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

LESLIE SENOREN, an individual, on
behalf of herself and on behalf of all
persons similarly situated,

Plaintiff,

vs.

AIR CANADA CORPORATION, a
Corporation; and DOES 1 through 50,
inclusive,

Defendants.

CASE No. **20STCV13942**

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

Hearing Date: January 6, 2022

Hearing Time: 11:00 a.m.

[Hearing scheduled by Order dated August 5, 2021]

Judge: Hon. Amy D. Hogue

Dept: SS-7

Action Filed: April 9, 2020

Trial Date: Not Set

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1 **I. INTRODUCTION**

2 The parties to this action have reached a Settlement and the Court preliminarily approved the
3 First Amended Class Action Settlement Agreement and Stipulation to Correct the First Amended Class
4 Action Settlement Agreement (the “Agreement”), a true and correct copy of which is attached as
5 Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In accordance with the
6 Preliminary Approval Order dated August 5, 2021 (“Preliminary Approval Order”), the approved Class
7 Notice has been disseminated to the Class.²

8 The purpose of this hearing is to determine whether the proposed settlement of the litigation
9 should be finally approved. Plaintiff Leslie Senoren (“Plaintiff”) respectfully submits this
10 memorandum in support of the unopposed motion for final approval and the proposed entry of the Final
11 Approval Order and Judgment, submitted herewith. The settlement represents an excellent result for
12 the Class and avoids the delays, risks, and costs of further litigation. After disseminating notice to the
13 members of the Class, there were **no objections and three (3) requests for exclusion**, which means
14 that almost the entire Class has elected to participate in the Settlement.³ Blumenthal Decl. ¶4. This is
15 a positive response from the Class evidencing their collective approval of the settlement. As a result,
16 Plaintiff respectfully submits that the class settlement should be finally approved for the same reasons
17 that the Court preliminarily approved the settlement as fair, reasonable, and adequate.

18 **II. THE SETTLEMENT BEFORE THE COURT**

19 Plaintiff and Defendant Air Canada Corporation (“Defendant”) reached a full and final
20

21 ¹ Capitalized terms are defined in the Agreement.

22 ² The “Class” is “all individuals who worked for Defendant in California as non-exempt employees
23 at any time during the Class Period.” The “Class Period” means “the period of time from April 9, 2016
24 to May 24, 2021.” (Preliminary Approval Order at 3:12-16.)

25 ³ While the Parties have agreed that the request for exclusion from Caroline Zemaitis is valid,
26 Defendant did not agree to accept the two (2) requests from Kattya Han and Patricia Cardenas which
27 were submitted after November 1, 2021. Specifically, Kattya Han submitted a request for exclusion on
28 November 4, 2021, and Patricia Cardenas submitted a request for exclusion on November 5, 2021 and
 indicated it was late due to a family emergency. See Declaration of Christina Fowler at ¶11. Plaintiff
 believes these two late requests for exclusion should be accepted, and therefore this dispute needs to
 be resolved by the Court.

1 settlement of the above-captioned action, which is embodied in the Agreement filed concurrently with
2 the Court. As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant
3 is Nine Hundred Thousand Dollars (\$900,000). (Agreement at ¶¶ I(S) and III(A).) Under the
4 Settlement, the Gross Settlement Amount consists of the following elements: (1) payment of the
5 Settlement Shares to the Class; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses
6 Payment; (3) Settlement Administration Expenses; (4) the Class Representative Service Payment to
7 Plaintiff; and (5) the PAGA Payment. (Agreement at ¶ III(B)-(C).) Blumenthal Decl. ¶3(a).

8 The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement
9 at ¶ III(A).) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement
10 at ¶ III(A).) Blumenthal Decl. ¶3(b).

11 Following final approval, Defendant shall fund the Gross Settlement Amount within thirty (30)
12 days of the Effective Date. (Agreement at ¶ III(E)(9).) The Settlement Shares to Participating Class
13 Members will be mailed by the Settlement Administrator within 15 calendar days after the funding of
14 of the Gross Settlement Amount. (Agreement at ¶ III(E)(9).) Blumenthal Decl. ¶3(c).

15 The Net Settlement Amount shall equal the net amount available for payment to the Class after
16 deducting the Court-approved amounts for the (1) Class Counsel Fees Payment; (2) Class Counsel
17 Litigation Expenses Payment; (3) Class Representative Service Payment; (4) the Settlement
18 Administration Expenses, and (5) the PAGA Payment from the Gross Settlement Amount. (Agreement
19 at ¶ I(U).) The Net Settlement Amount will be distributed as the Settlement Shares to the Class
20 Members who do not timely request exclusion ("Participating Class Members"). (Agreement at ¶¶ I(X)
21 and III(C)(1).) The Settlement Share will be calculated as follows: (a) the Settlement Administrator
22 shall then divide the Net Settlement Amount by the total number of weeks included in the dates of
23 employment to determine a dollar amount per week ("Weekly Rate"); and (b) the Settlement
24 Administrator shall then take the number of weeks worked by each Participating Class Member and
25 multiply it by the Weekly Rate to calculate their Settlement Share. (Agreement at ¶ III(C)(2).)
26 Blumenthal Decl. ¶ 3(d).

27 Class Members were sent the Court approved Class Notice using the procedure approved by the
28 Court by mailing the notice packets after updating class members' addresses using the National Change

1 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
2 any forwarding address provided or updated address located. Declaration of Christina Fowler ("Fowler
3 Decl.") ¶ 7. Class Members were provided with the opportunity to exclude themselves or "opt out" if
4 they did not want to participate in the settlement. (Agreement at ¶ III(E)(3).) Fowler Decl. ¶ 5, Exh.
5 A. Three (3) Class Members submitted requests for exclusion, but only one has been accepted as valid.
6 Fowler Decl. ¶ 11. The remaining Class Members are deemed Participating Class Members who are
7 bound by the Settlement and will be entitled to receive a Settlement Share. (Agreement at ¶
8 III(E)(3)(c).) All Aggrieved Employees, including those who submit an opt-out request, will be paid
9 their allocation of the PAGA Payment and will remain bound by the release of the PAGA Released
10 Claims regardless of their request for exclusion. (Agreement at ¶ III(E)(3)(c).) The Class Notice also
11 advised Class Members of their right to object to the Settlement and/or dispute their workweeks.
12 (Agreement at ¶ III(E)(3)); Fowler Decl. ¶ 5, Exh. A. Blumenthal Decl. ¶ 3(e).

13 A Participating Class Member must cash his or her Settlement Share check within 180 days
14 after it is mailed. (Agreement at ¶ III(E)(10).) Any settlement checks not cashed within 180 days will
15 be voided and any funds from such uncashed checks will be paid to the California State Controller's
16 Unclaimed Property Fund in the name of the Participating Class Member. (Agreement at ¶ III(E)(10).)
17 Blumenthal Decl. ¶3(f).

18 Simpluris was appointed by the Court as the Settlement Administrator for the Settlement.
19 (Agreement at ¶ III(D)). From the Gross Settlement Amount, the Settlement Administrator shall be paid
20 for the expenses of effectuating and administering the Settlement in an amount not to exceed \$10,000.
21 (Agreement at ¶ III(B)(4).) As set forth in the Fowler Decl. at ¶ 15, the Settlement Administration
22 Expenses, including fees and costs incurred to-date, as well as anticipated fees and costs for completion
23 of the settlement administration, are \$8,450. Blumenthal Decl. ¶3(g).

24 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
25 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement
26 at ¶ III(B)(2).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
27 Litigation Expenses Payment in an amount not to exceed \$20,000. (Agreement at ¶ III(B)(2).) Subject
28 to Court approval, the Agreement provides for a payment of no more than \$10,000 to Plaintiff as the

1 Class Representative Service Payment. (Agreement at ¶ III(B)(1).) In support of this separate motion
2 for attorneys' fees, reimbursement of expenses and service awards, Class Counsel is providing
3 evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

4 Subject to Court approval, Twenty Thousand Dollars (\$20,000) will be paid from the Gross
5 Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal. Labor
6 Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code § 2699(i),
7 the PAGA Payment shall be allocated as follows: \$15,000 to the LWDA (the "LWDA Payment") as
8 the LWDA's share of the settlement of civil penalties pursuant to the PAGA, and \$5,000 will be
9 distributed to the Aggrieved Employees based on their respective weeks worked during the PAGA
10 Period. (Agreement at ¶ III(B)(3).) As set forth in the accompany proof of service, the LWDA has
11 been served with this motion and the Agreement. Blumenthal Decl. ¶3(i).

12 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
13 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
14 is "fair, adequate and reasonable". (Preliminary Approval Order at ¶ V(1).) In sum, the Settlement
15 valued at \$900,000 is an excellent result for the Class. This result is particularly favorable in light of
16 the fact that liability and class certification in this case were far from certain in light of the defenses
17 asserted by Defendant. Given the complexities of this case, the defenses asserted, the uncertainty of
18 class certification, along with the uncertainties of proof at trial and appeal, the proposed settlement is
19 fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

20 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL** 21 **OF CLASS ACTION SETTLEMENTS**

22 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
23 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
24 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*
25 *v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
26 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

27 "[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
28 action requires court approval." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (*citing*

1 *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579 (1980).) The
2 court must decide whether the proposed settlement falls within the range of reasonable settlements,
3 taking into account that settlements are compromises between the parties reflecting subjective,
4 unquantifiable judgments concerning the risks and possible outcomes of litigation. *See Wershba v.*
5 *Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) (“The proposed settlement is not to be judged
6 against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed
7 at trial.”) In *Wershba*, appellants argued that the settlement was too low given the “clear” liability,
8 however, the Court rejected this argument and held that “the merits of the underlying class claims are
9 not a basis for upsetting the settlement of a class action.” *Id.*; *see also 7-Eleven, supra*, at 1150.

10 In these cases, courts have repeatedly emphasized that there is a strong initial presumption that
11 the compromise is fair and reasonable. *Wershba*, 91 Cal. App. 4th at 245. Courts should not substitute
12 their judgment for that of the parties who negotiated the settlement. *Id.* at 246. The presumption of
13 fairness exists where: (1) investigation and discovery are sufficient to allow counsel and the court to
14 act intelligently; (2) the settlement is reached through arm's-length bargaining; (3) counsel is
15 experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App. 4th
16 at 1801, citing Newberg & Conte, *Newberg on Class Actions*, (3d ed. 1992) §11.41, pp. 11-91. Here,
17 all of these factors support a presumption of fairness. The essential evaluation is whether, given the
18 risks of litigation and the range of probable results, the settlement, taken as a whole, is fair, reasonable
19 and adequate to all concerned. Here, the facts and circumstances compel the conclusion that the
20 proposed settlement satisfies that standard and should be finally approved.

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

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

27 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*
28 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that the

trial court should consider in evaluating the reasonableness of a class action settlement agreement include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members 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.

A. The Settlement Satisfies the California Test for Fairness

1. The Investigation and Analysis of Documents are Sufficient to Allow Counsel and the Court to Act Intelligently

Over the course of nearly two years of litigation, the Parties engaged in the investigation of the claims, including the production of documents, class data, and other information, allowing for the full and complete analysis of liabilities and defenses to the claims in this Action. The procedural history and investigation performed was detailed at length in support of the motion for preliminary approval. The Settlement was the product of one arms-length mediation and contentious negotiations through an all-day mediation presided over by Mark Rudy, Esq., a respected and experience mediator of wage and hour class actions. The details of the litigation are set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(f).

2. The Settlement was Reached Through Arm’s Length Bargaining

This Settlement is the result of extensive and hard-fought litigation as well as negotiations

1 before an experienced and well-respected mediator. Defendant has expressly denied and continues to
2 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and
3 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released
4 Class Claims in accordance with this Settlement. Class Counsel are experienced and qualified to
5 evaluate the class claims, the viability of the defenses asserted, and the risks and benefits of trial and
6 settlement, and Class Counsel are experienced in wage and hour employment law class actions, as Class
7 Counsel has previously litigated and certified similar claims against other employers. Blumenthal Decl.
8 ¶7(a).

9 The Parties attended an arms-length mediation session with Mark Rudy, Esq., a respected and
10 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
11 for the mediation, Defendant provided Class Counsel with necessary information for the members of
12 the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiff
13 analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and submitted
14 a mediation brief and damage valuation to the Mediator. Following the mediation, each side,
15 represented by its respective counsel, were able to agree to settle the Action based on a mediator's
16 proposal. Blumenthal Decl. ¶7(b).

17 The fact that the settlement was negotiated with the assistance of an experienced mediator
18 supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS*
19 *Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
20 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the
21 litigation, with the assistance of a well-respected mediator with substantial experience in employment
22 litigation[, and] this factor supports approval of the settlement”).

23 From March 2021 to May 2021, the settlement agreement and exhibits thereto were finalized
24 and executed, and presented to this Court for preliminary approval. The Court issued a tentative ruling
25 on June 14, 2021 which identified a list of issues to be corrected and/or addressed. Plaintiff addressed
26 the issues and presented the revised Agreement in a supplemental filing on July 14, 2021. On August
27 2, 2021, the Court issued a further tentative ruling which granted preliminary approval based on certain
28 conditions being met. On August 2, 2021, Plaintiff addressed the conditions outlined by the Court and

1 submitted a further supplemental filing including a Stipulation to Correct the First Amended Class
2 Action Settlement Agreement. On August 5, 2021, the Court issued its Order granting preliminary
3 approved of the settlement as fair and reasonable to the Class. Blumenthal Decl. ¶7(c).

4 3. Class Counsel is Experienced in Similar Litigation

5 Class Counsel in this matter has extensive class action experience and has represented thousands
6 of persons in class actions including employment litigation, wage and hour class actions, and complex
7 litigation. Class Counsel has previously litigated wage and hour class actions involving employees and
8 claims similar to this case and have been approved as experienced class counsel during contested
9 motions in state and federal courts throughout California. As such, Class Counsel is experienced and
10 knowledgeable in this area of law. A list of class action cases managed and settled by the Class
11 Counsel in this action is provided to the Court as Exhibit #1 to the Blumenthal Decl. Class Counsel
12 have participated in every aspect of the settlement discussions and have concluded the settlement is fair,
13 adequate and reasonable and in the best interests of the Class. Blumenthal Decl. ¶ 3(j).

14 4. There Are No Objections and Few Requests for Exclusion

15 The reaction of the Class unequivocally supports approval of the Settlement. On September 1,
16 2021, the Settlement Administrator mailed the Court-approved Class Notice to the Class Members,
17 which provided each class member with the terms of the Settlement, including notice of the claims at
18 issue and the financial terms of the settlement, including the attorneys' fees, costs, and service award
19 that were being sought, how individual settlement awards would be calculated, and the specific,
20 estimated payment amount to that individual. See Fowler Decl. ¶ 8, Exh. A. In disseminating the
21 notice, the Settlement Administrator followed the notice procedures authorized by the Court in its
22 Preliminary Approval Order. Significantly, there have been no objections and only three (3) requests
23 to opt-out. Fowler Decl. ¶¶ 11-13. While the Parties have agreed that the request for exclusion from
24 Caroline Zemaitis is valid, Defendant did not agree to accept the two (2) requests from Kattya Han and
25 Patricia Cardenas which were submitted after November 1, 2021. Specifically, Kattya Han submitted
26 a request for exclusion on November 4, 2021, and Patricia Cardenas submitted a request for exclusion
27 on November 5, 2021 and indicated it was late due to a family emergency. See Declaration of Christina
28 Fowler at ¶11. Plaintiff believes these two late requests for exclusion should be accepted, and therefore

1 this dispute needs to be resolved by the Court. As a result, almost the entire Class will participate in
2 the Settlement and will be sent a settlement check. See Fowler Decl. at ¶¶ 11-13; Blumenthal Decl. ¶4.

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

11 5. The Strength of Plaintiff's Case

12 The Action generally alleges that Plaintiff and other Class Members were not properly paid all
13 minimum wages, all overtime wages for hours worked, were not provided meal and rest periods, were
14 not timely paid earned wages, were not provided reimbursement for required expenses, were not
15 provided accurate itemized wage statements, were not paid all wages at the time of termination. The
16 Action seeks unpaid wages, penalties, attorney fees, litigation costs, and any other equitable or legal
17 relief allegedly due and owing to Plaintiff and the other Class Members by virtue of the foregoing
18 claims. Blumenthal Decl. ¶5.

19 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
20 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
21 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
22 asserted that Defendant's practices complied with all applicable Labor laws. The airline employees
23 were also covered by a Collective Bargaining Agreement which eliminated overtime claims and
24 impacted meal and rest break practices and recording, making proof of these claims highly uncertain.
25 Defendant also asserted that all or some of the claims were barred by federal preemption applicable to
26 the airline's practices. Defendant argued that the off-the-clock work did not occur as it was against
27 company policy and that any rounding was neutral and therefore lawful. Defendant also contends that
28 its meal and rest period policies fully complied with California law. Defendant also contended that the

1 records show that meal period premiums were in fact paid showing their compliance. Finally,
2 Defendant could also argue that the recent Supreme Court decision in *Brinker v. Superior Court*, 53
3 Cal. 4th 1004 (2012), weakened Plaintiff's claims, on liability, value, and class certifiability as to the
4 meal and rest period claims. Defendant also argues that it acted in good faith and without willfulness,
5 which if accepted would negate the claims for waiting time penalties and/or inaccurate wage
6 statements. In fact, under the current state of the law, it is questionable whether these penalties could
7 be awarded at all based upon the alleged meal and rest period violations. If successful, Defendant's
8 defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiff believes that
9 these defenses could be overcome, Defendant maintains these defenses have merit and therefore present
10 a serious risk to recovery by the Class. Blumenthal Decl. ¶8(a).

11 In a similar wage and hour case, the federal district court in *Hopson v. Hanesbrands Inc.*, 2009
12 U.S. Dist. LEXIS 33900 (N.D. Cal. 2009), explained in approving an overtime class action settlement:

13 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
14 Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service
15 Associates were misclassified as exempt. In addition to the uncertainties raised by
16 Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,
17 Defendants notes that the question of an employer's duty to provide rest and meal
periods is an open one, signaling even less certainty for Plaintiffs. [...]he gross
settlement amount and the Class Members' expected net recovery, after fees and other
costs are deducted, appear to be a reasonable compromise, in light of the risks of
litigation.

18 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
19 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
20 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
21 approval."). 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 in favor of granting
23 final approval. Plaintiffs acknowledge the difficulties of proving damages, recognize the
24 uncertainty of outcome, and believe defendant would appeal in the event of adverse
25 judgment. A post-judgment appeal would require many years to resolve and delay
26 payment to class members. Plaintiffs believe the benefits of a guaranteed recovery today
27 outweigh an uncertain future result. Accordingly, plaintiffs argue, and the Court agrees,
28 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).

1 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
2 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
3 Defendant argued that the individual experience of each putative class member varied with respect to
4 the claims. Defendant could also contest class certification by arguing injury and good faith were case
5 by case determinations that precluded class certification. The auto-deduct system for meal periods
6 created problems for certification as Courts have held. Plaintiff is aware of cases where class
7 certification of similar claims was denied. See e.g. *Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
8 (2019) (denying certification of meal and rest break claims). Defendant also contended that individual
9 differences in work experiences not only impacted damages but would also impact certification.
10 Finally, even if class certification was successful, as demonstrated by the California Supreme Court
11 decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to
12 overcome for a class wide recovery even where the class has been certified. While other cases have
13 approved class certification in wage and hour claims, class certification in this action would have been
14 hotly disputed and was by no means a foregone conclusion. Blumenthal Decl. ¶8(b).

15 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
16 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
17 substantial defenses both to liability and to class certification. Currently, the maximum and average
18 class member allocation are \$4,134.21 and \$1,566.05, respectively. See Fowler Decl. ¶ 10. Given the
19 complexities of this case, the defenses, along with the uncertainties of proof and appeal, the proposed
20 Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

22 As demonstrated by the decision in *Duran*, the complexities and duration of further litigation
23 cannot be overstated. There is little doubt that Defendant would post a bond and appeal in the event
24 of an adverse judgment. A post-judgment appeal by Defendant would have required many more years
25 to resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the
26 case could have dragged on for years after the appeal. The benefits of a guaranteed recovery today
27 outweigh an uncertain result three or more years in the future. Blumenthal Decl. ¶8(c).

28 Plaintiff and Class Counsel recognize the expense and length of a trial against Defendant

1 through possible appeals which could take at least another two or three years. Class Counsel also have
2 taken into account the uncertain outcome, the risk of litigation, especially in complex actions such as
3 this one. Class Counsel are also mindful of and recognize the inherent problems of proof under, and
4 alleged defenses to, the claims asserted in the Action. Moreover, post-trial motions and appeals would
5 have been inevitable. Costs would have mounted and recovery would have been delayed if not denied,
6 thereby reducing the benefits of an ultimate victory. Plaintiff and Class Counsel believe that the
7 Settlement confers substantial benefits upon the Class. Based upon their evaluation, Plaintiff and Class
8 Counsel have determined that the Settlement set forth in the Agreement is in the best interest of the
9 Class. Blumenthal Decl. ¶8(c).

10 Although Plaintiff and Class Counsel believe that their case has merit, which Defendant
11 continues to vigorously deny, they recognized the potential risks both sides would face if litigation of
12 these Actions continued. As the federal court held in *Glass*, where the parties faced uncertainties
13 similar to those in this litigation:

14 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,
15 and likely duration of further litigation likewise favors the settlement. Regardless of
16 how this Court might have ruled on the merits of the legal issues, the losing party likely
17 would have appealed, and the parties would have faced the expense and uncertainty of
18 litigating an appeal. "The expense and possible duration of the litigation should be
19 considered in evaluating the reasonableness of [a] settlement." See *In re Mego Financial
20 Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further
21 litigation is substantial.

22 *Id.* at *12.

23 7. The Amount Offered in Settlement

24 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
25 to Plaintiff's claims. As set forth in the Supplemental Declaration of Nordrehaug in support of
26 preliminary approval which discussed the value of the class claims in detail, the Gross Settlement
27 Amount compares favorably to the value of the claims.

28 The calculations to compensate for the amount due to the Class Members at the time this
Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
mediation. For the individuals whose claims are at issue in this Actions, Plaintiff analyzed the data for
putative class members and determined the potential maximum damages for the class claims. For the

1 Class, Plaintiff determined that the damages for unpaid wages due to rounding was \$223,141, the
2 maximum potential meal period damages were estimated to be \$651,598 based on a one missed meal
3 period per week, the maximum rest period damages were estimated to be \$651,598 based upon
4 reasonable assumption of one violation per week, and the maximum damages for unreimbursed expenses
5 for cell phone usage was \$248,819. In total, the damages for the Class were calculated to have a
6 maximum total value of \$1,775,156. In addition, Plaintiff calculated that the maximum value of the
7 waiting time penalties were \$539,092 and the maximum value of the wage statement penalties were
8 \$586,100, however, these wage statement and waiting time penalties claims potentially have a much
9 smaller value, even if damages were awarded, to the extent that they are derivative of the meal and rest
10 break claims.⁴ Blumenthal Decl. ¶8(d).

11 Consequently, the Gross Settlement Amount of \$900,000 represents 50% of the value of the
12 potential damages at issue for the Class in this case, and 31% of the combination of damages and
13 penalties for the Class, assuming these amounts could all be proven in full at trial. The above maximum
14 calculations should then be adjusted in consideration for both the risk of certification and the risk of
15 establishing class-wide liability on all claims. Given the amount of the Settlement as compared to the
16 potential value of the claims, the Settlement is most certainly fair and reasonable.⁵ Blumenthal Decl.

18 ⁴ Importantly, while Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections
19 203 and 226, Plaintiff recognized that these claims were subject to various defenses asserted by
20 Defendant, including, but not limited to, a good faith dispute defense as to whether any premium wages
21 for meal or rest periods or other wages were owed given Defendant's position that Plaintiff was properly
22 compensated. See *Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is no
23 willful failure to pay wages if the employer and employee have a good faith dispute as to whether and
24 when the wages were due."). Additionally, Courts have held that violations of the meal and rest period
25 regulations, which require payment of a "premium wage" for each improper meal period, do **not** give
26 rise to claims under sections 203 and 226. See *Ling v. P.F. Chang's China Bisto, Inc.*, 245 Cal. App.
27 4th 1242, 1261 (2016) and *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1336 (2018).
28 As a result, the viability of Plaintiff's claims on these theories is uncertain.

⁵ See e.g. *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
(approving settlement which represented "roughly one-sixth of the potential recovery");
Stovall-Gusman v. W.W. Granger, Inc., 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015)
(granting final approval where "the proposed Total Settlement Amount represents approximately 10%
of what class might have been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*,
2016 WL 5907869 (N.D. Cal. 2016) (approving wage and hour class action settlement amounting to

¶8(d). Clearly, the goal of this litigation has been met.

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 requests entry of the Final Approval Order and Judgment, submitted herewith.

Dated: December 8, 2021

**BLUMENTHAL NORDREHAUG BHOWMIK
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By: /s/ Kyle Nordrehaug
Kyle R. Nordrehaug, Esq.
Attorneys for Plaintiff

8.1% of full verdict value); *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class action settlement worth "somewhere between 9% and 18%" of full verdict value).