

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

JCL LAW FIRM, APC

Jean-Claude Lapuyade (State Bar #248676)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 559-8292
Facsimile: (619) 559-8291
Website: www.jcl-lawfirm.com

Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO**

JESSICA BARACKMAN, an individual, on
behalf of herself and on behalf of all persons
similarly situated,

Plaintiff,

vs.

TEAZ N PLEAZ, INC., a California
Corporation dba SEDUCTIONS; and DOES 1
through 50, inclusive,

Defendant.

Case No: SC 20200179

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

Date: February 25, 2022
Time: 1:30 p.m.
Dept.: 4

*[Assigned for All Purposes to Judge Michael J.
McLaughlin]*

Action Filed: December 21, 2020

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 Settlement12

V. CONCLUSION.....14

TABLE OF AUTHORITIES

Cases:	Page:
<i>7-Eleven Owners for Fair Fran. v. Southland Corp.</i> , 85 Cal. App. 4th 1135, 1151 (2000)	4
<i>Alberto v. GMRI, Inc.</i> , 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008).	8
<i>Alonzo v. Maximus, Inc.</i> , 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011).	11
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018).	13
<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)	11-12
<i>Glass v. UBS Fin. Servs.</i> , 2007 U.S. Dist. LEXIS 8476 (N.D.Cal. January 27, 2007)	8
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1026 (9th Cir. 1998)	9
<i>Howard v. CVS Caremark Corp.</i> , 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014).	11
<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)	9
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 128 (2008)	1,5
<i>Lampe v. Queen of the Valley Medical Center</i> , 19 Cal.App.5th 832, 851 (2018).	9
<i>Laskey v. Int'l Union</i> , 638 F.2d 954 (6th Cir. 1981).	9

1	<i>Ling v. P.F. Chang's China Bistor, Inc.,</i>	
2	245 Cal. App. 4th 1242, 1261 (2016).....	13
3	<i>Maldonado v. Epsilon Plastics, Inc.</i>	
4	(2018) 22 Cal. App. 5th 1308, 1336.....	11,13
5	<i>Malibu Outrigger Bd. of Governors v. Superior Court,</i>	
6	103 Cal. App. 3d 573, 578-579 (1980)	4
7	<i>Munoz v. BCI Coca-Cola Bottling Co. of L. A.,</i>	
8	186 Cal. App. 4th 399, 408 (2010)	6
9	<i>Naranjo v. Spectrum Sec. Servs., Inc.,</i>	
10	40 Cal. App. 5th 444, 474, (Ct. App. 2019).....	11,13
11	<i>Nordstrom Commission Cases,</i>	
12	186 Cal. App. 4th 576, 584 (2010).....	13
13	<i>Officers for Justice v. Civil Service Com'n, etc.,</i>	
14	688 F.2d 615, 625 (9th Cir. 1982)	5
15	<i>Ordonez v. Radio Shack, Inc.</i>	
16	(C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11.....	10
17	<i>Reber v. AIMCO/Bethesda Holdings, Inc.,</i>	
18	2008 WL 4384147, at *9 (C.D. Cal. Aug. 25, 2008).....	13
19	<i>Stoetznner v. U.S. Steel Corp.,</i>	
20	897 F.2d 115, 118-119 (3d. Cir. 1990)	9
21	<i>Villa v. United Site Servs. of California, Inc.</i>	
22	(N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8.....	10
23	<i>Wershba v. Apple Computer, Inc.,</i>	
24	91 Cal.App.4th 224, 245-46 (2001)	4-5
25	Statutes, Rules and Regulations:	
26	California Business & Professions Code §17200	6
27	California Labor Code §203	7,11,13
28	California Labor Code §226	6, 11,13
	California Labor Code §226.7	6
	California Labor Code §510	6

1	California Labor Code §512	6
2	California Labor Code §2698	3,6
3	Secondary Sources:	
4	Newberg & Conte, <i>Newberg on Class Actions</i> , (3d ed. 1992) §11.41, pp. 11-91.....	5
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 Plaintiff Jessica Barackman (“Plaintiff”) and Defendant Teaz N Pleaz, Inc. (“Defendant”),
3 have reached a full and final settlement of the above-captioned action, which is set forth in the Class
4 Action Settlement Agreement (hereinafter the “Agreement”) filed herewith.¹ The Court
5 preliminarily approved the Agreement via its Preliminary Approval Order dated October 12, 2021
6 (“Preliminary Approval Order”); and pursuant to the Preliminary Approval Order the approved
7 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 \$225,000 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 \$225,000 in Settlement represents between 33.7% of
16 Defendant’s liability exposure for damages, and 17.1% of Defendant’s liability exposure for
17 damages and penalties, as estimated by Class Counsel’s expert at the time of mediation, which Class
18 Counsel calculated to be \$666,867 for damages and \$1,312,493 for damages and civil penalties.³
19 Under *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), this Settlement is a fair and
20 reasonable recovery on these claims (which were subject to considerable uncertainty, both as to the
21 merits and certification). The response of the Class has been positive. Accordingly, Plaintiff
22 respectfully submits that the Class Settlement should be finally approved as fair, reasonable, and
23 adequate.

24
25 ¹ A copy of the Agreement is attached as Exhibit 2 to the Declaration of Shani O. Zakay (“Decl.
26 Zakay”), served and filed herewith. Capitalized terms in this Memorandum have the same meaning
as contained in the Agreement.

27 ² The “Class” is all non-exempt employees are or previously were employed by Defendant in
28 California during the Class Period. The Class Period is the period of time from October 12, 2016
to May 10, 2021.

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

1 **II. THE SETTLEMENT BEFORE THE COURT**

2 Plaintiff and Defendant reached a full and final Settlement of the above-captioned action,
3 which is embodied in the Agreement filed concurrently with the Court. As consideration for this
4 Settlement, Defendant has agreed to pay the all-in, non-reversionary amount of Two Hundred
5 Twenty-Five Thousand Dollars (\$225,000) (“Gross Settlement Amount”). The Gross Settlement
6 Amount includes all Settlement Shares to Participating Class Members, the Class Representative
7 Service Payment to Plaintiff, Settlement Administration Expenses, the PAGA Payment, and Court-
8 approved attorneys’ fees and costs. Defendant will separately pay the employer’s share of payroll
9 taxes to the qualified settlement fund, per the Agreement. (Decl. Zakay ¶3(a).)

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

19 Class Members were sent the Court approved Class Notice, using the procedure approved
20 by the Court, by mailing the notice packets after updating class members’ addresses using the
21 National Change of Address database and, for any notice packets returned as undeliverable, re-
22 mailing such notices to any forwarding address provided or updated address located through skip
23 tracing. Class Members were provided with the opportunity to exclude themselves (“opt out”) if
24 they did not want to participate in the Settlement. Class Members who did not “opt out” are deemed
25 Participating Class Members who are bound by the Settlement and will be mailed a settlement
26 payment. The Class Notice also advised Class Members of their right to object to the Settlement.
27 This notice process is documented in the accompanying Declaration of Madely Nava (the
28 Settlement Administrator), which is filed concurrently herewith. (Decl. Zakay ¶3(c).)

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

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

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

20 The Settlement was reached through arm's length negotiations. On March 10, 2021, the
21 Parties participated in an all-day mediation presided over by (Ret.) Hon. Carl West, a respected
22 jurist and mediator of wage and hour class and PAGA actions. Prior to the mediation, the Parties
23 prepared by exchanging data, calculating damages, and submitting mediation briefs to the Mediator.
24 Defendant provided Class Counsel with necessary records and information for the members of the
25 Class. Defendant produced a sample consisting of pay records and time records for some of the
26 Class Members for the entire Class Period. Defendant also produced Defendant's relevant
27 employment policies, including compensation policies and timekeeping policies. Plaintiff analyzed
28 the data with the help of an expert and prepared and submitted a mediation brief to Judge West. At

1 the conclusion of the mediation, the Parties reached a settlement, which was supported by Judge
2 West. The Parties documented the agreement in the form of a Memorandum of Understanding.
3 The Parties then prepared the full Agreement which was signed by the Parties and received
4 preliminary approval from the Court by Order dated October 12, 2021. (Decl. Zakay ¶7).

5 The Settlement is fair, adequate and reasonable to the Class and should be finally approved
6 for the same reasons the Court granted preliminary approval to the Settlement, finding that it is fair,
7 adequate, and reasonable as to all potential Class Members. In sum, this Settlement valued at
8 \$225,000 is an excellent result for the Class. This result is particularly favorable in light of the fact
9 that liability in this case was far from certain in light of the defenses asserted by Defendants. There
10 have been no objections and no opt outs. Given the complexities of this case, the defenses asserted,
11 the uncertainty of class certification, along with the uncertainties of proof at trial and appeal, the
12 proposed Settlement is fair, reasonable and adequate, and should be finally approved. (Decl. Zakay
13 ¶8).

14 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND** 15 **APPROVAL OF CLASS ACTION SETTLEMENTS**

16 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th
17 259, 265 (1997). In evaluating settlements, the courts have long recognized that compromise is
18 particularly appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners*
19 *for Fair Fran. v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) (“[V]oluntary conciliation
20 and settlement are the preferred means of dispute resolution. This is especially true in complex class
21 action litigation.”)

22 “[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a
23 class action requires court approval.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996)
24 (citing *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579
25 (1980).) The court must decide whether the proposed settlement falls within the range of reasonable
26 settlements, taking into account that settlements are compromises between the parties reflecting
27 subjective, unquantifiable judgments concerning the risks and possible outcomes of litigation. See
28 *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) (“The proposed settlement is not to

1 be judged against a hypothetical or speculative measure of what might have been achieved had
2 plaintiffs prevailed at trial.”) In *Wershba*, appellants argued that the settlement was too low given
3 the “clear” liability, however, the Court rejected this argument and held that “the merits of the
4 underlying class claims are not a basis for upsetting the settlement of a class action.” *Id.*; see also
5 *7-Eleven, supra*, at 1150.

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

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

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

20 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*
21 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that
22 the trial court should consider in evaluating the reasonableness of a class action settlement
23 agreement include ‘the strength of plaintiffs’ case, the risk, expense, complexity and likely duration
24 of further litigation, the risk of maintaining class action status through trial, the amount offered in
25 settlement, the extent of discovery completed and the stage of the proceedings, the experience and
26 views of counsel, the presence of a governmental participant, and the reaction of the class members
27 to the proposed settlement.’” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008)

(internal citations omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal. App. 4th 399, 408 (2010).

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

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

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

On October 12, 2020, Plaintiff served Defendant and the Labor and Workforce Development Agency (“LWDA”) with a Notice of Violations (“PAGA Notice”). Plaintiff’s PAGA Notice set forth the facts and theories supporting Defendant’s alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions (“IWC”) Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 et seq (“PAGA”). On December 21, 2020, Plaintiff filed a class action complaint in the El Dorado Superior Court for: (1) Unfair Competition in Violation of Bus. and Prof. Code §§ 17200; (2) failure to pay minimum wages in violation of California Labor Code sections 1194, 1197 and 1197.1; (3) failure to pay overtime wages in violation of California Labor Code sections 510 et seq.; (4) failure to provide required meal periods in violation of California Labor Code sections 226.7 and 512; (5) failure to provide required rest periods in violation of California Labor Code sections 226.7 and 512; (6) failure to reimburse employees for required business expenses in violation of California Labor Code sections 2802; (7) failure to provide accurate itemized wage statements in violation of California Labor Code section 226; (8) failure to provide wages when due in violation of California Labor Code sections 201, 202

1 and 203; and (9) violations of the California Labor Code Private Attorney General Act (“PAGA”).
2 (Decl. Zakay at ¶11(a)).

3 After the Action was filed, the Parties met and conferred and agreed to mediate this action
4 as deemed in the best interest of the parties in particular in light of the many anticipated factual
5 disputes. In anticipation of mediation, the Parties engaged in formal and informal discovery. To
6 prepare for mediation, Defendant agreed to informally produce certain documents and data points
7 subject to the mediation privilege, including but not limited to, a sample of the Class Members’
8 time and payroll data. As discussed *infra*, Plaintiff’s counsel retained the Berger Consulting
9 Group, to analyze Defendant’s time and payroll data. Defendant, on the other hand, served
10 Plaintiff with formal written discovery, to which Plaintiff responded in advance of the mediation.
11 (Decl. Zakay at ¶ 11(a)).

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

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

26 This Settlement was the result of arm’s-length negotiations as well as informal settlement
27 conferences between the Parties through their respective attorneys. After comprehensive legal and
28 factual analysis, Class Counsel possessed sufficient information for intelligent evaluation of the

1 case for purposes of settlement. Prior to the initiation of settlement discussions, Class Counsel
2 reviewed and outlined the case based upon the information for the Class, and determined the
3 conditions of settlement which would be fair and reasonable to the Class with the assistance of an
4 expert. Class Counsel was experienced in the types of settlement appropriate to resolve these wage
5 and hour claims on behalf of employees. (Zakay Decl. ¶12(a)).

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

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

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

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

19 The reaction of the Class unequivocally supports approval of the Settlement. On November
20 2, 2021, the Settlement Administrator mailed the Court-approved Class Notice to the Class
21 Members, which provided each Class Member with the terms of the Settlement, including notice of
22 the claims at issue and the financial terms of the settlement, including the attorneys’ fees, costs, and
23 service awards that were being sought, how individual settlement awards would be calculated, and
24 the specific, estimated payment amount to that individual. In disseminating the Class Notice, the
25 Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary
26 Approval Order. Significantly, there have been no objections and no opt outs. (See Declaration of
27 Madely Nava at ¶¶ 11-12.) As a result, the entire Class has elected to participate in the Settlement
28 and will be sent a settlement check.

1 The administration process, including details regarding the mailing of the Notice Packet,
2 notices returned as undeliverable, the administrator's efforts to locate class members and remail
3 notices, and the final administration results, are all documented in the Declaration of Madely Nava,
4 which is filed concurrently herewith.

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

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

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

19 With respect to the unpaid wages claim, Defendant maintains that it paid Plaintiff for every
20 minute that they claimed they worked, and that it instructed Plaintiff to clock in as soon as she
21 arrived at the store and refrain from performing any work unless clocked-in. (Decl. Zakay at
22 ¶13(a)).

23 With respect to the meal break claim, Defendant maintains that it paid Plaintiff for every
24 minute that they claimed they worked. Defendant argued that it fully complied with California meal
25 period laws and maintained legally compliant policies and practices as outlined in its Handbook
26 and other policies. Courts have found that where an employer's meal period policies are compliant,
27 individualized issues exist as to the reasons for missed, late or truncated meal periods. See *e.g.*
28 *Lampe v. Queen of the Valley Medical Center*, 19 Cal.App.5th 832, 851 (2018) (holding that

1 although only 11.1% of the employees' time punches for meal periods were within the first 5 hours,
2 the claim was not certifiable because individualized issues existed as to the reasons for the late meal
3 periods). Defendant argued that it not only provided meal and rest breaks but also installed technical
4 enhancements that reminded employees to timely take their meal-and rest breaks. (Decl. Zakay at
5 ¶13(b)).

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

21 With respect to the reimbursement claim, Defendant vigorously denied any liability for this
22 claim. Defendant maintains that employees were never required to use their personal cell phone for
23 work at the store, which offered telephone service for any employees work related use, if any.
24 Instead, Defendant argued that any cell phone use was completely voluntary and for their own
25 personal not work-related use. (Decl. Zakay at ¶13(d)).

26 With respect to the wage statement and waiting time claim, Class Counsel considered the
27 arguable presence of various penalties and weighed the potential recoveries against probable
28 defenses. Specifically, Defendant could argue that Plaintiff could not prove the "willful" prong

1 needed to obtain waiting time penalties under Cal. Lab. Code § 203. Additionally, Defendant could
2 argue that Plaintiff could not show that Class Members suffered an “injury” because of wage
3 statement violations, as required by Cal. Lab. Code § 226. Defendant could also argue that that
4 meal and rest period violations do not entitled employees like Plaintiff and the Settlement Class
5 Members to pursue the derivative waiting time and itemized wage statement penalties. (*See Naranjo*
6 *v. Spectrum Security Services, Inc.*, (2019) 40 Cal. App. 5th 444; *Maldonado v. Epsilon Plastics,*
7 *Inc.* (2018) 22 Cal. App. 5th 1308.) Although the Settlement Class arguably could have seen a
8 payout of more than \$645,000 for these penalties if Plaintiff prevailed on every penalty claim,
9 Plaintiff would not recover any derivative penalties if they failed to prove the underlying claims.
10 Moreover, Plaintiff would have to overcome damaging precedent to prove the Class deserved the
11 penalties. *See, e.g., Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 172406 (C.D. Cal.
12 Dec. 9, 2014) (denying class certification for the same penalty claims); *Alonzo v. Maximus, Inc.*,
13 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence of bad faith or
14 actual injury). Plaintiff could not give the penalty claims great weight given that they depended on
15 proving the underlying claims, which according to Defendant were not supported by the facts.
16 (Decl. Zakay at ¶13(e)).

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

26 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and
27 trying the Action against Defendant through possible appeals which even if successful could take
28 several years. Class Counsel have also taken into account the uncertain outcome and risk of

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

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

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

20 The Settlement in this case is fair, reasonable and adequate considering Defendants'
21 significant defenses, which it believes to be valid, to Plaintiff's claims. As detailed during
22 preliminary approval, the Gross Settlement Amount compares favorably to the value of the claims.
23 Class Members will receive immediate and certain payments of considerable amounts under the
24 Settlement. Currently, the overall maximum and average Participating Class Member allocations
25 are estimated to be \$3,871.88 and \$707.79 respectively (Decl. Nava at ¶ 14).

26 Faced with the serious doubts as to recovery, the Settlement of \$225,000 plus the employer's
27 share of payroll taxes compares favorably to the damage estimates alleged to have been suffered by
28 the Class. Considered as a whole, the \$225,000 in Settlement represents between 33.7% of

1 Defendant's liability exposure for damages, and 17.1% of Defendant's liability exposure for
2 damages and penalties, as estimated by Class Counsel's expert at the time of mediation, which Class
3 Counsel calculated to be \$666,867 for damages and \$1,312,493 for damages and civil penalties.

4 If he could prove the claims, Plaintiff estimates that Defendant was subject to maximum
5 liability for damages in the amount of \$666,867, consisting of \$59,379 for unpaid wages, \$570,038
6 for meal and rest break periods, and \$37,450 for unreimbursed expenses.⁴ In addition, Plaintiff
7 calculated that Defendant could be liable for \$45,050 for wage statement penalties and \$600,576
8 waiting time penalties.⁵ Finally, Plaintiff's expert calculated that Defendant's exposure for PAGA
9 penalties up to \$802,450.⁶

10
11 ⁴ Some of Plaintiff's damages for unpaid wages, including minimum wages and overtime wages,
12 were predicated on Plaintiff's argument that Plaintiff and other employees were required to work
13 while clocked out during what was supposed to be their duty-free meal periods. Therefore, the
damages for unpaid wages are also partially encompassed in this figure. This was notably denied
by Defendant as stated above.

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

25 ⁶ *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of PAGA claims.
26 In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced
27 the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying
28 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%.

Consequently, the settlement of \$225,000.00 represents between 33.7% of Defendant's liability exposure for damages, and 17.1% of Defendant's liability exposure for damages and penalties, assuming each and every of these liability theories and amounts could be proved at trial. Given the amount of the settlement as compared to the potential value of claims in this case, the settlement is more than fair and reasonable based on prevailing case law. (Decl. Zakay ¶14(b)).

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: February 9, 2022

ZAKAY LAW GROUP, APLC

By: 

Shani O. Zakay
Attorney for Plaintiff