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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

FERNANDO ALCOCER, JR., an
individual, on behalf of himself and on
behalf of all persons similarly situated,

Plaintiff,

vs.

DSV SOLUTIONS, LLC, a Limited
Liability Company; and DOES 1 through
50, inclusive,

Defendants.

CASE No. **CIVDS2010345**

[Consolidated with case no. CIVDS2018614]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
SETTLEMENT**

Hearing Date: December 1, 2021

Hearing Time: 10:00 a.m.

Judge: Hon. David Cohn
Dept.: S26

Action Filed: June 2, 2020

Trial Date: Not Set

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1 **I. INTRODUCTION**

2 Plaintiff Fernando Alcocer, Jr. ("Plaintiff") respectfully submits this memorandum in support
3 of the unopposed motion for preliminary approval of the proposed class action settlement with
4 Defendant DSV Solutions, LLC ("Defendant"), and seeks entry of an order: (1) preliminarily approving
5 the proposed settlement of this class action with Defendant; (2) for settlement purposes only,
6 conditionally certifying the Class, which is comprised of the California Class of all individuals who are
7 or previously were employed by Defendant in California who were classified as non-exempt employees
8 at any time during the Class Period"; (3) provisionally appointing Plaintiff as the representative of the
9 Class; (4) provisionally appointing Norman B. Blumenthal, Kyle R. Nordrehaug, and Aparajit
10 Bhowmik of Blumenthal Nordrehaug Bhowmik De Blouw LLP as Class Counsel; (5) approving the
11 form and method for providing class-wide notice; (6) directing that notice of the proposed settlement
12 be given to the class; (7) appointing ILYM Group as Settlement Administrator, and (8) scheduling a
13 final approval hearing date to consider Plaintiff's motion for final approval of the settlement and entry
14 of the Judgment, and Plaintiff's motion for approval of attorneys' fees and expenses. Plaintiff and
15 Defendant (collectively the "Parties") have reached a full and final settlement of the above-captioned
16 action, which is embodied in the Class Action Settlement Agreement ("Agreement") filed concurrently
17 with the Court.¹ A copy of the fully executed Agreement is attached as Exhibit #1 to the Declaration
18 of Kyle Nordrehaug ("Decl. Nordrehaug"), served and filed herewith.

19 As consideration for this Settlement, the Gross Settlement Amount is One Million Five Hundred
20 Thousand Dollars (\$1,500,000) to be paid by Defendant, as set forth in the Agreement. The Gross
21 Settlement Amount will settle all issues pending in the Action between the Parties and will be made
22 in full and final settlement of the Released Class Claims, consisting of the all payments of Settlement
23 Shares to the Participating Class Members, Settlement Administration Expenses, Class Counsel Fees
24 Payment, Class Counsel Litigation Expenses Payment, Class Representative Service Payments and the
25 PAGA Payment. The Gross Settlement Amount does not include the employer's share of payroll taxes
26 which will be separately paid by Defendant. The Settlement is all-in with no reversion to Defendant
27

28 ¹ Capitalized terms shall have the same meaning as defined in the Agreement.

1 and no need to submit a claim form. Decl. Nordrehaug at ¶3.

2 Pursuant to the Court's instructions, the following is a table of the key financial terms of the
3 Settlement and the proposed deductions:

4 **\$1,500,000** (Gross Settlement Amount)

- 5 - \$10,000 (Plaintiff's proposed service award is not to exceed \$10,000)
- 6 - \$20,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- 7 - \$500,000 (Class Counsel Fees Payment - not to exceed amount)
- 8 - \$25,000 (PAGA Payment - 75% to LWDA / 25% to Aggrieved Employees)
- 9 - \$15,000 (Settlement Administration Expenses - not to exceed amount)

10 **\$930,000** (Net Settlement Amount)

11 Based upon 590 Class Members who collectively have 30,000 work weeks, the Net Settlement Amount
12 provided an average recovery of \$1,576 per Class Member and a recovery of \$31 per work week. Decl.
13 Nordrehaug at ¶6. Additional information requested by the Court's instructions are set forth in the
14 Decl. Nordrehaug at ¶¶ 33-38.

15 On March 17, 2021, the Parties participated in an all-day mediation session presided over by
16 Louis Marlin, a respected and experienced mediator of wage and hour class actions. At the conclusion
17 of the mediation, the Parties reached an agreement to settle the Action. Decl. Nordrehaug at ¶5. The
18 Settlement is fair, reasonable and adequate, and should be preliminarily approved because there is a
19 substantial monetary payment, and there are substantial litigation and class-certification risks.
20 Therefore, Plaintiff respectfully requests that this Court grant preliminary approval of the Agreement
21 and enter the proposed order submitted herewith.

22 **II. DESCRIPTION OF THE SETTLEMENT**

23 The Gross Settlement Amount is One Million Five Hundred Thousand Dollars (\$1,500,000).
24 (Agreement at ¶ I(S).) Under the Settlement, the Gross Settlement Amount consists of the following
25 elements: (1) payment of the Settlement Shares to the Class; (2) Class Counsel Fees Payment and Class
26 Counsel Litigation Expenses Payment; (3) Settlement Administration Expenses; (4) the Class
27 Representative Service Payment to Plaintiff; and (5) the PAGA Payment. (Agreement at ¶ III (B)-(C).)
28 The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement at ¶

1 III(A).) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement at
2 ¶ III(A).) Decl. Nordrehaug at ¶15.

3 Following final approval, Defendant shall fund the Gross Settlement Amount within fifteen (15)
4 days of the Effective Date. (Agreement at ¶ III(E)(9).) The Settlement Shares to Participating Class
5 Members will be mailed by the Settlement Administrator within 15 calendar days after the funding of
6 of the Gross Settlement Amount. (Agreement at ¶ III(E)(9).) Decl. Nordrehaug at ¶16.

7 The Net Settlement Amount shall equal the net amount available for payment to the Class after
8 deducting the Court-approved amounts for the (1) Class Counsel Fees Payment; (2) Class Counsel
9 Litigation Expenses Payment; (3) Class Representative Service Payment; (4) the Settlement
10 Administration Expenses, and (5) the PAGA Payment, from the Gross Settlement Amount. (Agreement
11 at ¶ I(U).) The Net Settlement Amount will be distributed as the Settlement Shares to the Class
12 Members who do not timely request exclusion ("Participating Class Members"). (Agreement at ¶¶ I(X)
13 and III(E)(1).) The Settlement Share will be calculated by: (a) dividing the Net Settlement Amount by
14 the total number of Workweeks included in the Class Data to determine a dollar amount per week
15 ("Weekly Rate"); and (iii) the Settlement Administrator shall then take the number of Workweeks
16 worked by each Participating Class Member and multiply it by the Weekly Rate to calculate their
17 Settlement Share. (Agreement at ¶ III(C)(2).) Workweeks will be based on Defendant's records,
18 however Class Members will have the right to challenge the number of workweeks. Decl. Nordrehaug
19 at ¶17.

20 Class Members may choose to opt-out of the Settlement by following the directions in the Class
21 Notice. (Agreement at ¶ III(E)(3), Ex. A.) All Class Members who do not "opt out" will be deemed
22 Participating Class Members who will be bound by the Settlement and will be entitled to receive a
23 Settlement Share. All PAGA Aggrieved Employees, including those who submit an opt-out request,
24 will still be paid their allocation of the PAGA Payment and will remain bound by the release of the
25 PAGA Released Claims regardless of their request for exclusion. (Agreement at ¶ III(B)(3).) Finally,
26 the Notice will advise the Class Members of their right to object to the Settlement and/or dispute their
27 workweeks. (Agreement at ¶ III(E)(3), Ex. A.) Decl. Nordrehaug at ¶18.

28 A Participating Class Member must cash his or her Settlement Share check within 180 days

1 after it is mailed. (Agreement at ¶ III(E)(10).) Any settlement checks not cashed within 180 days will
2 be voided and any funds from such uncashed checks will be paid to the California State Controller's
3 Unclaimed Property Fund in the name of the Participating Class Member. (Agreement at ¶ III(E)(10).)
4 Decl. Nordrehaug at ¶19.

5 Based upon the lowest bid received from qualified vendors, Plaintiff selected and the Parties
6 have agreed to use ILYM Group as the Settlement Administrator. (Agreement at ¶ III(D).) From the
7 Gross Settlement Amount, the Settlement Administrator shall be paid for the expenses of effectuating
8 and administering the Settlement in an amount not to exceed \$15,000. (Agreement at ¶ III(B)(4).)
9 Decl. Nordrehaug at ¶20.

10 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
11 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement
12 at ¶ III(B)(2).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
13 Litigation Expenses Payment in an amount not to exceed \$20,000. (Agreement at ¶ III(B)(2).) Subject
14 to Court approval, the Agreement provides for a payment of no more than \$10,000 to the Plaintiff as
15 his Class Representative Service Payment. (Agreement at ¶ III(B)(1).) Decl. Nordrehaug at ¶21.

16 Subject to Court approval, Twenty-Five Thousand Dollars (\$25,000) will be paid from the
17 Gross Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal.
18 Labor Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code §
19 2699(i), the PAGA Payment shall be allocated as follows: \$18,750 to the LWDA (the "LWDA
20 Payment") as the LWDA's 75% share of the settlement of civil penalties pursuant to the PAGA, and
21 \$6,250 for for distribution to the Aggrieved Employees to be allocated based upon their respective pay
22 periods during the PAGA Period. (Agreement at ¶ III(D)(3).) As set forth in the accompany proof of
23 service, the LWDA has been served with this motion and the Agreement. Decl. Nordrehaug at ¶22.

24 **III. CASE BACKGROUND**

25 The description of the case and claims, along with the procedural history is set forth in the
26 Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the
27 exchange of documents and information in connection with the Action over the last year which
28 permitted Class Counsel to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and

1 14. The Parties participated in mediation on March 17, 2021 with Louis Marlin, Esq, which after arm's
2 length negotiations, resulted in this Settlement. Decl. Nordrehaug, ¶12.

3 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO**
4 **GRANT PRELIMINARY APPROVAL**

5 When a proposed class-wide settlement is reached, the settlement must be submitted to the court
6 for approval. 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87.
7 California "[p]ublic policy generally favors the compromise of complex class action litigation."
8 *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) quoting *Cellphone Termination Fee*
9 *Cases*, 180 Cal.App.4th 1110, 1117-18 (2009). Class action settlements are approved where the
10 proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
11 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert.
12 denied, 459 U.S. 1217 (1983)).

13 Preliminary approval is the first of three steps that comprise the approval procedure for
14 settlements of class actions. The second step is the dissemination of notice of the settlement to all class
15 members. The third step is a final settlement approval hearing, at which evidence and argument
16 concerning the fairness, adequacy, and reasonableness of the settlement may be presented, and class
17 members may be heard regarding the settlement. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
18 1801 (1996); *Manual for Complex Litigation*, Second §30.44 (1993); Cal. Rules of Court, rule 3.769.

19 The primary question presented on an application for preliminary approval of a proposed class
20 action settlement is whether the proposed settlement is "within the range of possible approval."
21 *Manual for Complex Litigation*, Second §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th
22 Cir. 1982).² Preliminary approval is merely the prerequisite to giving notice so that "the proposed
23 settlement... may be submitted to members of the prospective Class for their acceptance or rejection."
24 *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is

25
26 ² California courts look to federal authority on class actions. *Vasquez v. Superior Court*, 4 Cal.3d
27 800, 821 (1971). "It is well established that in the absence of relevant state precedents trial courts are
28 urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure for
conducting class actions." *Frazier v. City of Richmond*, 184 Cal. App.3d 1491, 1499 (1986), citing
Green v. Obledo, 29 Cal.3d 126, 145-146 (1981).

1 "a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining."
2 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v.*
3 *Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's
4 determination that settlement was "fair, reasonable and adequate" where the settlement "provided
5 valuable benefits to the class . . . that were 'particularly valuable in light of the risks plaintiff would have
6 faced if she proceeded to litigate her case.'"); *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate
7 question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the
8 settlement is given to the class members and a final settlement hearing is held by the Court.

9 **A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement**

10 The approval of a proposed settlement of a class action suit is a matter within the broad
11 discretion of the trial court. *Wershba, supra*, 91 Cal.App.4th at 234-235; *Dunk*, 48 Cal.App.4th 1794.
12 Preliminary approval does not require the trial court to answer the ultimate question of whether a
13 proposed settlement is fair, reasonable and adequate. That final determination is made only after notice
14 of the settlement has been given to the class members and after they have been given an opportunity
15 to voice their views of the settlement or to be excluded from the settlement. 3B J. Moore, *Moore's*
16 *Federal Practice* §§23.80 - 23.85 (2003).

17 In considering a potential settlement for preliminary approval purposes, the trial court does not
18 have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the
19 dispute, and need not engage in a trial on the merits. *Wershba, supra*, 91 Cal.App.4th at 239-40; *Dunk*,
20 *supra*, 48 Cal.App. 4th at 1807. The Ninth Circuit explains, "the very essence of a settlement is
21 compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688
22 F.2d at 624. The question whether a proposed settlement is fair, reasonable and adequate necessarily
23 requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "the
24 terms of the compromise with the likely rewards of litigation.'" *Weinberger v. Kendrick*, 698 F.2d 61,
25 73 (2d Cir. 1982), *cert. denied* 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders*
26 *of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). Thus, when analyzing the
27 settlement, the amount is "not to be judged against a hypothetical or speculative measure of what might
28 have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625, 628.

1 With regard to class action settlements, the opinions of counsel should be given considerable
2 weight both because of counsel's familiarity with this litigation and previous experience with cases
3 such as these. *Officers for Justice*, 688 F.2d at 625; *In re Wash. Public Power Supply System Sec.*
4 *Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal.
5 1988); *Weinberger*, 698 F.2d at 74. "The recommendations of plaintiffs' counsel should be given a
6 presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As
7 a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat'l Rural*
8 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

9 **B. Factors To Be Considered In Granting Preliminary Approval**

10 A number of factors are to be considered in evaluating a settlement for purposes of preliminary
11 approval. In determining whether to grant preliminary approval, the court considers whether the "(1)
12 the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2)
13 has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives
14 or segments of the class, and (4) falls within the range of possible approval." *In re Tableware Antitrust*
15 *Litig.*, 484 F.Supp. 2d 1078, 1079 (N.D. Cal. 2007). No one factor should be determinative, but rather
16 all factors should be considered. The analysis has been summarized as follows:

17 If the proposed settlement appears to be the product of serious, informed, noncollusive
18 negotiations, has no obvious deficiencies, does not improperly grant preferential
19 treatment to class representatives or segments of the class, and falls within the range of
20 possible approval, then the court should direct that notice be given to the class members
of a formal fairness hearing, at which evidence may be presented in support of and in
opposition to the settlement.

21 *Manual of Complex Litigation, Second* § 30.44, at 229.

22 Here, the Settlement meets all of these criteria for preliminary approval.

23 **1. The Settlement is the Product of Serious, Informed and
24 Arm's Length Negotiations by Experienced Counsel**

25 This settlement is the result of extensive and hard-fought litigation as well as negotiations
26 before an experienced and well-respected mediator. Defendant has expressly denied and continues to
27 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and
28 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released

1 Class Claims of the Class in accordance with this Settlement.³

2 Class Counsel are experienced and qualified to evaluate the class claims, the defenses asserted,
3 and the risks and benefits of trial and settlement, and Class Counsel are particularly experienced in
4 wage and hour employment class actions, as Class Counsel has previously litigated and certified similar
5 claims against other employers. Decl. Nordrehaug at ¶31. The view of qualified and well-informed
6 counsel that a class action settlement is fair, adequate, and reasonable is entitled to significant weight.
7 *See Kullar v. Foot Locker*, 168 Cal. App. 4th 116, 133 (2008) (the trial court "undoubtedly should
8 continue to place reliance on the competence and integrity of counsel, the involvement of a qualified
9 mediator, and the paucity of objectors to the settlement."); *Dunk*, 48 Cal. App. 4th at 1802.

10 The Parties attended an arms-length mediation session with Louis Marlin, a respected and
11 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
12 for the mediation, Defendant provided Class Counsel with necessary information for the members of
13 the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiff
14 analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and submitted
15 a mediation brief and damage valuation to the Mediator. At the conclusion of the all-day mediation,
16 the Parties agreed to this Settlement. The final settlement terms were negotiated and set forth in the
17 Agreement now presented for this Court's approval. Decl. Nordrehaug at ¶ 5. Importantly, Plaintiff
18 and Class Counsel believe that this Settlement is fair, reasonable and adequate.

19 As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is
20 One Million Five Hundred Thousand Dollars (\$1,500,000). The Settlement is all-in with no reversion
21 to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

22 Class Counsel has conducted a thorough investigation into the facts of the class action. Over
23 the course of more than a year, Class Counsel has diligently evaluated the Class Members' claims

24
25 ³ The release applicable to the Class is appropriately tethered to allegations in the Action and the
26 "Released Class Claims" are defined as "all claims pled in the Action, as well as all predicate claims
27 that could have been pled based on the factual allegations and legal theories contained in the Action,
28 during the Class Period. The release expressly excludes all other claims, including claims for vested
benefits, wrongful termination, unemployment insurance, disability, social security, and workers'
compensation, and claims outside of the Class Period and PAGA claims outside of the PAGA Period."
(Agreement at ¶ III(F)(1).)

1 against Defendant. Prior to the settlement negotiations, counsel for Defendant provided Class Counsel
2 with access to necessary information for the Class. In addition, Class Counsel previously negotiated
3 settlements with other employers in actions involving nearly identical issues and analogous defenses.
4 Based on the foregoing data and their own independent investigation, evaluation and experience, Class
5 Counsel believes that the settlement with Defendant on the terms set forth in the Agreement is fair,
6 reasonable, and adequate and is in the best interest of the Class in light of all known facts and
7 circumstances, including the risk of significant delay, defenses asserted by Defendant, and potential
8 appellate issues. Decl. Nordrehaug at ¶ 14.

9 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and trying
10 this Action against Defendant through possible appeals which could take several years. Class Counsel
11 has also taken into account the uncertain outcome and risk of litigation, especially in complex class
12 actions such as this Action. Class Counsel is also mindful of and recognize the inherent problems of
13 proof under, and alleged defenses to, the claims asserted in the Action. Based upon their evaluation,
14 Plaintiff and Class Counsel have determined that the Settlement set forth in the Agreement is in the best
15 interest of the Class Members. Decl. Nordrehaug, ¶ 23.

16 Here, there can be no dispute that the litigation has been hard-fought with aggressive and
17 capable advocacy on both sides. The Parties were represented by experienced and capable counsel who
18 zealously advocated their positions. Accordingly, “[t]here is likewise every reason to conclude that
19 settlement negotiations were vigorously conducted at arms’ length and without any suggestion of undue
20 influence.” *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. at 1392.

21 **2. The Settlement Has No "Obvious Deficiencies" and Falls Well Within** 22 **the Range for Approval**

23 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
24 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
25 receive payment according to the same formula. (Agreement at ¶ III(E)(2).) After the proposed
26 deductions are made, the Net Settlement Amount provides of \$1,576 per Class Member and a value of
27 \$31 per work week. Decl. Nordrehaug, ¶6.

28 The calculations to compensate for the amount due to the Class Members at the time this

1 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
2 mediation. For the individuals whose claims are at issue in this Actions, Plaintiff analyzed the data for
3 putative class members and determined the potential maximum damages for the class claims. For the
4 Class, Plaintiff determined that the unpaid wages due to rounding were \$113,148, the maximum
5 potential meal period damages were estimated to be \$1,146,062 based on a maximum potential 47%
6 violation rate in the time records, the maximum rest period damages were estimated to be \$2,339,846
7 using a 100% violation rate because of an alleged facially illegal policy, and the off-the-clock damages
8 for donning and doffing were estimated to be \$605,520, and the alleged unpaid business expenses for
9 cell phone usage were estimate to be \$203,166. In total, the damages for the Class were calculated to
10 have a maximum total value of \$4,407,742. In addition, Plaintiff calculated that the maximum value
11 of the waiting time penalties were \$1,745,556 and the maximum value of the wage statement penalties
12 were \$1,239,900, however, these wage statement and waiting time penalties claims potentially have
13 a much smaller value, even if damages were awarded, to the extent that they are derivative of the meal
14 and rest break claims.⁴ Decl. Nordrehaug, ¶6.

15 Consequently, the Gross Settlement Amount of \$1,500,000 represents more than 34% of the
16 value of the potential maximum damages at issue for the Class in this case, assuming these amounts
17 could all be proven in full at trial.⁵ The above maximum calculations should then be adjusted in
18 consideration for both the risk of certification and the risk of establishing class-wide liability on all
19 claims. Given the amount of the Settlement as compared to the potential value of the claims, the

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

⁵ Because the PAGA claim does not provide a recovery to the Class, Plaintiff did not included the
PAGA claim in this discussion. The PAGA claim is addressed in the Decl. Nordrehaug at ¶ 33.

1 Settlement is most certainly fair and reasonable.⁶ Clearly, the goal of this litigation has been met. Decl.
2 Nordrehaug, ¶6.

3 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
4 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
5 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
6 asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued that the
7 off-the-clock work did not occur as it was against company policy and that the rounding was neutral
8 on its face and therefore lawful under case law. See e.g. *AHMC Healthcare, Inc. v. Superior Court*,
9 24 Cal. App. 5th 1014 (2018); *Silva v. See's Candy Shops, Inc.*, 7 Cal. App. 5th 235 (2016). Defendant
10 also contend that their meal and rest period policies fully complied with California law and that
11 Defendant's timekeeping system recorded meal periods, and was not required to record rest periods.
12 Finally, Defendant could also argue that the recent Supreme Court decision in *Brinker v. Superior*
13 *Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiff's claims, on liability, value, and class certifiability
14 as to the meal and rest period claims. Defendant also argued that it acted in good faith and without
15 willfulness, which if accepted would negate the claims for waiting time penalties and/or inaccurate
16 wage statements. In fact, under the current state of the law, it is questionable whether these penalties
17 could be awarded at all based upon the alleged meal and rest period violations. If successful,
18 Defendant's defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiff
19 believes that these defenses could be overcome, Defendant maintains these defenses have merit and
20 therefore present a serious risk to recovery by the Class. Decl. Nordrehaug, ¶ 24.

21 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
22 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
23 Defendant argued that the individual experience of each putative class member varied with respect to
24 the claims. Defendant could also contest class certification by arguing injury and good faith were case

25
26 ⁶ See *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
27 approving settlement which represented "roughly one-sixth of the potential recovery"; *Stovall-Gusman*
28 *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.")

1 by case determinations that precluded class certification. Plaintiff is aware of cases where class
2 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
3 (2019) (denying certification of meal and rest break claims). Defendant also contended that individual
4 differences in work experiences not only impacted damages but would also impact certification.
5 Finally, even if class certification was successful, as demonstrated by the California Supreme Court
6 decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to
7 overcome for a class wide recovery even where the class has been certified. While other cases have
8 approved class certification in wage and hour claims, class certification in this action would have been
9 hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug, ¶ 25.

10 After arm's length negotiations between experienced and informed counsel, the Parties
11 recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of
12 \$1,402,500. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

13 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,
14 and likely duration of further litigation likewise favors the settlement. Regardless of
15 how this Court might have ruled on the merits of the legal issues, the losing party likely
16 would have appealed, and the parties would have faced the expense and uncertainty of
17 litigating an appeal. 'The expense and possible duration of the litigation should be
18 considered in evaluating the reasonableness of [a] settlement.'"

19 2007 WL 221862, at *4 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458
20 (9th Cir. 2000)).

21 **3. The Settlement Does Not Improperly Grant Preferential Treatment To** 22 **Class Representatives or Segments Of The Class**

23 The relief provided in the Settlement will benefit all members of the Class. The Settlement does
24 not grant preferential treatment to Plaintiff or segments of the Class in any way. Payments to the Class
25 Members are all determined under a neutral methodology. Each Participating Class Member who is will
26 receive the same opportunity to participate in and receive payment through a neutral formula that is
27 based upon the weeks worked by that individual. Decl. Nordrehaug, ¶4.

28 Plaintiff will apply to the Court for Class Representative Service Payment in consideration for
his service and for the risks undertaken on behalf of the class. (Agreement at ¶ III(B)(1).) Plaintiff
performed his duty admirably by working with Class Counsel. Decl. Nordrehaug at ¶27. At this stage,
the requested service award of \$10,000 are well within the accepted range of awards for purposes of

1 preliminary approval. *See e.g. Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S. Dist. LEXIS 71386 (E.D.
2 Cal. 2018) (awarding \$12,500 where average class member payment was \$351); *Holman v. Experian*
3 *Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving \$10,000 service
4 award where class member recovery was \$375); *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008
5 WL 4473183, *7 (S.D.Cal. Oct. 06, 2008) (awarding \$25,000 service award to each of six plaintiffs
6 in overtime class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. Jan. 27 2007)
7 (awarding \$25,000 service award in overtime class action and a pool of \$100,000 in enhancements).
8 As explained in *Glass*, service awards are routinely awarded to class representatives to compensate the
9 employees for the time and effort expended on the case, for the risk of litigation, for the fear of suing
10 an employer and retaliation there from, and to serve as an incentive to vindicate the statutory rights of
11 all employees. 2007 WL 221862 at *16-17.

12 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit** 13 **Preliminary Approval Of The Settlement**

14 The stage of the proceedings at which this Settlement was reached also militates in favor of
15 preliminary approval and ultimately, final approval of the Settlement. Class Counsel has conducted
16 a thorough investigation into the facts of the class action. Class Counsel began investigating the Class
17 Members' claims before the Action were filed. Class Counsel engaged in formal discovery and
18 conducted a review and analysis of the relevant documents and data. Class Counsel was also
19 experienced with the claims at issue here, as Class Counsel previously litigated and settled similar
20 claims in other actions. Accordingly, the agreement to settle did not occur until Class Counsel
21 possessed sufficient information to make an informed judgment regarding the likelihood of success on
22 the merits and the results that could be obtained through further litigation. Decl. Nordrehaug at ¶28.

23 Based on the foregoing data and their own independent investigation and evaluation, Class
24 Counsel is of the opinion that the Settlement with Defendant for the consideration and on the terms set
25 forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light
26 of all known facts and circumstances, including the risk of significant delay, defenses asserted by
27 Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both
28 parties possessed sufficient information to make an informed judgment regarding the likelihood of

1 success on the merits and the results that could be obtained through further litigation. Decl.
2 Nordrehaug at ¶29.

3 **V. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES ONLY**

4 Plaintiff contends that the proposed settlement meet all of the requirements for class
5 certification under California Code of Civil Procedure § 382 as demonstrated below, and therefore, the
6 Court may appropriately approve the Class as defined in the Agreement. This Court should
7 conditionally certify the Class for settlement purposes only, defined as follows:

8 All individuals who are or previously were employed by Defendant in California who
9 were classified as non-exempt employees at any time during the Class Period.

10 (Agreement at ¶ I(C).)

11 The Class Period is from June 2, 2016 to June 15, 2021. (Agreement at ¶ I(J).)

12 **A. California Code of Civil Procedure § 382**

13 Plaintiff seeks certification of this Class for settlement purposes under California Code of Civil
14 Procedure § 382. The California Supreme Court has summarized the standard for determining whether
15 class certification is appropriate as follows:

16 Code of Civil Procedure Section 382 authorizes class actions “when the question is one
17 of a common or general interest, of many persons, or when the parties are numerous,
18 and it is impracticable to bring them all before the court....” The party seeking
19 certification has the burden to establish the existence of both an ascertainable class and
20 a well-defined community of interest among class members. (*citations omitted*). The
“community of interest” requirement embodies three factors: (1) predominant common
questions of law or fact; (2) class representatives with claims or defenses typical of the
class; and (3) class representatives who can adequately represent the class.

21 *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004).

22 While Defendant reserves all rights to dispute that the Plaintiff can satisfy these requirements,
23 the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
24 for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
settlement only. (Agreement at ¶ II(E).)

25 **B. The Proposed Class Is Ascertainable and Numerous**

26 Plaintiff brings this action on behalf of a Class of non-exempt employees during the applicable
27 Class Period. Plaintiff assert that all of these individuals are ascertainable because the class members
28 can readily be determined through examination of Defendant’s files. Given that the Class consists of

1 approximately 590 members, Plaintiff maintains that numerosity is clearly satisfied. *See Bowles v.*
2 *Superior Court*, 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of*
3 *Hayward*, 126 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.)
4 Here, Plaintiff assert that the 590 current and former employees that comprise the Class can be
5 identified based on Defendant's records and are sufficiently numerous for class certification. Decl.
6 Nordrehaug at ¶30.

7 **C. Common Issues of Law and Fact Predominate**

8 Predominance of common issues of law or fact does not require that the common issues be
9 dispositive of the entire controversy or even that they be dispositive of all liability issues. 1 *Newberg*
10 *on Class Actions*, Section 4.25 at 4-82, 4-83 (1992). "Predominance is a comparative concept, and 'the
11 necessity for class members to individually establish eligibility and damages does not mean individual
12 fact questions predominate.'" *Sav-On*, 34 Cal. 4th at 334.

13 Commonality exists if there is a predominant common legal question regarding how an
14 employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,
15 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its
16 drivers.") Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the
17 certification stage since the question is "essentially a procedural one that does not ask whether an action
18 is legally or factually meritorious." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

19 Here, Plaintiff contends that common questions of law and fact are present, and specifically the
20 common questions of whether the Defendant failed to provide meal and rest periods, whether class
21 members worked off the clock, whether Defendant's rounding practices were facially lawful, whether
22 Defendant failed to reimburse for necessary cell phone expenses, and whether Class Members are
23 entitled to damages and/or penalties as a result of these practices. Decl. Nordrehaug, ¶30. Defendant
24 disputes that common questions predominate but will not oppose such a finding for purposes of this
25 Settlement only.

26 **D. The Claims of the Plaintiff Are Typical of the Class Claims**

27 The typicality requirement requires the Plaintiff to demonstrate that the members of the class
28 have the same or similar claims as the Plaintiff. "The typicality requirement is met when the claims

1 of the [p]laintiff arise from the same event or are based on the same legal theories.” *Tate v.*
2 *Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In *Hanlon*, *supra*, 150 F.3d at 1020, the Ninth
3 Circuit held that “[u]nder the rule’s permissive standards, representative claims are ‘typical’ if they are
4 reasonably coextensive with those of absent class members; they need not be substantially identical.”

5 In the instant case, Plaintiff contends that there can be little doubt that the typicality requirement
6 is satisfied. The Plaintiff, like every other member of the Class, worked for Defendant as non-exempt
7 employee during the Class Period. Plaintiff contends that, like every other member of the Class, he was
8 subject to the same practices and policies of Defendant and would be subject to the same defenses.
9 Thus, Plaintiff asserts that the claims of the Plaintiff and the Class Members arise from the same course
10 of conduct by the Defendant, involve the same employment policies and practices of Defendant, and
11 are based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of settlement, Plaintiff
12 asserts that the typicality requirement is met as to the common issues presented in this case. Defendant
13 do not oppose a finding of typicality for purposes of this Settlement only.

14 **E. The Class Representation Fairly and Adequately Protected the Class**

15 Plaintiff contends that the Class Members are adequately represented here because Plaintiff and
16 representing counsel (a) do not have any conflicts of interest with other class members, and (b) will
17 prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is
18 met here. First, Plaintiff is well aware of his duties as the representative of the Class and has actively
19 participated in the prosecution of this case to date. He effectively communicated with counsel,
20 provided documents to counsel and participated in the investigation and negotiations in the Action.
21 Second, Plaintiff retained competent counsel who are experienced in employment class actions and who
22 have no conflicts. Decl. Nordrehaug at ¶ 31. Third, there is no antagonism between the interests of the
23 Plaintiff and those of the Class. Both the Plaintiff and the Class Members seek monetary relief under
24 the same set of facts and legal theories. Defendant disputes that the adequacy requirement is satisfied
25 but will not oppose such a finding for purposes of this Settlement only.

26 **F. The Superiority Requirement Is Met**

27 To certify a class, the Court must also determine that a class action is superior to other available
28 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of

1 common issues will reduce litigation costs and promote greater efficiency, a class action may be
2 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
3 1996). As courts have previously observed:

4 Absent class treatment, each individual plaintiff would present in separate, duplicative
5 proceedings the same or essentially the same arguments and evidence, including expert
6 testimony. The result would be a multiplicity of trials conducted at enormous expense
7 to both the judicial system and the litigants. “It would be neither efficient nor fair to
8 anyone, including defendants, to force multiple trials to hear the same evidence and
9 decide the same issues.”

10 *Sav-On*, 34 Cal. 4th at 340, citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991).

11 Here, Plaintiff contends that a class action is the superior mechanism for resolution of the claims
12 as pled by the Plaintiff. While Defendant disputes that class treatment is superior, Defendant does not
13 dispute a finding of superiority in this action for purposes of this Settlement only.

14 **VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE**

15 The Court has broad discretion in approving a practical notice program. The Parties have
16 agreed upon procedures by which the Class Members will be provided with written notice of the
17 Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance
18 with the Agreement, Defendant will provide to the Settlement Administrator a confidential electronic
19 spreadsheet containing the Class Data. (Agreement at ¶ III(E)(2).) Within 14 days after receiving the
20 Class Data, the Settlement Administrator will mail the Class Notice Packets to all Class Members via
21 first-class U.S. Mail using the most current mailing address information available. (Agreement at ¶
22 III(E)(2).)

23 The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel
24 and to be approved by the Court, includes all relevant information. (See Exhibit “A” to the Agreement.)
25 The Class Notice will include, among other information: (i) information regarding the Actions; (ii) the
26 impact on the rights of the Class Members if they do not opt out; (iii) information to the Class Members
27 regarding how to opt out and how to object to the Settlement; (iv) the estimated Settlement Share for
28 each of the Class Members; (v) the amount of attorneys’ fees and expenses to be sought; (vi) the
amount of the Plaintiff’s service award request; and (vi) the anticipated expenses of the Settlement
Administrator. Decl. Nordrehaug at ¶32.

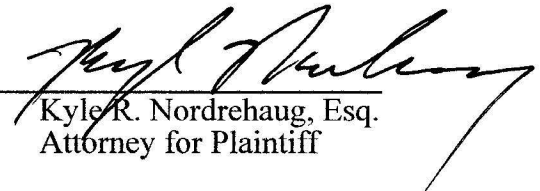
1 The Class Notice will state that the Class Members shall have forty-five (45) days from the date
2 that the Notice is mailed to them to request exclusion (opt-out) or to submit an objection. (Agreement
3 at ¶ III(E)(3).) Class Members shall be given the opportunity to object to the Settlement and/or requests
4 for attorneys' fees and expenses and to appear at the Final Approval Hearing. (Agreement at ¶
5 III(E)(3).) Class Members who do not submit a timely and proper request to opt-out will automatically
6 receive a payment of their Settlement Share. This notice program was designed to meaningfully reach
7 the Class Members and it advises them of all pertinent information concerning the Settlement. Decl.
8 Nordrehaug at ¶32. The mailing and distribution of the Class Notice satisfies the requirements of due
9 process and is the best notice practicable under the circumstances and complies with Rules of Court
10 3.766 and 3.769(f).

11
12 **VII. CONCLUSION**

13 Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement and
14 sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final
15 fairness hearing for a date that is at least one hundred twenty (120) days from the date of Preliminary
16 Approval.

17 Dated: November 2, 2021

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

18
19 By: 

Kyle R. Nordrehaug, Esq.
Attorney for Plaintiff