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

SARAH ARMSTRONG and ROBERT
WALLACE, individuals, on behalf of
themselves and on behalf of all persons
similarly situated,

Plaintiffs,

vs.

PROMETRIC LLC, a Limited Liability
Company, and DOES 1 through 50,
inclusive,

Defendants.

CASE No. **20STCV29967**

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

Hearing Date: June 30, 2022

Hearing Time: 9:00 a.m.

*[Hearing scheduled by Order dated January 14,
2022]*

Judge: Hon. Maren E. Nelson
Dept: SS-17

Action Filed: August 7, 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 Second Amended Class Action Settlement Agreement (the “Agreement”), a true and correct copy of
4 which is attached as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In
5 accordance with the Preliminary Approval Order dated January 14, 2022 (“Preliminary Approval
6 Order”), the approved 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. Plaintiffs Sarah Armstrong and Robert Wallace (“Plaintiffs”) respectfully
9 submit this memorandum in support of the unopposed motion for final approval and the proposed entry
10 of the Final Approval Order and Judgment, submitted herewith. The settlement represents an excellent
11 result for the Class and avoids the delays, risks, and costs of further litigation. After disseminating the
12 notice to the members of the Class, there were **no objections and no requests for exclusion**, which
13 means that the entire Class has elected to participate in the Settlement. Blumenthal Decl. ¶4. This is
14 a positive response from the Class evidencing their collective approval of the settlement. As a result,
15 Plaintiffs respectfully submit that the class settlement should be finally approved for the same reasons
16 that the Court preliminarily approved the settlement as fair, reasonable, and adequate.

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

18 Plaintiffs and Defendant Prometric LLC. (“Defendant”) reached a full and final settlement of
19 the above-captioned action, which is embodied in the Agreement filed concurrently with the Court.
20 As consideration for this Settlement, the Maximum Gross Settlement Amount to be paid by Defendant
21 is Eight Hundred Eighty Thousand Dollars (\$880,000). (Agreement at ¶ I(T).) Under the Settlement,
22 the Maximum Gross Settlement Amount consists of the following elements: (1) payment of the
23 Individual Settlement Payments to the Class; (2) Class Counsel Fees Payment and Class Counsel

24 ¹ Capitalized terms are defined in the Agreement.

25 ² The “Class” is defined as “all individuals employed by Defendant in California as non-exempt
26 employees at any time during the Class Period, but excluding individuals who released Defendant from
27 wage and hour claims for the Class Period, including those wage and hour claims released as part of
28 a general release of claims.” The “Class Period” is defined as “August 7, 2016 to July 3, 2021.”
 (Preliminary Approval Order at 3:10-14.)

1 Litigation Expenses Payment; (3) Settlement Administration Expenses; (4) Class Representative
2 Service Payments to Plaintiffs; (5) the PAGA Payment. (Agreement at ¶ III(B)-(C).) Blumenthal Decl.
3 ¶3(a).

4 The Maximum Gross Settlement Amount does not include Defendant's share of payroll taxes.
5 (Agreement at ¶ I(T).) The Maximum Gross Settlement Amount shall be all-in with no reversion to
6 Defendant. (Agreement at ¶ III(A).) Blumenthal Decl. ¶3(b).

7 Following final approval, Defendant shall fund the Maximum Gross Settlement Amount within
8 fifteen (15) calendar days of the Effective Date. (Agreement at ¶ III(E)(9).) The Individual Settlement
9 Payments to Participating Class Members will be mailed by the Settlement Administrator within thirty
10 (30) calendar days after the funding of the Gross Settlement Amount. (Agreement at ¶ III(E)(10).)
11 Blumenthal Decl. ¶3(c).

12 The Net Settlement Amount shall equal the net amount available for payment to the Class after
13 deducting the Court-approved amounts for the (1) the Class Counsel Fees Payment; (2) Class Counsel
14 Litigation Expenses Payment; (3) the PAGA Payment; (4) the Class Representative Service Payments;
15 and, (5) the Settlement Administration Expenses. (Agreement at ¶ I(V).) The Net Settlement Amount
16 will be distributed as the Individual Settlement Payments to the Class Members who do not timely
17 request exclusion ("Participating Class Members"). (Agreement at ¶¶ I(Z) and III(C)(1).) The
18 Individual Settlement Payment will be calculated as follows: (a) the Net Settlement Amount shall be
19 divided by the total Workdays for all Participating Class Members to determine the "Workday Payment
20 Amount"; and (b) the gross amount of each Participating Class Member's Individual Settlement
21 Payment shall be calculated by multiplying the Participating Class Member's individual Workday total
22 by the Workday Payment Amount. (Agreement at ¶ III(C)(1).) Workdays will be based on Defendant's
23 records, however Class Members had the right to challenge the number of Workdays before the
24 Response Deadline. Blumenthal Decl. ¶ 3(d).

25 Class Members were sent the Court approved Class Notice using the procedure approved by the
26 Court by mailing the notice packets after updating class members' addresses using the National Change
27 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
28 any forwarding address provided or updated address located. Declaration of Christina Fowler ("Fowler

Decl.”) ¶ 7. Class Members were provided with the opportunity to exclude themselves or "opt out" if they did not want to participate in the settlement. (Agreement at ¶ III(E)(3).) Fowler Decl. ¶ 5, Exh. A. No Class Members submitted requests for exclusion. Polites Decl. ¶ 11. Thus, all Class Members are deemed Participating Class Members who are bound by the Settlement and will be entitled to receive an Individual Settlement Payment. (Agreement at ¶ III(E)(3)(c).) All Aggrieved Employees will be paid their allocation of the PAGA Payment and will remain bound by the release of the Released PAGA Claims regardless of whether the Aggrieved Employee is a Non-Participating Class Member. (Agreement at ¶ III(E)(3)(c).) The Class Notice also advised Class Members of their right to object to the Settlement and/or dispute their Workdays. (Agreement at ¶ III(E)(3)(a) and (b); Fowler Decl. ¶ 5, Exh. A.) Blumenthal Decl. ¶ 3(e).

A Participating Class Member must cash his or her Individual Settlement Payment check within 180 days after it is mailed. (Agreement at ¶ III(E)(10).) Any settlement checks not cashed within 180 days will be voided and any funds from such uncashed checks will be paid *cy pres* to two recognized 501(c)(3) tax-exempt charities: (1) 50% to Bet Tzedek Legal Services and (2) 50% to Legal Aid at Work (the “*Cy Pres* Recipients”). Such *cy pres* payments will be made in compliance with Code of Civil Procedure section 384. (Agreement at ¶ III(E)(12).) The Parties have verified that they do not have and connection or relationship with the *Cy Pres* Recipients. Blumenthal Decl. ¶3(g).

Simpluris was appointed by the Court as the Settlement Administrator for the Settlement. (Agreement at ¶ III(E)(12).) From the Maximum Gross Settlement Amount, the Settlement Administrator shall be paid for the expenses of administering the Settlement in an amount not to exceed \$15,000. (Agreement at ¶ III(D).) As set forth in the Fowler Decl. at ¶ 15, 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 \$6,500. Blumenthal Decl. ¶3(g).

Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not to exceed one-third of the Maximum Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement at ¶ III(B)(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(B)(2).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000

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

4 Subject to Court approval, Thirty Thousand Dollars (\$30,000) will be paid out of the Maximum
5 Gross Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal.
6 Labor Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code §
7 2699(i), the PAGA Payment shall be allocated as follows: \$22,500 to the LWDA (the "LWDA
8 Payment") as the LWDA's share of the settlement of civil penalties pursuant to the PAGA, and \$7,500
9 will be distributed to the Aggrieved Employees based on their respective pay periods worked during
10 the PAGA Period. (Agreement at ¶ III(B)(3).) The Aggrieved Employees are defined the same as the
11 Class but are limited to the applicable PAGA Period of June 3, 2019 to July 3, 2021. (Agreement at ¶¶
12 I(B) and I(Y).) The Released PAGA Claims are appropriately tethered to the allegations of the
13 complaint. As set forth in the accompanying proof of service, the LWDA has been served with this
14 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 of the Settlement, agreeing that the settlement
17 is "fair, adequate and reasonable". (Preliminary Approval Order at § V.) In sum, the Settlement valued
18 at \$880,000 is an excellent result for the Class. This result is particularly favorable in light of the fact
19 that liability and class certification in this case were far from certain in light of the defenses asserted
20 by Defendant. Given the complexities of this case, the defenses asserted, the uncertainty of class
21 certification, along with the uncertainties of proof at trial and appeal, the proposed settlement is fair,
22 reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

23 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL**
24 **OF CLASS ACTION SETTLEMENTS**

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

1 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

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

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

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

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

1 the negotiating parties." *Dunk, supra*, at 1801.

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

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

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

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

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

23 Class Counsel has conducted a thorough investigation into the facts of the class action. Over
24 the course of more than a year, Class Counsel has diligently evaluated the Class Members' claims
25 against Defendant. The procedural history and investigation performed was detailed at length in support
26 of the motion for preliminary approval. The Settlement was the product of one arms-length mediation
27 and contentious negotiations through an all-day mediation presided over by David Rotman, Esq., a
28 respected and experienced mediator of wage and hour class actions. The details of the litigation are

1 set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(h).

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

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

12 The Parties attended an arms-length mediation session with David Rotman, a respected and
13 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
14 for the mediation, Defendant provided Class Counsel with necessary information for the members of
15 the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiffs
16 analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and submitted
17 a mediation brief and damage valuation to the Mediator. At the conclusion of the all-day mediation, the
18 Parties agreed to this Settlement. Blumenthal Decl. ¶7(b).

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

25 From May 2021 to July 2021, the initial settlement agreement and exhibits thereto were
26 finalized and executed, and then presented by motion to this Court for preliminary approval. Plaintiffs
27 filed their motion for preliminary approval, and the Court identified some issues to correct. The Parties
28 prepared a First Amended Class Action Settlement Agreement and then the Second Amended Class

1 Action Settlement Agreement to address the Court's issues. On January 14, 2022, the Court issued its
2 Order granting preliminary approval of the settlement as fair and reasonable to the Class. Blumenthal
3 Decl. ¶7(c).

4 3. Class Counsel is Experienced in Similar Litigation

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

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

15 The reaction of the Class unequivocally supports approval of the Settlement. On February 11,
16 2022, the Settlement Administrator mailed the Court-approved Class Notice to the Class Members,
17 which provided each class member with the terms of the Settlement, including notice of the claims at
18 issue and the financial terms of the settlement, including the attorneys' fees, costs, and service award
19 that were being sought, how individual settlement awards would be calculated, and the specific,
20 estimated payment amount to that individual. See Fowler Decl. ¶ 5, Exh. A. In disseminating the
21 notice, the Settlement Administrator followed the notice procedures authorized by the Court in its
22 Preliminary Approval Order. Significantly, there have been no objections and no requests for
23 exclusion. Fowler Decl. ¶¶ 11-13. As a result, the entire Class will participate in the Settlement and
24 will be sent a settlement check. See Fowler Decl. at ¶¶ 8-13; Blumenthal Decl. ¶4.

25 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
26 Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
27 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
28 indicative of the adequacy of the settlement."); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119

(3d. Cir. 1990) (29 objections out of 281 member class “strongly favors settlement”); *Laskey v. Int’l Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed settlement should be considered when determining fairness of settlement). Here, where there are no objections, the approval of the class is evident.

5. The Strength of Plaintiffs’ Case

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

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by Defendant present serious threats to the claims of the Plaintiffs and the other Class Members. Defendant asserted that Defendant’s practices complied with all applicable Labor laws. Defendant argued that all work time was paid for and argued against the off the clock claiming computers will always on so there would be no boot up time and that at the end of the day there were videos showing any time spent after clocking out and before setting the alarm would have been mere seconds. Defendant contends that its meal and rest period policies fully complied with California law and that Defendant’s timekeeping system recorded meal periods, and was not required to record rest periods. Finally, Defendant argued that the recent Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiffs’ claims, on liability, value, and class certifiability as to the meal and rest period claims. Defendant also argued that based on their facially lawful practices, it acted in good faith and without willfulness, which if accepted would negate the claims for waiting time penalties and/or inaccurate wage statements. In fact, under the current state of the law, it is questionable whether these penalties could be awarded at all based upon the alleged meal and rest period violations. Finally, Defendant also contends that the use of a smartphone application for correspondence did not require it to reimburse employee for personal cell phones. If successful, Defendant’s defenses could eliminate

1 or substantially reduce any recovery to the Class. While Plaintiffs believe that these defenses could be
2 overcome, Defendant maintains these defenses have merit and therefore present a serious risk to
3 recovery by the Class. Blumenthal Decl. ¶8(a).

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

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

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

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

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

25 There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable
26 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
27 Defendant argued that the individual experience of each putative class member varied with respect to
28 the claims. Defendant could also contest class certification by arguing injury and good faith were case
by case determinations that precluded class certification. Plaintiffs are aware of cases where class
certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
(2019) (denying certification of meal and rest break claims). Defendant also contended that individual

1 differences in work experiences not only impacted damages but would also impact certification.
2 Finally, even if class certification was successful, as demonstrated by the California Supreme Court
3 decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to
4 overcome for a class wide recovery even where the class has been certified. While other cases have
5 approved class certification in wage and hour claims, class certification in this action would have been
6 hotly disputed and was by no means a foregone conclusion. Blumenthal Decl. ¶ 8(b).

7 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
8 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
9 substantial defenses both to liability and to class certification. **The maximum and average class**
10 **member allocations are \$12,239.07 and \$2,020.67, respectively.** See Fowler Decl. ¶ 16. Given the
11 complexities of this case, the defenses, along with the uncertainties of proof and appeal, the proposed
12 Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

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

1 the Class. Blumenthal Decl. ¶8(c).

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

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

14 *Id.* at *12.

15 7. The Amount Offered in Settlement

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

20 The calculations to compensate for the amount due to the Class Members at the time this
21 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
22 mediation. For the individuals whose claims are at issue in this Action, Plaintiffs analyzed the data for
23 putative class members and determined the potential maximum damages for the class claims. For the
24 Class, Plaintiffs determined that the potential underpaid overtime due to the miscalculation of the
25 regular rate was \$2,203, the off-the-clock damages for preliminary activities were \$280,373, the
26 maximum potential meal period damages were estimated to be \$632,368 based on a maximum potential
27 61% violation rate observed in the time records, the maximum rest period damages were estimated to
28 be \$961,950 based upon a 100% violation rate for every shift, and the unreimbursed business expenses
were calculated to be a maximum of \$146,026 at \$30 per month for cell phone usage. In total, the
damages for the Class were calculated to have a maximum total value of \$2,022,920. In addition,
Plaintiffs calculated that the maximum value of the waiting time penalties were from \$65,769 to

1 \$328,847 and the maximum value of the wage statement penalties were from \$150,450 to \$307,000,
2 however, these wage statement and waiting time penalties claims potentially have a much smaller
3 value, even if damages were awarded, to the extent that they are derivative of the meal and rest break
4 claims.³ The valuation of the FLSA claim is subsumed within the class claims. Blumenthal Decl. ¶8(d).

5 Consequently, the Maximum Gross Settlement Amount of \$880,000 represents more than 43%
6 of the value of the potential maximum damages at issue for the Class in this case, assuming these
7 amounts could all be proven in full at trial.⁴ The above maximum calculations should then be adjusted
8 in consideration for both the risk of certification and the risk of establishing class-wide liability on all
9 claims. Given the amount of the Settlement as compared to the potential value of the claims, the
10 Settlement is most certainly fair and reasonable.⁵ Blumenthal Decl. ¶8(d). Clearly, the goal of this
11 litigation has been met.

13
14 ³ Importantly, while Plaintiffs alleged claims for statutory penalties pursuant to Labor Code
15 Sections 203 and 226, Plaintiffs recognized that these claims were subject to various defenses asserted
16 by Defendant, including, but not limited to, a good faith dispute defense as to whether any premium
17 wages for meal or rest periods or other wages were owed given Defendant's position that Plaintiffs were
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."). Additionally, Courts have held that violations of the meal and rest
21 period regulations, which require payment of a "premium wage" for each improper meal period, do **not**
22 give rise to claims under sections 203 and 226. *See Ling v. P.F. Chang's China Bisto, Inc.*, 245 Cal.
23 App. 4th 1242, 1261 (2016) and *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1336
24 (2018). As a result, the viability of Plaintiffs' claims on these theories is uncertain.

25 ⁴ Because the PAGA claim does not provide a recovery to the Class, Plaintiffs have not included the
26 PAGA claim in this discussion of the class claims. The PAGA claim valuation in paragraph 33 of the
27 initial Declaration of Nordrehaug filed in support of the motion for preliminary approval on July 27,
28 2021.

29 ⁵ *See e.g. Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
30 (approving settlement which represented "roughly one-sixth of the potential recovery");
31 *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015)
32 (granting final approval where "the proposed Total Settlement Amount represents approximately 10%
33 of what class might have been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*,
34 2016 WL 5907869 (N.D. Cal. 2016) (approving wage and hour class action settlement amounting to
35 8.1% of full verdict value); *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, (C.D. Cal. 2014)
36 (approving wage and hour class action settlement worth "somewhere between 9% and 18%" of full
37 verdict value).

1 **V. CONCLUSION**

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

5 Dated: May 3, 2022

**BLUMENTHAL NORDREHAUG BHOWMIK
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9 Attorneys for Plaintiffs
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