

JCL LAW FIRM, APC

Jean-Claude Lapuyade (State Bar #248676)

Eduardo Garcia (State Bar #290572)

3990 Old Town Avenue, Suite C204

San Diego, CA 92110

Telephone: (619) 599-8292

Facsimile: (619) 599-8291

jlapuyade@jcl-lawfirm.com

egarcia@jcl-lawfirm.com

ZAKAY LAW GROUP, APLC

Shani O. Zakay (State Bar #277924)

Jackland K. Hom (State Bar #327243)

3990 Old Town Avenue, Suite C204

San Diego, CA 92110

Telephone: (619) 255-9047

Facsimile: (858) 404-9203

shani@zakaylaw.com

jackland@zakaylaw.com

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

ELAINE MUNOZ, individually and on behalf
of all persons similarly situated

Plaintiffs,

vs.

AMTCR CALIFORNIA, LLC, a California
limited liability company, and Does 1 through
50, Inclusive,

Defendants.

Case No. CIV-DS2001914

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

Hearing Date: August 24, 2021

Hearing Time: 10:00 a.m.

Department S-26

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE SETTLEMENT BEFORE THE COURT.....	2
III.	GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL OF CLASS ACTION SETTLEMENTS	5
IV.	THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.....	6
	1. The Investigation and Discovery are Sufficient to Allow Counsel and the Court to Act Intelligently	7
	2. The Settlement Was Reached Through Arm's Length Bargaining	7
	3. Class Counsel is Experienced in Similar Litigation	8
	4. There Are No Objections by The Class Members..	8
	5. The Risk, Expense, Complexity and Likely Duration of Further Litigation	9
	6. The Amount Offered in Settlement	12
V.	CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases:	Page:
<i>7-Eleven Owners for Fair Fran. v. Southland Corp.</i> , 85 Cal. App. 4th 1135, 1151 (2000)	5
<i>Alberto v. GMRI, Inc.</i> , 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008).	9
<i>Alonzo v. Maximus, Inc.</i> , 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011).	11
<i>Cellphone Termination Fee Cases</i> , 180 Cal. App. 4th 1110, 1117 (2009).	6
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1801 (1996).	5, 6
<i>Duran v. U.S. Bank National Assn.</i> , 59 Cal. 4th 1 (2014)	11-12
<i>Glass v. UBS Fin. Servs.</i> , 2007 U.S. Dist. LEXIS 8476 (N.D.Cal. January 27, 2007)	8
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	9
<i>Howard v. CVS Caremark Corp.</i> , 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014).	11
<i>Huens v. Tatum</i> , 52 Cal. App. 4th 259, 265 (1997)	5
<i>In re Austrian & German Bank Holocaust Litigation</i> , 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000)	9
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 128 (2008)	1, 6
<i>Laskey v. Int'l Union</i> , 638 F.2d 954 (6th Cir. 1981).	10
<i>Malibu Outrigger Bd. of Governors v. Superior Court</i> , 103 Cal. App. 3d 573, 578-579 (1980)	5
<i>Munoz v. BCI Coca-Cola Bottling Co. of L. A.</i> , 186 Cal. App. 4th 399, 408 (2010)	6

1	<i>Officers for Justice v. Civil Service Com'n, etc.,</i>	
2	688 F.2d. 615 (9th Cir. 1982)	6
3	<i>Ordonez v. Radio Shack, Inc.</i>	
4	(C.D. Cal. Jan. 17, 2013).....	10
5	<i>Howard v. CVS Caremark Corp.,</i>	
6	2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014).....	11
7	<i>Robertson v. FedEx National LTL, Inc.,</i>	
8	2011 WL 13183041, at *3 (C.D. Cal. Jan. 24, 2011).....	11
9	<i>Ruelas v. Costco Wholesale Corp.,</i>	
10	67 F. Supp. 3d 1137, 1141 n. 28 (N.D. Cal. 2014).....	11
11	<i>Stoetzner v. U.S. Steel Corp.,</i>	
12	897 F.2d 115, 118-119 (3d. Cir. 1990)	10
13	<i>Villa v. United Site Servs. of California, Inc.</i>	
14	(N.D. Cal. Nov. 13, 2012).....	10
15	<i>Wershba v. Apple Computer, Inc.,</i>	
16	91 Cal.App.4th 224 (2001)	5
17		
18	Statutes, Rules and Regulations:	
19	California Labor Code §226	13
20		
21	Secondary Sources:	
22	Newberg & Conte, <i>Newberg on Class Actions</i> , (3d ed. 1992) §11.41, pp. 11-91.....	5
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 Plaintiff Elaine Munoz (“Plaintiff”) and Defendant AMTCR California, LLC
3 (“Defendant”) have reached a full and final settlement of the above-captioned action, which is set
4 forth in the Class Action Settlement Agreement (hereinafter the “Agreement”) filed herewith.¹
5 The Court preliminarily approved the Agreement via its Preliminary Approval Order dated April
6 14, 2021 (“Preliminary Approval Order”); and pursuant to the Preliminary Approval Order the
7 approved Class Notice has been disseminated to the two Classes.²

8 After disseminating notice to the members of the Class, to date there have been no
9 objections and no opt outs which means that the entire Class is currently participating in the
10 Settlement (1,995 out of 1,995). (Decl. Zakay ¶9.) This is a positive response from the class
11 evidencing their approval of the Settlement.

12 This \$1,850,000 settlement is an excellent result for the Class Members in light of the
13 serious doubts as to the result of the adjudication of their claims, along with further uncertainty as
14 to whether class certification can be maintained through trial.

15 Considered as a whole, the \$1,850,000 represents **42.6%** of the total potential *damages*
16 identified by Plaintiff’s expert. Additionally, the Gross Settlement Amount represents **16.2%** of
17 the total *damages and statutory penalties* identified by Plaintiff’s expert, which Class Counsel
18 calculated to be approximately \$11,329,000.³ Under *Kullar v. Foot Locker Retail, Inc.*, 168
19 Cal.App.4th 116 (2008), this Settlement is a fair and reasonable recovery on these claims (which
20 were subject to considerable uncertainty, both as to the merits and certification). The response of
21 the Class has been positive. Accordingly, Plaintiff respectfully submits that the Class Settlement
22 should be finally approved as fair, reasonable, and adequate.

23 _____
24 ¹ A copy of the Agreement is attached as Exhibit 2 to the Declaration of Shani O. Zakay (“Decl.
25 Zakay”), served and filed herewith. Capitalized terms in this Memorandum have the same
26 meaning as contained in the Agreement.

27 ² The “Non-Exempt Class” is All non-exempt employees who are or previously were employed
28 by Defendant in California during the Class Period, defined as the period between January 21,
2016 to April 14, 2021. The “Manager Class” is All managers employed by Defendant in
California who were paid a monthly salary equivalent to less than two times the State of
California’s minimum wages for full-time employment during the Class Period.

³ The damage analysis is detailed in the declaration of Shani O. Zakay. (Decl. Zakay, ¶ 15)

1 **II. THE SETTLEMENT BEFORE THE COURT**

2 Plaintiff and Defendant reached a full and final Settlement of the above-captioned action,
3 which is embodied in the Agreement filed concurrently with the Court. As consideration for this
4 Settlement, Defendant has agreed to pay the all-in, non-reversionary amount of One Million Eight
5 Hundred and Fifty Thousand Dollars (\$1,850,000) (“Gross Settlement Amount”). The Gross
6 Settlement Amount includes all Settlement Shares to Participating Class Members, the Class
7 Representative Service Payments to Plaintiff, Settlement Administration Expenses, the PAGA
8 Payment, and Court-approved attorneys’ fees and costs. Defendant will separately pay the
9 employer’s share of payroll taxes to the qualified settlement fund, per the Agreement.
10 (Agreement at ¶ I(N); Decl. Zakay ¶3(a).)

11 The Gross Settlement Amount is allocated as follows: \$1,700,000 to the Non-Exempt
12 Sub-Class, \$100,000 to the Manager Sub-Class, and \$50,000 towards PAGA penalties. The Net
13 Settlement Amount is estimated to be \$1,137,833.33. Therefore, the Net Settlement Amount for
14 the Non-Exempt Class will be \$1,080,941.66, and the Net Settlement Amount for the Manager
15 Class will be \$56,891.66.

16 The Net Settlement Amount shall equal the net amount available for Settlement shares to
17 Participating Class Members from the Gross Settlement Amount after deducting the Court-
18 approved amounts for the Class Representative Service Payments, the Class Counsel Fees
19 Payment, the Class Counsel Litigation Expenses Payment, the PAGA Payment, and the fees and
20 expenses of the Settlement Administrator. (Agreement at ¶I(R)). The Settlement Administrator
21 will pay a Settlement Share from the Net Settlement Amount to each Participating Class Member.
22 The submission of a claim form is not required to be paid. The Settlement Share for each
23 Participating Class Member will be calculated based on the ratio of the Total Weeks Worked by
24 the entire Sub-Class to the Individual Weeks Worked by each Sub-Class Member, calculated by
25 dividing the Individual Weeks Worked by the Total Weeks Worked and multiplying this result by
26 the Net Settlement Proceeds for each Sub-Class. The entire Net Settlement Fund shall be
27 distributed.

1 Class Members were sent the Court-approved Class Notice, using the procedure approved
2 by the Court, by mailing the notice packets after updating class members' addresses using the
3 National Change of Address database and, for any notice packets returned as undeliverable, re-
4 mailing such notices to any forwarding address provided or updated address located through skip
5 tracing. (Agreement at ¶ III(L)(4)). Class Members were provided with the opportunity to
6 exclude themselves ("opt out") if they did not want to participate in the Settlement. (Agreement
7 at ¶ III(L)(7)). Class Members who did not "opt out" are deemed Participating Class Members
8 who are bound by the Settlement and will be mailed a settlement payment. (Agreement at ¶
9 III(L)(7)). The Class Notice also advised Class Members of their right to object to the Settlement.
10 (Agreement at ¶ III(L)(8). This notice process is documented in the accompanying Declaration of
11 Lluvia Islas (the Settlement Administrator).

12 If a Participating Class Member's Settlement Share check is not cashed within 180 days
13 after its last mailing to the Participating Class Member, the funds from such uncashed checks will
14 be paid to Children Advocacy Institute in the name of the Class Member from whom the funds are
15 designated. (Agreement at ¶ III(M)(7)))

16 The Agreement provides for Class Counsel to be awarded a sum not to exceed 1/3 of the
17 Gross Settlement Amount as their Class Counsel Fees Payment. (Agreement at ¶ III(F)). Class
18 Counsel will also be allowed to apply separately for an award of litigation expenses in an amount
19 not to exceed \$25,000. (Agreement at ¶ III(F)). **In support of this request, Class Counsel is**
20 **providing evidentiary support, including lodestar, in the declarations submitted**
21 **concurrently herewith.** The Agreement provides for payment of Class Representative Service
22 Payment of no more than \$10,000 for Plaintiff, or such lesser amount as may be approved by the
23 Court in compensation for his services. (Agreement at ¶ III(I)). Defendant does not oppose a
24 motion for approval of attorneys' fees, costs and a service award consistent with the Agreement.

25 The Parties allocated the total amount of \$50,000 from the Gross Settlement Amount for
26 settlement of civil penalties under PAGA, Labor Code Section 2698 et seq. Pursuant to the
27 requirements of Labor Code §2699(i) the PAGA Payment shall be allocated \$37,500 to the
28 LWDA (the "LWDA Payment" or the "PAGA Payment") as the LWDA's share of the settlement

1 of civil penalties and \$12,500 to the Net Settlement Amount for distribution to the Participating
2 Class Members. (Agreement at ¶ III(W))).

3 The Settlement was reached through arm's length negotiations. On January 11, 2021, the
4 Parties participated in an all-day mediation presided over by Hon. Carl West (Ret.), a respected
5 and experienced jurist and mediator of wage and hour class actions. Prior to the mediation, the
6 Parties prepared for the mediation by exchanging significant records and data, calculating
7 damages, and submitting mediation briefs to the Mediator. Defendant provided Class Counsel
8 with necessary records and information for the members of the Class. Defendant produced a
9 sample consisting of pay records and time records for the Class Members for the entire Class
10 Period. Defendant also produced Defendant's relevant employment policies, including
11 compensation policies and timekeeping policies. Plaintiff analyzed the data and prepared and
12 submitted a mediation brief to Judge West. At the conclusion of the mediation, the Parties were
13 able to reach an agreement to settle the Action based on Judge West's mediator proposal. As a
14 result, the Parties entered into an agreement in the form of a Memorandum of Understanding. The
15 Parties then prepared the full Agreement which was signed by the Parties and received
16 preliminary approval from the Court by Order dated April 14, 2021.

17 The Settlement is fair, adequate and reasonable to the Class and should be finally
18 approved for the same reasons the Court granted preliminary approval to the Settlement, finding
19 that it is fair, adequate, and reasonable as to all potential Class Members. In sum, this Settlement
20 valued at \$1,850,000 is an excellent result for the Class. This result is particularly favorable in
21 light of the fact that liability in this case was far from certain in light of the defenses asserted by
22 Defendant. There have been no objections and no opt outs. Given the complexities of this case,
23 the defenses asserted, the uncertainty of class certification, along with the uncertainties of proof at
24 trial and appeal, the proposed Settlement is fair, reasonable and adequate, and should be finally
25 approved.

III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL OF CLASS ACTION SETTLEMENTS

Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259, 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran. v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) (“[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation.”)

“[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action requires court approval.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (citing *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579 (1980).) The court must decide whether the proposed settlement falls within the range of reasonable settlements, taking into account that settlements are compromises between the parties reflecting subjective, unquantifiable judgments concerning the risks and possible outcomes of litigation. See *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) (“The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiff prevailed at trial.”) In *Wershba*, appellants argued that the settlement was too low given the “clear” liability, however, the Court rejected this argument and held that “the merits of the underlying class claims are not a basis for upsetting the settlement of a class action.” *Id.*; see also *7-Eleven, supra*, at 1150.

In these cases, Courts have repeatedly emphasized that there is a strong initial presumption that the compromise is fair and reasonable. *Wershba*, 91 Cal. App. 4th at 245. Courts should not substitute their judgment for that of the parties who negotiated the settlement. *Id.* at 246. The presumption of fairness exists where: (1) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (2) the settlement is reached through arm’s-length bargaining; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App. 4th at 1801, citing Newberg & Conte, *Newberg on Class Actions*, (3d ed. 1992) §11.41, pp. 11-91. Here, all of these factors support a presumption of fairness.

1 **IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**

2 The Court must determine whether the settlement is fair, adequate, and reasonable. *Dunk*
3 *v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); see also *Officers for Justice v. Civil*
4 *Service Com’n*, 688 F.2d 615, 625 (9th Cir. 1982). The purpose of the requirement is “the
5 protection of those class members, including the named plaintiffs, whose rights may not have
6 been given due regard by the negotiating parties.” *Dunk, supra*, at 1801.

7 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*
8 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that
9 the trial court should consider in evaluating the reasonableness of a class action settlement
10 agreement include ‘the strength of plaintiffs’ case, the risk, expense, complexity and likely
11 duration of further litigation, the risk of maintaining class action status through trial, the amount
12 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
13 experience and views of counsel, the presence of a governmental participant, and the reaction of
14 the class members to the proposed settlement.’” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
15 4th 116, 128 (2008) (internal citations omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of*
16 *L.A.*, 186 Cal. App. 4th 399, 408 (2010).

17 The list of factors is not exhaustive and should be tailored to each case. *Dunk, supra*, at
18 1801. Due regard should be given to what is otherwise a private consensual agreement between
19 the parties. *Id.* The inquiry “must be limited to the extent necessary to reach a reasoned judgment
20 that the agreement is not the product of fraud or overreaching by, or collusion between, the
21 negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
22 concerned.” *Id.* “Ultimately, the [trial] court’s determination is nothing more than ‘an amalgam
23 of delicate balancing, gross approximations and rough justice.’ [Citation omitted.]” *Id.*

24 These factors are analyzed seriatim below, and all support final approval of the class
25 action Settlement before this Court, consistent with this Court’s Preliminary Approval Order.
26
27
28

1 **1. The Investigation and Discovery are Sufficient to Allow Counsel and the Court to Act**
2 **Intelligently**

3 Plaintiff Elaine Munoz initially filed this putative class action on January 1, 2020, alleging
4 Defendant failed to pay its non-exempt employees all minimum and overtime wages, failed to
5 provide meal periods and rest periods, failed to provide accurate itemized wage statements, failed
6 to pay all wages due upon separation of employment, misclassified a number of store managers,
7 and unfair business practices. Declaration of Shani O. Zakay in Support of Motion for
8 Preliminary Approval of Class Action Settlement Decl. Zakay ¶11(a). On August 25, 2020,
9 Munoz filed a First Amended Complaint adding a claim for penalties pursuant to PAGA. Id. On
10 or around October 5, 2020, Defendant filed an answer. Id.

11 Class Counsel has conducted a thorough investigation into the facts of the class action.
12 Class Counsel has diligently evaluated the Class Members' claims against Defendant. Class
13 Counsel engaged in formal discovery with Defendant when the Parties agreed to attend mediation.
14 Furthermore, as part of the agreement to mediate the case, Defendant agreed to produce to
15 Plaintiff the documents and data Class Counsel requested and needed for the mediation.
16 Defendant produced a sample consisting of pay records and time records for the Class Members
17 for the entire Class Period. Defendant also produced Defendant's relevant employment policies,
18 including compensation policies and timekeeping policies. Class Counsel conducted extensive
19 review of time records and data. Based on the foregoing data and their own independent
20 investigation, evaluation and experience, Class Counsel believe that the settlement with
21 Defendant on the terms set forth in the Agreement is fair, reasonable, and adequate and are in the
22 best interest of the Class in light of all known facts and circumstances, including the risk of
23 significant delay, the defenses asserted by Defendant, and potential appellate issues.

24 **2. The Settlement Was Reached Through Arm's Length Bargaining**

25 This Settlement was the result of arm's-length negotiations as well as formal and informal
26 settlement conferences between the Parties through their respective attorneys. After
27 comprehensive legal and factual analysis, Class Counsel possessed sufficient information for
28 intelligent evaluation of the case for purposes of settlement. Prior to the initiation of settlement

1 discussions, Class Counsel reviewed and outlined the case based upon the information for the
2 Class, and determined the conditions of settlement which would be fair and reasonable to the
3 Class with the assistance of an expert. Class Counsel was experienced in the types of settlement
4 appropriate to resolve these wage and hour claims on behalf of employees. (Zakay Decl. ¶12(a)).

5 On January 11, 2021, the Parties participated in an all-day mediation presided over by
6 Hon. Carl West (Ret.), a respected and experienced jurist and mediator of wage and hour class
7 actions. Prior to the mediation, the Parties prepared by exchanging data, calculating damages, and
8 submitting mediation briefs to the Mediator. Plaintiff analyzed the data and prepared and
9 submitted a mediation brief to Judge West. At the conclusion of the mediation, the Parties were
10 able to reach an agreement to settle the Action. As a result, the Parties entered into an agreement
11 in the form of a Memorandum of Understanding. The Parties then prepared the full Agreement,
12 which was signed by all counsel. Plaintiff and Class Counsel believe that this Settlement is fair,
13 reasonable, and adequate. (Zakay Decl. ¶12(d)).

14 The fact that the Settlement was negotiated with the assistance of a mediator supports
15 approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS Fin.*
16 *Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
17 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the
18 litigation, with the assistance of a well-respected mediator with substantial experience in
19 employment litigation[, and] this factor supports approval of the settlement.”)

20 **3. Class Counsel is Experienced in Similar Litigation**

21 California Courts have previously approved Class Counsel as experienced Class Counsel.
22 As set forth in the declarations submitted in support of preliminary approval and this motion, all
23 Class Counsel have extensive experience litigating wage and hour class actions involving
24 employees and claims similar to this case. Both Class Counsel support approval of the Settlement
25 based upon their experience in wage and hour litigation.

26 **4. There Are No Objections by the Class Members**

27 The reaction of the Class unequivocally supports approval of the Settlement. On May 20,
28 2021, the Settlement Administrator mailed the Court-approved Class Notice to the Class

Members, which provided each Class Member with the terms of the Settlement, including notice of the claims at issue and the financial terms of the settlement, including the attorneys' fees, costs, and service awards that were being sought, how individual settlement awards would be calculated, and the specific, estimated payment amount to that individual. In disseminating the Class Notice, the Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary Approval Order. Significantly, there have been no objections and a no opt outs. (See Declaration of Lluvia Islas at ¶¶11-12.) As a result, the entire Class has elected to participate in the Settlement and will be sent a settlement check. The final administration results are documented in the accompanying Declaration of Lluvia Islas. (Decl. Zakay ¶9.)

The absence of any objector strongly supports the fairness, reasonableness and adequacy of the Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed settlement should be considered when determining fairness of settlement). Here, where there are no objections, the approval of the Class is evident.

5. The Risk, Expense, Complexity and Likely Duration of Further Litigation

The risks and complexity of the alleged claims are discussed in detail in the Declaration of Zakay at ¶ 13. Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by Defendant presented serious threats to the claims of the Plaintiff and the other Class Members. Defendant asserted that the employment practices complied with all applicable Labor Laws.

The meal period claim was potentially worth about \$763,658.31⁴, as Plaintiff contends the time punch records evidenced that Defendant's meal period policies and/or practices resulted in Class Members taking their meal periods after the required time, and/or worked through their

⁴ This number includes \$627,098.31 for the Non-Exempt Sub-Class and \$136,560.00 for the Manager Sub-Class.

1 meal periods. However, Defendant denied the preceding and could have provided declarations
2 from Class Members, for example, stating that they voluntarily chose, and desired, to take their
3 meal periods at a later time or work through their meal periods. Thus, the meal period claim was
4 discounted to account for the potential for only a small recovery. Zakay Decl. ¶ 13.

5 The rest break claim was potentially worth about \$2,187,902.10⁵, but it would have mainly
6 relied on Class Member testimony, making it a riskier claim at class certification and liability
7 stages. Defendant likely would have argued that only a small number of Class Members actually
8 missed any of their rest breaks. Defendant likely would have also argued that, pursuant to recent
9 California decisions, a rest break policy which requires employees to remain on the premises is
10 not unlawful, unless it also results in employees remaining *on-duty* for their rest breaks.
11 Certification likely would have required depositions of Class Members who provided
12 declarations, and Defendant surely would have obtained opposing declarations stating either rest
13 breaks were taken off the premises and duty-free, or rest breaks were voluntarily waived. *See*,
14 *e.g.*, *Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 (“Because
15 of the competing testimony before the Court, plaintiff’s evidence that defendant may have an
16 illegal, written rest break policy is insufficient for this Court to find that common issues
17 predominate.”); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL
18 5503550, at *8 (“Indeed, Plaintiff’s own evidence confirms that the written policy does not
19 generate uniform practices.”). Accordingly, the rest break claim was heavily discounted in
20 Plaintiff’s valuation of the case. Zakay Decl. ¶ 13.

21 The unpaid wage claims were potentially worth approximately \$1,377,388.50⁶ but, with
22 respect to the Non-Exempt Sub-Class, was based entirely on Plaintiff’s argument that some Class
23 Members had to work off-the-clock during what was supposed to be their meal break. Therefore,
24 this claim was derivative of the meal break claim addressed above, and subject to the same
25 significant defenses and obstacles. With respect to the Manager Sub-Class, these claims were
26

27 ⁵ This number includes \$2,051,342.10 for the Non-Exempt Sub-Class and \$136,560.00 for the
Manager Sub-Class

28 ⁶ This number includes \$558,028.50 for the Non-Exempt Sub-Class and \$819,360.00 for the
Manager Sub-Class

1 based on Plaintiff's argument that managers were misclassified as exempt, and earned a salary
2 without compensation for overtime hours worked. Therefore, that claim was wholly dependent on
3 Plaintiff's ability to prove misclassification. Thus, the unpaid wages claim was discounted to
4 account for the potential for only a small recovery. Zakay Decl. ¶ 13.

5 Plaintiff's Counsel also considered the arguable presence of various penalties and weighed
6 the potential recoveries against probable defenses. Specifically, Defendant could argue that
7 Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Cal.
8 Lab. Code § 203. Defendant could further argue that Plaintiff could not recover waiting time
9 penalties based on the meal and rest break claims, because those carry premiums, which do not
10 constitute unpaid wages for purposes of Cal. Lab. Code § 203. Additionally, Defendant could
11 argue that Plaintiff could not show that Class Members suffered an "injury" as a result of wage
12 statement violations, as required by Cal. Lab. Code § 226. Although the Class arguably could
13 have seen a payout of nearly \$7 million for these penalties if Plaintiff prevailed on every penalty
14 claim, Plaintiff would not recover any derivative penalties if they failed to prove the underlying
15 claims. Moreover, Plaintiff would have to overcome damaging precedent to prove the Class
16 deserved the penalties. *See, e.g., Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 172406
17 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty claims); *Alonzo v.*
18 *Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence
19 of bad faith or actual injury). Plaintiff could not give the penalty claims great weight given that, in
20 large part, they depended on proving the underlying claims, which had their own risks. Zakay
21 Decl., ¶ 13.

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

1 there are significant hurdles to overcome for a class-wide recovery even where the class has been
2 certified. (Decl. Zakay at ¶13).

3 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and
4 trying the Action against Defendant through possible appeals which even if successful could take
5 several years. Class Counsel has also taken into account the uncertain outcome and risk of
6 litigation, especially in complex actions such as this Action. Class Counsel are also mindful of
7 and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted
8 in the Action. As demonstrated by the decision in *Duran*, the complexities and duration of further
9 litigation cannot be overstated. There is little doubt that Defendant would post a bond and appeal
10 in the event of an adverse judgment. A post-judgment appeal by Defendant would have required
11 many more years to resolve, assuming the judgment was affirmed. If the judgment was not
12 affirmed in total, then the case could have dragged on for years after the appeal. The benefits of a
13 guaranteed recovery today outweigh an uncertain result three or more years in the future.
14 Moreover, post-trial motions and appeals would have been inevitable. Costs would have mounted
15 and recovery would have been delayed if not denied, thereby reducing the benefits of an ultimate
16 victory. Plaintiff and Class Counsel believe that the Settlement confers substantial benefits upon
17 the Class. Based upon their evaluation, Plaintiff and Class Counsel have determined that the
18 Settlement set forth in the Agreement is in the best interest of the Class Members. (Decl. Zakay
19 ¶13(e)).

20 In sum, the Settlement is a fair and reasonable result, and provides the Class with a
21 significant recovery, particularly when viewed in light of the fact that Defendant asserted serious
22 and substantial defenses both to liability and to class certification. Given the complexities of this
23 case, the defenses, along with the uncertainties of proof and appeal, the proposed Settlement is
24 fair, reasonable and adequate, and should be finally approved. (Decl. Zakay ¶13).

25 **6. The Amount Offered in Settlement**

26 The Settlement in this case is fair, reasonable and adequate considering Defendant's
27 defenses to Plaintiff's claims. As detailed during preliminary approval, the Gross Settlement
28 Amount compares favorably to the value of the claims. Class Members will receive immediate

1 and certain payments of considerable amounts under the Settlement. The overall maximum and
2 average Participating Non-Exempt Class Member allocations are estimated to be \$2,953.85 and
3 \$550.50 respectively (Decl. Islas at ¶ 14). The overall maximum and average Participating
4 Manager Class Member allocations are estimated to be \$6,730.91 and \$4,328.21 respectively
5 (Decl. Islas at ¶ 14).

6 Faced with the serious doubts as to recovery, the Settlement of \$1,850,000 plus the
7 employer's share of payroll taxes compares favorably to the damage estimates alleged to have
8 been suffered by the Class. Considered as a whole, the \$1,850,000 represents **42.6%** of the total
9 potential *damages* identified by Plaintiff's expert. Additionally, the Gross Settlement Amount
10 represents **16.2%** of the total *damages and statutory penalties* identified by Plaintiff's expert,
11 which Class Counsel calculated to be approximately \$11,329,000. Given the amount of the
12 settlement as compared to the potential value of claims in this case, the settlement is fair and
13 reasonable. (Decl. Zakay ¶14).

14 V. CONCLUSION

15 Plaintiff respectfully submits that the proposed Settlement satisfies the standard of fairness
16 established in California law and should therefore be finally approved as fair, reasonable and
17 adequate and request entry of the Final Approval Order and Judgment.

18
19 DATED: August 2, 2021

20
21 ZAKAY LAW GROUP, APLC

22
23 By:  _____

24 Shani O. Zakay
25 Attorney for Plaintiff
26
27
28