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17
18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19
20 **COUNTY OF SAN BERNARDINO**

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

23 PLAINTIFFS,

24 vs.

25 AMTCR CALIFORNIA, LLC, a California
26 limited liability company, and Does 1 through
27 50, Inclusive,

28 DEFENDANTS.

Case No. CIV-DS2001914

**PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: April 14, 2021
Time: 11:00 a.m.
Dept: S-26

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1 **I. INTRODUCTION**

2 Plaintiff Elaine Munuz (“Plaintiff”) respectfully requests that this Court grant preliminary
3 approval of the proposed class action settlement of wage and hour claims against Defendant AMTCR
4 California, LLC (“Defendants”) pursuant to California Rules of Court (“CRC”) 3.769(d) and (e). The
5 basic terms of the Stipulation of Settlement of Class Action and Release of Claims (“Settlement
6 Agreement” or “Settlement”) provide for the following:

- 7 (1) A Gross Settlement Amount of \$1,850,000.00 allocated to approximately 1,890
8 Class Members, split between a sub-class of non-exempt employees (“Non-
9 Exempt Sub-Class”) and a sub-class of exempt managers (“Manager Sub-Class”)
10 and allocated on a pro rata basis according to the number of weeks each Class
11 Member worked during the Class Period, and subject to a pro rata increase if the
12 class size or workweek amount increases from this estimate by more than 10%;
- 13 (2) An award of up to one-third of the Gross Settlement Amount (currently equal to
14 \$616,666.67) and up to \$25,000.00 in reimbursement of costs to Class Counsel;
- 15 (3) A service award of up to \$10,000.00 to Plaintiff;
- 16 (4) Settlement Administration fees of up to \$23,000; and
- 17 (5) Payment of \$50,000 for the Private Attorneys’ General Act (“PAGA”) claims,
18 \$37,500.00 (75%) of which will be sent to the California Labor and Workforce
19 Development Agency (“LWDA”).

20 Should the Court approve the above distributions, the Net Settlement Amount is estimated to be
21 \$1,137,833.33. Therefore, the Net Settlement Amount for the Non-Exempt Class will be \$1,080,941.66
22 (95%), which means that the average payment to a Participating Non-Exempt Class Member is
23 approximately \$577.42. And, the Net Settlement Amount for the Manager Class will be \$56,891.66,
24 which means that the average payment to a Participating Manager Class Member is approximately
25 \$3,160.64.

26 As discussed below, the proposed Settlement satisfies all criteria for preliminary approval under
27 California law and falls well within the range of reasonableness. The Settlement was reached through
28 informed, arms-length bargaining at and after mediation between experienced attorneys. As such,

1 Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement, conditionally
2 certify the proposed Class for settlement purposes only, appoint Plaintiff as the Class Representative,
3 appoint Plaintiff's Counsel as Class Counsel, appoint ILYM Group, Inc. as the Settlement
4 Administrator, authorize the Settlement Administrator to send Notice of the Settlement to the Class
5 Members, and set a final approval hearing date.

6 **II. SUMMARY OF THE LITIGATION**

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

14 After engaging in numerous discussions, the parties agreed to attend a private mediation session
15 and exchange informal discovery. *Id.* at ¶ 4. Prior to mediation, Defendants produced considerable
16 relevant data, including policy documents, a large sample of time keeping records and payroll records,
17 earning statements, and other information Plaintiff requested in order to investigate and evaluate their
18 claims. *Id.* Plaintiff's expert (Desmond Marcello & Amster) formulated a damages analysis based on the
19 records provided by Defendant. *Id.*

20 The Parties attended a full-day mediation via Zoom on January 11, 2021 with Hon. Carl West (Ret.)
21 serving as mediator. *Id.* at ¶ 5. After arms-length negotiations and bargaining, the parties reached an
22 agreement to settle and signed a Memorandum of Understanding. *Id.* After reaching an agreement in
23 principle, the parties drafted and negotiated a long-form settlement agreement, which is the subject of the
24 instant motion.

25 **III. SUMMARY OF THE SETTLEMENT**

26 **A. Terms of Settlement**

27 Plaintiff and Defendant have agreed to settle the class claims in exchange for the Gross Settlement
28 Amount of \$1,850,000. *See* Zakay Decl., Ex. 1 (hereinafter "Settlement Agreement") at § I(N). The

1 Gross Settlement Amount is allocated as follows: \$1,700,000 to the Non-Exempt Sub-Class, \$100,000
2 to the Manager Sub-Class, and \$50,000 towards PAGA penalties. With a total of 1,872 Non-Exempt
3 Sub-Class Members who worked 90,150 workweeks, the Gross Settlement Amount allocates an average
4 of \$908.12 per Non-Exempt Sub-Class Member. And, with a total of 18 Manager Sub-Class Members
5 who worked 1,707 workweeks, the Gross Settlement Amount allocates an average of \$5,555.55 per
6 Manager Sub-Class Member.

7 If Defendants' production of Class Member identities after preliminary approval reveals that the
8 total workweeks exceeds 91,857 by more than 10%, there will be a pro rata adjustment to the Gross
9 Settlement Amount equal in proportion to the increase in workweeks.

10 The Gross Settlement Amount includes (1) Individual Settlement Payments to all non-exempt
11 employees and managers employed by Defendants in California from January 21, 2016 through
12 preliminary approval; (2) attorneys' fees to Class Counsel of up to one-third of the Gross Settlement
13 Amount (currently equal to \$616,666.67); (3) reimbursement of Class Counsel's litigation costs of up
14 to \$25,000; (4) a service award to Plaintiff of up to \$10,000; (5) Settlement Administration fees of no
15 more than \$23,000 and (6) a payment to the LWDA of \$37,500.00. *Id.* at § III(M)(3). Individual Class
16 Members who do not opt out will receive pro rata shares of the Net Settlement Amount calculated by
17 comparing the total Workweeks for the Class to each individual Class Member's Workweeks. *Id.* at §
18 III(M)(1)(a).

19 The Individual Settlement Payments to Class Members will be allocated for tax purposes as 15%
20 wages, and 85% penalties and interest. *Id.* at § III(M)(5)(c). The employer-side payroll taxes on the
21 portion allocated to wages will be paid separately by Defendant in addition to the Gross Settlement
22 Amount. *Id.* No portion of the Gross Settlement Amount will revert to Defendant. *Id.* Funds from
23 uncashed or undeliverable checks will be tendered by the Settlement Administrator who will deliver the
24 monies represented by the checks to the Children Advocacy Institute in the name of the Class Member
25 from whom the funds are designated. *Id.* at § III(M)(7).

26 **B. Proposed Opt-Out and Exclusion Process**

27 The Settlement Administrator will send Class Members the Notice of Class Action Settlement
28 ("Class Notice") by first-class mail after checking for updated addresses through the National Change of

1 Address database. Settlement Agreement at § III(L)(3). The Class Notice provides information regarding
2 the nature of the lawsuit, a summary of the substance of the settlement terms, the formula for calculating
3 Individual Settlement Amounts, the individual's estimated minimum payout, a statement that Class
4 Members who take no action will release their claims and receive settlement checks, instructions
5 regarding how to dispute the employment dates listed, instructions regarding how to request exclusion
6 or object to the Settlement (including the opportunity to appear personally or through counsel at the
7 final approval hearing regardless of whether a written, timely objection is submitted), the date for the
8 final approval hearing, the amounts sought for attorneys' fees and costs, the Settlement Administration
9 fees, the class representatives' service award and the PAGA allocation. *See* Class Notice attached to
10 Settlement Agreement as Exhibit A.

11 The Class Notice informs Class Members that they have 45 days to opt out or submit a written
12 objection. To opt out, Class Members are instructed to submit a written Request for Exclusion to the
13 Settlement Administrator. Class Members are informed of how they can submit a written objection to the
14 Settlement Administrator. The Class Notice also explains that Class Members may appear in person at the
15 final approval hearing. *See generally*, Class Notice attached to Settlement Agreement as Exhibit A.
16 Accordingly, the content of the Class Notice complies with the requirements of California Rule of Court
17 3.766(d).

18 If Class Notice packets are returned undeliverable, the Settlement Administrator will perform a
19 skip-trace or other search, and re-mail the Class Notice with an extended deadline of 15 days from the
20 original deadline to opt out or object. Settlement Agreement at § III(L)4). The initial 45-day notice period
21 and extension process ensure the notice program provides due process by giving Class Members enough
22 time to determine whether they want to participate in the Settlement. This means of notice is reasonably
23 calculated to apprise Class Members of the pendency of the action. *See* Cal. R. Ct. 3.766(e)-(f).

24 **C. Proposed Release**

25 Under the proposed release, Class Members who do not exclude themselves from the Settlement
26 will be deemed to have released Defendant and its current and former owners, officers, directors,
27 managers, members, employees, agents, representatives, subsidiaries, parents, affiliates, predecessors,
28 successors, franchisors, franchisees, joint venturers, co-owners, co-employers, joint employers,

1 payroll providers, benefits providers, attorneys, insurers, and reinsurers (“Released Parties”) from all
2 class claims alleged in the operative complaint including claims for violations of California Labor Code
3 sections 201, 202, 203, 226, 226.7, 510, 512, 1182.12, 1194, 1197, 1197.1, 1198.5, which occurred
4 during the Class Period, and expressly excluding all other claims, including claims for vested benefits,
5 wrongful termination, unemployment insurance, disability, social security, workers’ compensation,
6 and class claims outside of the Class Periods and PAGA claims outside of the PAGA period (“Released
7 Claims”). The Class Period is the period of January 21, 2016 through the date this Court grants
8 preliminary approval. Settlement Agreement at § I(H).

9 Only Plaintiff will agree to a general release of any and all claims, actions, charges, complaints,
10 grievances, and causes of action, of any nature arising from Plaintiff’s employment with Defendant,
11 whether known or unknown, which exist or may exist as of the Parties’ execution of this Agreement and
12 agree to a Code of Civil Procedures Section 1542 waiver as to the Released Claims. *Id.* at § III(D).

13 **IV. LEGAL ARGUMENTS SUPPORTING PRELIMINARY APPROVAL**

14 **A. Provisional Certification of the Class is Appropriate**

15 California law authorizes class certification when a class representative has proven the existence
16 of an ascertainable and sufficiently numerous class, a well-defined community of interest among class
17 members, and certification is a fair and efficient means of adjudicating the action, rendering proceeding
18 as a class superior to alternative means. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th
19 1004, 1021. For settlement purposes only, Defendant has stipulated and agreed that the requisites for
20 establishing class certification have been met for both the Non-Exempt Sub-Class and the Manager Sub-
21 Class. Settlement Agreement at § III(G).

22 **1. The Proposed Class is Numerous and Ascertainable**

23 Whether a class is “ascertainable” is “determined by examining (1) the class definition, (2) the
24 size of the class, and (3) the means available for identifying class members.” *Reyes v. Bd. of Supervisors*
25 (1987) 196 Cal. App. 3d 1263, 1271. In this case, the proposed Class and corresponding Sub-Classes
26 consist of all current and former non-exempt and manager employees who are and/or were employed by
27 Defendant in California at any time during the Class Period of January 21, 2016 through the date of
28 Preliminary Approval. Defendant’s records show the class consists of approximately 1,890 individuals,

1 making joinder of all Class Members impracticable. Further, the class is readily ascertainable from
2 Defendant's business records because all Class Members are current or former employees of Defendant.

3 2. **A Well-Defined Community of Interest Exists Among Class Members**

4 "[T]he 'community of interest requirement embodies three factors: (1) predominant common
5 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3)
6 class representatives who can adequately represent the class.'" *Fireside Bank v. Superior Court* (2007)
7 40 Cal. 4th 1069, 1089 (quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462, 470). The
8 application of each of these factors is discussed below.

9 a. Common Questions Predominate

10 To assess whether common questions predominate, courts focus on whether the theories of
11 recovery advanced are likely to prove amenable to class treatment. *Sav-On Drug Stores, Inc. v. Superior*
12 *Court* (2004) 34 Cal. 4th 319, 327. In other words, courts determine whether the elements necessary to
13 establish liability are susceptible of common proof, even if the class members must individually prove
14 their damages. *Brinker*, 53 Cal. 4th at 1021-1022, 1024.

15 Here, Plaintiff alleged that Defendant maintained uniform policies and employment practices that
16 illegally deprived Class Members of overtime wages, minimum wages, meal periods, rest breaks, and
17 accurate wage statements. For example, Defendant maintained allegedly illegal policies that failed to
18 include the address of the employer on the wage statements, allegedly failed to authorize all meal and rest
19 periods, and allegedly misclassified managers as exempt from overtime.

20 These claims were based on evidence of Defendant's common policies and practices in its records.
21 Indeed, these types of claims are regularly granted class certification when the plaintiff can present
22 evidence of common policies. *See, e.g., Bradley v. Networkers Internat., LLC* (2012) 211 Cal. App. 4th
23 1129, 1151 (holding "when an employer has not authorized and not provided legally required meal and/or
24 rest breaks, the employer has violated the law").

25 Plaintiff's allegations present common legal and factual questions of, *inter alia*, whether Defendant
26 applied the same compensation, meal period, rest break and wage statement policies to all class members;
27 whether those policies or their implementation resulted in Labor Code violations; whether Defendant
28 misclassified managers as exempt from overtime; whether Defendant's conduct was intentional; and

whether Class Members are entitled to damages and penalties. These questions could be resolved using Defendant's time and payroll records and common policies and practices. Thus, the Court can and should exercise its discretion to grant conditional class certification here, for settlement purposes.

b. Plaintiff's Claims are Typical of the Class Claims

Typical claims rely on legal theories and facts that are substantially similar to other class members. *See Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46. Here, Plaintiff allege that she and the other Class Members were employed by the same company and injured by the company's common policies and practices related to compensation, meal periods, and rest breaks; she seek relief for these claims on behalf of all Class Members. *See Zakay Decl.*, ¶¶ 3-4. Importantly, Plaintiff was employed by Defendant as both a non-exempt employee *and* as an exempt manager at different times during the Class Period. Thus, Plaintiff's claims arise from the same employment practices and are based on the same legal theories as those applicable to the other Class Members.

c. Plaintiff And Plaintiff's Counsel Will Adequately Represent The Interests Of The Proposed Class

Certification requires adequacy of both the proposed class representative and proposed class counsel. With respect to the class representative, a plaintiff must adequately represent and protect the interests of other members of the class and demonstrate that his or her claim is not inconsistent with the claims of other members of the class. *See Capitol People First v. Dept. of Developmental Services* (2007) 155 Cal. App. 4th 676, 696-697. In the present case, Plaintiff's interests are coextensive with the interests of the Class. Plaintiff has already demonstrated her ability to advocate for the interests of the Class by initiating this litigation, gathering documents and information, and obtaining a fair settlement on behalf of Class Members. Likewise, Zakay Law Group, APC and JCL Law Firm, APC have expended considerable time and effort on this case and will continue to do so through final approval. *See generally*, Zakay Decl. Accordingly, Ms. Munoz should be appointed Class Representative, and Zakay Law Group, APC and JLC Law Firm, APC should be appointed Class Counsel.

3. A Class Action is Superior to a Multitude of Individual Lawsuits

Class treatment is superior to other methods of adjudication when the probability is small that each class member will come forward to prove his or her claim and when the class approach would deter

1 and redress the alleged wrongdoing. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429 at 435, 446;
2 *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal. App. 4th 1524, 1537-1538. Here, none of the other
3 1,890 Class Members had shown any interest in bearing the expense and burden of litigating their own
4 claims. Thus, a class action is the superior method for seeking relief.

5 **B. The Proposed Settlement Meets the Standards for Preliminary Approval**

6 Preliminary approval is warranted if the settlement falls within a “reasonable range.” *See North*
7 *County Contractor’s Ass’n., Inc. v. Touchstone Ins. Serv.* (1994) 27 Cal. App. 4th 1085, 89-90; Conte
8 & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002) (“Newberg”). In reviewing the fairness
9 of a class action settlement, due regard should be given to what is “otherwise a private consensual
10 agreement between the parties.” *Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380,
11 1389. The inquiry “must be limited to the extent necessary to reach a reasoned judgment that the
12 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties,
13 and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Id.*

14 Reasonableness and fairness are presumed where (1) the settlement is reached through “arms-
15 length bargaining”; (2) investigation and discovery are “sufficient to allow counsel and the court to act
16 intelligently”; (3) counsel is “experienced in similar litigation”; and (4) the percentage of objectors “is
17 small.” *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1802. The Settlement here already
18 satisfies the first three factors. Plaintiff will analyze the fourth factor in their motion for final approval.

19 **1. The Settlement is Entitled to a Presumption of Fairness**

20 *a. The Settlement is the Result of Arm’s-Length Negotiations*

21 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
22 evidence to the contrary is offered; thus, there is a presumption that settlement negotiations are
23 conducted in good faith. Newberg, § 11.51. Here, the Settlement was the product of a mediation session
24 with a respected jurist and mediator and negotiations over the terms of the Settlement. Zakay Decl., ¶
25 6. The negotiations were adversarial, conducted at arm’s length and tempered by the efforts of both
26 sides to serve the interests of their clients. *Id.* The amount of the service award was not negotiated until
27 after the parties agreed to the Gross Settlement Amount and many other terms. *Id.* at ¶ 9. No action
28

1 would likely have been taken by Class Members individually, and no compensation would have been
2 recovered for them, but for Plaintiff's services on behalf of the Class. *Id.*

3 *b. Class Counsel Conducted Sufficient Investigation and Discovery*

4 Plaintiff's Counsel thoroughly investigated the proposed Class Members' claims, applicable law,
5 and potential defenses. In particular, Plaintiff's Counsel assessed, with the help of a damage expert, the
6 value of the class claims using data and documents provided by Defendant in informal discovery. As
7 described in Section II above, Plaintiff's Counsel obtained time, payroll, and policy records, as well as
8 data regarding the number of Class Members, workweeks, and average rate of pay in order to assess
9 damages before mediation. *Id.* at ¶¶ 4. In total, Plaintiff's Counsel obtained and reviewed nearly 1
10 million unique cells of time and payroll data in order evaluate Defendant's liability exposure.
11 Accordingly, Plaintiff's Counsel fully understood the strengths and weaknesses of the class claims
12 before the parties reached a settlement.

13 *c. Class Counsel is Experienced in Similar Litigation*

14 Plaintiff is represented by Zakay Law Group, APC ("ZLG") and JCL Law Firm, APC ("JCL").
15 ZLG and JCL prosecute wage and hour class actions on behalf of employees and others who have had
16 their rights violated. ZLG and JCL, either on their own, or with co-counsel is currently serving as
17 Plaintiff's counsel of record in dozens of wage and hour and employment class action cases pending in
18 both state and federal court. The attorneys working on this case have been appointed class counsel in
19 many cases, through both contested motions and settlement approval motions. Zakay Decl., ¶¶ 26-27;
20 Declaration of Jean-Claude Lapuyade, ¶¶ 26-33. Thus, ZLG and JCL have extensive experience in
21 similar litigation.

22 **2. The Proposed Settlement Is Reasonable Given the Strengths of Plaintiff's**
23 **Claims And The Risks And Expense Of Litigation**

24 Courts have discretion to approve class settlements by assessing several well-recognized factors,
25 including the "strength of plaintiff's case, risk, expense, complexity and likely duration of further
26 litigation and risk of maintaining the class action through trial." *Munoz v. BCI Coca-Cola Bottling Co.*
27 (2010) 186 Cal. App. 4th 399, 407; *see Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116,
28 129.

1 While Plaintiff and her counsel believed and continue to believe this is a strong case for
2 certification, the significant risks and expenses associated with class certification and liability
3 proceedings must be taken into account. In determining whether the amount offered at and after mediation
4 was reasonable, Plaintiff's Counsel weighed that figure against many risk factors. Although the amount
5 of the Class' maximum potential damages – if proven – is substantial, the legitimate and serious risks
6 above compelled a considerable discount for settlement. Zakay Decl., ¶ 18.

7 a. Exposure Analysis

8 A settlement does not have to provide 100% of the damages sought to be considered a fair and
9 reasonable settlement. *Rebney v. Wells Fargo Bank* (1991) 220 Cal. App. 3d 1117, 1139. Rather,
10 compromise is expected:

11 Compromise is inherent and necessary in the settlement process . . . even if “the relief
12 afforded by the proposed settlement is substantially narrower than it would be if the suits
13 were to be successfully litigated,” this is no bar to a class settlement because “the public
interest may indeed be served by a voluntary settlement in which each side gives ground
in the interest of avoiding litigation.”

14 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 250. Here, Plaintiff's Counsel calculated
15 Defendants' total potential exposure assuming Plaintiff prevailed on all aspects of her claims at trial,
16 but weighed that value against the chance of succeeding at class certification and trial. Zakay Decl., ¶
17 19.

18 The meal period claim was potentially worth about \$763,658.31¹, as the time punch records
19 evidenced that Defendant's meal period policies and practices resulted in Class Members taking their
20 meal periods after the required time, and/or worked through their meal periods. However, Defendant
21 could have provided declarations from Class Members stating that they voluntarily chose to work
22 through their meal periods. Thus, the meal period claim was discounted to account for the potential for
23 only a small recovery. Zakay Decl. ¶ 20.

24
25
26
27 ¹ This number includes \$627,098.31 for the Non-Exempt Sub-Class and \$136,560.00 for
28 the Manager Sub-Class.

1 The rest break claim was potentially worth about \$2,187,902.10², but it would have mainly relied
2 on Class Member testimony, making it a riskier claim at class certification and liability stages.
3 Defendant likely would have argued that only a small number of Class Members actually missed their
4 rest breaks. Defendant likely would have also argued that, pursuant to recent California decisions, a
5 rest break policy which requires employees to remain on the premises is not unlawful, unless it also
6 results in employees remaining *on-duty* for their rest breaks. Certification likely would have required
7 depositions of Class Members who provided declarations, and Defendant surely would have obtained
8 opposing declarations stating either rest breaks were taken off the premises and duty-free, or rest breaks
9 were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL
10 210223, at *11 (“Because of the competing testimony before the Court, plaintiff’s evidence that
11 defendant may have an illegal, written rest break policy is insufficient for this Court to find that common
12 issues predominate.”); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL
13 5503550, at *8 (“Indeed, Plaintiff’s own evidence confirms that the written policy does not generate
14 uniform practices.”). Accordingly, the rest break claim was heavily discounted in Plaintiff’s valuation
15 of the case. Zakay Decl. ¶ 21.

16 The unpaid wage claims were potentially worth approximately \$1,377,388.50³ but, with respect
17 to the Non-Exempt Sub-Class, was based entirely on Plaintiff’s argument that some Class Members had
18 to work off-the-clock during what was supposed to be their meal break. Therefore, this claim was
19 derivative of the meal break claim addressed above, and subject to the same significant defenses and
20 obstacles. With respect to the Manager Sub-Class, these claims were based on Plaintiff’s argument that
21 managers were misclassified as exempt, and earned a salary without compensation for overtime hours
22 worked. Therefore, that claim was wholly dependent on Plaintiff’s ability to prove misclassification.
23 Thus, the unpaid wages claim was discounted to account for the potential for only a small recovery.
24 Zakay Decl. ¶ 22.

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

28 ³ This number includes \$558,028.50 for the Non-Exempt Sub-Class and \$819,360.00 for
the Manager Sub-Class

1 Plaintiff's Counsel also considered the arguable presence of various penalties and weighed the
2 potential recoveries against probable defenses. Specifically, Defendants could argue that Plaintiff could
3 not prove the "willful" prong needed to obtain waiting time penalties under Cal. Lab. Code § 203.
4 Defendants could further argue that Plaintiff could not recover waiting time penalties based on the meal
5 and rest break claims, because those carry premiums, which do not constitute unpaid wages for purposes
6 of Cal. Lab. Code § 203. Additionally, Defendants could argue that Plaintiffs could not show that Class
7 Members suffered an "injury" as a result of wage statement violations, as required by Cal. Lab. Code §
8 226. Although the Class arguably could have seen a payout of nearly \$7 million for these penalties if
9 Plaintiff prevailed on every penalty claim, Plaintiff would not recover any derivative penalties if they
10 failed to prove the underlying claims. Moreover, Plaintiff would have to overcome damaging precedent
11 to prove the Class deserved the penalties. *See, e.g., Howard v. CVS Caremark Corp.*, 2014 U.S. Dist.
12 LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty claims); *Alonzo*
13 *v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence of bad
14 faith or actual injury). Plaintiff could not give the penalty claims great weight given that, in large party,
15 they depended on proving the underlying claims, which had their own risks. Zakay Decl., ¶ 23.

16 The PAGA claims presented even higher hurdles. Plaintiff's Counsel found Defendant's exposure
17 could potentially reach about \$21 million. However, Defendant could argue that the subsequent
18 violations under PAGA only start to accrue after employers receive notice through a citation from the
19 Labor Commissioner, reducing the PAGA exposure by half. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.
20 App. 4th 1157, 1209 (2008) (holding "[u]ntil the employer has been notified that it is violating a Labor
21 Code provision ... the employer cannot be presumed to be aware that its continuing underpayment of
22 employees is a 'violation' subject to penalties."). Most importantly, the court would have discretion to
23 reduce the PAGA award based on whether the amount of the award would be "unjust, arbitrary and
24 oppressive, or confiscatory." Cal. Labor Code § 2699(e)(2). Notably, there are very few California
25 appellate cases discussing PAGA issues. In theory, the Court could reduce the award by 99% if it so
26 wished. In this case in particular, Plaintiff's Counsel heavily discounted the PAGA claim based on the
27 risk that Defendant would convince the Court to dramatically reduce the PAGA penalties. Zakay Decl.
28 ¶ 25.

1 Overall, the Gross Settlement Amount of \$1,850,000 represents **42.6%** of the total potential
2 *damages* identified by Plaintiff's expert. Additionally, the Gross Settlement Amount represents **16.2%**
3 of the total *damages and statutory penalties* identified by Plaintiff's expert. In *Stovall-Gusman v. W.W.*
4 *Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) the court approved a settlement
5 of an action claiming unpaid wages where the settlement amount constituted roughly 10% of the
6 estimated actual damages to the class. Here, the settlement consideration far exceeds the percentage
7 approved in *Stovall-Gusman*. In *Stovall-Gusman*, the court ruled that the settlement which represented
8 approximately 10% of the estimated loss to the class was fair, reasonable, and adequate. As a result,
9 this settlement which exceeds the percentage approved in *Stovall-Gusman* is entitled to preliminary
10 approval.

11 Ultimately, the damages estimates were extremely liberal and assumed the best-case scenario for
12 every Class Member. Reaching a compromise at this stage will still allow Class Members to obtain
13 compensation for their claims without having to file and litigate their own cases.

14 **C. The Requested Service Award**

15 Plaintiff seeks a service award for accepting the responsibilities of representing the interests of
16 all Class Members and assuming risks and potential costs that were not borne by any other Class
17 Members. A named plaintiff is eligible for payment that reasonably compensates him for undertaking
18 and fulfilling a fiduciary duty to represent absent class members. *Cellphone Termination Fee Cases*,
19 186 Cal. App. 4th 1380, 1393 (Cal. App. 1st Dist. 2010); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th
20 715, 726 (2004). Here, Ms. Munoz assisted counsel in gathering the evidence necessary to prosecute
21 the class claims, maintained regular contact with counsel, and reviewed the Settlement to make sure it
22 was fair to the class. Further, Ms. Munoz was available by phone during mediation. No action would
23 likely have been taken by Class Members individually, and no compensation would have been recovered
24 for them, but for Plaintiff's services on behalf of the Class. Moreover, the amount of the service award
25 was not negotiated until after the parties agreed to the Gross Settlement Amount and many other terms.
26 Zakay Decl. ¶ 7.

27 By actively pursuing this action, Plaintiff has furthered the California public policy goal of
28 enforcing the State's wage and hour laws. See *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th

319, 340 (2004). Ms. Munoz had the option to pursue her claims individually, but instead she chose to pursue this class action, delaying her individual recovery until the class action settlement obtains approval. As such, the Settlement permits Plaintiff to seek a service award of up to \$10,000 each, subject to final court approval. The proposed service award, both for Plaintiff's service as the class representative and for her general release of all employment claims, is reasonable and should be preliminarily approved.

D. The Requested Attorneys' Fees

The purpose of an attorneys' fee award in class action litigation is to reward counsel who invested in a case despite the risk of non-payment and achieved a substantial positive result for the class. Attorneys' fees are awarded as a matter of equity. California courts routinely award attorneys' fees equaling one-third or more of the potential value of the common fund. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("Empirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery"). In the present case, Plaintiff will seek Court approval of the requested attorneys' fees award of up to one-third of the Gross Settlement Amount (currently equal to \$616,666.67), and up to \$25,000 in reimbursement of litigation costs.

Given the extensive information exchange and exhaustive negotiations in this case, Plaintiff's Counsel have achieved a large settlement through efficient and diligent work. At final approval, Plaintiff's Counsel will fully brief the merits of its request for the award of attorneys' fees and litigation costs.

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1 **V. CONCLUSION**

2 The parties have negotiated a fair and reasonable Settlement of the class claims. Because
3 Plaintiffs have appropriately presented the materials and information necessary for preliminarily
4 approval, she respectfully request that the Court preliminarily approve the Settlement and schedule a
5 date to conduct the final approval hearing.

6
7 Dated: March 17, 2021

ZAKAY LAW GROUP, APC

8
9 By: _____



Shani O. Zakay
Attorneys for Plaintiff