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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA**

DEBBIE FELIX, an individual; RICK
MELEAD, an individual, on behalf of
themselves, and on behalf of all persons
similarly situated, and in their representative
capacity on behalf of the State of California and
fellow Aggrieved Employees,

Plaintiffs,

vs.

TVI, INC., d.b.a. SAVERS, a Washington
corporation; and DOES 1 through 50, Inclusive;

Defendants.

Case No: 21CV376407

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

Date: February 17, 2022
Time: 1:30 P.M.
Dept.: 1

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1 **I. INTRODUCTION**

2 Plaintiffs DEBBIE FELIX, and RICK MELEAD, (hereafter “Plaintiffs”) and TVI, INC.,
3 d.b.a. SAVERS. (hereinafter “Defendant”), have reached a full and final settlement of the above-
4 captioned action, which is set forth in the Class Action Settlement Agreement (hereinafter the
5 “Agreement”) filed herewith.¹ The Court preliminarily approved the Agreement via its Preliminary
6 Approval Order dated October 21, 2021 (“Preliminary Approval Order”); and pursuant to the
7 Preliminary Approval Order the approved Class Notice has been disseminated to the Class.²

8 After disseminating notice to the members of the Class, to date there have been no objections
9 and no opt outs, which means that 100% of the Class is currently participating in the Settlement.
10 (Decl. Zakay ¶9.) This is a positive response from the class evidencing their approval of the
11 Settlement.

12 This \$1,500,000 settlement is an excellent result for the Class Members considering 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 \$1,500,000 in Settlement represents between 6.6% and 48.1%
16 of Defendant’s liability exposure as estimated by Class Counsel at the time of mediation, which
17 Class Counsel calculated to be \$3,116,921 and \$22,789,492 for damages, and between \$14,019,898
18 and \$33,692,469 for damages and statutory penalties.³ Under *Kullar v. Foot Locker Retail, Inc.*,
19 168 Cal.App.4th 116 (2008), this Settlement is a fair and reasonable recovery on these claims
20 (which were subject to considerable uncertainty, both as to the merits and certification). The
21 response of the Class has been positive. Accordingly, Plaintiffs respectfully submit that the Class
22 Settlement should be finally approved as fair, reasonable, and adequate.

23 //

24 //

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

² The “Class” is all of Defendant’s current and former California employees during the Class Period.
The Class Period is the period of time from April 18, 2017 to July 27, 2021.

³ The damage analysis is detailed in the declaration of Shani O. Zakay. (Decl. Zakay, ¶ 14)

II. THE SETTLEMENT BEFORE THE COURT

Plaintiffs and Defendant reached a full and final Settlement of the above-captioned action, which is embodied in the Agreement filed concurrently with the Court. As consideration for this Settlement, Defendant has agreed to pay the all-in, non-reversionary amount of One Million Five Hundred Thousand Dollars (\$1,500,000) (“Total Settlement Amount”). The Total Settlement Amount includes all Individual Settlement Payments to the Settlement Class Members, the Class Representative Service Award to Plaintiffs, Settlement Administration Costs, the PAGA Settlement, and Court-approved Class Counsel Award. Defendant will separately pay the employer’s share of payroll taxes to the qualified settlement fund, per the Agreement. (Decl. Zakay ¶3(a).)

The Net Settlement Amount shall equal the net amount available for Individual Settlement Payments to all Settlement Class Members from the Total Settlement Amount after deducting the Court-approved amounts for the Class Representatives Service Awards, the Class Counsel Award, the PAGA Settlement, and the Settlement Administration Costs. The Settlement Administrator will pay an Individual Settlement Payment from the Net Settlement Amount to each Settlement Class Member. The submission of a claim form is not required to be paid. The Individual Settlement Payments for each Settlement Class Member will be calculated based on the workweeks worked by each Settlement Class Member during the Class Period. The entire Net Settlement Fund shall be distributed. (Decl. Zakay ¶3(b).)

Class Members were sent the Court approved Class Notice, using the procedure approved by the Court, by mailing the notice packets after updating class members’ addresses using the National Change of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to any forwarding address provided or updated address located through skip tracing. Class Members were provided with the opportunity to exclude themselves (“opt out”) if they did not want to participate in the Settlement. Class Members who did not “opt out” are deemed Participating Class Members who are bound by the Settlement and will be mailed a settlement payment. The Class Notice also advised Class Members of their right to object to the Settlement.

1 This notice process is documented in the accompanying Declaration of Lluvia Islas (the Settlement
2 Administrator), which is filed concurrently herewith. (Decl. Zakay ¶3(c).)

3 If a Settlement Class Member's Individual Settlement Payment check is not cashed within
4 180 days after its last mailing to the Settlement Class Member, the funds from such uncashed checks
5 will be paid to the Children Advocacy Institute in accordance with California Code of Civil
6 Procedure section 384 in the name of the Settlement Class Member and the Settlement Class
7 Member will remain bound by the Settlement. (Decl. Zakay ¶4).

8 The Agreement provides for Class Counsel to be awarded a sum not to exceed 1/3 of the
9 Total Settlement Amount as the attorneys' fees portion of the Class Counsel Award. Class Counsel
10 will also be allowed to apply separately for an award of litigation expenses incurred in the
11 prosecution and settlement of the Action in an amount not exceeding \$25,000. **In support of this**
12 **request, Class Counsel is providing evidentiary support, including lodestar, in the**
13 **declarations submitted concurrently herewith.** The Agreement provides for payment of Class
14 Representative Service Awards of no more than \$7,500 for each Plaintiff, or such lesser amount as
15 may be approved by the Court in compensation for their services. Defendant does not oppose a
16 motion for approval of the Class Counsel Award and Class Representative Service Award consistent
17 with the Agreement. (Decl. Zakay ¶5).

18 The Parties allocated \$50,000 from the Total Settlement Amount for settlement of civil
19 penalties under PAGA, Labor Code Section 2698 et seq. Pursuant to the requirements of Labor
20 Code §2699(i) the PAGA Payment shall be allocated \$37,500 to the LWDA (the "LWDA
21 Payment") as the LWDA's share of the settlement of civil penalties and \$12,500 for distribution to
22 the Aggrieved Employees as the Aggrieved Employee Payments (Decl. Zakay ¶6).

23 The Settlement was reached through arm's length negotiations. On March 25, 2021, the
24 Parties participated in an all-day mediation presided over by Mark Rudy, Esq., a well-respected
25 wage and hour class action mediator. Prior to the mediation, the Parties prepared by exchanging
26 data, calculating damages, and submitting mediation briefs to the Mediator. Defendant provided
27 Class Counsel with necessary records and information for the members of the Class. Defendant
28 produced a sample consisting of pay records and time records for some of the Class Members for

1 the entire Class Period. Defendant also produced Defendant’s relevant employment policies,
2 including compensation policies and timekeeping policies. Plaintiffs analyzed the data with the
3 help of an expert and prepared and submitted a mediation brief to Mr. Rudy. After arms-length
4 negotiations and bargaining, the mediation concluded without a settlement. However, following
5 the mediation, each side, represented by its respective counsel, agreed to settle the Action based on
6 a mediator’s proposal, which was memorialized in the form of a Memorandum of Understanding.
7 The Parties then prepared the full Agreement which was signed by the Parties and received
8 preliminary approval from the Court by Order dated October 21, 2021. (Decl. Zakay ¶7).

9 The Settlement is fair, adequate and reasonable to the Class and should be finally approved
10 for the same reasons the Court granted preliminary approval to the Settlement, finding that it is fair,
11 adequate, and reasonable as to all potential Class Members. In sum, this Settlement valued at
12 \$1,500,000 is an excellent result for the Class. This result is particularly favorable in light of the
13 fact that liability in this case was far from certain in light of the defenses asserted by Defendants.
14 There have been no objections and no opt outs. Given the complexities of this case, the defenses
15 asserted, the uncertainty of class certification, along with the uncertainties of proof at trial and
16 appeal, the proposed Settlement is fair, reasonable and adequate, and should be finally approved.
17 (Decl. Zakay ¶8).

18 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND** 19 **APPROVAL OF CLASS ACTION SETTLEMENTS**

20 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th
21 259, 265 (1997). In evaluating settlements, the courts have long recognized that compromise is
22 particularly appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners*
23 *for Fair Fran. v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) (“[V]oluntary conciliation
24 and settlement are the preferred means of dispute resolution. This is especially true in complex class
25 action litigation.”)

26 “[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a
27 class action requires court approval.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996)
28 (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 plaintiffs 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.

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

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

The trial court has broad discretion to determine whether the settlement is fair. *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include ‘the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in

1 settlement, the extent of discovery completed and the stage of the proceedings, the experience and
2 views of counsel, the presence of a governmental participant, and the reaction of the class members
3 to the proposed settlement.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008)
4 (internal citations omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal. App.
5 4th 399, 408 (2010).

6 The list of factors is not exhaustive and should be tailored to each case. *Dunk, supra*, at
7 1801. Due regard should be given to what is otherwise a private consensual agreement between the
8 parties. *Id.* The inquiry “must be limited to the extent necessary to reach a reasoned judgment that
9 the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
10 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”
11 *Id.* “Ultimately, the [trial] court’s determination is nothing more than ‘an amalgam of delicate
12 balancing, gross approximations and rough justice.’ [Citation omitted.]” *Id.*

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

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

17 On May 26, 2020, Plaintiff Melead filed a class action complaint in the Orange County
18 Superior Court for: (1) Unfair Competition in Violation of Bus. and Prof. Code §§ 17200; (2) failure
19 to pay minimum wages in violation of California Labor Code sections 1194, 1197 and 1197.1; (3)
20 failure to pay overtime wages in violation of California Labor Code sections 510 *et seq.*; (4) failure
21 to provide required meal periods in violation of California Labor Code sections 226.7 and 512; (5)
22 failure to provide required rest periods in violation of California Labor Code sections 226.7 and
23 512; (6) failure to provide accurate itemized wage statements in violation of California Labor Code
24 section 226; and (7) failure to provide wages when due in violation of California Labor Code
25 sections 201, 202 and 203 (“*Melead* Action”). On July 22, 2020, Plaintiff Melead filed the *Melead*
26 PAGA Action against Defendant alleging a single cause of action for violations of California Labor
27 Code Private Attorney General Act (“PAGA”). On February 24, 2021, Plaintiff Felix filed a PAGA
28

1 Action against Defendant in the Santa Clara County Superior Court alleging a single cause of action
2 for violations of PAGA (“*Felix Action*”). (Decl. Zakay at ¶11(a)).

3 Defendant has denied and continues to deny these claims. Defendant maintains that it fully
4 complies with California meal period laws and maintains legally compliant policies and practices.
5 (Decl. Zakay at ¶ 11(a)).

6 Class Counsel has conducted a thorough investigation into the facts of the class action.
7 Class Counsel has diligently evaluated the Class Members’ claims against Defendant. Class
8 Counsel engaged in informal discovery in preparation for the mediation, and received significant
9 responses and documents to the discovery requests. Defendant produced a large sample
10 consisting of employee file and pay records, hiring/review and separation documents, payroll and
11 time records for some of the Class Members for the entire Class Period. Defendant also produced
12 Defendant’s relevant employment policies, including compensation policies and timekeeping
13 policies. Class Counsel conducted extensive review of time records and data with the help of an
14 expert. Based on the foregoing data and their own independent investigation, evaluation and
15 experience, Class Counsel believe that the settlement with Defendant on the terms set forth in the
16 Agreement is fair, reasonable, and adequate and are in the best interest of the Class in light of all
17 known facts and circumstances, including the risk of significant delay, the defenses asserted by
18 Defendant, and potential appellate issues.

19 **2. The Settlement Was Reached Through Arm’s Length Bargaining**

20 This Settlement was the result of arm’s-length negotiations as well as informal settlement
21 conferences between the Parties through their respective attorneys. After comprehensive legal and
22 factual analysis, Class Counsel possessed sufficient information for intelligent evaluation of the
23 case for purposes of settlement. Prior to the initiation of settlement discussions, Class Counsel
24 reviewed and outlined the case based upon the information for the Class, and determined the
25 conditions of settlement which would be fair and reasonable to the Class with the assistance of an
26 expert. Class Counsel was experienced in the types of settlement appropriate to resolve these wage
27 and hour claims on behalf of employees. (Zakay Decl. ¶12(a)).
28

1 The fact that the Settlement was negotiated with the assistance of a mediator supports
2 approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS Fin.*
3 *Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
4 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the
5 litigation, with the assistance of a well-respected mediator with substantial experience in
6 employment litigation[, and] this factor supports approval of the settlement.”)

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

8 California Courts have previously approved Class Counsel as experienced Class Counsel.
9 As set forth in the declarations submitted in support of preliminary approval and this motion, all
10 Class Counsel have extensive experience litigating wage and hour class actions involving
11 employees and claims similar to this case. All Class Counsel support approval of the Settlement
12 based upon their experience in wage and hour litigation.

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

14 The reaction of the Class unequivocally supports approval of the Settlement. On November
15 19, 2021, the Settlement Administrator Court-approved Class Notice to the Class Members, which
16 provided each Class Member with the terms of the Settlement, including notice of the claims at
17 issue and the financial terms of the settlement, including the attorneys’ fees, costs, and service
18 awards that were being sought, how individual settlement awards would be calculated, and the
19 specific, estimated payment amount to that individual. In disseminating the Class Notice, the
20 Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary
21 Approval Order. Significantly, there have been no objections and no opt outs. (See Declaration of
22 Lluvia Islas at ¶¶ 11-12.) As a result, the entire Class has elected to participate in the Settlement
23 and will be sent a settlement check. The administration process is documented in the Declaration
24 of Lluvia Islas, which is filed concurrently herewith.

25 The absence of any objector strongly supports the fairness, reasonableness and adequacy of
26 the Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
27 (S.D.N.Y. 2000) (“If only a small number of objections are received, that fact can be viewed as
28 indicative of the adequacy of the settlement.”); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-

1 119 (3d. Cir. 1990) (29 objections out of 281 member class “strongly favors settlement”); *Laskey*
2 *v. Int’l Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to
3 the proposed settlement should be considered when determining fairness of settlement). Here,
4 where there are no objections, the approval of the Class is evident.

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

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

11 With respect to the meal break claim, Defendant maintains that it fully complies with
12 California meal period laws and maintains legally compliant policies and practices. Courts have
13 found that where an employer's meal period policies are compliant, individualized issues exist as to
14 the reasons for missed, late or truncated meal periods. *See e.g. Lampe v. Queen of the Valley Medical*
15 *Center*, 19 Cal.App.5th 832, 851 (2018) (holding that although only 11.1% of the employees' time
16 punches for meal periods were within the first 5 hours, the claim was not certifiable because
17 individualized issues existed as to the reasons for the late meal periods). If successful, Defendant
18 availed itself to a complete defense of Plaintiffs’ meal period claim. Defendant further argued that
19 the absence of the time records was a result of a cyber-attack that left Defendant without those
20 records, and that had these records been available, they would have shown consistent compliance
21 with California’s meal break laws. Finally, Defendant argued that to the extent time records exist
22 (since September 2020) the violation rate was very low (below 3%) and meal premiums were
23 always paid—an assertion confirmed by Plaintiffs’ expert. Plaintiffs estimated the exposure for this
24 claim was approximately between \$0 and \$9,897,710, if substantiated. (Decl. Zakay at ¶13(a)).

25 With respect to the rest break claim, before and during the mediation, Defendant argued
26 that the Court of Appeals decision in *Cacho v. Eurostar, Inc.* (2019) 43 Cal.App.5th 885, all but
27 eliminated Plaintiffs’ claims, on liability, value, and manageability as to the rest period claims.
28 Additionally, Defendant cited to a prior ruling that upheld the same “on premise” rest period policy

1 challenged in this action. *See Bell v. Home Depot, U.S.A.*, (E.D. 2017) 2017 WL 1353779. Further,
2 Defendant likely would have argued that only a small number of Class Members actually missed
3 their rest breaks, and that those missed rest breaks were voluntary. Therefore, certification likely
4 would have required depositions of Class Members, and Defendant surely would have obtained
5 opposing testimony stating either rest breaks were taken or rest breaks were voluntarily waived.
6 *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11
7 (“Because of the competing testimony before the Court, plaintiff’s evidence that defendant may
8 have an illegal, written rest break policy is insufficient for this Court to find that common issues
9 predominate.”); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL
10 5503550, at *8 (“Indeed, Plaintiff’s own evidence confirms that the written policy does not
11 generate uniform practices.”). Accordingly, the rest break claim was subject to significant defenses.
12 If successful, Defendant availed itself to a complete defense of Plaintiffs’ rest period claim.
13 Plaintiffs estimated the exposure for this claim ranged between **\$0** and **\$9,774,861**, if substantiated.
14 (Decl. Zakay at ¶13(b)).

15 With respect to the minimum wages claim, Defendant argued, that employees were not
16 always required to go through the security checks, and that those checks were not always off-the-
17 clock. Finally, Defendant argued this claim, even if successful, was limited to only a small portion
18 of the Class Members who brought their purses or handbags into the store for their shift, and was
19 limited to 1-5 minutes ever time, and not 15 minutes as assumed by Plaintiffs. Accordingly, the
20 minimum wage claim was subject to significant defenses. Plaintiffs estimated the exposure for this
21 claim is approximately **\$3,114,753**, if substantiated. (Decl. Zakay at ¶13(c)).

22 With respect to the overtime claim, Defendant argued that most incentives were
23 *discretionary* bonuses that do not need to be included in employees’ regular rate of pay and for
24 those bonuses that were non-discretionary, such bonuses were already included the regular rate
25 of pay. Accordingly, the overtime claim was subject to significant defenses. Furthermore,
26 Defendant argued that, even if successful, this claim resulted in minimal actual damage to the Class
27 Members—and Plaintiffs’ expert confirmed this to be true. Plaintiffs estimated the exposure for
28 this claim to be approximately **\$2,168**, if substantiated. (Decl. Zakay at ¶13(d)).

1 With respect to the wage statement claim, Defendant could argue that Plaintiffs could not
2 prove the “willful” prong needed to obtain waiting time penalties under Cal. Lab. Code § 203.
3 Additionally, Defendant could argue that Plaintiffs could not show that Class Members suffered an
4 “injury” because of wage statement violations, as required by Cal. Lab. Code § 226. Defendant
5 could also argue that that meal and rest period violations do not entitle employees like Plaintiffs
6 and the Settlement Class Members to pursue the derivative waiting time and itemized wage
7 statement penalties. (See *Naranjo v. Spectrum Security Services, Inc.*, (2019) 40 Cal. App. 5th 444;
8 *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal. App. 5th 1308.) Although the Settlement Class
9 arguably could have seen a significant payout for these penalties if Plaintiffs prevailed on every
10 penalty claim, Plaintiffs would not recover any derivative penalties if they failed to prove the
11 underlying claims. Moreover, Plaintiffs would have to overcome damaging precedent to prove the
12 Class deserved the penalties. See, e.g., *Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS
13 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty claims); *Alonzo*
14 *v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence
15 of bad faith or actual injury). Plaintiffs could not give the penalty claims great weight given that
16 they depended on proving the underlying claims, which according to Defendant were not supported
17 by the facts. Nevertheless, Plaintiffs estimated the potential exposure for these claims, if
18 substantiated, was approximately **\$10,902,977** (\$7,031,977 for waiting time penalties and
19 \$3,871,000 for wage statement penalties). (Decl. Zakay at ¶13(e)).

20 There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable
21 to obtain class certification and thereby not recover on behalf of any employee other than
22 themselves. Defendant argued that the individual experience of each employee varied with respect
23 to the alleged claims. While other cases have approved class certification of wage and hour claims,
24 class certification in this action would have been hotly disputed and was by no means a foregone
25 conclusion. Finally, even if class certification was successful, as demonstrated by the California
26 Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are
27 significant hurdles to overcome for a class-wide recovery even where the class has been certified.
28 (Decl. Zakay at ¶13(g)).

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

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

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

23 The Settlement in this case is fair, reasonable and adequate considering Defendant's
24 significant defenses, which it believes to be valid, to Plaintiffs' claims. As detailed during
25 preliminary approval, the Total Settlement Amount compares favorably to the value of the claims.
26 Class Members will receive immediate and certain payments of considerable amounts under the
27 Settlement. Currently, the overall maximum and average Participating Class Member allocations
28 are estimated to be \$1,286.37 and \$262.19 respectively (Decl. Islas at ¶ 14).

1 Faced with the serious doubts as to recovery, the Settlement of \$1,500,000 plus the
2 employer's share of payroll taxes compares favorably to the damage estimates alleged to have been
3 suffered by the Class. Considered as a whole, the \$1,500,000 in Settlement represents between
4 6.6% and 48.1% of Defendant's liability exposure as estimated by Class Counsel at the time of
5 mediation, which Class Counsel calculated to be \$3,116,921 and \$22,789,492 for damages, and
6 between \$14,019,898 and \$33,692,469 for damages and statutory penalties.

7 If they could prove the claims, Plaintiffs estimate that Defendant was subject to maximum
8 liability consisting of between \$0 and \$9,897,710 for meal premiums, \$0 and \$9,774,861 for rest
9 premiums, approximately \$3,114,753 for unpaid minimum wages, and approximately \$2,168 for
10 unpaid overtime wages. In addition, Plaintiffs calculated that Defendant could be liable for
11 \$7,031,977 for waiting time penalties and \$3,871,000 for wage statement penalties.⁴ Finally,
12 Plaintiffs' expert calculated that Defendant's exposure for PAGA penalties up to \$2,836,000.⁵

13
14 ⁴ While Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
15 226 and various PAGA penalties, Plaintiffs recognize that these claims are subject to various
16 defenses asserted by Defendant, including, but not limited to, a good faith dispute defense as to
17 whether any premium wages for meal or rest periods or other wages were owed given Defendant's
18 position that Plaintiff and the Class were properly compensated. *See Reber v. AIMCO/Bethesda*
19 *Holdings, Inc.*, 2008 WL 4384147, at *9 (C.D. Cal. Aug. 25, 2008) (granting defendant's motion
20 for summary judgment on claim for failure to provide accurate itemized wage statements "because
21 a good faith dispute exists... [therefore, defendant] was not 'knowing and intentional' in failing to
22 provide [Section 226] statements"); *see also Nordstrom Commission Cases*, 186 Cal. App. 4th 576,
23 584 (2010) ("There is no willful failure to pay wages if the employer and employee have a good
24 faith dispute as to whether and when the wages were due."). Additionally, there is serious doubt as
25 to whether violations of the meal/rest period regulations, which require payment of a "premium
26 wage" for each improper meal period, give rise to claims under sections 203 and 226. *See Ling v.*
27 *P.F. Chang's China Bistor, Inc.*, 245 Cal. App. 4th 1242, 1261 (2016) and *Maldonado v. Epsilon*
28 *Plastics, Inc.*, 22 Cal. App. 5th 1308, 1336 (2018). This issue was decided in *Naranjo v. Spectrum*
Sec. Servs., Inc., 40 Cal. App. 5th 444, 474, (Ct. App. 2019), which held that actions for meal break
and rest break premiums "do not entitle employees to pursue the derivative penalties in sections
203 and 226." **In fact, under *Naranjo*, the value for claims under Labor Code §§ 203 and 226
could be \$0.** Further, Defendant denied rest and meal break violations, rendering void any
derivative claims or damages recovery potential.

⁵ *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of PAGA claims.
In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced
the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying
with the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at
539. Again, the *Carrington* decision was after Plaintiff actually prevailed at trial, and even then, the
PAGA penalties were reduced by 90%.

1 Consequently, the settlement of \$1,500,000.00 represents between 6.6% and 48.1% of
2 Defendant's maximum potential liability exposure, assuming each and every of these liability
3 theories and amounts could be proved at trial. Given the amount of the settlement as compared to
4 the potential value of claims in this case, the settlement is more than fair and reasonable based on
5 prevailing case law. (Decl. Zakay ¶14(b)).

6 **V. CONCLUSION**

7 Plaintiffs respectfully submit that the proposed Settlement satisfies the standard of fairness
8 established in California law and should therefore be finally approved as fair, reasonable and
9 adequate and request entry of the Final Approval Order and Judgment.

10
11 DATED: January 25, 2022

ZAKAY LAW GROUP, APLC

12 By: 
13 Shani O. Zakay
14 Attorney for Plaintiffs
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