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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

ROMAN PEREZ, individually and on behalf of all
persons similarly situated

PLAINTIFFS,

vs.

BUTLER AMERICA, LLC, a Delaware Limited
Liability Company; ZONES, LLC, a Washington
Limited Liability Company; and Does 1 through 50,
Inclusive,

DEFENDANTS.

Case No. CIV-DS2018372

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

Date: April 11, 2023
Time: 1:30 p.m.

Judge: Hon. Joseph Ortiz
Dept.: S-17

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I. INTRODUCTION

Plaintiff ROMAN PEREZ (“Plaintiff”) seeks preliminary approval of the Class Action Settlement Agreement and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 65 members of the Class and 40 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The “**Class Members**” and “**Settlement Period**” shall mean “all non-exempt employees who are or previously were assigned to provide professional services to Zones, LLC by Butler America, LLC and performed work in California during the period of May 27, 2016 to June 21, 2022. Agreement at § 1.08.

2. The “**Settlement Class**” refers to all Class Members who do not file a timely and valid Request for Exclusion. Agreement at § 1.37.

3. The “**Aggrieved Employees**” refers to all non-exempt employees who were assigned to provide professional services to Defendant Zones by Defendant Butler and performed work in California during the PAGA Period. Agreement at § 1.41. The “PAGA Period” refers to the time period from April 15, 2019 to June 21, 2022. Agreement at § 1.40. Aggrieved employees do not have the ability to opt-out of the PAGA portion of the settlement.

4. The “**Gross Settlement Amount**” is One Hundred Fifty Thousand Dollars (\$150,000.00). Agreement at § 1.20. The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Award**” in the amount of \$10,000 to Plaintiff for his services on behalf of the Class Members, and for agreeing to a general release including all claims arising from Plaintiff’s relationship with Defendants. Agreement at §§ 5.3;

b. A “**Class Counsel Payment**” in the amount not to exceed one-third of the Gross Settlement Amount for attorney’s fees, currently estimated to be \$50,000 *and* litigation costs and expenses not to exceed \$20,000, to be paid to Class Counsel. Agreement at §5.2;

c. A “**PAGA Payment**” of \$5,000 shall be set aside from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004

¹ The Agreement is attached as Ex “A” to the Declaration of Shani O. Zakay (“Zakay Dec.”) at ¶ 3. All citations to the Agreement 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.

1 (“PAGA Amount”). The Settlement Administrator shall pay \$3,750 representing 75% of the PAGA
2 Payment to the Labor and Workforce Development Agency (“LWDA Payment”). The Settlement
3 Administrator shall distribute \$1,250 representing 25% of the PAGA Amount to the Aggrieved
4 Employees (“Aggrieved Employee Payment”). Agreement at §5.4; and

5 d. “**Administrative Costs**” not to exceed \$5,500 payable to the Settlement
6 Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Class Notice and Individual
7 Settlement Payments. Agreement at § 5.1.

8 5. The “**Net Settlement Amount**” refers to the portion of the Gross Settlement Amount that
9 remains after accounting for any Class Representative Service Award, the PAGA Payment,
10 Administrative Costs, and the Class Counsel Payment. Agreement at §1.24. The Net Settlement
11 Amount is approximately \$59,500 which will be allocated to all Settlement Class Members on a pro-
12 rata basis according to the number of Workweeks each Settlement Class Member worked during the
13 Settlement Period. The entire Net Settlement Amount will be paid to all Settlement Class Members
14 who do not opt out of the Settlement resulting in an average Individual Settlement Share of
15 approximately **\$915.38**. Declaration of Shani O. Zakay (“Zakay Dec.”), ¶ 6.

16 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the
17 Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm’s length.
18 The Settlement confers substantial benefits to the Settlement Class. The relief offered by the Settlement
19 is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage
20 and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, Class Members will
21 not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being
22 denied or of Defendants prevailing at trial. Zakay Dec., ¶ 6.

23 As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement
24 approval and falls within the range of reasonableness. The average Individual Settlement Share to the
25 Settlement Class meets or exceeds awards in similar wage and hour class actions. Moreover, the
26 proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff
27 respectfully requests the Court grant preliminary approval of the Settlement. Zakay Dec., ¶ 7.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendants provide technical services and offer engineering, technology, aftermarket, and other related services to defense, energy, telecommunications, and healthcare sectors. This action asserts claims on behalf of non-exempt employees who were assigned to provide professional services to Zones, LLC by Butler America, LLC, who performed work in California during the Class Period. Plaintiff was employed by Butler America, LLC as a non-exempt employee in California from July 2016 to July 2019. At all times during his employment, Plaintiff earned an hourly wage and was entitled to legally compliant meal and/or rest periods, and minimum, regular and overtime wages for all hours worked. Throughout his employment, Plaintiff claims he was subject to Defendants' written policies and procedures. Zakay Dec., ¶ 8; Declaration of Roman Perez ("RP Dec.") at ¶¶ 1-5.

Generally, Plaintiff claims that Defendants failed to pay for all time worked, failed to provide compliant meal and rest periods, failed to furnish accurate itemized wage statements, and failed to pay all wages due upon separation. Defendants forcefully deny liability for each of Plaintiff's claims. Further, Defendants assert that they fully complied with all applicable employment laws and raised several other significant defenses to Plaintiff's claims, including but not limited to, facially compliant meal and rest period policies, compliant wage statements, and timely payment of all wages due upon separation of employment. Zakay Dec., ¶ 9.

On May 27, 2020, Plaintiff filed a class action complaint in the Superior Court of California, County of Los Angeles (the "Los Angeles Action"), alleging the following: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) Failure to Pay Minimum Wages in Violation of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Lab. Code §§ 510, *et seq.*; (4) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Provide Accurate Itemized Wage Statements in Violation of Cal. Lab. Code § 226; and (7) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201, 202 and 203. Zakay Dec., ¶ 11.

1 On September 2, 2020, Plaintiff filed a representative action complaint in the Superior Court of
2 California, County of San Bernardino (the “San Bernardino Action”), alleging a single cause of action
3 pursuant to PAGA for civil penalties pursuant to Cal. Lab. Code § 2699, *et seq.* On February 22, 2021,
4 Plaintiff filed a first amended complaint in the San Bernardino Action, adding the seven causes of
5 action alleged in the Los Angeles Action, and adding Zones, LLC as a defendant. Subsequent to filing
6 the Los Angeles Action, the Plaintiff and Defendant Butler met and conferred regarding the proper
7 venue for the action and determined that Defendant Butler operates its business, and Plaintiff performed
8 work, in the County of San Bernardino. As such, on March 19, 2021, Plaintiff filed a Request for
9 Dismissal of the Los Angeles Action, which the Court granted on March 25, 2021. The operative
10 complaint is the Class Action Complaint, which is the first amended complaint in the San Bernardino
11 Action. Zakay Dec., ¶ 12.

12 The Parties collectively agreed to mediate the Action, stay formal discovery, and continue
13 deadlines for class certification in the Action. To prepare for mediation, the Parties agreed to informally
14 produce additional documents and data points subject to the mediation privilege, including but not
15 limited to, employee handbooks, the Class Members’ time data, and certain payroll data points. As
16 discussed *infra*, Plaintiff’s counsel retained the forensic consultants at Berger Consulting Group
17 (“BCG”) to analyze Defendants’ time and payroll data. Zakay Dec., ¶ 13.

18 On April 21, 2022, the Parties participated in a full day mediation with Steven Serratore, Esq., a
19 respected mediator of wage and hour class and representative actions. After arms-length negotiations
20 and bargaining, the Parties reached an agreement to settle and signed a Memorandum of Understanding.
21 After reaching an agreement in principle, the Parties drafted and negotiated a long-form settlement
22 agreement, which is the subject of the instant motion. Zakay Dec., ¶ 13.

23 **B. Class Counsel Thoroughly Investigated the Factual and Legal Issues**

24 Months before filing the Action, Class Counsel began their pre-filing investigation into
25 Plaintiff’s complaints. Class Counsel’s investigation started with several lengthy interviews with
26 Plaintiff. As part of the interview process, Plaintiff produced documents related to his employment,
27 including his wage statements, and portions of Defendants’ handbooks. At the conclusion of the
28

1 interviews, Class Counsel determined that each Plaintiff's complaints justified further inquiry. Zakay
2 Dec., ¶ 14.

3 Class Counsel subsequently requested Plaintiff's employee file from Defendants. In response,
4 Defendants produced numerous documents, including, but not limited to, copies of Plaintiff's
5 employment agreements, performance evaluations, timekeeping policies, payroll and time records, and
6 separation documents. Class Counsel reviewed and analyzed the documents and determined the
7 documents appeared to substantiate Plaintiff's claim that Defendants failed to, among other things, pay
8 for all time worked, issue accurate itemized wage statements, and provide compliant meal and rest
9 periods. Zakay Dec., ¶ 15.

10 Considering the many anticipated factual disputes, the Parties agreed, relatively early in the
11 litigation, that it would be in the best interest of both Parties to mediate the matter. To prepare for
12 mediation, Class Counsel requested documents and data points to further evaluate Plaintiff's claims
13 and Defendants' liability exposure to the Class Members. In response to Class Counsel's request,
14 Defendants produced the time records for the Class Members, aggregate workweek and pay period data
15 for the Class Members, aggregate meal premiums paid to the Class Members, average hourly rate for
16 the Class Members, and copies of applicable handbooks, policies, applicable collective bargaining
17 agreements, and agreements containing, *inter alia*, compensation, timekeeping, and meal and rest
18 period policies. In total, Defendants produced more than 5,000 pages of documents, including time and
19 payroll data for Class Counsel to analyze. Zakay Dec., ¶ 16.

20 Class Counsel then retained the statisticians and economists at BCG to evaluate the Class
21 Members' payroll and time data. BCG provides data analysis and damage modeling consulting
22 services, specializing in wage and hour class actions. BCG's team of financial and data analysts are
23 credentialed and experienced experts in their fields and have provided their expertise on thousands of
24 cases. Stated differently, the BCG is well-qualified to analyze Defendants' time and payroll data.
25 Zakay Dec., ¶ 17.

26 BCG analyzed Defendants' time and payroll data to assist in the development of a damage
27 model. Among other things, BCG determined the approximate number of work shifts, workweeks, pay
28 periods, average length of shift and average number of hours worked per week and pay periods during

1 the Class Period. BCG also estimated the number of missed, late or truncated meal and rest periods,
2 the amount of missed meal period premiums paid during the Settlement Period, the amount of unpaid
3 wages due to rounding, and the amount of off-the-clock work performed by the Class Members during
4 the Class Period. Zakay Dec., ¶ 18.

5 In advance of mediation, Class Counsel created a damage model predicated on the BCG analysis.
6 Class Counsel's model calculated Defendants' potential liability exposure while accounting for the
7 uncertainties of continued litigation. These damage model informed and guided Class Counsel during
8 the mediated settlement discussions. Zakay Dec., ¶ 19.

9 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
10 Plaintiff's suitability as a putative class representative through interviews, background investigations,
11 and analysis of his employment files; (2) evaluating all of Plaintiff's potential claims; (3) researching
12 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type
13 of employer; (4) analyzing the Settlement Class' time and payroll records; (5) analyzing Defendants'
14 labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues
15 which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendants'
16 liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the
17 mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the
18 claims being settled, as well as the impediments to recovery, such as to make an independent
19 assessment of the reasonableness of the terms to which the Parties have agreed. Zakay Dec., ¶ 21.

20 Class Counsel only agreed to enter the Settlement following their thorough investigation and
21 evaluation of Plaintiff's claims. Based on their investigation of the facts, applicable law, and
22 marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated
23 with litigation, and the various defenses asserted by Defendants, Class Counsel firmly believe this
24 Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair,
25 reasonable, and adequate, the Court should preliminarily approve the Settlement. Zakay Dec., ¶ 22.

26 **C. The Parties Settled at Mediation**

27 On April 21, 2022, the Parties conducted a full day of mediation with Steven Serratore, Esq., a
28 respected mediator of wage and hour class and representative actions. Mediator Serratore helped

1 manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both
2 sides. The Parties made substantial progress with Mediator Serratore's assistance. Namely, the Parties
3 exchanged information regarding their respective claims and defense, including their respective
4 evaluation of the damages. The mediation concluded with a settlement, the complete and final terms of
5 which are now set forth in the Agreement. Class Counsel submit that the Settlement constitutes a fair,
6 adequate, and reasonable compromise of the claims at issue. Zakay Dec., ¶¶ 23-24.

7 **D. The Proposed Settlement Fully Resolves Plaintiff's Claims**

8 1. The Composition of the Settlement Class Members

9 The proposed Settlement Class consists of all non-exempt employees who were assigned to
10 provide professional services to Zones, LLC by Butler America, LLC and performed work in California
11 during the period of May 27, 2016 to June 21, 2022, who do not file a timely and valid Request for
12 Exclusion. In the data exchanged at the time the Agreement was executed, there were approximately
13 65 Class Members who worked approximately 3,412 workweeks. Agreement at §5.5.1.

14 2. The Settlement Consideration

15 The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement
16 Amount of \$150,000. The Gross Settlement Amount includes: (1) Individual Settlement Payments to
17 the Settlement Class; (2) a Class Representative Service Award of \$10,000 to Plaintiff for his services
18 on behalf of the Settlement Class and for a broad release of claims; (3) a PAGA Payment in the amount
19 of \$5,000; (4) Administrative Costs estimated at \$5,500; (5) Class Counsel Payment in the amount of
20 \$70,000, comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to
21 be \$50,000 and an estimated \$20,000 for actually incurred litigation expenses. *See generally*
22 Agreement at §5.

23 Subject to the Court approving the Class Representative Service Award, Class Counsel Payment,
24 PAGA Payment, and the Administrative Costs, the Net Settlement Amount will be distributed to each
25 participating member of the Settlement Class Member. Agreement at §5.5. There is no reversion to
26 Defendants and Defendants must separately pay for their share of the employer payroll taxes.
27 Agreement at §§ 1.20, 5.5.3.

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1 3. The Funding Date

2 Assuming there are no objectors, and no appeal is filed, Defendants will fund the \$150,000 Gross
3 Settlement Amount within thirty (30) calendar days of the Court's entry of the order granting final
4 approval of this Settlement. Agreement at §1.19.

5 4. Formula for Calculating Individual Settlement Payments

6 Each Settlement Class Member will receive an Individual Settlement Payment. The Class Data
7 provided by Defendants to the Settlement Administrator will include the number of eligible Workweeks
8 for each Settlement Class Member. Agreement at §3.3. The Individual Settlement Payment will be
9 proportional to the number of Eligible Workweeks each Settlement Class Member worked for
10 Defendants in California during the Settlement Period. Each Settlement Class Member's final
11 Individual Settlement Share for purposes of payment will be calculated by dividing the number of
12 Eligible Workweeks attributed to the Settlement Class Member by all Eligible Workweeks attributed
13 to members of the Settlement Class, multiplied by the Net Settlement Amount. Agreement at § 5.5.1.
14 Each Individual Settlement Payment will be reduced by any legally mandated employee tax
15 withholdings (e.g., employee payroll taxes, etc.).

16 Given that there are approximately 65 Settlement Class Members, *the average gross recovery is*
17 *approximately \$915.38* (Net Settlement Amount divided by Settlement Class Members). Zakay Dec.,
18 ¶ 6.

19 5. Release by Participating Settlement Class Members

20 Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to
21 release the Released Parties from the Released Claims, defined as all class claims alleged in the Class
22 Action Complaint and that could have been alleged in the Class Action Complaint based on the facts
23 alleged, which occurred during the Settlement Period, and expressly excluding all other claims,
24 including claims for vested benefits, wrongful termination, unemployment insurance, disability, social
25 security, workers' compensation, class claims outside of the Settlement Period, and PAGA claims,
26 which are released separately hereinbelow. The Release by Settlement Class Members shall be
27 effective as to Butler immediately upon Butler funding its respective share of the Gross Settlement
28

Amount and effective as to Zones immediately upon Zones funding its respective share of the Gross Settlement Amount, each independently of the other. Agreement at §§ 6.1.

6. PAGA Release by the State of California on behalf of the Aggrieved Employees

Generally, upon the Court's entry of Final Approval Order and Judgment, and funding of the Gross Settlement Amount, Plaintiff, acting as the representative of the State of California, on behalf of the Aggrieved Employees, will release the Released Parties from any all PAGA claims alleged in the Class Action Complaint and Plaintiff's PAGA notice to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period. The Release by the Aggrieved Employees shall be effective as to Butler immediately upon Butler funding its respective share of the Gross Settlement Amount, and it shall be effective as to Zones immediately upon Zones funding its respective share of the Gross Settlement Amount, each independently of the other. Agreement at §§ 6.2.

III. ARGUMENT

A. The Court Should Preliminarily Approve the Proposed Class Action Settlement

The proposed Settlement, including a Gross Settlement Amount of \$150,000, meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("Voluntary conciliation and settlement are the preferred means of dispute resolution.").) Class action settlement approval requires an early "preliminary" review by the trial court and a subsequent "final" review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2010) (the court first "preliminarily approves the settlement" and later "conducts a final approval hearing to inquire into the fairness of the proposed settlement").)

Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a "reasonable range." (See *North County Contractor's Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).)

Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class action litigation”).)

Additionally, in reviewing the fairness of a class action settlement, due regard should be given to what is “otherwise a private consensual agreement between the parties.” (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1389.) The inquiry “must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Id.*)

1. The Parties Reached the Settlement Through Arm’s-Length Bargaining Led by Experienced Counsel.

“[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg, § 11.51.)

The Parties participated in mediation with the highly respected mediator Steven Serratore, Esq. Mediator Serratore managed the Parties’ expectations and provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably against any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d

78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.”).) At all times, the Parties’ negotiations were at an arm’s length, adversarial, and non-collusive. Mediator Serratore only arrived at his proposal after hearing arguments, reviewing evidence, and evaluating the Parties’ respective claims and defenses. Zakay Dec., ¶ 24.

Once the Parties agreed to the Mediator’s proposal, the parties subsequently executed a binding and enforceable Memorandum of Understanding. The Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. Zakay Dec., ¶ 24.

2. Class Counsel’s Thorough Investigation Provided an Objective Measurement of the Settlement’s Reasonableness.

As set forth in greater detail above, Class Counsel conducted a very thorough investigation into the factual and legal issues in dispute. In addition to informal discovery, document review, data analysis, and legal research, Class Counsel also researched similar wage and hour actions. Although no two cases are identical, this research provided Class Counsel with a marker to inform settlement discussions and, ultimately, to measure this settlement against. The investigation allowed Class Counsel to realistically assess the value of the claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court. Zakay Dec., ¶ 20.

Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining Plaintiff’s suitability as a putative class representative through interviews, background investigations, and analysis of her employment files; (2) evaluating all of Plaintiff’s potential claims; (3) researching similar wage and hour class actions as to the claims brought, the nature of the positions, and the type of employer; (4) analyzing the Settlement Class’ time and payroll records; (5) analyzing Defendants’ labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues which could affect settlement approval; (7) evaluating Plaintiff’s claims and estimating Defendants’ liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the

claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. Zakay Dec., ¶ 21.

Class Counsel only agreed to enter the Settlement following a thorough investigation and evaluation of Plaintiff's claims. Based on their investigation of the facts, applicable law, and marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated with litigation, and the various defenses asserted by Defendants, Class Counsel firmly believe this Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement. Zakay Dec., ¶ 22.

3. The Settlement Falls Within the Recognized Range of Reasonableness.

The Gross Settlement Amount of \$150,000 is within the range of reasonableness. To determine whether a settlement is fair and reasonable, the court should "consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination, the court is "not to try the case" but rather "satisfy itself that the class action settlement is within the 'ballpark of reasonableness.'" (*Id.* (emphasis added).) For this analysis, courts do "not require any such explicit statement of value; [they] require[] a record which allows an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might have received if they had succeeded at trial.² Indeed, "[t]he determination whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.'" (*Frank v. Eastman Kodak*

² Federal district courts recognize that there is an inherent "range of reasonableness" in determining whether to approve a settlement "which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; see *In re Omnivision Tech, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036; see also *Nat'l Rural Telecomm. Coop. v. Directv. Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 ("well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y 2004) 225 F.R.D. 436, 460 ("settlement amount's ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlements fairness"); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184 ("the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims"); *Officers for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d 615, 628 (it is "the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness").

Co. (W.D.N.Y. 2005) 228 FRD. 174, 186 (*quoting In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

a. The Gross Settlement Amount Meets the Recognized Range of Reasonableness.

The Gross Settlement Amount of \$150,000 is fair and reasonable considering the nature and magnitude of the claims being settled and the various potential impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop an economic damage model measuring Defendants' liability exposure while accounting for the uncertainties of continued litigation. The model was informed by Class Counsel's investigation, including the analysis of a sample of time and payroll data. Class Counsel projected Defendants' liability exposure for *class claims* (excluding PAGA Penalties) ranged between \$655,015 (for just damages) and \$1,112,383 (for damages and statutory waiting time and wage statement penalties) if successful at trial. This range reflects the uncertainty regarding several of the claims, together with the uncertainty surrounding derivative liability for inaccurate wage statements and waiting time penalties. Thus, the Gross Settlement Amount of \$150,000 represents almost 23% of Defendants' class-wide liability exposure for damages, and almost 13.5% of Defendants' class-wide liability exposure for damages and statutory penalties, as estimated by Class Counsel at the time of mediation. The following summarizes Defendants' estimated exposure. Zakay Dec., ¶ 25.

(1) Estimated Damages for Meal and Rest Period Violations.

Plaintiff's primary claim in the Action alleged that Defendants failed to provide compliant meal and rest periods. Specifically, Plaintiff alleged that as a result of their rigorous work schedules, Plaintiff and the Class Members were not able to take timely and duty-free meal periods and rest periods. Zakay Dec., ¶ 26.

Conversely, Defendants argued, among other things, that their policies and procedures required Class Members to take uninterrupted, statutorily compliant meal and rest breaks and that the nature of the work, scheduling, and staffing provided employees ample ability to take compliant meal periods and rest breaks. Zakay Dec., ¶ 27.

1 Similarly, Defendants argued that any divergence from these written policies was not systematic
2 and, if any occurred, it was limited and location specific. Defendants also asserted that they maintained
3 facially compliant meal period policies and practices throughout the Class Period. Zakay Dec., ¶ 28.

4 Finally, Defendants contended that all Class Members were subject to a collective bargaining
5 agreement (“CBA”) that completely preempted Class Members’ meal, rest break claims. Courts apply
6 a two-part test for determining whether a claim is preempted by Labor Management Relations Act
7 (“LMRA”) at 29 U.S.C. §§ 141 et seq. *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1060 (9th Cir.
8 2007). Initially, the court determines “whether the asserted cause of action involves a right conferred
9 upon an employee by virtue of state law, not by a collective bargaining agreement.” *Id.* at 1059. “If the
10 right exists solely as a result of the CBA, then the claim is preempted, and [the] analysis ends there.”
11 *Id.* If the right exists independent of the CBA, the court turns to the second prong: whether the claim
12 is “substantially dependent on analysis of a collective-bargaining agreement.” *Id.* Zakay Dec., ¶ 28.

13 Even though Plaintiff contends that his claims arise out of the California Labor Code, and not
14 the CBAs, Plaintiff recognized the significant risk that their underlying claims could be preempted.
15 Specifically, the California Labor Code sections and Industrial Welfare Commission Wage Orders
16 governing Plaintiff’s meal and rest break claims explicitly state that California’s meal period and rest
17 period requirements do not apply to employees covered by CBAs “if the [collective bargaining
18 agreement] expressly provides for the wages, hours of work, and working conditions of the
19 employee[s].” (See Cal. Lab. Code §§ 512, 514; see also IWC Wage Order No. 16-2001 §§ 3(H),
20 10(E), 11(e).) Zakay Dec., ¶ 28.

21 As such, Defendants argued that the applicable CBA operated to completely invalidate the meal
22 period and rest period claims for the Class Members. Accordingly, the settlement accounts for the
23 heavily discounted potential liability for Plaintiffs’ meal period, rest period and overtime claims. Zakay
24 Dec., ¶ 28.

25 Notwithstanding Defendants’ arguments, Plaintiff estimated the damages for these claims were
26 approximately \$571,728 dollars. Zakay Dec., ¶ 29.

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1 (2) Exposure for Unpaid Wages due to Rounding

2 Plaintiff argued that because of Defendants' allegedly unlawful rounding policy, they failed to
3 pay Plaintiff and the Class Members all wages due for purposes of straight pay, overtime pay, and
4 double-time pay. Zakay Dec., ¶ 30.

5 Defendants denied liability and asserted that its employees were paid for all time worked.
6 Defendants argued that their employees review and verify that their pay is correct, and they understand
7 how they are paid. Defendants also argued that its rounding policy, if any, was neutral. Defendant did
8 not maintain non-rounded time records, so Plaintiff was unable to conduct an analysis on whether the
9 rounding policy, in practice, was neutral, and what damages, if any, the Class Members suffered as a
10 result. Nevertheless, Plaintiff generously estimated 5 minutes of unpaid wages for every Class Member
11 on every single shift. Accordingly, Plaintiff estimated that Defendants' exposure for this claim to be
12 approximately \$53,637. Zakay Dec., ¶ 31-32.

13 (3) Exposure for Unreimbursed Business Expenses

14 Plaintiff alleged that Defendants required Class Members to incur personal expenses for the use
15 of their own personal cellular phones. California employers who require employees to incur personal
16 business expenses for work purposes must reimburse the employee for the cost incurred. (See Cal. Lab.
17 Code § 2802(a), providing that "[a]n employer shall indemnify his or her employee for all necessary
18 expenditures or losses incurred by the employee in direct consequence of the discharge of his or her
19 duties, or of his or her obedience to the directions of the employer...."). Zakay Dec., ¶ 33.

20 Specifically, Plaintiff alleged Defendants required Plaintiff and Class Members to use their own
21 personal cellular phones in order to perform work-related tasks, but Defendants failed to reimburse
22 Plaintiff and Class Members for the required business expenses in violation of California Labor Code
23 section 2802. Zakay Dec., ¶ 33.

24 Again, Defendants denied any liability for this claim. Defendants argued, among other things,
25 that on the rare occasion where employees did incur business expenses, these expenses were fully
26 reimbursed. This claim was heavily discounted based on Defendants' defenses. Plaintiff estimated
27 Defendants' exposure for this claim was approximately \$29,650. Zakay Dec., ¶ 34.

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1 (4) Exposure for Wage Statement Violations and Waiting Time Penalties

2 Plaintiff alleges that Defendants' alleged violations resulted in derivative violations of Labor
3 Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties
4 and weighed the potential recoveries against probable defenses. Zakay Dec., ¶ 35.

5 Specifically, Defendants could argue that Plaintiff could not prove the "willful" prong needed to
6 obtain waiting time penalties under Labor Code section 203. Additionally, Defendants could argue that
7 Plaintiff could not show that Class Members suffered an "injury" because of wage statement violations,
8 as required by Labor Code section 226. Defendants could also argue that that meal and rest period
9 violations do not entitle employees like Plaintiff and the Class Members to pursue the derivative waiting
10 time and itemized wage statement penalties. (*See Naranjo v. Spectrum Security Services, Inc.*, (2019)
11 40 Cal.App.5th 444 (review granted); *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th
12 1308.) Plaintiff would have to overcome precedent to prove the Class deserved the penalties. *See, e.g.*,
13 *Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying
14 class certification for the same penalty claims); *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-
15 1137 (C.D. Cal. 2011) (finding insufficient evidence of bad faith or actual injury). Plaintiff could not
16 give the penalty claims great weight given that they depended on proving the underlying claims, which
17 had their own risks. Plaintiff estimated Defendants' exposure for these claims is approximately
18 \$457,368 (\$333,368 for waiting time penalties, and \$124,000 for wage statement penalties). Zakay
19 Dec., ¶ 35.

20 (5) Defendants' PAGA Exposure

21 Class Counsel's damage models also estimated Defendants' exposure for PAGA penalties. At
22 the time of mediation, Plaintiff estimated Defendants' PAGA exposure was approximately 587,500.
23 Zakay Dec., ¶ 36.

24 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
25 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
26 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
27 "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no
28 civil penalties, even when Labor Code violations are established. *See In re Nordstrom Com. Cases*, 186

1 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
2 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
3 6, 2016) (PAGA penalties denied after trial).

4 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of the
5 underlying Labor Code violations. *See Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
6 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on
7 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
8 defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for
9 each pay period the employee worked. Again, Defendants raised several defenses that presented serious
10 threats to the claims of the Plaintiff and the Aggrieved Employees. In addition to those arguments
11 discussed *supra*, Defendants also argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.*
12 (2019) 43 Cal.App.5th 885, weakened Plaintiff's claims, on liability, value, and manageability as to the
13 rest period claims. Zakay Dec., ¶ 37.

14 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, illustrates the risk of PAGA claims.
15 In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
16 maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with
17 the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539.
18 Again, the *Carrington* decision was after Plaintiff actually prevailed at trial, and even then, the PAGA
19 penalties were reduced by 90%.

20 The proposed Settlement allocates \$5,000 to satisfy the PAGA claims. This amount represents
21 approximately 3.33% of the Gross Settlement Amount. This is well within the range *See, e.g., Nordstrom*
22 *Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0% PAGA allocation); *Berry v. Urban*
23 *Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving 1% PAGA allocation in \$5M
24 settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL 4899942 * 6 (approving \$3,000
25 PAGA allocation in \$1.2M settlement); *Singer v. Becton Dickinson & Co.* (S.D. Cal. 2010) 2010 WL
26 2196104 *2 (approving \$3,000 PAGA allocation in \$1M settlement); and *Hopson v. Hanesbrands, Inc*
27 (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving \$1,500 PAGA allocation in \$1.026M settlement.)
28 Zakay Dec., ¶ 38.

1 **b. Inherent Risks of Continued Litigation Support Preliminary Approval.**

2 “It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot
3 and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to
4 the extent courts assess this factor, it is to ‘determine whether the decision to settle is a good value for a
5 relatively weak case or a sell-out of an extraordinary strong case.’” (*Misra v. Decision One Mortg. Co.*
6 (C.D. Cal. 2009) 2009 WL 4581276, at *7.)

7 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
8 certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates,*
9 *Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit vacated, reversed and remanded a \$110
10 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the
11 trial court to enter judgement in favor of the employer. *See also O’Conner v. Uber Technologies, Inc.*
12 (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also*
13 *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor
14 plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th
15 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly
16 individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176
17 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to
18 having taken meal and rest breaks demonstrated that individualized inquiries were required to show
19 harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following
20 *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack
21 of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying
22 certification of driver meal and rest period claims based on the predominance of individual issues).
23 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
24 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
25 settlement. *Zakay Dec.*, ¶¶ 40.

26 “The Settlement eliminates these and other risks of continued litigation, including the very real
27 risk of no recovery after several years of litigation.” (*In re Nvidia Derivs. Litig.* (N.D. Cal. 2008) 2008
28

1 WL 5382544, at *3.) Indeed, potential appeals aside, litigating a complex case through trial is
2 inherently perilous regardless of the strengths of merits of the claims:

3 [N]othing is assured when litigating against commercial giants with vast
4 litigative resources, particular in such complex litigation as this, which
5 would strain the cognitive capacities of any jury. Defense judgments were
6 hardly beyond the realm of possibility. Accordingly, this factor weighs in
7 favor of preliminary approval.

8 (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1140, *opinion modified* (June 18, 1990).)

9 Finally, continuing to litigate this action would require continued and extensive resources
10 coupled with significant Court time to proceed through trial and post-trial motions, which can often
11 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
12 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
13 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
14 Defendants would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d 668,
15 the risk of an appeal and subsequent reversal is real. *Zakay Dec.*, ¶ 43. “Avoiding such a trial and the
16 subsequent appeals in this complex case strongly militates in favor of settlement rather than further
17 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
18 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
19 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

20 In this matter, Class Counsel negotiated a Gross Settlement Amount of \$150,000 that is roughly
21 between 13.5% and 23% of Defendants’ maximum class wide liability exposure. Given the amount of
22 the settlement here, as compared to potential value of the claims, offset by the various inherent risks to
23 continued litigation, the settlement is fair and reasonable. *Zakay Dec.*, ¶ 42.

24 **B. The Proposed Notice Informs the Class about the Case and Settlement**

25 The Settlement Class is entitled to the best practical notice under the circumstances. (*Kass v.*
26 *Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient
27 information to decide whether they should accept the benefits offered, opt out and pursue their own
28 remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48

Cal.App.3d 143, 151-52.) The notice must advise class members “that they may be excluded from the class if they so request and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion.” (*Kass*, 67 Cal.App.3d at 106.) Authorities generally require service of the class notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)³

The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class Members of their rights and remedies. The Settlement Administrator will first verify addresses, then mail the proposed Class Notice to all Class Members. The Notice will include information regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the procedure, and time period within which to requests for exclusions or objections to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Claims. This method was negotiated by the Parties to ensure delivering the most reasonable method of notice to the Class Members while ensuring cost effective administration of the Settlement. *Zakay Dec.*, ¶¶ 43-44.

Accordingly, both the method of disseminating the Class Notice and content of the Class Notice satisfy due process. (*See C.R.C. 3.776(e)-(f); State of Cal. v. Levi Strauss* (1986) 41 Cal.3d 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.”).)

C. The Court Should Preliminarily Approve the Class Representative Service Award

Enhancement payments “are fairly typical in class action cases.” (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006).) Enhancement payments “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing

³ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice. *Fontana v. Elrod* (7th Cir. 1987) 826 F.2d 729, 732.

1 the action, and, sometimes, to recognize their willingness to act as a private attorney general.”
2 (*Rodriguez*, 563 F.3d at 958-59.) “[T]he rationale for making enhancement or incentive awards to
3 named plaintiffs is that they should be compensated for the expense or risk they have incurred in
4 conferring a benefit on other members of the class.” (*Clark v. American Residential Services LLC*
5 (2009) 175 Cal.App.4th 785.)

6 The Settlement provides for a Class Representative Service Award of \$10,000⁴ for Plaintiff. The
7 service award is fair and reasonable compensation for the Plaintiff’s efforts bringing the action,
8 assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on
9 the status of his case and the strategies for prosecuting the claims, reviewing the proposed Settlement
10 to ensure that its terms are fair and provide adequate relief for the Settlement Class, and agreeing to
11 provide Defendants a general release of all claims arising out of his employment. Zakay Dec., ¶ 45.

12 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class
13 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff
14

15 ⁴ The amount of the requested enhancement payment-\$10,000-is reasonable by reference to the amounts that California courts (both federal
16 and state) have repeatedly found to be reasonable for wage and hour class action settlements: *See Baker v. LA. Fitness Int’l, LLC*, No.
17 BC438654 (L.A. County Super. Ct. Dec. 12, 2012) (awarding \$10,000 enhancement payments to three of the named plaintiffs); *Blue v.*
18 *Codwell Banker Residential Brokerage Co.*, No. BC417335 (L.A. County Super. Ct. Mar. 21, 2011) (awarding \$10,000 enhancement
19 payment); *Buckmire v. Jo-Ann Stores, Inc.*, No. BC394795 (L.A. County Super. Ct. June 11, 2010) (awarding \$10,000 enhancement
20 payments to the named plaintiff); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013) (awarding
21 \$10,000 enhancement payment); *Ethridge v. Universal Health Services, Inc.*, No. BC391958 (L.A. County Super. Ct. May 27, 2011)
22 (awarding \$10,000 enhancement payment); *Hickson v. South Coast Auto Insurance Marketing, Inc.*, No. BC390395 (L.A. County Super.
23 Ct. Mar. 27, 2012) (awarding \$10,000 enhancement payment); *Hill v. Sunglass Hut Int’l, Inc.*, No. BC422934 (L.A. County Super. Ct. July
24 2, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs); *Kabamba v. Victoria’s Secret Stores. LLC*, No. BC368528
25 (L.A. County Super. Ct. Aug. 19, 2011) (awarding enhancement payments of \$ 10,000 to the named plaintiffs along with additional
26 compensation for their general release of claims); *Magee v. American Residential Services, LLC*, No. BC423798 (L.A. County Super. Ct.
27 Apr. 21, 2011) (awarding \$15,000 enhancement payment); *Mares v. BFS Retail & Commercial Operations, LLC*, No. BC375967 (L.A.
28 County Super. Ct. June 24, 2010) (awarding \$15,000 enhancement payments to the named plaintiffs); *Nevarez v. Trader Joe’s Co.*, No.
BC373910 (L.A. County Super. Ct. Jan. 29, 2010) (awarding \$10,000 enhancement payment); *Ordaz v. Rose Hills Mortuary, LP.*, No.
BC386500 (L.A. County Super. Ct. Mar. 19, 2010) (awarding 10,000 enhancement payments to the named plaintiffs); *Sheldon v. AHMC*
Monterey Park Hospital LP, No. BC440282 (L.A. County Super. Ct. Feb. 22, 2013) (awarding \$10,000 enhancement payment); *Silva v.*
Catholic Moray Services, Inc., No. BC408054 (L.A. County Super. Ct. Feb. 8, 2011) (awarding \$10,000 enhancement payments to the
named plaintiffs); *Weisbarth v. Banc West Investment Services, Inc.*, No. BC422202 (L.A. County Super. Ct. May 24, 2013) (awarding
\$10,000 enhancement payment); *Zamora v. Balboa Life & Casualty LLC*, No. BC360026 (L.A. County Super. Ct. Mar. 7, 2013) (awarding
\$25,000 enhancement payments to the named plaintiffs); *Acheson v. Express, LLC*, No. 109CV135335 (Santa Clara County Super. Ct.
Sep. 13, 2011) (awarding \$10,000 enhancement payment); *Aguilar v. Cingular Wireless. LLC*, No. CV 06-8197 DDP (AJWx) (C.D. Cal.
Mar. 17, 2011) (awarding \$14,767 enhancement payment); *Bejarano v. Amerisave Mortgage Corp.*, No. EDCV 08-00599 SGL (Opx)
(C.D. Cal. June 22, 2010) (awarding \$10,000 enhancement payment); *Carbajal v. Sally Beauty Supply LLC*, No. CIVVS 1004307 (San
Bernardino Super. Ct. Aug. 6, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs); *Contreras v. Serco Inc.*, No. 10-
cv-04526-CAS-JEMx (CD. Cal. Sep. 10, 2012) (awarding \$10,000 enhancement payment); *Guerrero v. R.R. Donnelley & Sons Co.*, No.
RIC 10005196 (Riverside Super. Ct. July 16, 2013) (awarding \$10,000 enhancement payment); *Kisliuk v. ADT Security Services, Inc.*, No.
CV08-0324 DSF (RZx) (C.D. Cal. Jan. 10, 2011) (awarding \$10,000 enhancement payment); *Morales v. BCBG Maxaria Int’l Holdings,*
Inc., No. JCCP 4582 (Orange County Super. Ct. Jan. 24, 2013) (awarding \$10,000 enhancement payment); and *Barrett v. Doyon Security*
Services, LLC, Nos. BS900199, BS900517 (San Bernardino County Super. Ct. Apr. 23, 2010) (awarding \$10,000 enhancement payment).

respectfully submits that the above showing is sufficient for preliminary approval of the negotiated Class Representative Service Award. Zakay Dec., ¶ 46.

D. The Court Should Preliminarily Approve the Class Counsel Payment

The purpose of a Class Counsel Payment in class action litigation is to reward counsel who took the risk of non-payment and invested in a case that achieved a substantial positive result for the class. California courts routinely award attorneys' fees equaling one-third or more of the potential value of the common fund, the amount requested under this settlement. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 ("Empirical studies show that regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, *J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent with market rates).)

Class Counsel took this matter on a contingency fee basis and invested significant time and expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average Individual Settlement Share illustrates the demonstrably positive outcome for the Settlement Class Members. Considering the positive outcome for the Class Members, and in light of the supporting authority, the proposed Class Counsel Payment is fair and reasonable. Zakay Dec., ¶ 47.

Plaintiff will file a formal motion for the negotiated Class Counsel Payment once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. Zakay Dec., ¶ 48.

E. Provisional Certification for Settlement Purposes Is Appropriate

For Settlement, Plaintiff contends, and Defendants do not dispute, that provisional certification of the Class is appropriate. Zakay Dec., ¶ 49.

1. The Standard for Class Certification

Class actions are statutorily authorized "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court" (*Cal.Civ.Proc. Code* § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1332.) Class

1 certification is appropriate when there is an “ascertainable class and a well-defined community of
2 interest among class members.” (*Sav-On Drug Stores, Inc.* (2014) 34 Cal.4th 319, 326.) Class treatment
3 is appropriate even if class members at some point may be required to make an individual showing as
4 to eligibility for recovery. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207;
5 *Sav-On*, 34 Cal.4th at 333.)

6 2. The Proposed Settlement Class is Ascertainable and there is a Well-Defined
7 Community of Interest Among the Settlement Class Members.

8 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure section 382 is
9 “determined by examining (1) the class definition, (2) the size of the class, and (3) the means available
10 for identifying class members.” (*Lee*, 166 Cal.App.4th at 1334.) Class members are ascertainable
11 where they may be readily identified without unreasonable expense or time by reference to official
12 records. (*Id.*)

13 The community of interest requirement embodies three factors: (1) predominant common
14 questions of law or fact; (2) a class representative with claims or defenses typical of the class; and (3)
15 a class representative and counsel who can adequately represent the class. (*Cal. Civ. Proc. Code* § 382.)

16 In April 2012, the Supreme Court expounded on the element of predominance: The “ultimate
17 question” the element of predominance presents is whether “the issues which may be jointly tried, when
18 compared with those requiring separate adjudication, are so numerous or substantial that the
19 maintenance of a class action would be advantageous to the judicial process and to the litigants.”
20 (*Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).)

21 Because all Class Members are Defendants’ current and former employees, the class is readily
22 ascertainable from Defendants’ regular business records, i.e., payroll records. *Zakay Dec.*, ¶ 54.

23 The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the entire
24 Settlement Class. Factually, Defendants’ policies and practices apply class-wide and Defendants’
25 liability can be determined by facts common to all members of the class. The wage and hour issues are
26 both numerous and substantial, and a class action is the most advantageous method of dealing with the
27 claims of the Settlement Class. *Zakay Dec.*, ¶ 51.

1 Plaintiff's wage and hour claims are typical of the proposed Settlement Class because they arise
2 from the same factual basis and are based on the same legal theories applicable to the other Class
3 Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the Settlement
4 Class. Plaintiff alleges that he was injured by the same company-wide practices to which the proposed
5 Class Members were subject and seek the same relief. Plaintiff has already demonstrated his ability to
6 advocate for the interests of the Class Member by initiating this litigation, undertaking extensive class
7 discovery, and evaluating the proposed settlement to assure that it is fair. Zakay Dec., ¶ 52.

8 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
9 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
10 gained state court settlement approval of the same class-wide causes of action that are at issue in this
11 case. Class Counsel's wage and hour class action experience establishes that they are well qualified to
12 represent the interests of this Class. Zakay Dec., ¶¶ 54, Declaration of Nicholas De Blouw, ¶¶ 1-3.

13 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
14 each individual claim, the Class Members likely have little incentive to litigate their claims on an
15 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
16 claim outweigh any potential recovery. In sum, class treatment is superior to individual, case-by-case
17 adjudication. Zakay Dec., ¶ 53.

18 IV. CONCLUSION

19 The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately
20 presented the materials and information necessary for preliminary approval, the Parties request that
21 the Court preliminarily approve the settlement.

22 Dated: March 9, 2023

ZAKAY LAW GROUP, APLC

24 By: 

25 Shani O. Zakay, Esq.