

**ZAKAY LAW GROUP, APLC**

Shani O. Zakay (State Bar #277924)  
Jackland K. Hom (State Bar #327243)  
5440 Morehouse Drive, Suite 3600  
San Diego, CA 92121  
Telephone: (619)255-9047  
Facsimile: (858) 404-9203  
[shani@zakaylaw.com](mailto:shani@zakaylaw.com)  
[jackland@zakaylaw.com](mailto:jackland@zakaylaw.com)

**JCL LAW FIRM, APC**

Jean-Claude Lapuyade (State Bar #248676)  
5440 Morehouse Drive, Suite 3600  
San Diego, CA 92121  
Telephone: (619)599-8292  
Facsimile: (619) 599-8291  
[jlapuyade@jcl-lawfirm.com](mailto:jlapuyade@jcl-lawfirm.com)

Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES**

DAVID MARTINELLO, on behalf of himself,  
and others similarly situated,

Plaintiff,

v.

CENTURY WILSHIRE, INC., a California  
Corporation, and DOES 1-50, inclusive,

Defendants.

Case No: 20STCV32613

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

Hearing Date: February 22, 2022  
Hearing Time: 10:30AM

Honorable Carolyn Kuhl  
Department 12

Trial Date: Not Set  
Action Filed: August 24, 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. INTRODUCTION .....1

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

III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL  
OF CLASS ACTION SETTLEMENTS .....6

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

1. The Investigation and Discovery are Sufficient to Allow Counsel and the Court to Act  
Intelligently .....7

2. The Settlement Was Reached Through Arm’s Length Bargaining .....8

3. Class Counsel is Experienced in Similar Litigation .....8

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

5. The Risk, Expense, Complexity and Likely Duration of Further Litigation .....9

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

V. CONCLUSION.....13

## TABLE OF AUTHORITIES

| Cases:                                                                                                                                  | Page: |
|-----------------------------------------------------------------------------------------------------------------------------------------|-------|
| <i>7-Eleven Owners for Fair Fran. v. Southland Corp.</i> ,<br>85 Cal. App. 4th 1135, 1151 (2000) .....                                  | 5     |
| <i>Alberto v. GMRI, Inc.</i> ,<br>252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008) .....                                                    | 8     |
| <i>Bright v. Dennis Garberg &amp; Assocs.</i><br>(C.D. Cal. May 4, 2011) 2011 WL 13147441, at *3–6.....                                 | 11    |
| <i>Brinker v. Superior Court</i> ,<br>53 Cal. 4th 1004 (2012) .....                                                                     | 10    |
| <i>Cellphone Termination Fee Cases</i> ,<br>180 Cal. App. 4th 1110, 1117 (2009).....                                                    | 6     |
| <i>Dunk v. Ford Motor Co.</i> ,<br>48 Cal. App. 4th 1794, 1801 (1996).....                                                              | 5-6   |
| <i>Duran v. U.S. Bank National Assn.</i> ,<br>59 Cal. 4th 1 (2014) .....                                                                | 10,12 |
| <i>Garcia v. Four Points Sheraton LAX</i> ,<br>188 Cal. App. 4th 364, 377 (2010).....                                                   | 9     |
| <i>Glass v. UBS Fin. Servs.</i> ,<br>2007 U.S. Dist. LEXIS 8476 (N.D.Cal. January 27, 2007) .....                                       | 8     |
| <i>Hanlon v. Chrysler Corp.</i> ,<br>150 F.3d 1011 (9th Cir. 1998) .....                                                                | 9     |
| <i>Huens v. Tatum</i> ,<br>52 Cal. App. 4th 259, 265 (1997) .....                                                                       | 5     |
| <i>In re Austrian &amp; German Bank Holocaust Litigation</i> ,<br>80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) .....                         | 9     |
| <i>Klingensmith v. Max &amp; Erma's Restaurants, Inc.</i> ,<br>2007 U.S. Dist. LEXIS 81029, 2007 WL 3118505, at *5 (E.D. Pa. 2007)..... | 11    |
| <i>Kullar v. Foot Locker Retail, Inc.</i> ,<br>168 Cal. App. 4th 116, 128 (2008) .....                                                  | 1,6   |
| <i>Laskey v. Int'l Union</i> ,<br>638 F.2d 954 (6th Cir. 1981).....                                                                     | 9     |

|    |                                                                                              |     |
|----|----------------------------------------------------------------------------------------------|-----|
| 1  | <i>Malibu Outrigger Bd. of Governors v. Superior Court,</i>                                  |     |
| 2  | <i>103 Cal. App. 3d 573, 578-579 (1980) . . . . .</i>                                        | 5   |
| 3  | <i>Myles v. Securitas Critical Infrastructure Servs., Inc.</i>                               |     |
| 4  | <i>(Cal. Ct. App. Nov. 29, 2018) 2018 WL 6241488, at *4–7. . . . .</i>                       | 11  |
| 5  | <i>Munoz v. BCI Coca-Cola Bottling Co. of L. A.,</i>                                         |     |
| 6  | <i>186 Cal. App. 4th 399, 408 (2010) . . . . .</i>                                           | 6   |
| 7  | <i>O'Connor v. Starbucks Corp. (2008)</i>                                                    |     |
| 8  | <i>2008 WL 2761586 *5. . . . .</i>                                                           | 11  |
| 9  | <i>Officers for Justice v. Civil Service Com'n, etc.,</i>                                    |     |
| 10 | <i>688 F.2d. 615 (9th Cir. 1982) . . . . .</i>                                               | 6   |
| 11 | <i>Stoetzner v. U.S. Steel Corp.,</i>                                                        |     |
| 12 | <i>897 F.2d 115, 118-119 (3d. Cir. 1990) . . . . .</i>                                       | 9   |
| 13 | <i>Wershba v. Apple Computer, Inc.,</i>                                                      |     |
| 14 | <i>91 Cal.App.4th 224, 245-46 (2001) . . . . .</i>                                           | 5   |
| 15 | <b>Statutes, Rules and Regulations:</b>                                                      |     |
| 16 | California Labor Code §203 . . . . .                                                         | 7   |
| 17 | California Labor Code §226 . . . . .                                                         | 7   |
| 18 | California Labor Code §2698 . . . . .                                                        | 3,7 |
| 19 | <b>Secondary Sources:</b>                                                                    |     |
| 20 | Newberg & Conte, <i>Newberg on Class Actions</i> , (3d ed. 1992) §11.41, pp. 11-91 . . . . . | 5   |
| 21 |                                                                                              |     |
| 22 |                                                                                              |     |
| 23 |                                                                                              |     |
| 24 |                                                                                              |     |
| 25 |                                                                                              |     |
| 26 |                                                                                              |     |
| 27 |                                                                                              |     |
| 28 |                                                                                              |     |

1                   **I.       INTRODUCTION**

2           Plaintiff David Martinello (“Plaintiff”) and Defendant Century Wilshire, Inc.  
3 (“Defendant”), have reached a full and final settlement of the above-captioned action, which is set  
4 forth in the Joint Stipulation of Settlement of Class Action Claims and Release of Claims  
5 (“Agreement” or “Settlement”) filed herewith.<sup>1</sup> The Court preliminarily approved the Agreement  
6 via its Preliminary Approval Order dated October 26, 2021 (“Preliminary Approval Order”); and  
7 pursuant to the Preliminary Approval Order the approved Class Notice has been disseminated to  
8 the Class, in English and Spanish languages.<sup>2</sup>

9           After disseminating the Notice to the members of the Class, to date there have been no  
10 objections and no opt outs, which means that the entire Class is currently participating in the  
11 Settlement. (Decl. Zakay ¶9.) This response from the Class supports final approval of the  
12 Settlement.

13           This Settlement is an excellent result for the Class Members in light of the serious doubts as  
14 to the result of the adjudication of their claims, along with further uncertainty as to whether class  
15 certification could be maintained through trial. Considered as a whole, the Settlement of  
16 approximately \$325,000.00 represents almost 16.3% of the value of the maximum actual damages  
17 at issue. Furthermore, the Settlement represents almost 9.4% of the maximum combination of  
18 damages and penalties to the Class, assuming all of these amounts could be proved at trial.

19           Under *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), this Settlement is a  
20 fair and reasonable recovery of Plaintiff’s wage and hour claims (which were subject to considerable  
21 uncertainty, both as to the merits and certification). The response of the Class has been extremely  
22 positive. Accordingly, Plaintiff respectfully submits that the Class and PAGA Settlement in this  
23 matter be finally approved as fair, reasonable, and adequate.

24   ///

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

<sup>2</sup> The “Class” is defined as “all individuals who worked for Defendant as non-exempt employees in  
California during the California Class Period. The Class Period is defined as the period between  
April 6, 2016, and July 27, 2021.

## II. THE SETTLEMENT BEFORE THE COURT

Plaintiff and Defendant reached a full and final Settlement of the above-captioned action, which is embodied in the Agreement filed concurrently with the Court. As consideration for this Settlement, Defendant has agreed to pay the all-in, non-reversionary amount of Three Hundred and Twenty-Five Thousand Dollars (\$325,000) (“Gross Settlement Amount”). The Gross Settlement Amount includes all payments of the Settlement Shares to Participating Class Members, the Class Representative Service Award to Plaintiff, Settlement Administration Expenses, the PAGA Payment, and Court-approved attorneys’ fees and costs. Defendant will separately pay the employer’s share of payroll taxes to the qualified settlement fund, per the Agreement. (Decl. Zakay ¶3(a).)

The Net Settlement Amount shall equal the net amount available for Individual Settlement Payments (or “Settlement Shares”) to Participating Class Members from the Gross Settlement Amount after deducting the Court-approved amounts for the Class Representative Service Award, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, the PAGA Payment, and the expenses the Settlement Administration Costs. The Settlement Administrator will pay a Settlement Share from the Net Settlement Amount to each Participating Class Member. The submission of a claim form is not required in order for the Participating Class Member to be paid his or her Settlement Share. The Settlement Share for each Participating Class Member will be calculated as follows: (a) dividing the Net Settlement Amount by the total number of workweeks for all Settlement Class Members that occurred during the Class Period and (b) multiplying the result by each individual Settlement Class Member’s workweeks that occurred during the Class Period. The entire Net Settlement Amount shall be distributed. (Decl. Zakay ¶3(b).)

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

1 Participating Class Members who are bound by the Settlement and will be mailed a settlement  
2 payment. The Notice advised the PAGA Employees that they will receive payment from the Net  
3 PAGA Amount regardless of their decision to participate in the Action. The Class Notice also  
4 advised Class Members of their right to object to the Settlement. This notice process is documented  
5 in the accompanying Declaration of Madely Nava (the Settlement Administrator). (Decl. Zakay  
6 ¶3(c).)

7 If a Participating Class Member's Settlement Share check is not cashed within 180 days  
8 after its last mailing to the Participating Class Member, the funds from such uncashed checks will  
9 be paid to Children's Advocacy Institute ("CAI") in accordance with California Code of Civil  
10 Procedure section 384 in the name of the Class Member and the Class Member will remain bound  
11 by the Settlement. (*Id.*). None of the Parties or counsel has any interest, pecuniary or otherwise, in  
12 CAI. (Decl. Zakay ¶4).

13 The Agreement provides for Class Counsel to be awarded a sum not to exceed 1/3 of the  
14 Gross Settlement Amount, currently estimated to be \$108,333, as their Class Counsel Fees Payment.  
15 Class Counsel will apply separately for an award of litigation expenses incurred in the prosecution  
16 and settlement of the Action in an amount not exceeding \$20,000, as their Class Counsel Costs  
17 Payment. The Class Counsel Fees Payment and Class Counsel Costs Payment are referred to  
18 collectively as the "Class Counsel Award," to be divided equally between Class Counsel (50% to  
19 JCL Law Firm, APC and 50% to Zakay Law Group, APLC). In support of this request, Class  
20 Counsel is providing evidentiary support, including lodestar, in the declarations submitted  
21 concurrently herewith. The Agreement provides for payment of Class Representative Service  
22 Award of no more than \$7,500 for Plaintiff, or such lesser amount as may be approved by the Court  
23 in compensation for his services. Defendant does not oppose the requested Class Counsel Award,  
24 Settlement Administration Costs, or Class Representative Service Award. (Decl. Zakay ¶5).

25 The Parties allocated \$15,000 from the Gross Settlement Amount for settlement of civil  
26 penalties under PAGA, Labor Code Section 2698 et seq. Pursuant to the requirements of Labor  
27 Code §2699(i) the PAGA Payment shall be allocated \$11,250 to the LWDA ("LWDA Payment" or  
28 the "PAGA Payment") as the LWDA's share of the settlement of civil penalties and \$3,750 to the

1 Net Settlement Amount for distribution to the PAGA Employees (“Net PAGA Amount”). (Decl.  
2 Zakay ¶6).

3 The Settlement was reached through arm’s length negotiations. On April 27, 2021, the  
4 Parties attended an arm’s-length private mediation before Tripper Ortman, Esq., a respected  
5 mediator of wage and hour class and PAGA actions. Prior to the mediation, the Parties prepared  
6 for the mediation by exchanging data and records, calculating damages, and submitting mediation  
7 briefs to the mediator. Defendant provided Class Counsel with requested records and information  
8 for the members of the putative Class. Defendant produced a sample consisting of pay records and  
9 time records for the Class Members for the entire Class Period. Defendant also produced  
10 Defendant’s relevant employment policies, including compensation policies and timekeeping  
11 policies. Plaintiff, through Class Counsel, analyzed the data with the help of an expert and prepared  
12 and submitted a mediation brief to Mr. Ortman. At the conclusion of the mediation, the Parties  
13 were able to reach an agreement to settle the Action based on Mr. Ortman’s informed mediator’s  
14 proposal. The basic terms were set forth in a signed Memorandum of Understanding. The Parties  
15 then prepared the full Agreement which was signed by the Parties and received preliminary approval  
16 from the Court by Order dated October 26, 2021. (Decl. Zakay ¶7).

17 The Settlement is fair, adequate and reasonable to the Class and should be finally approved  
18 for the same reasons the Court granted preliminary approval to the Settlement, finding that it is fair,  
19 adequate, and reasonable as to all potential Class Members. In sum, this Settlement valued at  
20 \$325,000 is an excellent result for the Class. This result is particularly favorable in light of the fact  
21 that liability in this case was far from certain in light of the defenses asserted by Defendant. There  
22 have been no objections and no opt outs. Given the complexities of this case, the defenses asserted,  
23 the uncertainty of class certification, along with the uncertainties of proof at trial and appeal, the  
24 proposed Settlement is fair, reasonable and adequate, and should be finally approved. (Decl. Zakay  
25 ¶8).

26  
27  
28 //

1                   **III.     GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND**  
2                   **APPROVAL OF CLASS ACTION SETTLEMENTS**

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

9           “[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a  
10 class action requires court approval.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996)  
11 (citing *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579  
12 (1980).) The court must decide whether the proposed settlement falls within the range of reasonable  
13 settlements, taking into account that settlements are compromises between the parties reflecting  
14 subjective, unquantifiable judgments concerning the risks and possible outcomes of litigation. See  
15 *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) (“The proposed settlement is not to  
16 be judged against a hypothetical or speculative measure of what might have been achieved had  
17 plaintiffs prevailed at trial.”) In *Wershba*, appellants argued that the settlement was too low given  
18 the “clear” liability, however, the Court rejected this argument and held that “the merits of the  
19 underlying class claims are not a basis for upsetting the settlement of a class action.” *Id.*; see also  
20 *7-Eleven, supra*, at 1150.

21           Courts have repeatedly emphasized that there is a strong initial presumption that the  
22 compromise is fair and reasonable. *Wershba*, 91 Cal. App. 4th at 245. Courts should not substitute  
23 their judgment for that of the parties who negotiated the settlement. *Id.* at 246. The presumption  
24 of fairness exists where: (1) investigation and discovery are sufficient to allow counsel and the court  
25 to act intelligently; (2) the settlement is reached through arm’s-length bargaining; (3) counsel is  
26 experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App.  
27 4th at 1801, citing Newberg & Conte, *Newberg on Class Actions*, (3d ed. 1992) §11.41, pp. 11-91.  
28 Here, all of these factors support a presumption of fairness.

1                   **IV.     THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**

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

7                   The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*  
8 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that  
9 the trial court should consider in evaluating the reasonableness of a class action settlement  
10 agreement include ‘the strength of plaintiffs’ case, the risk, expense, complexity and likely duration  
11 of further litigation, the risk of maintaining class action status through trial, the amount offered in  
12 settlement, the extent of discovery completed and the stage of the proceedings, the experience and  
13 views of counsel, the presence of a governmental participant, and the reaction of the class members  
14 to the proposed settlement.’” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008)  
15 (internal citations omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal. App.  
16 4th 399, 408 (2010).

17                  The list of factors is not exhaustive and should be tailored to each case. *Dunk, supra*, at  
18 1801. Due regard should be given to what is otherwise a private consensual agreement between the  
19 parties. *Id.* The inquiry “must be limited to the extent necessary to reach a reasoned judgment that  
20 the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating  
21 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”  
22 *Id.* “Ultimately, the [trial] court’s determination is nothing more than ‘an amalgam of delicate  
23 balancing, gross approximations and rough justice.’ [Citation omitted.]” *Id.*

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

26  
27  
28 //

1       **1. The Investigation and Discovery Are Sufficient to Allow Counsel and the Court to**  
2       **Act Intelligently**

3       On June 11, 2020, Plaintiff filed a Notice of Violations with the LWDA and served the same  
4 on Defendant. The Notice to the LWDA included a proposed Complaint which Plaintiff planned  
5 on filing with the Court, which asserted the Defendant: (1) Violated California Business and  
6 Professions Code § 17200 et seq.; (2) Failed to pay minimum wages in violation of California Labor  
7 Code §§ 1194, 1197, and 1997.1; (3) Failed to pay overtime wages in violation of California Labor  
8 Code §§ 510, et seq.; (4) Failed to provide meal periods in violation of California Labor Code §§  
9 226.7 & 512, and IWC Wage Order; (5) Failed to provide rest periods in violation of California  
10 Labor Code §§ 226.7 & 512, and IWC Wage Order; (6) Failed to provide accurate and complete  
11 itemized wage statements in violation of California Labor Code §226; (7) Failed to provide wages  
12 when due in violation of California Labor Code §§ 201, 202, and 203; (8) Failed to reimburse  
13 employees for required expenses in violation of California Labor Code §2802; and (9) Failed to  
14 provide gratuities in violation of California Labor Code §351. On August 24, 2020, Plaintiff filed  
15 a class action and PAGA Complaint against Defendant in the Superior Court of the State of  
16 California, County of Los Angeles. In addition to the causes of action asserted in the Notice to the  
17 LWDA, Plaintiff's complaint included a tenth cause of action for Defendant's violation of the  
18 Private Attorneys General Act in violation of California Labor Code §2698. (Decl. Zakay at ¶11(a)).

19       Class Counsel has conducted a thorough investigation into the facts of the class action. Class  
20 Counsel has diligently evaluated the Class Members' claims against Defendant. Class Counsel  
21 engaged in informal discovery in preparation for the mediation, and received significant responses  
22 and documents to the discovery requests. Defendant produced a large sample consisting of pay  
23 records and time records for the Class Members for the entire Class Period. Defendant also  
24 produced relevant employment policies, including compensation policies and timekeeping policies.  
25 Class Counsel conducted extensive review of time records and data with the help of an expert.  
26 Based on the foregoing data and their own independent investigation, evaluation and experience,  
27 Class Counsel believe that the Settlement is fair, reasonable, and adequate and is in the best interest  
28

of the Class in light of all known facts and circumstances, including the risk of significant delay, the defenses asserted by Defendant, and potential appellate issues.

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

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

The fact that the Settlement was negotiated with the assistance of a mediator supports 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**

As set forth in the declarations submitted in support of this motion, Class Counsel have extensive experience in wage and hour matters and have previously been appointed as Class Counsel by California courts. 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 November 12, 2021, the Settlement Administrator sent out the 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 Class Counsel Award, and Class Representative Service Award being sought, how individual Settlement Shares would be

1 calculated, and the specific, estimated payment amount to that individual. In disseminating the  
2 Class Notice, the Settlement Administrator followed the notice procedures authorized by the Court  
3 in its Preliminary Approval Order. The Notice was also mailed in Spanish language. Significantly,  
4 there have been no objections and no opt outs. (See Declaration of Madely Nava at ¶¶ 11-12.) As  
5 a result, the entire Class will participate in the Settlement. The final administration results are  
6 documented in the accompanying Declaration of the Settlement Administrator Madely Nava.

7 The absence of any objector strongly supports the fairness, reasonableness and adequacy of  
8 the Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175  
9 (S.D.N.Y. 2000) (“If only a small number of objections are received, that fact can be viewed as  
10 indicative of the adequacy of the settlement.”); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-  
11 119 (3d. Cir. 1990) (29 objections out of 281 member class “strongly favors settlement”); *Laskey*  
12 *v. Int’l Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to  
13 the proposed settlement should be considered when determining fairness of settlement). Here,  
14 where there are no objections, the approval of the Class is evident.

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

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

21 First, Defendant strongly argued that Plaintiff and the Class Members did not forfeit any  
22 gratuities because service charge is a separately designated amount collected by a hotel from patrons  
23 that is part of the amount due the hotel for services rendered, rather than something “over and above  
24 the actual amount due.” (See LAMC, § 184.01, subd. F.) Thus, a service charge by definition is not  
25 a gratuity. Defendant contends that the Legislature has made clear that amounts due for services  
26 (which include service charges) are not gratuities, which is evidenced by recent amendments to the  
27 definition of gratuity carving out an exception for dancing services. (§ 350, subd. (e).)” (*See Garcia*  
28 *v. Four Points Sheraton LAX*, 188 Cal. App. 4th 364, 377 (2010).) Defendant therefore argued that

1 the portion of the service charge, which was added to the banquet bills but allegedly not paid to  
2 employees in the chain of service, constituted only a charge for the actual amount due for  
3 managerial and planning services of the banquet as well as ancillary services and equipment  
4 provided by the hotel, and not any sum over and above the actual amount due for food and drink  
5 sold to its patrons. Defendant further argued that it specifically suggested to its banquet customers  
6 to pay gratuities separately and additionally to the service staff, and that its customers regularly paid  
7 such additional gratuities. Defendant argued, therefore, that California Labor Code § 351 did not  
8 apply to the banquet service charges and did not impact Plaintiff and the Class Members. This  
9 defense could substantially reduce any recovery to the class. While Plaintiff believes that this  
10 defense, and others, could be overcome, Defendant maintains these defenses have merit and  
11 therefore present a serious risk to recovery for the Class. (Decl. Zakay at ¶13).

12 Second, Defendant argued that the Supreme Court decision in *Brinker v. Superior Court*, 53  
13 Cal. 4th 1004 (2012) weakened, if not eliminated, Plaintiff's claims, on liability, value, and class  
14 certifiability as to the meal and rest period claims. A major component of the damages alleged to  
15 have been suffered by the Class Members are attributed to missed meal and rest breaks. Before and  
16 during the mediation, Defendant aggressively argued that Defendant's policies and culture afforded  
17 the Class Members an opportunity to take timely meal and rest breaks, and that if non-compliant  
18 breaks occurred, employees like the Plaintiff *voluntarily chose* not to take compliant breaks  
19 notwithstanding the fact that Defendant afforded all employees the full opportunity to take  
20 compliant, uninterrupted meal and rest periods. Defendant argued, therefore, that under the *Brinker*  
21 decision it has no liability for the missed breaks whatsoever. Defendant argued further that it  
22 adopted and strictly enforced lawful policies, afforded Plaintiff and the Class Members compliant  
23 meal and rest breaks, and had a system in place to pay premiums when breaks were missed, short  
24 or untimely, regardless of the reason. Finally, Defendant argued that certain of the Class Members  
25 executed meal period waivers and provided evidence of voluntarily waived meal periods, as  
26 permitted by California law, which would require a unique and individualized assessment of each  
27 and every employee. Plaintiff and Class Counsel appreciate that the court may find  
28 remitter/reduction of the statutory damages appropriate based on such defenses. See e.g.

1 *Klingensmith v. Max & Erma's Restaurants, Inc.*, 2007 U.S. Dist. LEXIS 81029, 2007 WL 3118505,  
2 at \*5 (E.D. Pa. 2007). If successful, such defenses could eliminate or substantially reduce any  
3 recovery to the Class. While Plaintiff believes that these defenses, and others, could be overcome,  
4 Defendant maintains these defenses have merit and therefore present a serious risk to recovery for  
5 the Class. (Decl. Zakay at ¶13).

6 Third, regarding reimbursement claims, Defendant argued *inter alia* that neither Plaintiff  
7 nor any Class Member was required to use a personal device for work. Defendant has available  
8 telephone and walkie-talkies/radios on-site for employees to carry out their work duties. Defendant  
9 maintains and enforces a strict policy prohibiting employees from carrying their mobile devices on  
10 them while on-the-clock. Moreover, for any management level personnel who elected to use their  
11 personal devices, Defendant required them to execute a “Bring Your Own Device Policy” and  
12 provided a monthly stipend to account for business use of such approved devices. (Decl. Zakay at  
13 ¶13).

14 Finally, Defendant argued that most clothing worn by hotel employees does not qualify as  
15 a “uniform” under California law. *See Bright v. Dennis Garberg & Assocs.* (C.D. Cal. May 4, 2011)  
16 2011 WL 13147441, at \*3–6 (basic articles of clothing —such as a white shirt and black pants—  
17 arguably do not fall within the definition of “uniform” as used in the Wage Orders). Basic wash  
18 and wear does not have to be reimbursed by the employers, only if something more than “minimal  
19 care” is required does the employer have a duty to reimburse. *See Myles v. Securitas Critical*  
20 *Infrastructure Servs., Inc.* (Cal. Ct. App. Nov. 29, 2018) 2018 WL 6241488, at \*4–7 (“whether a  
21 Securitas employee must be compensated for maintaining a uniform depends on whether it is ‘wash  
22 and wear’ or requires special treatment.”); *O'Connor v. Starbucks Corp.* (2008) 2008 WL 2761586  
23 \*5 (California law states employers owe duty to maintain uniform if it requires special laundering  
24 or care). (Decl. Zakay at ¶13).

25 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable  
26 to obtain class certification and thereby not recover on behalf of any employee other than himself.  
27 Defendant argued that the individual experience of each employee varied with respect to the alleged  
28 claims. While other cases have approved class certification of wage and hour claims, class

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

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

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

27  
28 //

- 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

- 2
- 3
- 4
- 5
- 6

7  
8  
9  
10  
11  
12  
13  
14  
15

## 16

17  
18  
19

21

22  
23

24

25

26