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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

ANA ARMAN, in a Representative capacity |
only, and on behalf of other members of the |
general public similarly situated

Plaintiff

v.

BANANA REPUBLIC, LLC, a Delaware |
Limited Liability Company, THE GAP, |
INC., a Delaware Corporation, and DOES 1- |
10, inclusive

Defendants

CASE NO. 37-2021-00007625-CU-OE-CTL

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT, AND CERTIFICATION
OF PROVISIONAL SETTLEMENT CLASS**

Date: January 27, 2023

Time: 9:30 a.m.

Dept.: 66

Judge: Hon. Kenneth J. Medel

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I. SUMMARY OF MOTION

This matter is a “Wage and Hour” representative (*i.e.* “PAGA”) and *proposed* class action. Plaintiff ANA ARMAN, in a Representative capacity, and on behalf of other members of the general public similarly situated, (“Plaintiff”) brings Labor Code claims against Defendants BANANA REPUBLIC, LLC and THE GAP INC. (hereinafter, “GAP” or “Defendants”).

After approximately 1 and ½ years of extensive litigation, exchanges on at least 12 sets of formal discovery devices (including 4 “Person Most Knowledgeable” Deposition Notices, 7 sets of Form Interrogatories, Special Interrogatories, Requests for Production of Documents and Requests for Admission propounded by Plaintiff, and 1 Request for Production of Documents propounded by Defendant), and a full day Mediation, the parties have agreed to the terms of a proposed class and PAGA action settlement. The parties have drafted and executed a Joint “Stipulation of Settlement and Release” (the “Agreement”), lodged as **Exhibit A**¹ to the declaration of Eric K. Yaeckel. Briefly, the parties’ settlement figures are estimated as follows:

Approximate size of class as of August 8, 2022:	14,800 individuals
Gross settlement amount (“GSA”):	\$3,155,000.00
Claims administration:	\$50,000.00
Costs/expenses of litigation:	\$24,000.00 (or less)
Claims Period:	45 days from Mailing of Notice
Class representative incentive:	\$5,000
LWDA payment:	\$240,000.00 (75% Share of \$320,000 allocation)
Attorney's fees:	1/3 of GSA (\$1,051,666.67)

The estimated average payment (before taxes) to each Class Member based on the above figures will be **\$120.86**. These estimates are an “average” only, and do not account for the fact that class members will receive more or less than an “average” share, as the amounts owed are calculated based on the number of workweeks each individual worked for Defendants during the class period.

Please Note: This is a **non** **reversionary** settlement, in that the entire net settlement amount,

¹ This Memorandum incorporates by reference the definitions in the Agreement and the terms used herein are intended to have the same meaning as set forth in the Agreement.

1 after the awarded costs, taxes and fees are deducted, will be automatically disbursed to all class
2 members who do not file a request to “opt-out” of participation in the lawsuit. (**Exhibit A** at ¶ 4).

3 **Please Note:** The “Limitations Period,” for purposes of this settlement only goes back 3.2 years
4 (to June of 2019), due to a prior Class Action against these Defendants. (Yaeckel decl. ¶ 3).

5 Plaintiff now moves the Court for an order: (1) preliminarily approving the proposed class
6 action settlement; (2) provisionally certifying the proposed class; (3) directing that Notice (defined
7 below) of the proposed settlement be provided to Class Members; and (4) scheduling a hearing for
8 final approval of the proposed settlement and entry of the parties’ proposed Final Order Approving
9 Class Action Settlement. Defendants do not oppose Plaintiff’s motion.

10 **II. FACTUAL AND PROCEDURAL HISTORY**

11 The putative class is comprised of Defendants’ California-based, nonexempt employees. The
12 relevant procedural history is set forth below.

13 **1. The Operative Claims, Investigation and Informal Discovery Conducted**

14 On **February 23, 2021**, Plaintiff Arman filed the Complaint in this matter. The original
15 Complaint alleged PAGA representative action claims, under the California Labor code involving,
16 *inter alia*, (1) Meal and Rest Period violations; (2) Minimum wage violations; (3) Overtime violations;
17 (4) Wage statement violations; (5) Failure to reimburse business expenses; and (6) Failure to pay
18 wages upon separation. (Yaeckel Decl. ¶ 4; ROA # 1).

19 On **March 2, 2021**, Plaintiff filed a First Amended Complaint, which added Class Action
20 allegations, based on the same underlying Labor Code violations in the original Complaint. (Yaeckel
21 Decl. ¶ 4; ROA # 7).

22 On **April 13, 2021**, Plaintiff propounded discovery requests on both Defendants, including
23 requests for admission, special interrogatories, requests for production of documents, and general and
24 employment form interrogatories. (Yaeckel decl. ¶6). Through these requests, Plaintiff sought, among
25 other information and documents, the identities of putative class members, Defendants’ compensation
26 policies, meal and rest period policies, employee handbooks, wage statements, payroll records, time
27 records, job descriptions, and reimbursement policies. (*Id.*).

28 Defendants provided discovery responses, documents, and objections to Plaintiff’s requests.
After a lengthy meet and confer processes and multiple *Ex Parte* hearings and Informal Discovery

1 Conferences, Defendants produced, *inter alia*, Plaintiff's time and wage records, copies of the relevant
2 employee handbooks, copies of all other relevant employee policies, the contents of Plaintiff's
3 employee file, Plaintiff's time records, and itemized wage statements. (Yaeckel decl. ¶ 7).

4 Defendant also propounded several sets of written discovery on Plaintiff. In total there were
5 at least 12 separate sets of written discovery exchanged between the parties. (Yaeckel decl. ¶ 7).

6 Plaintiff also took two separate "person most knowledgeable" depositions regarding the
7 challenged compensation and meal and rest period policies and practices at issue. (Yaeckel decl. ¶ 5).

8 Following substantive discovery, the parties agreed to explore resolution of this matter. As part
9 of the settlement discussions, Defendants agreed to voluntarily produce and verify thousands of pages
10 of documents. The production included all relevant policies and procedures. It also included large
11 electronic sampling of other class members' time and wage data. (Yaeckel decl. ¶ 8).

12 Plaintiff also requested Defendants provide additional informal discovery so that the parties
13 could experience a meaningful mediation. (Yaeckel decl. ¶ 9). Defendants provided informal discovery
14 which consisted of, *inter alia*, the number of current and former employees who worked for
15 Defendants during the limitations period, meal and rest period premiums paid, pay periods at issue,
16 a redacted sampling of employee time records and wage statements, alarm records, as well as
17 confirmation that various policies and agreements were standard as to the class. (*Id.*).

18 **2. Settlement Discussions**

19 On **August 8, 2022**, the Parties attended a full day mediation before the experienced "Wage
20 and Hour" mediator, Tripper Ortman. (Yaeckel decl. ¶ 10). Prior to the mediation, counsel for both
21 parties agreed to the informal exchange of information, and case theories and defenses, pertinent to
22 a class-wide settlement. Prior to mediation, plaintiff prepared and provided a detailed mediation brief.
23 (*Id.*). At the conclusion of mediation, the parties agreed on the key terms of a settlement that would
24 globally resolve all class and representative wage and hour claims asserted in the operative Complaint
25 in this Action and executed a Memorandum of Understanding. (*Id.*).

26 The parties continued negotiation over final settlement terms. As of **September 19, 2022**, the
27 parties agreed on all final terms of the settlement which was memorialized in the Agreement, which
28 is attached to the declaration of Eric K. Yaeckel as **Exhibit A**. Plaintiff now seeks the Court's
preliminary approval of the Agreement.

III. SETTLEMENT TERMS

The Agreement includes the following key terms:

1. Contingent Nature of the Settlement

The parties entered into the Agreement exclusively for the purpose of resolving the action and facilitating the negotiated settlement. Should the Court, for any reason, not preliminarily and/or finally approve the Agreement, or if the Agreement is terminated for any reason, then the parties have agreed that the Agreement will be null and void and this action will revert to its status with respect to any and all matters as they existed prior to the parties signing the Agreement. (**Ex. A** at ¶ 12).

2. Description of the Settlement Classes

Solely for the purposes of the Agreement, the parties have agreed that the term “Class Member” is defined as:

All current and former non-exempt employees who worked at a Gap or Banana Republic store in California from June 14, 2019, through the date of preliminary approval. (**Exhibit A** at ¶ 1).

The parties estimate that as of the August 8, 2022 mediation, the Settlement Class consisted of approximately fourteen thousand eight hundred (14,800) individuals, as determined by Defendants’ employment records. (**Ex. A** at ¶ D).

3. Appointment of Settlement Administrator

Multiple bids for Settlement Administration were obtained. The parties agreed to use CAC Services, LLC, as the “Settlement Administrator” for purposes of providing the Notice to Settlement Class Members, issuing payments pursuant to the Agreement, and carrying out all other duties pursuant to the Agreement. (**Ex. A** at ¶3(A)). CAC’s sole business has been the administration of class action settlements and class action notices, and has extensive experience. (Yaeckel decl.¶ 11).

4. Scope of the Release

For purposes of the Agreement, Class Members who do not request exclusion release all “Wage and Hour” claims that are either or both: (1) alleged in the First Amended Complaint; or (2) which relate to or arise out of the allegations and claims asserted in the First Amended Complaint and could have been alleged in the complaint relating in any way to violations of the wage and hour provisions of the California Labor Code or the California Wage Orders, or any other wage and hour provisions of California law. The precise release language is reflected in **Exhibit A** at ¶ 2.

1 There is a separate release of the PAGA claims for Class Members who worked within the
2 “PAGA Period” of December 17, 2019 through the date of preliminary approval. The members of this
3 PAGA Penalty Class will be entitled to an award of a PAGA Penalty. (**Exhibit A** at ¶ 2).

4 **5. Cash Payment and Allocation**

5 The Agreement provides for an automatic Individual Settlement Payment to the members of
6 the Class. No claims need be submitted. Class Members will be entitled to an average share of
7 approximately **\$120.86**. (Yaeckel Decl. ¶12). The actual share will depend on the amount of
8 workweeks they were employed during the limitations period. (**Exhibit A** at ¶ 4(a)). The Individual
9 Settlement will be allocated as follows: forty percent (40%) constitutes wages (subject to withholdings
10 and deductions and reported as wage income on a Form W-2) and sixty percent (60%) constitutes non-
11 wage penalties, and interest. (**Exhibit A** at ¶ 4(e)). **Please Note:** Defendants shall pay an additional
12 amount to cover all Corporate Payroll Taxes, separate and apart from the Maximum Settlement
13 Amount. (**Exhibit A** at ¶ 3(E)).

14 There is an additional formula based on employee pay periods worked, to calculate the separate
15 PAGA penalties paid to those employees who worked during the PAGA Period. (**Exhibit A** at ¶ 5).

16 **6. Proposed Settlement and Notice Program**

17 Subject to Court approval, the Parties agree that, within twenty-one (21) days after the Court
18 enters any Order granting preliminary approval of the Settlement, Defendants will provide to the
19 Settlement Administrator the following information for each Settlement Class Member in an electronic
20 format: class member names and last known home addresses, telephone numbers, social security
21 numbers, and weeks worked with Defendants based on Defendants’ records, and last known mailing
22 addresses for each member of the Class. (See **Exhibit A** at ¶ 9(A)). The Settlement Administrator will
23 perform address updates and verifications, including running all names through the National Change
24 of Address Database, prior to the first mailing. Within 14 days of receipt of the Class List, the
25 Settlement Administrator will mail the Class Notice (“Notice”) to each Class Member, by first class
26 mail. (See **Exhibit A**, at ¶ 9(B)). The parties’ agreed upon Class Notice is attached to the Declaration
27 of Eric Yaeckel, as **Exhibit B**.

28 The Notice is designed to provide Class Members with detailed information about the lawsuit,
the Agreement, their rights and the settlement benefits, and how to participate, exclude themselves,

1 or object. (See **Exhibit B**). The Class Members will have forty-five (45) calendar days (from the date
2 of notice) to request to be excluded, or file objections. (See **Exhibit A**, at ¶ 9(E); **Exhibit B** at § 5).

3 The Class Members will be given notice of the release, and information about the expected
4 settlement amount based on the workweeks employed with Defendants during the Class Period. If they
5 wish to receive a share of the Settlement, Class Members need not take any additional action. Class
6 Members are also given instructions on how to exclude themselves, file objections, or appear at the
7 final approval hearing to state objections. (**Exhibit A** at ¶ 9; **Exhibit B** at §IV(C) and § V).

8 The Notice process also has additional safeguards. For instance, for Notices returned as non-
9 deliverable, the Settlement Administrator will perform a skip-trace and mail or re-mail Notice to an
10 updated address (if any), upon receipt of the returned mail. (See **Exhibit A** at ¶ 9(C).) It is the intent
11 of the parties that all reasonable means be used to locate Class Members.

12 The Notice will inform Class Members of the number of weeks worked during the Class Period
13 (according to Defendant's records) and their estimated settlement amounts. Class Members will have
14 the opportunity to dispute the workweek calculation by submitting written documentation to the
15 Settlement Administrator. (See **Exhibit B** at IV(C)).

16 PAGA Members do **not** require notice prior to a settlement, nor may they opt out of the PAGA
17 penalty portion of the settlement. *Robinson v. S. Cty. Oil*, (2020) 53 Cal. App. 5th 476, 482–83, (Nov.
18 24, 2020). However, the PAGA members are nonetheless informed of the Settlement and estimated
19 payments. PAGA members who are Class Members can opt-out of the Class Settlement to retain all
20 claims in their individual capacities. These rights are all explained in the Class Notice. (**Exhibit B** at
21 § IV(C), § V(B)).

22 **7. Contingent Costs**

23 The Agreement provides for One Million Fifty One Thousand Six Hundred and Sixty Six
24 Dollars and Sixty Seven Cents (\$1,051,666.67) in Attorneys' Fees, which is one-third (1/3%) of the
25 total Settlement, and up to Twenty Four Thousand Dollars (\$24,000.00) in litigation costs. (See
26 **Exhibit A** at ¶ 6). For costs incurred in administrating the Settlement, the Agreement provides for an
27 estimated Fifty Thousand Dollars (\$50,000.00). (See **Exhibit A** at ¶ 8).

28 The Agreement also provides for Three Hundred Twenty Thousand Dollars (\$320,000.00) to
be allocated for Plaintiff's PAGA claims with 75% of the amount, or \$240,000.00, being paid to the

1 LWDA, and 25%, or \$80,000.00, being distributed amongst the PAGA Penalty Class. (See **Exhibit**
2 **A** at ¶ 3(C)(5)).

3 The Agreement also provides payment to Plaintiff Arman of Five Thousand Dollars
4 (\$5,000.00), as an Incentive Award in consideration for her services as Class Representative. (See
5 **Exhibit A** at ¶ 3(C)(3)). The Incentive Award was part of good faith negotiations and is intended to
6 recognize that it was the Class Representative (Ms. Arman) who initiated the lawsuit, initiated the
7 PAGA claims, provided critical documents and witnesses to her attorneys, and worked with her
8 attorney to propound and prepare written discovery, all in an effort to obtain moneys allegedly owed
9 not only to herself, but to thousands of other employees. (Yaeckel Decl. ¶14).

10 **IV. SUMMARY OF CLAIMS AND ESTIMATES OF POTENTIAL DAMAGES**

11 Counsel hereby submits estimates and calculations for the total potential value of all claims
12 so this Court may evaluate if the amount to be paid to the class ultimately could be determined to be
13 fair and reasonable when balanced against the probable outcome of the future litigation. *Kullar v. Foot*
14 *Locker Retail, Inc.*, (2008) 168 Cal. App. 4th 116, 133.

15 Concerning the strength of the plaintiff's case, the California Court of Appeal has said that the
16 "merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the
17 operative word is 'settlement.'" *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
18 Cal. App. 4th 1135, 1150 [citing, *inter alia*, *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d
19 448,455 ("The fact that a proposed settlement may only amount to a fraction the potential recovery
20 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
21 disapproved"); see also *Linney v. Cellular Alaska P'ship.* (9th Cir. 1998) 151 F.3d 1234, 1242 ("This
22 court has aptly held that 'it is the very uncertainty of outcome in litigation and avoidance of wasteful
23 and expensive litigation that induce consensual settlements'"); *Officers for Justice v. Civil Servo Com.*
24 (9th Cir. 1982) 688 F.2d 615, 625 ("The proposed settlement is not to be judged against a hypothetical
25 or speculative measure of what might have been achieved by the negotiators.")

26 Each of the primary claims also had risks to obtaining both class certification and a finding of
27 liability. If Defendants' defenses were successful, the class would not receive anything. As is set forth
28 below, Plaintiff submits that the most realistic "best case" scenario would be an average recovery per
class member of approximately **\$344.23** and a worst case scenario would be a recovery of \$0, by way

1 of denial of class certification or defense verdict. (Yaeckel decl. ¶ 16). Given all the risks on each
2 claim the estimated **\$120.86** average recovery secured via this settlement, is a reasonable compromise
3 and is in the best interests of the class given all the risks of continued litigation. (Yaeckel decl. ¶ 25).

4 **A. FAILURE TO PAY ALL COMPENSATION CLAIMS**

5 Plaintiff's unpaid wages (and unpaid overtime) claims were based on the allegation that
6 employees were performing unpaid work due to the GAP's timekeeping system which "rounded"
7 employee time entries and caused other losses due to certain alleged "transitional math errors" caused
8 by the payroll system. Plaintiff also alleged certain "alarm" records could be used to establish that
9 employees were not paid for all time subject to GAP's control. Plaintiffs alleged this resulted in
10 regular time and overtime pay being owed where Defendants were on notice of work being performed
11 without pay.

12 Defendants argued that its system was not actually "rounding" and even if it was, this practice
13 has been upheld under California law. Defendants also denied that any unpaid work occurred, and even
14 if some did occur, Defendants claimed it was not on notice of these alleged Labor Code violations and
15 had a strict written prohibition against off-the-clock work and a mandate that all time worked must be
16 accurately recorded. Defendants asserted proof of these alleged violations would require individualized
17 inquiries, which could preclude class certification and make any PAGA claims unmanageable.
18 (Yaeckel decl. ¶ 27).

19 Based on Class Counsels' analysis, this claim was worth as little as \$0 (a defense verdict or
20 denial of class certification) or as much as \$237,600.00. (Yaeckel decl. ¶ 18).

21 **B. MEAL AND REST PERIOD CLAIMS**

22 Plaintiff was able to identify hundreds of examples of missing or late meal periods without the
23 provision of a meal period penalty payment. However, Defendants argued that these records do not
24 conclusively show whether (1) Defendants actually failed to provide the meal period, (2) there was a
25 voluntary waiver, (3) employees forgot to clock out, or (4) employees voluntarily chose to skip or take
26 them late even though they were provided. Additionally, in light of GAP'S written meal and rest
27 period policy, Defendants contended there was no uniform policy or practice of denying meal and rest
28 periods, requiring individualized inquiries that would preclude class certification and make any PAGA
claims unmanageable. (Yaeckel decl. ¶ 28).

1 Plaintiff also alleged the Defendants written policies improperly restricted class members from
2 leaving the premises during their rest breaks among other deficiencies. Defendants pointed out that
3 the policy contained no such restriction, provided for adequate breaks and argued that witness
4 testimony would demonstrate that in practice, no restriction on rest breaks were ever enforced.
5 Defendants also contended individualized inquiries will abound as to why individual employees may
6 have failed to take appropriate meal periods or rest breaks. (Yaeckel decl. ¶ 29).

7 While there are time records to support the existence of alleged meal period violations, there
8 are no corresponding rest period records, making this aspect of the claim much harder to prove. Some
9 Courts have been disinclined to accept survey evidence that may have been needed to help establish
10 rest period violations. See e.g. *Duran v. U.S. Bank National Assn.* (2018) 19 Cal.App.5th 630.

11 Based on counsels' analysis, these claims were worth as little as \$0 (a defense verdict or denial
12 of class certification) or as much as \$3,960,000.00. (Yaeckel decl. ¶ 18).

13 **C. PLAINTIFF'S WAGE STATEMENT CLAIMS**

14 Plaintiff acknowledges that these claims are largely derivative, in that both the gross and net
15 wages could be found to be inaccurate, due to the above-referenced claims.

16 GAP argued that the failure to list gross and net wages are derivative of other claims that may
17 ultimately fail and as a result there is no "knowing and intentional failure" to list information, which
18 triggers liability under Labor Code §226(e). (Yaeckel decl. ¶ 30).

19 The California Supreme Court has recently held that the failure to pay meal and rest period
20 premiums *may* give rise to a claim for inaccurate wage statements (or waiting time penalties).
21 However, such derivative liability is not automatic and the Plaintiff still must show a "knowing and
22 intentional" or "wilful" failure to comply with the Labor Code. See *Naranjo v. Spectrum Security*
23 *Services* (2022) 2022 Cal. LEXIS 2878. Defendants (as with the underlying meal and rest period
24 claims) maintained individualized inquiries would abound as to why breaks were missed and whether
25 meal and rest period premiums should have been paid, requiring individualized inquiries that would
26 preclude class certification and make any PAGA claims unmanageable. (Yaeckel decl. ¶ 30.)

27 Based on counsels' analysis, this claim was worth as little as \$0 (a defense verdict or denial
28 of class certification) or as much as \$2,025,000.00. (Yaeckel decl. ¶ 18).

1 **D. PLAINTIFF’S REIMBURSEMENT CLAIMS**

2 Plaintiff contended that GAP violated Labor Code section 2802 by failing to reimburse its
3 employees for certain costs, including cellular phone costs.

4 GAP countered that it has a policy for expense reimbursements in its employee handbook. GAP
5 further contended that Ms. Arman’s (and others’) position did not require the use of a cell phone.
6 (Yaeckel decl. ¶ 31).

7 Based on counsels’ analysis, this claim was worth as little as \$0 (a defense verdict or denial
8 of class certification) or as much as \$222,000. (Yaeckel decl. ¶ 18).

9 **E. OTHER “DERIVATIVE” CLAIMS (PAGA, LABOR CODE SECTION 203)**

10 The remaining claims are derivative in that PAGA and Labor Code § 203 penalties would only
11 be permissible if the above claims are proven.

12 The parties agreed to allocate \$320,000 to the PAGA claims, which is 10.14% of the total
13 settlement. This PAGA allocation is in the range routinely approved by California Courts. *See Garcia*
14 *v. Gordon Trucking, Inc.* (E.D. Cal., Oct. 31, 2012, No. 1:10-CV-0324 AWISKO) 2012 WL 5364575,
15 at *7 (approving \$10,000 PAGA penalty for a California class with a \$3.7 million gross settlement
16 payment); *Syed v. M-I, L.L.C.* (E.D. Cal., Feb. 22, 2017, No. 112CV01718DADMJS) 2017 WL
17 714367, at *13 (approving 2.53% of the estimated \$3.95 million gross settlement amount allocated
18 to the California class); *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No.
19 15-CV-02198-EMC) 2016 WL 5907869 (approving allocation of \$20,000 to the PAGA claim (**0.15%**
20 of its total value of \$12,952,000) as reasonable in the context of the settlement as a whole); *In re Uber*
21 *FCRA Litigation* (N.D. Cal., June 29, 2017, No. 14-CV-05200-EMC) 2017 WL 2806698 (approving
22 a settlement agreement of \$7.5 million, where the amount allocated to the PAGA claims was only
23 \$7,500 – .01% of the total settlement amount).

24 Based on Class Counsel's analysis, the PAGA and Labor Code § 203 claims were worth as little
25 as \$0 (a PAGA defense verdict or denial of certification of the § 203 claim) or as much as
26 \$27,000,000.00 and \$6,750,000.00 respectively. (Yaeckel decl. ¶ 18).

27 **F. CASE LAW SUPPORTS A FURTHER REDUCTION ON ANY RECOVERY**

28 Plaintiff concedes she would be highly unlikely to ever be awarded an amount approaching the
maximum damages set forth above. To wit, the majority of the recovery would be "derivative"

1 penalties under PAGA, Labor Code § 203 and Labor Code § 226. The Court would have great
2 discretion to mitigate any penalties awarded. *Thurman v. Bayshore Transit Management, Inc.* (2012)
3 203 Cal.App.4th 1112, 1135 (disapproved on other grounds).

4 In a recent trial involving Class Counsel in this case, the Court found liability, but then reduced
5 the PAGA penalties by 90%, from \$50 per violation down to \$5 a violation. See *Carrington v.*
6 *Starbucks Corp.* (2018) 30 Cal.App.5th 504; See accord *Fleming v. Covidien, Inc.*, No.
7 ED-CV-10-1487-RGK(OPx), 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA
8 penalties by over 82%, in part because employer was "not aware" of violations). And in *Carrington*,
9 the Trial Court declined to award penalties under Labor Code §§ 203 and 226, noting that other trial
10 courts have declined to "stack" (impose multiple) penalties based on the same underlying Labor Code
11 violation. See *Ruelas v. Costco Wholesale Corporation* (N.D. Cal. 2014) 67 F.Supp.3d 1137.

12 Class Counsel believes a mitigation of the damages and potential PAGA penalties would be
13 warranted here. As in the *Carrington* case, there was evidence that GAP attempted to provide meal
14 and rest periods in practice, and the written policies contained no facially non-compliant terms.

15 Given this, it is likely that some of the violations by GAP were not "willful." Finally, given
16 the defenses raised by Defendants, there was a significant risk that many of the claims would not have
17 been certified or, if they were, certification could not have been maintained through trial and appeal.

18 The Parties agree the failure to pay "former employees" under § 203 is derivative of the other
19 claims. As GAP asserts a "good faith dispute" for withholding any unpaid wages, it would be difficult
20 to establish any liability for a "willful" failure to pay wages owed.

21 Based on the above, it is possible that PAGA penalties could be reduced to approximately \$5
22 per violation and the Court would find no basis for imposing Labor Code §§ 203 or 226 penalties. If
23 this occurred, the average class member's pre-tax share of a realistic best case recovery would be
24 \$344.23. (Yaeckel decl. ¶ 25).

25 Accordingly, Class Counsel submits the **\$120.86** average recovery secured via this Settlement,
26 is a reasonable compromise and is in the best interests of the Class given all the risks of continued
27 litigation. (Yaeckel decl. ¶¶ 25-32).

28 **V. PROVISIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

Under California law, a class action is appropriate when the class is ascertainable and there is
Memorandum In Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement

1 “a well defined community of interest in the questions of law and fact involved affecting the parties
2 to be represented.” Cal. Code Civ. Proc. § 382; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34
3 Cal. 4th 319, 341. State law requirements under California Code of Civil Procedure § 382 for class
4 certification mirror those of federal law under Rule 23 of the Federal Rules of Civil Procedure:
5 numerosity, typicality of the class representatives’ claims, adequacy of representation, predominance
6 of common issues, and superiority. See Fed. R. Civ. P. 23(a); see also *Hanlon v. Chrysler Corp.* (9th
7 Cir. 1998) 150 F.3d 1011, 1019. Thus, for settlement purposes, each of these elements must be
8 present. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 237-38.

9 **A. THE PROPOSED SETTLEMENT CLASS IS ASCERTAINABLE**

10 The proposed class is ascertainable because all Class Members currently or formerly worked
11 for Defendants as nonexempt employees and will be identified through Defendant’s employment
12 records. See *Rose v. City of Hayward*, 126 Cal.App.3d 926 (1981) (finding that “Class Members are
13 ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference
14 to official records”). Thus, the ascertainability requirement is met.

15 **B. THE PROPOSED SETTLEMENT CLASS IS SUFFICIENTLY NUMEROUS**

16 The numerosity requirement is met if the class is so large that joinder of all members would
17 be impracticable. *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 318. Here, Defendants’ records
18 show that approximately **14,800 class members** worked for the company during the limitations period
19 as of August 8, 2022. (Yaeckel decl. ¶ 33). Thus, joinder of all members of the Class would be
20 impracticable.

21 **C. THE COMMONALITY REQUIREMENT WAS MET**

22 The commonality requirement is met if there are questions of law and fact common to the class.
23 See *Hanlon, supra*, 150 F.3d at 1019.

24 Here, for purposes of the Settlement only, the parties agree the claims of Class Members all
25 involve the same questions of law and fact. (See Ex. A at ¶ 1; and section IV *supra*). Namely, all class
26 members were subject to the same employment policies and practices of Defendants. (Yaeckel decl.
27 ¶34). The common question exists as to whether the policies and practices Class Members were
28 subjected to are illegal. Under these circumstances, the commonality requirement is satisfied. See
Hanlon, supra, 150 F.3d at 1019-20.

1 **D. THE TYPICALITY REQUIREMENT IS MET**

2 The typicality requirement is met if the class representatives and class counsel have no interests
3 adverse to the interests of the proposed Class Members and are committed to vigorously prosecuting
4 the case on behalf of the class. See *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).

5 Here, there are no such adverse interests. Plaintiff has the same claims that are substantially
6 the same as the other Class Members. (Yaeckel decl. ¶ 35). Factual differences may exist between the
7 class representatives and the Class, so long as the claims arise from the same events or course of
8 conduct and are based on the same legal theories. See *Hanlon*, 150 F.3d at 1020; see also 1 *Newberg*
9 § 53.13 at 3-76-77 (“When it is alleged that the same unlawful conduct was directed at or affected both
10 the named plaintiff and the class sought to be represented, the typicality requirement is usually met
11 irrespective of varying fact patterns which under lie individual claims.”) Thus, the typicality
12 requirement is also satisfied.

13 **E. THE ADEQUACY REQUIREMENT IS MET**

14 The adequacy of representation component of the community of interest requirement for class
15 certification “comes into play when the party opposing certification brings forth evidence indicating
16 widespread antagonism to the class suit.” *Capitol People First v. Dep’t of Develop. Servs.* (2007) 155
17 Cal. App. 4th 676, 696-97. The adequacy inquiry “serves to uncover conflicts of interest between
18 named parties and the class they seek to represent.” *Id.* To assure “adequate” representation, the “class
19 representative’s [...] claim must not be inconsistent with the claims of other members of the class.” *Id.*

20 Here, no such “inconsistencies” exist. The Plaintiff will be compensated based on the same
21 weeks worked formula as all other members of the Class. (Yaeckel decl. ¶ 35).

22 Additionally, any Class Member who wishes to “opt out” of the Settlement may do so and
23 retain all of their individual rights. (Yaeckel decl. ¶ 36). There is therefore no conflict of interest
24 between the Class Representatives and the Class Members. (*Id.*) Thus, at least for settlement purposes,
25 the adequacy prong is met. (*Id.*)

26 **F. COMMON ISSUES PREDOMINATE AND CLASS-WIDE SETTLEMENT IS**
27 **SUPERIOR TO OTHER AVAILABLE METHODS OF RESOLUTION**

28 Class certification is authorized where common questions of law and fact predominate over
 individual questions, and where class-wide treatment of a dispute is superior to individual litigation.

1 See *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 469 (1981).

2 The proposed class in this case is sufficiently cohesive because, for purposes of the Settlement
3 only, the parties have stipulated that all class certification elements are met. (**Exhibit A** at ¶ 1).
4 Plaintiff contends all members of the Class worked under the same conditions and experienced the
5 same policies and practices of Defendant. (See section IV, *supra*). Thus, the Class is sufficiently
6 cohesive.

7 Further, it would be preferable to resolve all of the Class Members' claims by means of a class-
8 wide settlement than to require each Class Member to litigate individual claims. (Yaeckel decl. ¶ 37).

9 **VI. PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT IS PROPER**

10 The trial court has broad discretion to determine whether a class action settlement is fair and
11 reasonable. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. Fairness is presumed where
12 (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are
13 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
14 litigation; and (4) the percentage of objectors is small. *Chaves v. Netflix, Inc.* (2008) 162 Cal.App.4th
15 43, 52; *Dunk v. Ford Motor Co.*(1996) 48 Cal.App.4th 1794, 1802. But, even where it appears the
16 settlement is fair, the court must still determine on the record before it whether the settlement should
17 be approved after considering "the strengths and weaknesses of the claims and risks of the particular
18 litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. The courts will
19 consider: (i) the strength of the plaintiff's case; (ii) the risks, expense, complexity and likely duration
20 of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount
21 offered in settlement; (v) the extent of discovery completed; (vi) the stage of the proceedings; (vii) the
22 experience and views of counsel; (viii) the presence of a governmental participant; and (ix) any
23 reaction of putative class members to the proposed settlement. *Dunk*, 48 Cal.App.4th, at 1800-1801;
24 *In re Microsoft I-V Cases*, 135 Cal.App.4th, at 723.

25 When evaluating these factors, the court "must stop short of the detailed and thorough
26 investigation that it would undertake if it were actually trying the case," but nonetheless it "must
27 eschew any rubber stamp approval in favor of an independent evaluation." *Kullar*, 168 Cal.App.4th,
28 at 130. Ultimately, the court approves the proposed class action settlement when the settlement is fair
and falls "within the range of reasonableness." *Hernandez v. Vitamin Shoppe Indus., Inc.* (2009) 174

1 Cal.App.4th 1441, 1446.

2 **A. FAIRNESS OF THE SETTLEMENT**

3 For preliminary approval purposes, a proposed class action settlement is *presumed* to be fair
4 where, as here, (1) the settlement is reached through arm's-length bargaining; (2) investigation and
5 discovery are sufficient to allow counsel and the court to act intelligently; and (3) counsel is
6 experienced in similar litigation. *Chaves, supra*, 162 Cal.App.4th at 52.

7 The proposed settlement in this action meets these criteria, and merits preliminary approval.
8 As discussed above, the parties only entered into the Agreement after engaging in a full day of
9 mediation with an experienced mediator who routinely handle "wage and hour" class action litigation,
10 Tripper Ortman. (Yaeckel Decl. ¶¶ 9-10). The mediation was preceded by substantial discovery,
11 motion work, investigation into the claims at issue, interviews of Class Members, disclosure and
12 review of documents detailing company-wide policies and practices, informal information exchanges
13 for mediation purposes, and ongoing discussions about the merits between the parties' counsel during
14 the span of the litigation. (Yaeckel Decl. ¶¶ 5-10). Thereafter, the parties memorialized the details of
15 this Settlement via the Agreement. (Ex. A).

16 When negotiating the Settlement, both sides took into account the strengths and weaknesses
17 of their opponent's positions as pointed out by Tripper Ortman, the data available to evaluate liability
18 and damages, the lack of data or evidence on certain issues, and the substantial and evolving law
19 applicable to the merits of the claims. The Agreement was only agreed to after extensive arms-length
20 negotiations resulting in a unique compromise that permits all parties to move forward and bring this
21 action to close. Despite a mutual desire to resolve this action, the negotiations remained at all times
22 adversarial. (Yaeckel Decl. ¶ 38).

23 As set forth below in section H, *infra.*, counsel for both parties have extensive experience in
24 litigating wage and hour class action lawsuits. Based on this experience, Class Counsel has determined
25 that the settlement is fair, adequate, and reasonable. (Yaeckel decl. ¶ 32).

26 **B. STRENGTH OF PLAINTIFFS' CASE**

27 The most important factor courts consider when evaluating the fairness of the class action
28 settlement is the strength of the plaintiffs' case balanced against the amount offered in settlement.
Kullar, 168 Cal.App.4th, at 130.

1 All of Plaintiff's claims — individual, PAGA, and class claims — presented hurdles including
2 obtaining class certification, in addition to a substantial risk of a defense verdict by way of summary
3 judgment motion or at trial. (Yaeckel Decl. ¶¶ 26-31).

4 The exchange of mediation briefs, the assistance of an experienced “wage and hour” mediator,
5 and the parties’ ongoing negotiations all helped the parties realize the strengths and weaknesses of
6 their case, as well as the risks and expenses of continuing litigation.

7 Additionally, as trial approaches, each party’s monetary risk increases significantly as
8 substantial additional attorney hours and expert witness hours would have to be devoted to this case
9 by each party. Each party bears a real risk at trial, and considering the balance of the strengths of
10 Plaintiff’s claims versus the risks inherent in trial and the consideration given to settle now, the
11 settlement reflects a fair and adequate resolution to this action.

12 **C. THE RISK, EXPENSE, COMPLEXITY, AND LIKELY DURATION OF FURTHER**
13 **LITIGATION**

14 Plaintiff’s Counsel’s effectiveness in prosecuting this case has translated into tangible monetary
15 and non-monetary benefits for the Settlement Class Members in the following respects: (1) a
16 guaranteed favorable result; (2) guaranteed monetary recovery over a reasonably short period of time,
17 as opposed to possibly waiting additional years for a potentially worse result; and (3) significant
18 savings in attorneys’ fees and costs, which would have increased had the case progressed through trial
19 and possible appeals. (Yaeckel decl. ¶ 39).

20 Without entering into the Agreement, there existed a significant chance that Defendants would
21 prevail on the merits of some or all claims and that Class Members would receive nothing. Through
22 the Agreement, participating Class Members receive guaranteed cash, and this action has also been
23 the catalyst for programmatic relief. (Yaeckel decl. ¶ 40).

24 If the litigation were to proceed in lieu of settlement, additional and substantial attorneys fees
25 and costs, expert witnesses fees would quickly accumulate. Given the numerous claims being litigated,
26 the parties may be required to hire multiple experts each (as many as 8 total). This would result in not
27 only the production of eight expert reports, but eight depositions as well. And, based on previous
28 discussions between counsel regarding the remaining claims (including the PAGA claims), Plaintiff
anticipated at least one motion to compel, a motion for class certification and two dueling motions for

summary judgment / adjudication (one from each side). (Yaeckel decl. ¶ 41).

Importantly, even after engaging in all of the potential continued and protracted litigation set forth above, the putative class would continue to have no guarantee of success on any of the claims advanced in this case. Thus, the parties and their counsel believe in good faith that the proposed resolution is a fair, reasonable, and adequate compromise. (Yaeckel decl. ¶ 42).

D. THE RISK OF MAINTAINING CLASS ACTION STATUS THROUGH THE TRIAL

Plaintiff had not filed a Motion for Class Certification at the time settlement was reached. (Yaeckel decl. ¶ 43). Defendants presented multiple different defenses to certification during mediation and throughout litigation. Even assuming Plaintiff did obtain class certification of the claims, each claim is subject to substantial risk of a Defense verdict at trial. (*Id.*)

Regarding the representative (PAGA) claims, there is also a substantial risk that, at trial, Plaintiffs will either fail to obtain a favorable judgment on one or more of these claims, or that a favorable award on one or more PAGA claims may be reduced. *See Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reversed on other grounds).

E. THE AMOUNT OFFERED IN THE SETTLEMENT

After deduction from the total “Settlement Amount” of the projected costs of administration, proposed class representative service awards, potential attorney fees and costs, the “Net Settlement Amount (“NSA”) will be distributed to all Class Members who do not file a request for exclusion. Participating Class Members will receive their share of the NSA based on the total amount of time they worked during the Class and PAGA Period. (**Exhibit A**, ¶¶ 4-5).

Based on the current proposed figures, each Class Member will receive an average of **\$120.86**, although the actual amount will vary based on the amount of pay periods s employed. The Class Notice will list each individual class member’s actual share. (See **Ex. B.**) Plaintiffs’ counsel maintains this recovery was significant in light of the circumstances of the case. (Yaeckel Decl. ¶32).

F. THE EXTENT OF DISCOVERY COMPLETED

Plaintiff propounded numerous sets of separate written discovery devices on Defendants, including requests for admission, special interrogatories, requests for production of documents, and general and employment form interrogatories. (Yaeckel Decl. ¶ 6). Through these requests, Plaintiffs

1 sought, among other information and documents, the identities of putative class members, Defendants’
2 compensation policies, meal and rest period policies, employee handbooks, wage statements, time
3 records, job descriptions, and reimbursement policies. *Id.*

4 Defendants provided detailed substantive responses detailing all relevant employment policies,
5 in addition to producing thousands of pages of documents. The document production also included a
6 large sampling of other putative class members time and wage records. (Yaeckel Decl. ¶ 6-8).

7 Defendant also propounded its own separate sets of written discovery that Plaintiff was
8 required to respond to. (Yaeckel Decl. ¶ 7).

9 In total it appears there were at least 12 separate sets of written discovery exchanged between
10 the parties. (Yaeckel Decl. ¶ 7).

11 Plaintiff also took two separate “person most knowledgeable” depositions regarding the
12 challenged compensation and meal and rest period policies and practices at issue. (Yaeckel decl. ¶ 5).

13 Plaintiff’s counsel has also interviewed at least 10 Class Members in the course of investigating
14 and litigating this matter. (Yaeckel decl. ¶ 44). Counsel has also reviewed thousands of pages of
15 documents produced by Defendants, Plaintiffs, and Class Members. (*Id.*)

16 This information, along with documents and information obtained through formal discovery
17 and from Class Members, allowed Plaintiffs’ counsel to prepare a detailed Mediation Brief. (*Id.*) The
18 Brief was provided to opposing counsel and contained a breakdown of potential damages based on all
19 of the information obtained. (*Id.*) GAP also provided a detailed mediation brief, outlining its defenses
20 to both class certification and liability. (*Id.*)

21 Thus, sufficient discovery, both formal and informal, has been conducted to allow the parties
22 to participate in an informed, arms-length negotiation process.

23 **G. THE STAGE OF THE PROCEEDINGS**

24 Plaintiff already had possession of all written discovery needed for a class certification motion.
25 Additional depositions would have followed and then a motion for class certification would have been
26 filed. Depending on that motion, Plaintiff may have lost her ability to negotiate a class-wide or
27 representative settlement agreement on certain issues. Alternatively, Defendants stood to lose a key
28 negotiating tool in the event the Motions were decided in Plaintiff’s favor. Therefore, the parties

1 achieved a settlement agreement at a point when neither side had a stated advantage in the litigation.

2 **H. THE EXPERIENCE AND VIEWS OF COUNSEL**

3 Class Counsel has considerable experience in wage and hour and class action litigation.
4 William Sullivan has over 28 years of experience, 27 years of which has been devoted to both
5 prosecuting and defending class action litigation. Mr. Yaeckel has over 11 years of experience in class
6 action litigation. (Yaeckel Decl. ¶ 45).

7 Plaintiff's counsel considers the Agreement to represent a fair, adequate and reasonable
8 settlement that is well within the accepted range of recoveries for similar cases. Counsel further
9 believes the Agreement is in the best interests of the Settlement Class Members. (Yaeckel Decl. ¶ 46).

10 **I. PRESENCE OF A GOVERNMENTAL ACTOR**

11 Although the State is not directly involved in this action, Plaintiff "stands in the shoes" of the
12 Labor and Workforce Development Agency ("LWDA") by bringing his PAGA action. Consideration
13 has been made to compensate to Labor Workforce Development Agency ("LWDA") in the amount
14 of \$150,000, even though the LWDA declined to prosecute the claims itself. (See Exhibit "A," at
15 ¶3(C)(5).) To confirm, 75% of the total allocation of \$320,000 amount, or **\$240,000.00**, is being paid
16 to the LWDA, and 25%, or **\$80,000.00**, being distributed amongst the class members. (*Id.*, at ¶46).
17 Counsel for the parties believe this is a fair, reasonable, and adequate allocation. (Yaeckel Decl. ¶ 47).

18 **J. REACTION OF THE CLASS MEMBERS TO THE PROPOSED SETTLEMENT**

19 Prior to preliminary approval, what can be said of the reaction the class members is limited.
20 However, Plaintiff's counsel has spoken to some Class Members since the parties reached a proposed
21 settlement agreement, and all were in favor of the Settlement. (Yaeckel Decl. ¶ 48).

22 As explained in the Agreement, the Settlement Claims Administrator will send a Notice to the
23 Settlement Class Members. (See Exhibit A at ¶ 9). The negotiated Class Notice form is attached to the
24 declaration of Eric K. Yaeckel as **Exhibit B**.

25 The proposed Notice advises the Settlement Class Members of their anticipated recovery under
26 the Agreement, how they can object, how they can exclude themselves, the amount of fees and costs
27 sought by Class Counsel, the amount of enhancement payment sought on behalf of the Class
28 Representative, and the date of the final approval hearing. (See Exhibit "B.") Thus, the proposed
Notice complies with the notice requirements set forth in CRC Rule 3.766(d) and Rule 3.769(f).

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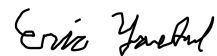
VI. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court issue an Order:

- i. Certifying the Proposed Settlement Class;
- ii. Preliminarily approving the Settlement as set forth in the Agreement; and
- iii. Approving the proposed Notice Packet to be directed to the Settlement Class.

Dated: September 22, 2022

SULLIVAN & YAECKEL LAW GROUP, APC



Eric K. Yaeckel

Ryan T. Kuhn

Attorneys for Plaintiff ANA ARMAN, in a
Representative capacity only, and on behalf of other
members of the general public similarly situated