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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF DEL NORTE**

REINALD PILLSBURY, an individual, on
behalf of himself and on behalf of all persons
similarly situated,

Plaintiff,

vs.

T & T RESTAURANTS CA, INC., a
Corporation; and DOES 1 through 50, inclusive,

Defendant.

Case No: CVUJ-20-1214

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

Date: December 3, 2021

Time: 10:00 a.m.

Dept.: 1

*[Assigned for All Purposes to Judge Darren
McElfresh]*

Action Filed: September 8, 2020

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1 **I. INTRODUCTION**

2 Plaintiff Reinald Pillsbury (“Plaintiff”) and Defendant T & T Restaurants CA INC.
3 (“Defendant”), have reached a full and final settlement of the above-captioned action, which is set
4 forth in the Class Action Settlement Agreement (hereinafter the “Agreement”) filed herewith.¹ The
5 Court preliminarily approved the Agreement via its Preliminary Approval Order dated August 27,
6 2021 (“Preliminary Approval Order”); and pursuant to the Preliminary Approval Order the
7 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.)³ This is a positive response from the class evidencing their approval of the
11 Settlement.

12 This \$280,000 settlement is an excellent result for the Class Members in light of the serious
13 doubts as to the result of the adjudication of their claims, along with further uncertainty as to
14 whether class certification can be maintained through trial.

15 Considered as a whole, the \$280,000 in Settlement represents between 22% and 66% of
16 Defendant’s liability exposure as estimated by Class Counsel at the time of mediation, which Class
17 Counsel calculated to be \$425,733 for damages and \$1,251,090 for damages, civil penalties and
18 interest.⁴ Under *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), this Settlement is

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

21 ² The “Class” is all individuals who are or previously were employed as non-exempt employees by
The Class Period is the period of time from September 8, 2016 to March 16, 2021.

22 ³ 75 Notice Packets have been returned to the administrator as undeliverable. Of the 75 returned
23 Notice Packets, none included a forwarding address. The administrator performed a computerized
24 skip trace on the 75 returned Notice Packets that did not have a forwarding address, in an effort to
25 obtain an updated address for purpose of re-mailing the Notice Packet. To perform the skip tracing
26 process, the administrator utilized a skip tracing system to provide actionable intelligence to support
27 identity verification. The system pulls from Credit level data, Proprietary sources, and public
28 sources. Input can be name and address, Name and DOB, SSN, Address only, etc. As a result of
this skip trace, 31 updated addresses were obtained and the Notice Packet was promptly re-mailed
to those Settlement Class Members, via U.S First Class Mail. 44 notices have been deemed
undeliverable as no updated address was found notwithstanding the skip tracing. (See Decl. of
Madely Nava at Paragraph 10).

⁴ The damage analysis is detailed in the declaration of Shani O. Zakay. (Decl. Zakay, ¶ 14)

1 a fair and reasonable recovery on these claims (which were subject to considerable uncertainty, both
2 as to the merits and certification). The response of the Class has been positive. Accordingly,
3 Plaintiff respectfully submits that the Class Settlement should be finally approved as fair,
4 reasonable, and adequate.

5 **II. THE SETTLEMENT BEFORE THE COURT**

6 Plaintiff and Defendant reached a full and final Settlement of the above-captioned action,
7 which is embodied in the Agreement filed concurrently with the Court. As consideration for this
8 Settlement, Defendant has agreed to pay the all-in, non-reversionary amount of Two Hundred
9 Eighty Thousand Dollars (\$280,000) (“Gross Settlement Amount”). The Gross Settlement Amount
10 includes all Settlement Shares to Participating Class Members, the Class Representative Service
11 Payment to Plaintiff, Settlement Administration Expenses, the PAGA Payment, and Court-
12 approved attorneys’ fees and costs. Defendant will separately pay the employer’s share of payroll
13 taxes to the qualified settlement fund, per the Agreement. (Decl. Zakay ¶3(a).)

14 The Net Settlement Amount shall equal the net amount available for Settlement shares to
15 Participating Class Members from the Gross Settlement Amount after deducting the Court-
16 approved amounts for the Class Representative Service Payment, the Class Counsel Fees Payment,
17 the Class Counsel Litigation Expenses Payment, the PAGA Payment, and the fees and expenses of
18 the Settlement Administrator. The Settlement Administrator will pay a Settlement Share from the
19 Net Settlement Amount to each Participating Class Member. The submission of a claim form is not
20 required to be paid. The Settlement Share for each Participating Class Member will be calculated
21 based on the workweeks worked by each Participating Class Member during the Class Period. The
22 entire Net Settlement Fund shall be distributed. (Decl. Zakay ¶3(b).)

23 Class Members were sent the Court approved Class Notice, using the procedure approved
24 by the Court, by mailing the notice packets after updating class members’ addresses using the
25 National Change of Address database and, for any notice packets returned as undeliverable, re-
26 mailing such notices to any forwarding address provided or updated address located through skip
27 tracing. Class Members were provided with the opportunity to exclude themselves (“opt out”) if
28 they did not want to participate in the Settlement. Class Members who did not “opt out” are deemed

1 Participating Class Members who are bound by the Settlement and will be mailed a settlement
2 payment. The Class Notice also advised Class Members of their right to object to the Settlement.
3 This notice process is documented in the accompanying Declaration of Madely Nava (the
4 Settlement Administrator), which is filed concurrently herewith. (Decl. Zakay ¶3(c).)

5 If a Participating Class Member's Settlement Share check is not cashed within 180 days
6 after its last mailing to the Participating Class Member, the funds from such uncashed checks will
7 be paid to the Del Norte Habitat for Humanity in accordance with California Code of Civil
8 Procedure section 384 in the name of the Participating Class Member and the Participating Class
9 Member will remain bound by the Settlement. (Decl. Zakay ¶4).

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

19 The Parties allocated \$10,000 from the Gross Settlement Amount for settlement of civil
20 penalties under PAGA, Labor Code Section 2698 et seq. Pursuant to the requirements of Labor
21 Code §2699(i) the PAGA Payment shall be allocated \$7,500 to the LWDA (the "LWDA Payment"
22 or the "PAGA Payment") as the LWDA's share of the settlement of civil penalties and \$2,500 to
23 the Net Settlement Amount for distribution to the Participating Class Members. (Decl. Zakay ¶6).

24 The Settlement was reached through arm's length negotiations. On March 16, 2021, the
25 Parties participated in an all-day mediation presided over by (Ret.) Hon. William Pate, a respected
26 jurist and mediator of wage and hour class and PAGA actions. Prior to the mediation, the Parties
27 prepared by exchanging data, calculating damages, and submitting mediation briefs to the Mediator.
28 Defendant provided Class Counsel with necessary records and information for the members of the

1 Class. Defendant produced a sample consisting of pay records and time records for some of the
2 Class Members for the entire Class Period. Defendant also produced Defendant's relevant
3 employment policies, including compensation policies and timekeeping policies. Plaintiff analyzed
4 the data with the help of an expert and prepared and submitted a mediation brief to Judge Pate. At
5 the conclusion of the mediation, the Parties reached a settlement, which was supported by Judge
6 Pate. The Parties documented the agreement in the form of a Memorandum of Understanding. The
7 Parties then prepared the full Agreement which was signed by the Parties and received preliminary
8 approval from the Court by Order dated August 27, 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 \$280,000 is an excellent result for the Class. This result is particularly favorable in light of the fact
13 that liability in this case was far from certain in light of the defenses asserted by Defendants. There
14 have been no objections and no opt outs. Given the complexities of this case, the defenses asserted,
15 the uncertainty of class certification, along with the uncertainties of proof at trial and appeal, the
16 proposed Settlement is fair, reasonable and adequate, and should be finally approved. (Decl. Zakay
17 ¶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 September 8, 2020, Plaintiff filed a class action complaint in the Del Norte Superior
18 Court for: (1) Unfair Competition in Violation of Bus. and Prof. Code §§ 17200; (2) failure to pay
19 minimum wages in violation of California Labor Code sections 1194, 1197 and 1197.1; (3) failure
20 to pay overtime wages in violation of California Labor Code sections 510 *et seq.*; (4) failure to
21 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 reimburse employees for required business expenses in violation of California
24 Labor Code sections 2802; (7) failure to provide accurate itemized wage statements in violation of
25 California Labor Code section 226; (8) failure to provide wages when due in violation of California
26 Labor Code sections 201, 202 and 203; and (9) violations of the California Labor Code Private
27 Attorney General Act (“PAGA”). (Decl. Zakay at ¶11(a)).
28

1 Defendant denied liability for each of Plaintiff's claims. Defendant argued that it fully
2 complied with all applicable employment laws, had clear compliant policies and procedures such
3 as for taking rest and meal periods as outlined in its Handbook and additional technical assistance
4 for accurate time keeping that included meal and rest break reminders. Defendant raised several
5 other significant defenses to Plaintiff's claims, including but not limited to, lack of any evidence
6 of overtime and minimum wage violations, and the opportunity and encouragement to take all
7 meal and rest-breaks compliant with its policies and the law. Additionally, Defendant maintained
8 that Plaintiff was not required to use his personal cell phone or car for work. (Decl. Zakay at ¶
9 11(a)).

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

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

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

1 conditions of settlement which would be fair and reasonable to the Class with the assistance of an
2 expert. Class Counsel was experienced in the types of settlement appropriate to resolve these wage
3 and hour claims on behalf of employees. (Zakay Decl. ¶12(a)).

4 The fact that the Settlement was negotiated with the assistance of a mediator supports
5 approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS Fin.*
6 *Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
7 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the
8 litigation, with the assistance of a well-respected mediator with substantial experience in
9 employment litigation[, and] this factor supports approval of the settlement.”)

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

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

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

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

27 The administration process, including details regarding the mailing of the Notice Packet,
28 notices returned as undeliverable, the administrator’s efforts to locate class members and remail

1 notices, and the final administration results, are all documented in the Declaration of Madely Nava,
2 which is filed concurrently herewith. Notably, 75 Notice Packets have been returned to the
3 administrator as undeliverable. Of the 75 returned Notice Packets, none included a forwarding
4 address. The administrator performed a computerized skip trace on the 75 returned Notice Packets
5 that did not have a forwarding address, in an effort to obtain an updated address for purpose of re-
6 mailing the Notice Packet. To perform the skip tracing process, the administrator utilized a skip
7 tracing system to provide actionable intelligence to support identity verification. The system pulls
8 from Credit level data, Proprietary sources, and public sources. Input can be name and address,
9 Name and DOB, SSN, Address only, etc. As a result of this skip trace, 31 updated addresses were
10 obtained and the Notice Packet was promptly re-mailed to those Settlement Class Members, via
11 U.S First Class Mail. 44 notices have been deemed undeliverable as no updated address was found
12 notwithstanding the skip tracing. (See Decl. of Madely Nava at Paragraph 10).

13 The absence of any objector strongly supports the fairness, reasonableness and adequacy of
14 the Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
15 (S.D.N.Y. 2000) (“If only a small number of objections are received, that fact can be viewed as
16 indicative of the adequacy of the settlement.”); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-
17 119 (3d. Cir. 1990) (29 objections out of 281 member class “strongly favors settlement”); *Laskey*
18 *v. Int’l Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to
19 the proposed settlement should be considered when determining fairness of settlement). Here,
20 where there are no objections, the approval of the Class is evident.

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

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

27 With respect to the meal break claim, Defendant maintains that it paid Plaintiffs for every
28 minute that they claimed they worked. Defendant argued that it fully complied with California meal

1 period laws and maintained legally compliant policies and practices as outlined in its Handbook
2 and other policies. Courts have found that where an employer's meal period policies are compliant,
3 individualized issues exist as to the reasons for missed, late or truncated meal periods. *See e.g.*
4 *Lampe v. Queen of the Valley Medical Center*, 19 Cal.App.5th 832, 851 (2018) (holding that
5 although only 11.1% of the employees' time punches for meal periods were within the first 5 hours,
6 the claim was not certifiable because individualized issues existed as to the reasons for the late meal
7 periods). Defendant argued that it not only provided meal and rest breaks but also installed technical
8 enhancements that reminded employees to timely take their meal-and rest breaks. If successful,
9 Defendant availed itself to a complete defense of Plaintiff's meal period claim. (Decl. Zakay at
10 ¶13(a)).

11 With respect to the rest break claim, Defendant argued that it not only provided all rest
12 breaks but reminded Plaintiff and employees to take them. Plaintiff recognizes the evidentiary
13 burdens establishing this claim. Establishing Plaintiff's rest period claim would rely, almost
14 entirely, on Class Member testimony, making it a riskier claim at class certification and liability
15 stages. Defendant likely would have argued that only a small number of Class Members missed
16 their rest breaks. Certification likely would have required depositions of Class Members who
17 provided declarations, and Defendant surely would have obtained opposing declarations stating
18 either rest breaks were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio*
19 *Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing
20 testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest
21 break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United*
22 *Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed,
23 Plaintiff's own evidence confirms that the written policy does not generate uniform practices.").
24 Accordingly, the rest break claim was subject to significant defenses. If successful, Defendant
25 availed itself to a complete defense of Plaintiff's rest period claim. (Decl. Zakay at ¶13(b)).

26 With respect to the reimbursement claim, Defendant maintains that employees were never
27 required to use their personal cell phone for work at the restaurant, which offered telephone service
28

1 for any employees work related use, if any. Instead, Defendant argued that any cell phone use was
2 completely voluntary and for their own personal not work related use. (Decl. Zakay at ¶13(c)).

3 With respect to the wage statement claim, Defendant could argue that Plaintiff could not
4 prove the “willful” prong needed to obtain waiting time penalties under Cal. Lab. Code § 203.
5 Additionally, Defendant could argue that Plaintiff could not show that Class Members suffered an
6 “injury” because of wage statement violations, as required by Cal. Lab. Code § 226. Defendant
7 could also argue that that meal and rest period violations do not entitled employees like Plaintiff
8 and the Settlement Class Members to pursue the derivative waiting time and itemized wage
9 statement penalties. (See *Naranjo v. Spectrum Security Services, Inc.*, (2019) 40 Cal. App. 5th 444;
10 *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal. App. 5th 1308.) (Decl. Zakay at ¶13(d)).

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

20 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and
21 trying the Action against Defendant through possible appeals which even if successful could take
22 several years. Class Counsel have also taken into account the uncertain outcome and risk of
23 litigation, especially in complex actions such as this Action. Class Counsel are also mindful of and
24 recognize the inherent problems of proof under, and alleged defenses to, the claims asserted in the
25 Action. As demonstrated by the decision in *Duran*, the complexities and duration of further
26 litigation cannot be overstated. There is little doubt that Defendant would post a bond and appeal
27 in the event of an adverse judgment. A post-judgment appeal by Defendant would have required
28 many more years to resolve, assuming the judgment was affirmed. If the judgment was not affirmed

1 in total, then the case could have dragged on for years after the appeal. The benefits of a guaranteed
2 recovery today outweigh an uncertain result three or more years in the future. Moreover, post-trial
3 motions and appeals would have been inevitable. Costs would have mounted and recovery would
4 have been delayed if not denied, thereby reducing the benefits of an ultimate victory. Plaintiff and
5 Class Counsel believe that the Settlement confers substantial benefits upon the Class. Based upon
6 their evaluation, Plaintiff and Class Counsel have determined that the Settlement set forth in the
7 Agreement is in the best interest of the Class Members. (Decl. Zakay ¶13(g)).

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

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

14 The Settlement in this case is fair, reasonable and adequate considering Defendants'
15 significant defenses, which it believes to be valid, to Plaintiff's claims. As detailed during
16 preliminary approval, the Gross Settlement Amount compares favorably to the value of the claims.
17 Class Members will receive immediate and certain payments of considerable amounts under the
18 Settlement. Currently, the overall maximum and average Participating Class Member allocations
19 are estimated to be 2,990.47 and \$422.62 respectively (Decl. Nava at ¶ 14).

20 Faced with the serious doubts as to recovery, the Settlement of \$280,000 plus the employer's
21 share of payroll taxes compares favorably to the damage estimates alleged to have been suffered by
22 the Class. Considered as a whole, the \$280,000 in Settlement represents between 22% and 66% of
23 Defendant's liability exposure as estimated by Class Counsel at the time of mediation, which Class
24 Counsel calculated to be \$425,733 for damages and \$1,251,090 for damages and civil penalties.

25 If he could prove the claims, Plaintiff estimates that Defendant was subject to maximum
26 liability for damages in the amount of \$1,251,090, consisting of \$87,000 for unreimbursed
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28

1 expenses, and \$401,341 for meal and rest break periods.⁵ In addition, Plaintiff calculated that
2 Defendant could be liable for \$215,300 for wage statement penalties and \$547,449 waiting time
3 penalties.⁶ Finally, Plaintiff's expert calculated that Defendant's exposure for PAGA penalties up
4 to \$2,836,000.⁷

5 Consequently, the settlement of \$280,000.00 represents between 22% and 66% of
6 Defendant's maximum potential liability exposure, assuming each and every of these liability
7 theories and amounts could be proved at trial. Given the amount of the settlement as compared to
8 the potential value of claims in this case, the settlement is more than fair and reasonable based on
9 prevailing case law. (Decl. Zakay ¶14(b)).

10
11 ⁵ Plaintiff's damages for unpaid wages, including minimum wages and overtime wages, were
12 predicated on Plaintiff's argument that Plaintiff and other employees were required to work while
13 clocked out during what was supposed to be their duty-free meal periods. Therefore, the damages
14 for unpaid wages are encompassed in this figure. This was notably denied by Defendant as stated
15 above.

16 ⁶ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
17 226 and various PAGA penalties, Plaintiff recognizes that these claims are subject to various
18 defenses asserted by Defendant, including, but not limited to, a good faith dispute defense as to
19 whether any premium wages for meal or rest periods or other wages were owed given Defendant's
20 position that Plaintiff and the Class were properly compensated. *See Reber v. AIMCO/Bethesda*
21 *Holdings, Inc.*, 2008 WL 4384147, at *9 (C.D. Cal. Aug. 25, 2008) (granting defendant's motion
22 for summary judgment on claim for failure to provide accurate itemized wage statements "because
23 a good faith dispute exists... [therefore, defendant] was not 'knowing and intentional' in failing to
24 provide [Section 226] statements"); *see also Nordstrom Commission Cases*, 186 Cal. App. 4th 576,
25 584 (2010) ("There is no willful failure to pay wages if the employer and employee have a good
26 faith dispute as to whether and when the wages were due."). Additionally, there is serious doubt as
27 to whether violations of the meal/rest period regulations, which require payment of a "premium
28 wage" for each improper meal period, give rise to claims under sections 203 and 226. *See Ling v.*
P.F. Chang's China Bistor, Inc., 245 Cal. App. 4th 1242, 1261 (2016) and *Maldonado v. Epsilon*
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, Defendants denied rest and meal break violations, rendering void any
derivative claims or damages recovery potential.

⁷ *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%.

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V. CONCLUSION

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

DATED: November 8, 2021

ZAKAY LAW GROUP, APLC

By: 
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