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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

LUIS DE JESUS, an individual, on behalf of
himself and on behalf of all persons similarly
situated,

Plaintiff,

v.

GUARDIAN ANGEL HOME CARE, INC., a
Michigan Corporation; SAM D. KASSAB; an
individual, and DOES 2-50, Inclusive,

Defendants.

Case No: 37-2020-00021049-CU-OE-CTL

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

Hearing Date: December 3, 2021

Hearing Time: 8:30am

Honorable Judge Ronald Frazier
Department: 65

Trial Date: Not Set

Action Filed: June 18, 2020

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1 **I. INTRODUCTION**

2 Plaintiff Luis De Jesus (“Plaintiff”) respectfully submits this memorandum in support of the
3 motion for preliminary approval of the proposed class and Private Attorneys General Act (“PAGA”)
4 action settlement with Defendant Guardian Angel Home Care, Inc. (“Defendant”), and seeks entry
5 of an order: (1) preliminary approving the proposed settlement of this class and PAGA action with
6 Defendant; (2) approving the form and method for providing class-wide notice; (3) directing that
7 notice of the proposed settlement be given to the class; and (4) scheduling a final approval hearing
8 date to consider Plaintiff’s motion for final approval of the settlement and entry of the Judgment,
9 and Plaintiff’s motion for approval of attorneys’ fees and litigation expenses.

10 Plaintiff and Defendant have reached a full settlement of the above-captioned action, which
11 is embodied in the Class and PAGA Action Settlement Agreement (“Agreement”). A copy of the
12 fully executed Agreement is attached as Exhibit #1 to the Declaration of Shani O. Zakay (“Decl.
13 Zakay”), served and filed herewith.

14 As consideration for this Settlement, the total amount to be paid by Defendant is One Million
15 Dollars (\$1,000,000) (the “Gross Settlement Amount”). The Gross Settlement Amount will settle
16 all issues pending in this litigation between the Plaintiff and the Class on the one hand, and the
17 Defendant and the Released Parties, on the other hand, including: payment of all Settlement Shares
18 to Participating Class Members, the Class Representative Service Payments, the Class Counsel Fees
19 Payment, Class Counsel Litigation Expenses Payment, the payment to the California Labor
20 Workforce Development Agency (“LWDA Payment”), and the expenses of the Settlement
21 Administrator. The Gross Settlement Amount does not include Defendant’s share of employer
22 payroll taxes, which it shall pay separately. The Settlement is all-in with no reversion to Defendant
23 and no need to submit a claim form. (Decl. Zakay at ¶3).

24 On August 2, 2021, the parties participated in a full-day mediation with Steven Rottman,
25 Esq., an experienced wage and hour class and PAGA action mediator. The mediation concluded
26 without an agreement to settle the Action¹. However, mediator Rottman made a mediator proposal
27 that was subsequently accepted by all parties. The basic terms were set forth in a signed

28 _____
¹ Defined below.

1 Memorandum of Understanding. The Parties then prepared the full Agreement, which was signed
2 by all counsel and the Parties and is now presented to this Court for preliminary approval. Plaintiff
3 and Class Counsel believe that this Settlement is fair, reasonable, and adequate. (Decl. Zakay at
4 ¶15).

5 The Settlement is fair, reasonable, and adequate, and should be preliminarily approved.
6 Therefore, Plaintiff respectfully requests that this Court grant preliminary approval of the
7 Agreement and enter the proposed order submitted herewith.

8 **II. DESCRIPTION OF THE SETTLEMENT**

9 The Gross Settlement Amount to be paid by Defendant is One Million Dollars (\$1,000,000).
10 Under the Settlement, the Gross Settlement Amount consists of the following elements: (1)
11 payments of the Settlement Shares to Participating Class Members, including the Class Members,
12 (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment, (3) Settlement
13 Administration Costs, (4) the LWDA Payment, and (5) the Class Representative Service Payment
14 to the Plaintiff. The Gross Settlement Amount does not include Defendant's share of employer
15 payroll taxes, which Defendant shall pay to the Administrator separately. The Gross Settlement
16 Amount shall be all-in with no reversion to Defendant. (Decl. Zakay at ¶13).

17 Within 65 days of final approval and the Judgment becomes final, the Defendant will fund
18 the Gross Settlement Amount. Within fourteen (14) days after Defendant funds the Gross
19 Settlement Amount, the Settlement Administrator will pay: the Participating Class Members their
20 Settlement Shares; Class Counsel their Class Counsel Fees Payment and the Class Counsel
21 Litigation Expenses Payment; the LWDA its LWDA Payment; and the Settlement Administrator
22 its Settlement Administration Costs, all in the amounts approved by the Court. (Decl. Zakay at
23 ¶14).

24 The Net Settlement Amount shall equal the net amount available for Settlement shares to
25 Participating Class Members from the Gross Settlement Amount after deducting the Court-
26 approved amounts for the Class Representative Service Payments, the Class Counsel Fees Payment,
27 the Class Counsel Litigation Expenses Payments, the LWDA Payment, and the Settlement
28 Administration Costs. The Settlement Administrator will pay a Settlement Share from the Net

1 Settlement Amount to each Participating Class Member. The submission of a claim form is not
2 required in order for the Participating Class Member to be paid his or her Settlement Share. The
3 Settlement Share for each Participating Class Member in the Class will be calculated by (a) dividing
4 this amount by the total number of workweeks worked by all Participating Class Members in the
5 Class during the Class Period to determine a dollar amount per workweek (“Workweek Payment”),
6 and (b) multiplying the total number of workweeks worked by each Participating Class Member in
7 the Class during the Class Period by the Workweek Payment. The entire Net Settlement Fund shall
8 be distributed. (Decl. Zakay at ¶15).

9 Class Members will have 90 days after the mailing of the Class Notice to exclude themselves
10 or submit written objections. Class Members may choose to opt-out of the Settlement by following
11 the directions in the Class Notice. All Class Members who do not “opt out” will be deemed
12 Participating Class Members who will be bound by the Settlement and will be entitled to receive a
13 settlement payment. Finally, the Class Notice will advise the Class Members of their right to object
14 to the Settlement. (Decl. Zakay at ¶16).

15 If a check is returned to the Settlement Administrator, the Settlement Administrator will
16 make all reasonable efforts to obtain a correct address for the Participating Class Member and re-
17 mail the check to the Participating Class Member at his or her correct address. If a Participating
18 Class Member’s Settlement Share check is not cashed within 90 days after the Settlement
19 Administrator’s last mailing to the Participating Class Member, the Settlement Administrator will
20 send the affected Participating Class Member a notice informing him or her that unless the check is
21 cashed in the next 90 days, it will expire and become non-negotiable, and offer to replace the check
22 if it was lost or misplaced but not cashed. If the check remains uncashed by the expiration of the
23 60 days period after this notice, the funds from such uncashed check will be paid to the Children’s
24 Advocacy Institute in the name of the Participating Class Member and the Participating Class
25 Member will remain bound by the Settlement. (Decl. Zakay at ¶17).

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

1 Settlement Administrator shall receive payment for services in an amount not to exceed \$10,000.00.
2 (Decl. Zakay at ¶18).

3 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum
4 not to exceed 1/3 of the Gross Settlement Amount as their Class Counsel Fees Payment. Class
5 Counsel will also be allowed to apply separately for an award of litigation expenses in an amount
6 not to exceed \$20,000. In support of this request, Class Counsel will provide evidentiary support,
7 including lodestar method calculations. Subject to Court approval, the Agreement provides for
8 payment of Class Representative Service Payment of no more than \$10,000 for Plaintiff, or such
9 lesser amount as may be approved by the Court at final approval.² Defendant will not oppose a
10 motion for approval of attorneys' fees, costs and a service award consistent with the Agreement.
11 (Decl. Zakay at ¶19).

12 Subject to Court approval, \$40,000 will be paid from the Gross Settlement Amount for
13 settlement of civil penalties under PAGA, Labor Code Section 2698 *et seq.* Pursuant to the
14 requirements of Labor Code §2699(i), the PAGA Payment shall be allocated \$30,000 (75%) to the
15 LWDA (the "LWDA Payment") as the LWDA's share of the settlement of civil penalties and
16 \$10,000 (25%) to the Net Settlement Amount for distribution to the Participating Class Members
17 in the Class. (Decl. Zakay at ¶20).

18 III. CASE BACKGROUND

19 On June 19, 2020, Plaintiff filed a Notice of Violations with the Labor and Workforce
20 Development Agency (LWDA) and served the same on Defendant. On August 27, 2020, Plaintiff
21 filed an Amended Notice of Violations with the LWDA and served the same on Defendant. On
22 February 8, 2021, Plaintiff filed a Second Amended Notice of Violations with the LWDA and
23 served the same on Defendant.

24 On June 18, 2020, plaintiff Luis De Jesus filed a class action Complaint in the Action against
25 Defendant in the Superior Court of the State of California, County of San Diego. On March 24,

26
27 ² Plaintiffs 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).

2021, Plaintiff amended the Complaint to add a claim under the Private Attorneys General Act (PAGA). The First Amended Complaint, which is the operative complaint, alleged claims for (1) unfair business practices; (2) failure to pay minimum wage; (3) failure to pay overtime; (4) failure to authorize or permit meal breaks; (5) failure to authorize or permit rest breaks; (6) failure to furnish accurate wage statements; (7) waiting time penalties; (8) failure to reimburse for required business expenses in violation of Cal. Lab. Code §2802; (9) PAGA violations; and (10) failure to pay sick time; (the “Action”). (Decl. Zakay at ¶7).

Plaintiff seeks to represent a class of all of employees who are or previously were employed by Defendant who earned piece-rate compensation in California during the Class Period, which is April 6, 2016 to August 2, 2021 (the “Class”). The Action generally alleges that Defendant failed to pay employees for all time worked, including overtime, failed to provide them with proper meal breaks and rest breaks, failed to separately compensate employees for rest breaks, failed to provide them with complete and accurate wage statements, failed to reimburse them for business expenses, engaged in unfair business practices, and failed to timely pay them all wages owed at the time of the separation of their employment. The Action seeks unpaid wages, statutory penalties, civil penalties, attorneys’ fees, litigation costs³, and any other equitable or legal relief allegedly due and owing to Plaintiff and the other Class Members by virtue of the foregoing claims. (Decl. Zakay at ¶8).

Prior to mediation, the Parties engaged in investigation and the exchange of documents and information in connection with the Action. As part of this process, Defendant provided a significant sample of time records and payroll records, as well as other documents and information, to Class Counsel to review and analyze. On August 2, 2021, the Parties participated in an all-day mediation presided over by Steven Rottman, Esq. The mediation concluded without an agreement to settle the Action⁴. However, mediator Rottman made a mediator proposal that was subsequently accepted by all parties. The basic terms were set forth in a signed Memorandum of Understanding. The

³ Plaintiff will provide a lodestar analysis for the fees and supporting evidence of the costs with the final approval papers.

⁴ Defined below.

1 Parties then prepared the full Agreement, which was signed by all counsel and the Parties and is
2 now presented to this Court for preliminary approval. (Decl. Zakay at ¶9).

3 Accordingly, for purposes of this Settlement, the “Class” is defined as ““Class” means all
4 employees who are or previously were employed by Defendant who earned piece-rate
5 compensation in California during the Class Period.” (Agreement at ¶A(7)). The Class Period is
6 the period of time from April 6, 2016 to August 2, 2021. (*See id.* at ¶A(8)). (Decl. Zakay at ¶10).

7 Although a resolution has been reached, Defendant denies any liability or wrongdoing of
8 any kind associated with the claims alleged in the Action and further denies that, for any purpose
9 other than Settlement, the Action is appropriate for class treatment. Defendant contends, among
10 other things, that it has correctly and fully compensated the Class Members, provided compliant
11 meal and rest periods to the Class Members, provided complete, accurate itemized wage statements,
12 and complied at all times with the California Labor Code, and the applicable Wage Orders. Further,
13 Defendant contends that class certification would be inappropriate for any reason other than for
14 settlement. (Decl. Zakay at ¶11).

15 Plaintiff contends that Defendant violated California wage and hour laws. Plaintiff further
16 contends that the Action is appropriate for class certification on the basis that the Plaintiff’s claims
17 meet the requisites for class certification. Without admitting that class certification is proper,
18 Defendant has stipulated that the above Class may be certified for settlement purposes only. The
19 Parties agree that certification for settlement purposes is not an admission that class certification
20 would be proper or that Plaintiff would be an adequate class representative if the class certification
21 issues were litigated. Further, the Agreement is not admissible in this or any other proceeding as
22 evidence that the Class could be certified absent a settlement. Solely for purposes of settling the
23 Action, the Parties stipulate and agree that the requisites for establishing class certification with
24 respect to the Class, as defined above, are satisfied. (Decl. Zakay at ¶11).

25 Class Counsel has conducted a thorough investigation into the facts of the class action. Class
26 Counsel has diligently evaluated the Class Members’ claims against Defendant. Class Counsel
27 reviewed the production of documents from the Defendant. Prior to the settlement negotiations,
28 counsel for Defendant provided Class Counsel with access to the necessary data and information

1 for Class Counsel to evaluate the claims by the Class. Class Counsel conducted extensive review
2 of a significant sample of time records and data with the assistance of a damages expert (Berger
3 Consulting Group). Based on the foregoing data and their own independent investigation,
4 evaluation and experience, Class Counsel believe that the Settlement is fair, reasonable, and
5 adequate and are in the best interest of the Class in light of all known facts and circumstances,
6 including the risk of significant delay, the defenses asserted by Defendant, and potential appellate
7 issues. (Decl. Zakay at ¶12).

8 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS** 9 **COURT TO GRANT PRELIMINARY APPROVAL**

10 When a proposed class-wide settlement is reached, the settlement must be submitted to the
11 court for approval. (2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41,
12 p.11-87). California “[p]ublic policy generally favors the compromise of complex class action
13 litigation.” (*Nordstrom Comm’n Cases*, 186 Cal. App. 4th 576, 581 (2010) (quoting *Cellphone*
14 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117-18 (2009).) Class action settlements are
15 approved where the proposed settlement is “fair, adequate and reasonable.” (*Dunk v. Ford Motor*
16 *Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d
17 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983)).

18 Preliminary approval is the first of three steps that comprise the approval procedure for
19 settlements of class actions. The second step is the dissemination of notice of the settlement to all
20 Class Members. The third step is a final settlement approval hearing, at which evidence and
21 argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented
22 and Class Members may be heard regarding the settlement. (See *Dunk v. Ford Motor Co.*, 48 Cal.
23 App. 4th 1794, 1801 (1996); *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of
24 Court, rule 3.769.).

25 The primary question presented on an application for preliminary approval of a proposed
26 class action settlement is whether the proposed settlement is “within the range of possible approval.”
27 (*Manual for Complex Litigation, Second* §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3
28

1 (7th Cir. 1982)).⁵ Preliminary approval is merely the prerequisite to giving notice so that “the
2 proposed settlement... may be submitted to members of the prospective Class for their acceptance
3 or rejection.” (*Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*,
4 323 F. Supp. 364, 372 (E.D. Pa. 1970); *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist.
5 LEXIS 151997, *3 (C.D. Cal. 2010)). There is an initial presumption of fairness when a proposed
6 settlement, which was negotiated at arm’s length by counsel for the Class, is presented for court
7 approval. (*Newberg*, 3d Ed., §11.41, p.11-88; *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
8 224, 245 (2001) [citation omitted]; see also *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th
9 734, 742-45 (2009) (upholding trial court’s determination that settlement was “fair, reasonable and
10 adequate” where the settlement “provided valuable benefits to the class ... that were ‘particularly
11 valuable in light of the risks plaintiff would have faced if she proceeded to litigate her case.’”).
12 However, the ultimate question of whether the proposed settlement is fair, reasonable, and adequate
13 is made after notice of the settlement is given to the Class Members and a final settlement hearing
14 is held by the Court.

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

16 The approval of a proposed settlement of a class action suit is a matter within the broad
17 discretion of the trial court. (*Wershba*, 91 Cal. App. 4th at 234-235; *Dunk*, 48 Cal. App. 4th at
18 1794). Preliminary approval does not require the trial court to answer the ultimate question of
19 whether a proposed settlement is fair, reasonable, and adequate. That final determination is made
20 only after notice of the settlement has been given to the class members and after they have been
21 given an opportunity to voice their views of the settlement or to be excluded from the settlement.
22 (3B J. Moore, *Moore’s Federal Practice* §§23.80 - 23.85 (2003)).

23 In considering a potential settlement for preliminary approval purposes, the trial court does
24 not have to reach any ultimate conclusions on the issues of fact and law which underlie the merits
25

26 ⁵ California courts look to federal authority on class actions. *Vasquez v. Superior Court*, 4 Cal.3d
27 800, 821 (1971). “It is well established that in the absence of relevant state precedents trial courts
28 are urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure
for conducting class actions.” *Frazier v. City of Richmond*, 184 Cal. App.3d 1491, 1499 (1986),
citing *Green v. Obledo*, 29 Cal.3d 126, 145-146 (1981).

1 of the dispute, and need not engage in a trial on the merits. (*Wershba, supra*, 91 Cal. App. 4th at
2 239-40; *Dunk, supra*, 48 Cal. App. 4th at 1807). The Ninth Circuit explains, “the very essence of a
3 settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” (*Officers*
4 *for Justice v. Civil Service Com’n of City and County of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982).
5 The question whether a proposed settlement is fair, reasonable, and adequate necessarily requires a
6 judgment and evaluation by the attorneys for the parties based upon a comparison of “the terms of
7 the compromise with the likely rewards of litigation.” (*Weinberger v. Kendrick*, 698 F.2d 61, 73
8 (2d Cir. 1982), cert. denied 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders*
9 *of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968))). Thus, when analyzing the
10 settlement, the amount is “not to be judged against a hypothetical or speculative measure of what
11 might have been achieved by the negotiators.” (*Officers for Justice*, 688 F.2d at 625, 628).

12 With regard to class action settlements, the opinions of counsel should be given considerable
13 weight both because of counsel’s familiarity with this litigation and previous experience with cases
14 such as these. (*Officers for Justice*, 688 F.2d 615, 625 (9th Cir. 1982); *In re Wash. Public Power*
15 *Supply System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F.
16 Supp. 446, 451 (N.D. Cal. 1988); *Weinberger*, 698 F.2d at 74). For example, in *Lyons v. Marrud,*
17 *Inc.*, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the
18 court noted that “[e]xperienced and competent counsel have assessed these problems and the
19 probability of success on the merits... The parties’ decision regarding the respective merits of their
20 position has an important bearing.” (*Id.* at ¶ 92,520). “The recommendations of plaintiffs’ counsel
21 should be given a presumption of reasonableness.” (*Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622
22 (N.D. Cal. 1979)). As a result, courts hold that the recommendation of counsel is entitled to
23 significant weight. (*Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D.
24 Cal. 2004)).

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

26 A number of factors are to be considered in evaluating a settlement for purposes of
27 preliminary approval. In determining whether to grant preliminary approval, the court considers
28 whether the “(1) the proposed settlement appears to be the product of serious, informed, non-

collusive negotiations, (2) has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives or segments of the class, and (4) falls within the range of possible approval.” (*In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)). No one factor should be determinative, but rather all factors should be considered. The analysis has been summarized as follows:

If the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement. (*Manual of Complex Litigation, Second* §30.44, at 229).

Here, the Settlement meets all of these criteria for preliminary approval.

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

This settlement is the result of extensive and hard-fought litigation and negotiations before an experienced and well-respected mediator. Defendant has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and Class Counsel have determined that it is desirable and beneficial to the Class Members to put to rest the Released Class Claims.⁶

The Parties scheduled and, on August 2, 2021, attended an arms-length private mediation before Steven Rottman, Esq. a respected and experienced mediator. In preparation for the mediation, Defendant provided Class Counsel with necessary records and information for the members of the Class. Defendant produced a large sample consisting of pay records and time records. Defendant also produced Defendant’s relevant employment policies, including compensation policies and timekeeping policies. Plaintiff analyzed the data. The mediation concluded without an agreement to settle the Action. However, mediator Rottman made a mediator

⁶ Upon the Effective Date and funding of the settlement in full by Defendant, any person who is a Class Member who does not timely and validly opt out shall be deemed to have fully and finally released any and “all claims contained in the operative complaint and any additional wage and hour claims that could have been brought based on the facts alleged in the Complaint during the Class Period. (See Agreement at ¶ A(24).

1 proposal that was subsequently accepted by all parties. The basic terms were set forth in a signed
2 Memorandum of Understanding. The Parties then prepared the full Agreement, which was signed
3 by all counsel and the Parties. (Decl. Zakay at ¶5).

4 Class Counsel has conducted a thorough investigation into the facts of the class action. Class
5 Counsel has diligently evaluated the Class Members' claims against Defendant. Class Counsel
6 reviewed the production of documents from the Defendant. Prior to the settlement negotiations,
7 counsel for Defendant provided Class Counsel with access to the necessary data and information
8 for Class Counsel to evaluate the claims by the Class. Class Counsel conducted extensive review
9 of a significant sample of time records and data with the assistance of an expert. Based on the
10 foregoing data and their own independent investigation, evaluation and experience, Class Counsel
11 believe that the Settlement is fair, reasonable, and adequate and are in the best interest of the Class
12 in light of all known facts and circumstances, including the risk of significant delay, the defenses
13 asserted by Defendant, and potential appellate issues. (Decl. Zakay at ¶12).

14 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and
15 trying the Action against Defendant through possible appeals which could take several years. Class
16 Counsel have also taken into account the uncertain outcome and risk of litigation, especially in
17 complex actions such as the one here. Class Counsel are also mindful of, and recognize, the inherent
18 problems of proof under, and asserted defenses to, the claims asserted in the Action. Based upon
19 their evaluation, Plaintiff and Class Counsel have determined that the settlement set forth in the
20 Agreement is in the best interest of the Class Members. (Decl. Zakay at ¶21).

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

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28 ///

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

3 **a. The Settlement is Fair, Reasonable, and Adequate**

4 The proposed Settlement here has no “obvious deficiencies” and is well within the range of
5 possible approval. All Class Members will receive an opportunity to participate in the Settlement
6 and receive payment according to the same formula if they do not opt out. (Agreement at ¶
7 C(14)(a)).

8 The amounts to compensate the Class Members for the alleged violations at the time this
9 Settlement was negotiated were calculated by Class Counsel. Plaintiff and Class Counsel analyzed
10 the data and determined the potential damages for the employees. For the Class, Plaintiff estimates
11 that Defendant was subject to maximum liability for damages in the amount of \$5,189,022,
12 consisting of \$3,175,559 for unpaid wages, \$174,175 for unreimbursed expenses, and \$1,839,288
13 for meal and rest break periods. In addition, Plaintiff calculated that Defendant could be liable for
14 \$295,250 for wage statement penalties and 889,224 for waiting time penalties.⁷ Finally, Plaintiff
15 calculated that Defendant could be liable for PAGA penalties in an amount of \$4,678,750.⁸

16 ⁷ While Plaintiff alleged claims for statutory penalties, they recognize that this claim is subject to
17 various defenses asserted by Defendant, including, but not limited to, a good faith dispute defense
18 as to whether Defendant, as a staffing agency, is governed by Labor Code Section 201.3, instead of
19 Section 203, which, if proven, would significantly limit the amount of damages owed to the
20 California Class. Moreover, Plaintiff’s claims pursuant to Labor Code Section 226 and various
21 PAGA penalties are also subject to a good faith defense as to whether any premium wages for meal
22 or rest periods or other wages were owed given Defendant’s position that Plaintiffs and the Class
23 were properly compensated. *See Reber v. AIMCO/Bethesda Holdings, Inc.*, 2008 WL 4384147, at
24 *9 (C.D. Cal. Aug. 25, 2008) (granting defendant’s motion for summary judgment on claim for
25 failure to provide accurate itemized wage statements “because a good faith dispute exists...
26 [therefore, defendant] was not ‘knowing and intentional’ in failing to provide [Section 226]
27 statements”); *see also Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) (“There is
28 no willful failure to pay wages if the employer and employee have a good faith dispute as to whether
and when the wages were due.”). Additionally, there is serious doubt as to whether violations of
the meal/rest period regulations, which require payment of a “premium wage” for each improper
meal period, give rise to claims under sections 203 and 226. *See Ling v. P.F. Chang’s China Bistor,*
Inc., 245 Cal. App. 4th 1242, 1261 (2016) and *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App.
5th 1308, 1336 (2018). This issue was decided in *Naranjo v. Spectrum Sec. Servs., Inc.*, 40 Cal.
App. 5th 444, 474, (Ct. App. 2019), which held that actions for meal break and rest break premiums
“do not entitle employees to pursue the derivative penalties in sections 203 and 226.”

⁸ Plaintiff recognizes that the PAGA penalties claim is also subject to various defenses by
Defendant, including that Class Members may not be able to recover subsequent penalties until, at

1 Consequently, the Settlement of approximately \$1,000,000.00 represents more than 19.3% of the
2 value of the maximum actual damages at issue. Furthermore, the Settlement represents almost
3 15.7% of the maximum combination of damages and penalties to the Class, assuming all of these
4 amounts could be proved at trial. Given the amount of the Settlement as compared to the potential
5 value of claims in this case, the Settlement is fair and reasonable. Clearly, the goal of this litigation
6 to provide compensation to Class Members for unpaid time and for allegedly missed rest breaks has
7 been met. (Decl. Zakay at ¶6).

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

15 **b. The Strengths and Weaknesses in Plaintiffs' Case and Defendant's Defenses**
16 **Warrant the Settlement**

17 Where both sides face significant uncertainty, the attendant risks favor settlement. (*Hanlon*
18 *v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). Here, a number of defenses asserted by
19 Defendant presented serious threats to the claims of the Plaintiff and the other Class Members. In
20 general, Defendant asserted that the employment practices complied with all applicable Labor
21 Laws.

22
23 _____
24 a minimum, Plaintiffs provided PAGA notice. See *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157,
25 1209 (2008) ("Until the employer has been notified that it is violating a Labor Code provision
26 (whether or not the commissioner or court chooses to impose penalties), the employer cannot be
27 presumed to be aware that its continuing underpayment of employees is a "violation" subject to
28 penalties."). In addition, Plaintiffs recognize that PAGA claims bear some risk. See *Carrington v.*
Starbucks Corp., 30 Cal. App. 5th 504 (2018). In *Carrington*, while the plaintiff prevailed on his
PAGA claim at trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing
the employer's good faith attempt at complying with the law. *Id.* at 517. Upon review, the Court of
Appeal found such reduction to be proper. *Id.* at 539. Again, the *Carrington* decision was after
Plaintiff actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%.

1 Defendant argued that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th
2 1004 (2012) weakened, if not eliminated, Plaintiff's claims, on liability, value, and class
3 certifiability as to the meal and rest period claims. A major component of the damages alleged to
4 have been suffered by the Class Members are attributed to missed meal and rest breaks. Before and
5 during the mediation, Defendant aggressively argued that Defendant's policies and culture afforded
6 the Class Members an opportunity to take timely meal and rest breaks, and that employees like the
7 Plaintiffs *chose* not to take compliant breaks. Defendant argued, therefore, that under the *Brinker*
8 decision it has no liability for the missed breaks whatsoever. Defendant argued that it adopted and
9 strictly enforced lawful policies, afforded Plaintiffs and the Class Members compliant meal and rest
10 breaks, and had a system in place to pay premiums when breaks were missed, short or untimely.
11 As to expense reimbursement, Defendant argued that any use of personal cellphones was voluntary,
12 and not a necessary expense that required reimbursement. (Decl. Zakay at ¶23).

13 **c. The Risk of Obtaining and Maintaining a Class Action and the Risk, Duration**
14 **and Complexity of Further Litigation Weight in Favor of the Settlement**

15 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
16 to obtain class certification and thereby not recover on behalf of any employee other than
17 themselves. Defendant argued that the individual experience of each employee varied with respect
18 to the alleged claims. While other cases have approved class certification of wage and hour claims,
19 class certification in this action would have been hotly disputed and was by no means a foregone
20 conclusion. Finally, even if class certification was successful, as demonstrated by the California
21 Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are
22 significant hurdles to overcome for a class-wide recovery even where the class has been certified.
23 (Decl. Zakay at ¶24).

24 This Settlement is therefore entitled to preliminary approval. Were this case to go to trial,
25 the Plaintiff and other Class Members would need to prove to the satisfaction of the Court, among
26 other things, that wages, premiums, and other damages were owed on a class-wide basis. This was
27 and is a substantial risk, and the Parties, after arm's-length negotiations between experienced and
28 informed counsel, recognized the potential risks and agreed on the settlement. The "risk, expense,

complexity, and likely duration of further litigation” in this case “favors the settlement.” *Glass v. UBS Fin. Servs.*, 2007 WL 221862 at *4 (N.D. Cal. Jan. 27, 2007) (“Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. ‘The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement.’”) (citing *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000)).

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

The relief provided in the Settlement will benefit all members of the Class who do not opt out. The Settlement does not improperly grant preferential treatment to the Plaintiff or segments of the Class in any way. Each Participating Class Member will be entitled to a cash payment based on the plan of allocation described herein. Each Participating Class Member’s Settlement Share will be determined based upon the number of shifts worked by that employee during the prescribed Class Period. (Decl. Zakay at ¶4).

Plaintiff will apply to the Court for Class Representative Service Payments in consideration for his service, his broad release, and for the risks undertaken on behalf of the Class. (Agreement at ¶C(14)(i)). Plaintiff performed his duties admirably by working with Class Counsel. The requested Plaintiff’s service payments is well within the accepted range of awards for purposes of preliminary approval. See *e.g. Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S. Dist. LEXIS 71386 (E.D. Cal. 2018) (awarding \$12,500 where average class member payment was \$351); *Holman v. Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving \$10,000 service award where class member recovery was \$375); *Rausch v. Hartford Fin. Servs. Grp.*, 2007 U.S. Dist. LEXIS 14740, 2007 WL 671334 (D. Or. 2007) (approving award of \$10,000 where class member recoveries were as little as \$150); *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008 WL 4473183, *7 (S.D. Cal. Oct. 06, 2008) (awarding \$25,000 service award to each of six plaintiffs in overtime class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D. Cal. 2007) (awarding \$25,000 service award in overtime class action and a pool of \$100,000.00 in

enhancements). As explained in *Glass*, service awards are routinely awarded to class representatives to compensate the employees for the time and effort expended on the case, for the risk of litigation, for the fear of suing an employer and retaliation therefrom, and to serve as an incentive to vindicate the statutory rights of all employees. 2007 WL 221862 at *16-17. (Decl. Zakay at ¶26).

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

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

Based on the foregoing data and their own independent investigation and evaluation, Class Counsel is of the opinion that the settlement with Defendant for the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both Parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. (Decl. Zakay at ¶28).

The fact that an informal exchange of information (as opposed to formal discovery) was agreed to by the Parties is of no consequence. In *Glass*, the Northern District of California granted final approval of an unpaid wages action although in *Glass* no formal discovery had been conducted prior to the settlement:

1 Here, no formal discovery took place prior to settlement. As the Ninth Circuit has
2 observed, however, ‘[i]n the context of class action settlements, ‘formal discovery
3 is not a necessary ticket to the bargaining table’ where the parties have sufficient
4 information to make an informed decision about settlement.” *See In re Mego*
5 *Financial Corp. Securities Litigation*, 213 F.3d at 459. (Glass, 2007 U.S. Dist.
6 LEXIS 8476 at *14).

7 Here, Class Counsel conducted both formal and informal discovery, and was in a better
8 position to evaluate the fairness of this settlement because Class Counsel had the same sufficient
9 information, as well as document production, independent investigations and due diligence, to
10 confirm the accuracy of the information supplied by Defendant.

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

12 Plaintiff contends that the proposed settlement meets all the requirements for class
13 certification under the California Code of Civil Procedure section 382 as demonstrated below, and
14 therefore, the Court may appropriately approve the Class as defined in the Agreement. This Court
15 should conditionally certify the Classes for settlement purposes only, defined as follows: “Class”
16 means all employees who are or previously were employed by Defendant who earned piece-rate
17 compensation in California during the Class Period. The Class Period is the period of time from
18 April 6, 2016 to August 2, 2021. The Parties estimate that there are 316 Class Members who
19 collectively worked approximately 14,000 workweeks. (Decl. Zakay at ¶29).

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

21 Plaintiff seeks certification of this Class for settlement purposes under California Code of
22 Civil Procedure section 382. The California Supreme Court has summarized the standard for
23 determining whether class certification is appropriate as follows:

24 Code of Civil Procedure Section 382 authorizes class actions “when the question is
25 one of a common or general interest, of many persons, or when the parties are
26 numerous, and it is impracticable to bring them all before the court....” The party
27 seeking certification has the burden to establish the existence of both an
28 ascertainable class and a well-defined community of interest among class members.

(citations omitted). The “community of interest” requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 326 (2004).

While Defendant reserves all rights to dispute that the Plaintiffs can satisfy any of these requirements, Defendant will not dispute that these requirements may be satisfied in this case for purposes of settlement and therefore, the proposed Class should be certified for purposes of settlement only.

B. The Proposed Class Is Ascertainable and Numerous

Here, the approximately 316 current and former employees that comprise the Class can be identified based on Defendant’s records and are sufficiently numerous for class certification. All of these employees are ascertainable because the class members can readily be determined through examination of Defendant’s employment files. Given that the classes consist of approximately 316 members, numerosity is satisfied. (*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.)). Moreover, the current and former employees that comprise the Class can be identified based on Defendant’s records and are sufficiently numerous for class certification. (Decl. Zakay at ¶29(a)).

C. Common Issues of Law and Fact Predominate

Predominance of common issues of law or fact does not require that the common issues be dispositive of the entire controversy or even that they be dispositive of all liability issues. (1 *Newberg on Class Actions*, Section 4.25 at 4-82, 4-83 (1992)). “Predominance is a comparative concept, and ‘the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.’” (*Sav-On*, 34 Cal. 4th at 334).

Commonality exists if there is a predominant common legal question regarding how an employer’s policies impact its employees. (*Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1536 (2008) (“[T]he common legal question remains the overall impact of Diva's policies on

its drivers.”)). Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the certification stage since the question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003)).

Here, Plaintiff contends that common questions of law and fact are present, and specifically the common questions of whether Defendant’s employment practices were lawful, whether Defendant failed to properly provide and/or pay for meal and rest periods, whether Defendant paid for all time worked, whether Defendant provided accurate wage statements, whether Defendant failed to pay all wages, and whether the Class is entitled to compensation and related penalties. (Decl. Zakay at ¶29(b)). Defendant will not oppose such a finding for purposes of this settlement only.

D. The Claims of the Plaintiffs Are Typical of the Class Claims

The typicality requirement requires Plaintiffs to demonstrate that the members of the class have the same or similar claims as Plaintiff. “The typicality requirement is met when the claims of the Plaintiff [] arise from the same event or are based on the same legal theories.” (*Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983)). In *Hanlon v. Chrysler Co.*, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit held that “[u]nder the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably coextensive with those of absent class members; they need not be substantially identical.” (50 F.3d at 1020).

In the instant case, Plaintiff contends that the typicality requirement is fully satisfied. The Plaintiff, like every other member of the Class was employed by Defendant, earned piece-rate compensation, and is a member of the Class. Plaintiff was subject to the same employment practices concerning payment of wages, and the meal and rest periods, and received similar wage statements. Thus, the claims of the Plaintiff and the Class Members arise from the same course of conduct by the Defendant, involve the same employment policies, and are based on the same legal theories. (Decl. Zakay at ¶29(c)). For purposes of settlement, the typicality requirement is met as to the common issues presented in this case. Defendant will not oppose such a finding for purposes of this settlement only.

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

2 The Class Members are adequately represented because Plaintiff and Class Counsel (a) do
3 not have any conflicts of interest with other class members, and (b) will prosecute the case
4 vigorously on behalf of the class. (*See Hanlon* 150 F.3d at 1020). First, Plaintiff is well aware of
5 his duties as representatives of the Class and has actively participated in the prosecution of this case
6 to date. He effectively communicated with Class Counsel, provided documents to them and
7 participated in discovery, investigation and negotiations in the Action. Second, Plaintiff retained
8 competent counsel who are experienced in employment class actions. Third, there is no antagonism
9 between the interests of the Plaintiff and those of the Class. Both the Plaintiff and the Class
10 Members seek monetary relief under the same set of facts and legal theories. (Decl. Zakay at
11 ¶29(d)).

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

13 To certify a class, the Court must also determine that a class action is superior to other
14 available methods for the fair and efficient adjudication of the controversy. “Where classwide
15 litigation of common issues will reduce litigation costs and promote greater efficiency, a class action
16 may be superior to other methods of litigation.” (*Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227,
17 1234 (9th Cir. 1996)). As courts have previously observed:

18 Absent class treatment, each individual plaintiff would present in separate,
19 duplicative proceedings the same or essentially the same arguments and evidence,
20 including expert testimony. The result would be a multiplicity of trials conducted
21 at enormous expense to both the judicial system and the litigants. ‘It would be
22 neither efficient nor fair to anyone, including defendants, to force multiple trials to
23 hear the same evidence and decide the same issues.’

24 *Sav-On*, 34 Cal. 4th at 340.

25 Here, a class action is the superior mechanism for resolution of the claims as pled by the
26 Plaintiff. Defendant will not dispute such a finding for purposes of this settlement only.

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

28 The Court has broad discretion in approving a practical notice program. The Parties have
agreed upon procedures by which the Class Members will be provided with written notice of the

1 Settlement similar to that approved and utilized in hundreds of class action settlements. In
2 accordance with the Agreement, within 10 days after the Court enters its order granting Preliminary
3 Approval of the Settlement, Defendant will provide to the Settlement Administrator an electronic
4 database containing the Class Data. (Agreement at ¶ C(13)(a)). Within 14 days after receiving the
5 Class Data, the Settlement Administrator will mail the Class Notice Packets to all Class Members
6 via first-class regular U.S. Mail to their last known addresses. (Agreement at ¶ C(13)(c)).

7 The Class Notice, drafted jointly and agreed upon by the Parties through their respective
8 counsel and to be approved by the Court, includes all relevant information. (See Exhibit A to the
9 Agreement). The Class Notice will include, among other information: (i) information regarding the
10 Action; (ii) the impact on the rights of the Class Members if they do not opt out; (iii) information
11 to the Class Members regarding how to opt out and how to object to the Settlement; (iv) the
12 estimated settlement payment for each of the Class Members; (v) the amount of attorneys' fees and
13 litigation expenses to be sought; (vi) the amount of the Plaintiffs' Class Representative Service
14 Payment requests; (vii) the amount being paid to the LWDA; and (viii) the Settlement
15 Administration Costs. (Decl. Zakay at ¶31).

16 The Class Notice will state that the Class Members shall have ninety (90) days from the date
17 that the Class Notice is mailed to them to request exclusion or to submit an objection. The Class
18 Members will be given an opportunity to object to the terms of the Agreement and/or the request
19 for attorneys' fees and costs and to participate at the final approval hearing, in accordance with the
20 instructions set forth in the Class Notice. Class Members will be instructed to only contact the
21 Settlement Administrator and Class Counsel an

22 d not the Court. Class Members who do not opt out will automatically receive a settlement
23 payment. The Class Members are highly skilled and educated nurses who must speak and read in
24 English fluently in order to perform their job. Therefore, Spanish notice is not necessary and is not
25 included. This notice program was designed to meaningfully reach the Class Members and advises
26 them of all pertinent information concerning the Settlement. The mailing and distribution of the
27 Class Notice satisfies the requirements of due process, is the best notice practicable under the
28 circumstances and constitutes due and sufficient notice to all persons entitled thereto. The Class

1 Notice provides information on the terms and provisions of the Settlement; the benefits that the
2 Settlement provides for Class Members; the date, time and place of the final settlement approval
3 hearing; and the procedure and deadline for submitting comments, objections, and requests for
4 exclusion. The Class Notice complies with Rules of Court 3.766 and 3.769(f). (Decl. Zakay at
5 ¶31).

6 **VII. CONCLUSION**

7 Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement
8 and sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the
9 final fairness hearing for a date that is at least one hundred twenty (120) days after the date of
10 Preliminary Approval.

11
12 DATED: November 8, 2021

13 **ZAKAY LAW GROUP, APC**

14
15 By: _____

16 Shani O. Zakay
17 Attorney for Plaintiff
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