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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

EMILY TOLOSA, on behalf of herself and on
behalf of all persons similarly situated,

Plaintiffs,

v.

KENSINGTON REDWOOD CITY LLC, a
Virginia Limited Liability Company;
KENSINGTON SENIOR LIVING, LLC, a
Virginia Limited Liability Company; and
DOES 1-50, Inclusive,

Defendants.

Case No. 21-CIV-03030

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

Date: February 8, 2024
Time: 9:00 a.m.
Dept.: 3
Judge: Hon. Susan Greenberg

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	OVERVIEW OF THE LITIGATION	2
III.	THE SETTLEMENT BEFORE THE COURT	4
IV.	GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL OF CLASS ACTION SETTLEMENTS	5
V.	THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE	6
	A. Class Counsel Conducted a Thorough Investigation	7
	B. The Parties Settled At Mediation	8
	C. Class Counsel is Experienced in Similar Litigation	8
	D. The Settlement Class Responded Positively to the Settlement	8
	E. The Gross Settlement Amount is Fair and Reasonable	9
	F. The Strength of Plaintiff's Case and Risks of Continued Litigation	11
VI.	THE PENALTIES UNDER THE PRIVATE ATTORNEY GENERAL ACT OF 2004 ARE REASONABLE	14
VII.	CONCLUSION	15

///

TABLE OF AUTHORITIES
CASES

1		
2		
3	<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i>	
4	(2000) 85 Cal.App.4th 1135, 1150-51.....	5-6
5	<i>Ali v. U.S.A. Cab Ltd.</i>	
6	(2009) 176 Cal.App.4th 1333, 1341.....	12
7	<i>Barcia v. Contain-A-Way, Inc.</i>	
8	2009 U.S. Dist. LEXIS 17118, *9 (S.D. Cal. 2009).....	13
9	<i>Brinker</i>	
10		12
11	<i>Brown v. Fed Express Corp.</i>	
12	(C.D. Cal. 2008) 249 F.R.D. 580, 587-88.....	12
13	<i>Browning v. Yahoo!, Inc.</i>	
14	2007 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007).....	13
15	<i>Campbell v. Best Buy Stores, L.P.,</i>	
16	(C.D. Cal. 2013) 2013 WL 5302217 at *11-13.....	12
17	<i>Dunk v. Ford Motor Co.</i>	
18	(1996) 48 Cal.App.4th 1794, 1801.....	6-7
19	<i>Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)</i>	
20	(9th Cir. 2000) 213 F.3d 454, 459.....	10
21	<i>Duran v. U.S. Bank National Association</i>	
22	(2014) 59 Cal.4th 1, 31.....	12, 14
23	<i>Glass v. UBS Fin. Servs.</i>	
24	2007 WL221862.....	12
25	<i>Hanlon v. Chrysler Corp.</i>	
26	(9th Cir. 1998) 150 F.3d 1011, 1026.....	14
27	<i>Hopson v. Hanesbrands Inc.</i>	
28	2009 U.S. Dist. LEXIS 33900 at * 1, 9, 19-20 (N.D. Cal. 2009).....	13,15
	<i>Huens v. Tatum</i>	
	(1997) 52 Cal.App.4th 259, 265.....	6
	<i>In re Austrian & German Bank Holocaust Litigation</i>	
	(S.D.N.Y. 2000)80 F.Supp.2d 164, 175.....	9
	<i>In re Newbridge Networks Sec. Litig.</i>	
	(D.D.C. Oct. 23, 1998) 1998 WL 765724, at *2.....	10
	<i>Jack v. Hartford Fire Ins. Co.</i>	
	No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011).....	15
	<i>Kullar v. Foot Locker Retail, Inc.</i>	
	(2008) 168 Cal.App.4th 116, 128-129.....	7, 9
	<i>Laskey v. Int'l Union</i>	
	(6th Cir. 1981) 638 F.2d 954.....	9
	<i>Leverage v. Traeger Pellet Grills, LLC</i>	
	(N.D. Cal. June 28, 2017, No. 16-CV-00784) 2017 WL 2797811, at *7.....	10
	<i>Louie v. Kaiser Foundation Health Plan, Inc.</i>	
	2008 U.S. Dist. LEXIS 78314, *14 (S.D. Cal. 2008).....	13
	<i>Magadia v. Wal-Mart Associates, Inc.</i>	
	(9 th Cir. 2021) 999 F.3d 668.....	12, 14
	<i>Malibu Outrigger Bd. Of Governors v. Superior Court</i>	
	(1980) 103 Cal.App.3d 573, 578-579.....	6

1	<i>McKenzie v. Fed. Express Corp.</i>	
2	No. CV 10-02420 GAF (PLAx), 2012 WL 12882124, at *5 (C.D. Cal. Jan. 23, 2012).....	15
3	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i>	
4	(2010) 186 Cal.App.4th 399, 408.....	7
5	<i>O’Conner v. Uber Technologies, Inc.</i>	
6	(9 th Cir. 2018) 904 F.3d 1087, 1133.....	12, 14
7	<i>Officers for Justice v. Civil Serv. Comm’n</i>	
8	(9th Cir. 1982) 688 F. 2d 615, 625.....	7
9	<i>Rebney v. Wells Fargo Bank</i>	
10	(1990) 220 Cal.App.3d 1117, 1138.....	7
11	<i>Stoetznner v. U.S. Steel Corp.</i>	
12	(3d. Cir. 1990) 897 F.2d 115, 118-119.....	9
13	<i>Stovall-Gusman v. W.W. Granger, Inc.</i>	
14	2015 U.S. Dist. LEXIS 78671, at * 12.....	10
15	<i>Tech-Bilt, Inc. v. Woodward-Clyde & Associates</i>	
16	38 Cal.3d 488, 499-500 (1985).....	9
17	<i>Tien v. Tenet Healthcare Corp.</i>	
18	(2012) 209 Cal.App.4th 1077, 1088.....	12
19	<i>Viceral v. Mistras Grp., Inc.</i>	
20	(N.D. Cal. Oct. 11, 2016, No. 15-CV-02198) 2016 WL 5907869, at *3, 7.....	10
21	<i>Wershba v. Apple Computer</i>	
22	(2001) 91 Cal.App.4th 224, 245-246, 250, 2246.....	6, 9

RULES, CODES, AND STATUTES

1	<i>Cal. Bus. and Prof. Code</i> §§ 17200.....	3
2	<i>Cal. Lab. Code</i> § 201.....	3
3	<i>Cal. Lab. Code</i> § 202.....	3
4	<i>Cal. Lab. Code</i> § 203.....	3
5	<i>Cal. Lab. Code</i> § 226.....	3
6	<i>Cal. Lab. Code</i> § 226.7.....	3
7	<i>Cal. Lab. Code</i> § 1194.....	3
8	<i>Cal. Lab. Code</i> § 1197.....	3
9	<i>Cal. Lab. Code</i> § 1197.1.....	3
10	<i>Cal. Lab. Code</i> §§ 510 et seq.....	3
11	<i>Cal. Lab. Code</i> § 512.....	3
12	<i>Cal. Lab. Code</i> §§ 2698 et seq.....	3
13	<i>Code of Civ. Proc.</i> § 877.6.....	9

SECONDARY SOURCES

1	Newberg & Conte, <i>Newberg on Class Actions</i> , (3d ed. 1992) §11.41, pp. 11-91	
2		6

1 I. INTRODUCTION

2 Plaintiff EMILY TOLOSA (hereinafter “Plaintiff”) seeks final approval of the Stipulation of
3 Settlement of Class and PAGA Action Claims and Release of Claims (“Agreement”)¹, which if
4 approved, would provide valuable monetary relief for 314 Settlement Class Members employed by
5 Defendant Kensington Senior Living, LLC. (hereinafter “Defendant”).

6 In an order dated October 2, 2023, this Court preliminarily approved the Agreement and
7 preliminarily certified the Class. Declaration of Jean-Claude Lapuyade (“JCL Dec.”), ¶ 4. On
8 October 20, 2023, the Settlement Administrator delivered notice of the proposed settlement to the
9 Class. Declaration of Madely Nava (“Apex Dec.”), ¶ 7.

10 *As of the filing of this Motion, the Class has greeted news of the Settlement with 99.68%*
11 *approval.* There is currently one opt-out and one objection² to the Settlement. Apex Dec., ¶¶ 10-13.
12 The high approval by the Settlement Class evidences the clear fairness and reasonableness of the
13 Settlement. JCL Dec., ¶ 11.

14 An objective evaluation of the proposed settlement of Nine Hundred and Thirty Thousand
15 Dollars and Zero Cents (\$930,000.00) (“Gross Settlement Amount”) confirms that the relief
16 negotiated on behalf of the Settlement Class is fair, reasonable, and valuable. The Settlement is a
17 product of informed, adversarial, and non-collusive negotiations, between experienced counsel, and
18 presided over by Tripper Ortman, Esq., a respected and experienced mediator of wage and hour
19 class and representative actions. After deducting any Court-approved attorneys’ fees and expenses,
20 class representative service awards, claims administration expenses, and the payments to the Labor
21 & Workforce Development Agency (“LWDA”), the net settlement amount shall be distributed to
22 the Settlement Class based on the number of Workweeks they worked while employed by
23 Defendant during the Class Period. JCL Dec., ¶ 11.

24 ¹ The Agreement is attached as Ex “1” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations
25 to the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise,
capitalized terms used herein have the same meaning as those defined by the Agreement.

26 ² While one objection form was received by the Settlement Administrator, the contents of the form do not seek to
27 object to the Settlement, but rather note that the objecting Class Member does not fully understand the terms of the
28 Settlement Agreement and wishes to preserve her rights to bring claims against the Defendant (which effectively
requests to be excluded from the Settlement). On December 28, 2023, Class Counsel called the Objector and left a
voice message in an attempt to answer the Objector’s questions about the settlement. As of the filing of this motion,
Class Counsel has not received a response from the Objector. A copy of the Objection Form, which was not filed
with the Court, is attached as Exhibit 8 to the JCL Dec.

1 This Settlement provides substantial recovery to Class Members. Plaintiff estimates that the
2 Settlement, if approved, would result in a Net Settlement Amount of approximately **\$523,500.00**.
3 This will result in an average Individual Settlement Payment of **\$1,672.52**, with the estimated
4 highest gross payment being \$7,403.03. PAGA Class Members will receive an estimated average
5 gross payment of \$52.74, with the estimated highest gross payment being \$169.12. JCL Dec., ¶ 12;
6 Apex Dec., ¶¶ 15, 17.

7 The relief offered by the Settlement is immediate and is particularly impressive when viewed
8 against the difficulties encountered by plaintiffs pursuing similar wage and hour cases (*see infra*).
9 Indeed, by settling now rather than proceeding to trial, the Settlement Class will not have to wait
10 (possibly years) for relief, nor will they have to bear the risks associated with prolonged and
11 uncertain litigation. JCL Dec., ¶ 13.

12 As discussed below, the proposed Settlement satisfies all criteria for final settlement approval
13 under California law and falls well within the range of reasonableness. Accordingly, the Class
14 Representative and Class Counsel respectfully request this Court grant final approval of the
15 Agreement and entry of the proposed Final Approval Order and Judgment. JCL Dec., ¶ 14.

16 **II. OVERVIEW OF THE LITIGATION**

17 Defendant operates a senior living facility in San Mateo County. This action asserts claims
18 on behalf of Defendant's current and former non-exempt employees employed in California.
19 Plaintiff worked for Defendant as a non-exempt employee during the Class Period. At all times
20 during her employment, Plaintiff earned an hourly wage, was entitled to legally compliant meal
21 and/or rest periods, and minimum, regular and overtime wages for all hours worked. Throughout
22 her employment, Plaintiff was subject to Defendant's written policies and procedures. JCL Dec., ¶
23 15; Declaration of Emily Tolosa ("ET Dec.") at ¶ 1-15.

24 Generally, Plaintiff claims that Defendant failed to accurately pay wages, failed to provide
25 compliant meal and rest periods, failed to pay for all hours worked, failed to reimburse for required
26 business expenses, failed to furnish accurate itemized wage statements, and failed to pay all wages
27 when due. Defendant forcefully denies liability for each of Plaintiff's claims. Further, Defendant
28 asserts that it fully complied with all applicable employment laws and raised several other

1 significant defenses to Plaintiff’s claims, including but not limited to, asserting that it maintained
2 compliant reimbursement policies, maintained facially compliant meal and rest period polices,
3 issued compliant wage statements, and timely paid all wages when due. JCL Dec., ¶ 16.

4 On March 29, 2021, Plaintiff served Defendant and the Labor and Workforce Development
5 Agency (“LWDA”) with a Notice of Violations (“PAGA Notice”). On June 2, 2021, Plaintiff filed
6 this class action complaint in the San Mateo Superior Court (“the Action”). The Action alleged ten
7 causes of action against Defendants for: (1) Unfair competition in violation of Business and
8 Professions Code sections 17200 *et seq*; (2) Failure to pay minimum wages in violation of California
9 Labor Code sections 1194, 1197 & 1197.1; (3) Failure to pay overtime wages in violation of
10 California Labor Code sections 510 *et seq*; (4) Failure to provide required meal periods in violation
11 of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; (5) Failure to
12 provide required rest periods in violation of California Labor Code sections 226.7 and 512 and the
13 applicable IWC wage order; (6) Failure to provide accurate itemized wage statements in violation
14 of California Labor Code section 226; (7) Failure to provide wages when due in violation of Cal.
15 Lab. Code sections 201, 202 and 203; and (8) Violation of the Private Attorneys General Act [
16 Labor Code section 2698, *et seq.*]. JCL Dec., ¶ 17.

17 The Parties agreed relatively early to mediate the Action. To prepare for mediation, the
18 Parties agreed to informally exchange relevant documents and data points subject to the mediation
19 privilege. Pursuant to that agreement, Defendant produced a sample of the Class Members’ time
20 and payroll data along with itemized wage statements and relevant policies applicable to Class
21 Members. As discussed *infra*, Plaintiff’s counsel retained the forensic consultants at Berger
22 Consulting Group (“BCG”) to analyze Defendant’s time and payroll data. JCL Dec., ¶ 18.

23 On February 1, 2023, the Parties participated in a full day mediation with Tripper Ortman,
24 Esq. an experienced mediator of wage and hour class and PAGA actions. The mediation concluded
25 without a settlement. However, following the mediation the Parties accepted a mediator’s
26 settlement proposal, which was subsequently memorialized in the form of a Memorandum of
27 Understanding (“MOU”). After reaching an agreement in principle, the Parties negotiated a long-
28 form settlement agreement, which is the subject of the instant motion. JCL Dec., ¶ 19.

On October 2, 2023, this Court granted preliminary approval of the Settlement. JCL Dec., ¶ 6. On October 20, 2023, the Settlement Administrator mailed Notice Packets to all 314 Class Members. Apex Dec., ¶ 7. The mailing of the Notice Packets triggered a sixty (60) day Response Deadline for the Settlement Class to submit requests for exclusion or objections to the Settlement. As of the filing of this motion, the response from the Settlement Class to the Settlement has been outstanding – 99.68% of the Class Members are participating in the Settlement. Apex Dec., ¶¶ 10-13.

III. THE SETTLEMENT BEFORE THE COURT

The Court preliminarily approved an initial Gross Settlement Amount of Nine Hundred and Thirty Thousand Dollars and Zero Cents (\$930,000.00) based on a total of an estimated 26,500³ Workweeks worked by the Class during the Class Period. The Gross Settlement Amount shall be used: (1) to satisfy Individual Settlement Payments; (2) to satisfy the Service Award; (3) to satisfy the Attorneys' Fees and Attorneys' Expenses; (4) to satisfy the PAGA Payment; and (5) to satisfy the Claims Administration Expenses incurred in this action. JCL Dec., ¶ 20.

Defendant will fund the Settlement by transferring the Gross Settlement Amount to the Settlement Administrator thirty (30) calendar days after Final Approval. Agreement, ¶ I(2). Individual Settlement Payments and PAGA Class Member Payments shall be mailed by regular First-Class U.S. Mail to Settlement Class Members' and/or PAGA Class Members' last known mailing address no later than fifteen (15) calendar days after the Defendant deposits the initial payment. Agreement, ¶ I(3). The Settlement Administrator will calculate Individual Settlement Payments by adding up the total number of Workweeks for all Class Members. The Settlement Administrator will then divide the respective Workweeks for each member of the Settlement Class by the total Workweeks for the entire Settlement Class, resulting in a Payment Ratio for each Class Member. Each Settlement Class Member's Payment Ratio is then multiplied by the Net Settlement Amount to calculate each estimated Individual Settlement Payment. The estimated average Individual Settlement Payment is approximately \$1,672.52. Apex Dec., ¶ 15; JCL Dec., ¶ 21.

³ After reviewing the data, the Settlement Administrator has concluded that the Class worked a total of only 21,780 workweeks.

1 In exchange for the valuable consideration, as of the funding of the Gross Settlement Amount
2 in full, the Settlement Class Members will release the Released Parties from the Released Class
3 Claims that accrued during the Class Period. The PAGA Members, the LWDA, and the State of
4 California will release the Released Parties from the Released PAGA Claims for the PAGA Period.
5 Agreement at ¶ E.

6 Apex Class Action LLC was appointed as the Settlement Administrator for the Class. Claims
7 Administration Expenses include those expenses of effectuating and administering the Settlement,
8 i.e., the costs incurred to the Settlement Administrator, the costs of giving notice to the Class, the
9 costs of administering and disbursing the Individual Settlement Payments, and the fees of the
10 Settlement Administrator approved for reimbursement by the court. The Settlement Administrator
11 expenses are \$6,500. Apex Dec., ¶ 18. These expenses shall be paid from the Gross Settlement
12 Amount.

13 Subject to Court approval, Class Counsel shall seek an award of Attorneys' Fees and
14 Attorneys' Expenses in the amount of \$340,000, comprised of attorneys' fees equal to one-third of
15 the Gross Settlement Amount estimated to be at least \$310,000 and up to \$30,000.00 for actually
16 incurred litigation expenses. Plaintiff's counsel is to split the fees 50% to the JCL Law Firm, APC,
17 and 50% to the Zakay Law Group, APLC. Agreement, ¶A(6). The Agreement also provides for a
18 Service Award in the amount of \$10,000.00 paid to Plaintiff in consideration of her time, risk, and
19 efforts as the Class Representative on behalf of the Settlement Class. Agreement, ¶¶ A(41).

20 As explained in further detail below, the Settlement is fair, adequate, and reasonable to the
21 class and should be granted final approval. This is evidenced by the high approval of the Settlement
22 by the Settlement Class and absence of any objections to the Settlement and the average Individual
23 Settlement Payment of \$1,672.52. Apex Dec., ¶ 15; JCL Dec., ¶ 21.

24 **IV. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND**
25 **APPROVAL OF CLASS ACTION SETTLEMENTS**

26 Settlements of disputed claims are favored by the courts. *Huens v. Tatum* (1997) 52
27 Cal.App.4th 259, 265. In evaluating settlements, the courts have long recognized that compromise
28 is particularly appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven*

1 *Owners for Fair Fran. v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary
2 conciliation and settlement are the preferred means of dispute resolution. This is especially true in
3 complex class action litigation”).

4 “[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
5 action requires court approval.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 *citing*
6 *Malibu Outrigger Bd. Of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579. The
7 court must decide whether the proposed settlement falls within the range of reasonable settlements,
8 considering that settlements are compromises between the parties reflecting subjective,
9 unquantifiable judgments concerning the risks and possible outcomes of litigation. *See also*
10 *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 2246 (The proposed settlement is not to
11 be judged against a hypothetical or speculative measure of what might have been achieved had
12 plaintiffs prevailed at trial.”). In *Wershba*, appellants argued that the settlement was too low given
13 the “clear” liability, however, the Court rejected this argument and held that “the merits of the
14 underlying class claims are not a basis for upsetting the settlement of a class action.” *Wershba*,
15 *supra*, at 246; *see also 7-Eleven, supra*, at 1150.

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

24 The essential evaluation is whether, given the risks of litigation and the range of probable
25 results, the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. Here,
26 the facts and circumstances compel the conclusion that the proposed settlement satisfies that
27 standard.

28 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

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

6 The trial court has broad discretion to determine whether the settlement is fair. *Rebney v.*
7 *Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1138. “The well-recognized factors that the trial
8 court should consider in evaluating the reasonableness of a class action settlement agreement
9 include ‘the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further
10 litigation, the risk of maintaining class action status through trial, the amount offered in settlement,
11 the extent of discovery completed and the stage of the proceedings, the experience and views of
12 counsel, the presence of a governmental participant, and the reaction of the class members to the
13 proposed settlement.’ [Citations.]” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116,
14 128; *see also Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399,
15 408.

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

23 These factors are analyzed seriatim below and all support final approval of the class action
24 settlement before this Court.

25 **A. Class Counsel Conducted a Thorough Investigation.**

26 As detailed in the motion for preliminary approval, Class Counsel thoroughly investigated
27 the proposed Class Members’ claims, applicable law, and potential defenses. Specifically, Class
28 Counsel assessed the value of the claims using data and documents provided by Defendant through

informal discovery. Class Counsel obtained time, payroll, and policy records, as well as data regarding the number of Class Members, workweeks, and average rate of pay to assess damages before mediation. Class Counsel retained BCG to analyze Defendant's time and payroll data to formulate damage models estimating Defendant's liability exposure. Class Counsel's investigation, research, experience, and damage models informed and guided the mediated negotiations that resulted in this settlement. Accordingly, Class Counsel fully understood the strengths and weaknesses of the class claims before the parties reached a settlement. JCL Dec., ¶ 22-27.

B. The Parties Settled At Mediation.

On February 1, 2023, the Parties participated in a full day mediation with Tripper Ortman, Esq. an experienced mediator of wage and hour class and PAGA actions. The mediation concluded without a settlement. However, following the mediation the Parties accepted a mediator's settlement proposal, which was subsequently memorialized. The amount of the service awards was not negotiated until after the parties agreed to the Gross Settlement Amount and many other terms. No action would likely have been taken by Class Members individually, and no compensation would have been recovered for them, but for Plaintiff's services on behalf of the Class. JCL Dec., ¶ 28.

C. Class Counsel is Experienced in Similar Litigation.

Class Counsel in this matter has extensive class action experience in multiple fields and has represented tens-of-thousands of persons in class actions. Counsel has previously litigated similar wage and hour class actions involving similar claims. Class Counsel has been approved as class counsel in similar wage and hour class actions throughout the State of California. As such, courts throughout the California have deemed Class Counsel experienced and knowledgeable in this area of law. Class Counsel has participated in every aspect of the settlement discussions and has concluded the settlement is fair, adequate, and reasonable and in the best interests of the Class. JCL Dec., ¶¶ 29-35; Declaration of Shani Zakay ("Zakay Dec."), ¶¶ 1-3.

D. The Settlement Class Responded Positively to the Settlement.

The reaction of the Settlement Class unequivocally supports approval of the Settlement. Significantly, after dissemination of the notice to the Settlement Class, which provided each class

1 member with the terms of the Settlement, including the specific estimated Individual Settlement
2 Payments. To date, only one of the 314 members of the Settlement Class has opted-out of the
3 Settlement. Moreover, there is only one objection.⁴ Stated differently, 99.68% of the Settlement
4 Class chose to participate in the Settlement. JCL Dec., ¶ 10; Apex Dec., ¶¶ 10-12.

5 The high approval by the Settlement Class strongly supports a finding that the Settlement is
6 fair, reasonable, and adequate. *See In re Austrian & German Bank Holocaust Litigation* (S.D.N.Y.
7 2000)80 F.Supp.2d 164, 175 (“If only a small number of objections are received, that fact can be
8 viewed as indicative of the adequacy of the settlement.”); *Stoetznner v. U.S. Steel Corp.* (3d. Cir.
9 1990) 897 F.2d 115, 118-119 (29 objections out of 281 member class “strongly favors settlement”);
10 *Laskey v. Int’l Union* (6th Cir. 1981) 638 F.2d 954 (The fact that 7 out of 109 class members
11 objected to the proposed settlement should be considered when determining fairness of settlement.).
12 Consequently, Class Counsel respectfully request the Court to follow the high approval of the
13 Settlement Class and grant final approval of the Settlement.

14 **E. The Gross Settlement Amount is Fair and Reasonable.**

15 The Gross Settlement Amount of Nine Hundred and Thirty Thousand Dollars and Zero Cents
16 (\$930,000.00) in this case is fair and well within the range of recognized reasonableness. The *Kullar*
17 court acknowledged that “as the court does when it approves a settlement as in good faith under
18 Code of Civil Procedure section 877.6, the court must at least satisfy itself that the class settlement
19 is within the ‘ballpark’ of reasonableness.” *Kullar, supra*, at 129; *See Tech-Bilt, Inc. v. Woodward-*
20 *Clyde & Associates*, 38 Cal.3d 488, 499-500 (1985).

21 Here, the Settlement is clearly within the “ballpark” of reasonableness because the Settlement
22 provides a sizeable recovery to the Settlement Class Members and need not necessarily obtain 100
23 percent of the damages sought to be fair, reasonable, and ultimately, meaningful. *Wershba*, 91
24 Cal.App.4th at 250. While the Gross Settlement Amount of Nine Hundred and Thirty Thousand
25 Dollars and Zero Cents (\$930,000.00) represents a discount on Defendant’s potential exposure if

26
27 ⁴ The Settlement Administrator received one objection form. However, the contents of the form do not set forth a
28 legal objection to the settlement, but rather states that the objecting Class Member does not fully understand the terms
of the Settlement Agreement and wishes to preserve her rights to bring claims against the Defendant (which
effectively requests to be excluded from the Settlement). A copy of the Objection Form, which was not filed with the
Court, is attached as Exhibit 8 to the JCL Dec.

1 Plaintiff established liability on all claims and were awarded the full amount of the estimated
2 damages at trial, this compromise is reasonable because (1) the formidable defenses raised by
3 Defendant presented a risk that could award significantly less in damages than Plaintiff's estimate
4 and (2) any theoretical post-trial recovery may require many more years of litigation, resulting in
5 added fees and costs without any guarantee of recovery for the Class. JCL Dec., ¶ 36.

6 As detailed at the time of preliminary approval, the Gross Settlement Amount is fair and
7 reasonable considering the nature and magnitude of the claims being settled and the various
8 potential impediments to recovery. Class Counsel developed varied economic damages models
9 measuring Defendant's liability exposure while accounting for the uncertainties of continued
10 litigation. The various models were informed by Class Counsel's investigation, including the
11 analysis of a significant sample of time and payroll data. As detailed in greater depth during the
12 preliminary approval process, Class Counsel projected a range of Defendant's liability exposure for
13 the claims asserted on behalf of the Settlement Class. Class Counsel projected Defendants' liability
14 exposure for *class claims* (excluding PAGA Penalties) at \$3,634,933 dollars. Thus, the Gross
15 Settlement Amount of \$930,000.00 represents approximately 25.6% of Defendant's *class-wide*
16 liability exposure, assuming all of these amounts could be proved at trial. JCL Dec., ¶ 37.

17 In *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at * 12, the District
18 Court for the Northern District of California granted final approval in a wage and hour
19 misclassification action and found that the Gross Settlement Amount representing 10% of the
20 estimated trial award was within the "range of reasonableness." In *Dunleavy v. Nadler (In re Mego*
21 *Fin. Corp. Sec. Litig.)* (9th Cir. 2000) 213 F.3d 454, 459, the Ninth Circuit approved a settlement
22 representing "roughly one-sixth of the potential recovery." Given the amount of the settlement here
23 as compared to potential value of the claims, particularly the strength of Plaintiff's action, the
24 settlement is clearly fair and reasonable.⁵

25
26 ⁵ See also *Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016, No. 15-CV-02198) 2016 WL 5907869, at *3, 7
27 (approving a California wage and hour settlement where the class received 11.6% of the estimated total liability, or
28 approximately \$29 per work week); *Leverage v. Traeger Pellet Grills, LLC* (N.D. Cal. June 28, 2017, No. 16-CV-
00784) 2017 WL 2797811, at *7 (Approving a California wage and hour settlement where the class received 18% of
the estimated total liability); see also *In re Newbridge Networks Sec. Litig.* (D.D.C. Oct. 23, 1998) 1998 WL 765724,
at *2 ("Courts have not identified a precise numerical range within which a settlement must fall in order to be deemed
reasonable; but an agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing

1 The calculation methodology used to compensate the Settlement Class Members for the
2 alleged damages was negotiated at the time of the Settlement. More importantly, the methodology
3 is fair, objective, and impartial. The calculation methodology is based on the number of Workweeks
4 each Settlement Class Member worked for Defendant during the Class Period. The number of
5 Workweeks for the Settlement Class Members is established through Defendant's data and
6 documented compensation records. The Settlement Administrator is responsible for calculating the
7 Individual Settlement Payments by multiplying the Payment Ratio for each Settlement Class
8 Member by the Net Settlement Amount. The Settlement Administrator will calculate the Payment
9 Ratio by dividing the total number of Workweeks for each Settlement Class Member by the total
10 number of Workweeks for all Settlement Class Members. This process establishes an objectively
11 fair and reasonable procedure to compensate the Settlement Class.

12 The Settlement also provides significant relief to the Settlement Class Members. After
13 deductions for the Attorneys' Fees and Attorneys' Expenses, Claims Administration Expenses, the
14 PAGA Payment, and the Service Awards, the Net Settlement Amount is currently estimated to be
15 **\$523,500**. The average settlement payment is approximately **\$1,672.52**. Apex Dec., ¶ 15. This
16 average net recovery is on par with many wage and hour class action settlements approved by
17 California state and federal courts. JCL Dec., ¶ 38. Additionally, Defendant must separately fund
18 its share of any employer side payroll taxes. Agreement, ¶ D(1).

19 Clearly the goal of this litigation – to obtain redress for the class – has been met by this
20 Settlement. Given the amount of the Settlement, the risks of litigation, and the arm's length
21 negotiations between experienced counsel, the settlement is fair and reasonable, and is therefore
22 entitled to final approval. JCL Dec., ¶ 39.

23 **F. The Strength of Plaintiff's Case and Risks of Continued Litigation**

24 Although Class Counsel believes strongly in Plaintiff's claims, it would be misguided to
25 ignore the asserted defenses. If successful on any one its defenses, Defendant could defend the
26 action or, at least, drastically undercut Plaintiff's claims. JCL Dec., ¶ 40. As the federal court in
27

28 further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the
targeted range of reasonableness.”).

1 *Glass v. UBS Fin. Servs.*, 2007 WL221862 held, where the parties faced uncertainties similar to
2 those in this litigation:

3 ***In light of the above-referenced uncertainty in the law, the risk,***
4 ***expense, complexity, and likely duration of further litigation***
5 ***likewise favors the settlement.*** Regardless of how this Court might
6 have ruled on the merits of the legal issues, the losing party likely
7 would have appealed, and the parties would have faced the expense
8 and uncertainty of litigating an appeal. The expense and possible
9 duration of the litigation should be considered in evaluating the
10 reasonableness of [a] settlement.

11 With respect to the most immediate challenge, i.e., class certification, the risks attendant to
12 the certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart*
13 *Associates, Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated, reversed, and
14 remanded a \$110 million judgement against an employer for, *inter alia*, inaccurately paying
15 overtime, and directed the trial court to enter judgement in favor of the employer. *See also*
16 *O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and
17 hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th
18 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet*
19 *Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might
20 not take their breaks were predominantly individualized questions of fact not susceptible to class
21 treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of
22 certification because employees’ declarations attesting to having taken meal and rest breaks
23 demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy*
24 *Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying
25 certification of proposed off-the-clock and rest and meal break classes due to lack of uniform
26 policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying
27 certification of driver meal and rest period claims based on the predominance of individual issues).
28 Collectively, the examples cited above illustrate the uncertain nature of class litigation.
Consequently, the uncertainty of obtaining certification through a contested motion is a significant
risk factor favoring settlement. JCL Dec., ¶ 41.

Although Plaintiff is confident about the strength of her claims, Plaintiff nevertheless

1 recognizes that Defendant has factual and legal defenses that, if successful, would potentially defeat
2 or impair the value of the lawsuit. Legally, the fast-changing landscape of wage and hour litigation
3 can drastically affect the value of Plaintiff's claims and, in fact, already has. JCL Dec., ¶ 42.

4 In a similar wage and hour case, the federal district court in *Hopson v. Hanesbrands Inc.*,
5 2009 U.S. Dist. LEXIS 33900 at * 19-20 (N.D. Cal. 2009), granted approval of an overtime class
6 action settlement and explained:

7 **Plaintiffs may have a strong case, but the risks inherent in**
8 **continued litigation are great.** Defendants strongly deny liability for
9 Plaintiffs' principal claim that full-time Service Associates were
10 misclassified as exempt. In addition to the uncertainties raised by
11 Defendants at the preliminary stage regarding Plaintiffs' chance of
12 success in this case, Defendants notes that the question of an
13 employer's duty to provide rest and meal periods is an open one,
14 signaling even less certainty for Plaintiffs.....[T]he Total Settlement
15 **amount and the Class Members' expected net recovery, after fees**
16 **and other costs are deducted, appear to be a reasonable**
17 **compromise, in light of the risks of litigation.**

18 *See also Browning v. Yahoo!, Inc.*, 2007 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In
19 considering the strength of Plaintiffs' case, legal uncertainties at the time of settlement - particularly
20 those which go to fundamental legal issues - favor approval.").

21 As recognized in a federal decision approving settlement of an overtime wage class action:

22 **The potential complexity and possible duration of trial also weigh**
23 **in favor of granting final approval.** Plaintiffs acknowledge the
24 difficulties of proving damages, recognize the uncertainty of
25 outcome, and believe defendant would appeal in the event of adverse
26 judgment. A post-judgment appeal would require many years to
27 resolve and delay payment to class members. Plaintiffs believe the
28 benefits of a guaranteed recovery today outweigh an uncertain future
result. Accordingly, plaintiffs argue, and the Court agrees, the actual
recovery confers substantial benefits on the class that outweigh the
potential recovery through full adjudication.

Barcia v. Contain-A-Way, Inc., 2009 U.S. Dist. LEXIS 17118, *9 (S.D. Cal. 2009); see also *Louie*
v. Kaiser Foundation Health Plan, Inc., 2008 U.S. Dist. LEXIS 78314, *14 (S.D. Cal. 2008).

In sum, while other cases have approved class certification in wage and hour claims, class
certification in this action would have been hotly disputed and was by no means a foregone
conclusion. Where both sides face significant uncertainty, as here, the attendant risks favor

1 settlement. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.)

2 As demonstrated by the decisions in *Magadia, supra*, 999 F.3d 668, *O'Conner v. Uber*
3 *Technologies* (N.D. Cal. 2018) 82 F.Supp.3d 1133 and *Duran v. U.S. Bank National Assn.* (2014)
4 59 Cal.4th 1, the complexities and duration of further litigation cannot be overstated. There is little
5 doubt that if Defendant faced a large adverse judgement, Defendant undoubtedly has the resources
6 to post a bond and appeal. A post-judgment appeal by Defendant would have required many more
7 years to resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total,
8 then the case could have dragged on for years after the appeal. The benefits of a guaranteed recovery
9 today outweigh an uncertain result three or more years in the future. JCL Dec., ¶ 43.

10 Class Representative and Class Counsel recognize the expense and length of a trial against
11 Defendant through possible appeals which could take another three years. In arriving at their
12 informed belief that the present settlement is fair and adequate, Class Counsel accounted for the
13 uncertain outcome and risk inherent in complex actions such as this one. Class Counsel is also
14 mindful of and recognize the inherent problems of proof under, and alleged defenses to, the claims
15 asserted in the litigation. Moreover, post-trial motions and appeals would have been inevitable.
16 Costs would have mounted, and recovery would have been delayed if not denied, thereby reducing
17 the benefits of an ultimate victory. Class Representatives and Class Counsel believe that the
18 Settlement confers substantial monetary and non-monetary benefits upon the Class.

19 Further, prior to and during the mediation and settlement discussions, the Parties exchanged
20 information and engaged in a detailed discussion regarding their evaluate of the case and various
21 aspects of the matter, including but not limited to, the risks and delays of further litigation. The
22 Parties only reached a Settlement after Mediator Ortman heard arguments, reviewed evidence, and
23 evaluated the Parties' respective claims and defenses. Based upon their evaluation, Class
24 Representative and Class Counsel have determined that the Settlement set forth in the Agreement
25 is in the best interest of the Class, is fair, reasonable, and adequate, and should be granted final
26 approval. JCL Dec., ¶ 44.

27 **VI. THE PENALTIES UNDER THE PRIVATE ATTORNEY GENERAL ACT OF 2004**
28 **ARE REASONABLE**

1 Where settlements “negotiate a good faith amount” for PAGA penalties and “there is no
2 indication that this amount was the result of self-interest at the expense of class members,” such
3 amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL,
4 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009). Courts routinely approve of amounts for PAGA
5 penalties in the range of zero to two percent of the settlement. *See id.* at *1, 9 (approving a PAGA
6 payment of 0.3%); *Jack v. Hartford Fire Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942,
7 at *6 (S.D. Cal. Oct. 13, 2011) (approving a PAGA payment of 0.25%); *McKenzie v. Fed. Express*
8 *Corp.*, No. CV 10-02420 GAF (PLAx), 2012 WL 12882124, at *5 (C.D. Cal. Jan. 23, 2012)
9 (acknowledging that courts approve PAGA claim settlements in the range of zero to two percent of
10 the total settlement).

11 Here, the Parties negotiated a good faith PAGA Payment in the amount of \$50,000.00 which
12 is 5.3% of the Gross Settlement Amount. As illustrated above, this amount falls well within the
13 range of approved PAGA settlements. Seventy-five percent (75%) of the PAGA Payment
14 (\$37,500.00) will be paid to the LWDA (“LWDA Payment”) with the remaining twenty-five
15 percent (25%) to be distributed to the PAGA Class Members, which is within the range of PAGA
16 penalties approved by courts and should be approved. JCL Dec., ¶ 45.

17 Class Counsel gave the LWDA notice of this Settlement and proposed allocation by filing a
18 copy of the Settlement, the Motion for Preliminary Approval, and this motion seeking final approval
19 with the LWDA. JCL Dec., ¶¶ 5-6, 46. By not registering an objection with either Class Counsel
20 or the Court, the LWDA has accepted and approved of the proposed PAGA Payment.

21 **VII. CONCLUSION**

22 Plaintiff respectfully submit that the proposed settlement satisfies the standard of fairness
23 established in California law and should therefore be finally approved as fair, reasonable, and
24 adequate and requests entry of the Final Approval Order and Judgment submitted herewith.

25 DATED: January 2, 2024

JCL LAW FIRM APC

26 By: 
27 Jean-Claude Lapuyade

28 Attorney for Plaintiff