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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

EDUARDO YBARRA, an individual, on behalf
of himself and on behalf of all persons similarly
situated,

Plaintiff,

vs.

HELZBERG'S DIAMOND SHOPS, LLC, a
Missouri Limited Liability Company; and DOES
1-50, Inclusive,

Defendants.

Case No. 21CV003531

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

Date: August 15, 2023

Time: 3:00 p.m.

Judge: Hon. Brad Seligman

Dept.: 23

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1 I. INTRODUCTION

2 Plaintiff EDUARDO YBARRA (hereinafter “Plaintiff”) seeks final approval of the First
3 Amended Joint Stipulation of Class and Representative Action Settlement Agreement (“Agreement”)¹,
4 which if approved, would provide valuable monetary relief for 352 Participating Class Member
5 employed by Defendant Helzberg’s Diamond Shops, LLC (hereinafter collectively “Defendant”) during
6 the Class Period.

7 In an order dated October 24, 2022, this Court preliminarily approved the Agreement and
8 preliminarily certified the Class. Declaration of Jean-Claude Lapuyade (“JCL Dec.”), ¶ 5. On February
9 2, 2023, the Court-approved Class Notice was mailed to each Class Member via U.S. First Class Mail.²
10 Declaration of Makenna Snow (“ILYM Dec.”), ¶ 7.

11 Shortly after mailing occurred, the Parties discovered that the Notice was found to contain
12 inaccurate information with respect to the workweek count. Additionally, the Notice was erroneously
13 mailed to some of Defendant’s employees who did not work during the Class Period and are therefore,
14 not Class Members. ILYM Dec., ¶ 8. On May 5, 2023, revised Notices with accurate information were
15 mailed to each Class Member via U.S First Class Mail. ILYM Dec., ¶ 9. ***The Class greeted news of the***
16 ***Settlement with unanimous approval.***³ There are zero opt-outs and zero objections to the Settlement.
17 ILYM Dec., ¶¶ 13-14. The unanimous approval by the Class evidences the clear fairness and
18 reasonableness of the Settlement. JCL Dec., ¶ 9.

19 An objective evaluation of the proposed settlement of Six Hundred Sixty Thousand Dollars and
20 Zero Cents (\$660,000.00) (“Gross Settlement Amount”) confirms that the relief negotiated on behalf
21 of the Participating Class Members is fair, reasonable, and valuable. The Settlement is a product of
22 informed, adversarial, and non-collusive negotiations, between experienced counsel, and presided over
23 by Tripper Ortman, Esq. After deducting any Court-approved attorneys’ fees and costs, class
24 representative incentive payments, administration costs, and the payments to the Labor & Workforce
25

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

² After the Notices were mailed, it was found that the Notice contained inaccurate information with respect to the workweek
count. Additionally, the Notice was erroneously mailed to some of Defendant’s employees who did not work for Defendant
during the Class Period and are therefore not Class Members in this Action. ILYM Dec., ¶ 9.

³ Fifteen (15) Notices were deemed undeliverable. ILYM Dec. at ¶¶ 12.

1 Development Agency (“LWDA”), the net settlement fund shall be distributed to Participating Class
2 Members based on the number of Workweeks they worked while employed by Defendant during the
3 Class Period. JCL Dec., ¶ 10.

4 This Settlement provides substantial recovery for Defendant’s alleged wage and hour violations.
5 Plaintiff estimates that the Settlement, if approved, would result in a Net Settlement Amount of
6 approximately \$355,000.00. This will result in an average Individual Class Settlement Payment of
7 **\$1,008.52** and high payment of **\$3,544.74**. JCL Dec., ¶ 11; ILYM Dec. at ¶ 14.

8 The relief offered by the Settlement is immediate and is particularly impressive when viewed
9 against the difficulties encountered by plaintiffs pursuing similar wage and hour cases (*see infra*).
10 Indeed, by settling now rather than proceeding to trial, the Class will not have to wait (possibly years)
11 for relief, nor will they have to bear the risks associated with prolonged and uncertain litigation. JCL
12 Dec., ¶ 12.

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

17 **II. OVERVIEW OF THE LITIGATION**

18 Defendant is a Missouri limited liability company that owns and operates a chain of diamond
19 and jewelry retail stores in California. This action asserts claims on behalf of Defendant’s non-exempt
20 employees working in California. Plaintiff worked for Defendant as a non-exempt employee in
21 California between October of 2020 to July of 2021. At all times during his employment, Plaintiff
22 earned hourly wage, including overtime, and performance-based incentive compensation, and was
23 entitled to legally compliant meal and/or rest periods. Throughout his employment, Plaintiff was subject
24 to Defendant’s written policies and procedures. JCL Dec., ¶ 14.

25 Generally, Plaintiff claims that Defendant failed to pay for all time worked, including, time spent
26 waiting for and undergoing mandatory loss prevention security checks, failed to provide compliant
27 meal and rest periods, failed to pay overtime, meal premiums, and sick pay, at the correct regular rate
28 of pay, failed to furnish accurate itemized wage statements, failed to pay all wages when due and failed

1 to reimburse employees for mandatory business expenses. Defendant forcefully denies liability for each
2 of Plaintiff's claims. Further, Defendant asserts that it fully complied with all applicable employment
3 laws and raised several other significant defenses to Plaintiff's claims, including but not limited to,
4 facially compliant meal and rest period policies, compliant wage statements, and timely payment all
5 wages due upon separation of employment. JCL Dec., ¶ 15.

6 On September 27, 2021, Plaintiff filed a Notice of Violations ("PAGA Notice") with the Labor
7 and Workforce Development Agency ("LWDA") and served the same on Defendant. Plaintiff's PAGA
8 Notice set forth the facts and theories supporting Defendant's alleged violations of various California
9 Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to
10 pursue claims under the California Labor Code Private Attorneys General Act, Cal. Lab. Code sections
11 2698, *et seq.* ("PAGA"). JCL Dec., ¶ 16.

12 On December 3, 2021, Plaintiff filed a class action complaint in the Alameda Superior Court,
13 Case Number 21CV003531 ("Action"). The Action alleged nine causes of action against Defendant
14 for: (1) Unfair Competition in Violation of California Business and Professions Code §§ 17200; (2)
15 Failure to Pay Minimum Wages in Violation of California Labor Code §§ 1194, 1197 and 1197.1; (3)
16 Failure to Pay Overtime Wages in Violation of California Labor Code §§ 510 *et seq.*; (4) Failure to
17 Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 and 512; (5) Failure to Provide
18 Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 and 512; (6) Failure to Provide Accurate
19 Itemized Wage Statements in Violation of Cal. Lab. Code §226; (7) Failure to Provide Wages When
20 Due in Violation of Cal. Lab. Code §§ 201, 202 and 203; (8) Failure to Reimburse Employees for
21 Required Expenses in Violation of Cal. Lab. Code § 2802; and (9) Violation of the Private Attorneys
22 General Act [Labor Code §§ 2698 *et seq.*]. On February 2, 2022, Defendant removed the Action to the
23 United States District Court, Northern District of California. JCL Dec., ¶ 17.

24 On April 13, 2022, Plaintiff filed a second PAGA Notice with the LWDA alleging several
25 additional wage and hour claims, including a new suitable seating claim, and seeking civil penalties
26 and other relief provided by PAGA. JCL Dec., ¶ 18.

27 Plaintiff and Defendant agreed to mediate the Action with Tripper Ortman, Esq., an experienced
28 wage and hour mediator. In anticipation of mediation, the Parties agreed to stay formal discovery and

1 continue deadlines for class certification in the Action. To prepare for mediation, Defendant agreed to
2 informally produce documents and data points subject to the mediation privilege, including but not
3 limited to, the Class Members' time data and certain payroll data points. As discussed *infra*, Plaintiff's
4 counsel retained the forensic consultants at Berger Consulting Group ("BCG") to analyze Defendant's
5 time and payroll data. JCL Dec., ¶ 19.

6 On April 19, 2022, the Parties participated in a full day mediation with Mr. Ortman. After arms-
7 length negotiations and bargaining, the Parties reached an agreement to settle and signed a
8 Memorandum of Understanding. Subsequently, the Parties drafted and negotiated a long-form
9 settlement agreement, which is the subject of the instant motion. As part of the Agreement, the Parties
10 stipulated to remand the Action back to the Alameda Superior Court and Plaintiff filed a First Amended
11 Complaint adding the claims and causes of action included in both PAGA Notices and in the original
12 Complaint. The Parties now seek approval of the entire Agreement. JCL Dec., ¶ 20.

13 On October 24, 2022, this Court granted preliminary approval of the Settlement. JCL Dec., ¶ 5.
14 On May 24, 2023, the Settlement Administrator mailed Notice Packets to all 352 Participating Class
15 Member. ILYM Dec., ¶ 7. The mailing of the Notice Packets triggered a forty-five (45) day Response
16 Deadline for the Class to submit requests for exclusion or objections to the Settlement. The response
17 from the Class to the Settlement was outstanding – 100% of the Class Members are participating in the
18 Settlement. ILYM Dec., ¶¶ 15.

19 **III. THE SETTLEMENT BEFORE THE COURT**

20 The Court preliminarily approved an initial Gross Settlement Amount of Six Hundred Sixty
21 Thousand Dollars (\$660,000.00) based on a total of an estimated 22,934 Workweeks worked by the
22 Class during the Class Period. The Gross Settlement Amount shall be used: (1) to satisfy Individual
23 Class Settlement Payments; (2) to satisfy the Class Representative Service Payment; (3) to satisfy the
24 Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment (collectively
25 hereinafter "Class Counsel Fees and Expenses Payment"); (4) to satisfy the PAGA Civil Penalty
26 Payment; and (5) to satisfy the Administration Expenses incurred in this action. JCL Dec., ¶ 20.

27 Defendant will fund the Settlement by transferring the Gross Settlement Amount into a Qualified
28 Settlement Fund within thirty (30) calendar days after the Effective Date. Agreement, ¶ 56. The

1 Settlement Administrator shall disburse the Individual Class Settlement Payments to the Participating
2 Class Member no later than fourteen (14) days after Defendant funds the Gross Settlement Amount.
3 Agreement, ¶ 56. The Settlement Administrator will calculate Individual Class Settlement Payments by
4 adding up the total number of Workweeks for all Class Members. The Settlement Administrator will
5 then divide the Net Settlement Amount of the Workweek Total, resulting in a Workweek Value for each
6 Class Member. Each Workweek Value is then multiplied by the number of Workweeks of all
7 Participating Class Members to calculate each estimated Individual Class Settlement Payment.
8 Agreement, ¶ 45(a). The estimated average Individual Class Settlement Payment is approximately
9 **\$1,008.52**. ILYM Dec., ¶ 14.

10 In exchange for the valuable consideration, as of the funding of the Gross Settlement Amount,
11 the Participating Class Member will release the Released Parties from the Released Class Claims that
12 accrued during the Class Period. Agreement, ¶ 59.

13 ILYM Group, Inc. was appointed as the Settlement Administrator for the Class. The
14 Administration Expenses include those expenses of effectuating and administering the Settlement, i.e.,
15 the costs incurred to the Settlement Administrator, the costs of giving notice to the Class, the costs of
16 administering and disbursing the Individual Class Settlement Payments, and the fees of the Settlement
17 Administrator approved for reimbursement by the court. The Settlement Administrator expenses are
18 \$10,000. ILYM Dec., ¶ 50. These expenses shall be paid from the Gross Settlement Amount.
19 Agreement, ¶ 19.

20 Subject to Court approval, Class Counsel shall seek a Class Counsel Fees and Expenses Payment
21 in the amount of \$245,000.00 comprised of attorneys' fees equal to thirty percent (30%) of the Gross
22 Settlement Amount estimated to be at least \$220,000.00 and up to \$25,000 for actually incurred litigation
23 expenses. Agreement, ¶ 50(b). Plaintiff's counsel is to split the fees 50% to the JCL Law Firm, APC,
24 and 50% to the Zakay Law Group, APLC. Agreement, ¶ 5. The Agreement also provides for a Class
25 Representative Service Payment in the amount of \$10,000 for Plaintiff, in consideration of his time, risk,
26 and efforts as the Class Representative on behalf of the Class and a general release. Agreement, ¶ 50(a).

27 As explained in further detail below, the Settlement is fair, adequate, and reasonable to the class
28 and should be granted final approval. This is evidenced by the unanimous approval of the Settlement by

the Class, the absence of any objections to the Settlement and the average Individual Class Settlement Payment of \$1,008.52. ILYM Dec., ¶¶ 12-13; JCL Dec., ¶ 22.

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

Settlements of disputed claims are favored by the courts. *Huens v. Tatum* (1997) 52 Cal.App.4th 259, 265. In evaluating settlements, the courts have long recognized that compromise is particularly appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran. v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation”).

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

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

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

4 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

5 The court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v. Ford*
6 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *see also Officers for Justice v. Civil Service Com'n* (9th
7 Cir. 1982) 688 F. 2d 615, 625. The purpose of the requirement is "the protection of those class members,
8 including the named plaintiffs, whose rights may not have been given due regard by the negotiating
9 parties." *Dunk, supra*, at 1801.

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

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

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

28 ///

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

2 As detailed in the motion for preliminary approval, Class Counsel thoroughly investigated the
3 proposed Class Members' claims, applicable law, and potential defenses. Specifically, Class Counsel
4 assessed the value of the class claims using data and documents provided by Defendant through formal
5 and informal discovery. Class Counsel obtained time, payroll, and policy records, as well as data
6 regarding the number of Class Members, workweeks, and average rate of pay to assess damages before
7 mediation. Class Counsel retained BCG to analyze Defendant's time and payroll data to formulate
8 damage models estimating Defendant's liability exposure. Class Counsel's investigation, research,
9 experience, and damage models informed and guided the mediated negotiations that resulted in this
10 settlement. Accordingly, Plaintiff's Counsel fully understood the strengths and weaknesses of the class
11 claims before the parties reached a settlement. JCL Dec., ¶ 24-31.

12 **B. The Parties Settled Following Mediation.**

13 On April 19, 2022, the Parties conducted a full day mediation with Tripper Ortman, Esq., an
14 experienced wage and hour mediator. Mediator Ortman helped to manage the Parties' expectations
15 and provided a useful, neutral analysis of the issues and risks to both sides. The Parties made substantial
16 progress with Mediator Ortman's assistance. Namely, the Parties exchanged information regarding
17 their respective claims and defenses, including their respective evaluations of the damages. After more
18 than eight hours of arm's length and adversarial negotiations, the mediation concluded without a
19 settlement. However, at the conclusion of the mediation, Mediator Ortman's issued a Mediator's
20 proposal which the Parties ultimately accepted. The amount of the service awards was not negotiated
21 until after the parties agreed to the Gross Settlement Amount and many other terms. JCL Dec., ¶ 32.
22 No action would likely have been taken by Class Members individually, and no compensation would
23 have been recovered for them, but for Plaintiff's service on behalf of the Class.

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

25 Class Counsel in this matter has extensive class action experience in multiple fields and has
26 represented tens-of-thousands of persons in class actions. Counsel has previously litigated similar wage
27 and hour class actions involving similar claims. Class Counsel has been approved as class counsel in
28 similar wage and hour class actions throughout the State of California. As such, courts throughout

California have deemed Class Counsel experienced and knowledgeable in this area of law. Class Counsel has participated in every aspect of the settlement discussions and has concluded the settlement is fair, adequate, and reasonable and in the best interests of the Class. JCL Dec., ¶¶ 33-39; Declaration of Shani Zakay (“Zakay Dec.”), ¶¶ 1-3.

D. The Class Responded Positively to the Settlement.

The reaction of the Class unequivocally supports approval of the Settlement. Significantly, after dissemination of the notice to the Class, which provided each class member with the terms of the Settlement, including the specific estimated Individual Class Settlement Payments. To date, none of the 352 members of the Class opted out of the Settlement. Moreover, there are zero objections. Stated differently, 100% of the Class chose to participate in the Settlement. JCL Dec., ¶ 10; ILYM Dec., ¶¶ 12-13.

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

E. The Gross Settlement Amount is Fair and Reasonable.

The Gross Settlement Amount of Six Hundred Sixty Thousand Dollars and Zero Cents (\$660,000.00) in this case is fair and well within the range of recognized reasonableness. The *Kullar* court acknowledged that “as the court does when it approves a settlement as in good faith under Code of Civil Procedure section 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of reasonableness.” *Kullar, supra*, at 129; *See Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488, 499-500 (1985.).

Here, the Settlement is clearly within the “ballpark” of reasonableness because the Settlement

1 provides a sizeable recovery to the Participating Class Member and need not necessarily obtain 100
2 percent of the damages sought to be fair, reasonable, and ultimately, meaningful. *Wershba*, 91
3 Cal.App.4th at 250. While the Gross Settlement Amount of Six Hundred Sixty Thousand Dollars and
4 Zero Cents (\$660,000.00) represents a discount on Defendant’s potential exposure if Plaintiff
5 established liability on all claims and was awarded the full amount of the estimated damages at trial, this
6 compromise is reasonable because (1) the formidable defenses raised by Defendant presented a risk that
7 could award significantly less in damages than Plaintiff’s estimate and (2) any theoretical post-trial
8 recovery may require many more years of litigation, resulting in added fees and costs without any
9 guarantee of recovery for the Class. JCL Dec., ¶ 40.

10 As detailed at the time of preliminary approval, the Gross Settlement Amount is fair and
11 reasonable considering the nature and magnitude of the claims being settled and the various potential
12 impediments to recovery. Class Counsel developed varied economic damages models measuring
13 Defendant’s liability exposure while accounting for the uncertainties of continued litigation. The various
14 models were informed by Class Counsel’s investigation, including the analysis of a significant sample
15 of time and payroll data. Detailed in greater depth during the preliminary approval process, Class
16 Counsel projected a range of Defendant’s liability exposure for the claims asserted on behalf of the
17 Class. The Gross Settlement Amount represents between approximately 29% and 40% of Defendant’s
18 *class-wide* liability exposure as estimated by Class Counsel at the time of mediation. JCL Dec., ¶ 41.

19 In *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at * 12, the District
20 Court for the Northern District of California granted final approval in a wage and hour misclassification
21 action and found that the Gross Settlement Amount representing 10% of the estimated trial award was
22 within the “range of reasonableness.” In *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)* (9th Cir.
23 2000) 213 F.3d 454, 459, the Ninth Circuit approved a settlement representing “roughly one-sixth of the
24 potential recovery.” Given the amount of the settlement here as compared to potential value of the
25 claims, particularly the strength of Plaintiff’s action, the settlement is clearly fair and reasonable.⁴

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27 ⁴ See also *Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016, No. 15-CV-02198) 2016 WL 5907869, at *3, 7 (approving
28 a California wage and hour settlement where the class received 11.6% of the estimated total liability, or approximately \$29
per work week); *Leverage v. Traeger Pellet Grills, LLC* (N.D. Cal. June 28, 2017, No. 16-CV-00784) 2017 WL 2797811, at
*7 (Approving a California wage and hour settlement where the class received 18% of the estimated total liability); see also

1 The calculation methodology used to compensate the Participating Class Member for the alleged
2 damages was negotiated at the time of the Settlement. More importantly, the methodology is fair,
3 objective, and impartial. The calculation methodology is based on the number of Workweeks each
4 Participating Class Member worked for Defendant during the Class Period. The number of Workweeks
5 for the Participating Class Member is established through Defendant's data and documented
6 compensation records. The Settlement Administrator is responsible for calculating the Individual Class
7 Settlement Payments by multiplying the Workweek Value for each Participating Class Member by the
8 Net Settlement Amount. The Settlement Administrator will calculate the payment ratio by dividing the
9 total number of Workweeks for each Participating Class Member by the total number of Workweeks for
10 all Participating Class Member. This process establishes an objectively fair and reasonable procedure to
11 compensate the Class. Agreement, ¶ 45(a).

12 The settlement also provides significant relief to the Participating Class Members. After
13 deductions for the Class Counsel Fees and Expenses Payment, Administration Expenses, the PAGA
14 Civil Penalty Payment, and the Class Representative Service Payment, the Net Settlement Amount is
15 currently estimated to be \$355,000.00. ILYM Dec., ¶ 16. The average settlement payment is
16 approximately \$1,008.52, and the highest is approximately \$3,544.74. ILYM Dec., ¶ 16. This average
17 net recovery is on par with many wage and hour class action settlements approved by California state
18 and federal courts. *See, e.g., Palencia v. 99 Cents Only Stores*, No. 34-2010-00079619 (Sacramento
19 County Super. Ct) (average net recovery of approximately \$80); *Fukuchi v. Pizza Hut*, Case No.
20 BC302589 (LA. County Super. Ct.) (average net recovery of approximately \$120); *Contreras v. United*
21 *Food Group, LLC*, Case No. BC389253 (L.A. County Super. Ct.) (average net recovery of
22 approximately \$120); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County
23 Super. Ct.) (average net recovery of approximately \$90); *Doty v. Costco Wholesale Corp.*, Case No.
24 CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average net recovery of approximately \$65);
25 *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (ED. Cal.) (average net recovery of

26
27 *In re Newbridge Networks Sec. Litig.* (D.D.C. Oct. 23, 1998) 1998 WL 765724, at *2 ("Courts have not identified a precise
28 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.").

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, ¶ 19.

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. JCL Dec., ¶ 41.

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 the asserted defenses. If successful on any one of its defenses, Defendant could defend the action or, at least, drastically undercut Plaintiff's claims. JCL Dec., ¶ 42. As the federal court in *Glass v. UBS Fin. Servs.*, 2007 WL221862 held, where the parties faced uncertainties similar to those in this litigation:

In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties 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.

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the trial court to enter judgement in favor of the employer. *See also O'Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 ("[T]he reason, if any, that employees might not take their breaks were predominantly

individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues). Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶ 43.

Although Plaintiff is confident about the strength of his claims, Plaintiff nevertheless recognizes that Defendant has factual and legal defenses that, if successful, would potentially defeat or impair the value of the lawsuit. Legally, the fast-changing landscape of wage and hour litigation can drastically affect the value of Plaintiff’s claims and, in fact, already has. JCL Dec., ¶ 44.

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

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

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

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

The potential complexity and possible duration of trial also weigh in

1 **favor of granting final approval.** Plaintiffs acknowledge the difficulties
2 of proving damages, recognize the uncertainty of outcome, and believe
3 defendant would appeal in the event of adverse judgment. A post-judgment
4 appeal would require many years to resolve and delay payment to class
5 members. Plaintiffs believe the benefits of a guaranteed recovery today
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.

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

8 In sum, while other cases have approved class certification in wage and hour claims, class
9 certification in this action would have been hotly disputed and was by no means a foregone conclusion.
10 Where both sides face significant uncertainty, as here, the attendant risks favor settlement. *Hanlon v.*
11 *Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.)

12 As demonstrated by the decisions in *Magadia, supra*, 999 F.3d 668, *O’Conner v. Uber*
13 *Technologies* (N.D. Cal. 2018) 82 F.Supp.3d 1133 and *Duran v. U.S. Bank National Assn.* (2014) 59
14 Cal.4th 1, the complexities and duration of further litigation cannot be overstated. There is little doubt
15 that if Defendant faced a large adverse judgement, Defendant undoubtedly have the resources to post a
16 bond and appeal. A post-judgment appeal by Defendant would have required many more years to
17 resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the case
18 could have dragged on for years after the appeal. The benefits of a guaranteed recovery today outweigh
19 an uncertain result three or more years in the future. JCL Dec., ¶ 45.

20 Class Representative and Class Counsel recognize the expense and length of a trial against
21 Defendant through possible appeals which could take another three years. In arriving at their informed
22 belief that the present settlement is fair and adequate, Class Counsel accounted for the uncertain outcome
23 and risk inherent in complex actions such as this one. Class Counsel is also mindful of and recognize
24 the inherent problems of proof under, and alleged defenses to, the claims asserted in the litigation.
25 Moreover, post-trial motions and appeals would have been inevitable. Costs would have increased, and
26 recovery would have been delayed if not denied, thereby reducing the benefits of an ultimate victory.
27 Class Representative and Class Counsel believe that the Settlement confers substantial monetary and
28 non-monetary benefits upon the Class. Based upon their evaluation, Class Representative and Class

Counsel have determined that the Settlement set forth in the Agreement is in the best interest of the Class, is fair, reasonable, and adequate, and should be granted final approval. JCL Dec., ¶ 46.

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

Where settlements “negotiate a good faith amount” for PAGA penalties and “there is no indication that this amount was the result of self-interest at the expense of class members,” such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 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 Civil Penalty Payment in the amount of \$40,000 which is 6% 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 Civil Penalty Payment (\$30,000) will be paid to the LWDA (“LWDA Payment”) with the remaining twenty-five percent (25%) of the PAGA Civil Penalty Payment (\$10,000) to be distributed to the Aggrieved Employees (“Individual PAGA Payment”), which is within the range of PAGA penalties approved by courts and should be approved. JCL Dec., ¶ 47.

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. JCL Dec., ¶¶ 5-6. By not registering an objection with either Class Counsel or the Court, the LWDA has accepted and approved of the proposed PAGA Civil Penalty Payment.

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Dated: July 21, 2023

By: Jean-Claude Lapuyade, Esq.
Attorneys for Plaintiff