

1 David Mara, Esq. (SBN 230498)
2 Matthew Crawford, Esq. (SBN 310230)
3 **MARA LAW FIRM, PC**
4 2650 Camino del Rio N., Suite 302
5 San Diego, California 92108
6 Telephone: (619) 234-2833
7 Facsimile: (619) 234-4048

8 Attorneys for Plaintiff GABRIELA GUEVARA,
9 on behalf of herself and all others similarly situated
10 and on behalf of the general public

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **IN AND FOR THE COUNTY OF LOS ANGELES**

13 GABRIELA GUEVARA, on behalf of
14 herself and all others similarly situated, and
15 on behalf of the general public,

16 Plaintiffs,

17 v.

18 AGUILASMORALES, INC.; and DOES 2-
19 100,

20 Defendants.

Case No. 21STCV47592

[Related to Case No. 22STCV08424]

**PLAINTIFF GABRIELA GUEVARA'S
MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND PAGA
ACTION SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL APPROVAL
HEARING DATE**

Date: December 13, 2023

Time: 10:30 a.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. INVESTIGATION/LITIGATION HISTORY 3

 a. Discovery and Investigation 3

 b. The Parties Agreed to Attend Mediation 3

 c. The Parties’ Staunchly Conflicting Positions 3

 i. Meal and Rest Periods..... 3

 ii. Rounding 5

 iii. Overtime 6

 iv. Wage Statements and Waiting Time Penalties..... 6

IV. TERMS OF THE PROPOSED SETTLEMENT 7

 a. Deductions from the Settlement..... 7

 b. Calculation of the Settlement Payments to Class Members 8

 c. Notice to the Class 9

 i. Requests for Exclusion..... 10

 ii. Objections to the Settlement..... 11

 iii. Disputes 11

 iv. Returned Notices 12

 d. Website 12

 e. Distribution of Funds 12

 f. Release of Claims 14

 g. Class Representative Enhancement Payment 14

1	h. Final Judgment.....	15
2	V. ARGUMENT.....	16
3	a. Class Action Settlements Are Subject to Court Review and Approval Under the	
4	California Rules of Court.....	16
5	b. The Settlement Is Fair, Reasonable, and Adequate	16
6	i. The Settlement Was Reached as a Result of Arm’s-Length Negotiations.....	17
7	ii. The Settlement is the Result of Thorough Investigation and Discovery	17
8	iii. Counsel for Both Parties Are Experienced in Similar Litigation	17
9	iv. The Proposed Settlement is a Reasonable Compromise of Claims.....	18
10	1. The Proposed Settlement is a Reasonable Compromise of Claims	19
11	2. Maximum Potential Exposure as Estimated by Plaintiff.....	19
12	3. The Settlement Amount of \$350,000 is Reasonable.....	23
13	c. Provisional Class Certification Should be Granted	23
14	i. The Proposed Settlement Class is Ascertainable	24
15	ii. The Proposed Settlement Class is Sufficiently Numerous	24
16	iii. The Commonality Requirement is Met	25
17	iv. The Typicality Requirement is Met.....	26
18	v. The Adequacy Requirement is Met.....	27
19	d. Notice to Class Members Complies with California Rule of Court 3.769(f)	27
20	VI. CONCLUSION.....	27
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Cases

<i>Aguilar v. Cintas Corp. No. 2</i>	
(2006) 144 Cal. App. 4th 121	19
<i>Amaral v. Cintas Corp. No. 2</i>	
(2008) 163 Cal.App.4th 1157	7
<i>Avila v. Cold Spring Granite Co.</i>	
(E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142	
.....	22
<i>Bowles v. Superior Court</i>	
(1995) 44 Cal.2d 574	25
<i>Boyd v. Bechtel Corp.</i>	
(N.D. Cal. 1979) 485 F. Supp. 610	17
<i>Brinker Restaurant Corp. v. Superior Court</i>	
(2012) 53 Cal.4th 1004	18
<i>Classen v. Weller</i>	
(1983) 145 Cal.App.3d 27	26
<i>Donohue v. AMN Services, LLC</i>	
(2021) 11 Cal.5th 58	4, 5
<i>Dunbar v. Albertson's Inc.</i>	
(2006) 141 Cal. App. 4th 1422	19
<i>Dunk v. Ford Motor Co.</i>	
(1996) 48 Cal.App.4th 1794	16, 18, 24
<i>Early v. Superior Court</i>	
(2000) 79 Cal.App.4th 1420	15
<i>Gay v. Waiters' & Dairy Lunchmen's Union</i>	
(N.D. Cal. 1980) 489 F. Supp. 282, <i>aff'd</i> (9th Cir. 1982) 694 F.2d 531	25

1	<i>Gentry v. Superior Court</i>	
2	(2007) 42 Cal.4th 443	25
3	<i>Ghazaryan v. Diva Limousine, Ltd.</i>	
4	(2008) 169 Cal.App.4th 1524	26
5	<i>Glob. Minerals & Metals Corp. v. Superior Court</i>	
6	(2013) 113 Cal.App.4th 836	24
7	<i>Green v. Obledo</i>	
8	(1981) 29 Cal.3d 126	16
9	<i>Hanlon v. Chrysler Corp.</i>	
10	(9th Cir. 1998) 150 F.3d 1011	24, 25, 26, 27
11	<i>Harris v. Superior Court</i>	
12	(2007) 154 Cal. App. 4th 164	19
13	<i>Hebbard v. Colgrove</i>	
14	(1972) 28 Cal.App.3d 1017	25
15	<i>Henderson v. Ready to Roll Transportation, Inc.</i>	
16	(2014) 228 Cal.App.4th 1213	25
17	<i>Ikonen v. Hartz Mountain Corp.</i>	
18	(S.D. Cal. 1988) 122 F.R.D. 258.	25
19	<i>In re Beef Industry Antitrust Litigation</i>	
20	(5th Cir. 1979) 607 F. 2d 167	16
21	<i>In re Omnivision Technologies, Inc.</i>	
22	(N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 95616	23
23	<i>Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n</i>	
24	(1981) 452 U.S. 905	16
25	<i>Iskanian v. CLS Transp. Los Angeles, LLC</i>	
26	(2014) 59 Cal.4th 348	25
27	<i>Koehl v. Verio, Inc.</i>	
28	(2006) 142 Cal.App.4th 1313	15

1	<i>Kullar v. Foot Locker Retail, Inc.</i>	
2	(2008) 168 Cal.App.4th 116	18
3	<i>Linder v. Thrifty Oil Co.</i>	
4	(2003) 23 Cal.4th 429	26
5	<i>Maldonado v. Epsilon Plastics, Inc.</i>	
6	(2018) 22 Cal.App.5th 1308	7
7	<i>McGhee v. Bank of America</i>	
8	(1976) 70 Cal.App.3d 442	27
9	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i>	
10	(2010) 186 Cal.App.4th 399	18
11	<i>Rebney v. Wells Fargo Bank</i>	
12	(1990) 220 Cal.App.3d 1117	23
13	<i>Romero v. Producers Dairy Foods</i>	
14	(E.D. Cal. 2006) 235 F.R.D. 474	25
15	<i>Rose v City of Hayward</i>	
16	(1981) 126 Cal.App.3d 926	24
17	<i>Sav-On v. Superior Court</i>	
18	(2004) 34 Cal.4th 319	19, 26
19	<i>See's Candy, Inc. v. Superior Court</i>	
20	(2012) 210 Cal. App. 4th. 889	5
21	<i>Sevidal v. Target Corp.</i>	
22	(2010) 189 Cal.App.4th 905	24
23	<i>Tech-Bilt v. Woodward-Clyde & Associates</i>	
24	(1985) 38 Cal.3d 488	19
25	<i>Vasquez v. Superior Court</i>	
26	(1971) 4 Cal.3d 800	16
27	<i>Walsh v. IKON Solutions, Inc.</i>	
28	(2007) 148 Cal. App. 4th 1440	19

1	<i>Wehner v. Syntex Corp.</i>	
2	(N.D. Cal. 1987) 117 F.R.D. 641	26
3	<i>Wershba v. Apple Computers, Inc.</i>	
4	(2001) 91 Cal.App.4th 2	23, 24
5	<i>Whiteway v. Fedex Kinkos Office & Print Services, Inc.</i>	
6	2007 U.S. Dist. LEXIS 95398 (N.D. Cal. 2007)	15
7	Statutes	
8	Cal. Code Regs. Tit. 8 § 13520	7
9	California Civil Procedure Code § 382	24
10	California Labor Code § 218.5	15
11	California Labor Code § 226(a)	7
12	California Labor Code § 226(e)(1)	21
13	California Labor Code § 2699(e)(2)	22
14	California Labor Code §§ 203, 226, 558(a)	22
15	California Rule of Court 3.769(f)	27
16	California Rules of Court, Rule 3.769(g)	16
17	California Code of Civil Procedure § 877.6	18
18	Federal Rule of Civil Procedure 23	16
19	Federal Rule of Civil Procedure 23(a)	24
20	PAGA Section 2699	22
21	PAGA Section 2699(f)(2)	22
22	Other Authorities	
23	<i>Newberg on Class Actions</i> , 4th ed. § 3:15, p.335	26
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 Plaintiff Gabriela Guevara (hereinafter “Plaintiff”), on behalf of herself and the
3 approximately 100-member putative class, respectfully requests that this Court preliminarily
4 approve the Joint Stipulation and Settlement Agreement (hereinafter “Agreement”¹) entered into
5 between Plaintiff and Defendant AguilasMorales, Inc. (hereinafter “Defendant”) (hereinafter
6 Plaintiff and Defendant are collectively referred to as the “Parties”). The Parties’ Agreement seeks
7 to resolve claims raised against Defendant in this matter in exchange for a non-reversionary
8 \$350,000 Gross Settlement Amount. The proposed Class is comprised of individuals who worked
9 for Defendant as non-exempt hourly employees in California at any time during the Class Period.²
10 The Class Period is December 30, 2017 through September 19, 2023.³ It is requested that the Court
11 grant preliminary approval as, when analyzing the strengths and vulnerabilities of the claims and
12 Defendant’s potential liability exposure, this proposed settlement of \$350,000 is well within the
13 range of reasonableness. **This settlement is estimated to pay Class Members an average**
14 **payment of approximately \$1,758.33.**⁴ The proposed Agreement satisfies all the criteria for
15 preliminary approval under Rule 3.769 of the California Rules of Court.

16 As the following sections show, Class Counsel are convinced that the proposed settlement
17 is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues
18 presented in this action. The length and risks of trial and perils of litigation that affect the value of
19 the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the
20 uncertainty of class certification, the difficulties of complex litigation, the lengthy process of
21 establishing specific damages and various possible delays and appeals, were also carefully
22 considered by Class Counsel in arriving at the proposed settlement. The Agreement was the
23 product of an all-day mediation with the Honorable Joan Lewis (Ret.) and was the product of non-
24 collusive, arm’s-length negotiations by informed counsel and parties. The settlement is fair,

25
26 ¹ The Agreement is attached to the Declaration of David Mara, Esq. (“Mara Dec.”) as **Exhibit 1**.

27 ² **Exhibit 1** at Paragraph I(E).

28 ³ **Exhibit 1** at Paragraph I(J).

⁴ Estimated Net Settlement Amount of \$175,833.34 / approximately 100 putative class members
= \$1,758.33.

reasonable, and adequate. Accordingly, Plaintiff seeks: (1) preliminary approval of the terms contained in the Agreement; (2) provisional certification of the Class; (3) appointment of Plaintiff as Class Representative; (4) appointment of Mara Law Firm, PC, as Class Counsel; (5) approval of the Parties' proposed notice of class action settlement⁵ (referred to herein as the "Class Notice" or "Notice") and method of notifying the Class about the settlement; and (6) a hearing date for final approval on April 30, 2024.

II. BACKGROUND

Defendant AguilasMorales, Inc. ("Defendant") operates a restaurant in the Los Angeles area under the name "Paseo San Miguel." On December 30, 2021, Plaintiff commenced this action by filing a class action complaint alleging causes of action against Defendant for 1) Failure to Pay All Straight Time Wages; 2) Failure to Pay Overtime; 3) Failure to Provide Meal Periods; 4) Failure to Authorize and Permit Rest Periods; 5) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; 6) Failure to Pay all Wages Due at the Time of Termination; 7) Irregular Pay Periods; 8) Failure to Adopt a Compliant Sick Pay Policy; and 9) Violation of Unfair Competition Law. Mara Dec. ¶ 12.

On December 8, 2021, Plaintiff provided notice to the Labor and Workforce Development Agency ("LWDA") and Defendant in accordance with the Private Attorneys General Act of 2004 ("PAGA").⁶ On March 8, 2022, Plaintiff filed a PAGA action which seeks civil penalties pursuant to Cal. Lab. Code 2699 *et seq.* for 1) Failure to Pay All Straight Time Wages; 2) Failure to Pay Overtime; 3) Failure to Provide Meal Periods; 4) Failure to Authorize and Permit Rest Periods; 5) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; 6) Failure to Pay all Wages Due at the Time of Termination; 7) Failure to Pay All Wages Twice Per Month; and 8) Failure to Adopt a Compliant Sick Pay Policy. The PAGA action was related with the class action on or around June 8, 2022. Mara Dec. ¶ 13.

⁵ The Class Notice is attached to the Agreement as **Exhibit A**.

⁶ The Notice to the LWDA dated December 8, 2021 is attached to the Declaration of David Mara as **Exhibit 2**. Plaintiff's Amended Notice dated July 6, 2022 (naming the correct employer entity) is attached to the Declaration of David Mara as **Exhibit 3**.

1 **III. INVESTIGATION/LITIGATION HISTORY**

2 **a. Discovery and Investigation**

3 After filing, the Parties engaged in discovery. These discovery efforts led to Defendant
4 producing policy documents, such as the employee handbooks that covered employees’
5 employment with Defendant, and time and wage records. Included within these documents were
6 Defendant’s wage and hour policies, including its meal and rest period policies. Defendant also
7 produced time and wage records for an approximate 57% sampling of the Class Members which
8 Plaintiff’s Counsel had analyzed with the assistance of an expert. These records consisted of the
9 entirety of the time and wage records from 2017 through 2021. As such, the sampling should be
10 reflective of the entire Class. With the assistance of her expert, Plaintiff was able to use these
11 records to obtain the data points needed to establish a potential exposure model in preparation for
12 mediation. Defendant further produced Plaintiff’s personnel file and time and pay records. The
13 Parties also engaged in the *Belaire-West* notice process to obtain the contact information for the
14 putative class members. From this discovery, Plaintiff and her Counsel were able to analyze
15 Defendant’s liability in this action and prepare a realistic damage model. Mara Dec. ¶ 14.

16 **b. The Parties Agreed to Attend Mediation**

17 The Parties attended an all-day mediation presided over by Honorable Joan Lewis (Ret.)
18 on July 21, 2023. This mediation was successful. The Parties then met and conferred over all the
19 terms of the settlement and finalized their settlement in the Parties’ Agreement. The Parties seek
20 preliminary approval of the Agreement in the instant motion. Mara Dec. ¶ 15; **Exhibit 1**.

21 **c. The Parties’ Staunchly Conflicting Positions**

22 **i. Meal and Rest Periods**

23 Plaintiff alleges that employees are not provided with lawful meal and rest periods. Under
24 California Labor Code § 512(a), “[a]n employer may not employ an employee for a work period
25 of more than five hours per day without providing the employee with a meal period of not less
26 than 30 minutes” Cal. Lab. Code § 512(a). An employer “satisfies this obligation [to provide
27 meal periods] if it relieves its employees of all duty, relinquishes control over their activities and
28 permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not

1 impede or discourage them from doing so.” *Brinker Restaurant Corp. v. Superior Court* (2012) 53
2 Cal.4th 1004, 1040. Under Wage Order 4-2001, Section 12(A), “[e]very employer shall authorize
3 and permit all employees to take rest periods, which insofar as practicable shall be in the middle
4 of each work period. The authorized rest period time shall be based on the total hours worked daily
5 at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.”

6 Here, Plaintiff contends that Defendant has consistently and systematically denied
7 employees their rights to meal and rest periods throughout the entire class period. Employees are
8 routinely told by their supervisors and managers that they need to work through their meal and rest
9 periods, as it is “too busy” for them to be allowed to take them. Mara Dec. ¶ 16.

10 Defendant asserts that its meal and rest period policies are lawful and provide employees
11 with meal and rest periods in compliance with California law. Defendant alleges that if litigation
12 continues it would be able to show that it adequately advised employees of their rights to meal and
13 rest periods, that employees were provided the opportunity to take legally compliant meal and rest
14 periods, and employees were relieved of all work duties during such meal and rest periods.
15 Defendant also contends that if litigation were to continue, it would provide declarations from
16 employees stating that they knew they were entitled to meal and rest periods in accordance with
17 California law and that they were able to take these meal and rest periods without any interference
18 from Defendant. Mara Dec. ¶ 17.

19 In addition, Defendant argues that in order for Plaintiff to demonstrate the existence of its
20 purported unlawful policy, the Court would have to ask each employee what it thought Defendant’s
21 meal and rest period policies were. As such, individualized issues would predominate, rendering
22 the matter unsuitable for class certification. Mara Dec. ¶ 18.

23 Plaintiff further argues that Defendant’s time records, which contain records of both meal
24 and rest periods, support Plaintiff’s claim. In *Donohue v. AMN Services, LLC*, the California
25 Supreme Court issued a decision, wherein it ruled that time records showing late, short, or missed
26 meal periods raises a rebuttable presumption that the meal periods were not provided: “If time
27 records show missed, short, or delayed meal periods with no indication of proper compensation,
28 then a rebuttable presumption arises” that the meal periods were not provided in accordance with

1 California law. *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 74.

2 Plaintiff contends that, here, the time records show non-compliant meal and rest periods.
3 In these shifts, under *Donohue*, Plaintiff contends that it is presumed that meal period violations
4 occurred, and while *Donohue* does not apply to rest periods, records showing of non-compliant
5 rest periods can indisputably be used as further evidence of Defendant's failure to provide
6 complaint rest periods. Mara Dec. ¶ 19.

7 Defendant again points out that its meal and rest period policies are lawful and that it
8 provides employees with meal and rest periods in compliance with California law, and that
9 Defendant would be able to provide declarations from employees stating that they were able to
10 take these meal and rest periods without any interference from Defendant. As such, any records
11 reflecting non-complaint meal and rest periods would be insufficient to demonstrate any purported
12 violations, and Defendant would be able rebut the presumption under *Donohue v. AMN Services,*
13 *LLC* for meal periods and defeat Plaintiff's rest period claims on the merits. Mara Dec. ¶ 20.

14 **ii. Rounding**

15 Plaintiff contends that the time and wage records produced by Defendant demonstrate
16 that Defendant operates under an unlawful rounding policy. y. In California, rounding policies
17 are only permissible if the rounding policy is "fair and neutral on its face and 'it is used in such a
18 manner that it will not result, over a period of time, in failure to compensate the employees
19 properly for all the time they have actually worked.'" *See's Candy, Inc. v. Superior Court* (2012)
20 210 Cal. App. 4th. 889, 907.

21 Here, Defendant has an unlawful rounding policy that is not fair and neutral in practice.
22 Defendant's rounding policy results in employees systematically being undercompensated. An
23 analysis of the sampling of time records reveals that the majority of employees were underpaid
24 by the rounding policy by several minutes across a significant number of shifts. Mara Dec. ¶ 21.

25 Defendant argues that Plaintiff's analysis only focuses on the shifts in which employee's
26 are underpaid and ignores the instances in which an employee's compensation is neutral or is
27 being overcompensated as a result of the rounding policy. Defendant contends that when the
28 records are considered as a whole, the rounding policy is indisputably fair, neutral, and properly

1 compensates employees over time for all hours worked in compliance with California law. Mara
2 Dec. ¶ 22.

3 **iii. Overtime**

4 Plaintiff also alleges that Defendant fails to pay its employees for all overtime worked.
5 Labor Code § 510 provides that “[a]ny work in excess of eight hours in one workday and any
6 work in excess of 40 hours in any one workweek . . . shall be compensated at the rate of no less
7 than one and one-half times the regular rate of pay for an employee.”

8 Here, Plaintiff contends that employees are routinely told by their supervisors and
9 managers that that they need to clock out before they reach the eight (8) hour mark in their shifts
10 so they do not work overtime. However, Defendant then requires them to continue working off
11 the clock anyway, all in order to avoid having to pay employees overtime. Mara Dec. ¶ 23.

12 Defendant argues that beyond the limited accusations of Plaintiff, there is no evidence
13 that employees performed *any* work-related tasks for which they were not compensated, and that
14 Defendant has uniform practices and policies *forbidding* employees from working off the clock.
15 Defendant claims that Plaintiff’s “investigation” is wholly inaccurate, and that employees are
16 instructed to clock in before performing any work related tasks, and that they are trained on how
17 to accurately log their time so that they can be paid for all time worked. Defendant further argues
18 that the Court would have to ask each employee if this purported unlawful practice existed, and
19 that individualized issues would predominate as a result, rendering the matter unsuitable for class
20 certification. Mara Dec. ¶ 24.

21 **iv. Wage Statements and Waiting Time Penalties**

22 Plaintiff also pursued claims for failure to provide accurate itemized wage statements and
23 waiting time penalty claims. These claims are derivative of Plaintiff’s underlying claims outlined
24 above. Should Plaintiff’s underlying claims fail, these claims would also fail. Mara Dec. ¶ 25.

25 In addition, Defendant contends that even if Plaintiff were successful in her underlying
26 claims, she would have to prove Defendant “willfully” failed to pay employees the appropriate
27 wages and premiums due upon separation of employment. “A willful failure to pay wages within
28 the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages

1 to an employee when those wages are due. However, a good faith dispute that any wages are due
2 will preclude imposition of waiting time penalties under Section 203.” Cal. Code Regs. Tit. 8 §
3 13520. “A ‘good faith dispute’ that any wages are due occurs when an employer presents a defense,
4 based in law or fact, which would preclude any recovery on the part of the employee. The fact that
5 a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist.”
6 *Id.* Defendant contends that any failure to pay wages due at the separate of employment was not
7 willful. Defendant argues that it would not be liable for waiting time penalties because a “good
8 faith dispute” exists over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral*
9 *v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201. Mara Dec. ¶ 26.

10 Defendant also argues that Plaintiff’s meal and rest period claims cannot form the basis of
11 her wage statement claim. Defendant relies on the case *Maldonado v. Epsilon Plastics, Inc.* (2018)
12 22 Cal.App.5th 1308, for the position that employees do not suffer injury under California Labor
13 Code § 226(a) so long as the wage statements correctly reflected the hours worked and the pay
14 received even if the pay is later determined to be inaccurate. Mara Dec. ¶ 27.

15 **IV. TERMS OF THE PROPOSED SETTLEMENT**

16 Under the terms of the settlement, Defendant will create a settlement fund of \$350,000.

17 **a. Deductions from the Settlement**

18 The Parties have agreed (subject to and contingent upon the Court’s approval) that this
19 action be settled and compromised for the non-reversionary total sum of \$350,000 (“Gross
20 Settlement Amount” or “GSA”), which includes, subject to Court approval: (a) attorneys’ fees of
21 up to \$116,666.66 (one-third of the GSA)⁷ to compensate Class Counsel for work already
22 performed and all work remaining to be performed in documenting the settlement, administering
23 the settlement, and securing Court approval; (b) litigation costs estimated at approximately, and
24 not to exceed, \$20,000;⁸ (c) a Class Representative Enhancement Payment to the named class

25 ⁷ Although Plaintiff’s Counsel seeks attorneys’ fees under the percentage method, Plaintiff’s
26 Counsel will also provide the Court with their lodestar information at final approval.

27 ⁸ These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the
28 amount of actual costs incurred during the litigation of this case. Should the actual costs exceed
\$20,000, Plaintiff will only seek reimbursement of costs up to \$20,000. Should the actual costs be
lower than \$20,000, the difference will be added to the Net Settlement Amount for disbursement
to Participating Class Members.

representative, Gabriela Guevara, in a sum not to exceed \$7,500 in consideration for prosecuting this class action, serving as Class Representative, work performed, and risks undertaken for the payment of attorneys' fees and costs in the event she had been unsuccessful in the matter; (d) settlement administration fees and expenses to APEX Class Action LLC (hereinafter "APEX"), estimated not to exceed approximately \$10,000;⁹ and (e) \$20,000 allocated to Plaintiff's claims under the PAGA. Of this payment, 75%, or \$15,000 will be provided to the LWDA, and 25%, or \$5,000, will be available for distribution to Aggrieved Employees.¹⁰

b. Calculation of the Settlement Payments to Class Members

After all Court-approved deductions from the GSA, it is estimated that \$175,833.34¹¹ ("Net Settlement Amount" or "NSA"), less employee taxes on the "wage portion" of the settlement payment, will be distributed to Participating Class Members.¹² Subject to the terms and conditions of the settlement, each Participating Class Member will receive a portion of the NSA called their "Individual Class Settlement Share." An Individual Class Settlement Share will be calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. **Exhibit 1** at Paragraph III(F)(1)(a). Therefore, the

⁹ APEX provided the Parties with the lowest bid for the settlement administration process in this case, meaning that more of the Net Settlement Amount will be available for Participating Class Members. Further, APEX will present to the Court a declaration in conjunction with the final approval motion outlining the costs of the settlement administration process. If the settlement administration costs are lower than the amount allocated in the Agreement, the difference will be added to the Net Settlement Amount for distribution to Participating Class Members.

¹⁰ Aggrieved Employees are all individuals who worked for Defendant as non-exempt hourly employees in California during the PAGA Period. **Exhibit 1** at Paragraph I(C). The PAGA Period is December 28, 2020 through September 19, 2023. **Exhibit 1** at Paragraph I(GG).

¹¹ It should be noted that this number will increase at final approval because any unused portions of the settlement administration costs and litigation costs will be added to the Net Settlement Fund and available for distribution to Participating Class Members. Currently, APEX's quote for the administration costs is \$8,850. If this amount remains the same, the difference between this amount and the \$10,000 allocated to administration costs will be added to the Net Settlement Amount at final approval. In addition, Plaintiff's Counsel's litigation costs are currently approximately \$15,000. While these costs will increase due to the filing fees associated with the filings of the preliminary and final approval motions, the difference between the actual costs and the \$20,000 allocated to litigation costs will be added to the Net Settlement Amount at final approval.

¹² Participating Class Members are "[a]ll Class Members who do not submit a valid and timely request to exclude themselves from this Settlement." **Exhibit 1** at Paragraph I(HH). If the Class Member is also an Aggrieved Employee, they will still be bound by the PAGA Settlement and will receive an Individual PAGA Settlement Payment as approved by the Court. **Exhibit 1** at Paragraph III(J)(4)(a).

1 value of each Class Member's Individual Settlement Share ties directly to the amount of weeks
2 that he or she worked.

3 The Individual Class Settlement Share will be divided into a "wage portion" to compensate
4 Participating Class Members for alleged unpaid wages, an "interest portion" to compensate
5 Participating Class Members for alleged interest, and a "penalty portion" to compensate
6 Participating Class Members for alleged penalties. The wage portion, the interest portion, and the
7 penalty portion will each make up 33 1/3% of each Participating Class Members' Individual Class
8 Settlement Share. **Exhibit 1** at Paragraph III(F)(2).

9 In addition, each Aggrieved Employee will receive a will receive a proportionate share of
10 the PAGA Payment that is allocated for distribution to Aggrieved Employees (i.e., 25% of the
11 PAGA Payment). The Administrator will calculate each Individual PAGA Payment by (a) dividing
12 the amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$5,000) by the total
13 number of weeks worked by all Aggrieved Employees during the PAGA Period and (b)
14 multiplying the result by each Aggrieved Employee's weeks worked. **Exhibit 1** at Paragraph
15 III(G)(1)(a). Therefore, the value of each Aggrieved Employees' PAGA Settlement Share ties
16 directly to the amount of weeks that the Aggrieved Employees worked during the PAGA Period.
17 Each Aggrieved Employee's Individual PAGA Settlement Share will be apportioned as 100%
18 penalties. **Exhibit 1** at Paragraph III(G)(2).

19 **Under no circumstances will any portion of the \$350,000 settlement revert to**
20 **Defendant and 100% of the NSA will be paid out to Participating Class Members. In**
21 **addition, the employer's share of taxes will be paid in addition to and outside of the GSA.**

22 **c. Notice to the Class**

23 Not later than 15 business days after the Court grants Preliminary Approval of the
24 Settlement, Defendant will deliver the Class and PAGA Data to the Administrator. **Exhibit 1** at
25 Paragraph III(J)(2)(a). The data will list for each Class Member and Aggrieved Employee: (1) first
26 and last name; (2) last known mailing address; (3) social security number; (4) hire and termination
27 dates; (5) last known email address; and (6) the total number of weeks during which the Class
28 Member and/or Aggrieved Employee performed any actual work during the Class Period and/or

1 PAGA Period as a member of the Class and/or as an Aggrieved Employee. *Id.*

2 Using best efforts to perform as soon as possible, within 10 days after receiving the Class
3 and PAGA Data, the Administrator will send to all Class Members and Aggrieved Employees
4 identified in the data, via first-class USPS mail, the Class Notice substantially in the form attached
5 to the Agreement as **Exhibit A**. Before mailing Class Notices, the Administrator will conduct a
6 skip trace for the address of all Class Members and Aggrieved Employees who are former
7 employees of Defendant. **Exhibit 1** at Paragraphs III(J)(2)(a) – (b). The Notices will be mailed in
8 English and Spanish.

9 After notices are mailed, Class Members will have forty-five (45) days to respond to the
10 settlement. **Exhibit 1** at Paragraph I(NN). Class Members may respond to the settlement by
11 requesting to be excluded from it or objecting to it. Class Members can also file a dispute as to the
12 number of workweeks attributed to them. The deadlines for Class Members' written objections,
13 Challenges to Workweeks, and Requests for Exclusion will be extended an additional 15 days
14 beyond the 45 days otherwise provided in the Class Notice for all Class Members whose notice is
15 re-mailed. The Administrator will inform the Class Member of the extended deadline with the re-
16 mailed Class Notice. **Exhibit 1** at Paragraph III(J)(2)(c).

17 **i. Requests for Exclusion**

18 Class Members who wish to exclude themselves (opt-out of) the Class Settlement must
19 send the Administrator a signed written Request for Exclusion not later than 45 days after the
20 Administrator mails the Class Notice (plus an additional 15 days for Class Members whose Class
21 Notice is re-mailed). The written request for exclusion must: (a) state the Class Member's name,
22 address, telephone number, and social security number or employee identification number; (b)
23 state the Class Member's intention to exclude themselves from or opt-out of the Settlement (*e.g.*
24 "I want to exclude myself from this settlement. I also understand that I retain all rights to sue the
25 Defendant for the class claims asserted in this lawsuit and those included in the Class Release.");
26 (c) be addressed to the Settlement Administrator; (d) be signed by the Class Member or his or her
27 lawful representative; (e) be postmarked no later than the Response Deadline and (f) state that
28 opting out/requesting exclusion from the Class Settlement only pertains to the Class Settlement

1 and not the PAGA Settlement and that Class Members who do opt-out/Request Exclusion from
2 the Class Settlement will still receive an Individual PAGA Settlement Payment as approved by the
3 Court. **Exhibit 1** at Paragraph III(J)(4).

4 **ii. Objections to the Settlement**

5 Participating Class Members may send written objections to the Administrator. In the
6 alternative, Participating Class Members may appear in Court (or hire an attorney to appear in
7 Court) to present oral objections at the Final Approval Hearing. A Participating Class Member
8 who elects to send a written objection to the Administrator must do so not later than 45 days after
9 the Administrator's mailing of the Class Notice (plus an additional 15 days for Class Members
10 whose Class Notice was re-mailed) and state: (a) the case name (e.g. *Gabriela Guevara v.*
11 *Aguilas Morales, Inc.*) and case numbers (21STCV47592 and 22STCV08424); (b) the objecting
12 person's or his/her attorney's full name, address, and telephone number; (c) the words "Notice of
13 Objection" or "Formal Objection;" (d) describe, in clear and concise terms, the legal and factual
14 arguments supporting the objection; (e) list identifying witness(es) the objector may call to testify
15 at the Final Approval Hearing; (f) provide true and correct copies of any exhibit(s) the objector
16 intends to offer at the Final Approval Hearing; and (g) state whether the objection applies only to
17 the objector, to a specific subset of the Class, or to the entire Class. **Exhibit 1** at Paragraph
18 III(J)(3)(b).

19 **iii. Disputes**

20 Each Class Member shall have 45 days after the Administrator mails the Class Notice (plus
21 an additional 15 days for Class Members and Aggrieved Employees whose Class Notice is re-
22 mailed) to challenge the number of workweeks allocated to the Class Member or Aggrieved
23 Employee in the Class Notice. They may challenge the allocation by communicating with the
24 Administrator in writing. Any such challenge shall include the reasons supporting the challenge,
25 as well as any documentation supporting his or her contention that the Individual Settlement Share
26 calculation is incorrect. In the absence of such evidence, the data will be controlling. The
27 Settlement Administrator will consult with the Parties about how to resolve the challenge, evaluate
28 the information provided, and will make a final and unappealable decision as to the outcome of

1 the challenge. If the Individual Class or PAGA Settlement Share calculation is adjusted following
2 a challenge, then the Settlement Administrator shall notify the Class Member or Aggrieved
3 Employee of the adjustment. **Exhibit 1** at Paragraphs III(J)(6) – (7).

4 **iv. Returned Notices**

5 Not later than 5 business days after the Administrator’s receipt of any Class Notice returned
6 by the USPS as undelivered, the Administrator shall re-mail the Class Notice using any forwarding
7 address provided by the USPS. If the USPS does not provide a forwarding address, the Settlement
8 Administrator will conduct a search for a more current address for the Class Member and re-mail
9 the Class Notice to the Class Member. The Settlement Administrator will use the National Change
10 of Address Database and skip traces to attempt to find the current address. The Settlement
11 Administrator will be responsible for taking reasonable steps to trace the mailing address of any
12 Class Member for whom a Class Notice is returned by U.S. Postal Service as undeliverable. These
13 reasonable steps shall include, at a minimum, the tracking of all undelivered mail; performing
14 address searches for all mail returned without a forwarding address; and promptly re-mailing to
15 Class Members for whom new addresses are found. The Settlement Administrator is unable to
16 locate a better address, the Class Notice shall be re-mailed to the original address. **Exhibit 1** at
17 Paragraph III(J)(2)(c).

18 **d. Website**

19 The Administrator will establish and maintain a website which posts the Class Notice and
20 other important documents in the case, including the posting of any Final Judgment or Final
21 Approval Order issued by the Court. **Exhibit 1** at Paragraph III(I). The Administrator will also
22 maintain and monitor a toll-free telephone number to receive Class Member calls that will be
23 provided on the Class Notice. *See Exhibit A* attached to the Agreement.

24 **e. Distribution of Funds**

25 The GSA will be funded and disbursed in two installments. Defendant shall fund and
26 deliver to the Settlement Administrator the First Installment, which shall be comprised \$150,000,
27 plus the applicable Employer Taxes. Defendant shall fund and deliver to the Settlement
28 Administrator the First Installment either sixty (60) calendar days after the Effective Final

1 Settlement Date,¹³ or May 21, 2024,¹⁴ whichever is later. Within ten (10) calendar days after
2 receiving the First Installment, the Settlement Administrator shall disburse: (1) 42.85% of the Net
3 Settlement Amount to Participating Class Members; (2) 42.85% of the Attorneys Fee Award and
4 Cost Award to Class Counsel; (3) 42.85% of the Class Representative Enhancement Payment to
5 the Class Representative; (4) 42.85% of the Administration Costs to itself; and (5) 42.85% of the
6 PAGA Payment to the LWDA and PAGA Aggrieved Employees. **Exhibit 1** at Paragraphs
7 III(J)(11)(a) – (b).

8 The Second Installment shall be comprised of \$200,000, plus the applicable Employer
9 Taxes. Defendant shall fund and deliver to the Settlement Administrator the Second Installment
10 ten (10) months after the First Installment was funded. Within ten (10) calendar days after
11 receiving the Second Installment, the Settlement Administrator shall disburse: (1) 57.15% of the
12 Net Settlement Amount to Participating Class Members; (2) 57.15% of the Attorneys Fee Award
13 and Cost Award to Class Counsel; (3) 57.15% of the Class Representative Enhancement Payment
14 to the Class Representative; (4) 57.15% of the Administration Costs to itself; and (5) 57.15% of
15 the PAGA Payment to the LWDA and PAGA Aggrieved Employees. **Exhibit 1** at Paragraphs
16 III(J)(11)(a) – (b).

17 Participating Class Members and Aggrieved Employees must cash or deposit their
18 Individual Class Settlement Share and Individual PAGA Settlement Share checks within one
19 hundred and eighty (180) calendar days after the checks are mailed to them. **Exhibit 1** at Paragraph
20 III(J)(13). If any checks are not redeemed or deposited within ninety (90) calendar days after
21 mailing, the Settlement Administrator will send a reminder postcard indicating that unless the
22 check is redeemed or deposited in the next ninety (90) days, it will expire and become non-
23 negotiable, and offer to replace the check if it was lost or misplaced. **Exhibit 1** at Paragraph

24
25 ¹³ The effective date of this Settlement will be when the final approval of the settlement can no
26 longer be appealed, or, if there are no objectors and no plaintiffs in intervention at the time the
27 court grants final approval of the settlement, the date the court enters judgment granting final
28 approval of the settlement.

¹⁴ Given that Plaintiff is requesting an April 30, 2024 Final Approval Hearing date, this May 21,
2024 will be irrelevant, as sixty (60) calendar days after April 30, 2024 will undoubtedly extend
beyond May 21, 2024.

1 III(J)(13)(a). If any checks remain uncashed or not deposited by the expiration of the 90-day period
2 after mailing the reminder notice, the Settlement Administrator will, within two hundred (200)
3 calendar days after the checks are mailed, cancel the checks. All funds associated with the
4 Individual Class Settlement Share and PAGA Settlement Share checks returned as undeliverable
5 and funds associated with those checks remaining un-cashed, shall escheat to the State of
6 California Controller's Office under the Unclaimed Property Statutes in the name of the Class
7 Member and/or Aggrieved Employee. **Exhibit 1** at Paragraph III(J)(13)(b).

8 **f. Release of Claims**

9 In exchange for an Individual Class Settlement Share, Participating Class Members will
10 agree to the following release:

11 [A]ny and all claims, debts, liabilities, demands, obligations, penalties, guarantees,
12 costs, expenses, attorney's fees, damages, action or causes of action of whatever
13 kind or nature, whether known or unknown, contingent or accrued, that are alleged
14 or could have been alleged during the Class Period based upon a reasonable
interpretation of the facts alleged in the Class Action against Defendant. The release
as to these claims will be deemed effective when Defendant funds the settlement.

15 **Exhibit 1** at Paragraph I(KK).

16 In addition, all Aggrieved Employees will agree to the following release in exchange for
17 an Individual PAGA Settlement Share:

18 [A]ny and all claims for civil penalties under the California Labor Code and the
19 Private Attorneys General Act predicated upon the Labor Code violations asserted,
20 as well as any potential penalties, interest or attorneys' fees associated with those
21 violations under California law, to the extent such claims are predicated on claims
22 made or that could have been made during the PAGA Period based on the facts and
circumstances alleged in the PAGA Action and Plaintiff's notice to the LWDA
against Defendant. Aggrieved Employees will release the Released PAGA Claims
even if they opted-out/requested exclusion from the Class Settlement. The release
as to these claims will be deemed effective when Defendant funds the settlement.

23 **Exhibit 1** at Paragraph I(LL).

24 In addition, Plaintiff has agreed to a general release of her claims. *See Exhibit 1* at
25 Paragraph III(L).

26 **g. Class Representative Enhancement Payment**

27 Subject to the Court's approval, Plaintiff shall receive a payment not to exceed \$7,500 in
28 consideration for a general release of all her claims against Defendant. The payment shall be made

1 from the GSA. As just noted, Plaintiff has agreed to a general release of her claims against
2 Defendant.

3 Moreover, as representative for the absent class members, Plaintiff risked a potential
4 judgment taken against her for attorneys' fees and costs if this matter had not been successfully
5 concluded. Case law holds that a losing party is liable for the prevailing party's costs. *See Early v.*
6 *Superior Court*, 79 Cal.App.4th 1420, 1433 (2000). And in some wage and hour actions, such as
7 this case, pursuant to California Labor Code § 218.5, the prevailing party can be liable for
8 attorneys' fees as well. Though Class Counsel has agreed to pay such costs, Plaintiff would
9 nevertheless have had a cost bill entered against her leaving her ultimately liable for potentially
10 hundreds of thousands of dollars in the unexpected possibility that Class Counsel did not meet
11 their obligation to cover those costs. Unfortunately, there have been judgments like this entered
12 against class representatives.¹⁵ The risk of payment of Defendant's costs, alone, is a sufficient
13 basis for an award of the requested service award. Few individuals are willing to take this risk, and
14 Plaintiff championed a cause on behalf of others with potentially huge monetary risks.

15 Additionally, the modern-day work force is mobile, with employees holding several jobs
16 over the span of their career. It is also true that prospective employers in this computer, high-tech
17 age "Google" and/or do extensive background checks and have access to court databases to see if
18 applicants have ever filed a lawsuit or have ever been sued. Here, Plaintiff's conduct will not be
19 lost on a prospective employer who has to choose between an applicant who has never sued an
20 employer and one who has done so. The requested award far from compensates Plaintiff for
21 opportunities she may lose in the future because of the exercise of a Constitutional right to Petition
22 the Courts for redress of a grievance.

23 **h. Final Judgment**

24 Pursuant to Cal. Rules of Court, Rule 3.771(b), notice of the final judgment will be posted
25

26 ¹⁵ *See, e.g. Koehl v. Verio, Inc.*, 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action
27 where Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for
28 the Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, No. 05-
2320, 2007 U.S. Dist. LEXIS 95398 (N.D. Cal. Dec. 17, 2007) (a wage and hour misclassification
case lost on summary judgment, after the case was certified, the named Plaintiff was assessed costs
in the sum of \$56,788.).

on the Settlement Administrator’s website. *See Exhibit 1* at Paragraph III(I).

V. ARGUMENT

a. Class Action Settlements Are Subject to Court Review and Approval Under the California Rules of Court

Rule 3.769 requires court approval for class action settlements.¹⁶ “Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of Court, Rule 3.769(g)). Rule 3.769 further requires a noticed motion for preliminary approval of class settlements:

(a) A settlement or compromise of an entire class action, or a cause of action in a class action, or as to a party, requires the approval of the court after hearing.

...
(c) Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion.

Courts act within their discretion in approving settlements that are fair, not collusive, and take into account “all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452 U.S. 905.

b. The Settlement Is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement under Code of Civil Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-length negotiations; (2) investigation and discovery were sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these

¹⁶ The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

1 elements – with the exception of the percentage of objectors, which cannot be anticipated at this
2 stage of the litigation – bearing on the fairness of the proposed settlement are present here and the
3 Court’s grant of preliminary approval is therefore requested.

4 **i. The Settlement Was Reached as a Result of Arm’s-Length**
5 **Negotiations**

6 The settlement was reached as a result of arm’s-length negotiations. Though cordial and
7 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
8 nature. Prior to, at, and after the mediation, Counsel for the Parties conducted extensive arm’s
9 length settlement negotiations until the settlement was reached. The terms of the settlement are
10 memorialized in the Agreement which is attached to the Declaration of David Mara, Esq. as
11 **Exhibit 1**. While Plaintiff believes in the merits of her case, she also recognizes the inherent risks
12 of litigation and understands the benefit of the class receiving significant settlement funds
13 immediately as opposed to risking continued litigation in achieving class certification, preparing
14 for and conducting a trial, and/or an appeal that may take several more years to litigate.

15 **ii. The Settlement is the Result of Thorough Investigation and**
16 **Discovery**

17 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
18 before reaching the proposed settlement, and engaged in sufficient investigation, research and
19 discovery to support the settlement. The settlement was only possible following investigation,
20 discovery, and evaluation of Defendant’s policies and procedures, as well as the data produced for
21 the putative class, which permitted Class Counsel to engage in a comprehensive analysis of
22 liability and potential damages. This litigation has reached the stage where “the Parties certainly
23 have a clear view of the strengths and weaknesses of their cases” sufficient to support the
24 settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

25 **iii. Counsel for Both Parties Are Experienced in Similar Litigation**

26 Both Plaintiff’s Counsel and Defendant’s Counsel are particularly experienced in wage and
27 hour employment law and class actions. Plaintiff’s Counsel has significant experience in litigating
28 unpaid wages, unprovided meal and rest periods, and overtime claims. Mara Dec. ¶¶ 2-11. Indeed,

1 Plaintiff's Counsel was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which
2 is the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012)
3 53 Cal.4th 1004. Mara Dec. ¶ 4. Plaintiff's Counsel has prosecuted numerous wage and hour class
4 action cases on behalf of employees for California Labor Code violations and thus are experienced
5 and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed
6 basis, and to evaluate the viability of the defenses. This experience instructed Plaintiff's Counsel
7 on the risks and uncertainties of further litigation and guided their determination to endorse the
8 proposed settlement.¹⁷ Defendant's Counsel practices labor and employment law and have
9 represented numerous employers in similar types of claims. Accordingly, both Parties' Counsel
10 are experienced in wage and hour employment law and class actions.

11 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

12 An understanding of the amount in controversy is an important factor in determining
13 whether the settlement "of the class members' claims is reasonable in light of the strengths and
14 weaknesses of the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail,*
15 *Inc.* (2008) 168 Cal.App.4th 116, 129; *see also Munoz v. BCI Coca-Cola Bottling Co. of Los*
16 *Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is "the strength
17 of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Id.*

18 In weighing the strength of the plaintiff's case, *Kullar* instructs that the court is not to
19 "decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
20 that of the attorneys." *Kullar, supra*, 168 Cal.App.4th at 133. *Kullar* does not require an explicit
21 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,
22 provided there is a record which allows "an understanding of the amount that is in controversy and
23 the realistic range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at 409. Put differently,
24 "as the court does when it approves a settlement as in good faith under Code of Civil Procedure §
25 877.6, the court must at least satisfy itself that the class settlement is within the 'ballpark' of
26 reasonableness." *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde &*

27 ¹⁷ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the
28 Class Notice has been provided to the class and they have had an opportunity to respond. This
information will be provided to the Court in conjunction with the final approval motion.

1 *Associates* (1985) 38 Cal.3d 488, 499-500. As the following subsections show, the Parties’
2 investigation and discovery revealed many reasons to discount claims and agree to this settlement.

3 **1. The Proposed Settlement is a Reasonable Compromise of**
4 **Claims**

5 The proposed settlement was only possible following significant discovery and an
6 evaluation of Defendant’s relevant policies and procedures, as well as the data that Defendant
7 produced for the putative class as referenced above. This permitted Class Counsel to engage in a
8 comprehensive analysis of liability and potential damages. The discovery conducted allowed
9 Plaintiff to evaluate the strengths and weaknesses of her central theories of liability, which are
10 predicated on Plaintiff’s claims that Defendant failed to provide compliant meal and rest periods,
11 and failed to pay all wages. As explained herein, Defendant maintains that the discovery produced
12 demonstrates that it would succeed at both in denying class certification and on the merits.

13 Although, Plaintiff believes this case is suitable for certification on the claimed bases that
14 there are company-wide policies that Plaintiff contends violate California law and uniformly affect
15 the Class Members, Defendant’s counterarguments raise uncertainties with respect to both class
16 certification and success on the merits. As the California Supreme Court ruled in *Sav-On v.*
17 *Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court’s
18 sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to
19 certification of wage and hour claims.¹⁸ While remaining confident in the strengths of her claims,
20 all of these factors led Plaintiff to discount the following maximum potential damage exposure.

21 **2. Maximum Potential Exposure as Estimated by Plaintiff**

22 At the time of mediation, Class Members had worked approximately 6,158 workweeks.
23 This equates to approximately 31,012 shifts worked by class members during the Class Period.
24 Employees average rate of pay is approximately \$15.00 per hour.

25 ¹⁸ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of
26 class claiming misclassification and ordering summary adjudication in favor of employees), *review*
27 *granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only);
28 *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class
claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing
denial of certification); *Dunbar v. Albertson’s Inc.* (2006) 141 Cal. App. 4th 1422 (affirming
denial of certification).

1 Plaintiff alleges that Defendant failed to provide employees with meal periods in
2 accordance with California law because Plaintiff asserts that employees were told by Defendant
3 that the restaurant was too busy for employees to be able take them. Plaintiff points to Defendant's
4 own records, which show that 24,944 shifts over five (5) hours in length worked by employees
5 indicate that a complaint meal period was not provided. If Plaintiff were to prevail on this claim,
6 Plaintiff and the Class Members would be entitled to the following **maximum** potential damages:
7 \$374,160 (24,944 shifts x \$15.00 average hourly rate = \$374,160). Mara Dec. ¶ 28. Defendant
8 contends that this amount should be zero because it has a lawful meal period policy and that it
9 would provide declarations confirming this is the case if litigation were to continue.

10 Plaintiff contends that Defendant failed to provide employees with rest periods in
11 accordance with California law because Plaintiff asserts that employees were told by Defendant
12 that the restaurant was too busy for employees to be able take them. Plaintiff points to Defendant's
13 own records, which show that 28,604 shifts over three and a half (3.5) hours in length worked by
14 employees indicate that a complaint rest period was not provided. If Plaintiff were to prevail on
15 this claim, Plaintiff and the Class Members would be entitled to the following **maximum** potential
16 damages: \$429,060 (28,604 shifts x \$15.00 per hour = \$429,060). Mara Dec. ¶ 29. Defendant
17 contends that this amount should be zero because it has a lawful rest period policy and that it would
18 provide declarations confirming this is the case if litigation were to continue.

19 Plaintiff further alleges that Defendant operates under an unlawful rounding policy. With
20 the assistance of her expert, Plaintiff determined that employees were underpaid an average of 2.7
21 minutes, or 0.045 hours, across 13,212 shifts. If Plaintiff were to prevail on this claim, Plaintiff
22 and the Class Members would be entitled to the following **maximum** potential damages: \$8,918
23 (13,212 shifts x 0.045 hours x \$15.00 per hour = \$8,918). Mara Dec. ¶ 30. Defendant contends
24 that this amount should be zero because Plaintiff's analysis of the records is inaccurate, and that
25 the rounding policy is indisputably fair, neutral, and properly compensates employees over time
26 for all hours worked in compliance with California law.

27 Plaintiff further contends that Defendant fails to pay its employees for all overtime worked.
28 Plaintiff claims that employees are routinely told by their supervisors and managers to clock out

1 before they reach the eight (8) hour mark in their shifts and to continue working off the clock for
2 about an hour on average in approximately 20% of their shifts in order to avoid having to pay
3 employees overtime. If Plaintiff were to prevail on this claim, Plaintiff and the Class Members
4 would be entitled to the following **maximum** potential damages: \$139,545 (6,202 shifts x \$22.50
5 overtime hourly rate = \$139,545). Mara Dec. ¶ 31. Defendant contends that this amount should be
6 zero because there is no evidence that employees performed any work-related tasks for which they
7 were not compensated, and that the Court would have to ask each employee if this purported
8 unlawful practice existed, creating individualized issues unsuitable for class certification.

9 If Plaintiff were to prevail on her underlying claims, Plaintiff may be entitled to penalties
10 for inaccurate wage statements. The statute of limitations for Plaintiff's wage statement claim is
11 one year. Under California Labor Code § 226(e)(1), the damages for breach of this section are fifty
12 dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100)
13 per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of
14 four thousand dollars (\$4,000). If Plaintiff were to prevail on this claim and assume that all current
15 employees are entitled to the maximum penalty of \$4,000, the **maximum** damages would be
16 \$104,000 (\$4,000 x 26 employees = \$104,000). Mara Dec. ¶ 32. As these damages are derivative
17 of Plaintiff's underlying claims, if Plaintiff's underlying claims fail, this claim also would fail.
18 Defendant also contends that Plaintiff would not be able to show that this violation was knowing
19 and intentional. On this basis, Defendant contends that Plaintiff would not be entitled to any
20 damages for unlawful wage statements.

21 If Plaintiff were to prevail on her underlying claims, she and the Class Members may also
22 be entitled to waiting time penalties. Plaintiff calculates the potential **maximum** exposure under
23 her waiting time penalties cause of action as \$216,000 (60 former employees within the three-year
24 statute of limitations x 30 days x 8 hour shift x \$15.00 average hourly rate = \$ 216,000). Mara
25 Dec. ¶ 33. As these damages are derivative of Plaintiff's underlying claims, if Plaintiff's
26 underlying claims fail, this claim also would fail. Defendant also contends that Plaintiff would not
27 be able to show that this violation was willful. On this basis, Defendant contends that Plaintiff
28 would not be entitled to any damages for waiting time penalties.

1 Plaintiff also seeks PAGA penalties. PAGA allows the private enforcement of certain
2 California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2)
3 reads, in part, as follows:

4 [T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per
5 pay period for the initial violation and two hundred dollars (\$200) for each
6 aggrieved employee per pay period for each subsequent violation.

7 Plaintiff alleges that Defendant has five (5) violations –failure to pay all time worked, failure to
8 pay overtime, failure to provide meal periods, failure to provide rest periods, and failure to provide
9 accurate wage statements –which give rise to PAGA penalties. The statute of limitations for PAGA
10 violations go back one year. Therefore, the maximum potential damages under Plaintiff’s PAGA
11 claim is: \$100 x 5 PAGA violations x 1,443 pay periods = \$721,500. *Mara Dec.* ¶ 34. As Plaintiff’s
12 PAGA claims are based on the same alleged unlawful conduct as her class claims, Plaintiff’s
13 PAGA claims are subject to the same risks on the merits as Plaintiff’s class claims. In addition,
14 the Court may reduce any PAGA penalties awarded under Section 2699, subdivision (e)(2). The
15 likelihood of the Court reducing the PAGA penalties awarded to Plaintiff and the Aggrieved
16 Employees – assuming liability is proven as to each of Plaintiff’s claims – is higher in this case
17 where these same individuals may also be receiving money for the same unlawful conduct under
18 the class claims. *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-
19 001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are
20 at least partially duplicative of penalties granted by the underlying Labor Code violations, *see,*
21 *e.g.,* Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether
22 and in what amount to award PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff
23 recognizes that the potential PAGA penalties are highly uncertain.”). As such, the Court may
24 reduce any PAGA penalty amount awarded to Plaintiff and the Aggrieved Employees.¹⁹

25 Thus, not taking into account any of its defenses or arguments, Plaintiff estimated that if
26 she were successful in her core claims, Defendant’s total exposure would be approximately

27 ¹⁹ The amount allocated to Plaintiff’s PAGA claims takes into account the risk that the Court will
28 likely reduce Plaintiff’s PAGA exposure for the reasons outlined above. It should be noted that all
Aggrieved Employees are also Class Members.

1 \$951,683 [\$374,160 (meal period exposure) + \$429,060 (rest period exposure) + \$8,918 (unpaid
2 wages due to rounding) + \$139,545 (unpaid overtime) = \$951,683]. If Plaintiff is successful in her
3 underlying claims, she may also be entitled to damages for wage statements and waiting time
4 penalties in the amount of \$320,000 [\$104,000 (wage statements) and \$216,000 (waiting time
5 penalties) = \$320,000]. If Plaintiff's claims are successful, she may also be entitled to PAGA
6 penalties in the amount of \$721,500. Mara Dec. ¶ 35.

7 **3. The Settlement Amount of \$350,000 is Reasonable**

8 In light of the risks Plaintiff's claims faced, Plaintiff and her Counsel believe that the
9 settlement amount of \$350,000 – **with an average settlement share amount estimated at**
10 **\$1,758.33** – is a reasonable and fair settlement amount. Mara Dec. ¶ 36.

11 It should be noted that a settlement is not judged solely against what might have been
12 recovered, had the plaintiff prevailed at trial, nor does the settlement have to provide 100% of the
13 damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91
14 Cal.App.4th 224, 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139;
15 “Compromise is inherent and necessary in the settlement process...even if the relief afforded by
16 the proposed settlement is substantially narrower than it would be if the suits were to be
17 successfully litigated, this is no bar to a class settlement because the public interest may indeed be
18 served by a voluntary settlement in which each side gives ground in the interest of avoiding
19 litigation.” *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688
20 F.2d 615, 628 (“It is well-settled law that a cash settlement amounting to only a fraction of the
21 potential recovery does not...render the settlement inadequate or unfair”); *see also In re*
22 *Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 95616, *21 , (noting that
23 certainty of recovery in settlement of 6% of maximum potential recovery after reduction for
24 attorneys’ fees was higher than median percentage for recoveries in shareholder class action
25 settlements, averaging 2.2%-3% from 2002 through 2006).

26 **c. Provisional Class Certification Should be Granted**

27 Under California law, a class action is appropriate when the class is ascertainable and there
28 is “a well defined community of interest in the questions of law and fact involved affecting the

1 parties to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code
2 of Civil Procedure section 382 for class certification follow federal law according to Rule 23 of
3 the Federal Rule of Civil Procedure: numerosity, typicality of the class representatives’ claims,
4 adequacy of representation, predominance of common issues, and superiority. Fed. R. Civ. P.
5 23(a); *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted
6 that while a court must certify a class for settlement purposes if a class has not already been
7 certified, “it is well established that trial courts should use different standards to determine the
8 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser
9 standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior*
10 *Court* (2013) 113 Cal.App.4th 836, 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
11 1794, 1807, fn. 19.

12 Plaintiff contends, and Defendant does not dispute for settlement purposes only, each of
13 these elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224,
14 237-38. Plaintiff seeks approval of the following Class for settlement purposes only: All
15 individuals who worked for Defendant as non-exempt hourly employees in California at any time
16 during the Class Period.

17 **i. The Proposed Settlement Class is Ascertainable**

18 Plaintiff contends that the proposed Class is ascertainable because of all of the Class
19 Members have worked for Defendant as non-exempt employees and have been identified through
20 Defendant’s own records, such as employee and payroll files. *See Rose v City of Hayward* (1981)
21 126 Cal.App.3d 926, 932 (finding that “Class Members are ‘ascertainable’ where they may be
22 readily identified without unreasonable expense or time by reference to official records.”); *Sevidal*
23 *v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (“[c]lass members are ‘ascertainable’ where they
24 may be readily identified without unreasonable expense or time by reference to official [or
25 business] records.”). Thus, the ascertainability requirement is met.

26 **ii. The Proposed Settlement Class is Sufficiently Numerous**

27 The numerosity requirement is met if the class is so large that joinder of all members would
28 be impracticable. *Gay v. Waiters’ & Dairy Lunchmen’s Union* (N.D. Cal. 1980) 489 F. Supp. 282,

1 *aff'd* (9th Cir. 1982) 694 F.2d 531. “There is no set number required to maintain a class action,
2 and the statutory test is whether a class is so numerous that ‘it is impracticable to bring them all
3 before the court.’” *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213,
4 1223 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior*
5 *Court* (1995) 44 Cal.2d 574 (upholding a class of ten members). “The numerosity requirement is
6 more readily met when a class contains employees suing their present employer . . . This is because
7 class members may be unwilling to sue their employer individually out of fear of retaliation.”
8 *Romero v. Producers Dairy Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the
9 California Supreme Court, “fear of retaliation for individual suits against an employer is a
10 justification for class certification in the arena of employment litigation, even when it is otherwise
11 questionable that the numerosity requirements were satisfied . . . It needs no argument to show that
12 fear of economic retaliation might often operate to induce aggrieved employees quietly to accept
13 substandard conditions.” *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460 (citation omitted),
14 overruled on other grounds in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.

15 Here, Defendant’s records show that they proposed Class has approximately 100 members.
16 Plaintiff contends that joinder of all Class Members is impracticable and, therefore, a class wide
17 proceeding is preferable. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 (noting that
18 there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is
19 acceptable.). In fact, a class of ten (10) has been certified as a class action. *Id.*, citing *Bowles v.*
20 *Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue have held that classes of
21 over forty (40) individuals are numerous enough to meet the numerosity requirement. *See Ikonen*
22 *v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly, the Class is
23 comprised of approximately 100 members and is sufficient to satisfy the numerosity requirement.

24 **iii. The Commonality Requirement is Met**

25 The commonality requirement is met if there are questions of law and fact common to the
26 class. *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual
27 predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies
28 within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members

1 to individually establish eligibility and damages does not mean individual fact questions
2 predominate.” *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334.
3 Commonality exists if there is a predominant common legal question regarding how an employer’s
4 policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536
5 (2008) (“[T]he common legal question remains the overall impact of Diva’s policies on its
6 drivers.”). Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the
7 certification stage since the question is “essentially a procedural one that does not ask whether an
8 action is legally or factually meritorious.” *Linder v. Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-
9 440.

10 Here, Plaintiff contends that the proposed Class Members’ claims all stem from the same
11 allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff
12 seeks the same legal remedies under state law on behalf of herself and all Class Members. As
13 liability as to all Class Members is predicated on the same policies and practices, which Plaintiff
14 alleges violates California law, the commonality requirement has been satisfied.

15 **iv. The Typicality Requirement is Met**

16 The typicality requirement is met if the claims of the named representative are typical of
17 those of the class, though “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at
18 1020; *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiff contends that her claims are
19 typical of the Class Members’ claims because they arise from the same factual basis and are based
20 on the same legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.*
21 (N.D. Cal. 1987) 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and
22 practices. Plaintiff alleges that Defendant’s policies applied to all Class Members. Factual
23 differences may exist between Plaintiff’s and the Class Members so long as the claims arise from
24 the same events or course of conduct and are based on the same legal theories. *Hanlon, supra*, 150
25 F. 3d at 1020; *see also Wehner, supra*, 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. §
26 3:15, p.335 (“When it is alleged that the same unlawful conduct was directed at or affected both
27 the named plaintiff and the class sought to be represented, the typicality requirement is usually met
28

1 irrespective of varying fact patterns which underlie individual claims.”) As such, the typicality
2 requirement is satisfied.

3 **v. The Adequacy Requirement is Met**

4 The adequacy requirement is met if Plaintiff has no interests adverse to the interests of the
5 proposed Class Members and is committed to vigorously prosecuting the case on behalf of the
6 class. *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442,
7 450-51. Plaintiff contends those standards are met here. Plaintiff does not have any conflicts of
8 interest with the Class. She has been and continues to be committed to vigorously prosecuting this
9 case. If any Class Member wishes to opt-out of the Settlement, he or she may do so. Therefore,
10 there is no conflict of interest between Plaintiff and the Class Members.

11 **d. Notice to Class Members Complies with California Rule of Court 3.769(f)**

12 California Rule of Court 3.769(f), provides:

13 If the court has certified the action as a class action, notice of the final approval
14 hearing must be given to class members in the manner specified by the court. The
15 notice must contain an explanation of the proposed settlement and procedures for
16 class members to follow in filing written objections to it and in arranging to appear
17 at the settlement hearing and state any objections to the proposed settlement.

16 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises the
17 class of their rights to participate in the settlement, how to and when to object to or request
18 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
19 proposed Class Notice is attached as **Exhibit A** to the Agreement.

20 **VI. CONCLUSION²⁰**

21 Plaintiff respectfully submits that the proposed settlement is in the best interests of the
22 Class and Class Members, as it is fair, adequate, and reasonable, and one that should ultimately be
23 granted final approval. Under the applicable class action criteria and guidelines, the proposed
24 settlement should be preliminarily approved by the Court, the class should be conditionally
25 certified for purposes of settlement only, and the Class Notice should be approved. Plaintiff also

26 ²⁰ Pursuant to the Court’s Checklist for Preliminary Approval of Class Action Settlement, attached
27 to the Declaration of David Mara as **Exhibits 4, 5, 6, and 7** are proof of submission of the proposed
28 settlement agreement to the LWDA (**Exhibits 4 and 5**) and the Parties’ proposed final approval
order (**Exhibit 6**) and proposed judgment (**Exhibit 7**) that they intend to file with the Court in
conjunction with final approval.

1 respectfully requests the Court set a final approval hearing date of April 30, 2024.

2

3 Dated: November 16, 2023

MARA LAW FIRM, PC

4

5

A handwritten signature in black ink, appearing to read "David Mara", is written over a horizontal line.

6

David Mara, Esq.

7

Matthew Crawford, Esq.

8

Attorneys for Plaintiff GABRIELA GUEVARA on
behalf of herself, all others similarly situated, and on
behalf of the general public

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28