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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

NORMAN RESPASS, an individual, on behalf of
himself and on behalf of all persons similarly
situated,

Plaintiff,

v.

THE SCION GROUP LLC, a Limited Liability
Company; and DOES 1 through 50, inclusive,

Defendants.

Case No. 34-2020-00285285-CU-OE-GDS

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

Hearing Date: December 9, 2022
Hearing Time: 9:00am

Judge: Hon. Lauri A. Damrell
Department: 28

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1 **I. INTRODUCTION**

2 Plaintiff NORMAN RESPASS (“Plaintiff”) respectfully submits this memorandum in
3 support of the motion for preliminary approval of the Class Action Complaint (*Norman Respass v.*
4 *The Scion Group LLC, et al.*, Case No. 34-2020-00285285, filed on or about September 23, 2020)
5 (the “Action”) with Defendant THE SCION GROUP LLC (“Defendant”), and seek entry of an
6 order: (1) preliminary approving the proposed settlement of the Action with Defendant; (2)
7 approving the form and method for providing class-wide notice; (3) directing that notice of the
8 proposed settlement be given to the class; and (4) scheduling a final approval hearing date to
9 consider Plaintiff’s motion for final approval of the settlement and entry of the Judgment, and
10 Plaintiff’s motion for approval of attorneys’ fees and litigation expenses.

11 The Parties have reached a full settlement of the Action, which is embodied in the Joint
12 Stipulation of Class Action Settlement (the “Agreement”). A copy of the executed Agreement is
13 attached as Exhibit #1 to the Declaration of Shani O. Zakay (“Decl. Zakay”), served and filed
14 herewith. The Settlement is fair, reasonable, and adequate. Plaintiff requests that this Court grant
15 preliminary approval of the Agreement and enter the proposed order submitted herewith.

16 **II. DESCRIPTION OF THE SETTLEMENT**

17 The Gross Settlement Amount to be paid by Defendant is Three Hundred Twenty Five
18 Thousand Dollars (\$325,000). The Gross Settlement Amount consists of the following elements:
19 (1) the Individual Settlement Payments to Settlement Class Members, including the Credit Report
20 Claim Settlement Cash Payment, (2) Class Counsel Attorneys’ Fees, (3) Class Counsel Litigation
21 Costs, (4) incentive payment to Plaintiff, (5) PAGA Settlement Amount, and (6) Settlement
22 Administration Costs. The Gross Settlement Amount does not include Defendant’s share of
23 employer payroll taxes, which Defendant shall pay to the Administrator separately. The Gross
24 Settlement Amount shall be all-in with no reversion to Defendants. (Decl. Zakay at ¶ 13.)

25 After Final Approval and the Judgment becomes final (the “Effective Date”), Defendant
26 will fund the Gross Settlement Amount in one lump sum payment within ten (10) calendar days.
27 Within twenty-one (21) days after the Effective Date, the Settlement Administrator will pay: all
28 Individual Settlement Payments to Settlement Class Members, Attorneys’ Fees and Litigation Costs

1 to Class Counsel, incentive payment to Plaintiff, and Settlement Administration Costs to itself, all
2 as determined by the Court at the Final Approval Hearing. (Decl. Zakay at ¶ 14.)

3 The Net Settlement Amount shall equal the amount available for Individual Settlement
4 Payments after deducting the Court-approved amounts for the Class Counsel Attorneys' Fees, Class
5 Counsel Litigation Costs, incentive payment to Plaintiff, PAGA Settlement Amount, Credit Report
6 Claim Settlement Cash Payment, and Settlement Administration Costs. The submission of a claim
7 form is not required for the Settlement Class Member to be paid an Individual Settlement Payment.
8 The Individual Settlement Payment will be calculated by dividing the Net Settlement Amount by
9 the total number of workweeks worked by all Settlement Class Members during the Class Period
10 and then multiplying that amount (the "Class Weekly Rate") by the total number of workweeks
11 worked by each Settlement Class Member during the Class Period. The entire Net Settlement Fund
12 shall be distributed. The Credit Report Claim Settlement Cash Payment will be divided and paid to
13 the 46 claim participants equally (approximately \$108.69 each). (Decl. Zakay at ¶ 15-16.)

14 Class Members will have forty-five (45) days after the mailing of the Settlement Notice to
15 exclude themselves or submit written objections. All Class Members who do not "opt out" will be
16 deemed Settlement Class Members and will be bound by the Settlement. The Notice will advise the
17 Class Members of their right to object to the Settlement. (Decl. Zakay at ¶ 17.)

18 Prior to mailing the Class Notice to the Class, the Settlement Administrator will perform a
19 search on the National Change of Address Database to update the Class Members' addresses. The
20 Settlement Administrator will perform a skip-trace search and re-mail all Class Notices that are
21 returned on or before the Response Deadline. If an Individual Settlement Payment check is not
22 cashed within 180 days after the Settlement Administrator's last mailing to the Settlement Class
23 Member ("Check Stale Date"), the funds from such uncashed check will be transmitted to the
24 Controller of the State of California to be held pursuant to the Unclaimed Property Law, California
25 Civil Code § 1500 *et seq.*, in the names and corresponding amounts associated with each Class
26 Member whose check(s) are cancelled. (Decl. Zakay at ¶ 18.)

27 The Parties have agreed to use ILYM Group as the Settlement Administrator. Payment of
28 the expenses of the Settlement Administrator from the Gross Settlement Fund shall be made for the

1 expenses of effectuating and administering the Settlement. The Settlement Administrator shall
2 receive payment for services estimated at \$6,500. (Decl. Zakay at ¶ 19.)

3 Subject to Court approval, the Agreement provides, (a) for Class Counsel to be awarded a
4 sum not to exceed 33.33% of the Gross Settlement Amount for their fees and (b) an award of
5 litigation costs and expenses in an amount not to exceed \$25,000. In support of this request, Class
6 Counsel will provide evidentiary support, including lodestar method calculations. Subject to Court
7 approval, the Agreement provides for payment of an incentive payment to Plaintiff of no more than
8 \$5,000.¹ Defendant will not oppose a motion for approval of attorneys' fees, costs and an incentive
9 award consistent with the Agreement. (Decl. Zakay at ¶ 20.)

10 Subject to Court approval, \$16,000 will be paid for settlement of civil penalties under
11 PAGA, Labor Code Section 2698 *et seq.* Pursuant to the requirements of Labor Code §2699(i), the
12 PAGA Payment shall be allocated \$12,000.00 (75%) to the LWDA (the "LWDA Payment") as the
13 LWDA's share of the settlement of civil penalties and \$4,000.00 (25%) will be paid to the PAGA
14 Members. Subject to Court approval, \$5,000 will be paid for settlement of claims made under the
15 Fair Credit Reporting Act, Investigative Consumer Reporting Agency Act, and Consumer Credit
16 Report Agencies Act, and paid to the Credit Report Claim Participants. (Decl. Zakay at ¶ 21.)

17 **III. CASE BACKGROUND**

18 On February 17, 2020, Plaintiff filed a Notice of Violations with the LWDA and served the
19 same on Defendant. On September 23, 2020, Plaintiff filed the class action complaint in this Court,
20 asserting claims for: (1) unfair competition; (2) failure to pay minimum wages; (3) failure to pay
21 overtime wages; (4) failure to provide required meal breaks; (5) failure to provide required rest
22 breaks; (6) failure to provide accurate itemized wage statements; (7) failure to provide wages when
23 due; (8) failure to reimburse employees for required expenses; (9) violation of Fair Credit Reporting
24 Act ("FCRA") for failure to make proper disclosures; (10) violation of FCRA for failure to obtain
25 proper authorization; (11) violation of the Investigative Consumer Reporting Agencies Act for
26

27 ¹ Plaintiff will address the reasonableness of this award when filing their final approval papers,
28 including the enhancement factors set forth in *Golba v. Dick's Sporting Goods, Inc.*, 238 Cal. App.
4th 1251 (2015) and *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785 (2009).

1 failure to make proper disclosures; (12) violation of the Consumer Credit Reporting Agencies Act
2 for failure to obtain proper disclosures; and (13) violation of the Private Attorneys General Act. On
3 November 18, 2020, Defendant removed the action to the United States District Court for the
4 Eastern District of California. Thereafter, the Parties agreed to stipulate to remand the action to state
5 court for approval of the settlement. (Decl. Zakay at ¶ 7.)

6 Plaintiff seeks to represent the following sub-classes: a putative class of all individuals who
7 are or previously were employed by Defendant in California and classified as non-exempt
8 employees (the “Wage and Hour Class” or “Wage and Hour Class Member(s)”); all employees or
9 prospective employees of Defendant in California who executed Defendant’s standard background
10 check disclosure and authorization form (the “FCRA/ICRAA Class” or “FCRA/ICRAA Class
11 Member(s)”); all persons in California who executed Defendant’s standard background check
12 disclosure and authorization form in connection with prospective employment (the “CCRAA Class”
13 or “CCRAA Class Member(s)”) (collectively the “Class Members”). The Complaint generally
14 alleges the causes of action listed above. The Action seeks unpaid wages, statutory and PAGA
15 penalties, attorneys’ fees, and litigation costs². (Decl. Zakay at ¶ 8.)

16 Prior to mediation, the Parties engaged in investigation and the exchange of documents and
17 information in connection with the Action. As part of this process, Defendant provided a significant
18 sample of time records and payroll records, as well as other documents and information, to Class
19 Counsel to review and analyze. On June 22, 2021, the Parties participated in an all-day mediation
20 presided over by Jeffrey Krivis, Esq., a respected mediator of wage and hour class actions. At the
21 conclusion of the full-day mediation, the Parties were not able to reach a settlement, but continued
22 to negotiate mutually agreeable terms of settlement over several months. The Parties documented
23 the agreement in the form of a Settlement Agreement, which was signed by the Parties and is now
24 presented to this Court for preliminary approval. (Decl. Zakay at ¶ 9.)

25 Although a resolution has been reached, Defendant denies that they have violated any
26 applicable law, committed any wrong against Plaintiff or any other current or former employee, or
27

28 ² Plaintiff will provide a lodestar analysis for the fees and supporting evidence of the costs with the final approval papers.

1 that it has otherwise damaged Plaintiff or any other current or former employee in any way. Further,
2 Defendant contends that class certification would be inappropriate for any reason other than
3 settlement. Plaintiff contends that Defendant violated California wage and hour laws. Plaintiff
4 further contends that the Action is appropriate for class certification on the basis that the Plaintiff's
5 claims meet the requisites for certification. Without admitting that class certification is proper,
6 Defendant has stipulated that the above Class may be certified for settlement purposes only. The
7 Parties agree that certification for settlement purposes is not an admission that certification would
8 be proper if the class certification issues were litigated. Further, the Agreement is not admissible in
9 this or any other proceeding as evidence that the Class could be certified absent a settlement. Solely
10 for purposes of settling the Action, the Parties stipulate and agree that the requisites for establishing
11 class certification with respect to the Class are satisfied. (Decl. Zakay at ¶ 11.)

12 Class Counsel has conducted a thorough investigation into the facts of the action and
13 diligently evaluated the Class Members' claims against Defendant. Prior to the mediation, counsel
14 for Defendant provided Class Counsel with access to the necessary data and information to evaluate
15 the claims by the Class. Class Counsel reviewed the production of documents and conducted an
16 extensive review of a significant sample of time records and data with the assistance of an expert
17 (Berger Consulting Group). Based on the foregoing and their own independent investigation,
18 evaluation and experience, Class Counsel believe that the Settlement is fair, reasonable, and
19 adequate and is in the best interest of the Class considering all known facts and circumstances,
20 including the risk of significant delay, defenses asserted by Defendant, and potential appellate
21 issues. (Decl. Zakay at ¶ 12.)

22 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS** 23 **COURT TO GRANT PRELIMINARY APPROVAL**

24 When a proposed class-wide settlement is reached, the settlement must be submitted to the
25 court for approval. (2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41,
26 p.11-87.) California "[p]ublic policy generally favors the compromise of complex class action
27 litigation." (*Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) (quoting *Cellphone*
28 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117-18 (2009).) Class action settlements are
approved where the proposed settlement is "fair, adequate and reasonable." (*Dunk v. Ford Motor*

1 Co., 48 Cal. App. 4th 1794, 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d
2 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983).)

3 The primary question presented on an application for preliminary approval of a proposed
4 class action settlement is whether the settlement is “within the range of possible approval.” (*Manual*
5 *for Complex Litigation*, Second §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir.
6 1982).) Preliminary approval is the prerequisite to giving notice so that “the proposed settlement...
7 may be submitted to members of the prospective Class for their acceptance or rejection.”
8 (*Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F. Supp.
9 364, 372 (E.D. Pa. 1970); *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3
10 (C.D. Cal. 2010).) There is an initial presumption of fairness when a proposed settlement, which
11 was negotiated at arm’s length by counsel, is presented for court approval. (*Newberg*, 3d Ed., §11.41,
12 p.11-88; *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 245 (2001) [citation omitted]; see
13 also *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial
14 court’s determination that settlement was “fair, reasonable and adequate” where the settlement
15 “provided valuable benefits to the class ... that were ‘particularly valuable in light of the risks
16 plaintiff would have faced if she proceeded to litigate her case.’”.) However, the ultimate question
17 of whether the proposed settlement is fair, reasonable, and adequate is made after notice of the
18 settlement is given to the Class Members and a final settlement hearing is held by the Court.

19 **A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement**

20 Approval of a proposed settlement of a class action suit is a matter within the broad
21 discretion of the trial court. (*Wershba*, 91 Cal. App. 4th at 234-235; *Dunk*, 48 Cal. App. 4th at 1794.)
22 In considering a potential settlement for preliminary approval purposes, the trial court does not have
23 to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the
24 dispute, and need not engage in a trial on the merits. (*Wershba, supra*, 91 Cal. App. 4th at 239-40;
25 *Dunk, supra*, 48 Cal. App. 4th at 1807.) The Ninth Circuit explains, “the very essence of a settlement
26 is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” (*Officers for Justice*
27 *v. Civil Service Com’n of City and County of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982).) The question
28 whether a proposed settlement is fair, reasonable, and adequate necessarily requires a judgment and

1 evaluation by the attorneys for the parties based upon a comparison of “the terms of the
2 compromise with the likely rewards of litigation.” (*Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d
3 Cir. 1982), cert. denied 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders of*
4 *TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)).) Thus, when analyzing the
5 settlement, the amount is “not to be judged against a hypothetical or speculative measure of what
6 might have been achieved by the negotiators.” (*Officers for Justice*, 688 F.2d at 625, 628.) With
7 regard to class action settlements, the opinions of counsel should be given considerable weight both
8 because of counsel’s familiarity with this litigation and previous experience with cases such as
9 these. (*Id.* at 625.) “The recommendations of plaintiffs’ counsel should be given a presumption of
10 reasonableness.” (*Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979).) As a result, courts
11 hold that the recommendation of counsel is entitled to significant weight. (*Nat’l Rural Telecomms.*
12 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).)

13 **B. Factors To Be Considered In Granting Preliminary Approval**

14 In determining whether to grant preliminary approval, the court considers whether the “(1)
15 the proposed settlement appears to be the product of serious, informed, non-collusive negotiations,
16 (2) has no obvious deficiencies, (3) does not improperly grant preferential treatment to class
17 representatives or segments of the class, and (4) falls within the range of possible approval.” (*In re*
18 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).) No one factor should be
19 determinative. Here, the Settlement meets the criteria for preliminary approval.

20 **1. The Settlement is the Product of Serious, Informed and Arm’s Length**
21 **Negotiations by Experienced Counsel**

22 This Settlement is the result of extensive and hard-fought litigation and negotiations before
23 an experienced mediator. Defendant denied and continues to deny any wrongdoing or legal liability
24 arising out of the conduct alleged in the Action. Plaintiff and Class Counsel have determined that it
25 is beneficial to the Class Members to put to rest the Released Wage and Hour Claims and Released
26 Credit Reporting Claims.³ (Decl. Zakay at ¶ 5.) Plaintiff and Class Counsel recognize the expense

27 ³ Released Class Claims and Released Credit Reporting Claims are defined in the Settlement
28 Agreement at ¶ II(DD) and (EE) and are limited to claims based on or reasonably related to the
claims asserted in the Action.

involved in continuing to litigate and ultimately trying the Action against Defendant through possible appeals which could take several years. Class Counsel have also considered the uncertain outcome and risk of litigation, especially in complex actions such as the one here. Class Counsel are also mindful of, and recognize, the inherent problems of proof under, and asserted defenses to, the claims asserted in the Action. Based upon their evaluation, Plaintiff and Class Counsel have determined that the Settlement is in the best interest of the Class Members. (Decl. Zakay at ¶ 22.)

Here, there can be no dispute that the litigation has been hard-fought with aggressive and capable advocacy on both sides. The Parties were represented by experienced counsel who zealously advocated their respective positions with the assistance of an experienced mediator. Accordingly, “[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms’ length and without any suggestion of undue influence.” (*In re Wash. Public Power*, 720 F. Supp. at 1392.)

2. The Settlement Has No “Obvious Deficiencies” and Falls Within the Range of Approval

The proposed Settlement has no “obvious deficiencies” and is well within the range of possible approval. All Class Members will receive an opportunity to participate in the Settlement and receive payment if they do not opt out. (Agreement at ¶ IV(C)(5).)

Defendant’s total exposure for the alleged violations at the time this Settlement was negotiated was calculated by BCG, Plaintiff’s damage expert. For the Class, Plaintiff estimates that Defendant was subject to maximum liability for damages in the amount of \$731,075 consisting of \$14,785 for unpaid wages, \$708,673 for rest periods, and \$97,370 for meal periods. In addition, Plaintiff’s expert calculated \$293,146 in waiting time penalties and \$264,900 for wage statement penalties.⁴ Consequently, the Settlement of \$325,000 represents approximately 44.4% of the

⁴ While Plaintiff alleged claims for statutory penalties, they recognize that this claim is subject to various defenses asserted by Defendant. Plaintiff’s claims pursuant to Labor Code Section 226 and various PAGA penalties are also subject to a good faith defense as to whether any premium wages for meal or rest periods or other wages were owed given Defendant’s position that Plaintiff and the Class were properly compensated. (*See Reber v. AIMCO/Bethesda Holdings, Inc.*, 2008 WL 4384147, at *9 (C.D. Cal. Aug. 25, 2008) (granting defendant’s motion for summary judgment on claim for failure to provide accurate itemized wage statements “because a good faith dispute exists... [therefore, defendant] was not ‘knowing and intentional’ in failing to provide [Section 226] statements”).)

1 maximum estimated *damages*, and 25.2% of the maximum combination of damages and penalties
2 to the Class, assuming these amounts could be proved at trial (excluding PAGA Penalties). Given
3 the amount of the Settlement compared to the potential value of claims in this case, the Settlement
4 is fair and reasonable. The goal of this litigation – to provide compensation to Class Members for
5 unpaid time and for allegedly missed meal and rest breaks – has been met. (Decl. Zakay at ¶ 6.)

6 In *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal.
7 2015) the court approved a settlement of an action claiming unpaid wages where the settlement
8 amount constituted roughly 10% of the estimated actual damages to the class, determining it was
9 fair, reasonable, and adequate. Here, the settlement consideration exceeds the percentage approved
10 in *Stovall-Gusman*. As a result, this Settlement, which exceeds the percentage approved in *Stovall-*
11 *Gusman*, is entitled to preliminary approval.

12 Moreover, where both sides face significant uncertainty, the attendant risks favor settlement.
13 (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.) Here, several defenses asserted by
14 Defendant presented serious threats to the claims of the Plaintiff and the other Class Members. For
15 instance, Defendant asserted that the employment practices complied with all applicable Labor
16 Laws and with the FCRA, the ICRAA, and the CCRAA. Specifically, Defendant argued that the
17 Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012) weakened, if not
18 eliminated, Plaintiff's claims on liability, value, and class certifiability as to the meal and rest period
19 claims. Before and during the mediation, Defendant argued that they adopted and strictly enforced
20 lawful policies and afforded Plaintiff and the Class Members compliant meal and rest breaks, and
21 that employees like the Plaintiff *chose* not to take compliant breaks. Defendant argued, therefore,
22 that under the *Brinker* decision they have no liability for the missed breaks whatsoever. As to the
23 FCRA claim, Defendant argued that the Plaintiffs' FCRA claim was not viable under the United
24 States Supreme Court decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Some district
25 courts have ruled that a disclosure form that contains other information—for instance, a liability
26 waiver—does not violate the FCRA. E.g., *Smith v. Waverly Partners, LLC*, 2012 U.S. Dist. LEXIS
27 119403, 2012 WL 3645324, at *6 (W.D.N.C. Aug. 23, 2012); *Burghy v. Dayton Racquet Club, Inc.*,
28 695 F. Supp. 2d 689, 699 (S.D. Ohio 2010). Finally, the court may find remitter/reduction of the

1 statutory damages appropriate. See e.g. *Klingensmith v. Max & Erma's Restaurants, Inc.*, 2007 U.S.
2 Dist. LEXIS 81029, 2007 WL 3118505, at *5 (E.D. Pa. 2007). If successful, these defenses could
3 eliminate or substantially reduce any recovery to the Class. While Plaintiff believes that these
4 defenses, and others, could be overcome, Defendant maintains these defenses have merit and
5 therefore present a serious risk to recovery for the Class. (Decl. Zakay at ¶ 24.)

6 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
7 to obtain class certification and thereby not recover on behalf of any employee other than himself.
8 Defendant argued that the individual experience of each employee varied with respect to the alleged
9 claims. While other cases have approved class certification of wage and hour claims, class
10 certification in this action would have been hotly disputed and was not a foregone conclusion. Even
11 if class certification was successful, as demonstrated by the California Supreme Court decision in
12 *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome
13 for a class-wide recovery even where the class has been certified. (Decl. Zakay at ¶ 25.) Here, the
14 risk of further litigation is substantial. After arm's-length negotiations between experienced and
15 informed counsel, the Parties recognized the potential risks and agreed on the Settlement.

16 Finally, Plaintiff's expert calculated that Defendant could be liable for PAGA penalties in an
17 amount of \$2,837,850.00. However, Courts have considerable discretion to reduce the penalty
18 award. Some trial courts have awarded no civil penalties, even when Labor Code violations are
19 established. See *In re Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award
20 of \$0 in PAGA penalties in a wage and hour class action). To recover any PAGA penalties, Plaintiff
21 would be required at trial to prove each of the underlying Labor Code violations. See *Cardenas v.*
22 *McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) Here, Plaintiff
23 would need to prove that each PAGA Member suffered a violation for each pay period the employee
24 worked. Again, Defendant raised several defenses that presented serious threats to the claims of the
25 Plaintiff and the PAGA Members. In all, Plaintiff's PAGA liability exposure is hotly contested.
26 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of PAGA claims.
27 In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced
28 the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at

1 complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be
2 proper. *Id.* at 539. Again, the *Carrington* decision was after Plaintiff prevailed at trial, and even
3 then, the PAGA penalties were reduced by 90%. (Decl. Zakay at ¶ 26).

4 **3. The Settlement Does Not Improperly Grant Preferential Treatment to the**
5 **Class Representative or Segments of The Class**

6 The relief provided in the Settlement will benefit all members of the Class who do not opt
7 out. The Settlement does not improperly grant preferential treatment to the Plaintiff or segments of
8 the Class in any way. Each Settlement Class Member will be entitled to a cash payment based on
9 the plan of allocation described herein. Each Individual Settlement Payment will be determined
10 based upon the weeks worked by that employee during the prescribed Class Period. The Settlement
11 Shares for the FCRA/ICRAA/CCRAA Class Members will be allocated on an equal pro rata share
12 for all employees or prospective employees of Defendant who executed Defendant's standard
13 FCRA disclosure form during the prescribed Class Period. (Decl. Zakay at ¶ 4.)

14 Plaintiff will apply to the Court for an incentive payment in consideration for his service,
15 and for the risks undertaken on behalf of the Class. Plaintiff performed his duties admirably by
16 working with Class Counsel. The requested Plaintiff's service payment is well within the accepted
17 range of awards for purposes of preliminary approval. (*See* Decl. Zakay at ¶ 27.)

18 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit**
19 **Preliminary Approval Of The Settlement**

20 The stage of the proceedings at which this Settlement was reached supports preliminary
21 approval and ultimately, final approval of the Settlement. Class Counsel has conducted a thorough
22 investigation into the facts of the class action, including before this action was filed. Prior to the
23 mediation, Class Counsel performed significant review and analysis of Defendant's documents,
24 time records and pay records. Class Counsel engaged in a thorough research and analysis of the
25 relevant claims and data. Class Counsel are experienced with the claims at issue here, as Class
26 Counsel previously litigated and settled similar claims in numerous other actions. Accordingly, the
27 Settlement did not occur until Class Counsel possessed sufficient information to make an informed
28 judgment regarding the likelihood of success on the merits and results that could be obtained
through further litigation. (Decl. Zakay at ¶ 28.)

1 **V. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES**

2 Plaintiff contends that the proposed Settlement meets all the requirements for class
3 certification under the California Code of Civil Procedure section 382 as demonstrated below, and
4 therefore, the Court may appropriately approve the Class as defined in the Agreement. This Court
5 should conditionally certify the Class for settlement purposes only, defined as follows:

6 The “Class” or “Class Members” includes the following sub-classes:

7 **“All individuals who are or previously were employed by Defendant in California and**
8 **classified as non-exempt employees at any time beginning September 23, 2016 and**
9 **ending February 28, 2022 (the “Wage and Hour Class” or “Wage and Hour Class**
10 **Member(s)).”**

11 **“All employees or prospective employees of Defendant in California who executed**
12 **Defendant’s standard background check disclosure and authorization form at any**
13 **time beginning September 23, 2018 and ending on February 28, 2022 (the**
14 **“FCRA/ICRAA Class” or “FCRA/ICRAA Class Member(s)).”**

15 **“All persons in California who executed Defendant’s standard background check**
16 **disclosure and authorization form in connection with prospective employment at any**
17 **time beginning September 23, 2018 and ending on February 28, 2022 (the “CCRAA**
18 **Class” or “CCRAA Class Member(s)). (Agreement at ¶ II(C).)**

19 The Parties estimate that there are 10,919 workweeks worked by 176 Wage and Hour Class
20 Members during the Class Period and 46 FCRA/ICRAA Class Members and CCRAA Class
21 Members during the FCRA/ICRAA or CCRAA Credit Report Class Periods. (Decl. Zakay at ¶ 30.)

22 **A. California Code of Civil Procedure §382**

23 Plaintiff seeks certification of this Class for settlement purposes under California Code of
24 Civil Procedure section 382. While Defendants reserve all rights to dispute that the Plaintiff can
25 satisfy these requirements, Defendants will not dispute that the proposed Class should be certified
26 for purposes of settlement only.

27 **B. The Proposed Class Is Ascertainable and Numerous**

28 Here, the approximately 176 current and former employees that comprise the Class are
sufficiently numerous for class certification. (*See Bowles v. Superior Court*, 44 Cal.2d 574 (1955)
(class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934
(1981) (class of 48 members satisfies numerosity requirement.)) All of these employees are
ascertainable because the Class Members can readily be determined through examination of

1 Defendant's employment files. (Decl. Zakay at ¶ 30.) For purposes of settlement only, Defendant
2 will not oppose a finding of numerosity.

3 **C. Common Issues of Law and Fact Predominate**

4 Predominance of common issues of law or fact does not require that the common issues be
5 dispositive of the entire controversy or even that they be dispositive of all liability issues. (1
6 *Newberg on Class Actions*, Section 4.25 at 4-82, 4-83 (1992).) "Predominance is a comparative
7 concept, and 'the necessity for class members to individually establish eligibility and damages does
8 not mean individual fact questions predominate.'" (*Sav-On*, 34 Cal. 4th at 334.) Commonality exists
9 if there is a predominant common legal question regarding how an employer's policies impact its
10 employees. (*Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1536 (2008) ("[T]he
11 common legal question remains the overall impact of Diva's policies on its drivers.")) Whether
12 Plaintiff is likely to prevail on his theory of recovery is irrelevant at the certification stage since the
13 question is "essentially a procedural one that does not ask whether an action is legally or factually
14 meritorious." (*Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).)

15 Here, Plaintiff contends that common questions of law and fact are present. Specifically: (i)
16 whether Defendant failed to pay Class Members for all hours worked; (ii) whether Defendant failed
17 to provide meal and rest periods to Class Members; (iii) whether Defendant failed to timely furnish
18 accurate, itemized and legal wage statements; (iv) whether Defendant subjected Class Members to
19 unfair business practices; (v) whether Defendant's authorization and consent forms complied with
20 the FCRA; and (vi) whether Defendant are liable for attorneys' fees and costs. (Decl. Zakay at ¶
21 30.) Defendant will not oppose a finding of commonality for purposes of settlement only.

22 **D. The Claims of the Plaintiff Are Typical of the Class Claims**

23 "The typicality requirement is met when the claims of the Plaintiff [] arise from the same
24 event or are based on the same legal theories." (*Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th
25 Cir. 1983).) In *Hanlon v. Chrysler Co.*, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit held that
26 "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably
27 coextensive with those of absent class members; they need not be substantially identical." (50 F.3d
28 at 1020.) Plaintiff contends that the typicality requirement is fully satisfied. Plaintiff, like every

1 other member of the Class was employed by Defendant and is a member of the Class. Plaintiff was
2 subject to the same employment practices, meal and rest periods, and received similar wage
3 statements. Plaintiff was also subject to Defendant's allegedly unlawful background checks. Thus,
4 the claims of the Plaintiff and the Class Members arise from the same course of conduct by the
5 Defendant, involve the same employment policies, and are based on the same legal theories. (Decl.
6 Zakay at ¶ 30.) For purposes of settlement only, Defendant will not oppose typicality.

7 **E. The Class Representative Fairly and Adequately Protected the Class**

8 The Class Members are adequately represented because Plaintiff and Class Counsel (a) do
9 not have any conflicts of interest with other Class Members, and (b) will prosecute the case
10 vigorously on behalf of the class. (*See Hanlon*, 150 F.3d at 1020.) Plaintiff is well aware of his
11 duties as a representative of the Class and has actively participated in the prosecution of this case
12 to date. First, Plaintiff effectively communicated with Class Counsel, provided documents to them
13 and participated investigation and negotiations in the Action. Second, Plaintiff retained competent
14 counsel who are experienced in employment class actions. Third, there is no antagonism between
15 the interests of the Plaintiff and those of the Class. Both the Plaintiff and the Class Members seek
16 monetary relief under the same set of facts and legal theories. (Decl. Zakay at ¶ 30.)

17 **F. The Superiority Requirement Is Met**

18 To certify a class, the Court must determine that a class action is superior to other available
19 methods for the fair and efficient adjudication of the controversy. "Where classwide litigation of
20 common issues will reduce litigation costs and promote greater efficiency, a class action may be
21 superior to other methods of litigation." (*Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th
22 Cir. 1996).) Here, a class action is the superior mechanism for resolution of the claims as pled by
23 the Plaintiff. Defendant will not dispute such a finding for purposes of this settlement only.

24 **VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE**

25 The Court has broad discretion in approving a practical notice program. The Parties have
26 agreed upon procedures for providing the Class Members with written notice of the Settlement like
27 those approved and utilized in hundreds of class action settlements. The Settlement Notice, drafted
28 jointly and agreed upon by the Parties through their respective counsel and to be approved by the

1 Court, includes all relevant information. (See Exhibit A to the Agreement.) The Settlement Notice
2 will state that the Class Members shall have forty-five (45) days from the date that the Settlement
3 Notice is mailed to them to request exclusion or to submit an objection. The Class Members will be
4 given an opportunity to object to the terms of the Agreement and/or the request for attorneys' fees
5 and costs and to participate at the final approval hearing. Class Members will be instructed to
6 contact the Settlement Administrator and/or Class Counsel, not the Court. This notice program was
7 designed to meaningfully reach the Class Members and advise them of all pertinent information
8 concerning the Settlement. The mailing and distribution of the Settlement Notice satisfies the
9 requirements of due process, is the best notice practicable under the circumstances, and constitutes
10 due and sufficient notice to all persons entitled thereto. The Settlement Notice provides information
11 on the terms and provisions of the Settlement; the benefits that the Settlement provides for Class
12 Members; the date, time, and place of the final settlement approval hearing; and the procedure and
13 deadline for submitting comments, objections, and requests for exclusion. The Settlement Notice
14 complies with Rules of Court 3.766 and 3.769(f). (Decl. Zakay at ¶ 32.)

15 VII. CONCLUSION

16 Plaintiff respectfully requests that the Court preliminarily approve the proposed Settlement
17 and sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the
18 final fairness hearing for a date that is at least one hundred twenty (120) days after the date of
19 Preliminary Approval.

20 DATED: November 15, 2022

ZAKAY LAW GROUP, APLC

21 By: 

22 Shani O. Zakay

23 Attorney for Plaintiffs