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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF SAN DIEGO**

15 MARTINA AVERY, an individual, on
16 behalf of herself, and on behalf of all
17 persons similarly situated,

18 Plaintiff,

19 vs.

20 SLEEP DATA SERVICES LLC, a
21 California Limited Liability Company; and
22 Does 1 through 50, inclusive,

23 Defendants.

Case No. **37-2020-00032747-CU-OE-CTL**

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

Hearing Date: February 17, 2023

Hearing Time: 8:30 a.m.

*[Hearing scheduled by Orders dated June 16, 2022
and November 15, 2022]*

Dept.: C-74

Judge: Hon. Keri Katz

Action Filed: September 17, 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
4 as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In accordance with the
5 Preliminary Approval Order dated June 16, 2022 (“Preliminary Approval Order”), the approved Class
6 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 Martina Avery (“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 the notice to
12 the members of the Class, there were **no objections and no requests for exclusion**, which means that
13 the entire Class has elected to participate in the Settlement. Blumenthal Decl. ¶4. This is a positive
14 response from the Class evidencing their collective approval of the settlement. As a result, Plaintiff
15 respectfully submits that the class settlement should be finally approved for the same reasons that the
16 Court preliminarily approved the settlement as fair, reasonable, and adequate.

17 **II. THE SETTLEMENT BEFORE THE COURT**

18 Plaintiff and Defendant Sleep Data Services LLC (“Defendant”) reached a full and final
19 settlement of the above-captioned action, which is embodied in the Agreement filed concurrently with
20 the Court. As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant
21 is Two Hundred Seventy-Seven Thousand and Five Hundred Dollars (\$277,500) (Agreement at ¶¶ I(S)
22 and III(B).) Under the Settlement, the Gross Settlement Amount consists of the following elements:
23 (1) Settlement Shares to the Participating Class Members, (2) Settlement Administration Expenses, (3)
24 Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, (4) Class Representative

25 _____
26 ¹ Capitalized terms are defined in the Agreement.

27 ² The “Class” is defined as “all individuals who worked for Defendant in California as non-exempt
28 employees at any time during the Class Period.” The “Class Period” is defined as “April 22, 2019 to
 September 22, 2021.” (Preliminary Approval Order at ¶5.)

1 Service Payment, and (5) the PAGA Payment, and excluding any employer payroll taxes, if any, due
2 on the portion of the Settlement Shares allocated to wages which shall not be paid from the Gross
3 Settlement and shall be the separate additional obligation of Defendant.. (Agreement at ¶¶ I(S) and
4 III(B).) The Gross Settlement Amount does not include Defendant's share of payroll taxes.
5 (Agreement at ¶¶ I(S) and III(B).) The Gross Settlement Amount shall be all-in with no reversion to
6 Defendant. (Agreement at ¶¶ I(S) and III(B).) Blumenthal Decl. ¶3(a).

7 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay Defendant's
8 share of payroll taxes within thirty (30) days of the Effective Date. (Agreement at ¶ III(F)(9).) Within
9 fifteen (15) days after Defendant funds the Gross Settlement Amount, the Settlement Administrator will
10 make payment of all Class Settlement Shares to Participating Class Members. (Agreement at ¶
11 III(F)(9).) Blumenthal Decl. ¶3(b).

12 The Net Settlement Amount shall equal the Gross Settlement Amount less the Court approved
13 amounts for the Class Representative Service Payment, the Class Counsel Fees Payment, Class Counsel
14 Litigation Expenses Payment, the PAGA Payment, and the Settlement Administration Expenses.
15 (Agreement at ¶ I(U).) The Net Settlement Amount will be distributed as the Settlement Shares to the
16 Class Members who do not timely request exclusion ("Participating Class Member"). (Agreement at
17 ¶¶ III(D)(1).) The Settlement Share will be calculated as follows: (a) the Settlement Administrator shall
18 then divide the Net Settlement Amount by the total number of workweeks to determine a dollar amount
19 per week ("Weekly Rate"); and (b) the Settlement Administrator shall then take the number of weeks
20 worked by each Participating Class Member and multiply it by the Weekly Rate to calculate their
21 Settlement Share. (Agreement at ¶ III(D)(2).) Workweeks were based on Defendant's records, however
22 Class Members had the right to challenge the number of workweeks. Blumenthal Decl. ¶ 3(c).

23 Class Members were sent the Court approved Class Notice using the procedure approved by the
24 Court by mailing the notice packets after updating class members' addresses using the National Change
25 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
26 any forwarding address provided or updated address located. Declaration of Stephen Gomez ("Gomez
27 Decl.") ¶¶ 5-8. Class Members were provided with the opportunity to exclude themselves or "opt out"
28 if they did not want to participate in the settlement. (Agreement at ¶ III(F)(2), Ex. A.) Gomez Decl.

¶ 5, Exh. A. No Class Members submitted a request for exclusion. Gomez Decl. ¶ 13. As a result, all of the Class Members are deemed Participating Class Members who are bound by the Settlement and will be entitled to receive a Settlement Share. (Agreement at ¶ III(F)(3)(c).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be subject to the release of the PAGA Released Claims, whether or not they opt out of the Settlement. (Agreement at ¶ III(F)(3)(c).) The Class Notice also advised Class Members of their right to object to the Settlement and/or dispute their workweeks. (Agreement at ¶ III(F)(3)); Gomez Decl. ¶ 5, Exh. A.) Blumenthal Decl. ¶ 3(d).

A Participating Class Member must cash his or her Settlement Share check within 180 days after it is mailed. (Agreement at ¶ III(F)(10).) The Settlement Administrator will send a reminder to Participating Class Members who have not cashed their checks within 120 days after its last mailing to the affected individual. (Agreement at ¶ III(F)(10).) Any settlement checks not cashed within 180 days will be voided and any the funds from such uncashed checks will be paid to the California State Controller's Unclaimed Property Fund in the name of and for the benefit of the individual who did not cash their check. (Agreement at ¶ III(F)(10).) Blumenthal Decl. ¶ 3(e).

Simpluris was appointed by the Court as the Settlement Administrator for the Settlement. (Agreement at ¶ III(E).) From the Gross Settlement Amount, the Settlement Administrator shall be paid for the expenses of administering the Settlement in an amount not to exceed \$10,000. (Agreement at ¶ III(C)(4).) As set forth in the Gomez Decl. at ¶ 16, the Settlement Administration Expenses, including fees and costs incurred to-date, as well as anticipated fees and costs for completion of the settlement administration, are \$8,250.00. Blumenthal Decl. ¶ 3(f).

Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not to exceed one-third (1/3) of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement at ¶ III(C)(2).) Class Counsel will also be allowed to apply separately for an award of Class Counsel Litigation Expenses Payment in an amount not to exceed \$25,000. (Agreement at ¶ III(C)(2).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000 to the Plaintiff as the Class Representative Service Payment. (Agreement at ¶ III(C)(1).) In support of this separate motion for attorneys' fees, reimbursement of expenses and service awards, Class Counsel is providing evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶ 3(g).

1 Subject to Court approval, Twenty--Five Thousand Dollars (\$25,000) will be paid from the
2 Gross Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal.
3 Labor Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code §
4 2699(i), the PAGA Payment shall be allocated as follows: 75% (\$18,750) to the LWDA as the LWDA's
5 share of the PAGA Payment pursuant to PAGA and 25% (\$6,250) will be distributed to the Aggrieved
6 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at ¶
7 III(C)(3).) As set forth in the accompanying proof of service, the LWDA has been served with this
8 motion and the Agreement. Blumenthal Decl. ¶3(h).

9 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
10 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
11 is "fair, adequate and reasonable". (Preliminary Approval Order at ¶3.) In sum, the Settlement valued
12 at \$277,500 is an excellent result for the Class. This result is particularly favorable in light of the fact
13 that liability and class certification in this case were far from certain in light of the defenses asserted
14 by Defendant. Given the complexities of this case, the defenses asserted, the uncertainty of class
15 certification, along with the uncertainties of proof at trial and appeal, the proposed settlement is fair,
16 reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(i).

17 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL**
18 **OF CLASS ACTION SETTLEMENTS**

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

24 "[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
25 action requires court approval." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (*citing*
26 *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579 (1980).) The
27 court must decide whether the proposed settlement falls within the range of reasonable settlements,
28 taking into account that settlements are compromises between the parties reflecting subjective,

1 unquantifiable judgments concerning the risks and possible outcomes of litigation. *See Wershba v.*
2 *Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) (“The proposed settlement is not to be judged
3 against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed
4 at trial.”) In *Wershba*, appellants argued that the settlement was too low given the “clear” liability,
5 however, the Court rejected this argument and held that “the merits of the underlying class claims are
6 not a basis for upsetting the settlement of a class action.” *Id.*; *see also 7-Eleven, supra*, at 1150.

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

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

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

24 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*
25 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that the
26 trial court should consider in evaluating the reasonableness of a class action settlement agreement
27 include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further
28 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the

1 extent of discovery completed and the stage of the proceedings, the experience and views of counsel,
2 the presence of a governmental participant, and the reaction of the class members to the proposed
3 settlement.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (internal citations
4 omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L. A.*, 186 Cal. App. 4th 399, 408 (2010).

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

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

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

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

17 Over the course of more than two years of litigation, the Parties engaged in the investigation
18 of the claims, including the production of documents, class data, and other information, allowing for
19 the full and complete analysis of liabilities and defenses to the claims in this Action. The procedural
20 history and investigation performed was detailed at length in support of the motion for preliminary
21 approval. The Settlement was the product of one arms-length mediation and contentious negotiations
22 through an all-day mediation presided over by Hon. Louis Meisinger (Ret.), a respected jurist and
23 mediator of wage and hour representative and class actions. The details of the litigation are set forth
24 in the Blumenthal Decl. at ¶¶ 6(a)-6(g).

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

26 This Settlement is the result of extensive and hard-fought litigation as well as negotiations
27 before an experienced and well-respected mediator. Defendant has expressly denied and continues to
28 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and

1 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released
2 Class Claims in accordance with this Settlement. Class Counsel are experienced and qualified to
3 evaluate the class claims, the viability of the defenses asserted, and the risks and benefits of trial and
4 settlement, and Class Counsel are experienced in wage and hour class actions, as Class Counsel has
5 previously litigated and certified similar claims against other employers. Blumenthal Decl. ¶7(a).

6 The Parties attended an arms-length mediation session with Hon. Louis Meisinger (Ret.), a
7 respected and experienced mediator of wage and hour class actions, in order to reach this Settlement.
8 In preparation for the mediation, Defendant provided Class Counsel with necessary information for the
9 members of the Class, including time data, payroll data and data concerning the composition of the
10 Class. Class Counsel analyzed the data with the assistance of damages expert, Berger Consulting, and
11 prepared and submitted a mediation brief and damage valuation to the Mediator. At the conclusion of
12 the all-day mediation, the Parties agreed to this Settlement. Blumenthal Decl. ¶7(b).

13 The fact that the settlement was negotiated with the assistance of an experienced mediator
14 supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS*
15 *Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
16 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the
17 litigation, with the assistance of a well-respected mediator with substantial experience in employment
18 litigation[, and] this factor supports approval of the settlement”).

19 From September 2021 to February 2022, the settlement agreement and exhibits thereto were
20 finalized and executed. In an Order dated June 3, 2022, the Court issued a tentative ruling granting
21 preliminary approval and identifying modifications to be made to the class notice. On June 9, 2022,
22 Plaintiff filed a revised [Proposed] Preliminary Approval Order applying the modifications requested
23 by the Court. On June 16, 2022, the Court issued its Order granting preliminary approved of the
24 settlement as fair and reasonable to the Class. Due to some data issues, the parties stipulated to
25 continue the final approval hearing date to the current date to allow the notice process to be concluded.
26 Blumenthal Decl. ¶7(c).

27 3. Class Counsel is Experienced in Similar Litigation

28 Class Counsel in this matter has extensive class action experience and has represented thousands

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

9 4. There Are No Objections and No Requests for Exclusion

10 The reaction of the Class unequivocally supports approval of the Settlement. On November 18,
11 2022, the Settlement Administrator mailed the Court-approved Class Notice to the Class Members,
12 which provided each class member with the terms of the Settlement, including notice of the claims at
13 issue and the financial terms of the settlement, including the attorneys' fees, costs, and service award
14 that were being sought, how individual settlement awards would be calculated, and the specific,
15 estimated payment amount to that individual. See Gomez Decl. ¶ 8, Exh. A. In disseminating the
16 notice, the Settlement Administrator followed the notice procedures authorized by the Court in its
17 Preliminary Approval Order. Significantly, there have been no objections and no requests to opt-out.
18 Gomez Decl. ¶¶13, 15. As such, 100% of the Class will participate in the Settlement and will be sent
19 a settlement check. See Gomez Decl. at ¶ 13. Blumenthal Decl. ¶4.

20 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
21 Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
22 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
23 indicative of the adequacy of the settlement."); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
24 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l*
25 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
26 settlement should be considered when determining fairness of settlement). Here, where there are no
27 objections, the approval of the class is evident.

1 5. The Strength of Plaintiff's Case

2 The Action generally alleges that Plaintiff and other Class Members were not properly paid all
3 minimum and overtime wages for hours worked, were not provided meal and rest periods, were not
4 timely paid earned wages, were not provided accurate itemized wage statements, were not paid all
5 wages at the time of termination. The Action seeks unpaid wages, penalties, attorney fees, litigation
6 costs, and any other equitable or legal relief allegedly due to Plaintiff and the other Class Members by
7 virtue of the foregoing claims. Blumenthal Decl. ¶5.

8 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
9 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
10 Defendant present serious threats to the claims of the Plaintiff and the other Class Members, including
11 that there would be no class without settlement given that the Plaintiff and the Class Members signed
12 arbitration agreements. Defendant also asserted that Defendant's practices complied with all applicable
13 Labor laws. Defendant argued that all work time was paid for and that the regular rate was properly
14 calculated. Defendant contended that their meal and rest period policies fully complied with California
15 law and that although Defendant's timekeeping system recorded meal periods, all meal periods were
16 provided. Further, Defendant argued that Defendant was not required to record rest periods. Finally,
17 Defendant could argue that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004
18 (2012), weakened Plaintiff's claims, on liability, value, and class certifiability as to the meal and rest
19 period claims. Defendant also argues that based on their facially lawful practices, they acted in good
20 faith and without willfulness, which if accepted would negate the claims for waiting time penalties
21 and/or inaccurate wage statements. In fact, under the current state of the law, it is questionable whether
22 these penalties could be awarded at all based upon the alleged meal and rest period violations. If
23 successful, Defendant's defenses could eliminate or substantially reduce any recovery to the Class.
24 While Plaintiff believes that these defenses could be overcome, Defendant maintains these defenses
25 have merit and therefore present a serious risk to recovery by the Class. Blumenthal Decl. ¶8(a).

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

28 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.

1 Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service
2 Associates were misclassified as exempt. In addition to the uncertainties raised by
3 Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,
4 Defendants notes that the question of an employer's duty to provide rest and meal
5 periods is an open one, signaling even less certainty for Plaintiffs. [...T]he gross
6 settlement amount and the Class Members' expected net recovery, after fees and other
7 costs are deducted, appear to be a reasonable compromise, in light of the risks of
8 litigation.

9 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
10 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) (“In considering the strength of Plaintiff's case, legal
11 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
12 approval.”). As recognized in a federal decision approving settlement of an overtime wage class action:

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

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

23 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
24 to move for class certification given the existence of an arbitration agreement and thereby not recover
25 on behalf of any employees other than herself. Even if Plaintiff could move for class certification,
26 Defendant argued that the individual experience of each putative class member varied with respect to
27 the claims. Defendant could also contest class certification by arguing injury and good faith were case
28 by case determinations that precluded class certification. Plaintiff is aware of cases where class
certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885, 256
Cal. Rptr. 3d 547 (2019) (denying certification of meal and rest break claims). Defendant also
contended that individual differences in work experiences not only impacted damages but would also
impact certification. Finally, even if class certification was successful, as demonstrated by the
California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there
are significant hurdles to overcome for a class wide recovery even where the class has been certified.
While other cases have approved class certification in wage and hour claims, class certification in this

1 action would have been hotly disputed and was by no means a foregone conclusion. Blumenthal Decl.
2 ¶8(b).

3 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
4 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
5 substantial defenses both to liability and to class certification. Currently, the maximum and average
6 class member allocation are \$1,279.13 and \$454.28, respectively. See Gomez Decl. ¶11. Given the
7 complexities of this case, the defenses, along with the uncertainties of proof and appeal, the proposed
8 Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

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

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

1 similar to those in this litigation:

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

10 *Id.* at *12.

11 7. The Amount Offered in Settlement

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

16 The calculations to compensate for the amount due to the Class Members at the time this
17 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
18 mediation. For the individuals whose claims are at issue in this Actions, Plaintiff analyzed the data for
19 putative class members and determined the potential maximum damages for the class claims. For the
20 Class, Plaintiff determined that the unpaid wages due to the alleged failure to pay overtime wages based
21 on the regular rate miscalculation to be \$46,785, maximum potential off-the-clock damages to be
22 \$308,114, maximum potential rest period damages were estimated to be \$366,663, maximum meal
23 period damages at a 25% violation rate were estimated to be \$364,453, and the maximum damages for
24 unreimbursed expenses were estimated to be \$228,200 at a rate of \$200 of unreimbursed expenses
25 incurred each month. In total, the damages for the Class were calculated to have a maximum total value
26 of \$1,314,215. In addition, Plaintiff calculated that the maximum value of the waiting time penalties
27 were \$683,950 and the maximum value of the wage statement penalties to be \$428,100, however, these
28 wage statement and waiting time penalties claims potentially have a much smaller value, even if
damages were awarded, to the extent that they are only derivative of the meal and rest break claims.³

³ Importantly, while Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and 226, at mediation Plaintiff recognized that these claims were subject to various defenses

1 Blumenthal Decl. ¶8(d).

2 Consequently, the Gross Settlement Amount represents more than 21% of the value of the
3 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
4 proven in full at trial.⁴ The above maximum calculations should then be adjusted in consideration for
5 both the risk of certification and the risk of establishing class-wide liability on all claims. Given the
6 amount of the Settlement as compared to the potential value of the claims, the Settlement is most
7 certainly fair and reasonable.⁵ Blumenthal Decl. ¶8(d). Clearly, the goal of this litigation has been met.

8 **V. CONCLUSION**

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

12 Dated: January 25, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

13 By: /s/ Kyle Nordrehaug

14 Kyle R. Nordrehaug, Esq.
Attorneys for Plaintiff

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

26 ⁴ Because the PAGA claim does not provide a recovery to the Class, Plaintiff has not included the
27 PAGA claim in this discussion. The PAGA claim was addressed in Motion for Preliminary Approval
28 in the Declaration of Nordrehaug at ¶ 33.

⁵ *See e.g. Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
(approving settlement of "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
settlement "represents approximately 10%" of potential verdict); *Viceral v. Mistras Grp., Inc.*, 2016
WL 5907869 (N.D. 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).