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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

ISAIAH DAVIS, CHARLES HARRELL,
individuals, on behalf of themselves and on behalf
of all persons similarly situated,

Plaintiffs,

vs.

RPM JUICE, INC., a California Corporation;
RPM FOODS, INC., a California Corporation;
and DOES 1-50, Inclusive.

Defendants.

Case No. 21STCV14755

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

Hearing Date: June 23, 2023
Hearing Time: 10:00 a.m.
Department: 7

Trial Date: None
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1 **I. INTRODUCTION**

2 Plaintiffs ISAIAH DAVIS and CHARLES HARRELL (“Plaintiffs”) respectfully submit
3 this memorandum in support of their Motion for Preliminary Approval of the Class Action and
4 PAGA Settlement of the action *Isiah Davis v. RPM Juice, Inc., et al.*, (Case No. 21STCV14755,
5 operative complaint filed on or about September 20, 2021) (the “Action”), filed against Defendants
6 RPM JUICE, INC. and RPM FOODS, INC. (“Defendants”). Plaintiffs seek entry of an order: (1)
7 preliminarily approving the proposed settlement of the Action with Defendants; (2) approving the
8 form and method for providing class-wide notice; (3) directing that notice of the proposed
9 settlement be given to the class; and (4) scheduling a final approval hearing date to consider
10 Plaintiffs’ motion for final approval of the settlement and entry of the Judgment, and Plaintiffs’
11 motion for approval of attorneys’ fees and litigation expenses.

12 Plaintiffs and Defendants have reached a full settlement of the Action, which is embodied
13 in the Settlement Agreement, a copy of which is attached as Exhibit #1 to the Declaration of Shani
14 O. Zakay (“Decl. Zakay”), served and filed herewith. The Settlement is fair, reasonable, and
15 adequate, and should be preliminarily approved. Plaintiffs respectfully request that this Court grant
16 preliminary approval of the Agreement and enter the proposed order submitted herewith.

17 **II. DESCRIPTION OF THE SETTLEMENT**

18 The Gross Settlement Amount to be paid by Defendants is Six Hundred Forty Six Thousand
19 Three Hundred Twenty-Five Dollars and Zero Cents (\$646,325.00). The Gross Settlement Amount
20 consists of the following elements: (1) the Individual Class Payments to Participating Class
21 Members, (2) Individual PAGA Payments, (3) the LWDA PAGA Payment, (4) Class Counsel Fees,
22 (5) Class Counsel Expenses, (6) Class Representative Service Payments, and (7) Administrator’s
23 Fees. The Gross Settlement Amount does not include Defendants’ share of employer payroll taxes,
24 which Defendants shall pay to the Administrator separately. The Gross Settlement Amount shall be
25 all-in with no reversion to Defendants. (Decl. Zakay at ¶ 13.)

26 After Final Approval and the Judgment becomes final (the “Effective Date,” as defined in
27 the Agreement), Defendants will fund the Gross Settlement Amount in four equal installments of
28 \$161,581.25 paid per installment. Defendants shall pay the first installment six (6) months after the

1 Court grants final approval of the Settlement. Defendants shall pay the second installment within
2 one (1) year after the first payment is made. Defendants shall pay the third installment within two
3 (2) years after the first payment is made. Defendants shall pay the fourth and final installment
4 within three (3) years after the first payment is made. Within 14 days after Defendants fund the
5 Gross Settlement Amount in an amount sufficient to cover the Individual Class Payments,
6 Individual PAGA Payments, and the Class Representative Service Payments, the Administrator will
7 mail checks for all Individual Class Payments, all Individual PAGA Payments, and the Class
8 Representative Service Payments. Thereafter, within 14 days after Defendants fund the Gross
9 Settlement Amount in full, the Administrator will mail checks for the LWDA PAGA Payment, the
10 Administration Expenses Payment, the Class Counsel Fees Payment, and the Class Counsel
11 Litigation Expenses Payment. Disbursement of the Class Counsel Fees Payment, the Class Counsel
12 Litigation Expenses Payment and the Class Representative Service Payment shall not precede
13 disbursement of Individual Class Payments and Individual PAGA Payments. (Decl. Zakay at ¶ 14.)

14 The Net Settlement Amount shall equal the amount available for Individual Class Payments
15 after deducting the Court-approved amounts for the Individual PAGA Payments, the LWDA PAGA
16 Payment, Class Representative Service Payments, Class Counsel Fees Payment, Class Counsel
17 Litigation Expenses Payment and the Administration Expenses Payment. The submission of a claim
18 form is not required for a Participating Class Member to be paid an Individual Class Payment. The
19 Individual Class Payment will be calculated by dividing the Net Settlement Amount by the total
20 number of workweeks worked by all Participating Class Members during the Class Period and then
21 multiplying that amount by the total number of workweeks worked by each Participating Class
22 Member during the Class Period. (Decl. Zakay at ¶ 15-16.)

23 Class Members will have forty-five (45) days after the mailing of the Class Notice to exclude
24 themselves or submit written objections. The deadlines will be extended an additional fourteen (14)
25 calendar days for Class Members whose notice is re-mailed. All Class Members who do not “opt
26 out” will be deemed Participating Class Members and will be bound by the Settlement. The Notice
27 will advise the Class Members of their right to object to the Settlement. (Decl. Zakay at ¶ 17.)
28

1 If a check is returned to the Settlement Administrator, the Settlement Administrator will
2 make all reasonable efforts to obtain a correct address for the Settlement Class Member and re-mail
3 the check to the Settlement Class Member at his or her correct address. If a Settlement Class
4 Member's Individual Settlement Payment check is not cashed within 180 days after the Settlement
5 Administrator's last mailing to the Settlement Class Member, the Administrator shall transmit the
6 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
7 name of the Class Member. (Decl. Zakay at ¶ 18.)

8 The Parties have agreed to use ILYM Group as the Settlement Administrator. Payment of
9 the expenses of the Settlement Administrator from the Gross Settlement Amount shall be made for
10 the expenses of effectuating and administering the Settlement. The Settlement Administrator shall
11 receive payment for services estimated at approximately \$14,000. (Decl. Zakay at ¶ 19.) A
12 declaration from ILYM Group outlining its qualifications and providing for the estimated
13 administration costs is filed concurrently with this Motion.

14 Subject to Court approval, the Agreement provides for Attorneys' Fees not to exceed 1/3 of
15 the Gross Settlement Amount and Attorneys' Expenses in an amount not to exceed \$20,000. In
16 support of this request, Class Counsel will provide evidentiary support, including lodestar method
17 calculations. Subject to Court approval, the Agreement provides for payment of a Class
18 Representative Service Award of no more than \$20,000 (\$10,000 each for both Plaintiffs), or such
19 lesser amount as may be approved by the Court at Final Approval.¹ (Decl. Zakay at ¶ 20.)

20 Subject to Court approval, \$36,000 will be paid for settlement of civil penalties under
21 PAGA, Labor Code Section 2698 *et seq.* Pursuant to the requirements of Labor Code §2699(i), the
22 PAGA Settlement shall be allocated \$27,000.00 (75%) to the LWDA (the "LWDA PAGA
23 Payment") as the LWDA's share of the settlement of civil penalties and \$9,000.00 (25%) for
24 distribution as Individual PAGA Payments to the Aggrieved Employees. The Administrator will
25 calculate each Individual PAGA Payment by dividing the amount of the Aggrieved Employees'

26
27 ¹ Plaintiffs will address the reasonableness of this award when filing their final approval papers,
28 including the enhancement factors set forth in *Golba v. Dick's Sporting Goods, Inc.*, 238 Cal. App.
4th 1251 (2015) and *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785 (2009).

1 25% share of PAGA Penalties by the total number of PAGA Period Pay Periods worked by all
2 Aggrieved Employees during the PAGA Period and multiplying the result by the total number of
3 pay periods each Aggrieved Employee worked within the PAGA Period. (Decl. Zakay at ¶ 21.)

4 **III. CASE BACKGROUND**

5 On February 2, 2021, Plaintiff Davis filed a Notice of Violations with the LWDA and served
6 the same on Defendants. On April 19, 2021, Plaintiff Davis filed the class action and PAGA
7 complaint in this Court, asserting claims for: (1) unfair competition; (2) failure to pay minimum
8 wages; (3) failure to pay overtime wages; (4) failure to provide required meal breaks; (5) failure to
9 provide required rest breaks; (6) failure to reimburse employees for required expenses; (7) failure
10 to provide accurate itemized wage statements; (8) failure to provide wages when due; (9) Unpaid
11 sick pay and failure to provide paid sick leave balance; and (10) violation of the Private Attorneys
12 General Act. (Decl. Zakay at ¶ 7.)

13 On April 23, 2021, Plaintiff Harrell filed a Notice of Violations with the LWDA and served
14 the same on Defendants. On September 20, 2021, Plaintiff Davis filed a First Amended Complaint
15 that added Plaintiff Harrell as a plaintiff in this Action. The First Amended Complaint also added
16 a cause of action for failure to provide personnel files in violation of California Labor Code Section
17 1198.5. (Decl. Zakay at ¶ 7.)

18 Plaintiffs seek to represent a putative class of all non-exempt employees who are or
19 previously were employed by RPM Juice, Inc. and/or RPM Foods Inc., who performed work in
20 California during the period of April 19, 2017 through the December 15, 2022 (the "Class Period").
21 The Complaint generally alleges the causes of action listed above. The Action seeks unpaid wages,
22 statutory and PAGA penalties, attorneys' fees, and litigation costs². (Decl. Zakay at ¶ 8.)

23 Plaintiffs also seek to represent a PAGA group of Aggrieved Employees which is comprised
24 of all non-exempt employees who are or previously were employed by RPM Juice, Inc. and/or RPM
25 Foods Inc., who performed work in California during the period of February 8, 2020 through
26 December 15, 2022 (the "PAGA Period"). (Decl. Zakay at ¶ 8.)

27
28 ² Plaintiff will provide a lodestar analysis for the fees and supporting evidence of the costs with the
final approval papers.

1 Prior to mediation, the Parties agreed to informally exchange documents and information in
2 connection with the Action. As part of this process, Defendants provided time and pay records for
3 298 employees, approximately 22.6% of the total Class. Plaintiffs' statistician found this to be
4 sufficient to develop a meaningful damages model. Additionally, the 22.6% sample is statistically
5 reliable, resulting in a confidence level of 95% with a margin of error of 5%. In addition to the time
6 and payroll records, Defendants produced multiple iterations of Defendants' Employee Handbook,
7 as well as other relevant policies and agreements. (Decl. Zakay at ¶ 9.)

8 On December 15, 2022, the Parties participated in an all-day mediation presided over by
9 Steven Rottman, Esq., a mediator of wage and hour class actions. Defendants raised an inability to
10 pay defense at the Parties' mediation, and the Parties agreed to a settlement of \$646,325 contingent
11 upon a forensic accountant's review of Defendants' financial records to advise on Defendants'
12 ability to fund a larger settlement. Plaintiffs subsequently retained Creal & Creal, an accountancy
13 corporation that regularly performs litigation support and forensic accounting services, including
14 providing opinions related to solvency. Defendants sent Kenneth Creal, CPA, of Creal & Creal a
15 number of financial documents including tax returns from recent years, balance sheets, and profit
16 and loss summaries. Kenneth Creal also performed an investigation into the assets owned by
17 Defendants and their owners. Following his review, Kenneth Creal advised Plaintiffs via a written
18 opinion that in his professional opinion, the conditional settlement of approximately \$650,000
19 negotiated between the Parties facilitated by mediator Rottman was reasonable in light of
20 Defendants' financial condition. Following Plaintiffs' consultation with Creal & Creal, the Parties
21 reached a settlement based on Mr. Rottman's recommended settlement amount, and executed a
22 binding Memorandum of Understanding. Thereafter, the Parties documented the agreement in the
23 form of a Settlement Agreement, which was signed by the Parties and is now presented to this Court
24 for preliminary approval. (Decl. Zakay at ¶ 10.)

25 Although a resolution has been reached, Defendants deny that they have violated any
26 applicable law, committed any wrong against Plaintiffs or any other current or former employee, or
27 that they have otherwise damaged Plaintiffs or any other current or former employee in any way.
28 Further, Defendants contend that class certification would be inappropriate for any reason other

1 than for settlement. Plaintiffs contend that Defendants violated California wage and hour laws.
2 Plaintiffs further contend that the Action is appropriate for class certification on the basis that the
3 Plaintiffs' claims meet the requisites for class certification. Without admitting that class certification
4 is proper, Defendants have stipulated that the above Class may be certified for settlement purposes
5 only. The Parties agree that certification for settlement purposes is not an admission that class
6 certification would be proper if the class certification issues were litigated. Further, the Agreement
7 is not admissible in this or any other proceeding as evidence that the Class could be certified absent
8 a settlement. Solely for purposes of settling the Action, the Parties stipulate and agree that the
9 requisites for establishing class certification with respect to the Class, as defined above, are
10 satisfied. (Decl. Zakay at ¶ 11.)

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

22 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS** 23 **COURT TO GRANT PRELIMINARY APPROVAL**

24 When a proposed class-wide settlement is reached, the settlement must be submitted to the
25 court for approval. (2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41,
26 p.11-87.) California "[p]ublic policy generally favors the compromise of complex class action
27 litigation." (*Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) (quoting *Cellphone*
28 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117-18 (2009).) Class action settlements are

1 approved where the proposed settlement is “fair, adequate and reasonable.” (*Dunk v. Ford Motor*
2 *Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d
3 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983).)

4 The primary question presented on an application for preliminary approval of a proposed
5 class action settlement is whether the proposed settlement is “within the range of possible approval.”
6 (*Manual for Complex Litigation*, Second §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3
7 (7th Cir. 1982).) Preliminary approval is merely the prerequisite to giving notice so that “the
8 proposed settlement... may be submitted to members of the prospective Class for their acceptance
9 or rejection.” (*Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*,
10 323 F. Supp. 364, 372 (E.D. Pa. 1970); *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist.
11 LEXIS 151997, *3 (C.D. Cal. 2010).) There is an initial presumption of fairness when a proposed
12 settlement, which was negotiated at arm’s length by counsel for the Class, is presented for court
13 approval. (*Newberg*, 3d Ed., §11.41, p.11-88; *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
14 224, 245 (2001) [citation omitted]; see also *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th
15 734, 742-45 (2009) (upholding trial court’s determination that settlement was “fair, reasonable and
16 adequate” where the settlement “provided valuable benefits to the class ... that were ‘particularly
17 valuable in light of the risks plaintiff would have faced if she proceeded to litigate her case.’”)).
18 However, the ultimate question of whether the proposed settlement is fair, reasonable, and adequate
19 is made after notice of the settlement is given to the Class Members and a final settlement hearing
20 is held by the Court.

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

22 Approval of a proposed settlement of a class action suit is a matter within the broad
23 discretion of the trial court. (*Wershba*, 91 Cal. App. 4th at 234-235; *Dunk*, 48 Cal. App. 4th at 1794.)
24 In considering a potential settlement for preliminary approval purposes, the trial court does not have
25 to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the
26 dispute, and need not engage in a trial on the merits. (*Wershba, supra*, 91 Cal. App. 4th at 239-40;
27 *Dunk, supra*, 48 Cal. App. 4th at 1807.) The Ninth Circuit explains, “the very essence of a
28 settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” (*Officers*

1 *for Justice v. Civil Service Com'n of City and County of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982).)

2 The question whether a proposed settlement is fair, reasonable, and adequate necessarily requires a

3 judgment and evaluation by the attorneys for the parties based upon a comparison of “the terms of

4 the compromise with the likely rewards of litigation.” (*Weinberger v. Kendrick*, 698 F.2d 61, 73

5 (2d Cir. 1982), cert. denied 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders*

6 *of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)).) Thus, when analyzing the

7 settlement, the amount is “not to be judged against a hypothetical or speculative measure of what

8 might have been achieved by the negotiators.” (*Officers for Justice*, 688 F.2d at 625, 628.) With

9 regard to class action settlements, the opinions of counsel should be given considerable weight both

10 because of counsel’s familiarity with this litigation and previous experience with cases such as

11 these. (*Id.* at 625.) “The recommendations of plaintiffs’ counsel should be given a presumption of

12 reasonableness.” (*Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979).) As a result, courts

13 hold that the recommendation of counsel is entitled to significant weight. (*Nat’l Rural Telecomms.*

14 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).)

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

16 In determining whether to grant preliminary approval, the court considers whether the “(1)

17 the proposed settlement appears to be the product of serious, informed, non-collusive negotiations,

18 (2) has no obvious deficiencies, (3) does not improperly grant preferential treatment to class

19 representatives or segments of the class, and (4) falls within the range of possible approval.” (*In re*

20 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).) No one factor should be

21 determinative. Here, the Settlement meets all of these criteria for preliminary approval.

22 **1. The Settlement is the Product of Serious, Informed and Arm’s Length**

23 **Negotiations by Experienced Counsel**

24 This Settlement is the result of extensive and hard-fought litigation and negotiations before

25 an experienced and well-respected mediator. Defendants denied and continue to deny any

26 wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiffs and Class

27 Counsel have determined that it is desirable and beneficial to the Class Members to put to rest the

28 Released Class Claims and Released PAGA Claims. The Released Class Claims include all claims

1 that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative
2 Complaint that occurred during the Class Period. The Released PAGA Claims include all claims for
3 PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in
4 the Operative Complaint and the PAGA Notices sent by Plaintiffs, that occurred during the PAGA
5 Period. (Decl. Zakay at ¶ 5.)

6 Plaintiffs and Class Counsel recognize the expense and time involved in continuing to
7 litigate and ultimately trying the Action against Defendants through possible appeals which could
8 take several years. Class Counsel have also taken into account the uncertain outcome and risk of
9 litigation, especially in complex actions such as the one here. Class Counsel are also mindful of,
10 and recognize, the inherent problems of proof under, and asserted defenses to, the claims asserted
11 in the Action. Based upon their evaluation, Plaintiffs and Class Counsel have determined that the
12 Settlement set forth in the Agreement is in the best interest of the Class Members. (Decl. Zakay at
13 ¶ 22.)

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

20 **2. The Settlement Has No “Obvious Deficiencies” and Falls Within the Range of** 21 **Approval**

22 The proposed Settlement here has no “obvious deficiencies” and is well within the range of
23 possible approval. All Class Members will receive an opportunity to participate in the Settlement
24 and receive payment according to the same formula if they do not opt out.

25 Defendants’ total exposure for the alleged violations at the time this Settlement was
26 negotiated was calculated by BCG, Plaintiffs’ damage expert. Plaintiffs used BCG to analyze the
27 data and determine the potential damages for the Class Members. For the Class, Plaintiffs estimate
28 that Defendants were subject to maximum liability for damages in the amount of \$3,466,532

1 consisting of \$286,846 for unpaid wages due to off-the-clock work, \$1,109,828 for rest period
2 violations, \$1,116,976 for meal period violations, and \$952,882 for unreimbursed expenses.
3 Plaintiffs contend that Defendants required themselves and Class Members to perform work-related
4 activities pre and post shift, including performing tasks such as disarming/arming alarms, turning
5 machinery on/off and preparing/cleaning food items for the day. Plaintiffs further contend that
6 Defendants required Plaintiffs and Class Members to receive and respond to work-related
7 communications off the clock, including but not limited to answering questions about product
8 supply and shift coverage. Plaintiffs also allege that Defendants did not provide compliant rest
9 periods for themselves or other Class Members, as evidenced by the sample of Class Member time
10 and pay records provided, Class Members recorded rest breaks. Similarly, Plaintiffs contend that
11 Defendants failed to provide compliant meal periods, which is also evidenced in the sampled Class
12 Member time and pay records. Plaintiffs' further allege that they and other Class Members were
13 not reimbursed for the required use of their personal cell phones to receive and respond to work-
14 related communications with supervisors and co-workers regarding product supply and shift
15 coverage, and the occasional use of personal vehicles to perform work-related tasks including
16 making bank deposits, transporting product between stores, and driving to off-site events.

17 As it pertains to derivative penalties, Plaintiffs' expert calculated \$2,224,288 in waiting time
18 penalties and \$1,637,100 for wage statement penalties. Finally, Plaintiffs' expert calculated that
19 Defendants could be liable for PAGA penalties in an amount of \$2,974,675. Consequently, the
20 Settlement of \$646,325.00 represents approximately 18.6% of the maximum estimated *damages*.
21 Given the amount of the Settlement as compared to the potential value of claims in this case, the
22 Settlement is fair and reasonable. Clearly, the goal of this litigation – to provide compensation to
23 Class Members for unpaid time and for allegedly missed meal and rest breaks – has been met. (Decl.
24 Zakay at ¶ 6.)

25 In *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal.
26 2015) the court approved a settlement of an action claiming unpaid wages where the settlement
27 amount constituted roughly 10% of the estimated actual damages to the class. Here, the settlement
28 consideration exceeds the percentage approved in *Stovall-Gusman*. In *Stovall-Gusman*, the court

1 ruled that the settlement which represented approximately 10% of the estimated loss to the class
2 was fair, reasonable, and adequate. As a result, this Settlement, which exceeds the percentage
3 approved in *Stovall-Gusman*, is entitled to preliminary approval.

4 Moreover, where both sides face significant uncertainty, the attendant risks favor settlement.
5 (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.) Here, a number of defenses
6 asserted by Defendants presented serious threats to the claims of the Plaintiffs and the other Class
7 Members. For instance, Defendants asserted that the employment practices complied with all
8 applicable Labor Laws. Specifically, Defendants argued that the Supreme Court decision in *Brinker*
9 *v. Superior Court*, 53 Cal. 4th 1004 (2012) weakened, if not eliminated, Plaintiffs' claims, on
10 liability, value, and class certifiability as to the meal and rest period claims. A major component of
11 the damages alleged to have been suffered by the Class Members are attributed to non-compliant
12 meal and rest breaks. Before and during the mediation, Defendants aggressively argued that
13 Defendants' policies and culture afforded the Class Members an opportunity to take timely meal
14 and rest breaks, and that to the extent that breaks were not taken, this was done at the election of
15 the employee, particularly in instances in which an employee worked a shift of 6 hours or less.
16 Defendants argued, therefore, that under the *Brinker* decision they have no liability for the missed
17 breaks whatsoever. Defendants argued that they adopted and strictly enforced lawful policies, and
18 afforded Plaintiffs and the Class Members compliant meal and rest breaks. If successful, these
19 defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiffs believes
20 that these defenses, and others, could be overcome, Defendants maintain these defenses have merit
21 and therefore present a serious risk to recovery for the Class. (Decl. Zakay at ¶¶ 23-24.)

22 There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable
23 to obtain class certification and thereby not recover on behalf of any employee other than himself.
24 Defendants argued that the individual experience of each employee varied with respect to the
25 alleged claims. While other cases have approved class certification of wage and hour claims, class
26 certification in this action would have been hotly disputed and was by no means a foregone
27 conclusion. Finally, even if class certification was successful, as demonstrated by the California
28 Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are

1 significant hurdles to overcome for a class-wide recovery even where the class has been certified.
2 (Decl. Zakay at ¶ 25.) Here, the risk of further litigation is substantial. After arm's-length
3 negotiations between experienced and informed counsel, the Parties recognized the potential risks
4 and agreed on the Settlement.

5 Finally, Plaintiffs' expert calculated that Defendants could be liable for PAGA penalties in
6 an amount of \$2,974,675. However, Courts have considerable discretion to reduce the penalty
7 award. Some trial courts have awarded no civil penalties, even when Labor Code violations are
8 established. *See In re Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award
9 of \$0 in PAGA penalties in a wage and hour class action). To recover any PAGA penalties, Plaintiffs
10 would be required at trial to prove each of the underlying Labor Code violations. *See Cardenas v.*
11 *McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) Here, Plaintiffs
12 would need to prove that each Aggrieved Employee suffered a violation for each pay period the
13 employee worked. Again, Defendants raised several defenses that present serious threats to the
14 claims of the Plaintiffs and the Aggrieved Employees. In all, Plaintiffs' PAGA liability exposure is
15 hotly contested. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of
16 PAGA claims. In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial
17 court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith
18 attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such
19 reduction to be proper. *Id.* at 539. Again, the *Carrington* decision was after the plaintiff prevailed
20 at trial, and even then, the PAGA penalties were reduced by 90%. (Decl. Zakay at ¶ 26).

21 **3. The Settlement Does Not Improperly Grant Preferential Treatment to the** 22 **Class Representative or Segments of The Class**

23 The relief provided in the Settlement will benefit all Class Members who do not opt out.
24 The Settlement does not improperly grant preferential treatment to the Plaintiffs or segments of the
25 Class in any way. Each Class Member will be entitled to a cash payment based on the plan of
26 allocation described herein. Each Participating Class Member's Individual Settlement Payment will
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1 be determined based upon the weeks worked by that employee during the prescribed Class Period.
2 (Decl. Zakay at ¶ 4.)

3 Plaintiffs will apply to the Court for Class Representative Service Awards in consideration
4 of their service, and for the risks undertaken on behalf of the Class. Plaintiffs performed their duties
5 admirably by working with Class Counsel. The requested Plaintiffs' Service Awards of \$10,000 per
6 Plaintiff is within the accepted range of awards for purposes of preliminary approval. Plaintiffs
7 have not negotiated individual settlement payments with Defendants. (See Decl. Zakay at ¶ 27.)

8 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit**
9 **Preliminary Approval Of The Settlement**

10 The stage of the proceedings at which this Settlement was reached also militates in favor of
11 preliminary approval and ultimately, final approval of the Settlement. Class Counsel has conducted
12 a thorough investigation into the facts of the class action. Class Counsel began investigating the
13 Class Members' claims before this Action was filed. Prior to the mediation, Class Counsel
14 performed significant review and analysis of Defendants' documents, time records and pay records.
15 Class Counsel engaged in a thorough research and analysis of the relevant claims and data. (Decl.
16 Zakay at ¶ 28.) Class Counsel are also experienced with the claims at issue here, as Class Counsel
17 previously litigated and settled similar claims in numerous other actions. Accordingly, the
18 Settlement did not occur until Class Counsel possessed sufficient information to make an informed
19 judgment regarding the likelihood of success on the merits and results that could be obtained
20 through further litigation. (Decl. Zakay at ¶ 29.)

21 There can be no doubt that Counsel for both Parties possessed sufficient information to make
22 an informed judgment regarding the likelihood of success on the merits and the results that could
23 be obtained through further litigation.

24 In *Glass v. UBS Financial Services, Inc.*, the Northern District of California granted final
25 approval of an unpaid wages action although in *Glass* no formal discovery had been conducted prior
26 to the settlement:

27 Here, no formal discovery took place prior to settlement. As the Ninth Circuit has
28 observed, however, '[i]n the context of class action settlements, 'formal discovery
is not a necessary ticket to the bargaining table' where the parties have sufficient
information to make an informed decision about settlement." See *In re Mego*

1 *Financial Corp. Securities Litigation*, 213 F.3d [454,] 459. (*Glass*, 2007 WL
221862 at *4.)

2 Here, Class Counsel was in a strong position to evaluate the fairness of this Settlement
3 because Class Counsel had the same, if not more, sufficient information, as well as an informal
4 document production.

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

6 Plaintiffs contend that the proposed Settlement meets all the requirements for class
7 certification under the California Code of Civil Procedure section 382 as demonstrated below, and
8 therefore, the Court may appropriately approve the Class as defined in the Agreement. This Court
9 should conditionally certify the Class for settlement purposes only, defined as follows: all non-
10 exempt employees who are or previously were employed by either Defendant who performed work
11 in California at any time during the Class Period of April 19, 2017 through December 15, 2022.
12 Defendants estimate the number of work weeks during the Class Period to be approximately 41,454.
13 (Decl. Zakay at ¶ 30.)

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

15 Plaintiffs seek certification of this Class for settlement purposes under California Code of
16 Civil Procedure section 382. While Defendants reserve all rights to dispute that the Plaintiffs can
17 satisfy any of these requirements, Defendants will not dispute that these requirements may be
18 satisfied in this case for purposes of settlement and therefore, the proposed Class should be certified
19 for purposes of settlement only.

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

21 Here, the approximately 1,319 current and former employees that comprise the Class are
22 sufficiently numerous for class certification. (*See Bowles v. Superior Court*, 44 Cal.2d 574 (1955)
23 (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934
24 (1981) (class of 48 members satisfies numerosity requirement)). All of these employees are
25 ascertainable because the Class Members can readily be determined through examination of
26 Defendants' employment files. (Decl. Zakay at ¶ 31.) For purposes of settlement only, Defendants
27 will not oppose a finding of numerosity.

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

1 Predominance of common issues of law or fact does not require that the common issues be
2 dispositive of the entire controversy or even that they be dispositive of all liability issues. (1
3 *Newberg on Class Actions*, Section 4.25 at 4-82, 4-83 (1992).) “Predominance is a comparative
4 concept, and ‘the necessity for class members to individually establish eligibility and damages does
5 not mean individual fact questions predominate.’” (*Sav-On*, 34 Cal. 4th at 334.) Commonality exists
6 if there is a predominant common legal question regarding how an employer’s policies impact its
7 employees. (*Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1536 (2008) (“[T]he
8 common legal question remains the overall impact of Diva’s policies on its drivers.”).) Whether
9 Plaintiffs are likely to prevail on their theory of recovery is irrelevant at the certification stage since
10 the question is “essentially a procedural one that does not ask whether an action is legally or
11 factually meritorious.” (*Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).)

12 Here, Plaintiffs contend that common questions of law and fact are present. Specifically: (i)
13 whether Defendants failed to pay Class Members for all hours worked; (ii) whether Defendants
14 failed to provide meal and rest periods to Class Members; (iii) whether Defendants failed to timely
15 furnish accurate, itemized and legal wage statements; and (iv) whether Defendants are liable for
16 attorneys’ fees and costs. (Decl. Zakay at ¶ 32.) Defendants will not oppose a finding of
17 commonality for purposes of settlement only.

18 **D. The Claims of the Plaintiffs Are Typical of the Class Claims**

19 The typicality requirement requires Plaintiffs to demonstrate that the members of the class
20 have the same or similar claims as Plaintiffs. “The typicality requirement is met when the claims
21 of the Plaintiff [] arise from the same event or are based on the same legal theories.” (*Tate v.*
22 *Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983).) In *Hanlon v. Chrysler Co.*, 150 F.3d 1011
23 (9th Cir. 1998), the Ninth Circuit held that “[u]nder the rule’s permissive standards, representative
24 claims are ‘typical’ if they are reasonably coextensive with those of absent class members; they
25 need not be substantially identical.” (50 F.3d at 1020.)

26 In the instant case, Plaintiffs contend that the typicality requirement is fully satisfied.
27 Plaintiffs, like every other member of the Class was employed by Defendants and are members of
28 the Class. Plaintiffs were subject to the same practices affecting all other Class Members concerning

1 non-compliant meal and rest periods and Defendants’ failure to pay meal or rest period premiums,
2 unpaid wages as a result of off-the-clock work, unreimbursed business expenses, and received
3 similar wage statements. Plaintiffs’ claims and the Class Members’ claims arise from the same
4 course of conduct by Defendants, involve the same policies, are based on the same legal theories,
5 and are subject to the same defenses. Plaintiffs did not separately negotiate individual settlements
6 with Defendants. (Decl. Zakay at ¶ 33.) For purposes of settlement only, Defendants will not oppose
7 typicality.

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

9 The Class Members are adequately represented because Plaintiffs and Class Counsel (a) do
10 not have any conflicts of interest with other Class Members, and (b) will prosecute the case
11 vigorously on behalf of the class. (*See Hanlon*, 150 F.3d at 1020.) Plaintiffs have been and continue
12 to be aware of their duties as the representative of the class and has actively participated in the
13 prosecution of the case to date, with the Class Members’ interests as a priority. Plaintiffs understood
14 at the time they filed that as a class representatives, they owed a duty to the putative Class Members
15 to faithfully prosecute this Action with their best interests at the forefront of every decision.

16 First, Plaintiffs effectively communicated with Class Counsel, provided documents to them
17 and participated in the investigation and negotiations in the Action. Second, Plaintiffs retained
18 competent counsel who are experienced in employment class actions. Third, there is no antagonism
19 between the interests of the Plaintiffs and those of the Class. Both the Plaintiffs and the Class
20 Members seek monetary relief under the same set of facts and legal theories. (Decl. Zakay at ¶ 34.)
21 Defendants will not dispute such a finding for purposes of this settlement only.

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

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

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

2 The Court has broad discretion in approving a practical notice program. The Parties have
3 agreed upon procedures by which the Class Members will be provided with written notice of the
4 Settlement similar to that approved and utilized in hundreds of class action settlements. The Notice
5 Packet, drafted jointly and agreed upon by the Parties through their respective counsel and to be
6 approved by the Court, includes all relevant information. (See Exhibit A to the Agreement.) The
7 Notice Packet will state that the Class Members shall have forty-five (45) days from the date that
8 the Notice Packet is mailed to them to request exclusion or to submit an objection. The Class
9 Members will be given an opportunity to object to the terms of the Agreement and/or the request
10 for attorneys' fees and costs and to participate at the final approval hearing, in accordance with the
11 instructions set forth in the Notice Packet. Class Members will be instructed to only contact the
12 Settlement Administrator and/or Class Counsel and not the Court. Class Members who do not opt
13 out will automatically receive an Individual Settlement Payment. This notice program was designed
14 to meaningfully reach the Class Members and advises them of all pertinent information concerning
15 the Settlement. The mailing and distribution of the Notice Packet satisfies the requirements of due
16 process, is the best notice practicable under the circumstances, and constitutes due and sufficient
17 notice to all persons entitled thereto. The Notice Packet provides information on the terms and
18 provisions of the Settlement; the benefits that the Settlement provides for Class Members; the date,
19 time, and place of the final settlement approval hearing; and the procedure and deadline for
20 submitting comments, objections, and requests for exclusion. The Notice Packet complies with
21 Rules of Court 3.766 and 3.769(f). (Decl. Zakay at ¶ 35.)

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1 **VII. CONCLUSION**

2 Plaintiffs respectfully request that the Court preliminarily approve the proposed Settlement
3 and sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the
4 final fairness hearing for a date that is at least one hundred twenty (120) days after the date of
5 Preliminary Approval.

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7 DATED: April 20, 2023

ZAKAY LAW GROUP, APLC

8 By: 
9 Shani O. Zakay, Attorney for Plaintiffs
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