Prefab, Inc.*, No. CIVDS2017517, 2022
20 WL 3362485, at *3 (Cal. Super. Ct. June 9, 2022)) (approving \$10,000 PAGA allocation from
21 \$400,000 fund); 4 (*Kim v. LeafFilter N., LLC*, No. 30-2019-01061296-CU-OE-CXC, 2022 WL
22 3133929, at *3 (Cal. Super. Ct. May 26, 2022)) (approving \$50,000 PAGA allocation from \$2.8
23 million fund); 5 (*Louka v. Nations Direct Mortg., LLC*, No. 30-2019-01042277-CU-OE-CXC, 2021
24 WL 9507756, at *1 (Cal. Super. Ct. Oct. 8, 2021)) (approving \$25,000 PAGA allocation from
25 \$800,000 fund); 6 (*Cesario v. Hartwell Corp.*, No. 30-2018-00976928-CU-OE-CXC, 2021 WL
26 9097971, at *2 (Cal. Super. Ct. Aug. 26, 2021)) (approving \$275,000 PAGA allocation from \$3.6
27 million fund).

1 **D. The Settlement Is Presumptively Fair Because It Is the Result of Non-Collusive, Arm’s-Length,**
2 **and Informed Negotiations by Experienced Counsel.**

3 A settlement is presumptively fair where it was reached through arm’s-length bargaining, was
4 informed by sufficient investigation and discovery, and conducted by experienced counsel. *Munoz v.*
5 *BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal. App. 4th 399, 408 (2010) (citing *Dunk*, 48 Cal. App. 4th
6 at 1802).

7 As described above, the parties here negotiated the Settlement Agreement in good faith after
8 extensive discovery. In preparation for mediation, the parties exchanged legal arguments. During the
9 mediation, the parties debated their positions with the mediator. A settlement was not reached during
10 the mediation, but at the end of the mediation, Mr. Ross provided a mediator’s proposal. Both Parties
11 analyzed the proposal before accepting its terms.

12 Plaintiff’s Counsel, GBDH, are experienced and qualified to evaluate the class claims, the risks
13 and benefits of continued litigation and settlement, and the strength of defenses asserted. GBDH has
14 significant experience litigating wage-and-hour cases, including cases similar to this one. Goldstein
15 Decl. ¶¶ 41-44.

16 The Settlement is the result of non-collusive, arms-length, and informed negotiation between
17 the parties, which supports the presumption that it is fair and should be approved.

18 **E. The Proposed Class Notice Content and Procedures Are Appropriate.**

19 The proposed Notice and Class Administration Procedures satisfy due process because they
20 provide the best practicable notice of the Settlement to the Class and that notice contains all the
21 required information.

22 To guard the rights of absent Class Members, the Class must be provided with the best notice
23 practicable of the potential settlement. *Wershba*, 91 Cal. App. 4th at 251-52. The Court has discretion
24 to fashion an appropriate notice program. Cal. Civ. Code § 1781. In addition, Rule 3.766(d) of the
25 California Rules of Court states that a class notice must contain: (1) a brief explanation of the case; (2)
26 a statement about requests for exclusion by a specific date; (3) a procedure for requesting exclusion
27 from the class; (4) a statement that the judgment will bind all members who do not request exclusion;

1 and (5) a statement that any member who does not request exclusion may enter an appearance through
2 counsel.

3 Plaintiff's comprehensive Notice satisfies all of these requirements. The proposed Class Notice
4 will notify all Settlement Class Members of the terms of the settlement, that their rights may be
5 affected by the settlement, that they may participate, opt out of, or object to the settlement. The Notice
6 is in English, which is appropriate for this class because they are required to read and write in English
7 to perform their jobs. The Notice will describe the procedure for opting out and will explain that if
8 they choose to participate, they may appear through their own counsel. The proposed Notice will
9 provide each Settlement Class Member with their estimated award, along with an explanation of how
10 the allocation was calculated and how to dispute any information regarding their employment dates or
11 job position. Goldstein Decl. ¶¶ 19-20.

12 Notice will have a "reasonable chance of reaching a substantial percentage of the class
13 members." *Cartt v. Superior Court*, 50 Cal. App. 3d 960, 974 (1975). Here, the Settlement
14 Administrator will receive contact information from CPS and send notice by first class mail to each
15 Settlement Class Member. If any notices are returned as undeliverable, the Claims Administrator will
16 use skip tracing or other comparable methods to resend the notice. Settlement Agreement ¶ 44.
17 Consequently, notice is likely to reach most Settlement Class Members.

18 The Parties have selected claims administrator Atticus Administration to distribute Notice,
19 process opt-outs, and share challenges. Atticus is a well-regarded administrator that Plaintiff's
20 Counsel have retained in the past with good results. In Plaintiff's Counsel's experience, Atticus' bid
21 was reasonable. Goldstein Decl. ¶ 18.

22 **F. The Service Payment to the Class Representative**

23 Although this Court does not the decide the amount of any service award until the final
24 approval hearing, notice of the requested service payments of \$30,000 to Plaintiff Lawson (who was
25 deposed) should be provided to the Class. Plaintiff is eligible to receive a service award that
26 reasonably compensate him for undertaking and fulfilling a fiduciary duty to represent the absent class
27 members. *See Cellphone Termination Fee Cases*, 186 Cal. App. 4th at 1393-94 (2010); *Bell v.*

1 *Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 725-26 (2004) (affirming service payments to class
2 representatives); Fed. Jud. Ctr., *Manual for Complex Litigation* § 21.62 (4th ed. 2004) (service awards
3 are warranted). Service awards are appropriate to incentivize plaintiffs in their positions to bring
4 representative cases. *See Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009).

5 Plaintiff has filed a declaration in support of the Preliminary Approval Motion describing the
6 role he has played in this case. *See* Declaration. of James Lawson (“Lawson Decl.”) Under the factors
7 identified in *Clark*, and in light of service awards approved in similar circumstances, the requested
8 award of \$30,000 for Plaintiff Lawson is reasonable. Service payments are also consideration for the
9 execution of broader release of claims than the rest of the class. Goldstein Decl. ¶ 36.

10 **1. The Actions Plaintiff Has Taken to Protect the Interests of the Class, and the Amount**
11 **of Time Spent on Those Actions.**

12 The *Clark* factors take into account the degree to which Plaintiff has taken actions to protect the
13 interests of the class, and the amount of time and effort he has put forth. 175 Cal. App. 4th at 804.
14 Plaintiff Lawson was the original named Plaintiff in this case and has contributed approximately 80
15 hours of his time on this case. *See* Lawson Decl. ¶ 20. His time included assisting Plaintiff’s Counsel
16 investigate the case through multiple interviews, gathering documents and other information,
17 reviewing the PAGA letter, reviewing the complaint and amended complaint, reviewing responses to
18 discovery requests, preparing for and attending deposition, preparing for and attending two mediations,
19 and reviewing and approving the terms of the settlement. *Id.* ¶¶ 3-19.

20 Without Plaintiff’s willingness to take the foregoing actions and devote significant time to
21 them, the interests of the Class would not have been protected.

22 **2. The Degree to Which the Class Has Benefitted from Plaintiff’s Actions.**

23 The *Clark* factors take into account the degree to which the class has benefited from the named
24 plaintiffs’ actions. 175 Cal. App. 4th at 804. Here, 30 Class Members will receive a settlement
25 payment due to the actions that Plaintiff has taken. The Class Members will receive an average of over
26 \$15,000 as a result of this lawsuit. The Class Notice will inform class members that Plaintiff will be
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1 seeking the service award requested here, and class members will have the option to object. At final
2 approval, Plaintiff will report on the response from the class.

3 **3. The Risk and Difficulties Experienced by the Class Representative**

4 The *Clark* factors take into account the reputational or financial risk the named plaintiff has
5 incurred, as well as any personal difficulties resulting from fulfilling the class representative role.
6 Plaintiff faced the possibility that future employers will look unfavorably upon his role in this case and
7 took the risk of negative references from CPS within the industry. Lawson Decl. ¶¶ 21-23.

8 **4. Duration of Litigation.**

9 Plaintiff's involvement in this case has now lasted over five years. Lawson Decl. ¶ 3. As
10 describe above, this case was litigated vigorously for approximately 5 years.

11 **5. Personal Benefit (or Lack Thereof) Enjoyed by Class Representative.**

12 Plaintiff only worked for CPS for around one year, so he is entitled to a smaller award than
13 some Reps who worked the entire Class Period. It is therefore equitable to provide Plaintiff with an
14 additional award to recognize the contributions he made that allowed his colleagues to reap such
15 significant settlement payments.

16 Under the *Clark* factors, the requested award of \$30,000 for Plaintiff is justified. Plaintiff's
17 Counsel believe that \$30,000 in service award is a reasonable incentive for employees to step forward
18 and serve as class representatives in cases like this one. Goldstein Decl. ¶ 36. Plaintiff's Counsel
19 confirm that Plaintiff was an excellent class representative. *Id.* ¶ 37. The requested award is also in
20 the range of awards that courts have found reasonable, particularly since the average class member
21 recovery is \$15,000. *See, e.g., Munoz*, 186 Cal. App. 4th at 412 (finding that award to named plaintiff
22 that was more than twice the average payment to class members was reasonable); *Zamora Jordan v.*
23 *Nationstar Mortg., LLC*, No. 2:14-cv-00175-TOR, 2019 WL 1966112, at *9 (E.D. Wash. May 2, 2019)
24 (awarding \$20,000 service award where median estimated award for the class was 1,033.51); *In re*
25 *Netflix Priv. Litig.*, No. 5:11-cv-00379-EJD, 2013 WL 1120801, at *1-2, *15 (N.D. Cal. Mar. 18,
26 2013) (awarding \$30,000 service where no monetary award distributed to the class); *Montgomery v.*
27 *Cont'l Intermodal Grp.-Trucking LLC*, No. 2:19-cv-00940-GJF, 2021 WL 1339305, at *8-9 (D.N.M.

1 Apr. 9, 2021) (awarding \$25,000 service award in wage and hour settlement and finding it “is in the
2 range of incentive payments approved in similar wage and hour cases”); *McCurley v. Flowers Foods,*
3 *Inc.*, No. 5:16-cv-00194-JMC, 2018 WL 6650138, at *8 (D.S.C. Sept. 10, 2018) (awarding \$25,000
4 service award in wage and hour class settlement, “which is well within the range of reasonable
5 incentive awards approved by the courts”) (collecting cases); *RJN Ex. 7 (Kirschenbaum v. Electr. Arts,*
6 *Inc.*, No. Civ. 440876, 2006 WL 2613160 (Cal. Super. Ct. Jan. 27, 2006) (approving \$30,000 service
7 award to lead named plaintiff and \$15,000 to each of three other plaintiffs); *Roldan v. Bland*
8 *Landscaping Co., Inc.*, No. 3:20-cv-00276-KDB-DSC, 2022 WL 17824035, at *7 (W.D.N.C. Dec. 19,
9 2022) (approving \$25,000 as well within range of reasonable incentive awards).

10 **G. Plaintiff’s Request for Attorneys’ Fees and Reimbursement of Litigation Costs**

11 Plaintiff, having reached a favorable settlement of this wage and hour class action, is a
12 “prevailing party” entitled to recover reasonable attorneys’ fees and costs. *See* Cal. Lab. Code §§
13 218.5, 226, 1194, & 2699(g)(1); Cal. Civ. Proc. Code § 1021.5(a) (awarding reasonable attorneys’ fees
14 and costs where plaintiff’s action resulted in the enforcement of an important right, conferred a
15 significant benefit to a large class of persons, and private enforcement was necessary); *Maria P. v.*
16 *Riles*, 43 Cal. 3d 1281, 1290-91 (1987) (fee award justified when legal action produced its benefits
17 through voluntary settlement). Plaintiff’s Counsel spent significant time on this case, particularly on
18 the motion for summary adjudication, after the Parties’ failed first attempt at mediation.

19 The Settlement authorizes Plaintiff’s Counsel to request up to \$440,000, which is 40 percent of
20 the Gross Settlement Amount, and up to \$65,000 for reimbursement of litigation costs. Plaintiff’s
21 Counsel estimate that their lodestar will exceed \$1.3 million, resulting in a significant negative
22 multiplier. Plaintiff will fully brief these requests when moving for final approval. At this stage,
23 Plaintiff asks that the Court authorize notice of the requested award of the fees and costs to the
24 Settlement Class. Goldstein Decl. ¶ 39. With the requested \$440,000, class members still receive an
25 average recovery of \$15,000. *Id.*

1 **1. The Class Should be Informed of the Requested Attorneys’ Fee Award.**

2 Courts may award attorneys’ fees from a common fund in a class action using either the
3 “percentage” method or the “lodestar-multiplier” method. *Lafitte v. Robert Half Int’l, Inc.*, 1 Cal. 5th
4 480, 489 (2016). “The percentage method calculates the fee as a percentage share of a recovered
5 common fund or the monetary value of plaintiffs’ recovery.” *Id.* The common fund method provides
6 both “[f]airness to the successful litigant, who might otherwise receive no benefit because his recovery
7 might be consumed by the expenses” and “encouragement of the attorney for the successful litigant,
8 who will be more willing to undertake and diligently prosecute proper litigation for the protection or
9 recovery of the fund.” *Bank of Am. v. Cory*, 164 Cal. App. 3d 66, 90 (1985) (citation omitted). The
10 lodestar method, on the other hand, “is calculated by multiplying the reasonable hours expended by a
11 reasonable hourly rate.” *Wershba*, 91 Cal. App. 4th at 254. “The court may then enhance the loadstar
12 with a multiplier, if appropriate.” *Id.* (citations omitted). “Multipliers can range from 2 to 4 or even
13 higher.” *Id.* at 255.

14 The Court need not decide now what amount of attorneys’ fees and expenses should be
15 awarded. Rather, the Court need only satisfy itself that the overall settlement is within a range that
16 could justify final approval. The standard is met here. The requested fee is reasonable because
17 Plaintiff’s Counsel achieved significant results for the class and took on the risk of non-payment by
18 prosecuting the case on a contingency basis, and the financial burden of litigating the case for close to
19 five years.

20 Considering the extensive monetary relief in this case, Plaintiff’s Counsel’s request of up to
21 \$440,000, which is a significant negative multiplier on their lodestar, is warranted. reasonable and
22 routinely awarded. *See Roos v. Honeywell Int’l, Inc.*, 241 Cal. App. 4th 1472, 1495-96 (2015),
23 *overruled on another ground in Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 269 (2018)
24 (affirming trial court award of attorneys’ fees that were 37.5 percent of fund); *Miller v. CEVA Logistics*
25 *USA, Inc.*, No. 2:13-cv-01321-TLN-CKD, 2015 WL 4730176, at *8 (E.D. Cal. Aug. 10, 2015)
26 (“California district courts usually award attorneys’ fees in the range of 30-40% in wage and hour class
27 actions that result in the recovery of a common fund under \$10 million”); *Martin v. AmeriPride Serv.*,

1 *Inc.*, No. 3:08-cv-00440-MMA-JMA, 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) (“courts may
2 award attorneys fees in the 30-40% range in wage and hour class actions that result in recovery of a
3 common fun [sic] under \$10 million”); *Bennett v. SimplexGrinnell LP*, No. 3:11-cv-01854-JST, 2015
4 WL 12932332, at *6 (N.D. Cal. Sept. 3, 2015) (approving fees of 38.8% of \$4.9 million settlement in
5 prevailing wage case); *Birch v. Office Depot, Inc.*, No. 3:06-cv-01690-DMS-WMC, 2007 WL 9776717
6 (S.D. Cal. Sept. 28, 2007) (awarding a 40% fee on a \$16 million wage and hour class action); Pls.’
7 Mem. of P. & A. in Supp. of Class Counsel's Application for an Award of Attys’ Fees, Reimbursement
8 of Expenses, and Award of Class Reps. Serv. Awards 1, *Birch v. Office Depot, Inc.*, No. 3:06-cv-
9 01690-DMS-WMC (S.D. Cal. Sept. 28, 2007), ECF No. 46-1; *Rippee v. Boston Mkt. Corp.*, No. 3:05-
10 cv-01359-BTM-JMA, 2006 WL 8455400, at *4 (S.D. Cal. Oct. 10, 2006) (awarding a 40% fee on a
11 \$3.75 million wage and hour class action); *Velez v. Bakken*, No. 2:17-cv-00960-WBS-KJN, 2019 WL
12 358703, at *2 (E.D. Cal. Jan. 29, 2019) (approving fee award of 46% of settlement based on counsel’s
13 experience with similar cases, the amount of time counsel spent investigating the claims, and the risk
14 counsel took in pursuing the action on a contingency basis).

15 Plaintiff’s effort to bring and maintain the case as a class and collective action faced arguments
16 by CPS that: (i) Reps agreed to individual arbitration of their claims; (ii) Reps were exempt under the
17 outsides sales exemption; (iii) Reps had enough time during their shifts to take meal and rest breaks.
18 *See* section, *supra*. In light of these litigation risks, awarding Plaintiff’s Counsel a fee of 40 percent of
19 the fund is warranted. *See Pagh v. Wyndham Vacation Ownership, Inc.*, No. 8:19-cv-00812-JWH-
20 ADS, 2021 WL 3017517 (C.D. Cal. Mar. 23, 2021) (upward departure from benchmark was warranted
21 given the results achieved, substantial risk, contingency basis, and quality of representation).

22 The requested fee is also reasonable in light of the risk of litigating on a contingent basis.
23 Plaintiff’s Counsel were obligated to dedicate sufficient attorney resources to the prosecution of this
24 litigation for close to five years, which reduced Counsel’s ability to work on less risky cases in which
25 recovery of fees was more certain. Goldstein Decl. ¶ 46. In the time that the case has been pending,
26 Plaintiff’s Counsel have not received any compensation or reimbursement for their efforts, and have
27 advanced all expenses. *Id.* The significant outlay of monetary and personnel resources has been
28

1 completely at risk and wholly dependent upon obtaining a substantial recovery for the Class. *See In re*
2 *Heritage Bond Litig.*, No. 02-ML-01475 DT, 2005 WL 1594403, at *21 (C.D. Cal. June 10, 2005)
3 (“[T]he Court notes that Plaintiffs’ counsel proceeded entirely on contingency basis, while paying for
4 all expenses incurred. There was no guarantee of any recovery, and thus, counsel was subjected to
5 considerable risk of no compensation for time or no reimbursement for expenses.”). Plaintiff’s
6 Counsel were willing to bear that expense because of the potential of recovering a fee award if they
7 succeeded. *See* Goldstein Decl. ¶ 46. It has been a long-recognized principle that an attorney merits a
8 larger fee when the compensation is contingent, rather than being fixed on a time or contractual basis.
9 *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002). Here, the contingent nature
10 of the representation weigh in favor of approval of the fee request.

11 **2. The Requested Litigation Costs Are Preliminarily Reasonable.**

12 Plaintiff’s Counsel expect to incur no more than \$65,000 in litigation costs to bring this to an
13 end. Goldstein Decl. ¶ 47. These costs include court-filing and process-serving fees, e-discovery fees,
14 mediation costs, online research costs, postage costs, and copying costs. This amount is modest and
15 reflects efficient litigation of the case. Plaintiff’s Counsel will provide the court with updated costs
16 information and additional briefing in the final approval motion. *Id.*

17 **H. There Are No Concurrent Pending Cases Impacted by this Settlement.**

18 In compliance with the Court’s direction, Plaintiff’s Counsel made reasonable efforts to
19 determine if there are any class, representative or other collective action in any other court that asserts
20 claims similar to those asserted in the action being settled. There are no pending actions that assert
21 claims on behalf of Reps similar to those being asserted in this action. Goldstein Decl. ¶¶ 48-49
22 Declaration of Jacqueline Thompson (“Thompson Decl.”) ¶¶ 3-5.

23 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE.**

24 A court may certify a provisional settlement class after the preliminary settlement hearing. *See*
25 Cal. Rule of Court 3.769(d). Manageability and due process concerns for absent class members are
26 eliminated or mitigated in the context of settlement. *Dunk*, 48 Cal. App. 4th at 1807 n.19. “Courts
27 regularly certify class actions to resolve wage and hour claims.” *Gonzales v. San Gabriel Transit, Inc.*,

1 40 Cal. App. 5th 1131, 1149 (2019), *superseded by statute on another ground as stated in Parada v. E.*
2 *Coast Transp. Inc.*, 62 Cal. App. 5th 692, 699 n.2 (2021) (internal citation omitted). In California, a
3 class is certifiable if (1) it is ascertainable and sufficiently numerous; (2) there is a well-defined
4 community of interest, and (3) a class action is superior to other methods of adjudication. *Brinker Rest.*
5 *Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012). Plaintiff contends, and CPS does not dispute
6 for settlement purposes only, that all of the elements are met here.

7 **A. The Class Is Ascertainable and Sufficiently Numerous.**

8 A class is ascertainable if it “identifies a group of unnamed plaintiffs by describing a set of
9 common characteristics sufficient to allow a member of that group to identify himself or herself as
10 having a right to recover based on the description.” *Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App.
11 4th 1290, 1299-1300 (2015) (quoting *Bartold v. Glendale Fed. Bank*, 81 Cal. App. 4th 816, 828
12 (2000)). Here, Class Members are ascertainable from CPS’ payroll records, which provide information
13 about the employee’s name, dates of employment, and rates of pay. *See Aguiar v. Cintas Corp. No. 2*,
14 144 Cal. App. 4th 121, 136 (2006), *disapproved of on other grounds by Noel v. Thrifty Payless, Inc.*, 7
15 Cal. 5th 955, 985-86 (2019) (members of proposed class were ascertainable because they could be
16 determined from defendant’s payroll records).

17 A class is sufficiently numerous if joinder of all class members would be impracticable. *See*
18 *Hendershot v. Ready to Roll Transp., Inc.*, 228 Cal. App. 4th 1213, 1222 n.5 (2014). Here, CPS’
19 payroll records show that there are roughly 30 members of the proposed class. Goldstein Decl. ¶ 21.
20 Joinder of so many parties would be impracticable. *See* RJN Ex. 8 (Order Granting Preliminary
21 Approval of Class Action Settlement, *Brooks v. Staffmark Inv., LLC*, No. RG190116919 (Cal. Super.
22 Ct. Jan. 7, 2021)) (provisionally certifying class of approximately 31 members).

23 **B. A “Community of Interest” Exists Among Settlement Class Members.**

24 The “community of interest” requirement includes three elements: (1) predominant common
25 questions of law or fact; (2) a class representative whose claims are typical of those of the class; and
26 (3) a class representative who can adequately represent the class. *See Brinker*, 53 Cal. 4th at 1021.
27 The proposed Settlement Class meets each element here.

1 **1. Common Questions of Law and Fact Predominate.**

2 “Claims alleging that a uniform policy consistently applied to a group of employees is in
3 violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class
4 treatment.” *Brinker*, 53 Cal. 4th at 1033.

5 Here, CPS’ uniform policies mean common questions predominate as to all Labor Code
6 violations alleged. All Reps were subject to the same policies, and the question of whether the outside
7 sales exemption applies to Reps is an issue appropriate for class certification. *See, e.g., Sav-On Drug*
8 *Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004) (trial court did not abuse its discretion in finding
9 that common questions predominated on whether exemption to overtime applied). Common questions
10 also predominate with respect to the Class’s meal and rest break claims. Plaintiff alleges that CPS had
11 a uniform policy of requiring Reps to remain on-duty during their entire shift. *See Faulkinbury v.*
12 *Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 233 (2013), *overruled in part on other grounds by Noel*,
13 7 Cal. 5th at 986 (lawfulness of uniform meal period policy could be determined on a classwide basis).

14 Finally, Plaintiff’s wage statement and waiting time claims are amenable to class certification.
15 Plaintiff’s wage statement claims either allege facial violations that are uniform with respect to all
16 class members (such as the failure to list overtime hours worked) or are derivative of the other Labor
17 Code claims above, and Plaintiff’s waiting time claims are similarly derivative of underlying Labor
18 Code violations. *Bradley v. Networkers Int’l, LLC*, 211 Cal. App. 4th 1156 (2012) (Derivative claims
19 for waiting time penalties and wage statement penalties based on underlying Labor Code claims should
20 be certified.).

21 **2. Plaintiff’s Claims Are Typical of the Class Claims.**

22 “The test of typicality is whether other [class] members have the same or similar injury,
23 whether the action is based on conduct which is not unique to the named plaintiffs, and whether other
24 class members have been injured by the same course of conduct.” *Seastrom v. Neways, Inc.*, 149 Cal.
25 App. 4th 1496, 1502 (2007) (internal citation omitted). Here, Plaintiff is a former CPS Rep who
26 alleges that he suffered the same injuries as other CPS Reps as a result of CPS’ overtime, business
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1 reimbursement, meal and rest break, and wage statement policies. Plaintiff seeks the same relief as the
2 rest of the class.

3 **3. Plaintiff and His Attorney Will Adequately Represent the Class.**

4 “Adequacy of representation depends on whether the plaintiff’s attorney is qualified to conduct
5 the proposed litigation and the plaintiff’s interests are not antagonistic to the interests of the class.”
6 *Caro v. Proctor & Gamble Co.*, 18 Cal. App. 4th 644, 669 n.21 (1993) (quoting *McGhee v. Bank of*
7 *Am.*, 60 Cal. App. 3d 442, 450 (1976)).

8 Here, Plaintiff’s Counsel have extensive experience in complex wage-and-hour litigation.
9 Plaintiff has committed to represent the interests of the Class and do not have conflicts with the
10 interests of the Class. Goldstein Decl. ¶ 23.

11 **C. This Class Action Is a Superior Method of Adjudication.**

12 Plaintiff and Class Members’ claims are based on CPS’ uniform policies and practices and
13 involve common evidence. It would be inefficient to resolve these claims at separate trials. *See Bufile*
14 *v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008), *disapproved of on other grounds by*
15 *Noel*, 7 Cal. 5th at 985-86.

16 The Class meets all of the requirements for certification in California. Therefore, this Court
17 should conditionally certify the Class for settlement purposes.

18 **V. CONCLUSION**

19 The Settlement is well within the range of acceptable settlements, and provides substantial
20 monetary relief. Plaintiff respectfully requests that the Court certify the class for settlement purposes,
21 conditionally appoint Goldstein, Borgen, Dardarian & Ho as Class Counsel and Named Plaintiff as
22 Class Representative, appoint Atticus Administration, LLC as Settlement Administrator, grant
23 preliminary approval of the settlement terms and notice process, order the issuance of notice, and set a
24 date for the final fairness hearing, as set forth in the accompanying proposed order.

1 Dated: August 3, 2023

Respectfully submitted,

2 GOLDSTEIN, BORGAN, DARDARIAN & HO

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Byron Goldstein

5 Attorneys for Plaintiff and Settlement Class

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