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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

ANNKLEIN PACIA, an individual, on behalf
of herself, and on behalf of all persons
similarly situated,

Plaintiff,

v.

KILROY REALTY, L.P., a Limited
Partnership; KILROY REALTY
CORPORATION, a Corporation; and DOES
1 through 50, Inclusive,

Defendants.

Case No. 21STCV20624

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

Date: March 29, 2023

Time: 10:30 a.m.

Judge: Stuart M. Rice

Dept.: 1

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	DESCRIPTION OF THE SETTLEMENT	1
III.	CASE BACKGROUND	3
IV.	THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL	6
	A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement	6
	B. Factors To Be Considered In Granting Preliminary Approval	7
	1. The Settlement Is the Product of Serious, Informed and Arm's Length Negotiations by Experienced Counsel	8
	2. The Settlement Has No "Obvious Deficiencies" and Falls Within the Range of Approval	8
	3. The Settlement Does Not Improperly Grant Preferential Treatment to the Class Representative or Segments of The Class	12
	4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit Preliminary Approval Of The Settlement	12
V.	THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES	12
	A. California Code of Civil Procedure §382	13
	B. The Proposed Class Is Ascertainable and Numerous	13
	C. Common Issues of Law and Fact Predominate	13

D. The Claims of the Plaintiff Are Typical of the Class Claims	14
E. The Class Representative Fairly and Adequately Protected the Class	14
F. The Superiority Requirement Is Met	15
VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE	15
VII. CONCLUSION	16

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TABLE OF AUTHORITIES

CASES

<i>Bowles v. Superior Court</i>	
44 Cal.2d 574 (1955).....	13
<i>Boyd v. Bechtel Corp.</i>	
485 F.Supp. 610, 622 (N.D. Cal. 1979).....	7
<i>Brinker v. Superior Court</i>	
53 Cal. 4th 1004 (2012).....	9, 10
<i>Burghy v. Dayton Racquet Club, Inc.</i>	
695 F. Supp. 2d 689, 699 (S.D. Ohio 2010).....	10
<i>Cardenas v. McLane Foodservice, Inc.</i>	
2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....	11
<i>Carrington v. Starbucks Corp.,</i>	
30 Cal. App. 5th 504, 517, 539 (2018).....	11
<i>Cellphone Termination Fee Cases</i>	
180 Cal. App. 4th 1110, 1117-18 (2009).....	6
<i>Cho v. Seagate Tech. Holdings, Inc.</i>	
177 Cal. App. 4th 734, 742-45 (2009).....	6
<i>Clark v. American Residential Services LLC</i>	
(2009) 175 Cal.App.4th 785.....	3
<i>Dunk v. Ford Motor Co.</i>	
48 Cal. App. 4th 1794, 1801, 1807 (1996).....	6-7
<i>Duran v. U.S. Bank National Association</i>	
(2014) 59 Cal.4th 1.....	11
<i>Gautreaux v. Pierce</i>	
690 F.2d 616, 621 n.3 (7 th Cir. 1982).....	6
<i>Ghazaryan v. Diva Limousine, Ltd.</i>	
169 Cal. App. 4th 1524, 1536 (2008).....	13
<i>Golba v. Dick's Sporting Goods, Inc.</i>	
238 Cal. App. 4th 1251 (2015).....	3
<i>Hanlon v. Chrysler Corp.</i>	
(9 th Cir. 1998) 150 F.3d 1011, 1020, 1026.....	9, 14-15
<i>In re Nordstrom Com. Cases</i>	
186 Cal. App. 4th 576, 581, 589 (2010).....	6, 11
<i>In re Tableware Antitrust Litig.</i>	
484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).....	7
<i>In re Wash. Public Power</i>	
720 F. Supp. at 1392.....	8
<i>Klingensmith v. Max & Erma's Restaurants, Inc.</i>	
2007 U.S. Dist. LEXIS 81029, 2007 WL 3118505, at *5 (E.D. Pa. 2007).....	10
<i>Linder v. Thrifty Oil Co.</i>	
23 Cal. 4th 429, 439-440 (2003).....	14
<i>Nat'l Rural Telecomm. Coop. v. Directv. Inc.</i>	
221 F.R.D. 523, 528 (C.D. Cal. 2004).....	7
<i>Officers for Justice v. Civil Serv. Comm'n</i>	
688 F.2d 615, 624-625, 628 (9 th Cir. 1982).....	6-7
<i>Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.</i>	
323 F. Supp. 364, 372 (E.D. Pa. 1970).....	6

///

1	<i>Pietras v. Sentry Ins. Co.</i>	
2	513 F. Supp. 2d 983, 985 (N.D. Ill 2007).....	10
3	<i>Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson</i>	
4	390 U.S. 414, 424-25 (1968).....	7
5	<i>Reber v. AIMCO/Bethesda Holdings, Inc.</i>	
6	2008 WL 4384147, at *9 (C.D. Cal. Aug. 25, 2008).....	9
7	<i>Rose v. City of Hayward</i>	
8	126 Cal.App.3d 926, 934 (1981).....	13
9	<i>Sav-On Drug Stores, Inc.</i>	
10	34 Cal. 4th at 334.....	13
11	<i>Sayaman v. Baxter Healthcare Corp.</i>	
12	2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010).....	6
13	<i>Smith v. Waverly Partners, LLC</i>	
14	2012 U.S. Dist. LEXIS 119403, 2012 WL 3645324, at *6 (W.D.N.C. Aug. 23, 2012).....	10
15	<i>Spokeo, Inc. v. Robins</i>	
16	136 S. Ct. 1540 (2016).....	10
17	<i>Stovall-Gusman v. W.W. Granger, Inc.</i>	
18	2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015).....	9
19	<i>Tate v. Weyerhaeuser Co.</i>	
20	723 F.2d 598, 608 (8th Cir. 1983).....	14
21	<i>Valentino v. Carter-Wallace, Inc.</i>	
22	97 F.3d 1227, 1234 (9th Cir. 1996).....	15
23	<i>Weinberger v. Kendrick</i>	
24	698 F.2d 61, 73 (2d Cir. 1982).....	7
25	<i>Wershba v. Apple Computer, Inc.</i>	
26	91 Cal. App. 4th 224, 234-235, 239-240, 245 (2001).....	6-7

CODES, RULES AND STATUTES

17	<i>Cal. Civ. Proc. Code</i> § 382.....	12-13
18	<i>Cal. Lab. Code</i> § 226.....	9
19	<i>Cal. Lab. Code</i> §§ 2698 <i>et seq.</i>	3
20	<i>Cal. Lab. Code</i> §§ 2699 <i>et seq.</i>	3

SECONDARY SOURCES

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22		6, 13

I. INTRODUCTION

Plaintiff ANNA KLEIN PACIA (“Plaintiff”) respectfully submits this memorandum in support of the motion for preliminary approval of the Class Action Complaint (*Anna Klein Pacia v. Kilroy Realty, L.P., et al.*, Case No. 21STCV20624, filed on or about June 2, 2021) (the “Action”) with Defendant KILROY REALTY, L.P. and Defendant KILROY REALTY CORPORATION (“Defendants”), and seeks entry of an order: (1) preliminarily approving the proposed settlement of the Action with Defendants; (2) approving the form and method for providing class-wide notice; (3) directing that notice of the proposed settlement be given to the class; and (4) scheduling a final approval hearing date to consider Plaintiff’s motion for final approval of the settlement and entry of the Judgment, and Plaintiff’s motion for approval of attorneys’ fees and litigation expenses.

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

II. DESCRIPTION OF THE SETTLEMENT

The Maximum Settlement Amount to be paid by Defendants is Eight Hundred Seventy Thousand Dollars (\$870,000). The Maximum Settlement Amount consists of the following elements: (1) the Individual Class Payments to Participating Class Members, including the Background Check Payments, (2) Class Counsel Attorneys’ Fees, (3) Class Counsel Litigation Costs, (4) Class Representative Payment to Plaintiff, (5) PAGA Payment, and (6) Settlement Administration Fees. The Maximum Settlement Amount does not include Defendants’ share of employer payroll taxes, which Defendants shall pay to the Administrator separately. The Maximum Settlement Amount shall be all-in with no reversion to Defendants. (Decl. Zakay at ¶ 13.)

After Final Approval and the Judgment becoming final (the “Effective Date”), Defendants will fund the Maximum Settlement Amount in one lump sum payment within sixty-five (65) calendar days (the “Funding Date”). Within fourteen (14) days after the Funding Date, the Settlement Administrator will pay: all Individual Class Payments, all Individual Background Check

1 Payments, all Individual PAGA Payments, the LWDA Payment, the Settlement Administration
2 Fees, Attorneys' Fees and Litigation Costs, and the Class Representative Payment, all as determined
3 by the Court at the Final Approval Hearing. (Decl. Zakay at ¶ 14.)

4 The Net Settlement Amount shall equal the amount available for Individual Class Payments
5 after deducting the Court-approved amounts for the PAGA Payment, the Background Check
6 Payment, Class Representative Payment, Attorneys' Fees and Litigation Costs, and the Settlement
7 Administration Fees. The submission of a claim form is not required for a Participating Class
8 Member to be paid an Individual Class Payment, including the Background Check Payment and
9 PAGA Payment. The Individual Class Payment will be calculated by dividing the Net Settlement
10 Amount by the total number of workweeks worked by all Participating Class Members during the
11 Class Period and then multiplying that amount by the total number of workweeks worked by each
12 Participating Class Member during the Class Period. The entire Net Settlement Amount shall be
13 distributed. The Background Check Payment will be divided and paid to the Participating Class
14 Members equally (approximately \$190.11 each). (Decl. Zakay at ¶ 15-16.)

15 Class Members will have forty-five (45) days after the mailing of the Class Notice to exclude
16 themselves or submit written objections. The deadlines will be extended an additional fourteen (14)
17 calendar days for Class Members whose notice is re-mailed. All Class Members who do not "opt
18 out" will be deemed Participating Class Members and will be bound by the Settlement. The Notice
19 will advise the Class Members of their right to object to the Settlement. (Decl. Zakay at ¶ 17.)

20 Prior to mailing the Class Notice to the Class, the Settlement Administrator will perform a
21 search on the National Change of Address Database to update the Class Members' addresses. The
22 Settlement Administrator will perform a skip-trace search and re-mail all Class Notices that are
23 returned on or before the Response Deadline. If an Individual Class Payment, Individual
24 Background Payment or Individual PAGA Payment check is not cashed within 180 days after the
25 Settlement Administrator's last mailing to the Participating Class Member, the funds from such
26 uncashed check will be transmitted to the Community Law Project consistent with Code of Civil
27 Procedure section 384, subdivision (b). Neither the Parties nor Counsel for the Parties have any
28 interest in the Community Law Project. (Decl. Zakay at ¶ 18.)

1 The Parties have agreed to use ILYM Group as the Settlement Administrator. Payment of
2 the expenses of the Settlement Administrator from the Maximum Settlement Amount shall be made
3 for the expenses of effectuating and administering the Settlement. The Settlement Administrator
4 shall receive payment for services estimated at \$8,000. (Decl. Zakay at ¶ 19.) A declaration from
5 ILYM Group outlining its qualifications and providing for the estimated administration costs is
6 filed concurrently with this Motion.

7 Subject to Court approval, the Agreement provides for Class Counsel to be awarded (a)
8 Attorneys' Fees of not more than one-third of the Maximum Settlement Amount, which is currently
9 estimated to be \$290,000, and (b) Litigation Costs of up to \$30,000. In support of this request, Class
10 Counsel will provide evidentiary support, including lodestar method calculations. Subject to Court
11 approval, the Agreement provides for payment of a Class Representative Payment to Plaintiff of no
12 more than \$5,000.¹ Defendants will not oppose a motion for approval of attorneys' fees, costs and
13 a Class Representative Payment consistent with the Agreement. (Decl. Zakay at ¶ 20.)

14 Subject to Court approval, \$30,000 will be paid for settlement of civil penalties under
15 PAGA, Labor Code Section 2698 *et seq.* Pursuant to the requirements of Labor Code §2699(i), the
16 PAGA Payment shall be allocated \$22,500 (75%) to the LWDA (the "LWDA Payment") as the
17 LWDA's share of the settlement of civil penalties and \$7,500 (25%) will be paid to the Aggrieved
18 Employees. (Decl. Zakay at ¶ 21.)

19 Subject to Court approval, \$50,000 will be paid for settlement of claims made under the Fair
20 Credit Reporting Act ("FCRA"), Investigative Consumer Reporting Agency Act ("ICRAA"), and
21 Consumer Credit Report Agencies Act ("CCRAA"), and paid to the Participating Class Members.
22 (Decl. Zakay at ¶ 21.)

23 III. CASE BACKGROUND

24 On February 3, 2021, Plaintiff filed a Notice of Violations with the LWDA and served the
25 same on Defendant. On June 2, 2021, Plaintiff filed a class action complaint in this Court, asserting
26

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

1 claims for: (1) unfair competition; (2) failure to pay minimum wages; (3) failure to pay overtime
2 wages; (4) failure to provide required meal breaks; (5) failure to provide required rest breaks; (6)
3 failure to provide accurate itemized wage statements; (7) failure to provide wages when due; (8)
4 failure to reimburse employees for required expenses; (9) violation of FCRA for failure to make
5 proper disclosures; (10) violation of FCRA for failure to obtain proper authorization; (11) violation
6 of the ICRAA for failure to make proper disclosures; (12) violation of the CCRAA for failure to
7 obtain proper disclosures; (13) wrongful termination; and (14) violation of Government Code
8 section 12940². On September 20, 2021, Plaintiff filed a First Amended Complaint to add a cause
9 of action for violation of the Private Attorney General Act (“PAGA”), while dismissing the
10 Background Check Class Claims (the “Action”). On March 2, 2023, Plaintiff filed a Second
11 Amended Complaint reasserting the Background Check Class Claims. (Decl. Zakay at ¶ 7.)

12 Plaintiff seeks to represent a putative class of all non-exempt employees who are or
13 previously were employed by Defendants and performed work in California during the Class
14 Period. The Class Period is the period commencing June 2, 2017, up to and including October 27,
15 2022. The Complaint generally alleges the causes of action listed above. The Action seeks unpaid
16 wages and premiums, statutory and PAGA penalties, attorneys’ fees, and litigation costs.³ (Decl.
17 Zakay at ¶ 8.)

18 Prior to mediation, the Parties engaged in investigation and the exchange of documents and
19 information in connection with the Action. As part of this process, Defendants provided a significant
20 sample of time records and payroll records, as well as other documents and information, to Class
21 Counsel to review and analyze. On September 29, 2022, the Parties participated in an all-day
22 mediation presided over by Steven Rottman, Esq., a respected mediator of wage and hour class
23 actions. At the conclusion of the full-day mediation, the Parties reached a settlement based on Mr.
24 Rottman’s recommendation and executed a binding Memorandum of Understanding. Thereafter,

25 ² Plaintiff has agreed to settle her individual wrongful termination claims pursuant to a separate,
26 confidential, settlement agreement. Concurrently with her motion for final approval, Plaintiff will
27 file a request for dismissal seeking to dismiss the 13th and 14th causes of action in the Action. The
28 individual settlement agreement can be made available to the Court for review in-camera should
the Court request to review the agreement.

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

1 the Parties documented the agreement in the form of a Settlement Agreement, which was signed by
2 the Parties and is now presented to this Court for preliminary approval. (Decl. Zakay at ¶ 9.)

3 Although a resolution has been reached, Defendants deny that they have violated any
4 applicable law, committed any wrong against Plaintiff or any other current or former employee, or
5 that they have otherwise damaged Plaintiff or any other current or former employee in any way.
6 Further, Defendants contend that class certification would be inappropriate for any reason other
7 than settlement. Plaintiff contends that Defendants violated California wage and hour laws, and
8 state and federal laws regarding credit and background checks. Plaintiff further contends that the
9 Action is appropriate for class certification on the basis that the Plaintiff's claims meet the
10 requirements for certification. Without admitting that class certification is proper, Defendants have
11 stipulated that the above Class may be certified for settlement purposes only. The Parties agree that
12 certification for settlement purposes is not an admission that certification would be proper if the
13 class certification issues were litigated. Further, the Agreement is not admissible in this or any other
14 proceeding as evidence that the Class could be certified absent a settlement. Solely for purposes of
15 settling the Action, the Parties stipulate and agree that the requirements for establishing class
16 certification with respect to the Class are satisfied. (Decl. Zakay at ¶ 11.)

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

27
28 ///

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

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

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

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

Approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. (*Wershba*, 91 Cal. App. 4th at 234-235; *Dunk*, 48 Cal. App. 4th at 1794.)

1 In considering a potential settlement for preliminary approval purposes, the trial court does not have
2 to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the
3 dispute, and need not engage in a trial on the merits. (*Wershba, supra*, 91 Cal. App. 4th at 239-40;
4 *Dunk, supra*, 48 Cal. App. 4th at 1807.) The Ninth Circuit explains, “the very essence of a settlement
5 is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” (*Officers for Justice*
6 *v. Civil Service Com’n of City and County of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982).) The question
7 whether a proposed settlement is fair, reasonable, and adequate necessarily requires a judgment and
8 evaluation by the attorneys for the parties based upon a comparison of “the terms of the
9 compromise with the likely rewards of litigation.” (*Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d
10 Cir. 1982), cert. denied 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders of*
11 *TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)).) Thus, when analyzing the
12 settlement, the amount is “not to be judged against a hypothetical or speculative measure of what
13 might have been achieved by the negotiators.” (*Officers for Justice*, 688 F.2d at 625, 628.) With
14 regard to class action settlements, the opinions of counsel should be given considerable weight both
15 because of counsel’s familiarity with this litigation and previous experience with cases such as
16 these. (*Id.* at 625.) “The recommendations of plaintiffs’ counsel should be given a presumption of
17 reasonableness.” (*Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979).) As a result, courts
18 hold that the recommendation of counsel is entitled to significant weight. (*Nat’l Rural Telecomms.*
19 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).)

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

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

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28 ///

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

3 This Settlement is the result of extensive and hard-fought litigation and negotiations before
4 an experienced mediator. Defendants denied and continue to deny any wrongdoing or legal liability
5 arising out of the conduct alleged in the Action. Plaintiff and Class Counsel have determined that it
6 is beneficial to the Class Members to put to rest the Released Class Claims.⁴ (Decl. Zakay at ¶ 5.)
7 Plaintiff and Class Counsel recognize the expense involved in continuing to litigate and ultimately
8 trying the Action against Defendants through possible appeals, which could take several years.
9 Class Counsel have also considered the uncertain outcome and risk of litigation, especially in
10 complex actions such as the one here. Class Counsel are also mindful of, and recognize, the inherent
11 problems of proof under, and asserted defenses to, the claims asserted in the Action. Based upon
12 their evaluation, Plaintiff and Class Counsel have determined that the Settlement is in the best
13 interest of the Class Members. (Decl. Zakay at ¶ 22.)

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

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

21 The proposed Settlement has no “obvious deficiencies” and is well within the range of
22 possible approval. All Class Members will receive an opportunity to participate in the Settlement
23 and receive payment if they do not opt out. (Agreement at § 3.2.4.)

24 Defendants’ total potential exposure for the alleged violations at the time this Settlement
25 was negotiated was calculated by BCG, Plaintiff’s damage expert. For the Class, Plaintiff estimates
26 that Defendants potentially could be subject to maximum liability for damages in the amount of
27 _____

28 ⁴ Released Class Claims is defined in the Settlement Agreement at § 1.41 and is limited to claims
asserted in the Action.

1 \$3,678,035 consisting of \$1,289,025 for unpaid wages and sick pay, \$1,010,350 for rest periods,
2 and \$1,378,660 for meal periods. In addition, Plaintiff's expert calculated \$777,040 in waiting time
3 penalties and \$583,150 for wage statement penalties.⁵ Consequently, the Settlement of \$870,000
4 represents approximately 23.6% of the maximum estimated labor code *damages*, and 17.3% of the
5 maximum combination of labor code damages and penalties to the Class, assuming these amounts
6 could be proved at trial (excluding PAGA Penalties). Given the amount of the Settlement compared
7 to the potential value of claims in this case, and taking into consideration the defenses and
8 contentions raised by Defendants, the Settlement is fair and reasonable. The goal of this litigation
9 – to provide compensation to Class Members for allegedly unpaid time and for allegedly missed
10 meal and rest breaks – has been met. (Decl. Zakay at ¶ 6.)

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

16 Moreover, where both sides face significant uncertainty, the attendant risks favor settlement.
17 (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.) Here, several defenses asserted by
18 Defendants presented serious threats to the claims of the Plaintiff and the other Class Members. For
19 instance, Defendants asserted that the employment practices complied with all applicable Labor
20 Laws and with the FCRA, the ICRAA, and the CCRAA. Specifically, Defendants argued that the
21 Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012) weakened, if not
22 eliminated, Plaintiff's claims on liability, value, and class certifiability as to the meal and rest period
23

24 ⁵ While Plaintiff alleged claims for statutory penalties, they recognize that this claim is subject to
25 various defenses asserted by Defendant. Plaintiff's claims pursuant to Labor Code Section 226 and
26 various PAGA penalties are also subject to a good faith defense as to whether any premium wages
27 for meal or rest periods or other wages were owed given Defendant's position that Plaintiff and the
28 Class were properly compensated. (*See Reber v. AIMCO/Bethesda Holdings, Inc.*, 2008 WL
4384147, at *9 (C.D. Cal. Aug. 25, 2008) (granting defendant's motion for summary judgment on
claim for failure to provide accurate itemized wage statements "because a good faith dispute exists...
[therefore, defendant] was not 'knowing and intentional' in failing to provide [Section 226]
statements").)

1 claims. Before and during the mediation, Defendants argued that they adopted and strictly enforced
2 lawful policies and afforded Plaintiff and the Class Members compliant meal and rest breaks, and
3 that employees like the Plaintiff *chose* not to take compliant breaks. Defendants argued, therefore,
4 that under the *Brinker* decision they have no liability for the missed breaks whatsoever. Defendants
5 additionally contend that the underlying merits of Plaintiffs' wage and hour claims are deficient
6 because, among other reasons, there is insufficient evidence to prove that: (1) any of the underlying
7 violations actually occurred, (2) any of the putative class members were entitled to non-
8 discretionary additional income or expense reimbursement, (3) Defendants' wage statements did
9 fully complied with the law, and (4) any rounding policy in effect during the relevant period was
10 applied neutrally such that it did not unfairly benefit Defendants at their employees' expense.

11 As to the Background Check Claims, Defendants' potential exposure ranged between
12 \$26,300 and \$263,000 (\$100-\$1,000 per person). Defendants argued, however, that the Plaintiff's
13 FCRA claim was not viable under the United States Supreme Court decision in *Spokeo, Inc. v.*
14 *Robins*, 136 S. Ct. 1540 (2016). Some district courts have ruled that a disclosure form that contains
15 other information—for instance, a liability waiver—does not violate the FCRA. E.g., *Smith v.*
16 *Waverly Partners, LLC*, 2012 U.S. Dist. LEXIS 119403, 2012 WL 3645324, at *6 (W.D.N.C. Aug.
17 23, 2012); *Burghy v. Dayton Racquet Club, Inc.*, 695 F. Supp. 2d 689, 699 (S.D. Ohio 2010).
18 Finally, the court may find remitter/reduction of the statutory damages appropriate. See e.g.
19 *Klingensmith v. Max & Erma's Restaurants, Inc.*, 2007 U.S. Dist. LEXIS 81029, 2007 WL 3118505,
20 at *5 (E.D. Pa. 2007). A comparison of recently approved FCRA settlements involving similar
21 facts confirms the reasonableness of this Settlement. The Court in *Pietras v. Sentry Ins. Co.*, 513
22 F. Supp. 2d 983, 985 (N.D. Ill 2007), “cited eighteen cases, which settled for an average of \$34.59
23 per class member.” The Settlement of \$190.11 per Class Member in this case far exceeds this range.
24 (Decl. Zakay at ¶¶ 23-24.)

25 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
26 to obtain class certification and thereby not recover on behalf of any employee other than herself.
27 Defendants argued that the individual experience of each employee varied with respect to the
28 alleged claims. While other cases have approved class certification of wage and hour claims, class

1 certification in this action would have been hotly disputed and was not a foregone conclusion,
2 because, among other reasons, Defendants contend that: (1) Plaintiff will not be able to identify
3 sufficiently pervasive patterns and practices to justify class claims, (2) Defendants policies and
4 procedures as set forth in their employee materials complied with all California laws, and (3)
5 Plaintiff herself did not suffer all of the alleged violations for which she seeks to be class
6 representative. Even if class certification was successful, as demonstrated by the California
7 Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are
8 significant hurdles to overcome for a class-wide recovery even where the class has been certified.
9 (Decl. Zakay at ¶ 25.)

10 Here, the risk of further litigation is substantial. After arm's-length negotiations between
11 experienced and informed counsel, the Parties recognized the potential risks and agreed on the
12 Settlement.

13 Finally, Plaintiff's expert calculated that Defendants could be liable for PAGA penalties in
14 an amount of \$2,267,100. However, Courts have considerable discretion to reduce the penalty
15 award. Some trial courts have awarded no civil penalties, even when Labor Code violations are
16 established. *See In re Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award
17 of \$0 in PAGA penalties in a wage and hour class action). To recover any PAGA penalties, Plaintiff
18 would be required at trial to prove each of the underlying Labor Code violations. *See Cardenas v.*
19 *McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) Here, Plaintiff
20 would need to prove that each Aggrieved Employee suffered a violation for each pay period the
21 employee worked. Again, Defendants raised several defenses that present serious threats to the
22 claims of the Plaintiff and the Aggrieved Employees. In all, Plaintiff's PAGA liability exposure is
23 hotly contested. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of
24 PAGA claims. In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial
25 court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith
26 attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such
27 reduction to be proper. *Id.* at 539. Again, the *Carrington* decision was after Plaintiff prevailed at
28 trial, and even then, the PAGA penalties were reduced by 90%. (Decl. Zakay at ¶ 26).

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

3 The relief provided in the Settlement will benefit all members of the Class who do not opt
4 out. The Settlement does not improperly grant preferential treatment to the Plaintiff or segments of
5 the Class in any way. Each Participating Class Member will be entitled to a cash payment based on
6 the plan of allocation described herein. Each Individual Class Payment will be determined based
7 upon the weeks worked by that employee during the prescribed Class Period. The Individual
8 Background Check Payment will be divided equally among the Participating Class Members.
(Decl. Zakay at ¶ 4.)

9 Plaintiff will apply to the Court for a Class Representative Payment in consideration for her
10 service, and for the risks undertaken on behalf of the Class. Plaintiff performed her duties admirably
11 by working with Class Counsel. The Plaintiff's requested payment of \$5,000 is well within the
12 accepted range of awards for purposes of preliminary approval. (See Decl. Zakay at ¶ 27.)

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

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

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

26 Plaintiff contends that the proposed Settlement meets all the requirements for class
27 certification under the California Code of Civil Procedure section 382 as demonstrated below, and
28

1 therefore, the Court may appropriately approve the Class as defined in the Agreement. This Court
2 should conditionally certify the Class for settlement purposes only, defined as follows:

3 The “Class” or “Class Members” includes:

4 **“All non-exempt employees who are or previously were employed by Defendants and
performed work in California during the Class Period. (Agreement at § 1.7.)**

5 The Parties estimate that there are 26,208 workweeks worked by 263 Class Members. (Decl. Zakay
6 at ¶ 30.)

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

8 Plaintiff seeks certification of this Class for settlement purposes under California Code of
9 Civil Procedure section 382. Although Defendants dispute that the Plaintiff can satisfy these
10 requirements for any reason other than for purposes of settlement, in the interest of resolving the
11 Action, Defendants will not dispute that the proposed Class should be certified for purposes of
12 settlement only.

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

14 Here, the approximately 263 current and former employees that comprise the Class are
15 sufficiently numerous for class certification. (*See Bowles v. Superior Court*, 44 Cal.2d 574 (1955)
16 (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934
17 (1981) (class of 48 members satisfies numerosity requirement.)) All of these employees are
18 ascertainable because the Class Members can readily be determined through examination of
19 Defendants’ employment files. (Decl. Zakay at ¶ 30.) For purposes of settlement only, Defendants
20 will not oppose a finding of numerosity.

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

22 Predominance of common issues of law or fact does not require that the common issues be
23 dispositive of the entire controversy or even that they be dispositive of all liability issues. (1
24 *Newberg on Class Actions*, Section 4.25 at 4-82, 4-83 (1992).) “Predominance is a comparative
25 concept, and ‘the necessity for class members to individually establish eligibility and damages does
26 not mean individual fact questions predominate.’” (*Sav-On*, 34 Cal. 4th at 334.) Commonality exists
27 if there is a predominant common legal question regarding how an employer’s policies impact its
28 employees. (*Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1536 (2008) (“[T]he

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

5 Here, Plaintiff contends that common questions of law and fact are present. Specifically: (i)
6 whether Defendants failed to pay Class Members for all hours worked; (ii) whether Defendants
7 failed to provide meal and rest periods to Class Members; (iii) whether Defendants failed to timely
8 furnish accurate, itemized and legal wage statements; (iv) whether Defendants subjected Class
9 Members to unfair business practices; (v) whether Defendants’ authorization and consent forms
10 complied with the FCRA, ICRAA and CCRAA; and (vi) whether Defendants are liable for
11 attorneys’ fees and costs. (Decl. Zakay at ¶ 30.) Defendants will not oppose a finding of
12 commonality for purposes of settlement only.

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

14 “The typicality requirement is met when the claims of the Plaintiff [] arise from the same
15 event or are based on the same legal theories.” (*Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th
16 Cir. 1983).) In *Hanlon v. Chrysler Co.*, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit held that
17 “[u]nder the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably
18 coextensive with those of absent class members; they need not be substantially identical.” (50 F.3d
19 at 1020.) Plaintiff contends that the typicality requirement is fully satisfied. Plaintiff, like every
20 other member of the Class was employed by Defendants and is a member of the Class. Plaintiff was
21 subject to the same employment practices, meal and rest periods, and received similar wage
22 statements. Plaintiff was also subject to Defendants’ allegedly unlawful background checks. Thus,
23 the claims of the Plaintiff and the Class Members arise from the same course of conduct by the
24 Defendants, involve the same employment policies, and are based on the same legal theories. (Decl.
25 Zakay at ¶ 30.) For purposes of settlement only, Defendants will not oppose typicality.

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

27 The Class Members are adequately represented because Plaintiff and Class Counsel (a) do
28 not have any conflicts of interest with other Class Members, and (b) will prosecute the case

1 vigorously on behalf of the class. (*See Hanlon*, 150 F.3d at 1020.) Plaintiff is well aware of her
2 duties as a representative of the Class and has actively participated in the prosecution of this case
3 to date. First, Plaintiff effectively communicated with Class Counsel, provided documents to them
4 and participated investigation and negotiations in the Action. Second, Plaintiff retained competent
5 counsel who are experienced in employment class actions. Third, there is no antagonism between
6 the interests of the Plaintiff and those of the Class. Both the Plaintiff and the Class Members seek
7 monetary relief under the same set of facts and legal theories. (Decl. Zakay at ¶ 30.)

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

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

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

16 The Court has broad discretion in approving a practical notice program. The Parties have
17 agreed upon procedures for providing the Class Members with written notice of the Settlement like
18 those approved and utilized in hundreds of class action settlements. The Class Notice, drafted jointly
19 and agreed upon by the Parties through their respective counsel and to be approved by the Court,
20 includes all relevant information. (*See Exhibit A* to the Agreement.) The Class Notice will state that
21 the Class Members shall have forty-five (45) days from the date that the Class Notice is mailed to
22 them to request exclusion or to submit an objection. The Class Members will be given an
23 opportunity to object to the terms of the Agreement and/or the request for attorneys’ fees and costs
24 and to participate at the final approval hearing. Class Members will be instructed to contact the
25 Settlement Administrator and/or Class Counsel, not the Court. This notice program was designed
26 to meaningfully reach the Class Members and advise them of all pertinent information concerning
27 the Settlement. The mailing and distribution of the Class Notice satisfies the requirements of due
28 process, is the best notice practicable under the circumstances, and constitutes due and sufficient

1 notice to all persons entitled thereto. The Class Notice provides information on the terms and
2 provisions of the Settlement; the benefits that the Settlement provides for Class Members; the date,
3 time, and place of the final settlement approval hearing; and the procedure and deadline for
4 submitting comments, objections, and requests for exclusion. The Class Notice complies with Rules
5 of Court 3.766 and 3.769(f). (Decl. Zakay at ¶ 32.)

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 DATED: March 6, 2023

ZAKAY LAW GROUP, APLC

12 By: 
13 Shani O. Zakay, Attorney for Plaintiff
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