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13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15
16 **IN AND FOR THE COUNTY OF SAN BERNARDINO**
17

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

21 Plaintiff,

22 vs.

23 DSV SOLUTIONS, LLC, a Limited
24 Liability Company; and DOES 1 through
25 50, inclusive,

26 Defendants.

CASE No. **CIVDS2010345**

[Consolidated with case no. CIVDS2018614]

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

Hearing Date: April 26, 2022

Hearing Time: 10:00 a.m.

[Hearing Set by Order dated December 1, 2021]

Judge: Hon. David Cohn

Dept: S26

Date Filed: June 2, 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 Class Action Settlement Agreement (the “Agreement”), a true and correct copy of which is attached as
4 Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In accordance with the
5 Preliminary Approval Order dated December 1, 2021 (“Preliminary Approval Order”), the approved
6 Class Notice has been disseminated to the Class.²

7 The purpose of this hearing is to determine whether the proposed settlement of the litigation
8 should be finally approved. Plaintiff Fernando Alcocer, Jr. ("Plaintiff") respectfully submits this
9 memorandum in support of the unopposed motion for final approval and the proposed entry of the Final
10 Approval Order and Judgment, submitted herewith. The settlement represents an excellent result for
11 the Class and avoids the delays, risks, and costs of further litigation. After disseminating notice to the
12 members of the Class, currently there are no objections and no opt outs, which means that the entire
13 Class has elected to participate in the Settlement, and the final results will be presented after the April
14 4, 2022 response deadline. Blumenthal Decl. ¶4. This is a positive response from the Class evidencing
15 their collective approval of the settlement. As a result, Plaintiff respectfully submits that the class
16 settlement should be finally approved for the same reasons that the Court preliminarily approved the
17 settlement as fair, reasonable, and adequate.

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

19 Pursuant to the Court’s instructions, the following is a table of the key financial terms of the
20 Settlement and the proposed deductions:

21 **\$1,500,000** (Gross Settlement Amount)
22 - \$10,000 (Plaintiff’s proposed service award - not to exceed \$10,000)
23 - \$20,000 (Class Counsel Litigation Expenses Payment - not to exceed \$20,000)
24 - \$500,000 (Class Counsel Fees Payment)
25 - \$25,000 (PAGA Payment - 75% to LWDA / 25% to Aggrieved Employees)
26 - \$15,000 (Settlement Administration Expenses - not to exceed \$15,000)
27 **\$930,000** (Net Settlement Amount)

28 ¹ Capitalized terms are defined in the Agreement.

² The “Class” is “all individuals who are or previously were employed by Defendant in California
who were classified as non-exempt employees at any time during the Class Period.” (Preliminary
Approval Order at ¶ 6.) The “Class Period” is June 2, 2016 to June 15, 2021. (*Ibid.*)

1 There are 559 Participating Class Members who worked a total of 32,327 workweeks in the Class
2 Period, and as such, the Net Settlement Amount provides an average recovery of \$1,663 per Class
3 Member and a recovery of \$28.76 per work week, with some Class Members receiving as much as
4 \$7,600 each.

5 Plaintiff and Defendant DSV Solutions, LLC ("Defendant") reached a full and final settlement
6 of the above-captioned action, which is set forth in the Agreement filed concurrently with the Court.
7 As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is One
8 Million Five Hundred Thousand Dollars (\$1,500,000). (Agreement at ¶ I(S).) Under the Settlement,
9 the Gross Settlement Amount consists of the following elements: (1) payment of the Settlement Shares
10 to the Class; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3)
11 Settlement Administration Expenses; (4) the Class Representative Service Payment to Plaintiff; and (5)
12 the PAGA Payment. (Agreement at ¶ III (B)-(C).) Blumenthal Decl. ¶3(a).

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

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

20 The Net Settlement Amount shall equal the net amount available for payment to the Class after
21 deducting the Court-approved amounts for the (1) Class Counsel Fees Payment; (2) Class Counsel
22 Litigation Expenses Payment; (3) Class Representative Service Payment; (4) the Settlement
23 Administration Expenses, and (5) the PAGA Payment, from the Gross Settlement Amount. (Agreement
24 at ¶ I(U).) The Net Settlement Amount will be distributed as the Settlement Shares to the Class
25 Members who do not timely request exclusion ("Participating Class Members"). (Agreement at ¶¶ I(X)
26 and III(E)(1).) The Settlement Share will be calculated by: (a) dividing the Net Settlement Amount by
27 the total number of Workweeks included in the Class Data to determine a dollar amount per week
28

1 ("Weekly Rate"); and (iii) the Settlement Administrator shall then take the number of Workweeks
2 worked by each Participating Class Member and multiply it by the Weekly Rate to calculate their
3 Settlement Share. (Agreement at ¶ III(C)(2).) Workweeks are based on Defendant's records, however
4 Class Members will have the right to challenge the number of workweeks. Blumenthal Decl. ¶ 3(d).

5 Class Members were sent the Court approved Class Notice using the procedure approved by the
6 Court by mailing the notice packets after updating class members' addresses using the National Change
7 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to any
8 forwarding address provided or updated address located. Class Members were provided with the
9 opportunity to exclude themselves or "opt out" if they did not want to participate in the settlement.
10 (Agreement at ¶ III(E)(3).) Class Members who did not "opt out" are deemed Participating Class
11 Members who are bound by the Settlement and will be mailed a settlement payment. (Agreement at ¶
12 III(E)(3)(c).) The Class Notice also advised Class Members of their right to object to the Settlement,
13 either by filing written objections or by appearing at the final approval hearing to make an oral
14 objection. Blumenthal Decl. ¶ 3(e).

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

20 ILYM Group was appointed by the Court as the Settlement Administrator for the Settlement.
21 (Agreement at ¶ III(D); Preliminary Approval Order at ¶ 10.) From the Gross Settlement Amount, the
22 Settlement Administrator shall be paid for the expenses of effectuating and administering the Settlement.
23 (Agreement at ¶ III(B)(4).) The Settlement Administrator shall receive payment for services in an
24 amount not to exceed \$15,000. (Agreement at ¶ IV(D)(4).) The actual Settlement Administration
25 Expenses will be documented in the Declaration of Madely Nava (Settlement Administrator) to be filed
26 after the April 4, 2022 response deadline and in advance of the hearing. Blumenthal Decl. ¶3(g).

27 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
28 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement

1 at ¶ III(B)(2).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
2 Litigation Expenses Payment in an amount not to exceed \$20,000. (Agreement at ¶ III(B)(2).) Subject
3 to Court approval, the Agreement provides for a payment of no more than \$10,000 to the Plaintiff as his
4 Class Representative Service Payment. (Agreement at ¶ III(B)(1).) In support of this separate motion
5 for attorneys' fees, expenses and service awards, Class Counsel is providing evidentiary support, for
6 these requests, including lodestar. Blumenthal Decl. ¶3(h).

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

15 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
16 the same reasons the Court granted preliminary approval to the settlement, agreeing that "the Settlement
17 is fair, adequate and reasonable when balanced against the probable outcome of further litigation and
18 the significant risks relating to certification, liability and damages issues." (Preliminary Approval Order
19 at ¶ 4.) In sum, this settlement valued at \$1,500,000 is an excellent result for the Class. This result is
20 particularly favorable in light of the fact that liability and class certification in this case were far from
21 certain in light of the defenses asserted by Defendant. There have been no objections to the Settlement.
22 Given the complexities of this case, the defenses asserted, the uncertainty of class certification, along
23 with the uncertainties of proof at trial and appeal, the proposed settlement is fair, reasonable and
24 adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

25 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL** 26 **OF CLASS ACTION SETTLEMENTS**

26 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
27 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
28

1 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*
2 *v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
3 the preferred means of dispute resolution. This is especially true in 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.*, 48 Cal. App. 4th 1794, 1801 (1996) (citing
6 *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579 (1980).) The
7 court must decide whether the proposed settlement falls within the range of reasonable settlements,
8 taking into account that settlements are compromises between the parties reflecting subjective,
9 unquantifiable judgments concerning the risks and possible outcomes of litigation. See *Wershba v.*
10 *Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) ("The proposed settlement is not to be judged against
11 a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at
12 trial.") In *Wershba*, appellants argued that the settlement was too low given the "clear" liability,
13 however, the Court rejected this argument and held that "the merits of the underlying class claims are
14 not a basis for upsetting the settlement of a class action." *Id.*; see also *7-Eleven*, *supra*, at 1150.

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

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

27 The court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v. Ford*
28 *Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); see also *Officers for Justice v. Civil Service Com'n*, 688

1 F.2d 615, 625 (9th Cir. 1982). The purpose of the requirement is "the protection of those class members,
2 including the named plaintiffs, whose rights may not have been given due regard by the negotiating
3 parties." *Dunk, supra*, at 1801.

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

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

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

22 **A. The Settlement Satisfies the California Test for Fairness**

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

25 Over the course of nearly two (2) years of litigation, the Parties engaged in the investigation
26 of the claims, including the production of documents, class data, and other information, allowing for
27 the full and complete analysis of liabilities and defenses to the claims in this Action. The procedural
28 history and investigation performed was detailed at length in support of the motion for preliminary

1 approval. The Settlement was the product of an arms length mediation and contentious negotiations
2 through an all-day mediation presided over Louis Marlin, Esq., a respected and experienced
3 mediator of wage and hour class actions. The details of the litigation are set forth in the Blumenthal
4 Decl. at ¶¶ 6(a)-6(g).

5 2. The Settlement was Reached Through Arm's Length Bargaining

6 This settlement is the result of extensive and hard fought litigation as well as negotiations
7 before an experienced and well-respected mediator. Defendant has expressly denied and continues
8 to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff
9 and Class Counsel have determined that it is desirable and beneficial to the Class to resolve the
10 claims of the Class in accordance with this Settlement. Class Counsel are experienced and qualified
11 to evaluate the class claims, the viability of the defenses asserted, and the risks and benefits of trial
12 and settlement, and Class Counsel are experienced in wage and hour employment law class actions,
13 as Class Counsel has previously litigated and certified similar claims against other employers.
14 Blumenthal Decl. ¶7(a).

15 The Parties attended an arms-length mediation sessions with Louis Marlin, Esq., a respected
16 and experienced mediator of wage and hour class actions, in order to reach this settlement. In
17 preparation for the mediation, Defendant provided Class Counsel with necessary information for the
18 members of the Class, including time data, payroll data and data concerning the composition of the
19 Class. Plaintiff analyzed the data with the assistance of damages expert, Berger Consulting Group,
20 and prepared and submitted a mediation brief to the Mediator. At the conclusion of the all-day
21 mediation, the Parties agreed to this Settlement. Blumenthal Decl. ¶7(b).

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

28 From April 2021 through September 2021, the settlement agreement and exhibits thereto

1 were finalized and executed. On November 2, 2021, Plaintiff filed the motion for preliminary
2 approval of the class settlement. At the hearing on December 1, 2021, the Court issued the
3 Preliminary Approval Order granting preliminary approval of the settlement as fair and reasonable to
4 the Class. Blumenthal Decl. ¶7(c).

5 3. Class Counsel is Experienced in Similar Litigation

6 Class Counsel in this matter has extensive class action experience and has represented
7 thousands of persons in class actions including employment litigation, wage and hour class actions,
8 and complex litigation. Class Counsel has previously litigated wage and hour class actions
9 involving employees and claims similar to this case and have been approved as experienced class
10 counsel during contested motions in state and federal courts throughout California. As such, Class
11 Counsel is experienced and knowledgeable in this area of law. Class Counsel have participated in
12 every aspect of the settlement discussions and have concluded the settlement is fair, adequate and
13 reasonable and in the best interests of the Class. Blumenthal Decl. ¶ 2.

14 4. There Are No Objections and No Opt Outs

15 The reaction of the Class unequivocally supports approval of the Settlement. On February
16 18, 2022, the Settlement Administrator mailed the Court-approved Class Notice to the Class
17 Members, which provided each class member with the terms of the Settlement, including notice of
18 the claims at issue and the financial terms of the settlement, including the attorneys' fees, costs, and
19 service award that were being sought, how individual settlement awards would be calculated, and the
20 specific, estimated payment amount to that individual, of their right to request exclusion from the
21 Settlement, object to the Settlement, do nothing, and the implications of each such action. In
22 disseminating the notice, the Settlement Administrator followed the notice procedures authorized by
23 the Court in its Preliminary Approval Order. Currently, there have been no objections and no opt
24 outs. As such, the entire Class is currently participating in the Settlement and will be sent a
25 settlement check. The final details of the notice process will be documented in the Declaration of
26 Madely Nava (Settlement Administrator) to be filed after the April 4, 2022 response deadline and in
27 advance of the hearing. Blumenthal Decl. ¶4.

28 The absence of any objector strongly supports the fairness, reasonableness and adequacy of

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

8 5. The Strength of Plaintiff's Case

9 The Action generally alleges that Plaintiff and other Class Members were not properly paid
10 minimum wages or overtime wages due to work performed off-the-clock, were not timely provided
11 with meal and rest periods, were not provided accurate itemized wage statements, were not
12 reimbursed for required business expenses and were not paid wages when due. The Action seeks
13 unpaid wages, penalties, attorney fees, litigation costs, and any other equitable or legal relief
14 allegedly due and owing to Plaintiff and the other Class Members by virtue of the foregoing claims.
15 Blumenthal Decl. ¶5.

16 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
17 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
18 Defendant present serious threats to the claims of the Plaintiff and the other Class Members.
19 Defendant asserted that Defendant's practices complied with all applicable Labor laws. Defendant
20 argued that the off-the-clock work did not occur as it was against company policy and that the
21 rounding was neutral on its face and therefore lawful under case law. See e.g. *AHMC Healthcare,*
22 *Inc. v. Superior Court*, 24 Cal. App. 5th 1014 (2018); *Silva v. See's Candy Shops, Inc.*, 7 Cal. App.
23 5th 235 (2016). Defendant also contend that their meal and rest period policies fully complied with
24 California law and that Defendant's timekeeping system recorded meal periods, and was not required
25 to record rest periods. Finally, Defendant could also argue that the recent Supreme Court decision in
26 *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiff's claims, on liability, value,
27 and class certifiability as to the meal and rest period claims. Defendant also argued that it acted in
28 good faith and without willfulness, which if accepted would negate the claims for waiting time

1 penalties and/or inaccurate wage statements. In fact, under the current state of the law, it is
2 questionable whether these penalties could be awarded at all based upon the alleged meal and rest
3 period violations. If successful, Defendant's defenses could eliminate or substantially reduce any
4 recovery to the Class. While Plaintiff believes that these defenses could be overcome, Defendant
5 maintains these defenses have merit and therefore present a serious risk to recovery by the Class.
6 Blumenthal Decl. ¶8(a).

7 In a similar wage and hour case, the federal district court in *Hopson v. Hanesbrands Inc.*,
8 2009 U.S. Dist. LEXIS 33900 (N.D. Cal. 2009), explained in approving an overtime class action
9 settlement:

10 Plaintiffs may have a strong case, but the risks inherent in continued litigation are
11 great. Defendants strongly deny liability for Plaintiffs' principal claim that full-time
12 Service Associates were misclassified as exempt. In addition to the uncertainties
13 raised by Defendants at the preliminary stage regarding Plaintiffs' chance of success
14 in this case, 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. [...T]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.

15 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); see also *Browning v. Yahoo!, Inc.*, 2007
16 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case,
17 legal uncertainties at the time of settlement - particularly those which go to fundamental legal issues
18 - favor approval.") As recognized in a federal decision approving settlement of an overtime wage
19 class action:

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

28 *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).

There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
to obtain class certification and thereby not recover on behalf of any employees other than

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

13 In sum, the Settlement is a fair and reasonable result, and provides the Class with a
14 significant recovery, particularly when viewed in light of the fact that the Defendant asserted serious
15 and substantial defenses both to liability and to class certification. Currently, the maximum and
16 average class member allocation are \$7,603 and \$1,663, respectively. Given the complexities of this
17 case, the defenses, along with the uncertainties of proof and appeal, the proposed Settlement is fair,
18 reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

27 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and
28 trying this Action against Defendant through possible appeals which could take several years. Class

1 Counsel has also taken into account the uncertain outcome and risk of litigation, especially in
2 complex class actions such as this Actions. Class Counsel is also mindful of and recognize the
3 inherent problems of proof under, and alleged defenses to, the claims asserted in the Action. Based
4 upon their evaluation, Plaintiff and Class Counsel have determined that the Settlement set forth in
5 the Agreement is in the best interest of the Class Members. Blumenthal Decl. ¶8(c).

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

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

18 *Id.* at *12.

19 7. The Amount Offered in Settlement

20 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
21 to Plaintiff's claims. As detailed during preliminary approval, the Gross Settlement Amount
22 compares favorably to the value of the claims.

23 The calculations to compensate for the amount due to the Class Members at the time this
24 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
25 mediation. For the individuals whose claims are at issue in this Actions, Plaintiff analyzed the data
26 for putative class members and determined the potential maximum damages for the class claims. For
27 the Class, Plaintiff determined that the unpaid wages due to rounding were \$113,148, the maximum
28 potential meal period damages were estimated to be \$1,146,062 based on a maximum potential 47%
violation rate in the time records, the maximum rest period damages were estimated to be \$2,339,846
using a 100% violation rate because of an alleged facially illegal policy, and the off-the-clock
damages for donning and doffing were estimated to be \$605,520, and the alleged unpaid business

1 expenses for cell phone usage were estimate to be \$203,166. In total, the damages for the Class were
2 calculated to have a maximum total value of \$4,407,742. In addition, Plaintiff calculated that the
3 maximum value of the waiting time penalties were \$1,745,556 and the maximum value of the wage
4 statement penalties were \$1,239,900, however, these wage statement and waiting time penalties
5 claims potentially have a much smaller value, even if damages were awarded, to the extent that they
6 are derivative of the meal and rest break claims.³ Blumenthal Decl. ¶8(d).

7 Consequently, the Gross Settlement Amount of \$1,500,000 represents more than 34% of the
8 value of the potential maximum damages at issue for the Class in this case, assuming these amounts
9 could all be proven in full at trial.⁴ The above maximum calculations should then be adjusted in
10 consideration for both the risk of certification and the risk of establishing class-wide liability on all
11 claims. Given the amount of the Settlement as compared to the potential value of the claims, the
12 Settlement is most certainly fair and reasonable.⁵ Clearly the goal of this litigation to obtain redress

13
14 ³ Importantly, while Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections
15 203 and 226, Plaintiff recognized that these claims were subject to various defenses asserted by
16 Defendant, including, but not limited to, a good faith dispute defense as to whether any premium wages
17 for meal or rest periods or other wages were owed given Defendant's position that Plaintiff was
18 properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There
19 is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether
20 and when the wages were due."). Consequently, the Gross Settlement Amount of \$1,500,000 represents
21 more than 34% of the value of the potential maximum damages at issue for the Class in this case,
22 assuming these amounts could all be proven in full at trial. The above maximum calculations should
23 then be adjusted in consideration for both the risk of certification and the risk of establishing class-wide
24 liability on all claims. Given the amount of the Settlement as compared to the potential value of the
25 claims, the Settlement is most certainly fair and reasonable. Additionally, Courts have held that
26 violations of the meal and rest period regulations, which require payment of a "premium wage" for each
27 improper meal period, do **not** give rise to claims under sections 203 and 226. *See Ling v. P.F. Chang's*
28 *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.

24 ⁴ Because the PAGA claim does not provide a recovery to the Class, Plaintiff has not included the
25 PAGA claim in this discussion. The PAGA claim was previously addressed in the motion for
26 preliminary approval in paragraph 33 of the Declaration of Nordrehaug in support of that motion.

27 ⁵ *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
28 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

1 for the class has been met by this settlement. Blumenthal Decl. ¶8(d).

2
3 **V. CONCLUSION**

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

7 Dated: March 30, 2022

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

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10 By:


11 Kyle R. Nordrehaug, Esq.
12 Attorneys for Plaintiff
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27 been awarded had they succeeded at trial.”); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D.
28 Cal. 2016) (approving wage and hour class action settlement amounting to 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).