

ZAKAY LAW GROUP, APLC

Shani O. Zakay (State Bar #277924)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 255-9047
Facsimile: (858) 404-9203
Website: www.zakaylaw.com

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP

Norman B. Blumenthal (State Bar #068687)
Kyle R. Nordrehaug (State Bar #205975)
Aparajit Bhowmik (State Bar #248066)
2255 Calle Clara
La Jolla, CA 92037
Telephone: (858) 551-1223
Facsimile: (858) 551-1232
Website: www.bamlawca.com

Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO**

MICHAEL ASHLOCK, an individual, on
behalf of himself and on behalf of all persons
similarly situated,

Plaintiff,

vs.

ADVANTIS MEDICAL STAFFING, LLC, a
California Limited Liability Company; and
Does 1 through 50, Inclusive;

Defendants.

Case No: 37-2020-00022305-CU-OE-CTL

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

Hearing Date: December 22, 2021
Hearing Time: 1:30 p.m.

Honorable Judge Ronald Frazier
Department: 65

Trial Date: Not Set
Action Filed: June 29, 2020

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. INTRODUCTION1

II. THE SETTLEMENT BEFORE THE COURT.....2

III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL
OF CLASS ACTION SETTLEMENTS4

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.....5

 1. The Investigation and Discovery are Sufficient to Allow Counsel and the Court to Act
 Intelligently6

 2. The Settlement Was Reached Through Arm’s Length Bargaining7

 3. Class Counsel is Experienced in Similar Litigation8

 4. There Are No Objections by The Class Members..8

 5. The Risk, Expense, Complexity and Likely Duration of Further Litigation9

 6. The Amount Offered in Settlement10

V. CONCLUSION.....12

TABLE OF AUTHORITIES

Cases:	Page:
<i>7-Eleven Owners for Fair Fran. v. Southland Corp.</i> , 85 Cal. App. 4th 1135, 1151 (2000)	4-5
<i>Alberto v. GMRI, Inc.</i> , 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008).	7
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	12
<i>Cellphone Termination Fee Cases</i> , 180 Cal. App. 4th 1110, 1117 (2009)	5
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1801 (1996)	4-6
<i>Duran v. U.S. Bank National Assn.</i> , 59 Cal. 4th 1 (2014)	10
<i>Glass v. UBS Fin. Servs.</i> , 2007 U.S. Dist. LEXIS 8476 (N.D.Cal. January 27, 2007)	7
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9 th Cir. 1998)	9
<i>Huens v. Tatum</i> , 52 Cal. App. 4th 259, 265 (1997)	4
<i>In re Austrian & German Bank Holocaust Litigation</i> , 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000)	8
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 128 (2008)	1, 6
<i>Laskey v. Int'l Union</i> , 638 F.2d 954 (6 th Cir. 1981)	9
<i>Malibu Outrigger Bd. of Governors v. Superior Court</i> , 103 Cal. App. 3d 573, 578-579 (1980)	4
<i>Munoz v. BCI Coca-Cola Bottling Co. of L. A.</i> , 186 Cal. App. 4th 399, 408 (2010)	6

1	<i>Officers for Justice v. Civil Service Com'n, etc.,</i>	
2	688 F.2d 615 (9th Cir. 1982)	5
3	<i>Stoetzner v. U.S. Steel Corp.,</i>	
4	897 F.2d 115, 118-119 (3d. Cir. 1990)	9
5	<i>Wershba v. Apple Computer, Inc.,</i>	
6	91 Cal.App.4th 224 (2001)	5
7	Statutes, Rules and Regulations:	
8	California Labor Code §203	1, 11-12
9	California Labor Code §226	1, 11-12
10	California Labor Code §2698	3
11	Secondary Sources:	
12	Newberg & Conte, <i>Newberg on Class Actions</i> , (3d ed. 1992) §11.41, pp. 11-91	5
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 Plaintiff MICHAEL ASHLOCK (“Plaintiff”) and Defendant ADVANTIS MEDICAL
3 STAFFING, LLC. (“Defendant”), have reached a full and final settlement of the above-captioned
4 action, which is set forth in the Class Action Settlement Agreement (hereinafter the “Agreement”)
5 filed herewith.¹ The Court preliminarily approved the Agreement via its Preliminary Approval
6 Order dated August 23, 2021 (“Preliminary Approval Order”); and pursuant to the Preliminary
7 Approval Order the approved Class Notice has been disseminated to the Class.²

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

12 This \$135,000 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. Considered as a whole, the \$135,000 in
15 Settlement represents approximately 53% of Defendant’s liability exposure for damages, and 39%
16 of Defendant’s liability exposure for damages and statutory penalties, as estimated by Class Counsel
17 at the time of mediation, which Class Counsel calculated to be \$250,757.59 for damages and
18 \$334,807.59³ for damages and statutory penalties for violations of Labor Code Sections 226 and
19 203.⁴ Under *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), this Settlement is a
20 fair and reasonable recovery on these claims (which were subject to considerable uncertainty, both
21 as to the merits and certification). The response of the Class has been positive. Accordingly,

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

24 ² The “Class” is “Class” means all non-exempt employees who are or previously were employed
25 by Defendant Advantis Medical Staffing, LLC in the State of California during the
period of June 29, 2016 to November 6, 2020.

26 ³ While Plaintiffs alleged claims for statutory penalties, they recognize that this claim is subject to
27 various defenses asserted by Defendant, including, but not limited to, a good faith dispute defense
as to whether Defendant, as a staffing agency, is governed by Labor Code Section 201.3, instead of
28 Section 203, which, if proven, would significantly limit the amount of damages owed to the
California Class.

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

1 Plaintiff respectfully submits that the Class Settlement should be finally approved as fair,
2 reasonable, and adequate.

3 **II. THE SETTLEMENT BEFORE THE COURT**

4 Plaintiff and Defendant reached a full and final Settlement of the above-captioned action,
5 which is embodied in the Agreement filed concurrently with the Court. As consideration for this
6 Settlement, Defendant has agreed to pay the all-in, non-reversionary amount of One Hundred
7 Thirty-Five Thousand Dollars and Zero Cents (\$135,000) (“Gross Settlement Amount”). The Gross
8 Settlement Amount includes all Settlement Shares to Participating Class Members, the Class
9 Representative Service Payment to Plaintiff, Settlement Administration Expenses, the PAGA
10 Payment, and Court-approved attorneys’ fees and costs. Defendant will separately pay the
11 employer’s share of payroll taxes to the qualified settlement fund, per the Agreement. (Decl. Zakay
12 ¶3(a).)

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

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

1 payment. The Class Notice also advised Class Members of their right to object to the Settlement.
2 This notice process is documented in the accompanying Declaration of Norman Alcantara (the
3 Settlement Administrator), which is filed concurrently herewith. (Decl. Zakay ¶3(c).)

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

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

18 The Parties allocated \$5,000 from the Gross Settlement Amount for settlement of civil
19 penalties under PAGA, Labor Code Section 2698 et seq. Pursuant to the requirements of Labor
20 Code §2699(i) the PAGA Payment shall be allocated \$3,750 to the LWDA (the "LWDA Payment"
21 or the "PAGA Payment") as the LWDA's share of the settlement of civil penalties and \$1,250 to
22 the Net Settlement Amount for distribution to the Participating Class Members. (Decl. Zakay ¶6).

23 The Settlement was reached through arm's length negotiations. On November 6, 2020, the
24 Parties participated in mediation presided over by (Ret.) Hon. Jan M. Adler, a respected jurist and
25 mediator of wage and hour class and PAGA actions. Prior to the mediation, the Parties prepared
26 by exchanging data, calculating damages, and submitting mediation briefs to the Mediator.
27 Defendant provided Class Counsel with necessary records and information for the members of the
28 Class. Defendant produced a sample consisting of pay records and time records for some of the

1 Class Members for the entire Class Period. Defendant also produced Defendant's relevant
2 employment policies, banquet policy information, including compensation policies and
3 timekeeping policies. Plaintiff analyzed the data with the help of an expert and prepared and
4 submitted a mediation brief to Hon. Jan M. Adler. At the conclusion of the mediation, the Parties
5 reached a settlement, which was supported by Hon. Jan M. Adler. The Parties documented the
6 agreement in the form of a Memorandum of Understanding. The Parties then prepared the full
7 Agreement that was signed by the Parties and received preliminary approval from the Court by
8 Order dated August 23, 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 \$135,000 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 Defendant. 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 June 29, 2020, plaintiff Michel Ashlock filed a class action Complaint in the Action
18 against Defendant in the Superior Court of the State of California, County of San Diego. On January
19 14, 2021, Plaintiff amended the Complaint to add a claim under the Private Attorneys General Act
20 (PAGA). The First Amended Complaint, which is the operative complaint, alleged claims for (1)
21 failure to pay for all hours worked; (2) failure to pay minimum wage; (3) failure to pay overtime;
22 (4) failure to authorize or permit meal breaks; (5) failure to authorize or permit rest breaks; (6)
23 failure to furnish accurate wage statements; (7) waiting time penalties; (8) unfair business practices;
24 (9) PAGA violations; and (10) failure to reimburse for required business expenses in violation of
25 Cal. Lab. Code §2802; (the “Action”). (Decl. Zakay at ¶11(a)).

26 Defendant denied liability for each of Plaintiff’s claims. Defendant denies any liability or
27 wrongdoing of any kind associated with the claims alleged in the. Defendant contends, among
28 other things, that it has correctly and fully compensated the Class Members for wages and

1 gratuities, provided compliant meal and rest periods, provided complete, accurate itemized wage
2 statements, and complied at all times with the California Labor Code and Wage Orders. Further,
3 Defendant contends that class certification would be inappropriate for any reason other than for
4 settlement. (Decl. Zakay at ¶ 11(a)).

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

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

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

27 The fact that the Settlement was negotiated with the assistance of a mediator supports
28 approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS Fin.*

Servs., 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal. 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the litigation, with the assistance of a well-respected mediator with substantial experience in employment litigation[, and] this factor supports approval of the settlement.”)

3. Class Counsel is Experienced in Similar Litigation

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

4. There Are No Objections by the Class Members

The reaction of the Class unequivocally supports approval of the Settlement. On September 15, 2021, the Settlement Administrator Court-approved Class Notice to the Class Members, which provided each Class Member with the terms of the Settlement, including notice of the claims at issue and the financial terms of the settlement, including the attorneys’ fees, costs, and service awards that were being sought, how individual settlement awards would be calculated, and the specific, estimated payment amount to that individual. In disseminating the Class Notice, the Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary Approval Order. Significantly, there have been no objections and no opt outs. (See Declaration of Norman Alcantara at ¶¶ 14-15.) As a result, the entire Class has elected to participate in the Settlement and will be sent a settlement check.

The administration process, including details regarding the mailing of the Notice Packet, notices returned as undeliverable, the administrator’s efforts to locate class members and re-mail notices, and the final administration results, are all documented in the Declaration of Norman Alcantara, which is filed concurrently herewith. (See Decl. of Norman Alcantara).

The absence of any objector strongly supports the fairness, reasonableness and adequacy of the Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) (“If only a small number of objections are received, that fact can be viewed as

indicative of the adequacy of the settlement.”); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119 (3d. Cir. 1990) (29 objections out of 281 member class “strongly favors settlement”); *Laskey v. Int’l Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed settlement should be considered when determining fairness of settlement). Here, where there are no objections, the approval of the Class is evident.

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

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

Defendant argued that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012) weakened, if not eliminated, Plaintiff’s claims, on liability, value, and class certifiability as to the meal and rest period claims. A major component of the damages alleged to have been suffered by the Class Members are attributed to missed meal and rest breaks. Before and during the mediation, Defendant aggressively argued that Defendant’s policies and culture afforded the Class Members an opportunity to take timely meal and rest breaks, and that employees like the Plaintiffs *chose* not to take compliant breaks. Defendant argued, therefore, that under the *Brinker* decision it has no liability for the missed breaks whatsoever. Defendant argued that it adopted and strictly enforced lawful policies, afforded Plaintiffs and the Class Members compliant meal and rest breaks, and had a system in place to pay premiums when breaks were missed, short or untimely. As to expense reimbursement, Defendant argued that any use of personal cellphones was voluntary, and not a necessary expense that required reimbursement. (Decl. Zakay at ¶13(a)).

There was also a significant risk that, if the Action was not settled, Plaintiff would be unable to obtain class certification and thereby not recover on behalf of any employee other than themselves. Defendant argued that the individual experience of each employee varied with respect to the alleged claims, particularly with regard to banquet managers and staff. While other cases have approved class certification of wage and hour claims, class certification in this action would

1 have been hotly disputed and was by no means a foregone conclusion. Finally, even if class
2 certification was successful, as demonstrated by the California Supreme Court decision in *Duran v.*
3 *U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class-
4 wide recovery even where the class has been certified. (Decl. Zakay at ¶13(b)).

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

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

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

27 The Settlement in this case is fair, reasonable and adequate considering Defendant's
28 significant defenses, which it believes to be valid, to Plaintiff's claims. As detailed during

1 preliminary approval, the Gross Settlement Amount compares favorably to the value of the claims.
2 Class Members will receive immediate and certain payments of considerable amounts under the
3 Settlement. Currently, the overall maximum and average Participating Class Member allocations
4 are estimated to be \$5,208.36 and \$1,398.96 respectively (Decl. Alcantara at ¶ 11).

5 Faced with the serious doubts as to recovery, the Settlement of \$135,000 plus the employer's
6 share of payroll taxes compares favorably to the damage estimates alleged to have been suffered by
7 the Class. Considered as a whole, the \$135,000 in Settlement represents approximately 53% of
8 Defendant's liability exposure for damages, and 39% of Defendant's liability exposure for damages
9 and statutory penalties, which Class Counsel calculated to be \$250,757.59 for damages and
10 \$334,807.59⁵ for damages and statutory penalties for violations of Labor Code Sections 226 and
11 203.

12 If he could prove the claims, Plaintiff estimates that Defendant was subject to maximum
13 liability for damages in the amount of \$250,757.59, consisting of \$68,061.59 for unpaid wages,
14 \$21,600 for unreimbursed expenses, and \$165,120 for meal and rest break periods. In addition,
15 Plaintiff calculated that Defendant could be liable for \$84,050 for wage statement penalties.⁶

16 ⁵ While Plaintiffs alleged claims for statutory penalties, they recognize that this claim is subject to
17 various defenses asserted by Defendant, including, but not limited to, a good faith dispute defense
18 as to whether Defendant, as a staffing agency, is governed by Labor Code Section 201.3, instead of
19 Section 203, which, if proven, would significantly limit the amount of damages owed to the
California Class.

20 ⁶ While Plaintiffs alleged claims for statutory penalties, they recognize that this claim is subject to
21 various defenses asserted by Defendant, including, but not limited to, a good faith dispute defense
22 as to whether Defendant, as a staffing agency, is governed by Labor Code Section 201.3, instead of
23 Section 203, which, if proven, would significantly limit the amount of damages owed to the
California Class. Moreover, Plaintiffs' claims pursuant to Labor Code Section 226 and various
24 PAGA penalties are also subject to a good faith defense as to whether any premium wages for meal
25 or rest periods or other wages were owed given Defendant's position that Plaintiffs and the Class
26 were properly compensated. *See Reber v. AIMCO/Bethesda Holdings, Inc.*, 2008 WL 4384147, at
27 *9 (C.D. Cal. Aug. 25, 2008) (granting defendant's motion for summary judgment on claim for
28 failure to provide accurate itemized wage statements "because a good faith dispute exists...
[therefore, defendant] was not 'knowing and intentional' in failing to provide [Section 226]
statements"); *see also Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is
no willful failure to pay wages if the employer and employee have a good faith dispute as to whether
and when the wages were due."). Additionally, there is serious doubt as to whether violations of
the meal/rest period regulations, which require payment of a "premium 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.

1 Finally, Plaintiff calculated that Defendant could be liable for PAGA penalties in an amount of
2 \$968,800.⁷

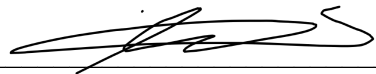
3 Consequently, the Settlement of approximately \$135,000.00 represents more than 53% of
4 the value of the maximum actual damages at issue. Furthermore, the Settlement represents almost
5 39% of the maximum combination of damages and penalties to the Class, assuming all of these
6 amounts could be proved at trial. Given the amount of the Settlement as compared to the potential
7 value of claims in this case, the Settlement is fair and reasonable. (Decl. Zakay ¶14(c)).

8 V. CONCLUSION

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

12
13 DATED: November 29, 2021

14
15 ZAKAY LAW GROUP, APLC

16
17 By: 

18 Shani O. Zakay
19 Attorney for Plaintiff

20
21 5th 1308, 1336 (2018). This issue was decided in *Naranjo v. Spectrum Sec. Servs., Inc.*, 40 Cal.
22 App. 5th 444, 474, (Ct. App. 2019), which held that actions for meal break and rest break premiums
23 “do not entitle employees to pursue the derivative penalties in sections 203 and 226.”

24 ⁷ Plaintiffs recognize that the PAGA penalties claim is also subject to various defenses by
25 Defendant, including that Class Members may not be able to recover subsequent penalties until, at
26 a minimum, Plaintiffs provided PAGA notice. *See Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157,
27 1209 (2008) (“Until the employer has been notified that it is violating a Labor Code provision
28 (whether or not the commissioner or court chooses to impose penalties), the employer cannot be
presumed to be aware that its continuing underpayment of employees is a “violation” subject to
penalties.”). In addition, Plaintiffs recognize that PAGA claims bear some risk. *See Carrington v.*
Starbucks Corp., 30 Cal. App. 5th 504 (2018). In *Carrington*, while the plaintiff prevailed on his
PAGA claim at 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%.