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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES
11

12 PAUL E. LOEB, on behalf of himself, all
other similarly situated,

13 *Plaintiff,*

14 vs.

15 ZIPRECRUITER, INC., a Delaware
16 corporation; and DOES 10 through 50,
inclusive,

17 *Defendant.*
18
19
20
21
22
23

Case No. 19STCV11091

Assigned For All Purposes to the Honorable
Lawrence P. Riff, Dept, SSC-7

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND CERTIFICATION OF
SETTLEMENT CLASS; MEMORANDUM
OF POINTS AND AUTHORITIES**

*[Filed concurrently with Declaration of Shaun
Setareh in support thereof and [Proposed] Order]*

Date: November 14, 2022
Time: 11:00 a.m.
Place: Department SSC-7

Complaint Filed: April 3, 2019

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on November 14, 2022 at 11:00 a.m., or as soon thereafter as the
3 matter may be heard in Department SSC-7 of the above-entitled Court located at 312 N. Spring St, Los
4 Angeles, California 90012, Plaintiff PAUL E. LOEB (“Plaintiff”) will and does hereby move this Court
5 for an Order:

- 6 • Preliminarily approving the proposed Stipulation Regarding Class Action and PAGA
7 Settlement;
- 8 • Certifying the Settlement Class;
- 9 • Appointing Plaintiff as the Class Representative;
- 10 • Appointing Shaun Setareh and William M. Pao of Setareh Law Group as Class Counsel;
- 11 • Appointing Simpluris, Inc. as the Settlement Administrator;
- 12 • Directing that notice be mailed to the Settlement Class; and
- 13 • Scheduling a hearing date for the Motion for Final Approval of Class Action Settlement.

14 This motion is made pursuant to California Rules of Court 3.769. This motion will be based
15 upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the
16 Declaration of Shaun Setareh as well as exhibits attached thereto, the arguments of counsel, the
17 documents filed in this action and any other matters as may be properly presented on or before the
18 hearing on this motion.

19
20 DATED: August 10, 2022

SETAREH LAW GROUP

21
22 /s/ Jose Maria D. Patino, Jr.

23 SHAUN SETAREH
24 WILLIAM M. PAO
25 JOSE MARIA D. PATINO, JR.
26 Attorneys for Plaintiff
27 PAUL E. LOEB
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff PAUL E. LOEB (“Plaintiff”) seeks preliminary approval of a non-reversionary class
4 and representative action settlement of Fair Credit Reporting Act (“FCRA”), wage and hour, and Private
5 Attorneys General Act of 2004 (“PAGA”) penalty claims against Defendant ZIPRECRUITER, INC.¹ for
6 a Maximum Settlement Amount (“MSA”) of **\$1,200,00.00**. The Settlement consists of three separate
7 Classes: FCRA Class, consisting of 492 members; Vacation Wage Class, consisting of 407 members;
8 and Wage Statement Class, consisting of 319 members.

9 The Net Settlement Amount (“NSA”) expected to be paid to Class Members – after payment of
10 Class Counsel fees of one-third (1/3) of the MSA (\$400,00.00) and costs of up to \$30,000, settlement
11 administration costs of up to \$12,500, and Plaintiff’s enhancement award of \$20,000 – is **\$ \$737,500.00**.
12 The NSA includes the \$50,000 PAGA allocation of the Settlement, 25% of which (\$12,500) will be paid
13 to PAGA Employees employed from October 30, 2018 to the date of preliminary approval (“PAGA
14 Claim Period”), and 75% of which (\$37,500) will be paid to the California Labor & Workforce
15 Development Agency (“LWDA”) pursuant to PAGA. Based upon the class sizes provided in the
16 Settlement, the estimated payment to each FCRA Class Member will be approximately **\$698.68** and the
17 estimated average payment to each Vacation Wage Class Member (including the Wage Statement
18 Class²) is approximately **\$906.02**, respectively. Plaintiff has obtained a significant monetary recovery for
19 Class Members.

20 The Settlement occurred as a result of extensive, arm’s-length negotiations by experienced
21 counsel after sufficient formal and informal written discovery and investigation into the facts with
22 _____

23 ¹ The Parties executed a Stipulation Regarding Class Action and PAGA Settlement (“Settlement”),
24 attached as **Exhibit 1** to the Declaration of Shaun Setareh filed concurrently herewith.

25 ² All Wage Statement Class Members are also Vacation Wage Class Members. Therefore, although
26 there are two classes (Vacation Wage and Wage Statement), the payments will be based on the
27 workweeks worked during the Vacation Wage Class Period, since any workweeks worked in the shorter
28 Wage Statement Class Period are already accounted for in the Vacation Wage Class Period. Moreover,
because the inaccurate wage statement claim is a derivative claim based only upon Vacation Wage Class
Members’ *final* pay stubs which do not properly show vacation wages paid, the claim has very little
value compared to the claim for non-payment of vacation wages, as shown in Section IV.C.4 below.

guidance of Michael Dickstein. Esq., an experienced and well-respected class action mediator. The Settlement seeks to fully and finally settle and resolve all claims that were pled or could have pled based on the allegations in the operative complaint (“Complaint”) filed with the Court, individually and on behalf of the three Classes. The **FCRA Class** contains all of Defendant’s current and former job applicants and employees in the United States who completed background check authorizations at any time from April 3, 2017 to March 24, 2018. The **Vacation Wage Class** contains all of Defendant’s former full-time employees who separated from employment at any time from April 3, 2016 up to the date of a signed order preliminarily approving the class settlement is filed. The **Wage Statement Class** contains all of Defendant’s former full-time employees who separated from employment at any time from April 3, 2018 up to the date of a signed order preliminarily approving the class settlement is filed. Collectively, the three Classes are referred to as “Settlement Class” or “Class Members.”

Based upon their evaluation, Plaintiff and his counsel, Shaun Setareh and William M. Pao of the Setareh Law Group, have determined that the Settlement is fair, reasonable, adequate and in the best interest of the Class, and they request that this Court grant preliminary approval of the Settlement.

II. THE MAJOR TERMS OF SETTLEMENT

Key provisions of the proposed settlement include the following:

- Defendant stipulates to certification of a Settlement Class for purposes of settlement only.
- Defendant will pay a maximum of **\$1,200,000**, referred to as the MSA.
- Defendant will not oppose Class Counsel’s application for fees of 1/3 of the MSA (**\$400,000**) and costs not to exceed **\$30,000**, to be paid out of the MSA.
- The notice portion of the Settlement will be administered by Simpluris, Inc. (“Simpluris”), whose costs are not expected to exceed **\$12,500** (based upon Simpluris’s actual price quote of **\$9,345**) to administer the Settlement per its terms.
- Out of the MSA, **\$50,000** is allocated to resolve the PAGA claims, with 75%, i.e., **\$37,500**, to be paid by the Settlement Administrator to the LWDA, and 25%, i.e., **\$12,500**, to be paid to PAGA Employees – i.e., Class Members employed at any time during the PAGA Claim Period.
- Defendant will not oppose the application for Class Representative Service Award in the amount of **\$20,000** to Plaintiff, to be paid out of the MSA.

- After deducting Class Counsel’s attorneys’ fees and costs, enhancement payment to Plaintiff, and settlement administration costs, the remainder – i.e., the NSA – is calculated to be at least **\$737,500.00**. 50% of the NSA shall be distributed equally to the FCRA Class Members and 50% of the NSA will be distributed *pro rata* to the Vacation Wage Class Members and Wage Statement Class Members based upon the number of weeks worked during the Class Periods. Each Aggrieved Employee’s PAGA share will be similarly calculated based on the number of weeks worked during the PAGA Period.
- Settlement Class Members will be mailed a check so long as they do not opt out. Vacation and Wage Statement Class Members will need to affirmatively opt-in for purposes of FLSA by endorsing their settlement check which will contain language affirming so.
- The Settlement will release specified PAGA claims for all PAGA Employees. Class Members who were employed with Defendant during the PAGA Claim Period. Such Class Members cannot opt out of the PAGA portion of the Settlement and will be mailed their share of the PAGA Payment even if they opt out of the rest of the Settlement.
- Any checks issued by the Settlement Administrator to participating Class Members shall be negotiable for not less than 120 calendar days after mailing. Those checks remaining uncashed for more than 120 days after issuance will paid to the California State Bar’s Justice Gap Fund, subject to Court approval.

(Declaration of Shaun Setareh (“Setareh Decl.”), ¶ 12, Ex. 1 (“Settlement”).)

III. STATEMENT OF FACTS

A. THE PARTIES

ZipRecruiter is an American employment marketplace for job seekers and employers. (Setareh Decl., ¶ 18.) The company is headquartered in Santa Monica, California with offices in Tempe, Arizona, United Kingdom, and Tel Aviv, Israel with over 1,000 employees. (*Id.*) On or about June 6, 2017, ZipRecruiter extended a written offer of employment to Plaintiff for the position Senior Product Manager, Campaign Management. Plaintiff worked for Defendant as an employee from approximately June 12, 2017 through January 2019. (*Id.*)

///

1 **1. Wage and Hour Allegations**

2 Plaintiff alleges Defendant failed to pay him and putative class members vacation wages upon
3 termination. (Complaint, ¶¶ 24-27.) Although Defendant claims to have a “flexible” vacation policy
4 where employees did not accrue vacation hours in the traditional sense, Plaintiff still believes that he and
5 the putative class are entitled to receiving vacation wages upon termination. (Setareh Decl., ¶ 19.) Due to
6 this violation, Plaintiff also alleges that Defendant did not provide Plaintiff and the putative class with
7 accurate wage statements as required under California Labor Code 226. (Complaint, ¶¶ 28-32.)

8 **2. FCRA Allegations**

9 Plaintiff also alleges that Defendant violated the FCRA. (FAC, ¶¶ 36-37.) In Plaintiff’s view,
10 the disclosure forms utilized by Defendant during the Class Period fall far short of meeting the
11 standards set forth in *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017) and *Gilberg v. California Check*
12 *Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019). Plaintiff contends that the forms are replete
13 with extraneous information, including but not limited to notices about various state law rights, and
14 thus do not meet the standards under the FCRA. (Setareh Decl., ¶ 19.)

15 **B. PROCEDURAL HISTORY**

16 On April 3, 2019, Plaintiff filed a class action complaint in the Los Angeles Superior Court
17 against Defendant, Case No. 19STCV11091 (the “Class Action” or “Complaint”), alleging claims for
18 willful failure to comply with the Fair Credit Reporting Act (the “FCRA Claim”), failure to pay vacation
19 wages under California Labor Code § 227.3 (the “Vacation Wage Claim”), failure to provide accurate
20 written wage statements under California Labor Code § 226(a) (the “Wage Statement Claim”), and
21 failure to timely pay all final wages under California Labor Code § 201, 202 and 203 (the “Waiting Time
22 Penalty Claim”). (Settlement, ¶ 2; *see generally*, Complaint.) On January 6, 2020, Defendant filed an
23 answer to the Class Action Complaint denying all material allegations and asserting affirmative defenses.
24 (Settlement, ¶ 2.) On October 2, 2020, Defendant filed a Motion for Summary Judgment and/or
25 Adjudication, and the Court summarily adjudicated Plaintiff’s second cause of action for violation of the
26 Fair Credit Reporting Act, 15 U.S.C. § 1681g(c) (failure to provide summary of rights), and Plaintiff’s
27 Waiting Time Penalty Claim in favor of Defendant on January 29, 2021. (*Id.*)

28 On January 3, 2020, Plaintiff filed a separate complaint against Defendant seeking penalties

1 pursuant to the Private Attorneys General Act, California Labor Code § 2698, et seq., Los Angeles Superior
2 Court Case No. 20STCV00221 (the “PAGA Action”). (*Id.*, ¶ 3.) The PAGA Action involves the same
3 alleged violations of the California Labor Code as alleged in the Class Action Complaint – namely, that
4 Defendant allegedly failed to pay the aggrieved employee group vacation wages upon separation of
5 employment (Labor Code § 227.3), failed to provide accurate wage statements (Labor Code § 226), and
6 failed to timely pay all wages owed at separation (Labor Code §§ 201 – 203). (*Id.*)

7 The Parties agreed to mediate Plaintiff’s alleged credit reporting, wage and hour, and PAGA
8 claims and selected Michael Dickstein, Esq., to serve as mediator. (Setareh Decl., ¶ 7.) On October 19,
9 2021, the Parties attended mediation with Mr. Dickstein and were able to reach an agreement on a class-
10 wide basis. (*Id.*)

11 C. INVESTIGATION AND DISCOVERY

12 Both sides propounded several sets of written discovery. (Setareh Decl., ¶ 7.) The Parties met
13 and conferred regarding the responses and supplied supplemental responses. (*Id.*) Plaintiff also took
14 several depositions, in addition to Plaintiff being deposed himself by Defendant. (*Id.*) The Parties agreed
15 to attend mediation to attempt to resolve the action entirely and further agreed to engage in informal
16 discovery in advance and in preparation thereof. (*Id.*) Defendant produced multiple documents, including
17 the Class List of all separated employees which listed their separation date and their pay rate; the number
18 of members in each class; and data regarding total pay periods. (*Id.*) This was in addition to other
19 documents Defendant has previously produced through formal discovery, including but not limited to all
20 relevant FCRA disclosure forms, employee handbooks, and records pertaining to paid time off and paid
21 vacation taken by Plaintiff’s and other employees of Defendant. (*Id.*) Plaintiff hired an expert to analyze
22 the produced data with respect to potential damages and penalties in preparation for mediation. (*Id.*)

23 D. SETTLEMENT NEGOTIATIONS AND SETTLEMENT

24 On October 12, 2021, the Parties participated in a full-day mediation before experienced
25 mediator Michael Dickstein, Esq. (Setareh Dec, ¶ 8.) During the mediation, the Parties had a full day of
26 productive negotiations and were able to reach an agreement on a class-wide settlement following the
27 mediation as a result of the arm’s length negotiations. (*Id.*) During the mediation, each of the Parties,
28 represented by its respective counsel, recognized the risk of an adverse result in the Action. (*Id.*)

Pursuant to a proposal made by the mediator after the mediation, the Parties agreed to settle the Action and resolve all claims alleged against Defendant in Plaintiff's operative complaint to the fullest extent permitted by law and without any admission of liability or wrongdoing by Defendant. (*Id.*)

E. REASONABLENESS OF THE SETTLEMENT

Plaintiff's counsel believe that the Settlement is in the best interest of the class members based on their investigation and discovery, their detailed understanding of the issues raised, and the outcome of extensive settlement negotiations. (Setareh Decl., ¶¶ 4-9.) Plaintiff's counsel balanced the Settlement against the probable outcome of class certification, liability, the range of recovery at trial, the risks of losing class certification, losing at trial, or not recovering as much as provided by the proposed Settlement, as well as the difficulties and complexity of the litigation, the lengthy process of litigating to judgment, and the various possible delays and appeals. (*Id.*) Although Defendant contends it has no liability in this case, Defendant's counsel shares Plaintiff's Counsel's belief that the Agreement represents a fair, reasonable and adequate settlement given the respective risks associated with the Action. (Settlement, ¶ 11.)

IV. DESCRIPTION OF THE SETTLEMENT

A. CONTINGENT NATURE OF THE SETTLEMENT

Should the Court decline to grant preliminary or final approval of the settlement of the Class Action or approve the settlement of the PAGA Action, this Settlement shall be null and void and have no force or effect. (Settlement, ¶ 44.) In other words, the Court must approve of the settlement of the Class Action and the settlement of the PAGA Action for this Stipulation of Settlement to become effective and binding. (*Id.*)

B. APPOINTMENT OF SETTLEMENT CLASS COUNSEL

The Parties have stipulated to the appointment of Shaun Setareh of Setareh Law Group as Settlement Class Counsel ("Class Counsel"). (*Id.*, ¶ 7(d).)

C. APPOINTMENT OF SETTLEMENT ADMINISTRATOR

The Parties have agreed to the appointment of Simpluris to administer the Settlement and to provide notice to the Class Members (the "Settlement Administrator" or "Claims Administrator").

(Settlement, ¶ 14(c)(vi).) Plaintiff estimates that settlement administration costs shall not exceed \$12,500. (*Id.*) The Settlement Administrator’s bid of a capped fee at \$9,345 for a class cap of 897 Class Members is reasonable for a settlement with a class of this size. (*Id.*)

D. DESCRIPTION OF THE SETTLEMENT CLASS

“Settlement Class”, “Class” or “Class Member(s)” means the combination of the FCRA Class, the Vacation Wage Class, and the Wage Statement Class. (Settlement, ¶ 5.) “FCRA Class” or “FCRA Class Member” means all of Defendant’s current and former job applicants and employees in the United States who completed background check authorizations at any time from April 3, 2017 to March 24, 2018. (*Id.*) “Vacation Wage Class” or “Vacation Wage Class Member” means all of Defendant’s former full-time employees who separated from employment at any time from April 3, 2016 up to the date of a signed order preliminarily approving the class settlement is filed. (*Id.*) “Wage Statement Class” or “Wage Statement Class Members” means all of Defendant’s former full-time employees who separated from employment at any time from April 3, 2018 up to the date of a signed order preliminarily approving the class settlement is filed. (*Id.*) The size of the FCRA Class, Vacation Wage Class, and Wage Statement Class is 492 (FCRA), 407 (Vacation), and 319 (Wage Statement), respectively. (*Id.*, ¶ 56.) “PAGA Aggrieved Employees” means all former full-time employees who worked for Defendant and who separated from employment between October 30, 2018 up to the date a signed order preliminarily approving the settlement is filed. (*Id.*, ¶ 6.) A “participating” Class Members is one who does not submit a valid and timely Request for Exclusion. (*Id.*, ¶ 14(c)(ii).) PAGA Aggrieved Employees shall have no right to opt out of or not participate in the PAGA Settlement. (*Id.*, ¶ 14(c)(i).)

E. SCOPE OF THE RELEASE

Effective upon the date of final approval by the Court of this Stipulation of Settlement, and upon funding of the Maximum Settlement Amount in full by Defendant, each Class Member who has not submitted a valid Request for Exclusion, fully releases and discharges (i) Defendant; (ii) its future and/or current subsidiaries, affiliates, affiliated companies, officers, directors, owners, employees, assigns, successors, attorneys, executors, trustees, agents, personal and legal representatives, and vendors; and (iii) any individual or entity which could be jointly liable with any of the foregoing (collectively referred to as the “Released Parties”) as to the following claims:

a. FCRA Class Members: All claims and derivative claims relating to facts that were or could have been alleged in the operative class action complaint concerning Defendant’s pre-employment background screening process, including but not necessarily limited to, the Fair Credit Reporting Act 15 U.S.C. § 1681 *et seq.*, the California Investigative

Consumer Reporting Agencies Act, Cal Civ. Code. § 1786 *et seq.*, (collectively, the “FCRA Claims”), and any other state and local equivalent claims, inclusive of all punitive damages, civil and statutory penalties, actual damages, attorneys’ fees, costs and any form of equitable relief.

b. Vacation Wage Class Members and Wage Statement Class Members: All claims and derivative claims relating to facts that were or could have been alleged in the operative class action complaint concerning Defendant’s alleged failure to pay allegedly accrued, unused vacation or other forms of paid time off, including but not necessarily limited to claims under Labor Code §§ 226 and 227.3 and claims under the Fair Labor Standards Act (“FLSA”), inclusive of statutory and civil penalties, attorneys’ fees, interest, liquidated damages, injunctive relief and costs.

(*Id.*, ¶ 31.)

Vacation Wage and Wage Statement Class Members will be deemed to have acknowledged and agreed that their claims for wages and/or penalties in the Action are disputed, and that their individual Settlement payments constitute payment of all sums allegedly due to them. Vacation Wage and Wage Statement Settlement Class Members will be deemed to have acknowledged and agreed that the California Labor Code section 206.5 is not applicable to the individual Settlement amounts paid to them. That section provides in pertinent part:

“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 of wages to be earned, unless payment of those wages has been made.”

(*Id.*, ¶ 32.)

Unless a Class Member affirmatively opts out of the Settlement, the Class Member will be deemed to have released the Released Claims against the Released Parties, irrespective of whether they cash their individual Settlement payment checks except that Vacation Wage and Wage Statement Class Members that do not cash their individual Settlement payment checks shall not be deemed to have released any claims they may have under the FLSA. Vacation Wage and Wage Statement Class Members shall be required to affirmatively opt-in for purposes of the FLSA and waive all Released Claims falling under the FLSA by endorsing their individual Settlement payment checks, which shall contain thereon the following or substantially similar language:

By endorsing and cashing this check, I agree to the waiver of the wage and hour claims set forth in the class notice in *Paul Loeb v. ZipRecruiter, Inc.*, including all claims under the Fair Labor Standards Act (“FLSA”) and hereby affirmatively opt into the FLSA claim and FLSA waiver for purposes of 29 U.S.C. § 216(b), (c).

This FLSA release shall not apply to the PAGA Award and this language shall not appear on the checks provided to PAGA Aggrieved Employees for their share of the PAGA Settlement Award.

(*Id.*, ¶ 33.)

F. SETTLEMENT AMOUNT AND ALLOCATION OF SETTLEMENT MONIES

The total payment (the “Maximum Settlement Amount” or “MSA”) under the Settlement is

1 \$1,200,000.00 including all Class Settlement Awards, all PAGA Settlement Awards, the attorneys' fees
2 and litigation costs to Class Counsel, the Enhancement Award to the Class Representative, the settlement
3 administration costs, and all other amounts requested in the operative Class Action and PAGA Action
4 complaints and provided for by the Settlement. (*Id.*, ¶ 13.) This is a non-reversionary settlement and
5 none of the MSA shall revert to Defendant, with the funds of checks uncashed by Class Members after
6 120 days of their mailing being directed to the California State Bar's Justice Gap Fund, subject to Court
7 approval. (*Id.*, ¶¶ 21-23.)

8 **G. CLASS MEMBER SETTLEMENT PAYMENT FORMULA**

9 **1. Payments to Class Members**

10 The "Class Settlement Awards" shall amount to the balance of the Net Settlement Amount after
11 subtracting the PAGA Settlement Award and shall be allocated to Class Members as follows (*Id.*, ¶
12 14(c)(ii)):

13 a. FCRA Payment to FCRA Class Members: 50% (One-Half) of the Class
14 Settlement Awards shall be distributed to FCRA Class Members who do not opt out of the Settlement.
15 Each participating FCRA Class Member's individual share of the FCRA Class Payment shall be the
16 same and shall be calculated by dividing the total FCRA Class. Payment by the number of
17 participating FCRA Class Members. These payments to FCRA Class Members shall be made without
18 withholding and apportioned as 100% statutory penalties and reported by IRS Form 1099.

19 b. Vacation Payment to Vacation Wage Class Members and Wage Statement
20 Class Members: 50% (One-Half) of the Class Settlement Awards shall be paid to the Vacation Wage
21 Class Members and Wage Statement Class Members who do not opt out of the Settlement and shall
22 be hereinafter defined as the "Vacation Payment." Each participating Vacation Wage and Wage
23 Statement Class Member's share of the Vacation Payment will be determined by dividing their total
24 weeks worked within the class period, based on their hire and separation dates, by the total weeks
25 worked by all participating Vacation Wage Class Members and Wage Statement Class Members
26 within the class periods. That fraction will then be multiplied by the apportioned Vacation Payment
27 to arrive at each Vacation Wage and Wage Statement Class Member's individual share. The
28 individual payments made to Vacation Wage and Wage Statement Class Members shall be allocated

1 as follows: 20% (Twenty Percent) shall be allocated as wages and 80% (Eighty Percent) shall be
2 allocated as penalties and interest.

3 **2. Payments to PAGA Aggrieved Employees.**

4 The “PAGA Settlement Award” amounts to \$50,000.00 of the Net Settlement Amount and
5 will be allocated to resolving the PAGA Action. (*Id.*, ¶ 14(c)(i).) Seventy-five percent (75%) of the
6 PAGA Settlement Award will be paid to the LWDA and twenty-five percent (25%) will be paid to
7 PAGA Aggrieved Employees. (*Id.*) The *pro rata* amount due to each PAGA Aggrieved Employee
8 will be determined by dividing his or her total weeks worked from October 30, 2018 up to the date a
9 signed order preliminarily approving the settlement is filed (“PAGA Claim Period”) by the total
10 weeks worked by all PAGA Aggrieved Employees within the PAGA Claim Period. (*Id.*) That
11 fraction will then be multiplied by the 25% portion of the PAGA Settlement Amount to arrive at the
12 PAGA Aggrieved Employee’s individual settlement shares. (*Id.*) These payments to PAGA
13 Aggrieved Employees shall be allocated as 100% penalties. (*Id.*) PAGA Aggrieved Employees will
14 be responsible for paying any personal income taxes owed on the amounts they receive. (*Id.*)
15 PAGA Aggrieved Employees shall have no right to opt out of or not participate in the PAGA
16 Settlement. (*Id.*)

17 **H. NOTICE TO CLASS MEMBERS OF SETTLEMENT**

18 Within 30 calendar days of preliminary approval of this Settlement by the Court, Defendant shall
19 provide to the Settlement Administrator the FCRA Class Members’ names, last-known addresses (to the
20 extent available), and last-known telephone numbers (to the extent available) during the FCRA Class
21 Period. (*Id.*, ¶ 18(a).) For the Vacation Wage Class Members, Wage Statement Class Members, and
22 PAGA Aggrieved Employees, within 30 calendar days of preliminary approval of this Settlement by the
23 Court, Defendant shall provide to the Settlement Administrator the Vacation Wage and Wage Statement
24 Class Members’ and PAGA Aggrieved Employees’ names, last known-addresses, last-known telephone
25 numbers, social security numbers, and hire and separation dates. (*Id.*) The spreadsheets provided for
26 above, shall be based on Defendant’s business records and in a format acceptable to the Settlement
27 Administrator. (*Id.*) The Settlement Administrator will run a check of the Class Members’ and PAGA
28 Aggrieved Employees’ addresses against those on file with the U.S. Postal Service’s National Change of

1 Address List. (*Id.*) Within 30 days of receiving the class information from Defendant, the Settlement
2 Administrator will mail the Notice of FCRA Settlement to FCRA Class Members and the Notice of
3 Vacation Wage Settlement to all Vacation Wage Class Members, Wage Statement Class Members, and
4 PAGA Aggrieved Employees. (*Id.*)

5 Notices returned to the Settlement Administrator as non-delivered during the 60-calendar day
6 period for the submission of exclusions or objections shall be resent to the forwarding address, if any, on
7 the returned envelope. (*Id.*, ¶ 18(a).) If there is no forwarding address, the Settlement Administrator will
8 perform an NCOA check, and will skip-trace returned mail, and re-mail within five (5) days of receipt
9 using the Class Member’s Social Security Number; this search will be performed only once per Class
10 Member by the Settlement Administrator. (*Id.*) Class Members who receive re-mailed notices will
11 receive an extension of time to submit an exclusion or objection accordingly. (*Id.*)

12 **I. NOTICE AND PAGA PAYMENT TO THE LWDA**

13 The Settlement provides for a total amount of **\$50,000** from the NSA and will be allocated to
14 resolving the PAGA Action. (*Id.*, ¶ 14(c)(i).) Pursuant to Labor Code section 2699(i), 75% of the
15 PAGA settlement amount, or **\$37,500**, will be paid to the LWDA. (*Id.*) The remaining 25%, or
16 **\$12,500**, will be distributed to the PAGA Aggrieved Employees. (*Id.*) In connection with Settlement
17 approval, Class Counsel must notify the LWDA of the Settlement’s existence. This settlement was
18 forwarded to the LWDA by Class Counsel. (Setareh Decl., ¶ 17.)

19 **V. ARGUMENT**

20 **A. THE COURT SHOULD CONDITIONALLY CERTIFY THE SETTLEMENT**
21 **CLASS BECAUSE IT MEETS ALL THE REQUIREMENTS FOR CLASS**
22 **CERTIFICATION FOR SETTLEMENT PURPOSES ONLY UNDER CODE OF**
23 **CIVIL PROCEDURE SECTION 382**

24 Under Code of Civil Procedure § 382, class certification is warranted so long as there is “a
25 numerous and ascertainable class with a well-defined community of interest among its members” and a
26 “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.”
27 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332. “The certification question
28 is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’”
Id. at 326 (quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440). Indeed, the certification

1 question simply asks whether the theory of recovery advanced by the plaintiff is likely to prove
2 amenable to class treatment. *E.g., Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1298. In
3 ruling on a certification motion, a trial court's task is to determine "whether...the issues which may be
4 jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial
5 that the maintenance of a class action would be advantageous to the judicial process and to the litigants."
6 *Id.*

7 "[I]t is also well established that trial courts should use different standards to determine the
8 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard
9 of scrutiny is used for settlement cases." *Global Minerals & Metals Corp. v. Superior Court* (2003) 113
10 Cal.App.4th 836, 859 (citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n.19
11 ("*Dunk*"). As the court noted in *Dunk*, although certification requirements are intended "to protect the
12 interests of the non-representative class members," that concern is "protected by the trial court's fairness
13 review of the settlement." *Id.*

14 Indeed, numerous courts have certified settlement classes. For example, *In re Drexel Burnham*
15 *Lambert Group, Inc.* (2d Cir. 1992) 960 F.2d 285, *cert. dismissed*, 506 U.S. 1088, 122 L. Ed. 497, 113 S.
16 Ct 1070 (1993), the parties entered into a tentative settlement before a class was certified. After a
17 hearing, the "district court issued an order certifying the class and approving the settlement agreement."
18 *Id.* at 289; *see also, Alaniz v. California Processors, Inc.* (N.D. Cal. 1976) 73 F.R.D. 269, 278 ("the use
19 of the tentative settlement class procedure was appropriate in this case"), *aff'd*, 572 F.2d 657 (9th Cir.),
20 *cert. denied*, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action
21 litigation and an approved procedure which ought to be followed in this case. *See Newberg on Class*
22 *Actions* (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; and *Manual for Complex Litigation*, 2d (1993) §
23 30.45.

24 As shown below, this Settlement and the Settlement Class easily meet all of the requirements for
25 certification for settlement purposes.

26 **1. Objectively Ascertainable and Sufficiently Numerous Class**

27 A class is ascertainable when it may be readily identified via an objectively stated definition
28 without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981)

1 126 Cal.App.3d 926, 932. No set number of class members is required to maintain a class action.
2 *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. The California Supreme Court has upheld a
3 class of as few as ten members. *Bowles v. Super. Ct. (Nickel, Jr.)* (1955) 44 Cal.2d 574, 577-81. Here,
4 the FCRA Class is made up of about 492 individuals, the Vacation Wage Class is made up of about 407
5 individuals, and the Wage Statement Class is made up of 319 individuals, all of whom may be readily
6 ascertained by reference to Defendant's personnel records. (Settlement, ¶ 56.) Accordingly, the
7 Settlement Class is not only ascertainable but also sufficiently numerous.

8 **2. Predominance of Common Questions**

9 A question of law or fact is common to the members of a class if it may be resolved through
10 common proof. *See Jaimez, supra*, 181 Cal.App.4th at 1305. As for predominance, it "is a comparative
11 concept, and 'the necessity for class members to individually establish eligibility and damages does not
12 mean individual fact questions predominate.'" *Sav-on, supra*, 34 Cal.4th at 334 (quoting *Reyes v. San*
13 *Diego Cty. Bd. of Supervisors* (1979) 196 Cal.App.3d 1263, 1278). Thus, "[i]ndividual issues do not
14 render class certification inappropriate so long as such issues may effectively be managed." *Id.* This is
15 especially so where the key difference between class members solely concerns their respective amounts
16 of damages. *See id.* As a general rule, if a defendant's liability can be determined by facts common to
17 all members, a class will be certified even if the members must individually prove their damages. *See*
18 *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.

19 In this case, all three Classes meet these requirements. Plaintiff submits that Defendant's liability
20 arises from the same set of facts and legal questions that apply to and are answered equally as to all
21 FCRA Class Members. Plaintiff alleges FCRA Class Members were subjected to a common practice in
22 the background disclosure form Defendant provided them did not comply with the requirements under
23 FCRA (Complaint, ¶¶ 33-54).

24 Similarly, the Vacation Wage and Wage Statement Settlement Classes meet these requirements
25 as well. Plaintiff alleges Class Members were subjected to a common practice in that Defendant failed to
26 pay them for all vacation wages owed (*Id.*, ¶¶ 67-72) and failed to provide compliant wage statements
27 (*Id.*, ¶¶ 73-79).

1 The Court accordingly should certify the FCRA Settlement Class, the Vacation Wage Settlement
2 Class, and the Wage Statement Settlement Class for purposes of settlement under Code of Civil
3 Procedure section 382 and Rule of Court 3.769(c).

4 **3. Typicality of Plaintiff's Claims**

5 Typicality “requires a showing that the class representative has claims or defenses typical of the
6 class.” *See, e.g., Fireside Bank v. Super. Ct. (Gonzalez)* (2007) 40 Cal.4th 1069, 1090. This focuses on
7 “the nature of the claim or defense of the class representative, and not to the specific facts from which it
8 arose or the relief sought.” *Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976 F.2d 497, 508 (internal
9 citations omitted). “The test of typicality ‘is whether other members have the same or similar injury,
10 whether the action is based on conduct which is not unique to the named plaintiffs, and whether other
11 class members have been injured by the same course of conduct.’” *Id. (quoting Schwartz v. Harp* (C.D.
12 Cal. 1985) 108 F.R.D. 279, 282; *accord Classen v. Weller* (1983) 145 Cal.App.3d 27, 46 (“it has never
13 been the law in California that the class representative must have *identical* interest with the class
14 members”).

15 Under these standards, Plaintiff's claims are typical of those of the class members. Like
16 Vacation Wage and Wage Statement Class Members, Plaintiff was an employee of Defendant in
17 California. (Setareh Decl., ¶ 10.) Plaintiff alleges that he and the putative class members were not
18 provided with vacation wages and did not receive accurate wage statements. (*Id.*) *See Classen, supra*,
19 145 Cal.App.3d at 46 (representative plaintiffs need not have all claims or identical interests with class
20 members; they need only have claims that are “typical of the class”); *see also B.W.I. Custom Kitchen v.*
21 *Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1347 (representative plaintiffs need not suffer all of
22 the exact same damages as every class member). Similarly, like FCRA Class Members, Plaintiff was an
23 individual who applied for employment with Defendant in the United States and had a background check
24 run on him. (Setareh Decl., ¶ 10.) Plaintiff alleges that that he and the putative class were not provided
25 with a FCRA compliant disclosure form. (*Id.*) Accordingly, Plaintiff pursues claims typical of the class
26 he seeks to represent.

27 **4. Adequacy of Plaintiff and Class Counsel to Represent the Class**

28 The adequacy requirement is met where the named plaintiffs are represented by counsel qualified

1 to conduct the litigation and the plaintiffs' interest in the litigation is not antagonistic to the class's
2 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51. In other words, where the
3 named plaintiffs have adequate counsel, they may represent the entire class absent any disabling conflicts
4 of interest that might hinder the named plaintiffs' ability to represent the class. *Id.*

5 In this case, Plaintiff has no conflict of interest with absent Settlement Class Members and has
6 agreed to place the class's interests above his own. (Setareh Decl., ¶ 10.) See *Global Minerals, supra*,
7 113 Cal.App.4th at 851 (the inquiry into the adequacy of a class representative is intended to uncover
8 any conflicts between the plaintiff and the class he or she seeks to represent). Plaintiff's counsel, Setareh
9 Law Group, is experienced in wage and hour and FCRA class action litigation and has no conflicts of
10 interest with absent Class Members. (Setareh Decl., ¶¶ 4-6, 10.) Thus, this Court should appoint Plaintiff
11 as Class Representative for the Settlement Class and appoint his counsel as Class Counsel.

12 **B. STANDARD FOR GRANTING PRELIMINARY SETTLEMENT APPROVAL**

13 Cases brought as class actions may only be settled upon court approval and then only after a
14 determination that the settlement is fair, adequate, and reasonable is made. *In re Microsoft I-V Cases*
15 (2006) 135 Cal.App.4th 706, 723. Courts have broad discretion to make this determination and consider
16 factors, such as the strength of plaintiff's case, the risk, expense, complexity and likely duration of
17 further litigation, the risk of maintaining class action status through trial, the amount offered in
18 settlement, the extent of discovery completed and the stage of the proceedings, the experience and views
19 of counsel, and the reaction of the class members to the proposed settlement. *In re Microsoft*, 135
20 Cal.App.4th at 723; *Dunk*, 48 Cal.App.4th at 1800-01; *Reed v. United Teachers Los Angeles* (2012) 208
21 Cal.App.4th 322, 336. "[A] presumption of fairness exists where: (1) the settlement is reached through
22 arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
23 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
24 small." *Dunk, supra*, at 1802; see also *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 52.

25 California Rule of Court 3.769 sets forth the procedures for settlement of class actions in
26 California. A two-step process is required. First, the court preliminarily approves the settlement and the
27 class members are notified as directed by the court. Cal. Rule of Court 3.769(c)-(f). "The notice must
28 contain an explanation of the proposed settlement and the procedures for class members to follow in

1 filing written objections to it and in arranging to appear at the settlement hearing and state any objections
2 to the proposed settlement.” Cal. Rule of Court 3.769(f). Second, the court conducts a final approval
3 hearing to inquire into the fairness of the proposed settlement. Cal. Rule of Court 3.769(g). If the court
4 approves the settlement, a judgment is entered with provision for continued jurisdiction for the
5 enforcement of the judgment. Cal. Rule of Court 3.769(h).

6 In deciding whether to grant preliminary approval, courts are to give “due regard” to “what is
7 otherwise a private consensual agreement between the parties.” *Sutter Health Uninsured Pricing Cases*
8 (2009) 171 Cal. App. 4th 495, 505. When approving a settlement, “the court need not ‘reach any
9 ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for
10 it is the very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation
11 that induce consensual settlements.’” *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268,
12 1291 (quoting *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625).³ The
13 court’s inquiry must be limited to the extent necessary to reach a reasoned judgment that the agreement
14 is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
15 settlement, taken as a whole, is fair, reasonable and adequate to all concerned. *Id.*

16 **C. THIS COURT SHOULD GRANT THIS MOTION AND ISSUE AN ORDER**
17 **PRELIMINARILY APPROVING THE SETTLEMENT BECAUSE IT IS FAIR,**
ADEQUATE, AND REASONABLE

18 **1. Settlement Resulted From Serious, Informed, Non-Collusive Negotiations**

19 The Parties reached this settlement only after they conducted extensive and protracted arm’s-
20 length negotiations through an experienced and knowledgeable mediator, Michael Dickstein, Esq.
21 (Setareh Decl., ¶ 7.) The Parties have not engaged in any collusion or improper negotiations. (*Id.*)
22 Plaintiff and Defendant do not have any agreements regarding the proposed Settlement that are not
23 reflected in the Settlement. (*Id.*)

24 ///

25 _____
26 ³ The California Supreme Court has suggested that trial courts, in the absence of controlling California
27 authority, utilize class action procedures of the Federal Rules of Civil Procedure. *See LaSala v.*
28 *American Sav. & Loan Ass’n* (1971) 5 Cal. 3d 864, 872. Thus, the Court may look to federal authorities
in ruling on this motion.

2. **Sufficient Fact Investigation and Discovery Has Occurred to Assess the Fairness of the Settlement**

As discussed above, Plaintiff's counsel engaged in extensive investigation and informal written discovery that has allowed them to evaluate the merits of the Class Members' claims and Defendant's defenses as well as the range of possible recoverable damages. (*Id.*, ¶¶ 6-9.) Based on Plaintiff's counsel's investigation and discovery, Plaintiff and his counsel are of the opinion that this settlement is fair, reasonable, adequate, and in the Class Members' best interest. (*Id.*) Plaintiff's counsel's investigation and discovery is more than sufficient to warrant their and Plaintiff's decision to enter into the Settlement. (*Id.*)

Plaintiff and Defendant engaged extensively in formal and informal discovery prior to resolving the Action. (*Id.*, ¶ 7.) Both sides propounded several sets of written discovery. (*Id.*) The Parties met and conferred regarding the responses and supplied supplemental responses. (*Id.*) Plaintiff also took several depositions, in addition to Plaintiff being deposed himself by Defendant. (*Id.*) The Parties also engaged in an informal, voluntary exchange of information in the context of privileged settlement discussions to facilitate an early mediation. (*Id.*) Defendant produced hundreds of pages of documents. (*Id.*) This included a Class List of all separated employees which listed their separation date, and their pay rate; number of members in each class; and data regarding total pay periods. (*Id.*) Defendant has previously provided other documents through formal discovery including, but not limited to, all relevant FCRA disclosure forms, employee handbooks, and records pertaining to paid time off and paid vacation taken by Plaintiff's and other non-exempt employees of Defendant. (*Id.*)

For example, Plaintiff obtained Defendant's policies regarding vacation and records regarding requests and approval of paid time off and paid vacation taken by employees. (Setareh Decl., ¶ 19.) Analyzing these documents, Plaintiff found that Defendant instituted a "flexible" vacation policy which allowed its employees to take paid vacation without the need to accrue vacation hours. (*Id.*) Plaintiff's expert then analyzed Defendant's vacation data to calculate the actual "accrual" of vacation days based on how many days were taken by employees. (*Id.*) From that data, Plaintiff's expert was able to calculate potential damages that Defendant may face at trial.

Furthermore, Plaintiff obtained Defendant's background check disclosure forms. (Setareh Decl.,

¶ 20.) The disclosure form was replete with extraneous information including state law disclosures for New York, New Jersey, Massachusetts, or Maine law (*Id.*) Similar state law disclosures were found to be unlawful in *Gilberg*.

3.
Plaintiff's Counsel Are Experienced Class Action and Employment Attorneys and the Amount of Attorneys' Fees Sought Are Appropriate

As detailed more completely in the declaration of Shaun Setareh, Plaintiff's counsel are particularly experienced in employment law, FCRA, and wage and hour class actions. (Setareh Decl., ¶¶ 4-6, 15.)

Plaintiff's counsel believe that the one-third of the MSA that they will seek in attorneys' fees are appropriate in this matter. (*Id.*, ¶ 15.) The Court of Appeal has recognized that one factor supporting a lodestar multiplier is comparison to the fees typically earned in contingency fee litigation where the plaintiff's attorney is awarded fees based on a percentage of the award recovered for the client: "to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 50. As the Court knows, contingency fees typically range from one-third to forty percent. Indeed, Setareh Law Group has been awarded one-third-common-fund attorneys' fees in numerous class actions. (*Id.*, ¶ 15.)

Factors that courts consider in determining the multiplier include: "The quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *Lafitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 489. "There is no hard and fast rule limiting [these]...numerous factors, and their evaluation is entrusted to a trial court's sound discretion." *Center for Biological Diversity v. Cty. of San Bernardino* (2010) 185 Cal.App.4th 866, 901.

Counsel believe the proposed Settlement is fair, reasonable, and adequate in light of the complexities of the case, the uncertainties of further litigation, and that it represents a fair and reasonable recovery for the Settlement Class. (Setareh Decl., ¶ 8; Settlement, ¶ 11.)

4.
The Settlement Is Fair and Reasonable Based on the Strength of Plaintiff's Case and the Risks and Costs of Further Litigation

California courts recognize that "the merits of the underlying class claims are not a basis for upsetting the settlement of a class action." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th

224, 246 (quoting *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1150). The settlement need not provide one hundred percent of the damages sought in order to be judged reasonable. *Wershba*, 91 Cal.App.4th at 250. “Thus, even if ‘the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,’ this is not a bar to a class settlement because ‘the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.’” *Id.* (quoting *Air Lines Stewards v. American Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109).

The following chart provides the estimated potential recovery on a class basis that Plaintiff believes he could reasonably achieve *if he were to prevail on all his causes of action*⁴:

Plaintiff's Estimated Potential Recovery for Wage and Hour Violations		
Assumptions During Class Period (based on time/payroll data provided by Defendant around the time of settlement)		
Number of Wage Statement Class Members: 400 Number of Vacation Class Members: 472		
Average pay rate: \$54.64 Number of untaken vacation days: 6,581 ⁵		
Cause of Action	Estimated Potential Recovery	Calculations for Estimated Potential Recovery
Vacation Claim	\$1,438,343.36	6,581 untaken vacation days x 8 hours per day x \$54.64 hourly pay rate x 50% offset ⁶

⁴ Civil penalties are estimated and interest is not included in this analysis. This is proper because, first, PAGA penalties are discretionary (see Lab. Code § 2699(e)(2) (the court in its discretion “may award a lesser amount than the maximum civil penalty amount specified by this part...”), and courts evaluate the strength of a proposed settlement without taking potential penalties or interest into consideration. See *Rodriguez v. West Publishing Corp.* (9th Cir. 2000) 563 F.3d 948, 955; see also *Miller v. CEVA Logistics U.S.A., Inc.* (E.D. Cal. Feb. 19, 2015) 2015 WL 729638, at *7 (court utilized calculation of a defendant’s exposure exclusive of interest and penalties to determine whether the settlement fell within the range of possible approval).

⁵ Defendant did not have a specific policy for vacation regarding how many days are accrued each year. Instead, employees were allowed to request vacation whenever they wanted to, so long as they kept up with their assigned work. Plaintiff’s expert calculated this amount based on the maximum number of days taken by a single employee, which demonstrates a reasonable estimate of “accrual” of vacation days.

⁶ The value is taken at 50% of maximum to account for the risks associated with the speculative nature of this claim. Unlike a vacation claim based on a fixed accrual policy, there is no standard and

Sub-Total Unpaid Wages	\$1,438,343.36	
Labor Code § 226 Penalties	\$20,000.00	400 initial pay periods x \$50
TOTAL	\$1,458,343.36	
PAGA Penalties	\$53,000.00 ⁷	
<i>Total if PAGA included</i>	\$1,511,343.36	

Plaintiff's Estimated Potential Recovery for FCRA Violations		
Assumptions During Class Period (based on data provided by Defendant)		
<u>FCRA Class Members: 492</u>		
Cause of Action	Estimated Potential Recovery	Calculations for Estimated Potential Recovery
FCRA Penalties	\$49,200.00 – 492,000.00	Penalties for FCRA violations range from \$100 - \$1,000 per violation. 15 U.S. Code § 1681n.

(Setareh Decl., ¶ 9.)

Despite a total potential recovery of about \$1.5 million on his unpaid wages, non-penalty, class claims, and a little less than \$1.5 million on all class claims, including statutory penalties, Plaintiff

very little case law to guide the Court as to how to formulate the accrual of a “flexible” vacation policy. Thus, the calculation was based on the maximum amount of vacation days that a single employee took. However, in a standard accrual policy, every employee would not be able to take as many vacation days as the employee with the most number of vacation days taken. If we assume a normal distribution of vacation days taken, with most class members taking the medial number of days then this modification to the calculation brings the valuation of the vacation wage claim closer to a more realistic value.

⁷ The PAGA penalties are minimal in this case because the violations are based on only the final pay period, as the violations are due to unpaid vacation wages due upon termination, and the wage statement claim is based on that same final wage statement.

1 recognizes the challenges he faces in certifying a class action and establishing liability on the wage and
2 hour claims. (*Id.*, ¶ 9.) Plaintiff estimates that his likelihood of prevailing on all his causes of action are
3 extremely low and thus his likelihood of recovering \$1.5 million or anything close to that amount on
4 behalf of a class is very unlikely. (*Id.*) For those claims, if any, that are certified for class treatment,
5 Plaintiff must prevail at a trial on the merits. (*Id.*)

6 With respect to the claims asserted on behalf of the Settlement Class in this case, there are
7 significant risks that support the reduced compromise amount. These risks include, but are not limited to,
8 the following:

9 (i) The risk that Plaintiff would not recover wage statement penalties pursuant to Labor
10 Code sections 226. For example, Plaintiff might not prove that Defendant acted with the intent
11 necessary for the alleged claims for penalties under Labor Code sections 226 because penalties pursuant
12 to section 226 require a “knowing and intentional” violation. This is an additional showing that must be
13 made on top of the showing of the inaccuracies themselves.

14 (ii) The risk that Defendant’s challenged employment policies might not ultimately support
15 class certification or a class-wide liability finding, *see, Duran*, 59 Cal.4th at 14 & fn. 28 (citing Court of
16 Appeal decisions favorable on class certification issue without expressing opinion as to ultimate viability
17 of proposition). Defendant has a “flexible vacation” policy rather than the standard vacation accrual
18 policy. There is currently no standard regarding how many vacation hours an employee has vested or
19 when those vacation hours are vested. The only possible guideline here is *McPherson v. EF Intercultural*
20 *Foundation, Inc.*, Cal.App.5th 243, 268-269 (2020), which only examines as to whether a vacation
21 policy is truly an “unlimited policy”. Moreover, if it is found to be limited, there is no guideline to
22 determine the limit and therefore, providing difficulty in proving whether Defendant is liable to which
23 employees, if any.

24 (iii) For the same reasons, liability, damages recovery, and certification risks are heightened
25 given: (1) the risk that uncertainties pertaining to the ultimate legality of Defendant’s policies and
26 practices could preclude class-wide awards of statutory penalties under Labor Code section 226(e); (2)
27 the risk that individual differences between settlement Class Members could be construed as pertaining
28 to liability, and not solely to damages, *see, Duran*, 59 Cal.4th at 19; and (3) the risk that class or

collective treatment could be deemed improper as to one or more claims except for settlement purposes.

(iv) The risk that any civil penalties award under PAGA could be reduced by the Court in its discretion could materially impact the recovery by the Class, *see* Labor Code section 2699(e)(1).

(v) The risk that lengthy appellate litigation could ensue as to both liability and certification issues, with associated litigation risk and costs, further enhances the value of a confirmed settlement as opposed to unpredictable litigation.

In these respects, Defendant strongly denies any liability and the propriety of class certification for any reason other than settlement. (*Id.*) Continued litigation of this lawsuit presented Plaintiff and Defendant with substantial legal risks that were (and continue to be) very difficult to assess. (*Id.*)

In light of the uncertainties of protracted litigation, the Settlement amount reflects a fair and reasonable recovery for the Class Members. (*Id.*) The Settlement amount is, of course, a compromise figure. (*Id.*) By necessity, it took into account risks related to liability, damages, class action certification, and all the defenses asserted by Defendant as to all such matters. (*Id.*) Moreover, each settlement Class Member will be given the opportunity to opt out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*)

D. THE COURT SHOULD GRANT THIS MOTION AND ISSUE AN ORDER DIRECTING THAT NOTICE BE SENT

“The notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.” *Trotsky v. L.A. Fed. Sav. & Loan Ass’n* (1975) 48 Cal.App.3d 134, 151-52. “The notice must be structured to enable class members to decide whether to intervene or object, ‘opt out,’ or accept the settlement.” *Id.* at 152. Class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members. *Wershba*, 91 Cal. App. 4th at 252. Furthermore, an appropriate notice is one which has a reasonable chance of reaching the class members. *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.

The Notice of Class Action Settlement explains in plain and easily understood language what the case is about; the class definition and claims; the settlement amount and approximate individual amount

1 each Class Member and/or PAGA Employee will receive; the requested amounts to be paid to class
2 counsel and as an enhancement award to the class representative; the rights of class members to opt out
3 or object to the Settlement's terms and the process by which they can do so; the binding effect of the
4 Settlement on those who do not request exclusion, including a description of the claims being released;
5 and the particulars of the final fairness hearing. (Settlement, ¶¶ 14(c)(viii), Ex. A, B.)

6 The Parties' proposed plan for directing notice to the Class is also the best notice that is
7 practicable under the circumstances. Using last-known addresses provided by Defendant, the Settlement
8 Administrator will send the Notice by First Class U.S. Mail to all Class Members. (*Id.*, ¶¶ 18, 18(a).)
9 Further, the Settlement Administrator will perform skip traces to obtain the correct address of any Class
10 Members for whom the Notice is returned as undeliverable and will attempt re-mailings where new
11 addresses are ascertained. (*Id.*, 18(b).)

12 **E. THE COURT SHOULD SET A HEARING FOR FINAL APPROVAL**

13 Finally, the Court should set a formal hearing to conduct an inquiry into the fairness of the
14 proposed settlement. Cal. Rule Ct.¶ 3.769(e), (g). At the hearing, proponents of the Settlement may
15 explain and describe the terms and conditions and offer argument of settlement approval. Members of
16 the Settlement Class, or their counsel, may also appear and offer evidence and testimony in opposition to
17 the Stipulation of Settlement. The Parties request that the hearing on final approval of the settlement be
18 set 150 days from the Preliminary Approval Hearing, or as soon thereafter as may be convenient for the
19 Court.

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1 **VI. CONCLUSION**

2 For the foregoing reasons, the Parties respectfully submit that the Settlement's terms are fair,
3 adequate, and reasonable and that it is in the best interest of the Class Members. Under the applicable
4 class action criteria and guidelines, this Class should be conditionally certified, the Settlement should be
5 preliminarily approved, the Class should be notified regarding the Settlement, and the Court should
6 schedule a final approval hearing.

7
8 DATED: August 10, 2022

SETAREH LAW GROUP

9
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