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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

MARQUAN NESBITT, an individual, on behalf
of himself, and on behalf of all persons similarly
situated,

Plaintiff,

vs.

AUTONOMOUS, INC. WHICH WILL DO
BUSINESS IN CALIFORNIA AS
AUTONOMOUS LABS INC., a Delaware
Corporation; and Does 1 through 50, Inclusive,

Defendant.

Case No. CIVSB2204742

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR FINAL APPROVAL OF CLASS
ACTION AND PAGA SETTLEMENT**

Date: April 18, 2024

Time: 1:30 p.m.

Judge: Hon. Joseph T. Ortiz

Dept.: S-17

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Cal. Lab. Code §§ 2698 et seq.....3

SECONDARY SOURCES

Newberg & Conte, *Newberg on Class Actions*, (3d ed. 1992) §11.41, pp. 11-91

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1 I. INTRODUCTION

2 Plaintiff MARQUAN NESBITT (hereinafter “Plaintiff”) seeks final approval of the Stipulation
3 of Settlement of Class and PAGA Action Claims and Release of Claims (“Agreement”)¹, which if
4 approved, would provide valuable monetary relief for 83 Settlement Class Members employed by
5 AUTONOMOUS, INC. WHICH WILL DO BUSINESS IN CALIFORNIA AS AUTONOMOUS
6 LABS INC., (hereinafter “Defendant”) during the period beginning March 28, 2018, through August
7 31, 2023, (“Class Period”).

8 In an order dated November 20, 2023, this Court preliminarily approved the Agreement and
9 preliminarily certified the Class. Declaration of Shani O. Zakay (“Zakay Dec.”), ¶ 4. On December 12,
10 2023, the Court-approved Class Notice was mailed to each Class Member via U.S. First Class Mail.
11 Declaration of Madely Nava (“Apex Dec.”), ¶ 7. *The Class greeted news of the Settlement with*
12 *unanimous approval.*² There are zero opt-outs and zero objections to the Settlement. Apex Dec., ¶¶ 11-
13 12. The unanimous approval by the Settlement Class evidences the clear fairness and reasonableness of
14 the Settlement. Zakay Dec., ¶ 19.

15 An objective evaluation of the proposed settlement of Two Hundred Sixty-Two Thousand, Five
16 Hundred Dollars and Zero Cents (\$262,500.00) (“Gross Settlement Amount”) confirms that the relief
17 negotiated on behalf of the Settlement Class Members is fair, reasonable, and valuable. The Settlement
18 is a product of informed, adversarial, and non-collusive negotiations, between experienced counsel,
19 and presided over by Hon. Brian C. Walsh. After deducting any Court-approved Attorneys’ Fees and
20 Attorneys’ Expenses, Service Award, PAGA Payment, and Settlement Administration Costs, the Net
21 Settlement Amount shall be distributed to each Settlement Class Member based on the number of
22 Workweeks they worked while employed by Defendant during the Class Period. Zakay Dec., ¶ 8.

23 This Settlement provides substantial recovery for Defendant’s alleged wage and hour violations.
24 Plaintiff estimates that the Settlement, if approved, would result in a Net Settlement Amount of
25 approximately One-Hundred and Twenty Thousand, Five-Hundred Dollars and Zero Cents
26

27 ¹ The Agreement is attached as Ex “1” to the Declaration of Shani Zakay (“Zakay Dec.”) at ¶ 3. All citations to the Agreement
28 incorporate by this reference a citation to the Zakay Dec., ¶ 3. Further, unless indicated otherwise, capitalized terms used
herein have the same meaning as those defined by the Agreement.

² Nine (9) Notices were deemed undeliverable. Apex Dec. at ¶¶ 8.

1 (\$120,500.00). This will result in an average Individual Settlement Payment of One Thousand, Four-
2 Hundred and Fifty-One Dollars and Eighty-One Cents (\$1,451.81) a high payment of Nine Thousand,
3 Three-Hundred and Seventy-Three Dollars and Sixty-Nine Cents (\$9,373.69), and low payment of
4 Thirty-Three Dollars and Twelve Cents (\$33.12). Zakay Dec., ¶ 9; Apex Dec. at ¶ 9.

5 The relief offered by the Settlement is immediate and is particularly impressive when viewed
6 against the difficulties encountered by plaintiffs pursuing similar wage and hour cases (*see infra*).
7 Indeed, by settling now rather than proceeding to trial, the Class will not have to wait (possibly years)
8 for relief, nor will they have to bear the risks associated with prolonged and uncertain litigation. Zakay
9 Dec., ¶ 10.

10 As discussed below, the proposed Settlement satisfies all criteria for final settlement approval
11 under California law and falls well within the range of reasonableness. Accordingly, the Class
12 Representative and Class Counsel respectfully request this Court grant final approval of the Agreement
13 and, entry of the proposed Final Approval Order and Judgment. Zakay Dec., ¶ 11.

14 II. OVERVIEW OF THE LITIGATION

15 Defendant is a retailer of office furniture, operating facilities in San Bernardino County,
16 including where Plaintiff worked. This action asserts claims on behalf of all current and former non-
17 exempt employees who worked for Defendant during the Class Period. Plaintiff worked for Defendant
18 as a non-exempt employee in California from March of 2017 to September of 2021. At all times during
19 his employment, Plaintiff earned an hourly wage and was entitled to legally compliant meal and/or rest
20 periods, and minimum, regular and overtime wages for all hours worked. Throughout his employment,
21 Plaintiff was subject to Defendant's written policies and procedures contained in, among other
22 documents, the "Employee Handbook." Zakay Dec., ¶ 12; Declaration of Marquan Nesbitt ("MN
23 Dec.") at ¶¶ 3.

24 Generally, Plaintiff claims that Defendant failed to furnish accurate itemized wage statements,
25 failed to provide compliant meal and rest periods, failed to pay for all time worked, failed to reimburse
26 for necessary business expenses and failed to pay all wages upon separation. Defendant forcefully
27 denies liability for each of Plaintiff's claims. Further, Defendant asserts that it fully complied with all
28 applicable employment laws and raised several other significant defenses to Plaintiff's claims,

1 including but not limited to, asserting that it issued compliant wage statements, maintained facially
2 compliant meal and rest period policies, paid for all hours worked, and timely paid all wages due upon
3 separation of employment. Zakay Dec., ¶ 13.

4 On March 28, 2022, Plaintiff filed a class action complaint in the San Bernardino Superior Court,
5 Case Number CIVSB220474 (“Action”). The Action alleged ten causes of action against Defendant
6 for: (1) Violation of California Business & Professions Code §§ 17200, *et seq.*; (2) Violations of
7 California Labor Code §§ 1194, 1197, 1197.1 (Unpaid Minimum Wages); (3) Violation of California
8 Labor Code §§510 *et seq.* (Overtime Wages); (4) Violation of California Labor Code §§ 226.7 and 512
9 (Unpaid Meal Period Premiums) and the IWC Wage Order; (5) Violation of California Labor Code §§
10 226.7 and 512 (Unpaid Rest Period Premiums) and the Applicable IWC Wage Order; (6) Violation of
11 California Labor Code § 226(a) (Non-Compliant Wage Statements); (7) Violations of California Labor
12 Code §§ 201, 202, and 203 (Final Wages Not Timely Paid); (8) Violation of California Labor Code §
13 2802 (Unreimbursed Business Expenses); (9) Unlawful deductions; and (10) Violation of the Private
14 Attorneys General Act §§ 2698 *et seq.* Zakay Dec., ¶ 14.

15 On January 18, 2022, Plaintiff served Defendant and the Labor and Workforce Development
16 Agency (“LWDA”) with a Notice of Violations (“PAGA Notice”). Plaintiff’s PAGA Notice set forth
17 the facts and theories supporting Defendant’s alleged violations of various provisions of the California
18 Labor Code and applicable Industrial Welfare Commissions (“IWC”) Wage Order and of his intent to
19 pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections
20 2698 *et seq.* (“PAGA”). Zakay Dec., ¶ 15.

21 The Parties agreed relatively early to mediate the Action. To prepare for mediation, the Parties
22 agreed to informally exchange additional documents and data points subject to the mediation privilege,
23 including but not limited to, employee handbooks, the Class Members’ time data, and certain payroll
24 data points. As discussed *infra*, Plaintiff’s counsel retained the forensic consultants at Berger
25 Consulting Group (“BCG”) to analyze Defendant’s time and payroll data. Zakay Dec., ¶ 16.

26 On June 27, 2023, the Parties participated in a full day mediation with mediator Hon. Brian C.
27 Walsh. After arms-length negotiations and bargaining, the Parties reached an agreement to settle and
28 signed a Memorandum of Understanding. After reaching an agreement in principle, the Parties drafted

1 and negotiated a long-form settlement agreement, which is the subject of the instant motion. Zakay
2 Dec., ¶ 17.

3 On November 20, 2023, this Court granted preliminary approval of the Settlement. Zakay Dec.,
4 ¶ 4. On December 12, 2023, the Settlement Administrator mailed Notice Packets to all 83 Class
5 Members. Apex Dec., ¶ 7. The mailing of the Notice Packets triggered a forty-five (45) day Response
6 Deadline for the Class to submit requests for exclusion or objections to the Settlement. The response
7 from the Class to the Settlement was outstanding – 100% of the Class Members are participating in the
8 Settlement. Apex Dec., ¶ 13.

9 **III. THE SETTLEMENT BEFORE THE COURT**

10 The Court preliminarily approved an initial Gross Settlement Amount of Two-Hundred Sixty-
11 Two Thousand, Five Hundred Dollars and Zero Cents (\$262,500.00) based on a total of approximately
12 3,638 workweeks worked by the Class during the Class Period. The Gross Settlement Amount shall be
13 used to satisfy: (1) the sum of the Settlement Administration Costs; (2) Attorneys' Fees and Attorneys'
14 Expenses; (3) Service Award; (4) the sum of all Individual Settlement Payments; and (5) the PAGA
15 Payment. Zakay Dec., ¶ 18.

16 Defendant will fund the Settlement by transferring the Gross Settlement Amount into a Qualified
17 Settlement Fund within thirty (30) calendar days of the Effective Date. Agreement at § I(P). The
18 Settlement Administrator shall disburse the Individual Settlement Payments to the Settlement Class
19 Members no later than thirty (30) business days after Defendant funds the Gross Settlement Amount.
20 Agreement, § III(N)(7). The Settlement Administrator shall add up the total number of Workweeks for
21 all Class Members. The respective Workweeks for each Class Member will be divided by the total
22 Workweeks for all Class Members, resulting in the Payment Ratio for each Class Member. Each Class
23 Member's Payment Ratio will then be multiplied by the Net Settlement Amount to calculate each Class
24 Member's estimated Individual Settlement Payments. Agreement at § III(N)(1). The estimated average
25 Individual Settlement Payment is approximately One Thousand, Four-Hundred and Fifty-One Dollars
26 and Eighty-One Cents (**\$1,451.81**). Apex Dec., ¶ 15.

27 In exchange for the valuable consideration, as of the funding of the Gross Settlement Amount,
28 the Settlement Class Members will release the Released Parties from the Released Class Claims.

1 Agreement, § III(B).

2 Apex Class Action LLC was appointed as the Settlement Administrator for the Class. The
3 Settlement Administration Costs include those expenses of effectuating and administering the
4 Settlement, i.e., the costs incurred to the Settlement Administrator, the costs of giving notice to the Class,
5 the costs of administering and disbursing the Individual Settlement Payments, and the fees of the
6 Settlement Administrator approved for reimbursement by the Court. The Settlement Administration
7 Costs are Four Thousand, Five Hundred Dollars and Zero Cents (**\$4,500.00**). Apex Dec., ¶ 18. These
8 expenses shall be paid from the Gross Settlement Amount. Agreement, § III(N)(12).

9 Subject to Court approval, Class Counsel shall seek a payment for Attorneys' Fees and Attorneys'
10 Expenses in the amount of One Hundred and Seven Thousand, Five Hundred Dollars and Zero Cents
11 (\$107,500.00), comprised of attorneys' fees equal to one-third of the Gross Settlement Amount
12 estimated to be at least Eighty Seven Thousand, Five Hundred Dollars and Zero Cents (\$87,500) and up
13 to Twenty Thousand Dollars and Zero Cents (\$20,000) for actually incurred litigation expenses.
14 Agreement, § III(N)(10). Plaintiff's counsel is to split the fees 50% to JCL Law Firm, APC, and 50%
15 to Zakay Law Group, APLC. Agreement, § I(F). The Agreement also provides for a Service Award in
16 the amount of Ten Thousand Dollars and Zero Cents (\$10,000.00) for Plaintiff, in consideration of his
17 time, risk, and efforts as the Class Representative on behalf of the Class and a general release.
18 Agreement, § III(N)(9).

19 As explained in further detail below, the Settlement is fair, adequate, and reasonable to the class
20 and should be granted final approval. This is evidenced by the unanimous approval of the Settlement by
21 the Settlement Class, the absence of any objections to the Settlement and the average Individual
22 Settlement Payment of One Thousand, Four-Hundred and Fifty-One Dollars and Eighty-One Cents
23 (**\$1,451.81**). Apex Dec., ¶¶ 13, 15; Zakay Dec., ¶ 19.

24 **IV. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL**
25 **OF CLASS ACTION SETTLEMENTS**

26 Settlements of disputed claims are favored by the courts. *Huens v. Tatum* (1997) 52 Cal.App.4th
27 259, 265. In evaluating settlements, the courts have long recognized that compromise is particularly
28 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*

1 v. *Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and settlement are the
2 preferred means of dispute resolution. This is especially true in complex class action litigation”).

3 “[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
4 action requires court approval.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 *citing*
5 *Malibu Outrigger Bd. Of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579. The court
6 must decide whether the proposed settlement falls within the range of reasonable settlements,
7 considering that settlements are compromises between the parties reflecting subjective, unquantifiable
8 judgments concerning the risks and possible outcomes of litigation. See also *Wershba v. Apple*
9 *Computer* (2001) 91 Cal.App.4th 224, 2246 (The proposed settlement is not to be judged against a
10 hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial.”).
11 In *Wershba*, appellants argued that the settlement was too low given the “clear” liability, however, the
12 Court rejected this argument and held that “the merits of the underlying class claims are not a basis for
13 upsetting the settlement of a class action.” *Wershba, supra*, at 246; *see also 7-Eleven, supra*, at 1150.

14 In these cases, Courts have repeatedly emphasized that there is a strong initial presumption that
15 the compromise is fair and reasonable. *Wershba*, 91 Cal.App.4th at 245. Courts should not substitute
16 their judgment for that of the parties who negotiated the settlement. *Id.* At 246. The presumption of
17 fairness exists where: (1) investigation and discovery are sufficient to allow counsel and the court to act
18 intelligently; (2) the settlement is reached through arm’s-length bargaining; (3) counsel is experienced
19 in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1801, *citing*
20 *Newberg & Conte, Newberg on Class Actions*, (3d ed. 1992) §11.41, pp. 11-91. Here, all of these factors
21 support a presumption of fairness.

22 The essential evaluation is whether, given the risks of litigation and the range of probable results,
23 the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. Here, the facts and
24 circumstances compel the conclusion that the proposed settlement satisfies that standard.

25 V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

26 The court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v. Ford*
27 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *see also Officers for Justice v. Civil Service Com'n* (9th
28 Cir. 1982) 688 F. 2d 615, 625. The purpose of the requirement is "the protection of those class members,

1 including the named plaintiffs, whose rights may not have been given due regard by the negotiating
2 parties." *Dunk, supra*, at 1801.

3 The trial court has broad discretion to determine whether the settlement is fair. *Rebney v. Wells*
4 *Fargo Bank* (1990) 220 Cal.App.3d 1117, 1138. "The well-recognized factors that the trial court should
5 consider in evaluating the reasonableness of a class action settlement agreement include 'the strength of
6 plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of
7 maintaining class action status through trial, the amount offered in settlement, the extent of discovery
8 completed and the stage of the proceedings, the experience and views of counsel, the presence of a
9 governmental participant, and the reaction of the class members to the proposed settlement.' [Citations.]"
10 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128; see also *Munoz v. BCI Coca-Cola*
11 *Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408.

12 The list of factors is not exhaustive and should be tailored to each case. *Dunk, supra*, at 1801.
13 Due regard should be given to what is otherwise a private consensual agreement between the parties.
14 *Id.* The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement
15 is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
16 settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.* "Ultimately, the
17 [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross
18 approximations and rough justice.' [Citation omitted.]" *Id.*

19 These factors are analyzed seriatim below and all support final approval of the class action
20 settlement before this Court.

21 **A. Class Counsel Conducted a Thorough Investigation.**

22 As detailed in the motion for preliminary approval, Class Counsel thoroughly investigated the
23 proposed Class Members' claims, applicable law, and potential defenses. Specifically, Class Counsel
24 assessed the value of the class claims using data and documents provided by Defendant through
25 informal discovery. Class Counsel obtained time records for the Class Members, aggregate workweek
26 and pay period data for the Class Members, aggregate meal premiums paid to the Class Members,
27 average hourly rate for the Class Members, and copies of applicable handbooks, policies, and
28 agreements containing, *inter alia*, compensation, timekeeping, and meal and rest period policies to

1 assess damages before mediation. Class Counsel retained BCG to analyze Defendant's time and payroll
2 data to formulate damage models estimating Defendant's liability exposure. Class Counsel's
3 investigation, research, experience, and damage models informed and guided the mediated negotiations
4 that resulted in this settlement. Accordingly, Class Counsel fully understood the strengths and
5 weaknesses of the class claims before the parties reached a settlement. Zakay Dec., ¶ 20-26.

6 **B. The Parties Settled at Mediation.**

7 On June 27, 2023, the Parties conducted a full day of mediation with Hon. Brian C. Walsh, a
8 mediator of wage and hour class and representative actions. Mediator Walsh helped manage the
9 Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. The
10 Parties made substantial progress with Mediator Walsh's assistance. Namely, the Parties exchanged
11 information regarding their respective claims and defense, including their respective evaluation of the
12 damages. The mediation concluded with a settlement, the complete and final terms of which are now
13 set forth in the Agreement. Class Counsel submit that the Settlement constitutes a fair, adequate, and
14 reasonable compromise of the claims at issue. Zakay Dec., ¶ 21.

15 **C. Class Counsel is Experienced in Similar Litigation.**

16 Class Counsel in this matter has extensive class action experience in multiple fields and has
17 represented tens-of-thousands of persons in class actions. Counsel has previously litigated similar wage
18 and hour class actions involving similar claims. Class Counsel has been approved as class counsel in
19 similar wage and hour class actions throughout the State of California. As such, courts throughout
20 California have deemed Class Counsel experienced and knowledgeable in this area of law. Class
21 Counsel has participated in every aspect of the settlement discussions and has concluded the settlement
22 is fair, adequate, and reasonable and in the best interests of the Class. Zakay Dec., ¶¶ 22-25.

23 **D. The Class Responded Positively to the Settlement.**

24 The reaction of the Class unequivocally supports approval of the Settlement. Significantly, after
25 dissemination of the notice to the Class, which provided each Class Member with the terms of the
26 Settlement, including the specific estimated Individual Settlement Payments. To date, none of the 83
27 Class Members opted out of the Settlement. Moreover, there are zero objections. Stated differently,
28 100% of the Class chose to participate in the Settlement. Zakay Dec., ¶ 19; Apex Dec., ¶¶ 11-13.

1 The unanimous approval by the Settlement Class strongly supports a finding that the Settlement
2 is fair, reasonable, and adequate. *See In re Austrian & German Bank Holocaust Litigation* (S.D.N.Y.
3 2000)80 F.Supp.2d 164, 175 ("If only a small number of objections are received, that fact can be viewed
4 as indicative of the adequacy of the settlement."); *Stoetznner v. U.S. Steel Corp.* (3d. Cir. 1990) 897 F.2d
5 115, 118-119 (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l*
6 *Union* (6th Cir. 1981) 638 F.2d 954 (The fact that 7 out of 109 class members objected to the proposed
7 settlement should be considered when determining fairness of settlement.). Consequently, Class
8 Counsel respectfully requests the Court to follow the unanimous approval of the Settlement Class and
9 grant final approval of the Settlement.

10 **E. The Gross Settlement Amount is Fair and Reasonable.**

11 The Gross Settlement Amount of Two-Hundred, Sixty-Two Thousand, Five Hundred Dollars
12 and Zero Cents (\$262,500.00) in this case is fair and well within the range of recognized
13 reasonableness. The *Kullar* court acknowledged that "as the court does when it approves a settlement
14 as in good faith under Code of Civil Procedure section 877.6, the court must at least satisfy itself that
15 the class settlement is within the 'ballpark' of reasonableness." *Kullar, supra*, at 129; *See Tech-Bilt,*
16 *Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488, 499-500 (1985).)

17 Here, the Settlement is clearly within the "ballpark" of reasonableness because the Settlement
18 provides a sizeable recovery to the Settlement Class Members and need not necessarily obtain 100
19 percent of the damages sought to be fair, reasonable, and ultimately, meaningful. *Wershba*, 91
20 Cal.App.4th at 250. While the Gross Settlement Amount of Two-Hundred, Sixty-Two Thousand, Five
21 Hundred Dollars and Zero Cents (\$262,500.00) represents a discount on Defendant's potential exposure
22 if Plaintiff established liability on all claims and was awarded the full amount of the estimated damages
23 at trial, this compromise is reasonable because (1) the formidable defenses raised by Defendant
24 presented a risk that could award significantly less in damages than Plaintiff's estimate and (2) any
25 theoretical post-trial recovery may require many more years of litigation, resulting in added fees and
26 costs without any guarantee of recovery for the Settlement Class. *Zakay Dec.*, ¶ 26.

27 As detailed at the time of preliminary approval, the Gross Settlement Amount is fair and
28 reasonable considering the nature and magnitude of the claims being settled and the various potential

1 impediments to recovery. Class Counsel developed varied economic damages models measuring
2 Defendant's liability exposure while accounting for the uncertainties of continued litigation. The various
3 models were informed by Class Counsel's investigation, including the analysis of a significant sample
4 of time and payroll data. Detailed in greater depth during the preliminary approval process, Class
5 Counsel projected a range of Defendant's liability exposure for the claims asserted on behalf of the
6 Class. The Gross Settlement Amount represents approximately 35.95% of Defendant's *class-wide*
7 damages liability exposure as estimated by Class Counsel at the time of mediation. Zakay Dec., ¶ 27.

8 In *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at * 12, the District
9 Court for the Northern District of California granted final approval in a wage and hour misclassification
10 action and found that the Gross Settlement Amount representing 10% of the estimated trial award was
11 within the "range of reasonableness." In *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)* (9th Cir.
12 2000) 213 F.3d 454, 459, the Ninth Circuit approved a settlement representing "roughly one-sixth of the
13 potential recovery." Given the amount of the settlement here as compared to potential value of the
14 claims, particularly the strength of Plaintiff's action, the settlement is clearly fair and reasonable.³

15 The calculation methodology used to compensate the Settlement Class Members for the alleged
16 damages was negotiated at the time of the Settlement. More importantly, the methodology is fair,
17 objective, and impartial. The calculation methodology is based on the number of Workweeks each
18 Settlement Class Member worked for Defendant during the Class Period. The number of Workweeks
19 for the Settlement Class Members is established through Defendant's data and documented
20 compensation records. Settlement Administrator shall add up the total number of Workweeks for all
21 Class Members. The respective Workweeks for each Class Member will be divided by the total
22 Workweeks for all Class Members, resulting in the Payment Ratio for each Class Member. Each Class
23 Member's Payment Ratio will then be multiplied by the Net Settlement Amount to calculate each Class
24

25 ³ See also *Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016, No. 15-CV-02198) 2016 WL 5907869, at *3, 7 (approving
26 a California wage and hour settlement where the class received 11.6% of the estimated total liability, or approximately \$29
27 per work week); *Leverage v. Traeger Pellet Grills, LLC* (N.D. Cal. June 28, 2017, No. 16-CV-00784) 2017 WL 2797811, at
28 *7 (Approving a California wage and hour settlement where the class received 18% of the estimated total liability); see also
In re Newbridge Networks Sec. Litig. (D.D.C. Oct. 23, 1998) 1998 WL 765724, at *2 ("Courts have not identified a precise
numerical range within which a settlement must fall in order to be deemed reasonable; but an agreement that secures roughly
six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk
that no recovery at all will be won, seems to be within the targeted range of reasonableness.").

Member's estimated Individual Settlement Payments. Agreement, § III(N)(1). This process establishes an objectively fair and reasonable procedure to compensate the Settlement Class. Zakay Dec., ¶ 8.

The Settlement also provides significant relief to the Settlement Class Members. After deductions for any Court-approved Attorneys' Fees and Attorneys' Expenses, Service Award, PAGA Payment, and Settlement Administration Costs, the Net Settlement Amount is currently estimated to be One-Hundred and Twenty Thousand, Five-Hundred Dollars and Zero Cents (\$120,500.00). Apex Dec., ¶ 14. The average Individual Settlement Payment is approximately One Thousand, Four-Hundred and Fifty-One Dollars and Eighty-One Cents (\$1,451.81), and the highest is approximately Nine Thousand, Three-Hundred and Seventy-Three Dollars and Sixty-Nine Cents (\$9,373.69). Apex Dec., ¶ 15. This average net recovery is on par with many wage and hour class action settlements approved by California state and federal courts. *See, e.g., Palencia v. 99 Cents Only Stores*, No. 34-2010-00079619 (Sacramento County Super. Ct) (average net recovery of approximately \$80); *Fukuchi v. Pizza Hut*, Case No. BC302589 (LA. County Super. Ct.) (average net recovery of approximately \$120); *Contreras v. United Food Group, LLC*, Case No. BC389253 (L.A. County Super. Ct.) (average net recovery of approximately \$120); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct.) (average net recovery of approximately \$90); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average net recovery of approximately \$65); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (ED. Cal.) (average net recovery of approximately \$60); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct.) (average net recovery of approximately \$35); and *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A. Super. Ct.) (average net recovery of approximately \$20). Additionally, Defendant must separately fund its share of any employer side payroll taxes. Agreement, § III(A)(4).

Clearly the goal of this litigation to obtain redress for the class has been met by this Settlement. Given the amount of the Settlement, the risks of litigation and the arm's length negotiations between experienced counsel, the settlement is fair and reasonable, and is therefore entitled to final approval. Zakay Dec., ¶ 28.

F. The Strength of Plaintiff's Case and Risks of Continued Litigation

Although Class Counsel believes strongly in Plaintiff's claims, it would be misguided to ignore

1 the asserted defenses. If successful on any one of its defenses, Defendant could defend the action or,
2 at least, drastically undercut Plaintiff's claims. Zakay Dec., ¶ 29. As the federal court in *Glass v. UBS*
3 *Fin. Servs.*, 2007 WL221862 held, where the parties faced uncertainties similar to those in this
4 litigation:

5 ***In light of the above-referenced uncertainty in the law, the risk, expense,***
6 ***complexity, and likely duration of further litigation likewise favors the***
7 ***settlement.*** Regardless of how this Court might have ruled on the merits of
8 the legal issues, the losing party likely would have appealed, and the parties
9 would have faced the expense and uncertainty of litigating an appeal. The
expense and possible duration of the litigation should be considered in
evaluating the reasonableness of [a] settlement.

10 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
11 certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates,*
12 *Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110
13 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the
14 trial court to enter judgement in favor of the employer. *See also O'Conner v. Uber Technologies, Inc.*
15 (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also*
16 *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor
17 plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th
18 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly
19 individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176
20 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to
21 having taken meal and rest breaks demonstrated that individualized inquiries were required to show
22 harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following
23 *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack
24 of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying
25 certification of driver meal and rest period claims based on the predominance of individual issues).
26 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
27 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
28 settlement. Zakay Dec., ¶ 30.

1 Although Plaintiff is confident about the strength of his claims, Plaintiff nevertheless recognizes
2 that Defendant has factual and legal defenses that, if successful, would potentially defeat or impair the
3 value of the lawsuit. Legally, the fast-changing landscape of wage and hour litigation can drastically
4 affect the value of Plaintiff's claims and, in fact, already has. Zakay Dec., ¶ 31.

5 In a similar wage and hour case, the federal district court in *Hopson v. Hanesbrands Inc.*, 2009
6 U.S. Dist. LEXIS 33900 at * 19-20 (N.D. Cal. 2009), granted approval of an overtime class action
7 settlement and explained:

8 **Plaintiffs may have a strong case, but the risks inherent in continued**
9 **litigation are great.** Defendants strongly deny liability for Plaintiffs'
10 principal claim that full-time Service Associates were misclassified as
11 exempt. In addition to the uncertainties raised by Defendants at the
12 preliminary stage regarding Plaintiffs' chance of success in this case,
13 Defendants notes that the question of an employer's duty to provide rest and
14 meal periods is an open one, signaling even less certainty for
15 Plaintiffs.....[T]he **Total Settlement amount and the Class Members'**
16 **expected net recovery, after fees and other costs are deducted, appear**
17 **to be a reasonable compromise, in light of the risks of litigation.**

18 *See also Browning v. Yahoo!, Inc.*, 2007 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In
19 considering the strength of Plaintiffs' case, legal uncertainties at the time of settlement - particularly
20 those which go to fundamental legal issues - favor approval.").

21 As recognized in a federal decision approving settlement of an overtime wage class action:

22 **The potential complexity and possible duration of trial also weigh in**
23 **favor of granting final approval.** Plaintiffs acknowledge the difficulties
24 of proving damages, recognize the uncertainty of outcome, and believe
25 defendant would appeal in the event of adverse judgment. A post-judgment
26 appeal would require many years to resolve and delay payment to class
27 members. Plaintiffs believe the benefits of a guaranteed recovery today
28 outweigh an uncertain future result. Accordingly, plaintiffs argue, and the
Court agrees, the actual recovery confers substantial benefits on the class
that outweigh the potential recovery through full adjudication.

Barcia v. Contain-A-Way, Inc., 2009 U.S. Dist. LEXIS 17118, *9 (S.D. Cal. 2009); see also *Louie v.*
Kaiser Foundation Health Plan, Inc., 2008 U.S. Dist. LEXIS 78314, *14 (S.D. Cal. 2008).

In sum, while other cases have approved class certification in wage and hour claims, class
certification in this action would have been hotly disputed and was by no means a foregone conclusion.

1 Where both sides face significant uncertainty, as here, the attendant risks favor settlement. *Hanlon v.*
2 *Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.)

3 As demonstrated by the decisions in *Magadia, supra*, 999 F.3d 668, *O’Conner v. Uber*
4 *Technologies* (N.D. Cal. 2018) 82 F.Supp.3d 1133 and *Duran v. U.S. Bank National Assn.* (2014) 59
5 Cal.4th 1, the complexities and duration of further litigation cannot be overstated. There is little doubt
6 that if Defendant faced a large adverse judgement, Defendant undoubtedly has the resources to post a
7 bond and appeal. A post-judgment appeal by Defendant would have required many more years to
8 resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the case
9 could have dragged on for years after the appeal. The benefits of a guaranteed recovery today outweigh
10 an uncertain result three or more years in the future. *Zakay Dec.*, ¶ 32.

11 Class Representative and Class Counsel recognize the expense and length of a trial against
12 Defendant through possible appeals which could take another three years. In arriving at their informed
13 belief that the present settlement is fair and adequate, Class Counsel accounted for the uncertain outcome
14 and risk inherent in complex actions such as this one. Class Counsel is also mindful of and recognize
15 the inherent problems of proof under, and alleged defenses to, the claims asserted in the litigation.
16 Moreover, post-trial motions and appeals would have been inevitable. Costs would have increased, and
17 recovery would have been delayed if not denied, thereby reducing the benefits of an ultimate victory.
18 Class Representative and Class Counsel believe that the Settlement confers substantial monetary and
19 non-monetary benefits upon the Class. Based upon their evaluation, Class Representative and Class
20 Counsel have determined that the Settlement set forth in the Agreement is in the best interest of the
21 Settlement Class, is fair, reasonable, and adequate, and should be granted final approval. *Zakay Dec.*, ¶
22 33.

23 **VI. THE PENALTIES UNDER THE PRIVATE ATTORNEY GENERAL ACT OF 2004**
24 **ARE REASONABLE**

25 Where settlements “negotiate a good faith amount” for PAGA penalties and “there is no
26 indication that this amount was the result of self-interest at the expense of class members,” such
27 amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL,
28 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009). Courts routinely approve of amounts for PAGA

penalties in the range of zero to two percent of the settlement. *See id.* at *1, 9 (approving a PAGA payment of 0.3%); *Jack v. Hartford Fire Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving a PAGA payment of 0.25%); *McKenzie v. Fed. Express Corp.*, No. CV 10-02420 GAF (PLAx), 2012 WL 12882124, at *5 (C.D. Cal. Jan. 23, 2012) (acknowledging that courts approve PAGA claim settlements in the range of zero to two percent of the total settlement).

Here, Plaintiff and Defendant negotiated a good faith PAGA Payment in the amount of Twenty Thousand Dollars and Zero Cents (\$20,000.00) which is 7.62% of the Gross Settlement Amount. As illustrated above, this amount falls well within the range of approved PAGA settlements. Seventy-Five percent (75%) of the PAGA Payment, Fifteen Thousand Dollars and Zero Cents (\$15,000.00), will be paid to the LWDA (“LWDA Payment”) with the remaining twenty-five percent (25%) of the PAGA Payment, Five Thousand Dollars and Zero Cents (\$5,000.00) to be distributed to the PAGA Class Members (“PAGA Class Member Payment”), which is within the range of PAGA payments approved by courts and should be approved. Zakay Dec., ¶ 35.

Class Counsel gave the LWDA notice of this Settlement and proposed allocation by filing a copy of the Settlement, the Motion for Preliminary Approval, and this motion seeking final approval with the LWDA. Zakay Dec., ¶¶ 5-6, 36. By not registering an objection with either Class Counsel or the Court, the LWDA has accepted and approved of the proposed PAGA Payment.

VII. CONCLUSION

Plaintiff respectfully submits that the proposed settlement satisfies the standard of fairness established in California law and should therefore be finally approved as fair, reasonable, and adequate and requests entry of the Final Approval Order and Judgment submitted herewith.

Dated: March 25, 2024

ZAKAY LAW GROUP, APLC

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