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10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SANTA CRUZ**

13 EDGAR GUTIERREZ, individually, and on
14 behalf of other members of the general
public similarly situated;

15 Plaintiff,

16 vs.

17 ZERO MOTORCYCLES INC., an unknown
18 business entity; and DOES 1 through 100,
inclusive,

19 Defendants.

ELECTRONICALLY FILED
Superior Court of California
County of Santa Cruz
1/27/2022 3:00 PM
Alex Calvo, Clerk
By: Declan Salsedo, Deputy

Case No. 19-CV-03725
Hon. Timothy Volkmann / Dept. 5

CLASS ACTION

**DECLARATION OF JENNIFER L.
CONNOR IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Preliminary Approval Hearing:

Date: April 19, 2022

Time: 8:30 a.m.

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1 executed Settlement Agreement signed by the Parties is attached at **Exhibit “1”** hereto.

2 6. This amount shall be inclusive of all settlement payments to Class Members who
3 do not opt out, the enhancement award to the Class Representative, all expenses and costs to the
4 Settlement Administrator, Atticus Administration, LLC, all attorneys’ fees and expenses to Class
5 Counsel, and penalties recoverable pursuant to PAGA, but exclusive employer federal and state
6 payroll taxes.

7 7. The amount available for distribution to Class Members is determined by deducting
8 the following from the Gross Settlement Amount:

- 9 • Up to thirty-five percent (35%) of the GSA in attorneys’ fees (*i.e.*, \$148,750) and litigation
10 expenses up to \$20,000 to Class Counsel;
- 11 • Up to \$7,500 to the Class Representative as a service award and in exchange for a general
12 release of claims;
- 13 • Up to \$12,000 to the Settlement Administrator, Atticus Administration, LLC, to notify
14 members of the Class and administer the Settlement; and
- 15 • \$30,000 – which is 75% of the \$40,000 – allocated to the LWDA for civil penalties
16 pursuant to statute.

17 The amount remaining after the foregoing deductions, approximately \$206,750, is called the “Net
18 Settlement Amount” or “NSA.” The entire Net Settlement Amount must automatically be paid out
19 to Class Members who do not opt-out/request exclusion ***without the need to submit a claim form,***
20 and shall received their *pro rata* share of the eligible PAGA Payment irrespective of whether or
21 not they opt-out.

22 8. Each Class Member will receive a proportional share of the Net Settlement Amount
23 based on his or her compensable workweeks during the Class Period, *to wit*: the time period
24 between December 16, 2015 and ending on June 13, 2021. The Settlement Administrator will
25 determine each Class Member’s individual settlement payment as follows: First, the sum of all
26 Class Members’ individual Workweeks will be the “Total Workweeks.” Second, the Net
27 Settlement Amount will be divided by the Total Workweeks to yield the “Workweek Value.”
28 Third, each Class Member’s individual settlement payments will be determined by multiplying his

1 or her individual Workweeks by the Workweek Value. In addition, all Class Members will receive
2 a proportional share of the 25% of the PAGA Payment based on his or her Workweeks during the
3 PAGA Period, defined as April 26, 2020 through June 13, 2021. This will be each Class Member's
4 estimated individual settlement payment and will be denoted on his or her individualized Share
5 Form.

6 9. After the Response Deadline, the Settlement Administrator shall calculate the final
7 individual settlement payments based on the actual participation of each Class Member who did
8 not opt-out. After reduction for the employee's share of taxes on the wage portion, the net payment
9 to each participating Class Member will be the sum of his or her individual settlement payment,
10 plus his or her share of the eligible PAGA Payment. As a result, the consideration paid to Class
11 Members is tailored to the impact of Defendant's alleged violation as well as the claims he or she
12 is releasing if he or she does not opt out of the Settlement.

13 10. If all of the approximately 113 Class Members participate (*i.e.*, remain in the
14 Class), and assuming hypothetically that distribution was on an individual *pro rata* basis, then the
15 individual settlement payment would be an ***estimated \$1,829.65 per Class Member***. In actuality,
16 each Class Member will receive a proportional share of the Net Settlement Amount based on his
17 or her eligible workweeks during the Class Period. Of course, any Class Member who prefers to
18 preserve his or her right to pursue relief or seek an alternative recovery may opt out.

19 11. As part of the Settlement, Plaintiff will apply for an enhancement award payment
20 at the time of seeking final approval of the Settlement in the amount of \$7,500 for services rendered
21 to the Class and a general release of all claims against Defendant.

22 12. Plaintiff's requested enhancement payment is intended to recognize the significant
23 benefits conferred upon the Class due to the time and effort that Plaintiff expended on behalf of
24 the Class, including providing factual information and documents to Class Counsel, identifying
25 potential witnesses, and participating in multiple meetings with Class Counsel to discuss the claims
26 and theories at issue in the litigation, as well as the significant risks Plaintiff undertook by agreeing
27 to serve as named plaintiff in this case, and the fact that Plaintiff agreed to a general release of all
28 claims subject to a waiver of Civil Code § 1542.

1 13. Class Counsel will also apply for an attorneys' fees award of up to thirty-five
2 percent (35%) of the Gross Settlement Amount – in other words, up to \$148,750 - and
3 reimbursement of litigation expenses in an amount up to \$20,000. Plaintiff submits that the
4 requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming
5 litigation on a purely contingent fee basis. Class Counsel has devoted substantial attorneys' time
6 to: conducting pre-filing investigation; analyzing Plaintiff's claims; conducting legal research and
7 analysis; propounding multiple sets of discovery; meeting and conferring over pre-mediation
8 information and data; reviewing policies and procedures regarding Zero Motorcycle's timekeeping
9 protocol, payment of wages, provision and tracking of meal and rest breaks, along with examining
10 a 20% random sample of actual employee time records, payroll information and wage statements;
11 building a damages model; preparing, briefing, and attending mediation; preparing and submitting
12 notice to the LWDA; negotiating and preparing the long-form Settlement Agreement and Class
13 Notice; amending the pleadings to incorporate a PAGA representative action and filing the
14 operative complaint; preparing this motion for preliminary approval; and otherwise litigating the
15 case.

16 14. Class Counsel will also expend future attorney time in attending the preliminary
17 approval hearing, and if approved, overseeing the Class Notice and administration process,
18 drafting the final approval motion and supporting documents, and appearing for the final approval
19 hearing, among other tasks, such as fielding questions from Class Members.

20 15. Class Counsel submit that their request for attorneys' fees and reimbursement of
21 actual costs is reasonable when viewed as an overall percentage of the Settlement in light of the
22 substantial risks and work undertaken, the extremely positive results obtained for the Class, and
23 the efficiency with which the Parties have conducted the litigation. Assuming the Court grants
24 preliminary approval, Class Counsel will seek an award of attorneys' fees, along with verified
25 litigation costs, at the time of seeking final approval of the Settlement.

26 16. This Settlement is fair, reasonable, and adequate and should be approved pursuant
27 to California law. *See, Clark v. American Residential Services, LLC* (2009) 175 Cal.App.4th 785
28 (hereinafter, "*Clark*") and *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116

(hereinafter, “Kullar”). After discussing these decisions, I will apply the pertinent factors to the present case.

THE CLARK AND KULLAR CASES

17. In *Clark*, the two named plaintiffs filed a class-action lawsuit alleging causes of action for unpaid wages, failure to provide meal periods and rest breaks, and other Labor Code violations. *Clark, supra*, 175 Cal.App.4th at 789. The parties subsequently settled the case. *Id.* Under the settlement each class member submitting a claim would receive approximately \$6.43 per work week. *Id.* at 791. The settlement agreement further provided that each class representative would receive \$25,000. *Id.* Twenty-three putative class members opted out of the settlement, *id.* at 792, and 20 putative class members objected. *Id.* at 793. The objectors challenged the settlement amount. *Id.* Class counsel defended the settlement amount by explaining that defendant’s overtime policy was legally compliant. *Id.* at 795. According to class counsel the overtime claim had absolutely no value. *Id.* at 802. The objectors responded that class counsel had made a “staggering mistake of law” because class counsel had misunderstood how overtime compensation is calculated for commissioned employees. *Id.* at 797. Nonetheless the court granted final approval.

18. The Court of Appeal reversed the trial court’s grant of final approval. *Id.* at 798. It did so because the trial court “made no independent assessment of the strength of the plaintiffs’ case, simply accepting class counsel’s assessment of value, including his assertion that the overtime claim ...had ‘absolutely no’ value.” *Id.* at 802. Because the trial court never independently evaluated the legal strength of the overtime claim, it could have had no way of assessing whether the settlement amount was adequate. *Id.* at 803.

19. In *Kullar*, plaintiff initially filed his lawsuit solely to recover work-related expenses for which defendant had failed to reimburse him and others similarly situated. *Kullar, supra*, 168 Cal.App.4th at 121. Plaintiff propounded written discovery to defendant relating to expense reimbursement. *Id.* at 122. Subsequently, plaintiff got wind that defendant’s practices may have violated additional wage-and-hour laws, particularly failure to provide meal periods, with regard to a subclass of employees. *Id.* at 121. Plaintiff did not propound any discovery related to the new claims. *Id.* at 122. Indeed, “[t]he only documents exchanged relating to the meal period claims

1 appear to be a two-page handwritten record of Kullar's personal meal period breaks and an
2 employee orientation brochure stating company policies and procedures which include the
3 statement, 'Rest breaks and meal periods are scheduled based on business levels, hours worked
4 and applicable state laws.'" *Id.* at 122, fn. 1.

5 20. The *Kullar* parties then settled at mediation. *Id.* Neither the parties' stipulation of
6 settlement nor any other materials presented to the court at preliminary approval discussed the
7 materials reviewed, the conclusions drawn from them in assessing damages and negotiating the
8 settlement amount, or the problematic legal positions that had been considered and analyzed. *Id.*
9 at 122, fn. 2, 126. Putative class members objected to the settlement. The objectors averred that
10 plaintiff "failed to conduct reasonable discovery or pre-settlement investigation to determine facts
11 necessary to ascertain the extent of class loss...including facts regarding the extent and rate of
12 Labor Code violations by defendant, the likely or probable range of damages sustained by...class
13 members arising from Labor Code violations by defendant, or the existence and nature of records
14 maintained by defendant regarding claimed Labor Code violation." *Id.* at 125, fn. 7 (quoting
15 objection). Further:

16 [T]he objectors argued...[that] absolutely no discovery was conducted
17 with respect to the claim that class members were not provided meal
18 periods to which they were entitled. No declarations were filed in
19 support of the settlement indicating the nature of the investigation that
20 had been conducted to determine the number of employees that had
21 allegedly been denied meal breaks, the frequency with which the
22 denials had occurred, or the circumstances surrounding those denials,
23 and no analysis was provided of the factual or legal issues that required
24 resolution to determine the extent of any one-hour-pay penalties to
25 which class members may have been entitled. No time records were
26 produced in discovery nor was the court presented any estimated
27 quantification of the number of one-hour-pay penalties that might be
28 due or any explanation of the factors that were considered in
discounting the potential recovery for purposes of settlement. *Id.* at
128-129.

24 21. The *Kullar* court agreed with the objectors that plaintiff did not make an adequate
25 showing to enable the court to intelligently assess the settlement. "There was nothing before the
26 court to establish the sufficiency of class counsel's investigation other than their assurance that
27 they had seen what they needed to see. The record fails to establish in any meaningful way what
28 investigation counsel conducted or what information they reviewed on which they based their

1 assessment of the strength of the class members' claims, much less does the record contain
2 information sufficient for the court to intelligently evaluate the adequacy of the settlement." *Id.* at
3 129. The *Kullar* court required that plaintiff provide the trial court with sufficient information
4 about the nature and magnitude of the claims being settled and the impediments to recovery to
5 enable it to make an independent assessment of the reasonableness of the settlement. *Id.* at 133.

6 22. As the foregoing discussion shows, the *Clark* and *Kullar* courts principally wanted
7 to ensure that trial courts, when deciding whether a class-action settlement is fair, adequate, and
8 reasonable, would independently evaluate the settlement amount in light of the strength of the
9 plaintiff's case, and that plaintiff should provide the court the information necessary to make that
10 evaluation. The *Clark* and *Kullar* courts cite the recognized factors set forth in cases like *Dunk v.*
11 *Ford Motors Co.* (1996) 48 Cal.App.4th 1794, 1801, that trial courts should examine during the
12 approval process, including (1) the extent of discovery completed and the stage of the proceedings;
13 (2) the strength of plaintiff's case in light of the settlement amount; (3) the risk, expense,
14 complexity, and likely duration of further litigation, as well as the risk of maintaining class-action
15 status through trial; (4) the experience and views of counsel; and (5) the reaction of class members
16 to the proposed settlement. *Id.* at 799.

17 23. Having discussed the governing law on class action settlements, I will now discuss
18 the above-listed factors.

19 THE EXTENT OF INVESTIGATION AND STAGE OF PROCEEDINGS

20 24. Prior to initiating this lawsuit, counsel for Plaintiff, Class Counsel, thoroughly
21 investigated the claims and considered the facts and circumstances underlying the pertinent issues
22 and applicable law. This required thorough discussions and interviews with Plaintiff and other
23 Class Members as well as research into the various legal issues involved in the case. After
24 conducting their initial investigation, Class Counsel determined that the claims were well suited
25 for class action adjudication owing to what appeared to be a common course of conduct affecting
26 a similarly situated group of employees. *See also*, (Declaration of Edwin Aiwarzian filed
27 concurrently herewith).

28 25. As a result, On December 16, 2019, through his attorneys, Plaintiff filed his

1 complaint in the Santa Cruz County Superior Court, alleging: (1) failure to pay overtime pursuant
2 to Labor Code §§ 510 and 1198; (2) failure to provide meal period premiums in violation of Labor
3 Code §§ 226.7 and 512(a); (3) failure to provide rest period premiums in violation of Labor Code
4 § 226.7; (4) failure to pay minimum wages pursuant to Labor Code §§ 1194, 1197, and 1197.1;
5 (5) failure to pay all wages owed upon termination in violation of Labor Code §§ 201-203; (6)
6 failure to timely pay wages during employment in violation of Labor Code § 204; (7) failure to
7 provide accurate and itemized wage statements in violation of Labor Code § 226(a); (8) failure to
8 keep requisite payroll records in violation of Labor Code § 1174(d); (9) failure to reimburse
9 business expenses in violation of Labor Code §§ 2800 and 2802; and (10) violations of California
10 Business and Professions Code § 17200, *et seq.*

11 26. Plaintiff's lawsuit seeks to recover unpaid wages and overtime compensation,
12 wages and premiums for improper meal and rest breaks, reimbursement of business expenses,
13 restitution, damages, liquidated damages, statutory penalties, civil penalties, injunctive and other
14 equitable relief, prejudgment interest, and attorneys' fees and costs.

15 27. On February 13, 2020, Defendant filed its Answer of a general denial and asserting
16 twenty-six (26) affirmative defenses.

17 28. On April 26, 2020, Plaintiff submitted notice to the California Labor & Workforce
18 Development Agency ("LWDA") seeking authority to pursue penalties under the Private
19 Attorneys General Act ("PAGA") for violations of California law. The LWDA has not provided
20 notice of its intent to investigate the alleged violations within 65 calendar days of the submission,
21 thereby, entitling Plaintiff to commence a representative action under PAGA.

22 29. After obtaining leave of Court pursuant to the Parties' stipulation, on December 22,
23 2021, Plaintiff filed his First Amended Complaint ("FAC") which added the PAGA representative
24 action claim allegations. On December 29, 2021, Defendant filed its Answer to Plaintiff's FAC
25 with a general denial and asserting thirty-two (32) affirmative defenses.

26 30. Defendant does not believe that any liability to Plaintiff or Class Members exists,
27 or that Plaintiff or Class Members are entitled to any recovery. In settling, Defendant does not
28 admit liability with respect to the alleged claims made by Plaintiff and makes no admissions

1 regarding any facts or law relate to the lawsuit. Defendant also disputes that Plaintiff would be
2 able to certify a class outside of the settlement context because Plaintiff's claims on the merits
3 would require a series of individualized mini-trials; Defendant agreed to a class for settlement
4 purposes only.

5 31. In advance of mediation, Class Counsel conducted formal and informal discovery
6 which yielded information and substantial documentation concerning the claims alleged, such as,
7 Defendant's written policies concerning those claims, including, Defendant's employee
8 handbooks, policies and procedures regarding the payment of wages, the provision of meal and
9 rest breaks, time keeping policies, such as recording hours, issuance of wage statements, and
10 providing all wages at separation.

11 32. Defendant also provided composite data for the Class including: total number of
12 putative class members; mix of current versus former hourly-paid or non-exempt employees; total
13 number of pay periods; total number of workweeks; and the average hourly rate in effect.
14 Significantly, Defendant produced a 20% random sampling of time and wage records for putative
15 class members, which consisted of approximately 7,797 shifts.

16 33. Class Counsel analyzed the documents and data produced to determine
17 Defendant's degree of liability and potential amounts due in damages.

18 34. Thereafter, the Parties participated in a full-day mediation, where they debated and
19 discussed their respective positions. The Parties' mediation session was facilitated by Jeffrey A.
20 Ross, Esq. of Employment Mediation. Mr. Ross is experienced in mediating and arbitrating
21 complex general litigation, labor and employment claims, class actions, and PAGA cases, among
22 others.

23 35. During the mediation, the Parties exchanged further information and discussed all
24 aspects of the case, including the risks and delays of litigation and the risk to both Parties for
25 proceeding with a motion for class certification and liability under the claims asserted, along with
26 the potential for PAGA penalties to be asserted. These were contentious issues because of the
27 factual and legal complexity of the case. With the assistance of Mr. Ross, and pursuant to a
28 mediator's proposal, the Parties agreed to resolve the matter and reached the terms of this proposed

1 arm's-length Settlement.

2 36. Thereafter, the Parties engaged in extensive negotiations to draft and memorialize
3 these terms in the long-form Settlement Agreement, dated December 17, 2021 (along with the
4 internal exhibit), attached at **Exhibit "1"** to Connor Decl. filed concurrently herewith.

5 37. The settlement negotiations, which were hard fought and conducted in good faith
6 and at arm's length between attorneys with substantial experience litigating class actions,
7 representative actions, and wage and hour cases, the Settlement was the product of a non-collusive
8 settlement process in which the Parties were forced to make significant compromises in the interest
9 of reaching a full and complete settlement of the action.

10 38. From Class Counsel's review of the facts, strengths, and weaknesses of the case,
11 the risks and delays posed by further litigation, and Class Counsel's own prior litigation
12 experience, Class Counsel believe that the recovery being made available to Class Members is fair,
13 reasonable, and adequate taking into consideration the amounts received in other wage and hour
14 class and representative actions, the risks inherent in litigation of this genre, and the reasonable
15 tailoring of each Class Members' claim to the settlement award he or she will receive. Class
16 Counsel believe that the Settlement serves the best interests of Class Members.

17 **THE STRENGTH OF THE CASE IN LIGHT OF THE SETTLEMENT AMOUNT**

18 39. Class Counsel carefully vetted the claims at issue, reviewed a significant amount
19 of written policy documentation, time punch information, wage statements, and payroll data and
20 conducted a detailed analysis to arrive at a comprehensive damages model for Defendant's
21 liability. Although Plaintiff steadfastly maintains that his claims are meritorious, he acknowledges
22 that there are substantial risks and uncertainty in proceeding with litigation through trial and
23 appeals, the question of certification, and the possible defenses.

24 40. These were contentious issues because of the factual and legal complexity of the
25 case (*i.e.*, evidentiary difficulty of proving off-the-clock claims and dearth of cases analyzing
26 Section 7.D of the Wage Order 1-2001 mandating accessibility of time clocks to work areas) as
27 well as the legal uncertainty regarding many of the central issues of the litigation (*i.e.*, certification,
28 liability, and devising a theory that properly measures monetary recovery, especially given overlap

1 of penalties and arguments against stacking). These risks justify a downward departure from the
2 maximum monetary exposure that each claim carries and was applied as explained *infra*.

3 **RISK, EXPENSE, COMPLEXITY, AND DURATION OF FURTHER LITIGATION**

4 41. Although Plaintiff conducted substantial formal and informal discovery prior to
5 mediation, the Parties agreed to focus on exhausting early settlement efforts at mediation before
6 launching into full-fledged and hotly contested litigation. Therefore, absent settlement, the Parties
7 would need to conduct further formal written discovery and take several depositions to prepare the
8 case for class certification and trial. The Parties would have had to depose a number of people such
9 as human resource manager(s), managers and department supervisors, and other employees in
10 order to establish liability. Discovery disputes would have been in the offing and liability likely
11 would have entailed a battle of experts. This Settlement avoids the considerable time, attorneys'
12 fees and costs, and party resources associated with conducting additional formal discovery,
13 moving for class certification and potentially summary judgment or adjudication, and ultimately,
14 trial, as well as the risks and the accompanying burden of continued litigation on the Court.

15 **RISK OF MAINTAINING CLASS ACTION STATUS**

16 42. Here, settlement was reached prior to class certification and the result was a
17 successful outcome for the Class. Yet, class certification was by no means a foregone conclusion.
18 For example, Plaintiff would face significant hurdles to certification given that Defendant argued
19 that employees worked in various job positions across multiple departments raising individualized
20 issues as to whether a given employee was provided a specific meal period on a specific shift, or
21 whether a meal period was waived.

22 43. Defendant further disputes Plaintiff's characterization of working conditions,
23 liability, and damages, and possesses documentary and testimonial evidence rebutting Plaintiff's
24 allegations. If the Court either denied class certification or later decertified it, the Class would
25 recover nothing and Class Members would be forced to retain their own counsel and proceed on
26 the basis of individual claims only.

27 44. Although Plaintiff was prepared to litigate these claims through class certification
28 and, ultimately, through trial, given the substantial amount offered in settlement relative to the size

1 of the Class and the anticipated individual Class Member recovery, Plaintiff predicted that it was
2 far from certain that Plaintiff would be able to recover a greater amount at trial, particularly after
3 considering the increased litigation costs that would accrue.

4 **AMOUNT OFFERED IN SETTLEMENT GIVEN REALISTIC VALUE OF CLAIMS**

5 45. Plaintiff's estimate of the settlement recovery is a reasonable percentage of possible
6 recoverable damages at trial. Plaintiff's damages analysis shows that the Settlement reflects an
7 estimated **26%** to **46%** of the maximum-to-realistic possible damages recoverable at trial. Utilizing
8 a class-wide damages study to assess the nature and magnitude of the claims in question, *see*,
9 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 123, this case clearly meets the
10 requirements that the class settlement is within the "ballpark" of reasonableness. This settlement
11 provides a fair and reasonable monetary recovery for the putative class in the face of disputed
12 claims.

13 46. Based on pre-mediation informal discovery and their investigation, Class Counsel
14 determined Defendant's degree of liability, prepared an exposure analysis and forecasted the
15 expected recover for each claims as follows:

16 **Unpaid Minimum and Overtime Wages**

17 47. Plaintiff alleges that he and other employees were subjected to uncompensated
18 time arising from pre- and post- shift duties, along with interrupted meal periods, that were
19 worked off-the-clock due to unreasonable workloads. For example, Plaintiff contends that he
20 and other employees were engaged in off-the-clock work activities (*i.e.*, attending to the arrival,
21 loading/unloading, and departure of delivery trucks) or travel to/from the time clock building
22 pre-shift, during lunches, and post-shift. As such, Plaintiff argues that these claims are
23 susceptible to "substantial evidence of systematic company policy to pressure or require
24 employees to work off-the-clock." *Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004.

25 48. Defendant also maintained a practice of rounding employees' work time despite
26 that the actual time is captured on automated clock systems. Further, Plaintiff alleges that
27 approximately 17.1% of the meal periods recorded appear to be systematized auto deductions
28 that fail to record actual contemporaneous break times.

1 49. Given that over half of the shifts are greater than 8 hours in length, it is inevitable
2 that some of portion of the off-the-clock hours will result in unpaid overtime under Labor Code
3 §§ 510, 1198.

4 50. Class Counsel analyzed the documents and data produced by Defendant and, in
5 consultation with Plaintiff, determined Defendant's degree of liability and amounts due in damages
6 – specifically, the incidence and amount of purported off-the-clock activity.

7 51. Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off-
8 the-clock hours, Plaintiff estimates that Defendant is liable for an aggregate of approximately
9 fifteen minutes (15) minutes of unpaid straight and overtime pay per shift (or, seventy-five (75)
10 minutes per workweek) attributed to pre-shift/post-shift duties. At the average hourly rate of
11 \$17.82, plus the additional overtime premium of \$8.91, such yields an estimated damages amount
12 of \$241,105. Plaintiff also concluded that inequitable rounding occurred with a net loss of 659.3
13 hours being unpaid to employees, thus, inclusive of interest, adding an extra \$20,577 to the off-
14 the-clock sum. Finally, Plaintiff calculated 3,242 hours of unpaid wages attributed to auto-deduct
15 meals, which inclusive of interest, results in a further sum of \$70,416 owed. The estimated total
16 of owed minimum and overtime wages is \$332,098, without discounting for risks associated with
17 certification or merits.

18 52. In opposition, however, Defendant contended that Plaintiff's claim for off-the-
19 clock work is not amenable to class treatment, because employees worked in a variety of job
20 positions with different requirements, and it would require an unmanageable series of mini-trials
21 to determine how much time was spent without pay.

22 53. Further, in terms of merit defenses, Defendant vigorously disagreed with Plaintiff's
23 theories regarding how much off-the-clock work occurred in reality and the credibility of those
24 claimed hours given Defendant's express written policies to the contrary.

25 54. The failure to track all hours poses evidentiary difficulties because it is hotly
26 contested how much off-the-clock work actually occurred. For Plaintiff to establish the quantity
27 of specific disputed and unrecorded work activities – especially over multiple job titles, at differing
28 pay rates - would have been costly, time-consuming, and daunting.

1 55. Defendant responded that any off-the-clock time is *de minimis*. Plaintiff countered
2 that such defense lacks viability in light of *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829 given
3 that the California Supreme Court refused to allow the *de minimis* defense to insulate Starbucks
4 from having to pay employees for small amounts of work regularly performed off-the-clock. What
5 is not clear, however, is to what extent the *de minimis* defense would apply where the uncaptured
6 hours were associated with an occasionally recurring activity.

7 56. In light of these considerations – especially the evidentiary difficulties of
8 demonstrating off-the-clock work on a classwide basis - Class Counsel acknowledged a fifty
9 percent discount – yielding **\$166,049** in unpaid minimum and overtime wages - that incorporated
10 the risks of non-certification and being unsuccessful on the merits.

11 **Meal Period Violations**

12 57. With respect to Defendant’s formal written meal policies, Plaintiff argues that they
13 are facially invalid and fail to mention any timing requirements for when a meal period is to be
14 taken, *see, Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 338, 410, and omit
15 any reference to potential entitlement to second meal periods altogether.

16 58. Further, in actual practice, Plaintiff’s review of the data of employee time-punches
17 demonstrates Defendant’s non-compliance. Records indicate that meal periods were often
18 “missed,” “short,” or “late” and that second meal periods for shifts worked in excess of ten (10)
19 hours were near non-existent.

20 59. Significantly, there is no indication that Defendant ever made a payment of a meal
21 period premium for “missed,” “short,” or “late” meal periods prior to the lawsuits. *C.f.* Wage Order
22 1-2001, § 11(b). Consequently, Plaintiff alleges that Defendant violated Labor Code §§ 226.7, 512,
23 and applicable Wage Orders by failing to compensate Plaintiff and Class Members for short, late,
24 interrupted, and missed meal periods.

25 60. Defendant, however, contended that it had practices, policies, and procedures to
26 provide meal and rest breaks every workday to their employees that fully complied with the law.
27 Defendant vehemently argued that they complied with the requirements articulated by the
28 California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004.

Specifically, Defendant maintained that it provided employees with a reasonable opportunity to take timely meal periods of at least 30 minutes, relieved employees of all duties during meal periods, and relinquished control over employees' activities, including the ability to leave the premises during meal periods.

61. Plaintiff faced significant challenges to his Labor Code § 226.7 meal period claims for two reasons: *First*, a majority of the records for Class Members showed lunch breaks, even if untimely and short. *Second*, like most employers facing meal period litigation, Defendant argued that employees were apprised of their right to take meal periods, but voluntarily waived them. Defendant contended that the issue of voluntary waiver would necessarily devolve into a series of individualized mini-trials, precluding class certification. *See, Duran v. U.S. Bank National Association* (2014) 59 Cal. 4th 1, 25 (holding that the defendant must be provided an opportunity to litigate affirmative defenses, even when they turn on individual questions).

62. Thus, although Plaintiff argues that Defendant had an impermissible top-down practice of requiring Class Members to work during meal breaks, in light of its written policies and other evidence suggesting an intent to follow those policies, establishing the alleged unlawful business practice as a rule rather than exception might prove daunting.

63. Based upon analysis of Class Member time and payroll records, and taking into account Plaintiff's assessment that 52.6% of eligible shifts were the subject of unique violations for missed, short, or late meal periods, Plaintiff calculated the potential maximum exposure of this claim to be \$355,562. However, to account for the above-described certification and liability risks, Plaintiff took a twenty-five percent discount for associated risks to yield **\$266,671** as the realistic exposure.

Rest Break Violations

64. Plaintiff also alleged that hourly employees did not receive authorized rest breaks as required whereby employers "relinquish control over how employees spend their time and relieve employees of all duties." *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal. 5th 257, 260. Here, hourly employees did not receive timely and compliant rest breaks, nor did Defendant relinquish control over how employees spent their 10-minute rest periods. Specifically, Defendant

1 conditioned the scheduling of rest breaks on workload and business flow.

2 65. As with the meal periods, Plaintiff neither received a rest period premium, nor is
3 there evidence that Defendant ever made a premium payment for a non-compliant rest break to
4 Class Members. Thus, Plaintiff alleges that Defendant did not provide premium pay for each non-
5 compliant rest break as required under Labor Code § 226.7.

6 66. Defendant again disputes liability and damages. Defendant maintained that it
7 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction
8 of four hours worked as required by Labor Code § 226.7. Defendant explained that Class Members
9 had ample opportunity to take, and did take, regular rest breaks. As with meal breaks, Defendant
10 argued that any Class Member who failed to take a rest break, or took a short or late rest period,
11 did so voluntarily and that all applicable rest periods were still authorized and provided. Thus,
12 Defendant argued that it did not act unlawfully to deprive Class Members of rest breaks.

13 67. Unlike meal periods, rest breaks need not be recorded and thus establishing
14 Defendant's exertion of pressure, control, and resulting violations is likely to be more difficult.
15 As such, and based on the narrative of Plaintiff, Class Counsel applied the same violation rate for
16 Class Members' rest breaks that equals those of meal breaks: thus, yielding a rest break maximum
17 exposure rate of \$355,562. For settlement purposes and to account for the difficulties of certifying
18 and proving unrecorded rest break violations, however, a fifty percent reduction from that
19 maximum exposure was and is warranted for a realistic recovery amount of **\$177,781**.

20 **Unreimbursed Expenses**

21 68. Plaintiff alleges a cause of action under Labor Code § 2802(a) which states that an
22 employer must reimburse employees for all necessary expenditures that employees incur in
23 discharging their duties. Here, Plaintiff alleges Defendant's failure to reimburse non-exempt
24 employees for necessary business expenses incurred: *to wit*, Plaintiff and Class Members incurred
25 unreimbursed PPE for dress-code compliant footwear, unreimbursed mileage, and personal cell
26 phone use, along with promised reimbursement of travel expenses.

27 69. With recognition that this claim is difficult to certify class-wide and quantify in
28 terms of damages, Plaintiff simply assigns a relatively nominal flat \$85 per Class Member; which

1 results in a nominal **\$9,605** attributed to this claim.

2 **Wage Statement Violations**

3 70. Plaintiff alleges a cause of action under Labor Code section 226(a) for Defendant's
4 failure to provide accurate itemized wage statements. Failure to comply with the statute entitles
5 employees to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay
6 period in which a violation occurs and one hundred dollars (\$100) for each violation in a
7 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). *See*,
8 Labor Code § 226(e). This cause of action is derivative of the foregoing causes of action because
9 if Defendant did not provide minimum and overtime wages for all hours worked, owes premiums
10 for non-compliant meal and rest breaks, unreimbursed expenses, and so forth, then the wage
11 statements were inevitably inaccurate.

12 71. Defendant contended, however, that Labor Code section 226(e) penalties are not
13 automatic. Rather, the employee must show that Defendant's noncompliance was "knowing and
14 intentional." Defendant suggested that any noncompliance was not knowing and intentional.
15 Moreover, Defendant argued that meal and rest period violations cannot support derivative wage
16 statement penalties. *See, Naranjo v. Spectrum Security Service, Inc.*, 40 Cal.App.5th 444, 474
17 (Sept. 20, 2019) (holding that violations of Labor Code's meal break provisions do not entitle
18 employees to pursue the derivative wage statement penalties). *C.f.*, but *review granted*, *Naranjo v.*
19 *Spectrum Security Services, Inc.*, 455 P.3d 704, 257 Cal.Rptr.3d 188 (Cal., Jan. 02, 2020) (Cal.
20 Sup. Ct. No. S258966).

21 72. Because the damages for this cause of action are penalties, the statute of
22 limitations is only one year prior to the filing of the original complaint. *See, Code Civ. Proc.*
23 § 340. The Parties discussed these issues and, based on the \$50 initial violation plus the \$100
24 per pay period subsequent violation rates, Plaintiff estimates the total maximum wage statement
25 exposure to be \$197,750. However, Class Counsel chose to utilize the more conservative \$50
26 initial violation penalty rate, which yields the realistic recovery amount of **\$100,750**.

27 **Waiting Time Violations**

28 73. Plaintiff further asserts a cause of action against Defendant for failure to timely pay

1 all wages due employees at separation. *See*, Labor Code §§201-203. As with other claims,
2 Defendant vigorously disagrees that it engaged in any conduct giving rise to liability or entitlement
3 to recovery of penalties.

4 74. Defendant argued that waiting time penalties are not appropriate because it
5 attempted to pay employees all final wages owed in good faith upon their separation, thereby
6 precluding a finding of willfulness necessary to obtain waiting time penalties.

7 75. Moreover, Defendant maintained that no waiting time penalties were recoverable
8 from alleged meal or rest period violations. Defendant raised the Second Appellate District's
9 decision in *Naranjo et al. v. Spectrum Services, Inc.* (2019) 40 Cal.App.5th 444 to argue that meal
10 and rest break violations trigger neither wage statement, nor waiting time penalties. Yet the
11 *Naranjo* decision is currently pending before the California Supreme Court, *see, Naranjo, supra*,
12 *review granted*, Supreme Court Case No. S258966, 455 P.3d 704 (January 02, 2020), and although
13 fully briefed, the outcome of this important case remains to be seen.¹

14 76. Based on the count of 45 former employees, Class Counsel appraised the
15 maximum value of the waiting time claim as \$192,456. But after the Parties discussed the above
16 risks, Class Counsel factored in a reduction of twenty-five percent - Plaintiff believes that the
17 combined potential derivative liability makes the claim relatively recoverable - and posits
18 **\$144,342** as a more realistic exposure value.

19 **Derivative PAGA Penalties**

20 77. Although Plaintiff did not originally plead PAGA, the Parties exchanged
21 sufficient data and information such that the potential liability and exposure to PAGA penalties
22 could be analyzed. The success of Plaintiff's PAGA claim is wholly dependent upon the success
23 of the underlying claims occurring within the one-year statute of limitations applicable to the
24 PAGA. Defendant contended that these penalties are derived from the underlying wage and hour
25 violations discussed above, which Defendant disputes.

26 ¹ The "Issues Presented" in the Case Summary of the Appellate Courts Case Information webpage
27 (<https://appellatecases.courtinfo.ca.gov/>) reads: "This case presents the following issues: (1) Does a violation of Labor
28 Code section 226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims
under Labor Code sections 203 and 226 when the employer does not include the premium wages in the employee's
wage statements but does include the wages earned for meal breaks? (2) What is the applicable prejudgment interest
rate for unpaid premium wages owed under Labor Code section 226.7?"

1 78. Defendant maintained and continues to maintain that it had legally
2 compliant employment policies and practices throughout the statutory period. Defendant
3 denied and continues to deny that it ever violated any provision of the California Labor
4 Code and argued that, even assuming such violations occurred, Defendant will not be
5 treated as having engaged in subsequent violations giving rise to heightened penalties. In
6 other words, Defendant argues that heightened civil penalties for subsequent violations
7 would not be assessed unless it could be shown that Defendant had notice that it was
8 violating the law, *e.g.*, it had been cited by a labor agency or adjudged by a court to have
9 done so. *See, e.g., Amaral v. Cintas Corp.* (2008) 163 Cal. 4th 1157, 1209. Thus,
10 Defendant contended that, at best, even if a violation giving rise to a penalty was shown
11 for each pay period, only the lower civil penalty associated with initial violations would
12 apply.

13 79. Under Labor Code § 2699(f)(2), Defendant is subject to a civil penalty of \$100
14 for the initial violation of the underlying Labor Code violations, and \$200 for each subsequent
15 pay period where the violation occurred. Extrapolating the one-year statutory PAGA period from
16 the date of filing through mediation, Plaintiff estimated 75 aggrieved employees with
17 approximately 2,015 pay periods at issue.

18 80. Although, strictly speaking, class certification requirements are not required to be
19 satisfied in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication
20 and valuation of a PAGA claim is uncertain. Thus, Class Counsel applied discounts for the risks
21 in establishing manageability and possible bifurcation of discovery and/or trial, the risks
22 regarding success on the merits and establishing liability, and the risks with proving the extent
23 of penalties that are warranted and possible discretionary reduction of penalties by the Court.

24 81. As a result, Plaintiffs used the “initial” \$100 per pay period violation (as opposed
25 to the \$200 subsequent per violation rate) to calculate a realistic estimate of \$201,500 in potential
26 PAGA penalty exposure – of which, by statute, only 25%, or **\$50,375** - would be recoverable by
27 aggrieved employees.

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2 **Summary**

3 82. In light of the foregoing, Class Counsel took into consideration, when valuing the
4 merits of these claims, the chances of prevailing on the derivative causes of action, as well as the
5 additional hurdles of prevailing under each standalone cause of action light of the defenses raised,
6 and applied the appropriate discounts. These factors each indicated that the interests of Class
7 Members are best served by a settlement of this action in the manner and upon the terms set forth
8 in the Settlement Agreement.

9 83. Using the estimated figures for each of the claims described above, Plaintiff
10 predicted that approximately \$1,645,343 would be the maximum possible recovery in damages
11 available to Class Members. Without any discount for risks for certification or liability, the
12 proposed recovery to the Class of \$425,000 thus represents **26% of the maximum possible**
13 **exposure** to Defendant. As described above, however, Plaintiff assumed multiple discounts
14 tailored to the various claims and, together, Plaintiff estimates approximately \$915,573 would
15 be the realistic value of Class Members' claims for which \$425,000 therefore represents **46% of**
16 **the realistic possible exposure** to Defendant. In sum, the data coupled with factual and legal
17 analysis shows that the Settlement reflects an estimated range of 26%-46% of the potential
18 maximum/realistic damages recoverable at trial.

19 84. The foregoing factors each indicate that the interests of Class Members are best
20 served by a settlement of this action in the manner and upon the terms set forth in the Settlement
21 Agreement. Given the relatively small size of the Class as compared to, for example, larger
22 nationwide corporate, consumer, or securities class actions, coupled with the financial
23 uncertainties faced by businesses amidst a public health crisis, this Settlement confers a substantial
24 benefit of \$425,000. Moreover, each Class Member will be given the opportunity to opt-out of the
25 Settlement, allowing those who feel they have claims that are greater than the benefits they can
26 receive under this Settlement, to pursue their own claims. After analyzing the claims in this matter,
27 Plaintiff and Class Counsel have concluded that the value of this Settlement is fair, reasonable,
28 and adequate.

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EXPERIENCE AND VIEWS OF COUNSEL

85. CounselOne and its attorneys possess considerable expertise in litigating complex litigation matters. CounselOne and its attorneys have represented millions of employees and consumers and in numerous class actions asserting violations of the California Labor Code, California's consumer protection statutes, and have litigated employment and false advertising and unfair business practice cases throughout the nation. A substantial percentage of CounselOne's practice is devoted to class action litigation, particularly in the areas of wage and hour, labor, and employment rights, along with consumer protection, invasion of privacy, and false advertising. CounselOne was recently certified as class counsel in a consumer-privacy action against Apple involving almost one million Californians. *See, Deveroux v. Apple, Inc.*, Santa Clara Super. Ct. Case No. 1-14-CV-271773, May 26, 2017.

86. Anthony Orshansky, attorney and shareholder of CounselOne, was responsible for ultimate oversight of this matter on behalf of the firm. Mr. Orshansky graduated from the University of California, Los Angeles in 1994 with a degree in Economics and from Loyola Law School of Los Angeles in 1998. Mr. Orshansky has extensive experience in the field of wage and hour litigation. Over the past 15 years, Mr. Orshansky has represented employees in numerous class action lawsuits involving wage-and-hour violations and has obtained favorable settlements against a range of defendants, including Fortune 1000 companies.

87. Since joining CounselOne in March 2020, I was the attorney responsible for the day-to-day litigation of this matter on behalf of the firm. I have approximately 16 years of experience with litigating dozens of wage-and-hour and consumer class actions. I have been appointed as Class Counsel in both contested motions for certification and preliminary/final approval stages of class action settlements. I served as second-chair in a wage-and-hour arbitration trial of employees' misclassification case. I also authored the merit briefs on behalf of plaintiff-appellant in *Aryeh v. Canon Business Solutions, Inc.*, California Supreme Court Case No. S184929, opinion published January 24, 2013. The *Aryeh* case was a unanimous opinion where the Supreme Court held that continuing accrual applies to calculating the statute of limitations in Unfair

1 Competition Law claims. I have also been invited as a lecturer for CLE courses on employment
2 law issues.

3 88. CounselOne is currently class counsel for numerous pending class action lawsuits
4 throughout the State of California. There follows a list of some of CounselOne's class action
5 settlements that have received final approval:

- 6 a. *Hoffman v. Bank of America*, CASD Case No. 3:12-cv-539 JAH (DHB);
- 7 b. *Byanooni v. Merrill Lynch Pierce Fenner & Smith*, CAND Case No. 3:12-cv-
8 05270-RS;
- 9 c. *Knell v. FIA Card Services, Inc.*, CASD Case No. 3:12-cv-00426-AJB-WVG;
- 10 d. *Lewert v. Vendini, Inc.*, Santa Clara Super. Ct. Case No. 1-14-CV-259897;
- 11 e. *Klacko v. Diamond Foods, Inc.*, S.D. Fla. Case No. 9:14-cv-80005-BB;
- 12 f. *Romero v. Loacker*, Santa Clara Super. Ct. Case No. 1-14-CV-274434;
- 13 g. *Zadeh v. Ikon*, LASC Case No. BC470371;
- 14 h. *Fast v. Hilton Hotel Corporation*, LASC Case No. BC409467;
- 15 i. *Sink-Crilly v. Centex Homes*, CACD Case No. CV09-2476;
- 16 j. *Alexander v. DS Waters of America*, CACD Case No. CV09-03384;
- 17 k. *Collins v. Live Nation Worldwide, Inc.*, LASC Case No. BC436141;
- 18 l. *Callela v. Dolce Group*, LASC Case No. BC364711;
- 19 m. *Beal v. Activision, Inc.*, LASC Case No. BC348560;
- 20 n. *Vasquez v. The Hollywood Pig n Whistle LP*, LASC Case No. BC335075;
- 21 o. *Flores v. Loomis Armored*, LASC Case No. BC409899;
- 22 p. *Galavis v. Patina Restaurant Group, LLC*, LASC Case No. BC375225;
- 23 q. *Dupont v. Innovative Dining Group*, LASC Case No. BC391240;
- 24 r. *Fluke v. RFG Oil, Inc.*, LASC Case No. BC403354;
- 25 s. *Smith v. Rio Rancho Pontiac GMC Buick Inc.*, LASC BC391187;
- 26 t. *Urena v. Camachos Restaurant*, LASC Case No. BC365913;
- 27 u. *Milford v. ADT Security Services, Inc.*, CACD Case No. CV08-2236;
- 28 v. *Healy v. Siemens IT Solutions and Services, Inc.*, Santa Clara Super. Ct. Case No.

- 108CV113479;
- w. *Gonzalez v. Calstar Motors, Inc.*, LASC Case No. BC479756;
- x. *Garcia v. California Credits Group*, LASC Case No. BC353213;
- y. *Rylko v. The Griddle Café, Inc.*, LASC No. BC386126;
- z. *Morris v. Gymboree, Inc.*, LASC Case No. BC393270;
- aa. *West v. Contemporary Services Corporation*, San Francisco Super. Ct. Case No. CGC-10-502191;
- bb. *Afanasyev v. Miller Infiniti, Inc.*, LASC Case No. BC350788;
- cc. *Ortega v. AJC Sandblasting, Inc.*, LASC Case No. BC378806;
- dd. *Goldman v. Aorta Restaurant Operating LP*, LASC Case No. BC379688;
- ee. *In Re Walgreen Co. Wage And Hour Litigation*, CACD Case No. 11-cv 07664-PSG (FFMx);
- ff. *Lulejyan v. Jim Falk Motors of Beverly Hills, Inc.*, LASC Case No. BC398459;
- gg. *White v. RBD Staffing, Inc., Sprint Communications Company*, CACD Case No. 2:15-cv-08519-GHK-KS;
- hh. *Carreon v. Wolfgang Puck Catering and Events, LLC*, LASC Case No. BC398569;
- ii. *Fikara v. Niemann Foods Inc.*, Case No. 3:16-cv-03285-TSH (Cent. Dist. Ill.);
- jj. *Cooke v. TCAG, Inc.*, San Diego Super. Ct. Case No. 37-2019-00007778-CU-OE-NC;
- kk. *Bradley v. Mercedes-Benz*, LASC Case No. BC499494;
- ll. *Davies v. Godiva Chocolatier, Inc.*, LASC Case No. BC429547;
- mm. *Ederly v. Citibank*, San Francisco Super. Ct. Case No. CGC-14-538436; and
- nn. *Huebner v. ManTech International Corporation*, CACD Case No. 2:15-cv-09889-PA-SS.

89. As demonstrated, CounselOne has litigated, and successfully settled, a number of wage-and-hour class actions against large and small employers. This experience has given us familiarity with California's wage and hour protections (including minimum wage, overtime premiums, wage statement itemizations, meal and rest breaks, reimbursement of business

1 expenses, PAGA, etc.) and the various ways employment policies and practices can violate
2 employee rights. This experience is helpful in assessing the reasonableness of settlements such as
3 the one at issue here; and from this experience Class Counsel has concluded that the Settlement
4 herein is fair, adequate, and reasonable under the facts and law applicable to this case.

5 90. Co-Counsel, Edwin Aiwarzian of Lawyers *for* Justice P.C., details his experience in
6 his own declaration submitted in support of Plaintiff's Motion For Preliminary Approval Of Class
7 Action Settlement. *See, Declaration of Edwin Aiwarzian*, dated January 10, 2022, filed concurrently
8 herewith.

9 91. Class Counsel have no conflicts of interest with the Class or with the Class
10 Representative. In sum, Class Counsel are well-suited to act as class counsel and have at all times
11 vigorously represented the interests of the Class.

12 **CLASS COUNSELS' REQUEST FOR ATTORNEYS' FEES AND COSTS**

13 92. Moreover, as part of the Settlement, the Parties have agreed that Plaintiff will
14 request an attorneys' fee award in the amount of \$148,750 (which is thirty-five percent of the
15 \$425,000 GSA common fund), along with up to \$20,000 in actual costs incurred, subject to court
16 approval.

17 93. This request is fair, reasonable, and adequate to compensate Class Counsel for the
18 substantial work they have put into this case and the risk they assumed by taking it in the first
19 place. Additionally, it is consistent with the contingency-fee agreement entered into by named
20 Plaintiff. The attorneys' fees award is intended to reimburse Class Counsel for all uncompensated
21 work that they have already done and for all the work they will continue to do in carrying out and
22 overseeing the notification to the Class, communicating with Class Members regarding their
23 claims, and communicating with the Settlement Administrator regarding the administration of the
24 settlement if it is preliminarily approved. *See also, Aiwarzian Decl., in passim*, filed concurrently
25 herewith.

26 94. CounselOne took this case on a contingent-fee basis against a business represented
27 by a reputable defense firm. When we take contingent cases, we must pay careful attention to the
28 economics involved or one bad case can destroy years of work. Accordingly, when we take

1 contingent cases, we anticipate that we shall, if successful, receive a fee that exceeds our normal
2 hourly rate; otherwise, the risk is often too great to bear. Even when we work long hours, the
3 number of hours in a day is limited. Because of this, when we take on one particular matter, we
4 are unable to take on other matters. When CounselOne became involved in this case, we realized
5 the time commitment that it would entail and we were forced to turn down matters that we
6 otherwise should have been able to handle.

7 95. In sum, Class Counsel devoted significant amounts of time and energy to achieving
8 the benefits for the Settlement Class, and to that end exercised a tremendous amount of skill.

9 **CLASS REPRESENTATIVE ENHANCEMENT AWARD REQUEST**

10 96. Class Counsel and named Plaintiff Edgar Gutierrez have no conflicts of interest
11 with the Class. CounselOne, PC, as well as co-counsel, are well-suited to act as Class Counsel,
12 Plaintiff Gutierrez is well-suited to act as a Class Representative, and at all times Class Counsel
13 and Plaintiff have vigorously represented the interests of the Class. *See also, Aiwazian Decl. and*
14 *Declaration of Edgar Gutierrez* (“Gutierrez Decl.”) filed concurrently herewith.

15 97. Specifically, Plaintiff Edgar Gutierrez has spent a significant amount of time with
16 Class Counsel detailing his knowledge of Defendant’s practices and helping Class Counsel with
17 the prosecution of this case. He diligently, adequately, and fairly represented members of the Class
18 and has not placed his interests above that of any member of the putative class.

19 98. As part of the Settlement, the Parties have agreed that Plaintiff will request a class
20 representative enhancement award to Plaintiff Gutierrez in the amount of \$7,500.00, subject to
21 Court approval. The service award amount is intended to compensate Plaintiff for his time and
22 effort in bringing the action, which he initiated over two years ago.

23 99. Further, the requested amount is still much less than the \$25,000 enhancement
24 awards approved for each of the class representatives in the seminal *Clark* case outlining approval
25 standards. *See Clark v. American Residential Services, LLC* (2009) 175 Cal. App. 4th 785, 807.

26 100. In light of the foregoing, Class Counsel believe that the proposed enhancement
27 award to Plaintiff in the amount of \$7,500.00 is fair and reasonable.
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2 **CRITERIA SATISFIED FOR CERTIFICATION OF SETTLEMENT CLASS**

3 101. The proposed class satisfies the criteria for certification of a settlement under
4 California law, as embodied in California Code of Civil Procedure section 382. Defendant has
5 agreed to the certification of the class for settlement purposes. In general, courts may take a
6 proposed settlement into account in evaluating the propriety of class certification. *See, Dunk v.*
7 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19. Indeed a “lesser standard” of scrutiny
8 applies in certifying classes for settlement purposes. *Id.* Therefore, the Court should take into
9 consideration the fact that the parties have settled their claims and stipulated to certification for
10 settlement purposes when making its assessment.

11 102. **Numerosity and Ascertainability.** Class Members are comprised of: “All current
12 and former hourly-paid or non-exempt employees who worked for Defendant within the State of
13 California at any time during the Class Period.” Thus, all Class Members are of a specific type
14 (*i.e.*, current or former non-exempt hourly employees) who worked for Defendant during the Class
15 Period – which is explicitly defined as the timeframe from December 16, 2015 through June 13,
16 2021. Defendant is required to and does maintain employment records of such persons, including
17 contact information and social security numbers. Documents and information exchanged reflect a
18 Class of approximately 113 non-exempt hourly employees (estimated as 66 currents, 45 formers,
19 and 2 currents who moved to exempt positions) during the relevant period. As a result, the
20 proposed Class satisfies the ascertainability and numerosity requirements. *See, e.g., Collins v.*
21 *Rocha* (1972) 7 Cal.3d 232 (finding a class of 44 farm workers sufficiently numerous).

22 103. **Commonality.** Here, litigation is predicated on uniform company policies and
23 systemic top-down business practices revolving principally around Defendant’s timekeeping and
24 pay practices – *e.g.*, off-the-clock work attributed to common job duties, unreasonable work
25 schedule demands, and detrimental rounding, failure to pay meal and rest break premiums despite
26 records depicting non-compliance and practices resulting in interruption, unreimbursed business
27 expenses etc. - as well as derivative inaccurate wage statements and pay owed upon separation.
28 These allegations have given rise to the following claims: failure to pay minimum and overtime

1 wages; meal period liability; rest break liability; unreimbursed business expenses; failure to pay
2 wages timely and all final wages at termination of employment; failure to maintain and provide
3 accurate itemized wage statements; and derivative UCL and PAGA claims arising therefrom.

4 104. Because Plaintiff has alleged a single top-down compensation scheme, “the
5 relevant proof [does] not vary among class members” and “clearly presents a common question
6 fundamental to all class members.” *See, In Re NASDAQ Market-Makers Antitrust Litigation*
7 (S.D.N.Y. 1997) 172 F.R.D. 119, 123 (citing *In Re NASDAQ Market-Makers Antitrust Litigation*
8 (S.D.N.Y. 1997) 169 F.R.D. 493, 518). California courts show “no hesitancy” in inferring class-
9 wide causation, class-wide injury, and class-wide damages when a common course of action has
10 been shown. *B.W.I. Custom Kitchens, supra*, 191 Cal.App.3d at 1350 (granting class certification
11 in a manufacturing defect case when a common course of action had been proven). This inference
12 “eliminates the need for each class member to prove individually the consequences of the
13 defendants’ actions to him or her.” *Id.* at 1351. Thus, the outcome of this matter depends upon
14 questions that are common to members of the Class. These types of claims are commonly held to
15 be proper for class certification.

16 105. **Typicality.** Plaintiff’s claims are typical of those held by members of the proposed
17 Class. Like all other Class Members, Plaintiff was an hourly-paid and non-exempt employee
18 working for Zero Motorcycles in California during the Class Period. Like Class Members, Plaintiff
19 was not paid for all hours worked due to off-the-clock work (*i.e.*, pre-/post-shift duties and travel
20 time, interrupted meals, and detrimentally rounded time), neither received timely and duty-free
21 meal and rest breaks, nor was paid premiums for non-compliant breaks, incurred necessary
22 unreimbursed business expenses, and did not receive accurate wage statements and all wages and
23 premiums owed upon termination of the business relationship. Plaintiff was therefore impacted by
24 the same challenged policies and practices that allegedly injured the Class as a whole and subject
25 to the same defenses raised by Defendant as to the Class and is therefore typical.

26 106. **Adequacy.** Plaintiff and Class Counsel will adequately represent the Settlement
27 Class, as there are no conflicts between the Plaintiff and the Class he seeks to represent. *McGhee*
28 *v. Bank of Bank of America* (1976) 60 Cal.App.3d 442, 450 (finding adequacy satisfied where

1 there was no indication that plaintiff's counsel were not qualified and the named plaintiff had no
2 interests antagonistic to those of the proposed class). Class Counsel also have extensive experience
3 in wage and hour litigation. *See*, "Experience and Views of Counsel," *supra*.

4 107. **Superiority.** By consolidating possibly over one hundred individual actions into
5 a single proceeding, this Court's use of the class action device enables it to manage this litigation
6 in a manner that serves the efficiency interests of the litigants and the judicial system. Absent class
7 treatment, the only alternative would be to force numerous employees to file individual actions.
8 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339, fn. 10. (stating "[t]he
9 relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class
10 action and the costs and benefits of proceeding by numerous separate actions – not between the
11 complexity of a class suit that must accommodate some individualized inquires and the absence of
12 any remedial proceeding whatsoever.") Finally, in the context of settlement, the superiority
13 concerns are essentially non-existent.

14 **PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS**

15 108. This Court should order distribution of the proposed Notice of Class Action and
16 PAGA Settlement ("Class Notice") to the current and former employees, *see*, internal exhibit "1"
17 respectively to the Settlement Agreement attached at **Exhibit "1"** to Connor Decl., to the Class by
18 first class mail, postage prepaid, using the last known mailing address information provided by
19 Defendant.

20 109. Plaintiff proposes that the Settlement be administered by Atticus Administration,
21 LLC ("Atticus"), an experienced class action settlement administrator. Class Members' addresses
22 will be ascertainable through Defendant's personnel and payroll records, which Defendant will
23 provide to Atticus within fifteen (15) calendar days after preliminary approval of the settlement.
24 Under the Settlement, Atticus will run all addresses through the National Change of Address
25 database and, to the extent that any notices are returned, will conduct further skip traces to obtain
26 current address information, and will send the Class Notice to the new address.

27 110. The content of the proposed notice satisfies California Rule of Court 3.766(d)
28 because it advises Settlement Class Members of the nature of the claims, basic contentions and

1 denials of the Parties, the key terms of the settlement, the uniform 45-day deadline to submit a
2 workweek dispute, request for exclusion/opt-out, or object to the settlement and the procedure by
3 which to do so, and explains the recovery formula and credited number of workweeks for each
4 Class Member. The proposed notice will also notify Class Members of the final approval hearing
5 date, provide the contact information for Class Counsel, and advise Class Members that they may
6 enter an appearance through counsel if they wish. This manner of giving notice is the “best notice
7 practicable” under the circumstances because it provides “individual notice to all members who
8 can be identified through reasonable effort.” *Eisen v. Carlisle and Jacquelin* (1974) 417 U.S. 156,
9 173.

10
11 I declare under penalty of perjury, under the laws of the State of California and the United
12 States of America, that the foregoing is true and correct.

13
14 Executed this 21st day of January, 2022, at San Diego, California.

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16 
17 Jennifer L. Connor
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Exhibit 1

1 **CLASS ACTION AND PAGA SETTLEMENT AGREEMENT AND STIPULATION**

2 This Class Action and PAGA Settlement Agreement and Stipulation (“Settlement,”
3 “Agreement,” or “Settlement Agreement”) is entered into between Defendant Zero Motorcycles, Inc.
4 (“Defendant” or “Zero Motorcycles”), and Plaintiff Edgar Gutierrez (“Plaintiff”), individually and on
5 behalf of the Class Members, as defined below.

6 **A. DEFINITIONS**

7 1. “Class Counsel” means Lawyers *for* Justice, P.C. and CounselOne, P.C.

8 2. “Class” or “Class Member(s)” means all current and former hourly-paid or non-exempt
9 employees who worked for Defendant within the State of California at any time during the Class
10 Period.

11 3. “Class Notice” means the document to be sent via first class U.S. mail to the Class
12 following preliminary approval, in substantially the form that is attached hereto as “**EXHIBIT 1**,”
13 which will notify Class Members of the Settlement, explain the basic terms of the Settlement, and
14 inform Class Members of their options with regard to the Settlement.

15 4. “Class Period” means the period beginning on December 16, 2015 and ending on June
16 13, 2021.

17 5. “Released Claims” means all claims contained in the operative complaint in the
18 Lawsuit, or that could have been brought in the Lawsuit based on the facts and claims alleged in the
19 operative complaint during the Class Period. The Released Claims include all claims for unpaid wages,
20 including, failure to pay minimum wages, straight time compensation, overtime compensation,
21 double-time compensation, and interest; the incorrect calculation of the regular rate of pay; wages
22 related to alleged illegal time rounding; non-compliant meal periods and rest periods and
23 compensation related thereto; payment for all hours worked, including off-the-clock work; inaccurate
24 wage statements; failure to keep accurate records; unfair business practices related to the Released
25 Claims; penalties, including, but not limited to, recordkeeping penalties, wage statement penalties,
26 minimum-wage penalties, and waiting-time penalties; and attorneys’ fees and costs; all claims related
27 to the Released Claims arising under the Wage Orders of the California Industrial Welfare
28 Commission; the California Private Attorneys General Act of 2004; and California Business and

Professions Code section 17200, *et seq.* This release excludes the release of claims not permitted by law.

6. “Court” means the Superior Court for the State of California, County of Santa Cruz.

7. “Defendant’s Counsel” means Freeman Mathis & Gary, LLP

8. “Effective Date” will be the date of entry of the Court’s order granting final approval of the Settlement if no objections to the Settlement are filed. If objections are filed and overruled, and no appeal is taken, then the Effective Date will be sixty-five (65) calendar days after the date of entry of the Court’s order granting final approval of the Settlement. If an appeal is taken from the Court’s overruling of objections to the Settlement, then the Effective Date will be twenty (20) calendar days after the appeal is dismissed or after an appellate decision affirming the Court’s order granting final approval of the Settlement becomes final.

9. “Lawsuit” means the action entitled *Edgar Gutierrez v. Zero Motorcycles, Inc., et al.* filed on December 16, 2019 in the Santa Cruz County Superior Court and assigned case number 19CV03725.

10. “PAGA Period” means the period beginning on April 26, 2020 and ending on June 13, 2021.

11. “Parties” means Plaintiff and Defendant, who are individually referred to as “Party.”

12. “Released Parties” means Defendant Zero Motorcycles, Inc., and each of its past, present and future employees, officers, directors, partners, shareholders, owners, trustees, representatives, agents, attorneys, parents, subsidiaries, related companies/corporations and/or partnerships, divisions, assigns, predecessors, successors, affiliates, and insurers, and all of their respective past, present and future employees, officers, directors, agents, attorneys, shareholders, owners, parents, subsidiaries, and assigns.

13. “Response Deadline” means the date forty-five (45) calendar days after the initial mailing of the Class Notice to Class Members and the last date on which Class Members may submit a request for exclusion or object to the Settlement.

14. “Settlement Administrator” means Atticus Administration, the neutral third-party administrator mutually agreed upon by the Parties, subject to approval by the Court.

1 **15.** “Workweek(s)” means a seven-day work week during the Class Period or PAGA
2 Period during which, based on Defendant’s records, Class Members were actively employed by
3 Defendant in an hourly-paid or non-exempt position in California.

4 **B. RECITALS**

5 **1. Procedural History.** Plaintiff filed his complaint on December 16, 2019 in the Santa
6 Cruz County Superior Court, alleging: (1) failure to pay overtime pursuant to Labor Code §§ 510 and
7 1198; (2) failure to provide meal period premiums in violation of Labor Code §§ 226.7 and 512(a);
8 (3) failure to provide rest period premiums in violation of Labor Code § 226.7; (4) failure to pay
9 minimum wages pursuant to Labor Code §§ 1194, 1197, and 1197.1; (5) failure to pay all wages owed
10 upon termination in violation of Labor Code §§ 201-203; (6) failure to timely pay wages during
11 employment in violation of Labor Code § 204; (7) failure to provide accurate and itemized wage
12 statements in violation of Labor Code § 226(a); (8) failure to keep requisite payroll records in violation
13 of Labor Code § 1174(d); (9) failure to reimburse business expenses in violation of Labor Code §§
14 2800 and 2802; and (10) violations of California Business and Professions Code § 17200, *et seq.*
15 Defendant filed its Answer including a general denial and twenty-six (26) affirmative defenses on
16 February 13, 2020.

17 **2. Pre-Filing PAGA Notice.** On April 26, 2021, Plaintiff’s counsel provided pre-filing
18 written notice to the Labor Workforce Development Agency (“LWDA”) and by certified mail to
19 Defendant of the above-identified allegations on behalf of Plaintiff and similarly situated aggrieved
20 employees in accord with the Private Attorneys General Act of 2004 (“PAGA”), California Labor
21 Code § 2698, *et seq.*

22 **3. Amended Pleading To Add PAGA.** The Parties agree that, once the requisite time has
23 lapsed without notice of intent to investigate by the LWDA, Defendant and Plaintiff will jointly
24 stipulate that Plaintiff seeks leave to amend the operative complaint to allege a PAGA claim and
25 Defendant may file an answer to the amended complaint.

26 **4. Formal Discovery.** The Parties engaged in extensive discovery and investigation prior
27 to participating in mediation and sufficient to allow the Parties to evaluate the case. For example,
28 Plaintiff propounded an initial round of written formal discovery (including requests for documents

1 and multiple sets of special interrogatories) related to wage-and-hour practices, policies, and records,
2 along with seeking putative class member contact information. While some substantive responses were
3 exchanged, some of the discovery was contested and resulted in objections. Thereafter, counsel for the
4 Parties undertook the meet and confer process, but in the interim, however, it was decided that
5 exploring the potential for early resolution would be most pragmatic. As a result, formal discovery
6 was held in abeyance in order to pursue informal discovery for mediation purposes.

7 **5. Informal Discovery and Investigation.** In advance of mediation, the Parties agreed to
8 an informal exchange of data. For example, Class Counsel requested production of key information
9 such as the number of putative class members and aggrieved employees, relevant wage and hour
10 policies and time and payroll records, among other things. Having enlisted the assistance of a
11 consultant, Class Counsel also analyzed a 20% random sampling of time and payroll records of
12 employees (consisting of approximately 7,797 shifts) in order to determine violation rate(s) across the
13 Class, along with other relevant data counts.

14 **6. Mediation.** On February 01, 2021, after having performed extensive investigation and
15 analysis of the legal and factual issues and risks, the Parties participated in a full-day mediation before
16 mediator, Jeffrey A. Ross, Esq. of Employment Mediation, in an attempt to resolve the Lawsuit. The
17 settlement discussions were conducted at arm's-length. While it did not resolve that day, with mediator
18 Ross' assistance and a mediator's proposal, the Parties ultimately came to agreement on all material
19 terms for this Settlement and resolution of the Lawsuit.

20 **7. Benefits of Settlement to Class Members.** Plaintiff and Class Counsel recognize the
21 expense and length of continued proceedings necessary to litigate their disputes through trial and
22 through any possible appeals. Plaintiff has also taken into account the uncertainty and risks of the
23 outcome of further litigation, and the difficulties and delays inherent in such litigation. Plaintiff and
24 Class Counsel are also aware of the burdens of proof necessary to establish liability for the claims
25 asserted in the Lawsuit, both generally and in response to Defendant's defenses thereto, and the
26 difficulties in establishing damages for the Class. Plaintiff and Class Counsel have also taken into
27 account the extensive settlement negotiations conducted. Based on the foregoing, Plaintiff and Class
28 Counsel have determined that the Settlement is a fair, adequate and reasonable settlement, and is in

1 the best interests of the Class Members.

2 **8. Defendant's Reasons for Settlement and Non-Admission.** Defendant has concluded
3 that any further defense of this litigation would be protracted and expensive for all Parties. Substantial
4 amounts of time and resources of Defendant have and, unless this Settlement is made, will continue
5 to be devoted to the defense of the claims asserted by Plaintiff. Defendant has also taken into account
6 the risks of further litigation in reaching its decision to enter into this Settlement. Despite maintaining
7 its position that it is not liable for any of the claims set forth by Plaintiff, and that this matter is
8 inappropriate for class treatment, Defendant has, nonetheless, agreed to settle in the manner and upon
9 the terms set forth in this Agreement to put to rest the claims as set forth in the Lawsuit. Defendant
10 continues to deny any liability or wrongdoing of any kind associated with the claims in the Lawsuit
11 and contends that it has complied at all times with all state, local, and federal laws and regulations.
12 This Agreement is a compromise of disputed claims.

13 **9. This Settlement Is Fair, Adequate and Reasonable.** The Parties believe this
14 Settlement is a fair, adequate and reasonable settlement of this Lawsuit and have arrived at this
15 Settlement after extensive arms-length negotiations, taking into account all relevant factors, present
16 and potential. In addition, the mediator may, at his discretion, execute a declaration supporting the
17 Settlement and the reasonableness of this Settlement, and the Court may in its discretion, contact the
18 mediator to discuss the Settlement and whether or not the Settlement is fair and reasonable.

19 **C. TERMS AND CONDITIONS**

20 **NOW, THEREFORE**, in consideration of the Recitals listed above and the promises and
21 warranties set forth below, and intending to be legally bound and acknowledging the sufficiency of
22 the consideration and undertakings set forth herein, the Plaintiff, individually and on behalf of the
23 Class Members and on behalf of the State of California as a private attorney general, on the one hand,
24 and Defendant, on the other hand, agree that the Lawsuit shall be, and is finally and fully compromised
25 and settled on the following terms and conditions, subject to Court approval:

26 **1. Non-Admission of Liability.** The Parties enter into this Agreement to resolve the
27 Lawsuit and to avoid the burden, expense, and risk of continued litigation. In entering into this
28 Agreement, Defendant does not admit, and specifically denies, that it has: violated any federal, state,

1 or local law; violated any regulations or guidelines promulgated pursuant to any statute or any other
2 applicable laws, regulations or legal requirements; breached any contract; violated or breached any
3 duty; engaged in any misrepresentation or deception; or engaged in any other unlawful conduct with
4 respect to its employees. Neither this Agreement, nor any of its terms or provisions, nor any of the
5 negotiations connected with it, shall be construed as an admission or concession by Defendant of any
6 such violation(s) or failure(s) to comply with any applicable law. Pursuant to California Evidence
7 Code Section 1152 and/or Federal Rule of Evidence 408 and/or any other similar law, this Settlement
8 Agreement is inadmissible in any proceeding, except a proceeding to approve, interpret or enforce this
9 Settlement Agreement. In addition, as set forth herein, the Parties intend this Settlement to be
10 contingent upon the Court's preliminary and final approval of this Agreement; and the Parties do not
11 waive, and instead expressly reserve, their respective rights to prosecute and defend the Lawsuit as if
12 this Agreement never existed in the event the Settlement is not fully and finally approved as set forth
13 herein.

14 **2. Release of Claims by Class Members.**

15 a. Upon the Court's final approval of this Settlement, Plaintiff and each Class
16 Member who does not validly request exclusion from the Settlement, shall be deemed to have fully,
17 finally, and forever released, settled, compromised, relinquished, and discharged the Released Parties
18 of and from any and all Released Claims.

19 b. The Parties agree for settlement purposes only that, because the Class Members
20 are so numerous, it is impossible or impracticable to have each Class Member execute this Agreement.
21 Accordingly, the Class Notice will advise all Class Members of the binding nature of the release
22 provided herein and the release shall have the same force and effect as if the Agreement were executed
23 by each Class Member.

24 c. Plaintiff represents, covenants, and warrants that he has not directly or
25 indirectly assigned, transferred, encumbered, or purported to assign, transfer, or encumber to any
26 person or entity any portion of any liability, claim, demand, action, cause of action, or rights herein
27 released and discharged, except as set forth herein.

28 **3. Full Release by Plaintiff.** In exchange for and in consideration of the individual

1 settlement payment and Enhancement Payment, along with the terms and undertakings herein, the
2 sufficiency and fairness of which are acknowledged, Plaintiff Edgar Gutierrez, individually, releases,
3 acquits, discharges, and covenants not to sue the Released Parties for any claim, whether known or
4 unknown, which he has ever had, or hereafter may claim to have, arising on or before the date he
5 signed this Agreement including without limitation to, any claims relating to or arising out of any
6 aspect of his relationship with Zero Motorcycles, along with a General Release of Released Parties.
7 The release by Plaintiff includes a waiver of his individual rights under Section 1542 of the Civil Code
8 of the State of California, which provides:

9 **A general release does not extend to claims that the creditor or**
10 **releasing party does not know or suspect to exist in his or her favor**
11 **at the time of executing the release and that, if known by him or her,**
 would have materially affected his or her settlement with the debtor
 or released party.

12 Thus, subject to and in accordance with this Agreement, even if Plaintiff may hereafter discover facts
13 in addition to or different from those he now knows or believes to be true, Plaintiff is deemed to have
14 fully, finally, and forever settled and released any and all claims against the Released Parties that were
15 alleged or could have been alleged in the Lawsuit, as well as any other claims, whether known or
16 unknown, suspected or unsuspected, contingent or non-contingent, that now exist, upon any theory of
17 law or equity, including without limitation, conduct which is negligent, intentional, with or without
18 malice, or a breach of any duty, law, or rule, without regard to the subsequent discovery or existence
19 of such different or additional facts (the "Plaintiff's Released Claims").

20 **4. Payments under the Settlement.** In consideration of the mutual covenants and
21 promises set forth herein, Defendant agrees to make a total payment under this Agreement in an
22 amount up to but not to exceed Four Hundred Twenty-Five Thousand Dollars (\$425,000.00) in full
23 and complete settlement of the Lawsuit (the "Gross Settlement Amount"). In no event shall Defendant
24 be required to pay any amount above the Gross Settlement Amount under this Agreement, except that
25 the payment of employer's share of payroll taxes and contributions in connection with the wages
26 portion of the payouts to Class Members will be in addition to the Gross Settlement Amount. The
27 Parties agree that the Gross Settlement Amount will be paid by Defendant on a non-reversionary basis
28 and no portion of the Gross Settlement Amount will revert to Defendant. The Parties agree, subject to

1 Court approval, that the Gross Settlement Amount shall be inclusive of the following:

2 a. Attorneys' Fees and Costs. Plaintiff will apply to the Court for an award of
3 attorneys' fees of no more than Thirty Five Percent (35%) of the Gross Settlement Amount
4 (\$148,750.00) and for an award of reimbursement of actual litigation costs and expenses of up to
5 Twenty Thousand Dollars (\$20,000.00), ("Attorneys' Fees and Costs"). Defendant will not oppose
6 such application.

7 b. Administration Costs. Plaintiff will also apply to the Court for payment to the
8 Settlement Administrator, for the fees and costs of notice and settlement administration not to exceed
9 Twelve Thousand Dollars (\$12,000.00) ("Administration Costs"). Defendant will not oppose such
10 application.

11 c. Enhancement Payment. Plaintiff will apply to the Court for payment in the
12 amount of Seven Thousand Five Hundred Dollars (\$7,500.00) for his services and responsibilities in
13 prosecuting the Lawsuit, and for his role as class representative and private attorney general
14 ("Enhancement Payment"). Defendant will not oppose such application.

15 d. PAGA Payment. The amount of Forty Thousand Dollars (\$40,000.00) is
16 allocated to penalties pursuant to California Labor Code Section 2698, *et seq.* ("PAGA Payment").
17 Pursuant to California Labor Code Section 2699(i), seventy-five percent (75%) of the PAGA Payment,
18 or Thirty Thousand Dollars (\$30,000.00), will be payable to the LWDA, and twenty-five percent
19 (25%), or Ten Thousand Dollars (\$10,000.00), will be payable to all Class Members, on a pro-rata
20 Workweeks basis (*i.e.*, individual recovery depends on each Class Member's ratio of his or her
21 Workweeks relative to the total of Workweeks of all Class Members) worked during the PAGA Period,
22 and irrespective of whether the Class Member requests exclusion.

23 e. All Payments to Class Members. The portion of the Gross Settlement Amount
24 available for distribution to the Class Members shall be calculated by subtracting the amounts awarded
25 for Attorneys' Fees and Costs, Administration Costs, Enhancement Payment, and the PAGA Payment
26 from the Gross Settlement Amount ("Net Settlement Amount"). The Net Settlement Amount will be
27 distributed to Class Members who do not timely request exclusion from the Settlement on a *pro rata*
28 basis, based on Workweeks. The Settlement Administrator will determine each participating Class

Member's individual Workweeks in accordance with Paragraph A.15. The sum of all Class Members' individual Workweeks will be the "Total Workweeks." The Net Settlement Amount will be divided by the Total Workweeks to yield the "Workweek Value." Each Class Member's individual settlement payments will be determined by multiplying his or her individual Workweeks by the Workweek Value. Class Members' individual settlement payment is subject to withholding of employee-side payroll taxes owed on any amounts allocated as taxable wages.

5. No Credit Toward Benefit Plans. Payments made to Plaintiff and the Class under this Agreement shall not be utilized to calculate any additional benefits under any benefit plans to which they may be eligible, including, but not limited to, profit-sharing plans, bonus plans, 401(k) plans, stock purchase plans, vacation plans, sick leave plans, PTO plans, and any other benefit plan. Rather, it is the Parties' intention that this Agreement will not affect any rights, contributions, or amounts to which Plaintiff and/or any Class Member may be entitled under any benefit plans. The Parties agree that any payments to Class Members, including the Enhancement Payment paid to Plaintiff under the terms of this Agreement do not represent any modification of Class Members' or Plaintiff's previously credited hours of service or other eligibility criteria under any employee pension benefit plan, employee welfare benefit plan, or any other plan or program, sponsored by Defendant. Further, any payments and the Enhancement Payment paid hereunder shall not be considered "compensation" in any year for purposes of determining eligibility for, or benefit accrual within, an employee pension benefit plan, employee welfare benefit plan, or any other plan or program sponsored by Defendant.

6. Taxation of Settlement Proceeds.

a. The Parties agree that twenty percent (20%) of each individual settlement payment will be considered taxable wages, subject to normal payroll taxes and withholdings, and will be reported as such to each Class Member on a W-2 Form. The Parties agree that eighty percent (80%) of each individual settlement payment will be considered interest and penalties and will be reported as such to each Class Member on an IRS Form 1099 (if required).

b. The Settlement Administrator shall calculate and remit to applicable taxing authorities sufficient amounts for the employee and employer taxes. Any funds returned by taxing

1 authorities due to cancellation of any individual settlement checks will be transmitted in accordance
2 with this Agreement, the same as all other residual funds associated with individual settlement checks.

3 c. The Settlement Administrator will issue appropriate tax forms to each Class
4 Member consistent with the foregoing breakdown.

5 d. Class Counsel will be issued an IRS Form 1099 for Attorneys' Fees and Costs
6 awarded by the Court. Except as provided herein, each of the Parties shall bear his, her, their, or its
7 own attorneys' fees, costs, and expenses incurred in the prosecution, defense, or settlement of the
8 Lawsuit. Plaintiff has confirmed that, other than Class Counsel, he has no other attorney representing
9 him in the Lawsuit and no other attorney has any claims to any attorneys' fees or costs in the Lawsuit
10 or under this Agreement.

11 e. Plaintiff will be issued an IRS Form 1099 for any Enhancement Payment. The
12 Enhancement Payment payable to Plaintiff shall be in addition to the individual settlement payment
13 he is contemplated to receive under the Settlement.

14 f. Circular 230 Disclaimer: EACH PARTY TO THIS AGREEMENT (FOR
15 PURPOSES OF THIS SECTION, THE "ACKNOWLEDGING PARTY" AND EACH PARTY TO
16 THIS AGREEMENT OTHER THAN THE ACKNOWLEDGING PARTY, AN "OTHER PARTY")
17 ACKNOWLEDGES AND AGREES THAT (1) NO PROVISION OF THIS AGREEMENT, AND
18 NO WRITTEN COMMUNICATION OR DISCLOSURE BETWEEN OR AMONG THE PARTIES
19 OR THEIR ATTORNEYS AND OTHER ADVISERS, IS OR WAS INTENDED TO BE, NOR
20 SHALL ANY SUCH COMMUNICATION OR DISCLOSURE CONSTITUTE OR BE
21 CONSTRUED OR BE RELIED UPON AS, TAX ADVICE WITHIN THE MEANING OF UNITED
22 STATES TREASURY DEPARTMENT CIRCULAR 230 (31 CFR PART 10, AS AMENDED); (2)
23 THE ACKNOWLEDGING PARTY (A) HAS RELIED EXCLUSIVELY UPON HIS OR ITS OWN,
24 INDEPENDENT LEGAL AND TAX COUNSEL FOR ADVICE (INCLUDING TAX ADVICE) IN
25 CONNECTION WITH THIS AGREEMENT, (B) HAS NOT ENTERED INTO THIS AGREEMENT
26 BASED UPON THE RECOMMENDATION OF ANY OTHER PARTY OR ANY ATTORNEY OR
27 ADVISOR TO ANY OTHER PARTY, AND (C) IS NOT ENTITLED TO RELY UPON ANY
28 COMMUNICATION OR DISCLOSURE BY ANY ATTORNEY OR ADVISER TO ANY OTHER

PARTY TO AVOID ANY TAX PENALTY THAT MAY BE IMPOSED ON THE
ACKNOWLEDGING PARTY; AND (3) NO ATTORNEY OR ADVISER TO ANY OTHER
PARTY HAS IMPOSED ANY LIMITATION THAT PROTECTS THE CONFIDENTIALITY OF
ANY SUCH ATTORNEY'S OR ADVISER'S TAX STRATEGIES (REGARDLESS OF WHETHER
SUCH LIMITATION IS LEGALLY BINDING) UPON DISCLOSURE BY THE
ACKNOWLEDGING PARTY OF THE TAX TREATMENT OR TAX STRUCTURE OF ANY
TRANSACTION, INCLUDING ANY TRANSACTION CONTEMPLATED BY THIS
AGREEMENT.

g. Defendant, Defendant's Counsel, the Settlement Administrator, and Class
Counsel make no representation as to the tax treatment or legal effect of the payments called for
hereunder, and Plaintiff and the Class Members are not relying on any statement, representation, or
calculation by Defendant, Defendant's Counsel, Class Counsel, or by the Settlement Administrator in
this regard. Plaintiff and the Class Members understand and agree that they will be solely responsible
for the payment of any and all taxes and penalties assessed on their respective payments described
herein and will defend, indemnify, and hold Defendant, Defendant's Counsel, Class Counsel and the
Settlement Administrator free and harmless from and against any claims resulting from treatment of
such payments as non-taxable penalties/damages.

7. Notice Procedure.

a. Within fifteen (15) calendar days of the Court's entry of the order granting
preliminary approval, Defendant shall provide the Settlement Administrator a list of all Class
Members, including full name, last known mailing address, last known telephone number, Social
Security number and start and end dates of employment in an hourly-paid or non-exempt position at
any of Defendant's locations in California during the Class Period.

b. Each Class Member's total Workweeks will be calculated by the Settlement
Administrator, based on the data provided by Defendant. The Class Member information and any
other data provided by Defendant to the Settlement Administrator shall be treated as confidential and
shall not be used by the Settlement Administrator for any purpose other than as permitted by this
Agreement. The Settlement Administrator will keep the list confidential, use it only for the purposes

described herein, and ensure that any other communications to Class Members shall not include the Class Members' Social Security Number except for the last four digits.

c. The Settlement Administrator shall be responsible for:

- i. Mailing the Class Notice to the Class Members as directed by the Court;
- ii. Consulting with counsel for the Parties concerning any relevant issue, including (without limitation) the estimated amounts of individual settlement payments;
- iii. Receiving and processing Workweek Disputes and rejecting timely or improper Workweek Disputes;
- iv. Keeping track of Requests for Exclusion, and rejecting timely or improper Requests for Exclusion;
- v. Keeping track of Objections that it receives;
- vi. Calculation and distribution of payments in accordance with this Agreement and the Court's orders;
- vii. Providing weekly status reports to counsel for the Parties, including: (a) the number of Class Notices mailed; (b) the number of Workweek Disputes received; (c) the number of Objections received; and (d) the number of Requests for Exclusion received;
- viii. No later than twenty-one (21) calendar days before the final approval hearing, preparing and providing to Class Counsel and Defendant's Counsel, for filing with the Court in support of Plaintiff's motion for final approval of the Settlement, a declaration of due diligence setting forth its compliance with its obligations under this Agreement;
- ix. Notifying Defendant's Counsel, within three (3) business days after the Effective Date, of the wiring instructions to fund the Gross Settlement Amount, which must be paid by Defendant in the amounts and in accordance with the deadlines set forth in in this Agreement;
- x. Issuing all appropriate and necessary tax forms, as contemplated above,
- xi. Such other tasks as the Parties mutually agree or the Court orders the Settlement Administrator to perform, including responding to questions from Class Members.

d. Within thirty (30) calendar days after entry of the Court's order granting preliminary approval of the Settlement, the Settlement Administrator shall mail the Class Notice to

1 the Class via first class U.S. mail, using the most current mailing address available after a National
2 Change of Address search. The Class Notice shall state an estimate of each Class Member's respective
3 individual settlement payment and the number of Workweeks credited to him or her.

4 e. Any Class Notice returned to the Settlement Administrator as undelivered within
5 thirty (30) calendar days of initial mailing and bearing a forwarding address shall be re-mailed by the
6 Settlement Administrator within three (3) business days following receipt of the returned mail. For
7 any such Class Notice returned to the Settlement Administrator without a forwarding address, the
8 Settlement Administrator shall first conduct a National Change of Address search as required for
9 undeliverable notices, followed by a computer/SSN and "skip trace" search to obtain an updated
10 address, and shall promptly re-mail the Class Notice to any newly-found address or addresses. The
11 Settlement Administrator shall also re-mail by first class U.S. mail any such Class Notice returned by
12 the Post Office with a forwarding address. It shall be conclusively presumed that those Class Members
13 whose re-mailed Class Notice is not returned to the Settlement Administrator as undeliverable within
14 five (5) calendar days after re-mailing, received the Class Notice.

15 f. Class Counsel shall provide the Court with a declaration from the Settlement
16 Administrator confirming that the Class Notice was mailed to all Class Members as required by this
17 Agreement, as well as any additional information Class Counsel deems appropriate to provide to the
18 Court, before the final approval hearing.

19 g. Class Members are not required to submit a claim form to receive an individual
20 settlement payment. The Class Notice will state that Class Members who wish to receive individual
21 settlement payments need not do anything except, they must not submit a valid and timely Request for
22 Exclusion and they must keep the Settlement Administrator apprised of a current mailing address in
23 order to receive an individual settlement check following the Effective Date of the Settlement.

24 **8. Submission of Workweek Disputes.**

25 a. The Class Notice will provide that Class Members who wish to dispute the
26 Workweeks set forth on the Class Notice must timely submit to the Settlement Administrator a fully
27 completed and signed written dispute ("Workweek Dispute"). To be timely, a Workweek Dispute must
28 be mailed to the Settlement Administrator and postmarked on or before the Response Deadline.

1 Untimely Workweek Disputes may be summarily rejected by the Settlement Administrator, in
2 consultation with Class Counsel and Defendant's Counsel.

3 b. A Workweek Dispute must: (1) be signed by the Class Member (2) contain the
4 case name and case number of the Lawsuit; (3) contain the Class Member's full name, telephone
5 number, mailing address, and e-mail address; (4) clearly state that the number of Workweeks attributed
6 to the Class Member in the Class Notice is incorrect and clearly state the number of Workweeks that
7 the Class Member contends is correct; and (5) provide facts and/or documents supporting the number
8 of Workweeks the Class Member contends is correct.

9 c. If there is a dispute, the Settlement Administrator will consult with the Parties to
10 determine whether an adjustment is warranted. The Settlement Administrator shall determine the
11 eligibility for, and the amounts of, any individual settlement payments under the terms of this
12 Agreement. The Settlement Administrator's determination of the eligibility for and amount of any
13 individual settlement payment shall be binding upon the Class Member and the Parties.

14 **9. Pro-Rata Increase of Gross Settlement Amount.**

15 Defendant's best estimate of the Class size as of January 25, 2021 is 113 individuals, and
16 Plaintiff is entering into this Agreement based on that representation. In the event it is determined that
17 the actual number of Class Members exceeds 113 by more than 10%, then the Gross Settlement
18 Amount shall be increased by the percentage amount in excess of 10%. For example, if the actual
19 number of Class Members is determined to be 11% higher than 113, the Gross Settlement Amount
20 shall be increased by 1%. However, the Gross Settlement Amount will not be reduced based on
21 Defendant's estimated Class size.

22 **10. Request For Exclusion Procedure.**

23 a. Class Members will have until the Response Deadline to mail by first class U.S.
24 mail, with proof of date of submission to be the postmark date, a written request to opt out of the
25 Settlement ("Request for Exclusion"). Unless a Class Member submits a timely and valid Request for
26 Exclusion, he/she shall be bound by the terms and conditions of this Agreement, including the release
27 of claims as set forth herein.

1 b. A Request for Exclusion, in order to be deemed valid, must: (1) be signed by
2 the Class Member; (2) contain the case name and case number of the Lawsuit; (3) contain the Class
3 Member's full name, telephone number, and mailing address; and (4) clearly state that the Class
4 Member wants to be excluded from the Settlement.

5 c. Upon receipt of any timely Request for Exclusion, the Settlement Administrator
6 shall review the request to verify the information contained therein and confirm that the request
7 complies with the requirements of this Agreement.

8 d. Any Class Member who fails to submit via first class U.S. mail a timely,
9 complete, and valid Request for Exclusion shall be barred from opting out of this Settlement. The
10 Settlement Administrator shall not review or consider any Request for Exclusion postmarked after the
11 Response Deadline. Under no circumstances shall the Settlement Administrator have the authority to
12 extend the Response Deadline for Class Members to file a Request for Exclusion, except as ordered
13 by the Court or mutually agreed by the Parties.

14 **11. Defendant's Right To Cancel.**

15 a. PAGA Release. As obtaining a PAGA release is a material aspect of this
16 Settlement and the agreed upon Gross Settlement Amount, in the event a PAGA release cannot be
17 successfully included as part of the Settlement for whatever reason, Defendant shall have the right to
18 declare the Settlement null and void.

19 b. Request for Exclusion. If ten percent (10%) or more of the Class Members
20 submit a timely and valid Request for Exclusion, Defendant shall have the sole and absolute discretion
21 to withdraw from this Agreement by providing written notice of such withdrawal to Class Counsel.
22 The Settlement Administrator shall notify Class Counsel and Defendant's Counsel of the total number
23 of valid Requests for Exclusion as soon as practicable, but no later than ten (10) days after the
24 expiration of the Response Deadline. If Defendant elects to withdraw from this Agreement,
25 Defendant's Counsel shall notify Class Counsel no later than ten (10) days after receiving notice of
26 the number of valid Requests for Exclusion from the Settlement Administrator. In the event that
27 Defendant elects to withdraw as set forth in this provision, the withdrawal shall have the same effect
28 as a termination of this Agreement for failure to satisfy a condition of settlement and the Agreement

1 shall become null and void and have no further force or effect. If Defendant exercises its option to
2 terminate this Settlement, it shall pay all Administration Costs incurred up to the date of and as a result
3 of the termination.

4 **12. Objections to Settlement.**

5 a. Any Class Member may object to the Settlement by mailing a written objection
6 to the Settlement Administrator (“Objection”). To be timely, Objections must be mailed to the
7 Settlement Administrator, postmarked on or before the Response Deadline.

8 b. An Objection must: (1) be signed by the Class Member; (2) contain the case
9 name and case number of the Lawsuit; (3) contain the Class Member’s full name, telephone number,
10 and mailing address; (4) clearly state the factual and legal basis for objecting to the Settlement; (5)
11 indicate whether the Class Member is represented by counsel and identify said counsel; and (6)
12 indicate whether the Class Member intends to appear at the final approval hearing and seeks to be
13 heard at the final approval hearing.

14 c. If a Class Member does not submit an Objection in accordance with the terms
15 of this Settlement Agreement, he or she shall conclusively be deemed to have waived his or her right
16 to object to the Settlement, and the Class Member will be barred from asserting any objection. The
17 Settlement Administrator will provide the Parties’ counsel with any Objections received and also
18 attach the Objections as exhibits to its declaration regarding due diligence that will be filed with the
19 Court in advance of the final approval hearing.

20 **13. Settlement Proceeds Distribution Deadlines.**

21 a. Defendant shall fund the Gross Settlement Amount within ten (10) business
22 days after the Effective Date. If the Gross Settlement Amount increases pursuant to Paragraph C.9.,
23 then the amount to be paid by Defendant will proportionally increase.

24 b. No later than fourteen (14) calendar days after Defendant fully funds the Gross
25 Settlement Amount, the Settlement Administrator shall distribute payments in accordance with this
26 Agreement and the Court’s orders, as follows: (i) full payment of the Enhancement Payment to
27 Plaintiff; (ii) full payment of the LWDA’s portion of the PAGA Payment to the LWDA; (iii) full
28 payment of individual settlement payments to participating Class Members; (iv) remittance of all taxes

1 and withholdings to the appropriate taxing authorities; (v) full payment of Attorneys' Fees and Costs
2 to Class Counsel; and (vi) full payment of Administration Costs to the Settlement Administrator.

3 c. Class Members will be issued their individual settlement payments by way of
4 one (1) check. Each check will be valid for a period of one hundred and eighty (180) calendar days
5 from the date of issuance of the check, and after this time period, the check(s) will be cancelled and
6 the funds associated with such cancelled checks will be transmitted to Legal Services for Children in
7 conformity with the requirements of California Code of Civil Procedure section 384. The Parties agree
8 that Code of Civil Procedure section 384 is not applicable to any portion of the Gross Settlement
9 Amount (including but not limited to any portion of the Net Settlement Amount), except for the
10 residual described in this Paragraph.

11 d. The remittance of all Court ordered and approved payments, under this
12 Agreement, to the Settlement Administrator shall constitute the full and complete discharge of the
13 entire obligation of Defendant under this Agreement.

14 e. No person shall have any claim against the Settlement Administrator,
15 Defendant, Class Counsel, Defendant's Counsel, or any other agent designated by Plaintiff or
16 Defendant based upon the distribution of payments made in accordance with this Agreement or further
17 orders of the Court.

18 f. Defendant shall not be obligated to make any payments contemplated by this
19 Agreement unless and until the Court enters the order granting final approval, and after the Effective
20 Date, and no amounts will be owed or payable until all appeals or other collateral attack have lapsed
21 or have been favorably resolved in favor of the Settlement and no further challenge to the Settlement
22 is possible.

23 **14. Binding Effect of Agreement on Class.** Subject to final approval, the Class shall be
24 bound by this Agreement and shall be enjoined from pursuing, or seeking to reopen, Released Claims
25 against the Released Parties.

26 **15. Provisional Approval of Settlement.** After execution of this Agreement, Plaintiff
27 shall file a motion requesting preliminary approval of the Settlement. Defendant shall not oppose the
28 motion so long as the motion and supporting papers are consistent with the terms of this Agreement.

1 By way of the motion, the Court will be requested to enter an order that:

- 2 a. Preliminarily approves this Agreement and finds its terms to be fair, reasonable
- 3 and adequate;
- 4 b. Conditionally certifies the Class, for purposes of settlement only;
- 5 c. Preliminarily appoints Plaintiff as representative of the Class, for settlement
- 6 purposes only;
- 7 d. Preliminarily appoints Class Counsel as counsel for the Class, for settlement
- 8 purposes only;
- 9 e. Approves and appoints the Settlement Administrator to administer the
- 10 Settlement;
- 11 f. Approves the form and content of the Class Notice and requires that it be sent
- 12 to Class Members by first class U.S. mail; and,
- 13 g. Schedules the final approval hearing.

14 **16. Non-Interference with Settlement Administration.** The Parties and their counsel
15 agree that they shall not seek to solicit or otherwise encourage Class Members to submit Requests for
16 Exclusion or Objections to the Settlement or to appeal from the order granting final approval.

17 **17. Final Approval of Settlement.** Following final approval of this Settlement, Plaintiff
18 will request, and Defendant will concur in said request, that the Court enter a proposed final approval
19 order drafted by Plaintiff in the form that is consistent with this Agreement and subject to prior review
20 and approval by Defendant. Plaintiff will request that the Court find that this Settlement is fair, just,
21 equitable, reasonable, adequate and in the best interests of the Class, enter judgment in accordance
22 with California Rules of Court Rule 3.769, and require the Parties to carry out the provisions of this
23 Agreement.

24 **18. Voiding of Agreement if Settlement Not Finalized Or for Failure to Satisfy**
25 **Conditions.**

- 26 a. The Court may award less to Plaintiff, Class Counsel, the Settlement
- 27 Administrator, and/or the LWDA than is provided for herein, without impacting the validity and
- 28 enforceability of the Agreement.

1 b. If for any reason the Settlement is terminated as permitted under this Agreement
2 or does not otherwise become final:

3 i. The Settlement shall be null and void and the orders and judgment to be
4 entered pursuant to this Agreement shall be vacated; and the Parties will be returned to the status quo
5 prior to entering into this Agreement with respect to the Lawsuit, as if the Parties had never entered
6 into this Agreement.

7 ii. The Agreement and all negotiations, court orders and proceedings
8 relating thereto shall be without prejudice to the rights of any and all Parties hereto and Class Members,
9 who shall be restored to their respective positions existing prior to the execution of this Agreement,
10 and evidence relating to the Agreement and all negotiations shall not be admissible or discoverable in
11 the litigation and/or Lawsuit or otherwise.

12 iii. Defendant will not have waived, and instead expressly reserves, its
13 rights to challenge the continuing propriety of class certification or representative adjudication for any
14 purpose.

15 iv. Plaintiff and Class Counsel will not have waived, and instead expressly
16 reserve, their rights to move for collective and/or class certification and seek representative
17 adjudication.

18 v. To the extent one exists, the Court's order granting preliminary approval
19 of the Settlement shall be vacated in its entirety and neither this Agreement nor any other document
20 in any way relating to any of the foregoing, shall be relied upon, referred to, or used in any way for
21 any purpose in connection with any further proceedings in this or any related action, including class
22 certification proceedings.

23 **19. No Publicity.** The Parties and their counsel will neither initiate nor respond to public
24 relations or media inquiries about the Settlement except as required by the settlement approval process.
25 In addition, the Parties and their counsel agree that they will not engage in any advertising or distribute
26 any marketing materials relating to the settlement of the Lawsuit in any manner that identifies
27 Defendant, including but not limited to any postings on any websites maintained by Class Counsel.
28 However, Defendant retains the right to provide information about the litigation to actual or potential

1 clients or business partners or as otherwise required by law.

2 **20. Notices.** All notices, requests, demands, and other communications required or
3 permitted to be given pursuant to this Agreement shall be in writing, and shall be delivered by first
4 class U.S. mail to the Settlement Administrator, as follows:

5 Atticus Administration
6 1250 Northland Drive, Suite 240
7 Mendota Heights, MN 55120

8 For Plaintiff and the Class:

9 Edwin Aiwazian
10 Arby Aiwazian
11 Lawyers for Justice, PC
12 410 West Arden Avenue, Suite 203
13 Glendale, California 91203

14 Anthony J. Orshansky
15 Jennifer L. Connor
16 CounselOne, PC
17 9301 Wilshire Boulevard Suite 650
18 Beverly Hills, California 90210

19 For Defendant:

20 Julie A. Marquis
21 Nicole M. Cloudsley
22 Freeman Mathis & Gary, LLP
23 1010 B Street, Suite 300
24 San Rafael, California 94901

25 **21. Modification in Writing.** This Agreement may be altered, amended, modified or
26 waived, in whole or in part, only in a writing signed by counsel for the Parties and approved by the
27 Court. This Agreement may not be amended, altered, modified or waived, in whole or in part, orally.

28 **22. Ongoing Cooperation.** Plaintiff and Defendant and each respective counsel shall
execute all documents and perform all acts necessary and proper to effectuate the terms of this
Agreement. The executing of documents must take place prior to the final approval hearing.

23. Binding on Successors. This Agreement shall be binding on and shall inure to the
benefit of the Parties and their respective successors, assigns, executors, administrators, heirs, and
legal representatives.

24. Entire Agreement. This Agreement constitutes the full, complete, and entire

1 understanding, agreement, and arrangement between the Parties with respect to the settlement of the
2 Lawsuit, Released Claims, and Plaintiff's Released Claims. This Agreement supersedes any and all
3 prior oral or written understandings, agreements, and arrangements between the Parties with respect
4 to the settlement of the Lawsuit, Released Claims, and Plaintiff's Released Claims. Except as to those
5 set forth and included expressly in this Agreement, there are no other agreements, covenants, promises,
6 representations, or arrangements between the Parties with respect to the settlement of the Lawsuit,
7 Released Claims, and Plaintiff's Released Claims.

8 **25. Execution in Counterparts.** This Agreement may be signed in one or more
9 counterparts and electronic signatures are acceptable. All executed copies of this Agreement, and
10 photocopies thereof (including facsimile copies of the signature pages), shall have the same force and
11 effect and shall be as legally binding and enforceable as the original.

12 **26. Captions.** The captions and section numbers in this Agreement are inserted for the
13 reader's convenience and in no way define, limit, construe, or describe the scope or intent of the
14 provisions of this Agreement.

15 **27. Governing Law.** This Agreement shall be interpreted, construed, enforced, and
16 administered in accordance with the laws of the State of California, without regard to conflict of law
17 rules.

18 **28. Reservation of Jurisdiction.** Notwithstanding entry and filing of the final approval
19 order, the Court shall retain jurisdiction for purposes of interpreting and enforcing the terms of this
20 Agreement.

21 **29. Mutual Preparation.** The Parties have had a full opportunity to negotiate the terms
22 and conditions of this Agreement. Accordingly, this Agreement shall not be construed more strictly
23 against one Party than another merely by virtue of the fact that it may have been prepared by counsel
24 for one of the Parties, it being recognized that, because of the arms-length negotiations between the
25 Parties, all Parties have contributed to the preparation of this Agreement.

26 **30. Warranties and Representations.** With respect to themselves, each of the Parties to
27 this Agreement and/or their agents or counsel represent, covenant, and warrant that (a) they have full
28 power and authority to enter into and consummate all transactions contemplated by this Agreement

and have duly authorized the execution, delivery, and performance of this Agreement and (b) the person executing this Agreement has the full right, power, and authority to enter into this Agreement on behalf of the Party for whom he/she has executed this Agreement, and the full right, power, and authority to execute any and all necessary instruments in connection herewith, and to fully bind such Party to the terms and obligations of this Agreement.

31. Representation by Counsel. The Parties acknowledge that they have been represented by counsel throughout all negotiations that preceded the execution of this Agreement and that this Agreement has been executed with the consent and advice of counsel. Further, Plaintiff and Class Counsel warrant and represent, to their knowledge, that there are no liens on the Agreement.

32. Authorization by Plaintiff. Plaintiff authorizes Class Counsel to sign this Agreement and further agrees not to request to be excluded from the Settlement.

IT IS SO AGREED:

Dated: _____, 2021

Plaintiff Edgar Gutierrez

Dated: December 15, 2021

Name: CURTIS JACKS
Title: CEO

On Behalf of Defendant Zero Motorcycles, Inc.

APPROVED AS TO FORM

Dated: _____, 2021

Anthony J. Orshansky
Jennifer L. Connor
CounselOne, PC
Attorneys for Plaintiff Edgar Gutierrez

Dated: December 17, 2021

Julie A. Marquis
Nicole M. Cloudsley
Freeman Mathis & Gary, LLP
Attorneys for Defendant Zero Motorcycles, Inc.

1 and have duly authorized the execution, delivery, and performance of this Agreement and (b) the
2 person executing this Agreement has the full right, power, and authority to enter into this Agreement
3 on behalf of the Party for whom he/she has executed this Agreement, and the full right, power, and
4 authority to execute any and all necessary instruments in connection herewith, and to fully bind such
5 Party to the terms and obligations of this Agreement.

6 **31. Representation by Counsel.** The Parties acknowledge that they have been represented
7 by counsel throughout all negotiations that preceded the execution of this Agreement and that this
8 Agreement has been executed with the consent and advice of counsel. Further, Plaintiff and Class
9 Counsel warrant and represent, to their knowledge, that there are no liens on the Agreement.

10 **32. Authorization by Plaintiff.** Plaintiff authorizes Class Counsel to sign this Agreement
11 and further agrees not to request to be excluded from the Settlement.

12
13 **IT IS SO AGREED:**

14 Dated: 12 / 06 / 2021, 2021

Edgar Gutierrez

Plaintiff Edgar Gutierrez

16
17 Dated: _____, 2021

Name: _____

Title: _____

On Behalf of Defendant Zero Motorcycles, Inc.

19
20 **APPROVED AS TO FORM**

21
22 Dated: 12-03, 2021

Anthony J. Orshansky
Anthony J. Orshansky
Jennifer L. Connor
CounselOne, PC
Attorneys for Plaintiff Edgar Gutierrez

25
26 Dated: _____, 2021

Julie A. Marquis
Nicole M. Cloudsley
Freeman Mathis & Gary, LLP
Attorneys for Defendant Zero Motorcycles, Inc.

Exhibit 1

Edgar Gutierrez v. Zero Motorcycles, Inc.
SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CRUZ
(CASE NO. 19-CV-03725)

NOTICE OF CLASS ACTION AND PAGA SETTLEMENT (“NOTICE”)

YOU MAY BE ELIGIBLE TO RECEIVE A SETTLEMENT PAYMENT. PLEASE READ THIS NOTICE CAREFULLY.

The Santa Cruz County Superior Court authorized this Notice. This is not an advertisement. This is not a solicitation from a lawyer.

- If you are a current or former hourly-paid or non-exempt employee who worked for Zero Motorcycles, Inc. (“Defendant”) within the State of California at any time from December 16, 2015 through June 13, 2021 (the “Class Period”), you may be able to collect money from a class action settlement.
- This Notice relates to a proposed settlement of class action litigation brought against Defendant by a former employee, Edgar Gutierrez (“Plaintiff”). The lawsuit, Case No. 19-CV-03725, is pending in the Superior Court for the State of California, County of Santa Cruz (the “Lawsuit”).

I. INTRODUCTION

This Notice explains a proposed settlement of the Lawsuit, and informs you of your legal rights under that proposed settlement. You are receiving this Notice because Defendant’s records indicate you actively worked for Defendant as a non-exempt employee in the State of California during the Class Period.

The Court has granted preliminary approval of the settlement and the Court ordered this Notice be sent to you because you may be entitled to money under the settlement and because the settlement affects your legal rights.

II. DESCRIPTION OF THE LAWSUIT

Plaintiff’s Claims. On December 16, 2019, Plaintiff initiated this Lawsuit on behalf of himself and a class of similarly-situated individuals against Defendant. On behalf of the putative class, Plaintiff alleged causes of action for: (a) failure to pay all minimum and overtime wages for all hours worked including, but not limited to, those resulting from rounding, miscalculated regular rate, and off-the-clock work (Labor Code §§ 510, 1194, 1197, 1197.1, and 1198); (b) failure to provide timely and compliant duty-free meal periods and pay premiums owed thereon (Labor Code §§ 226.7 and 512); (c) failure to provide timely and compliant duty-free rest breaks and pay premiums owed thereon (Labor Code § 226.7); (d) failure to reimburse all necessary business expenses incurred (Labor Code §§ 2800, 2802); (e) failure to maintain and furnish accurate itemized wage statements (Labor Code §§ 226, 1174(d)); (f) failure to timely pay wages during employment and all final wages owed upon separation (Labor Code §§ 201-203, 204); and (g) engaging in unfair and unlawful business practices (Business & Professions Code § 17200 *et seq.*) Subsequently, and after exhaustion of notice to the Labor Workforce Development Agency (“LWDA”), Plaintiff filed the operative First Amended Complaint adding a cause of action for violation of California’s Private Attorneys General Act of 2004 (Labor Code § 2699) (collectively, “Claims”).

Defendant expressly denies any and all liability and wrongdoing. There has been no finding of wrongdoing by Defendant. Defendant maintains that, at all times, it has complied in good faith with California wage and hour laws and has dealt legally and fairly with Plaintiff and all employees. Defendant further denies that, for any purpose other than settling this Lawsuit, these Claims are appropriate for class or representative treatment. Defendant has entered into this settlement solely with the intention to avoid costly, disruptive, and time-consuming litigation.

The Court has not ruled on the merits of Plaintiff's Claims. By approving the settlement and issuing this Notice, the Court is not suggesting which side would win or lose this case if it went to trial. However, to avoid additional expense, inconvenience, and the inherent risks of continued litigation, the parties and their respective counsel have concluded that it is in their respective best interests and the interests of the Class Members to settle the Lawsuit on the terms summarized in this Notice. The parties believe the settlement is a fair, reasonable and adequate way to resolve the disputed Claims.

Under this settlement, the following Class will be certified under California law for settlement purposes only:

"Class" or "Class Members": All current and former hourly-paid or non-exempt employees who worked for Defendant Zero Motorcycles, Inc. within the State of California at any time from December 16, 2015 through June 13, 2021.

IF YOU STILL WORK FOR DEFENDANT, PARTICIPATION IN THIS SETTLEMENT WILL NEITHER AFFECT, NOR DISRUPT YOUR WORK IN ANY MANNER.

California law strictly prohibits retaliation. Defendant is prohibited by law from taking any adverse action against or otherwise retaliating or discriminating against any Class Member because of the Class Member's participation or decision not to participate in this settlement.

III. TERMS OF THE SETTLEMENT

Defendant has agreed to pay a non-reversionary sum of \$425,000.00 (the "Gross Settlement Amount") to resolve the Claims in the Lawsuit. The following sums will be paid from the Gross Settlement Amount: (1) reasonable settlement administration costs to Atticus Administration (the "Settlement Administrator"), not to exceed \$12,000.00; (2) Class Counsel's attorney's fees, not to exceed \$148,750.00; (3) Class Counsel's actual litigation costs and expenses, not to exceed \$20,000.00; (4) class representative service award to Plaintiff, not to exceed \$7,500, for his efforts and risks in assisting with the prosecution of the Lawsuit and in exchange for providing a general release; (5) payment of \$30,000 to the California LWDA.

After deducting the amounts above, the balance of the Gross Settlement Amount will form the "Net Settlement Amount" for distribution to the Class Members who do not timely request exclusion from the settlement.

You can view the Settlement Agreement and other Court documents related to this case by visiting [www._____](http://www._____.).

IV. YOUR INDIVIDUAL SHARE OF THE SETTLEMENT AMOUNT

The individual settlement payment for each Class Member who does not timely request exclusion from the Settlement will be paid from the Net Settlement Amount and will be calculated as follows: The Net Settlement Amount shall be divided by the total compensable workweeks for all Class Members to yield the "Workweek Value." Each Class Member's individual settlement payment will be determined by multiplying his or her individual Workweeks by the Workweek Value.

Workweeks Credited to You. The Workweeks you worked as a qualifying Class Member in California for Defendant during the Class Period – which is from December 16, 2015 through June 13, 2021 - will be calculated based on Defendant's records.

According to Defendant's records:

From December 16, 2015 through June 13, 2021, you were employed by Defendant as an hourly-paid or non-exempt employee in California for [] Workweeks.

If you feel that you were not credited with the correct number of Workweeks, you may submit evidence to the Settlement Administrator postmarked or confirmed received on or before **[Insert Response Deadline]** with documentation to establish the number of Workweeks you claim to have actually worked during the Class Period. **DOCUMENTATION SENT TO THE SETTLEMENT ADMINISTRATOR WILL NOT BE RETURNED OR PRESERVED; DO NOT SEND ORIGINALS.** The parties and Settlement Administrator will promptly evaluate the evidence submitted and discuss in good faith how many Workweeks should be credited. The Settlement Administrator will make the final decision as to how many weeks are credited, and report the outcome to you. If you are unsatisfied with the decision, you may submit an Objection, as discussed below.

Furthermore, **irrespective of whether or not you request exclusion from the settlement**, as a qualifying Class Member you shall also receive your share of the PAGA Payment allocation to all Class Members as part of the individual settlement payment.

Tax Withholdings. Each Class Member's individual settlement payment will be reduced by any legally mandated tax withholdings for each Class Member. Of the amounts paid to individual Class Members, eighty percent (80%) shall be designated as penalties and interest for which an IRS Form 1099 shall be issued and twenty percent (20%) to wages for which an IRS Form W-2 shall be issued.

V. THE RELEASE OF CLAIMS

If the Court approves the settlement, the Court will enter judgment and the settlement agreement will bind all Class Members who have not requested exclusion from the settlement, and will bar all Class Members from bringing certain claims against Defendant as described below.

The settlement includes a release by Class Members who do not submit a timely request to be excluded of Defendant Zero Motorcycles, Inc., and each of its past, present and future employees, officers, directors, partners, shareholders, owners, trustees, representatives, agents, attorneys, parents, subsidiaries, related companies/corporations and/or partnerships, divisions, assigns, predecessors, successors, affiliates, and insurers, and all of their respective past, present and future employees, officers, directors, agents, attorneys, shareholders, owners, parents, subsidiaries, and assigns, and each of them, of and from all Class Members' claims as set forth below:

Class Members' Released Claims: means all claims contained in the operative complaint in the Lawsuit, or that could have been brought in the Lawsuit based on the facts and claims alleged in the operative complaint during the Class Period. This include all claims for unpaid wages, including, failure to pay minimum wages, straight time compensation, overtime compensation, double-time compensation, and interest; the incorrect calculation of the regular rate of pay; wages related to alleged illegal time rounding; non-compliant meal periods and rest periods and compensation related thereto; payment for all hours worked, including off-the-clock work; inaccurate wage statements; failure to keep accurate records; unfair business practices related to the Lawsuit; penalties, including, but not limited to, recordkeeping penalties, wage statement penalties, minimum-wage penalties, and waiting-time penalties; and attorneys' fees and costs; all claims related to the Lawsuit arising under the Wage Orders of the California Industrial Welfare Commission; the California Private Attorneys General Act of 2004; and California Business and Professions Code section 17200, *et seq.* This release excludes the release of claims not permitted by law.

Class Members will be deemed to have acknowledged and agreed that their claims for wages and/or penalties in the Lawsuit are disputed, and that the individual settlement payments constitute payment of all sums allegedly due to them. Class Members will be deemed to have acknowledged and agreed that California Labor Code Section 206.5 is not applicable to the individual settlement payments. That section provides in pertinent part as follows:

“An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made.”

VI. WHAT ARE YOUR OPTIONS?

A. Do Nothing and Receive Your Portion of the Settlement.

You are automatically included as a Class Member and will receive a settlement payment and do not have to take any further action to receive your settlement payment. It is the responsibility of all Class Members to ensure that the Settlement Administrator has your current address on file, or you may not receive important information or a settlement payment. The estimated amount of your settlement payment if you do nothing is included on the attached Share Form.

B. Request To Be Excluded from the Class and the Settlement.

If you **do not** wish to take part in the settlement, you may exclude yourself (*i.e.*, opt-out) by sending to the Settlement Administrator a written Request for Exclusion from the Settlement letter, with your name, address, telephone number, and signature. The written request should state:

“I WISH TO BE EXCLUDED FROM THE CLASS AND SETTLEMENT IN THE EDGAR GUTIERREZ v. ZERO MOTORCYCLES, INC. LAWSUIT. I UNDERSTAND THAT IF I ASK TO BE EXCLUDED FROM THE CLASS, I WILL NOT RECEIVE ANY MONEY FROM THE CLASS SETTLEMENT OF THIS LAWSUIT AND WILL NOT BE RELEASING ANY CLAIMS I MIGHT HAVE.”

Send the Request for Exclusion letter directly to the Settlement Administrator at the following address **postmarked by no later than**[Insert Response Deadline]:

Gutierrez v. Zero Motorcycles, Inc., Settlement Administrator
c/o Atticus Administration
P.O. Box 64053
Saint Paul, Minnesota 55164

Any person who submits a timely Request for Exclusion from the settlement shall, upon receipt, no longer be a Class Member, shall be barred from participating in any portion of the settlement, and shall receive no benefits from the settlement. If you want confirmation of receipt of your Request for Exclusion letter, please send it by U.S. certified mail, return receipt requested and/or contact the Settlement Administrator.

C. Object to the Settlement.

You also have the right to object to the terms of the settlement. However, if the Court rejects your objection, you will still be bound by the terms of the settlement. If you wish to object to the proposed settlement, or any portion of it, you must file with the Settlement Administrator a written objection stating: your name, address, and telephone number; dates of work as an hourly or non-exempt employee in California with Defendant; the case name and number; each specific reason in support of your objection; and any legal support for each objection. Objections must be in writing and must be mailed to the Settlement Administrator at: Gutierrez v. Zero Motorcycles, Inc., Settlement Administrator, c/o Atticus Administration, P.O. Box 64053, Saint Paul, Minnesota 55164, **postmarked by no later than [Response Deadline]** for your objection to be considered. **OBJECTIONS THAT DO NOT INCLUDE ALL REQUIRED INFORMATION, OR THAT ARE NOT SUBMITTED TIMELY, MAY NOT BE CONSIDERED BY THE COURT.**

If you object to the settlement, you will remain a member of the Class, and if the Court approves the settlement, you will receive payment and be bound by the terms of the settlement in the same way as Class Members who do not object. Any Class Member who does not object in the manner provided above shall have waived any objection to the settlement, whether by appeal or otherwise.

D. Your Right to Appear at the Final Approval and Fairness Hearing Through an Attorney or In Person.

If you choose to object to the settlement, you may also appear at the Final Approval and Fairness Hearing scheduled for _____, at _____ in Department 5 of the Santa Cruz County Superior Court, located at 701 Ocean Street, Santa Cruz, California 95060. You have the right to appear either in person or through your own attorney at this hearing. Objections not previously filed in writing in a timely manner as described above will not be considered by the Court. Any attorney who intends to represent an individual objecting to the settlement must file a notice of appearance with the Court and serve counsel for all parties on or before [Response Deadline]. All objections or other correspondence must state the name and number of the case, which is *Edgar Gutierrez v. Zero Motorcycles, Inc.*, Case No. 19-CV-03725.

You can also view the final approval order and final judgment and payment schedule at: www._____.

VII. UPDATE FOR YOUR CHANGE OF ADDRESS?

If you move after receiving this Notice or if it was mis-addressed, you must provide your correct mailing address to the Settlement Administrator as soon as possible. Please send updated address information to the Settlement Administrator at: Gutierrez v. Zero Motorcycles, Inc., Settlement Administrator, c/o Atticus Administration, P.O. Box 64053, Saint Paul, Minnesota 55164. **THIS**

IS IMPORTANT SO THAT FUTURE NOTICES AND/OR THE SETTLEMENT PAYMENT REACH YOU.

VIII. IF THE STIPULATION OF SETTLEMENT AND RELEASE OF CLASS ACTION IS NOT APPROVED

If the settlement is not approved by the Court, or if any of its conditions are not satisfied, the conditional settlement will be voided, no money will be paid, and the case will return to litigation. If that happens, there is no assurance: (1) that the Class will be certified; (2) that any decision at trial would be in favor of Class Members; (3) that a trial decision, if any, would be as favorable to the Class Members as this settlement; or (4) that any favorable trial decision would be upheld if an appeal was filed.

IX. QUESTIONS OR COMMENTS

This Notice summarizes the basic terms of the Lawsuit and proposed settlement. For a more detailed statement of the matters involved in the Lawsuit and proposed settlement, you may refer to the pleadings, Settlement Agreement, and other papers on file with the Santa Cruz County Superior Court.

PLEASE DO NOT CALL OR CONTACT THE COURT FOR MORE INFORMATION ABOUT THIS SETTLEMENT. If you have any questions about the settlement, you may contact the Settlement Administrator at: Gutierrez v. Zero Motorcycles, Inc., Settlement Administrator, c/o Atticus Administration, P.O. Box 64053, Saint Paul, Minnesota 55164 or by e-mail at _____. You may also contact Class Counsel at the address or phone number listed below.

COUNSELONE, P.C.
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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 9301 Wilshire Boulevard, Suite 650,
Beverly Hills, CA 90210..

5 On January 27, 2022, I caused to be served the following document(s) to the address(es)
6 and by the method of service described below:

7 **DECLARATION OF JENNIFER L. CONNOR IN SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

8 Julie A. Marquis, Esq.
9 Nicole Cloudsley, Esq.
10 **FREEMAN, MATHIS & GARY, LLP**
11 1010 B Street, Suite, 300
San Rafael, California 94901
Email: jmarquis@fmglaw.com
Email: ncloudsely@fmglaw.com

12 *Attorneys for Defendants*

13 [X] (BY E-SERVICE) I delivered to ONELEGAL, LLC, an e-filing and e-service
14 provider with the Superior Court of California for the County of Santa Cruz, the
above-described document(s), to be filed and electronically served through the
15 Superior Court's e-filing system on the above registered participants on this date.

16 I declare under penalty of perjury that the above is true and correct.

17 Executed on January 27, 2022 at Beverly Hills, California.

18 
19 _____
Anthony J. Orshansky