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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

VERONICA CHIANG, on behalf of herself and
all others similarly situated,

Plaintiff,

vs.

ZIPFIZZ CORPORATION; and DOES 1
through 100, inclusive,

Defendants.

Case No.: 23STCV17431

CLASS ACTION

*[Assigned for all purposes to Hon.
William F. Highberger, Dept. SSC-10]*

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: July 16, 2024

Time: 10:30 a.m.

Dept.: SSC-10

Action Filed: July 25, 2023

Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on July 16, 2024 at 10:30 a.m., or as soon thereafter as the matter may be heard in Department 10 of the above-entitled Court, located at 312 North Spring Street, California 90012, Plaintiffs Veronica Chiang and Patrick Langston (“Plaintiffs”) will, and hereby do, move this Court for:

1. Preliminary approval of the proposed Settlement Agreement (“Settlement”) between Plaintiffs and Defendant ZipFizz Corporation (“ZipFizz” or “Defendant”);
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the following Settlement Class:
All current and former non-exempt employees who worked for ZipFizz in California at any time from June 23, 2019 to February 15, 2024 (the “Class Period”).
3. Preliminary appointment of Plaintiffs as Class Representatives;
4. Preliminary appointment of Abramson Labor Group, Bokhour Law Group, P.C., and Falakassa Law, P.C. as Class Counsel;
5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;
6. Approval of the proposed Class Notice, and an order that the Class Notice be disseminated to the Settlement Class as provided in the Settlement; and
7. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award a Class Representative Service Award to Plaintiffs, and attorneys’ fees and costs to Class Counsel.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declarations of counsel and exhibits attached thereto; the declaration of Jodey Lawrence on behalf of Phoenix Settlement Administrators and exhibits attached thereto; the declaration of Plaintiffs; the pleadings and other papers filed in this action; and any further oral or documentary evidence or argument presented at the time of hearing.

Dated: June 12, 2024

Respectfully Submitted,
ABRAMSON LABOR GROUP

Neil Larsen

Neil M. Larsen
Attorneys for Plaintiffs

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF THE LITIGATION	2
A. FACTUAL AND PROCEDURAL BACKGROUND.....	2
B. PLAINTIFFS’ CLAIMS AND ZIPFIZZ’S DEFENSES.....	3
1. Unpaid Wages - Rounding.....	3
2. Unpaid Overtime – Regular Rate.....	3
3. Unpaid Minimum Wages – Commission Pay Plan.....	3
4. Unpaid Minimum Wages (Rest Period Time) – Commission Pay Plan.....	4
5. Unpaid Minimum Wages (Non-Productive Time) – Commission Pay Plan.....	4
6. Meal Period Violations	5
7. Rest Period Violations	5
8. Failure to Reimburse Business Expenses	6
9. Failure to Timely Pay Wages	6
10. Claims Under Lab. Code §§ 203, 226, and the PAGA	7
C. DISCOVERY AND MEDIATION.....	8
III. THE PROPOSED SETTLEMENT.....	9
A. ESSENTIAL TERMS OF THE SETTLEMENT	9
1. The Settlement Provides for Reasonable Monetary Payments.....	9
2. Notice Period and Release of Claims	10
3. Attorneys’ Fees and Costs, Service Awards, and PAGA Payment	10
IV. ARGUMENT.....	12
A. PRELIMINARY APPROVAL IS WARRANTED	12
1. Standard for Preliminary Approval.....	12
a. The Strength of Plaintiffs’ Case.....	13
b. Risk, Expense, Complexity, and Duration of Further Litigation.....	13
c. Risk of Maintaining Class Action Status	13
d. Amount Offered in Settlement Given Realistic Value of Claims.....	13

1	e. The Experience and Views of Counsel	14
2	2. The Preliminary Approval Standard Is Met.....	14
3	a. The Settlement Is Within the Range of Possible Approval	14
4	b. The Settlement Resulted from Serious, Informed Negotiations	14
5	c. The Settlement Is Devoid of Obvious Deficiencies.....	15
6	B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS.....	15
7	1. The Proposed Class Is Ascertainable and Numerous	15
8	2. Common Issues of Law and Fact Predominate.....	15
9	3. The Named Plaintiffs’ Claims Are Typical	16
10	4. Plaintiffs and Class Counsel Will Adequately Represent the Class	16
11	C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE	16
12	D. THE COURT SHOULD SET A FINAL APPROVAL HEARING	17
13	V. CONCLUSION.....	17

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Federal Cases

<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974).....	16
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	12
<i>In re Pac. Enter. Sec. Litig.</i> , 47 F.3d 373 (9th Cir. 1995).....	14
<i>In re Syncor ERISA Litig.</i> , 516 F.3d 1095 (9th Cir. 2008)	12

State Cases

<i>Benton v. Telecom Network Specialists, Inc.</i> , 220 Cal.App.4th 701 (2013).....	16
<i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> , 191 Cal.App.3d 1341 (1987)	16
<i>Brinker Restaurant Corp. v. Sup. Ct.</i> , 53 Cal.4th 1004 (2012).....	5
<i>Capital People First v. State Dept. of Develop. Svcs.</i> , 155 Cal.App.4th 676 (2007)	16
<i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018)	7, 8
<i>Chavez v. Netflix, Inc.</i> , 162 Cal.App.4th 43 (Cal.App. 1 Dist.,2008).....	11
<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794 (1996)	12
<i>Gattuso v. Hart-Hanks Shoppers, Inc.</i> , 42 Cal.4th 554 (2007).....	6
<i>Grissom v. Vons Companies, Inc.</i> , 1 Cal.App.4th 52 (1991).....	6
<i>In re Cellphone Fee Termination Cases</i> , 186 Cal.App.4th 1380 (2010).....	10
<i>Kao v. Joy Holiday</i> , 12 Cal.App.5th 947 (2017)	7
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008).....	12, 14, 15
<i>Laffitte v. Robert Half Int’l, Inc.</i> , 1 Cal.5th 480 (2016).....	11
<i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal.App.5th 1308 (2018)	7
<i>McGhee v. Bank of Am.</i> , 60 Cal.App.3d 442 (1976)	16
<i>Price v. Starbucks Corp.</i> , 192 Cal.App.4th 1136 (2011).....	7
<i>Reed v. United Teachers Los Angeles</i> , 208 Cal.App.4th 322 (2012).....	12
<i>Sav-On Drug Store, Inc. v. Sup. Ct.</i> , 34 Cal.4th 319 (2004).....	15
<i>Sevidal v. Target Corp.</i> , 189 Cal.App.4th 905 (2010).....	15
<i>Soto v. Motel 6 Operating, L.P.</i> , 4 Cal.App.5th 385 (2016).....	7

1	<i>Thurman v. Bayshore Transit Management, Inc.</i> , 203 Cal.App.4th 1112 (2012)	6, 8
2	<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224 (2001)	12
3	<u>Federal Statutes & Rules</u>	
4	Fed. R. Civ. Proc. Rule 23	12
5	<u>State Statutes and Rules</u>	
6	8 Cal. Code Regs. § 13520.....	7
7	Cal. Code Civ. Proc. § 382	15
8	Cal. Rule of Court 3.766	17
9	Cal. Rule of Court 3.769	12, 17
10	Cal. Labor Code § 203	7
11	Cal. Labor Code § 226	7
12	Cal. Labor Code § 2699	2, 3, 6, 8, 11
13	<u>Unpublished Cases</u>	
14	<i>Alvarado v. Nederend</i> , 2011 WL 1883188 (E.D. Cal. May 17, 2011)	10
15	<i>Chu v. Wells Fargo Inv., LLC</i> , 2011 WL 672645 (N.D. Cal. Feb. 16, 2011)	11
16	<i>Fleming v. Covidien, Inc.</i> , 2011 WL 7563047 (C.D. Cal. 2011)	7, 8
17	<i>Hudson v. Libre Technology, Inc.</i> , 2020 WL 2467060 (S.D. Cal. May 13, 2020)	11
18	<i>Martinez v. Knight Transportation</i> , 2023 WL 5917989 (E.D. Cal. Sept. 11, 2023)	11
19	<i>Tapia v. Zale Delaware Inc.</i> , 2016 WL 1385181 (S.D. Cal. Apr. 6, 2016)	15
20	<u>Other Citations</u>	
21	<i>Manual for Complex Litig.</i> , § 30.41 (3rd Ed. 1995)	14
22	<i>Newberg on Class Actions</i> , §§ 11:24-25 (4th Ed. 2013).....	14
23		
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Veronica Chiang and Patrick Langston (“Plaintiffs”) seek preliminary approval
4 of a class action settlement agreement (“Settlement”) with Defendant ZipFizz Corporation
5 (“ZipFizz” or “Defendant”) (together with Plaintiffs, the “Parties”). The Settlement resolves a
6 class and representative action pending before this Court (the “Action”), in which Plaintiffs allege
7 that ZipFizz: (1) failed to pay overtime wages; (2) failed to pay minimum wages; (3) failed to
8 timely pay wages; (4) failed to provide legally-compliant meal periods; (5) failed to authorize and
9 permit legally-complaint rest periods; (6) failed to pay sick pay wages; and (7) failed to reimburse
10 business expenses. Plaintiffs further allege that as a result of these violations, ZipFizz failed to
11 issue accurate itemized wage statements, failed to pay all wages on termination of employment,
12 engaged in unfair business practices, and is liable for civil penalties under the Private Attorneys
13 General Act (“PAGA”).

14 Plaintiffs now respectfully requests that this Court preliminarily approve this non-
15 reversionary, common-fund class action Settlement,¹ in which ZipFizz has agreed to pay
16 \$650,000.00 to the following Settlement Class, which is estimated to consist of 598 individuals:

17 All current and former non-exempt employees who worked for ZipFizz in
18 California at any time from June 23, 2019 to February 15, 2024 (the “Class
Period”).

19 The Settlement was reached after the Parties engaged in a full-day mediation with Tagore
20 Subramaniam, Esq., an experienced and well-regarded wage and hour class action mediator. Prior
21 to the mediation, ZipFizz provided Plaintiffs with extensive informal discovery, including
22 timekeeping and payroll records for approximately 10% putative class members; a class list
23 containing putative class members’ hire and separation dates (if applicable); relevant written
24 policies; and additional data and information.

25 After extensive research and investigation, including a detailed analysis of ZipFizz’s
26 potential exposure made with the assistance of an expert data analyst, the mediation session was
27 held with Mr. Subramaniam on December 19, 2023. The Parties reached a class-wide settlement

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¹ The Settlement is attached as Exhibit 1 to the Larsen Declaration. The Class Notice is attached
as **Exhibit A** to the Settlement.

at mediation. Over the following months, the Parties negotiated the finer terms of the settlement, ultimately resulting in the Settlement.

Notably, Settlement Class Members do not need to submit a claim to receive a payment (“Settlement Award”). After deductions for proposed administration costs, attorneys’ fees and costs, Class Representative Service Awards, and the LWDA’s share of PAGA civil penalties, the average Settlement Award is estimated to be **\$595.04**. For the reasons discussed herein, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. FACTUAL AND PROCEDURAL BACKGROUND

ZipFizz is a company that manufactures healthy sports drink mixes, immune health powders, and energy shots. *See* Declaration of Neil M. Larsen (“Larsen Decl.”), ¶ 7. Plaintiff Chiang and Plaintiff Langston both worked for ZipFizz as non-exempt employees during the Class Period. *Id.*

On June 23, 2023, Plaintiff Langston filed his Class Action Complaint in Orange County Superior Court, Case No. 30-2023-01333366-CU-OE-CXC (“Langston Action”), alleging claims for: (1) failure to pay wages in a timely manner, (2) failure to pay all minimum wages, (3) failure to pay all overtime wages, (4) failure to pay sick pay wages, (5) failure to provide meal periods or pay premium pay in lieu thereof, (6) failure to provide rest periods or pay premium pay in lieu thereof, (7) failure to issue accurate wage statements, (8) failure to pay all earned wages due to terminated/resigned employees, (9) failure to reimburse for necessary business expenditures, and (10) unfair business practices. Larsen Decl., ¶ 8. On September 14, 2023, Plaintiff Langston filed a First Amended Complaint, which added a claim for PAGA civil penalties. *Id.* On April 19, 2024, Plaintiff Langston submitted a conformed copy of the First Amended Complaint to the LWDA, pursuant to Labor Code § 2699(l). *Id.*

On July 25, 2023, Plaintiff Chiang filed her Class Action Complaint in Los Angeles Superior Court, alleging claims for: (1) failure to pay minimum wage violations; (2) failure to pay overtime wages, (3) meal period violations; (4) rest period violations; (5) wage statement penalties; (6) waiting time penalties; (7) failure to reimburse business expenses; and (8) unfair

1 business practices. Larsen Decl., ¶ 9. On September 29, 2023, Plaintiff Chiang filed a First
2 Amended Complaint, which added a claim for PAGA civil penalties. *Id.* On October 6, 2023,
3 Plaintiff Chiang submitted a conformed copy of the First Amended Complaint to the LWDA,
4 pursuant to Labor Code § 2699(l). *Id.*

5 On March 28, 2024, Plaintiff Chiang filed the operative Second Amended Complaint
6 (“SAC”) to add Plaintiff Langston as a named plaintiff and class representative, to add additional
7 allegations and causes of action pled in the *Langston* Action, which allegations and causes of
8 action were valued and negotiated at the mediation, and to add plaintiff’s counsel in the *Langston*
9 Action as proposed counsel in this Action. *Id.* at ¶ 10.

10 **B. PLAINTIFFS’ CLAIMS AND ZIPFIZZ’S DEFENSES**

11 **1. Unpaid Minimum and Overtime Wages – Rounding**

12 Plaintiffs allege that ZipFizz utilized a rounding system that rounded employees’ time to
13 the quarter hour, resulting in an underpayment of wages (including minimum and overtime
14 wages). Larsen Decl., ¶ 15. However, our Plaintiffs’ expert’s analysis of the timekeeping data
15 revealed that no rounding of employees’ time took place. *Id.* Thus, Plaintiffs did not place any
16 realistic value on this claim. *Id.*

17 **2. Underpaid Overtime – Regular Rate**

18 Plaintiffs allege that ZipFizz failed to incorporate bonuses in employees’ “regular rate”
19 and, as a result, underpaid Settlement Class members’ overtime wages. Larsen Decl., ¶ 16.
20 ZipFizz argues that the payments in question were discretionary, and/or were not tied to the
21 quantity or quality of work performed, and were therefore excludable from the regular rate. *Id.*
22 ZipFizz also argues that any overtime under-payments were de minimis and not recoverable. *Id.*
23 ZipFizz also maintains that employees received different types of remuneration throughout the
24 Class Period, thus creating substantive differences among the putative class members with respect
25 to the payments received as well as the expectations regarding those payments, making class
26 certification unlikely. *Id.*

27 **3. Unpaid Minimum Wages – Commission Pay Plan**

28 Plaintiffs also allege that they and Settlement Class members were paid an hourly rate
less than the legal minimum wage as a result of ZipFizz’s commission pay plan. Larsen Decl., ¶

1 17. Specifically, Plaintiffs allege that ZipFizz paid Settlement Class members less than the
2 applicable minimum wage, and used employees' earned commissions to offset any shortfall to
3 meet ZipFizz's minimum wage obligations. Larsen Decl., ¶ 17; *see also Armenta v. Osmose, Inc.*,
4 135 Cal. App. 4th 314 (2005) and *Oman v. Delta Air Lines, Inc.*, 9 Cal. 5th 762 (2020). ZipFizz
5 argues that with commissions, the hourly rate paid to Plaintiffs and other non-exempt employees
6 averaged to over the legal minimum wage over the course of each pay period. Larsen Decl., ¶ 17.
7 ZipFizz further argues that class certification on this claim is unlikely because commissions
8 varied widely among non-exempt employees, and therefore highly individualized inquiries
9 would be needed to determine the extent of any injury suffered by a given employee. *Id.*

10 **4. Unpaid Minimum Wages (Rest Period Time) – Commission Pay Plan**

11 Plaintiffs also allege that ZipFizz failed to separately compensate Settlement Class
12 members for required rest periods when they were compensated on a commission-only basis, in
13 violation of California law. Larsen Decl., ¶ 18. However, ZipFizz argues that its commission pay
14 plan complies with California law and that it has always compensated its commission-based
15 employees for all required rest periods. *Id.* ZipFizz further argues that at all times throughout the
16 Class Period, it calculated separate rest period compensation for its commissioned based
17 employees in compliant with California law. *Id.*

18 **5. Unpaid Minimum Wages (Non-Productive Time) – Commission Pay Plan**

19 Plaintiffs also allege that ZipFizz failed to separately compensate Settlement Class
20 members for "non-productive" time, such as time spent setting up and breaking down tables,
21 communicating with management, and other tasks that did not generate commissions. Larsen
22 Decl., ¶ 19. ZipFizz, however, argues that, as noted above, its commission pay plan complies
23 with California law and that it has always compensated its commission-based employees for all
24 hours worked under its pay plan. *Id.* ZipFizz also argues that employees experienced minimal (if
25 any) uncompensated "non-productive" time. *Id.* Additionally, ZipFizz argues that any questions
26 of non-productive time would be highly individualized, as employees worked in a variety of
27 locations, and there are no records or other common evidence of time spent on potentially non-
28 productive tasks, making Plaintiffs' claim unmanageable. *Id.*

1 **6. Meal Period Violations**

2 Plaintiffs allege that ZipFizz failed to provide them and Settlement Class members with
3 legally compliant meal periods. Larsen Decl., ¶ 20. Specifically, Plaintiffs allege that Zipfizz
4 automatically deducted a 30-minute meal period on all shifts regardless of whether legally
5 compliant meal periods were actually taken. *Id.* However, Plaintiffs’ theory of liability carried
6 significant risks of both non-certification and losing on the merits. ZipFizz contends that it
7 maintained compliant written meal period policies throughout the Class Period, and provided
8 legally-compliant meal periods in line with those policies. ZipFizz further contends that under
9 *Brinker*, it is only required to “provide” meal periods, not “ensure” that they are taken, and that
10 is has always done so. *Id.* ZipFizz further contends that any short, missed, or late meal period
11 was the result of lawful employee waiver or choice, thereby precluding liability. *Id.* ZipFizz
12 further asserts that many putative class members would testify that they were, in fact, provided
13 with legally compliant off-duty meal periods. *Id.* Lastly, ZipFizz argues that individualized
14 inquires would be needed to determine why each meal period was missed, taken late or was short
15 by each employee, whether there was a valid waiver, and whether each meal period was on-call
16 or off-duty for each employee, thus making certification of the meal period claim unlikely. *Id.*

17 **7. Rest Period Violations**

18 Plaintiffs allege that ZipFizz failed to authorize and permit legally-compliant off-duty
19 rest periods. Larsen Decl., ¶ 21. But Plaintiffs faced significant defenses on this claim, with
20 respect to the merits and class certification. ZipFizz argues that it always maintained and enforced
21 lawful rest period policies and practices during the Class Period, and that employees were
22 authorized and permitted to take off-duty rest periods, and that any failure of non-exempt
23 employees to do so was the result of employee choice rather than any policy or practice of
24 ZipFizz. *Id.* In fact, ZipFizz asserts that many putative class members would testify that they did,
25 in fact, take off-duty rest periods. *Id.* ZipFizz further contends that individual inquiries would be
26 required to determine whether each employee was in fact required to remain on-duty during each
27 rest period on each shift, precluding class certification. *Id.*

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1 **8. Failure to Reimburse Business Expenses**

2 Plaintiffs allege that ZipFizz failed to indemnify them and Settlement Class members for
3 the use of their personal cell phones for work purposes, including to use their cell phones to clock
4 in and out of work using the Celayix Team Xpress mobile app and to communicate with
5 management. Larsen Decl., ¶ 22. ZipFizz counters that Settlement Class members did not alert
6 ZipFizz of the need to use their personal cell phones in connection with their job duties, and that
7 there are procedures in place for employees to request reimbursement of work-related expenses.
8 *Id.* ZipFizz further argues that this claim would not be certified, as it would require hundreds of
9 individualized inquiries as to whether employees incurred business-related expenses, whether
10 they were reimbursed, whether ZipFizz knew (or reasonably should have known) about the
11 expense, and whether the expense was “necessary” under the circumstances. Larsen Decl., ¶ 22;
12 *See Gattuso v. Hart-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007) (“In calculating the
13 reimbursement amount due under section 2802, the employer may consider not only the actual
14 expenses that the employee incurred, but also whether each of those expenses was ‘necessary,’
15 which in turn depends on the reasonableness of the employee’s choices.”); *Grissom v. Vons*
16 *Companies, Inc.*, 1 Cal.App.4th 52, 58 (1991) (under § 2802, “ascertaining what was a necessary
expenditure will require an inquiry into what was reasonable under the circumstances”).

17 **9. Failure to Timely Pay Wages**

18 Plaintiffs next allege that ZipFizz failed to timely pay employees wages, as it paid
19 employees weekly but paid them 9 days after the end of the pay period. Larsen Decl., ¶ 25.

20 ZipFizz contends that it has always paid employees timely, as it pay them weekly, “on a
21 regular day designated by the employer in advance of the rendition of services as the regular
22 payday” (see Labor Code § 204(b)), and that Labor Code § 204 therefore does not apply. Larsen
23 Decl., ¶ 25. ZipFizz further contends that even if the Court were to find ZipFizz in violation of
24 the payment timing requirements, only PAGA penalties are available for such violations, and
25 that the Court would utilize its discretion under the PAGA to reduce penalties drastically. *Id.*
26 This is particularly true, ZipFizz argues, in light of ZipFizz’s good-faith attempts to comply with
27 the law and given that no employees were underpaid as a result of the alleged violation. *Id.*; see
28 also Lab. Code § 2699(e)(2) (authorizing reduction in PAGA penalties in court’s discretion);
Thurman v. Bayshore Transit Mgmt., Inc., 203 Cal.App.4th 1112, 1135 (2012) (affirming

1 reduction of PAGA penalties because, inter alia, “the evidence showed... defendants took their
2 obligations...seriously and attempted to comply with the law”); *Fleming v. Covidien, Inc.*, No.
3 ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA
4 penalties by over 82% in part because employer was “not aware” of violations); *Carrington v.*
5 *Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just \$5 per pay
6 period where employer made “good faith attempts” to comply with the law).

7 **10. Claims Under Lab. Code §§ 203, 226, and the PAGA**

8 As a result of its alleged failure to pay all wages, as well as its failure to provide all meal
9 and rest periods, Plaintiffs assert that ZipFizz failed to comply with its final payment and wage
10 statement obligations, in violation of Cal. Labor Code §§ 203 and 226, respectively. Larsen Decl.,
11 ¶¶ 23-24. Finally, Plaintiffs seek civil penalties under the PAGA based on the aforementioned
12 claims. *Id.* at ¶ 25.

13 ZipFizz argues that Plaintiffs’ derivative claims fail for the same reasons their underlying
14 claims fail. *Id.* at ¶¶ 23-24. ZipFizz further asserts it has strong, good-faith defenses to Plaintiffs’
15 underlying claims, precluding waiting time penalties. *See* 8 Cal. Code Regs. § 13520 (a “good
16 faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v.*
17 *Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposition
18 of waiting time penalties). ZipFizz further contends that any alleged wage statement violations
19 were not “knowing and intentional,” particularly given its good-faith defenses; that Plaintiffs
20 cannot show they or other employees “suffer[ed] injury” due to alleged wage statement violations,
21 as required by Lab. Code § 226(e), and that employee wage statements always accurately reflect
22 amounts *paid* to employees. Larsen Decl., ¶ 23; *see also Maldonado v. Epsilon Plastics, Inc.*, 22
23 Cal.App.5th 1308, 1336-37 (2018) (“The purpose of section 226 is to ‘document the paid
24 wages to ensure the employee is fully informed regarding the calculation of those wages.’”) (citing
25 *Soto v. Motel 6 Operating, L.P.*, 4 Cal.App.5th 385, 392 (2016)).

26 Finally, ZipFizz contends Plaintiffs’ PAGA claim fails because the underlying claims fail.
27 Larsen Decl., ¶ 26; *see, e.g., Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011)
28 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”).
ZipFizz further maintains that given its strong defenses and its good-faith attempts to comply with

the law, the Court would substantially reduce PAGA penalties even if it were to find in Plaintiffs' favor on their underlying claims. Larsen Decl., ¶ 26; *see also* Lab. Code § 2699(e)(2) (authorizing discretionary reduction in PAGA penalties); *Thurman, supra*, 203 Cal.App.4th 1112 at 1135 (affirming reduction of PAGA penalties because, *inter alia*, “the evidence showed...defendants took their obligations...seriously and attempted to comply with the law”); *Fleming, supra*, 2011 WL 7563047 at *4 (reducing PAGA penalties by over 82% in part because employer was “not aware” of violations); *Carrington, supra*, 30 Cal.App.5th 504 at 529 (affirming PAGA penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

C. DISCOVERY AND MEDIATION

Prior to mediation, the Parties engaged in significant informal discovery, including ZipFizz's production of timekeeping and payroll data for approximately 10% of putative class members, all relevant wage and hour written policies, and other relevant data and information. Larsen Decl., ¶ 11. Plaintiffs also retained an expert data analyst, who conducted a comprehensive analysis and extrapolation of the timekeeping and payroll data to calculate ZipFizz's potential exposure for each of Plaintiffs' claims. *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiffs' claims, the chances of certification of Plaintiffs' claims, and ZipFizz's potential defenses. *Id.*

On December 19, 2023, the Parties attended a mediation with Tagore Subramaniam, Esq., an experienced and well-regarded wage and hour class action mediator. Larsen Decl., ¶ 12. During mediation, the Parties vigorously debated Plaintiffs' claims and ZipFizz's defenses, the potential value of Plaintiffs' claims, and the chances of certification. *Id.* The Parties reached a class-wide settlement at mediation. *Id.* Over the following months, the Parties negotiated the finer terms of the settlement, ultimately resulting in the Settlement. *Id.*

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III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

Under the Settlement, ZipFizz will pay a non-reversionary Gross Settlement Amount (“GSA”) of \$650,000.00. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount (“GSA”):	\$650,000.00
• Minus Court-approved attorneys’ fees (one-third):	\$216,666.67
• Minus Court-approved costs (up to):	\$20,000.00
• Minus Court-approved Service Awards:	\$20,000.00
• Minus Amount Set Aside as PAGA penalties:	\$30,000.00
• <u>Minus estimated settlement administration costs:</u>	<u>\$15,000.00</u>
Net Settlement Amount (“NSA”):	\$348,333.33
PLUS 25% of PAGA penalties (“PAGA Amount”):	\$7,500.00
Total Amount Paid to Settlement Class:	\$355,833.33

1. The Settlement Provides for Reasonable Monetary Payments

As noted above, after deducting amounts for court-approved Class Representative Service Awards, administration costs, attorneys’ fees and costs, and PAGA payment to the LWDA, ZipFizz will pay at least \$355,833.33 to Settlement Class members. *See* Settlement, §§ 3.1, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5. ZipFizz represents that there are approximately 598 Settlement Class members. *Id.*, §§ 4.1, 8. Thus, the average Settlement Award is estimated to be \$595.04. Larsen Decl., ¶ 14.

The NSA shall be distributed to Participating Class Members (i.e., those Settlement Class members who do not opt out of the Settlement) as follows: An Individual Class Payment calculated by: (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member’s Workweeks. *See* Settlement, § 3.2.4.

In addition, all Settlement Class Members (regardless whether they opt-out) who were employed by ZipFizz in California at any time between July 11, 2022 and February 15, 2024 (the “PAGA Period”), will receive a portion of the \$7,500 PAGA Amount (“Individual PAGA Payment”), based on their proportionate number of pay periods worked during the PAGA Period. *See* Settlement, §§ 1.32, 3.2.5.1, 5.3.

Payments from the NSA will be treated as 20% wages reported on a Form W-2, with the remaining 80% treated as interest and penalties and reported on a Form 1099. *See* Settlement, § 3.2.4.1. Payments from the PAGA Amount will be treated as 100% penalties. ZipFizz will

1 separately pay the employer's share of payroll taxes on the amount designated as "wages," in
2 addition to the GSA. *Id.*, § 3.1.

3 **2. Notice Period and Release of Claims**

4 Settlement Class members will have 60 days from the Notice mailing to opt-out of or
5 object to the Settlement, or submit disputes, thereby providing ample time to review the Notice
6 without unduly delaying the Settlement. *See Id.*, §§ 7.5, 7.6, 7.7.

7 Participating Class Members will be bound by the Settlement and will release all claims
8 that were pled in the Action, or that could have been pled based on the facts alleged in the operative
9 SAC in the Action, during the Class Period ("Released Class Claims"). *See Settlement*, § 5.2. In
10 addition, all Settlement Class members (regardless whether they opt out) who worked for ZipFizz
11 in California during the PAGA Period, will release all claims against ZipFizz for PAGA penalties
12 based on the facts alleged in the operative SAC in the Action, that arose during the PAGA Period
13 ("PAGA Released Claims"). *Id.*, § 5.3.

14 **3. Attorneys' Fees and Costs, Service Awards, and PAGA Payment**

15 At final approval, Plaintiffs will apply for Class Representative Service Awards in the
16 amount of \$10,000.00 each (totaling \$20,000.00). *See Larsen Decl.*, ¶ 29; *see also Settlement*, §
17 3.2.1. "[I]ncentive awards are fairly typical in class action cases...and are intended to compensate
18 class representatives for work done on behalf of the class [and] to make up for financial or
19 reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases*, 186
20 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at final approval, Plaintiffs' requested
21 Service Awards are in recognition of the time and effort they expended on behalf of the Settlement
22 Class, including providing factual information and documents to counsel, identifying potential
23 witnesses, attending multiple telephonic meetings with the office of their respective counsels to
24 discuss the claims and theories at issue in the litigation, reviewing the settlement agreement, and
25 otherwise actively participating in the prosecution of this case. *Larsen Decl.*, ¶ 29. Plaintiffs
26 respectfully submit that the requested Service Awards are well within the range of approval. *See,*
27 *e.g., Alvarado v. Nederend*, No. 1:08-cv-01099-OWW-DLB, 2011 WL 1883188 at *10 (E.D. Cal.
28 May 17, 2011) (approving \$7,500 award to each of five named plaintiffs from \$505,058.60

1 settlement); *see also* *Martinez v. Knight Transportation*, No. 1:16-cv-01730, 2023 WL 5917989
2 (E.D. Cal. Sept. 11, 2023) (approving \$10,000 award to plaintiff in \$400,000 class action
3 settlement where class member payments averaged about \$127).

4 The Parties have also designated \$30,000.00 of the GSA as PAGA penalties, of which
5 \$22,500.00 (75%) will be paid to the LWDA, with the remaining \$7,500.00 (25%) distributed to
6 Settlement Class members (*see* Settlement, § 3.2.5), consistent with the PAGA’s requirement that
7 75% of penalties be allocated to the LWDA with the remaining 25% of penalties allocated to
8 aggrieved employees (Labor Code § 2699(i)). Plaintiffs submit this allocation to the LWDA is
9 appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells*
10 *Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 at *1 (N.D. Cal. Feb. 16, 2011)
11 (approving PAGA payment of \$7,500 to LWDA from \$6.9 million settlement); *Hudson v. Libre*
12 *Technology, Inc.*, No. 3:18-cv-1371-GPC, 2020 WL 2467060 at *8 (S.D. Cal. May 13, 2020)
13 (approving \$21,250 PAGA payment from \$425,000 settlement).

14 At final approval, Plaintiffs’ counsel will request attorneys’ fees of one-third of the GSA
15 (currently estimated at \$216,666.67), and up to \$20,000 in litigation costs. *See* Larsen Decl., ¶
16 28; *see also* Settlement, § 3.2.2. The requested fee is fair compensation for undertaking complex,
17 risky, expensive, and time-consuming litigation on a contingent basis. Plaintiffs’ counsel have
18 incurred substantial attorneys’ fees conducting pre-filing investigation; analyzing each Plaintiffs’
19 claims; conducting legal research; analyzing timekeeping, payroll, and other data with our expert
20 to create a comprehensive damages model; preparing for and attending mediation; negotiating
21 and preparing the Settlement; preparing this Motion; and otherwise prosecuting this case. Larsen
22 Decl., ¶ 28. Counsel will also incur future attorneys’ fees in overseeing the Notice process,
23 fielding phone calls from Settlement Class members, preparing the Final Approval Motion and
24 supporting documents, and appearing at the Final Approval Hearing. *Id.*

25 It is appropriate to award attorney fees as a percentage of the “common fund” created by
26 the settlement. *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480 (2016) (holding “the percentage of
27 fund method survives in California class action cases”). Counsel’s fee request is well within the
28 range of reasonableness and is typical for common fund settlements. *See, e.g., Chavez v. Netflix*,

1 *Inc.*, 162 Cal.App.4th 43, n.11 (2008) (“regardless whether the percentage method or the lodestar
2 method is used, fee awards in class actions average around one-third of the recovery”). As will
3 be briefed at final approval, the fee request is reasonable in light of the substantial risks and work
4 undertaken, the results obtained, and the efficiency with which counsel conducted the litigation.

5 **IV. ARGUMENT**

6 **A. PRELIMINARY APPROVAL IS WARRANTED**

7 California Rule of Court 3.769 conditions class action settlements on court approval,
8 which is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United*
9 *Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine
10 “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.*,
11 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine “whether a proposed
12 settlement is fundamentally fair, adequate, and reasonable”). Settlement is the preferred means of
13 dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*,
14 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role is to ensure the settlement agreement taken
15 as a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a
16 presumption of fairness when a settlement is negotiated at arm’s length by counsel. *See, e.g.,*
17 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

18 **1. Standard for Preliminary Approval**

19 To make a fairness determination, the Court should consider several factors, including:
20 “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further
21 litigation, the risk of maintaining class action status through trial, the amount offered in
22 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
23 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
24 “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing
25 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
26 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate,
27 and reasonable in light of the overall balance of factors in this case.

28 ///

1 **a. The Strength of Plaintiffs' Case**

2 While Plaintiffs are confident in the merits of their claims, Plaintiffs acknowledge there
3 were substantial risks and uncertainty in proceeding with class certification and eventual trial on
4 the merits. As described in section II.B., *supra*, ZipFizz presented multiple defenses to Plaintiffs'
5 claims, both on the merits and to class certification, rendering success far from certain.

6 **b. Risk, Expense, Complexity, and Duration of Further Litigation**

7 Although the Parties engaged in significant informal discovery, they had not completed
8 formal written and deposition discovery, which would have required expenditure of substantial
9 time and resources. Larsen Decl., ¶ 30. Plaintiffs also still had to file for class certification. *Id.*
10 Even if Plaintiffs obtained certification, the Parties would incur considerable attorneys' fees and
11 costs through a possible decertification motion, motions for summary judgment, trial, and
12 potential appeals. *Id.* The Settlement avoids these risks, expense, and delays, and is therefore a
13 favorable outcome for the Settlement Class. *Id.* Thus, this factor supports preliminary approval.

14 **c. Risk of Maintaining Class Action Status**

15 Plaintiffs had not yet filed their class certification motion, and as such, the extent to which
16 Plaintiffs' proposed classes were certifiable is somewhat speculative. Absent settlement, there
17 was a risk there would not be a certified class at trial, or if there were, that it would consist of a
18 significantly smaller group of employees than the proposed Settlement Class, and the expected
19 recovery would be significantly reduced. Thus, this factor supports preliminary approval.

20 **d. Amount Offered in Settlement Given Realistic Value of Claims**

21 The Settlement provides a fair and reasonable monetary recovery for the Settlement Class
22 for disputed claims. As detailed in the concurrently filed Larsen Declaration, and with the
23 assistance of an expert data analyst, Plaintiffs conducted an analysis of potential damages due to
24 ZipFizz's allegedly unlawful wage and hour policies and practices. After applying reasonable
25 discounts for risks of not obtaining class certification and risks of losing on the merits, Plaintiffs
26 estimated their claims had a realistic potential value of approximately \$879,031. Larsen Decl., ¶¶
27 15-27. The proposed settlement of \$650,000.00 therefore represents about 73.9% of Plaintiffs'
28 reasonably forecasted class-wide recovery. *Id.* As noted above, payments under the Settlement

will average approximately \$595.04. Larsen Decl., ¶ 14. Preliminary approval is appropriate as the Settlement will provide significant monetary relief to the Settlement Class.

e. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter. Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel have extensive experience litigating wage and hour class actions, and have been appointed class counsel in numerous cases alleging similar claims. See Larsen Decl., ¶¶ 2-5; Declaration of Mehrdad Bokhour (“Bokhour Decl.”), ¶¶ 17-22; Declaration of Joshua S. Falakassa (“Falakassa Decl.”), ¶¶ 4-12. Counsel conducted an in-depth review of ZipFizz’s policies, timekeeping and payroll records, and other relevant data, and drew on their extensive experience to assess Plaintiffs’ claims. Larsen Decl., ¶¶ 11, 15-26; Bokhour Decl., ¶¶ 23-33; Falakassa Decl., ¶¶ 16-17. The Settlement was also reached after a mediation session with Tagore Subramaniam, Esq., an experienced and well regarded wage and hour class action mediator. Larsen Decl., ¶ 12. This strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard Is Met

The Court can grant preliminary approval of a proposed settlement and direct that notice be given if the settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed negotiations; and (3) has no obvious deficiencies. See *Manual for Complex Litig.*, § 30.41 (3rd Ed. 1995); *Newberg on Class Actions*, §§ 11:24-25 (4th Ed. 2013).

a. The Settlement Is Within the Range of Possible Approval

As noted, the Settlement reflects approximately 73.9% of the realistic estimated recovery on Plaintiffs’ claims, and will provide tangible, monetary compensation for hotly disputed wage claims. Larsen Decl., ¶¶ 15-27. Accordingly, Plaintiffs submit that the Settlement is within the range of possible approval.

b. The Settlement Resulted from Serious, Informed Negotiations

The Settlement resulted from an exchange of substantial information, arm’s-length negotiations, a mediation session with an experienced mediator, and months of additional

negotiations. Plaintiffs’ counsel carefully vetted the claims at issue and conducted a detailed analysis of the relevant data and information. Larsen Decl., ¶¶ 11-12, 15-27. The Settlement is thus entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130.

c. The Settlement Is Devoid of Obvious Deficiencies

The Settlement provides tangible monetary relief to the Settlement Class, and the amounts proposed for attorneys’ fees, costs, Plaintiffs’ Service Awards, and PAGA penalties are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS

The proposed Settlement Class satisfies the criteria for certification because: 1) the Settlement Class is ascertainable and numerous; 2) common questions of law and fact predominate; 3) Plaintiffs’ claims are typical of the Settlement Class; and 4) Plaintiffs and their counsel will fairly and adequately represent the Settlement Class. Cal. Code Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is “ascertainable” where members “may be readily identified without unreasonable expense or time by reference to official [or business] records.” *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919 (2010). The Settlement Class includes non-exempt employees who worked for ZipFizz in California during the Class Period, and thus can be readily identified from ZipFizz’s records. As noted, *interalia*, ZipFizz represents there are about 598 Settlement Class members, rendering it impracticable to bring them all before the Court. Numerosity is therefore satisfied.

2. Common Issues of Law and Fact Predominate

The focus on certification is not on the merits of the case, but rather on what types of questions, “common or individual,” are likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiffs’ claims are predicated primarily on ZipFizz’s allegedly unlawful failure to pay minimum and overtime wages, allegedly unlawful meal and rest period policies/practices, alleged failure to reimburse for business expenses, and alleged failure to timely pay wages. Such claims are commonly held proper for class certification. *See, e.g., Tapia v. Zale Delaware Inc.*, 2016 WL 1385181 at **3-4 (S.D. Cal. Apr. 6, 2016) (certifying

rounding claim); *Benton v. Telecom Network Specialists, Inc.* 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims); *Tokoshima v. Pep Boys-Manny Moe & Jack of Calif.*, No. C-12-4810-CRB, 2014 WL 1677979 at **5-8 (N.D. Cal. Apr. 28, 2014) (certifying minimum wage claim); *Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (2014) (reversing denial of class certification of reimbursement claim).

3. The Named Plaintiffs' Claims Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiffs' claims are typical of those held by Settlement Class members. Each Plaintiff was employed by ZipFizz as a non-exempt employee in California during the Class Period, and they were injured by the same challenged policies that allegedly injured the Settlement Class as a whole. See Declaration of Veronica Chiang, ¶¶ 2-3; Declaration of Patrick Langston, ¶ 6. Thus, typicality is satisfied.

4. Plaintiffs and Class Counsel Will Adequately Represent the Class

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155 Cal.App.4th 676, 697 (2007). Plaintiffs and their respective counsel will adequately represent the Settlement Class, as there are no known conflicts between Plaintiffs or their counsel and the Settlement Class. See *McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was no indication that plaintiff's counsel was not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Plaintiffs' counsel also have extensive experience in wage and hour class action litigation, as noted above.

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE

The Court should order distribution of the proposed Notice by U.S. Mail, using last known mailing addresses provided by ZipFizz. See Settlement, § 7.4. This is the "best notice practicable" under the circumstances, as it provides "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiffs propose the Settlement be administered by Phoenix Settlement Administrators, an experienced

1 class action settlement administrator. See Jodey Lawrence Declaration and exhibits. Settlement
2 Class members' addresses will be ascertainable through ZipFizz's records. Phoenix will also run
3 all addresses through the U.S. Postal Service National Change of Address database and/or perform
4 "skip traces" to obtain current addresses. See Settlement, §§ 1.10, 7.4.2, 7.4.3.

5 The proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises Settlement
6 Class members of the nature of the claims; the basic contentions of the parties; the key terms of
7 the Settlement; the 60-day deadline to opt-out, object, or submit a dispute and how to do so;
8 explains the recovery formula and expected recovery amount for each Settlement Class member;
9 and explains the releases of claims included in the Settlement. See Larsen Decl., Exh. A to Exh.
10 1. The proposed Notice also includes the final approval hearing date and time, and it provides
11 contact information for Class Counsel and the administrator in the event Settlement Class
12 members have any questions about the Settlement. *Id.* This Notice satisfies Cal. Rule of Court
13 rule 3.766(e) as the most reliable and cost-effective method of reaching the Settlement Class.

14 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

15 Finally, the Court should set a hearing for final approval on a date appropriately scheduled
16 to follow Settlement Class members' response deadline. See Cal. Rule of Court 3.769.

17 **V. CONCLUSION**

18 For the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily
19 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
20 Proposed Order submitted concurrently herewith.

21 Respectfully submitted,

22 Dated: June 12, 2024

ABRAMSON LABOR GROUP

23
24 By: Neil Larsen
25 Neil M. Larsen
26 Attorneys for Plaintiffs
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28