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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA**

ANGELO KALAVERAS and EMAD
MISSREEZADAH,

Plaintiff,

vs.

NCR CORPORATION; and DOES
1-100, inclusive,

Defendants.

Case No.: **MSC20-01186**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
SETTLEMENT**

Hearing Date:
Hearing Time: 9:00 a.m.

Dept: 39
Judge: Hon. Edward G. Weil

Action Filed: June 25, 2020
Trial Date: None set

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1 **I. INTRODUCTION**

2 Plaintiffs Angelo Kalaveras and Emad Missreezadah (“Plaintiffs”) respectfully submit this
3 memorandum in support of the unopposed motion for preliminary approval of the proposed class and
4 representative action settlement with Defendant NCR Corporation (“Defendant”), and seek entry of an
5 order: (1) preliminarily approving the proposed settlement of this class action with Defendant; (2) for
6 settlement purposes only, conditionally certifying the Class, which is comprised of “all individuals who
7 were employed by Defendant in California as hourly, non-exempt employees during the Class Period”
8 of June 25, 2019 through July 19, 2022; (3) provisionally appointing Plaintiffs as the representatives
9 of the Class; (4) provisionally appointing Norman B. Blumenthal, Kyle R. Nordrehaug, and Aparajit
10 Bhowmik of Blumenthal Nordrehaug Bhowmik De Blouw LLP and Robert J. Wasserman and Jenny
11 D. Baysinger of Mayall Hurley P.C. as Class Counsel for the Class; (5) approving the form and method
12 for providing class-wide notice of the settlement; (6) directing that notice of the proposed settlement
13 be given to the class; (7) appointing Simpluris, Inc. as Settlement Administrator, and (8) scheduling
14 a final approval hearing date to consider Plaintiffs’ motion for final approval of the settlement and entry
15 of the Judgment, and Plaintiffs’ motion for approval of attorneys’ fees and expenses.

16 Plaintiffs and Defendant (collectively the “Parties”) have reached a full and final settlement of
17 the above-captioned action, which is embodied in the Class and Representative Action Settlement
18 Agreement (“Agreement”) filed concurrently with the Court.¹ A copy of the fully executed Agreement
19 is attached as Exhibit #1 to the Declaration of Kyle Nordrehaug (“Decl. Nordrehaug”), served and filed
20 herewith.

21 As consideration for this Settlement, the Gross Settlement Amount is One Million Dollars
22 (\$1,000,000) to be paid by Defendant, as set forth in the Agreement. The Gross Settlement Amount
23 will settle all issues pending in the Action between the Parties and will be made in full and final
24 settlement of the Released Class Claims and Released PAGA Claims. The Gross Settlement Amount
25 includes all payments of Settlement Shares to the Participating Class Members, Settlement
26 Administration Expenses, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment,
27

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

1 Class Representative Service Payments to Plaintiffs, and the PAGA Payment. The Gross Settlement
2 Amount does not include the employer's share of payroll taxes which will be separately paid by
3 Defendant. The Settlement is all-in with no reversion to Defendant and no need to submit a claim form.
4 Decl. Nordrehaug at ¶3.

5 On April 19, 2022, the Parties participated in an all-day mediation presided over by Mark Rudy,
6 a respected mediator of wage and hour representative and class actions. At the close of mediation, the
7 Parties were able to agree to settle the Action based upon a mediator's proposal which was
8 memorialized in a Memorandum of Understanding. Decl. Nordrehaug at ¶5. The Settlement is fair,
9 reasonable and adequate, and should be preliminarily approved because there is a substantial monetary
10 payment, and there are substantial litigation and class-certification risks. Therefore, Plaintiffs
11 respectfully request that this Court grant preliminary approval of the Agreement and enter the proposed
12 order submitted herewith.

13 **II. DESCRIPTION OF THE SETTLEMENT**

14 The Gross Settlement Amount that Defendant will pay under this Settlement is One Million
15 Dollars (\$1,000,000). (Agreement at ¶ I(19).) Under the Settlement, the Gross Settlement Amount
16 consists of the following elements: (1) payment of the Settlement Shares to Participating Class
17 Members; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3)
18 Settlement Administration Expenses; (4) Class Representative Service Payments to the Plaintiffs; and
19 (5) the PAGA Payment. (Agreement at ¶ I(19).) The Gross Settlement Amount does not include the
20 employer's share of payroll taxes. (Agreement at ¶ III(48).) The Gross Settlement Amount shall be
21 all-in with no reversion to Defendant. (Agreement at ¶ III(48).) Decl. Nordrehaug at ¶15.

22 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay
23 Defendant's share of payroll taxes within fifteen (15) calendar days of the Effective Date. (Agreement
24 at ¶ III(55).) The Settlement Shares to Participating Class Members will be mailed by the Settlement
25 Administrator within fifteen (15) calendar days after the funding of the Gross Settlement Amount.
26 (Agreement at ¶ III(55).) Decl. Nordrehaug at ¶16.

27 The Net Settlement Amount shall equal the net amount available for payment to the Class after
28 deducting the Court-approved amounts for the Class Representative Service Payments, the Class

1 Counsel Fees Payment, Class Counsel Litigation Expenses Payment, the PAGA Payment, and the
2 Settlement Administration Expenses. (Agreement at ¶ I(22).) The Net Settlement Amount will be
3 distributed as the Settlement Shares to the Class Members who do not timely request exclusion
4 (“Participating Class Members”). (Agreement at ¶¶ I(27) and III(50).) The Settlement Share for each
5 Participating Class Member will be calculated as follows: (a) the Settlement Administrator shall divide
6 the Net Settlement Amount by the total number of weeks employed during the Class Period by
7 Participating Class Members to determine a dollar amount per week ("Weekly Rate"); and (b) the
8 Settlement Administrator shall then take the number of weeks employed by each Participating Class
9 Member during the Class Period and multiply it by the Weekly Rate to calculate their Settlement Share.
10 (Agreement at ¶ III(50)(b).) Workweeks will be based on Defendant’s records, however, Class
11 Members will have the right to challenge the number of weeks they were employed during the Class
12 Period. Decl. Nordrehaug at ¶17.

13 Class Members may choose to opt-out of the Settlement by following the directions in the Class
14 Notice. (Agreement at ¶ III(52)(c)(iii) and Ex. A.) All Class Members who do not "opt out" will be
15 deemed Participating Class Members who will be bound by the Settlement and will be entitled to
16 receive a Settlement Share. Aggrieved Employees who opt out the Settlement will still be paid their
17 allocation of the PAGA Payment and will remain bound by the release of the Released PAGA Claims,
18 regardless of their request for exclusion. (Agreement at ¶ III(52)(c)(iii).) Finally, the Class Notice will
19 also advise the Class Members of their right to object to the Settlement and/or dispute the workweeks
20 they were employed by Defendant during the Class Period. (Agreement at ¶ III(52)(c)(i)-(ii), Ex. A.)
21 Decl. Nordrehaug at ¶18.

22 A Participating Class Member must cash a Settlement Share check within 180 calendar days
23 after it is mailed. (Agreement at ¶III(56).) The Settlement Administrator will send a reminder to
24 Participating Class Members who have not cashed their checks within 120 calendar days after its last
25 mailing to the affected individual. (Agreement at ¶ III(56).) Any settlement checks not cashed within
26 180 calendar days of the date the settlement check was mailed will be voided and any funds from such
27 uncashed checks will be paid to the California State Controller’s Unclaimed Property Fund in the name
28 of and for the benefit of the individual who did not cash their check. (Agreement at ¶ III(56).) Decl.

1 Nordrehaug at ¶19.

2 After receiving estimates from three different vendors, the Parties agreed to Simpluris as the
3 Settlement Administrator as their bid was the lowest. (Agreement at ¶ III(51).) From the Gross
4 Settlement Amount, the Settlement Administrator shall be paid for the expenses of administering the
5 Settlement in an amount not to exceed \$15,000. (Agreement at ¶ III(49)(d).) The bid from Simpluris
6 provided for a capped expense of \$12,000. Decl. Nordrehaug at ¶20.

7 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
8 to exceed one-third (1/3) of the Gross Settlement Amount as the Class Counsel Fees Payment.
9 (Agreement at ¶ III(49)(b).) Class Counsel will also be allowed to apply separately for an award of
10 Class Counsel Litigation Expenses Payment in an amount not to exceed \$21,000. (Agreement at ¶
11 III(49)(b).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000
12 to each of the Plaintiffs as the Class Representative Service Payments. (Agreement at ¶ III(49)(a).)
13 The Class Counsel Fee Payment, Class Counsel Litigation Expenses Payment, and Class Representative
14 Service Payments shall all be paid from the Gross Settlement Amount. Decl. Nordrehaug at ¶21.

15 The Parties will seek approval from the Court for the PAGA Payment of \$50,000 out of the
16 Gross Settlement Amount, which shall be allocated 75% (\$37,500) to the LWDA as the LWDA's share
17 of the PAGA Payment pursuant to PAGA and 25% (\$12,500) will be distributed to the Aggrieved
18 Employees based on their respective pay periods employed during the PAGA Period. (Agreement at
19 ¶ III(49)(c).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be
20 subject to the release of the Released PAGA Claims, whether or not they opt out of the Class.
21 (Agreement at ¶ III(49)(c).) As set forth in the accompany proof of service, the LWDA has been served
22 with this motion and the Agreement. Decl. Nordrehaug at ¶22.

23 **III. CASE BACKGROUND**

24 The description of the cases and claims, along with the procedural history are set forth in the
25 Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the
26 exchange of documents and information in connection with the Action over more than two years which
27 permitted Class Counsel to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and
28 14. The Parties participated in mediation on April 19, 2022 with Mark Rudy, which after arm's length

1 negotiations, resulted in this Settlement. Decl. Nordrehaug, ¶12.

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

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

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

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

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

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

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

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

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

28 With regard to class action settlements, the opinions of counsel should be given considerable

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

B. Factors To Be Considered In Granting Preliminary Approval

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

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

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

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

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

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

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

2 Class Counsel are experienced and qualified to evaluate the class claims, the defenses asserted,
3 and the risks and benefits of trial and settlement, and Class Counsel are particularly experienced in
4 wage and hour employment class actions, as Class Counsel has previously litigated and certified similar
5 claims against other employers. Decl. Nordrehaug at ¶31; Declaration of Jenny D. Baysinger at ¶¶ 14-
6 15. The view of qualified and well-informed counsel that a class action settlement is fair, adequate, and
7 reasonable is entitled to significant weight. See *Kullar v. Foot Locker*, 168 Cal. App. 4th 116, 133
8 (2008) (the trial court "undoubtedly should continue to place reliance on the competence and integrity
9 of counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement.");
10 *Dunk*, 48 Cal. App. 4th at 1802.

11 The Parties attended an arms-length mediation session with Mark Rudy, a respected and
12 experienced mediator of wage and hour class actions, in order to reach this Settlement. Prior to the
13 mediation, sufficient discovery was conducted to investigate the claims, Defendant's liability, and
14 class-wide damages, including, but not limited to the following: Plaintiffs requested and Defendant
15 produced extensive documentation including time and pay data for the alleged Class members and
16 Aggrieved Employees, policy documents, information concerning the total number of alleged Class
17 Members and Aggrieved Employees employed during the Class Period and PAGA Period, and
18 information on the number of weeks Class Members were employed during the Class Period and the
19 number of pay periods Aggrieved Employees were employed during the PAGA Period. In preparation
20 for the mediation, Defendant provided Class Counsel with necessary information for the members of
21 the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiffs

22
23 ³ The release applicable to the Class is tethered to allegations in the Action and the "Released Class
24 Claims" are defined as "all class claims and/or causes of action by Class Members against the Released
25 Parties that were plead or which could have been plead based on the factual allegations contained in the
26 operative complaints and PAGA letters previously submitted by Plaintiffs to the LWDA, which
27 occurred during the Class Period, including claims under Labor Code sections 201-204, 210, 226,
28 226.3, 226.7, 233, 245, 246, 248.5, 256, 510, 512, 558, 1194, 1197, 1197.1, 1198, and 2802, and
including claims under Business and Professions Code section 17200, et seq., and expressly excluding
all other claims, including claims for vested health insurance benefits, wrongful termination,
unemployment insurance, disability insurance, social security, workers' compensation, and claims
outside the Class Period." (Agreement at ¶ I(29).)

1 analyzed the data, and prepared and submitted a mediation brief and damage valuation to the Mediator.
2 At the conclusion of the all-day mediation, the Parties agreed to this Settlement. The final settlement
3 terms were negotiated and set forth in the Agreement now presented for this Court's approval.
4 Importantly, Plaintiffs and Class Counsel believe that this Settlement is fair, reasonable and adequate.
5 Decl. Nordrehaug at ¶ 5.

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

9 Class Counsel has conducted a thorough investigation into the facts of the class action. Over
10 the course of the litigation, Class Counsel has diligently evaluated the Class Members' claims against
11 Defendant. Prior to the settlement negotiations, counsel for Defendant provided Class Counsel with
12 access to necessary information for the Class. In addition, Class Counsel previously negotiated
13 settlements with other employers in actions involving nearly identical issues and analogous defenses.
14 Based on the foregoing data and their own independent investigation, evaluation and experience, Class
15 Counsel believes that the settlement with Defendant on the terms set forth in the Agreement is fair,
16 reasonable, and adequate and is in the best interest of the Class in light of all known facts and
17 circumstances, including the risk of significant delay, defenses asserted by Defendant, and potential
18 appellate issues. Decl. Nordrehaug at ¶ 14.

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

26 Here, there can be no dispute that the litigation has been hard-fought with aggressive and
27 capable advocacy on both sides. The Parties were represented by experienced and capable counsel who
28 zealously advocated their positions. Accordingly, "[t]here is likewise every reason to conclude that

1 settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue
2 influence." *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. at 1392.

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

5 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
6 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
7 receive payment according to the same formula. (Agreement at ¶ III(50)(b).) For the estimated 781
8 individuals in the Class who collectively were employed by Defendant for 72,937 weeks, the Gross
9 Settlement Amount provides an average value of \$1,280 per Class Member and \$13.71 per week
10 employed, and after deductions, the Net Settlement Amount provides an average recovery of \$717 per
11 Class Member and \$7.68 per week employed. Decl. Nordrehaug, ¶6.

12 The calculations to compensate for the amount due to the Class Members at the time this
13 Settlement was negotiated were calculated in advance of mediation. For the individuals whose claims
14 are at issue in this Action, Plaintiffs analyzed the data for putative class members and determined the
15 potential maximum damages for the class claims. For the Class, Plaintiffs determined that the
16 maximum potential unpaid overtime due to the alleged miscalculation of the regular rate was \$96,910,
17 the claim for underpayment of sick pay was \$82,532, the maximum potential meal period damages were
18 estimated to be \$1,977,740 based upon an alleged 20% violation rate evidenced in the time punch
19 records plus the *Ferra* underpayment and then deducting the meal premiums paid by Defendants, the
20 maximum rest period damages were estimated to be \$1,634,959 based upon the same 20% violation
21 rate, and the maximum damages for unreimbursed expenses were estimated to be \$157,550 based upon
22 cell phone usage of \$10 per month. In total, the damages for the Class were calculated to have a
23 maximum total value of \$3,949,691. In addition, Plaintiffs calculated that the maximum value of the
24 waiting time penalties was \$1,161,828, and the maximum value of the wage statement penalties was
25 \$2,079,600. However, these wage statement and waiting time penalties claims potentially had a much
26 smaller value, even if damages were awarded, to the extent that they are only derivative of the meal and
27
28

1 rest break claims.⁴ Defendant disputes Plaintiffs' estimates and believes the amount they can recover
2 for themselves and the Class, if anything at all, is actually much lower. Decl. Nordrehaug, ¶6.

3 Consequently, the Gross Settlement Amount represents 25% of the value of the potential
4 maximum damages at issue for the Class in this case, assuming these amounts could all be proven in
5 full at trial.⁵ The above maximum calculations should then be adjusted in consideration for both the
6 risk of certification and the risk of establishing class-wide liability on all claims. Given the amount of
7 the Settlement as compared to the potential value of the claims, the Settlement is most certainly fair and
8 reasonable.⁶ Clearly, the goal of this litigation has been met. Decl. Nordrehaug, ¶6.

9 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
10 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
11 Defendant presented serious threats to the claims of the Plaintiffs and the other Class Members.
12 Defendant asserted that Defendant's practices complied with all applicable Labor laws. Defendant
13 argued that all work time was recorded and paid, and that its policies expressly prohibit off-the-clock

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

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

29 ⁶ See *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"); *Stovall-Gusman*
31 *v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval
32 where "the proposed Total Settlement Amount represents approximately 10% of what class might have
33 been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D.
34 Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value);
35 *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class
36 action settlement worth "somewhere between 9% and 18%" of full verdict value).

1 work, and that the vast majority of the Class Members are afforded considerable discretion about how
2 to organize their work schedule such that there are virtually no barriers to taking breaks or to accurately
3 recording all time they work. Defendant contends that their meal and rest period policies fully
4 complied with California law, that Defendant's timekeeping system recorded meal periods, and that
5 meal periods were provided. Defendant also argued that meal period premiums were paid when a meal
6 period was not provided, which negated the meal period claim. Further, Defendant argued that
7 Defendant was not required to record rest periods and that there was no evidence that rest periods were
8 not provided given the facially lawful policies. Defendant also argues that Plaintiffs' regular rate claim
9 has minimal value because bonus or incentive compensation was not frequently paid to Class Members.
10 Finally, Defendant could argue that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal.
11 4th 1004 (2012), weakens Plaintiffs' claims, on liability, value, and class certifiability as to the meal
12 and rest period claims. Defendant also argued that based on its facially lawful practices, it acted in
13 good faith and without willfulness, which if accepted would negate the claims for waiting time penalties
14 and/or inaccurate wage statements. If successful, Defendant's defenses could eliminate or substantially
15 reduce any recovery to the Class. While Plaintiffs believe that these defenses could be overcome,
16 Defendant maintains these defenses have merit and therefore present a serious risk to recovery by the
17 Class. Decl. Nordrehaug, ¶ 24.

18 There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable
19 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
20 Defendant argued that the individual experience of each putative class member varied with respect to
21 the claims. Defendant argued that because the vast majority of the Class Members set their working
22 schedule, mini-trials would have been needed to determine whether each Class Member worked off the
23 clock, whether Defendant knew that they worked off the clock, whether each Class Member took meal
24 and/or rest breaks, and whether Class Members were ever prevented from taking their breaks as
25 opposed to choosing not to take their breaks. Defendant could also contest class certification by
26 arguing injury and good faith were case by case determinations that precluded class certification.
27 Plaintiffs are aware of cases where class certification of similar claims was denied. *See e.g. Cacho*
28 *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 action would have been hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug, ¶ 25.

After arm's length negotiations between experienced and informed counsel, the Parties recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of \$1,000,000. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

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

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

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

The relief provided in the Settlement will benefit all members of the Class. The Settlement does not grant preferential treatment to Plaintiffs or segments of the Class in any way. Payments to the Class Members are all determined under a neutral methodology. Each Participating Class Member will receive the same opportunity to participate in and receive payment through a neutral formula that is based upon the weeks that individual was employed by Defendant during the Class Period. Decl. Nordrehaug, ¶4.

Plaintiffs will apply to the Court for Class Representative Service Payments in consideration for their service and for the risks undertaken on behalf of the class. (Agreement at ¶ III(49)(a).) Plaintiffs performed their duty admirably by working with Class Counsel. Decl. Nordrehaug at ¶27. At this stage, the requested service award amount of \$10,000 each is well within the accepted range of awards for purposes of preliminary approval. See e.g. *Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S.

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

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

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

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

1 Nordrehaug at ¶29.

2 In *Glass*, the Northern District of California granted final approval of an overtime wage action
3 although in *Glass* no formal discovery had been conducted prior to the settlement:

4 Here, no formal discovery took place prior to settlement. As the Ninth Circuit has
5 observed, however, '[i]n the context of class action settlements, 'formal discovery is not
6 a necessary ticket to the bargaining table' where the parties have sufficient information
7 to make an informed decision about settlement.'"

8 *Glass*, 2007 U.S. Dist. LEXIS 8476 at *14 (quoting *In re Mego Financial Corp. Securities Litigation*,
9 213 F.3d at 459).

10 Here, Class Counsel was in far better position to evaluate the fairness of this Settlement because
11 Class Counsel performed informal discovery, received all necessary information which was analyzed,
12 and also performed independent investigations and due diligence to confirm the accuracy of the
13 information supplied by Defendant.

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

15 Plaintiffs contend that the proposed settlement meets all of the requirements for class
16 certification under California Code of Civil Procedure § 382 as demonstrated below, and therefore, the
17 Court may appropriately approve the Class as defined in the Agreement. This Court should
18 conditionally certify the Class for settlement purposes only, defined as follows:

19 All individuals who were employed by Defendant in California as hourly, non-exempt
20 employees during the Class Period.

21 (Agreement at ¶ I(3).)

22 The "Class Period" is June 25, 2019 through July 19, 2022. (Agreement at ¶ I(10).)

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

24 Plaintiffs seek certification of this Class for settlement purposes under California Code of Civil
25 Procedure § 382. The California Supreme Court has summarized the standard for determining whether
26 class certification is appropriate as follows:

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

1 class; and (3) class representatives who can adequately represent the class.

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

3 While Defendant reserves all rights to dispute that the Plaintiffs can satisfy these requirements,
4 the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
5 for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
6 settlement only. (Agreement at ¶ II(46).)

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

8 Plaintiffs bring this action on behalf of a Class of individuals during the applicable Class Period.
9 Plaintiffs assert that all of these individuals are ascertainable because the class members can readily be
10 determined through examination of Defendant's files. Given that the Class consists of approximately
11 781 members, Plaintiffs maintain that numerosity is clearly satisfied. *See Bowles v. Superior Court*,
12 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126
13 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiffs
14 assert that the 781 current and former employees that comprise the Class can be identified based on
15 Defendant's records and are sufficiently numerous for class certification. Decl. Nordrehaug at ¶30.

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

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

22 Commonality exists if there is a predominant common legal question regarding how an
23 employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,
24 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its
25 drivers.") Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the
26 certification stage since the question is "essentially a procedural one that does not ask whether an action
27 is legally or factually meritorious." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

28 Here, Plaintiffs contend that common questions of law and fact are present, and specifically the

1 common questions of whether Defendant properly compensated for alleged overtime and sick pay,
2 whether the Defendant failed to provide meal and rest periods, whether Defendant failed to provide
3 required expense reimbursement, and whether Class Members are entitled to damages and penalties as
4 a result of these practices. Decl. Nordrehaug, ¶30. Defendant disputes that common questions
5 predominate but will not oppose such a finding for purposes of this Settlement only.

6 **D. The Claims of the Plaintiffs Are Typical of the Class Claims**

7 The typicality requirement requires the Plaintiffs to demonstrate that the members of the class
8 have the same or similar claims as the Plaintiffs. “The typicality requirement is met when the claims
9 of the [p]laintiff arise from the same event or are based on the same legal theories.” *Tate v.*
10 *Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In *Hanlon, supra*, 150 F.3d at 1020, the Ninth
11 Circuit held that “[u]nder the rule’s permissive standards, representative claims are ‘typical’ if they are
12 reasonably coextensive with those of absent class members; they need not be substantially identical.”

13 In the Action, Plaintiffs contend that there can be little doubt that the typicality requirement is
14 satisfied. The Plaintiffs, like every other member of the Class, worked for Defendant as non-exempt
15 employees during the Class Period. Plaintiffs contend that, like every other member of the Class, they
16 were subject to the same practices and policies of the Defendant and are subject to the same defenses.
17 Thus, Plaintiffs assert that the claims of the Plaintiffs and the Class Members arise from the same
18 course of conduct by the Defendant, involve the same employment policies and practices of Defendant,
19 and are based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of settlement,
20 Plaintiffs assert that the typicality requirement is met as to the common issues presented in this case.
21 Defendant disputes that typicality exists, but do not oppose a finding of typicality for purposes of this
22 Settlement only.

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

24 Plaintiffs contend that the Class Members are adequately represented here because Plaintiffs
25 and representing counsel (a) do not have any conflicts of interest with other class members, and (b) will
26 prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is
27 met here. First, Plaintiffs are well aware of their duties as the representatives and have actively
28 participated in the prosecution of this case to date. They effectively communicated with counsel,

1 provided documents to counsel and participated in the investigation and negotiations in the Action.
2 Second, Plaintiffs retained competent counsel who are experienced in employment class actions and
3 who have no conflicts. Decl. Nordrehaug at ¶ 31; Declaration of Jenny D. Baysinger at ¶¶ 14-15.
4 Third, there is no antagonism between the interests of the Plaintiffs and those of the Class. Both the
5 Plaintiffs and the Class Members seek monetary relief under the same set of facts and legal theories.
6 Defendant disputes that the adequacy requirement is satisfied but will not oppose such a finding for
7 purposes of this Settlement only.

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

9 To certify a class, the Court must also determine that a class action is superior to other available
10 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of
11 common issues will reduce litigation costs and promote greater efficiency, a class action may be
12 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
13 1996). As courts have previously observed:

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

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

19 Here, Plaintiffs contend that a class action is the superior mechanism for resolution of the claims
20 as pled by the Plaintiffs. While Defendant disputes that class treatment is superior, Defendant does not
21 dispute a finding of superiority in this action for purposes of this Settlement only.

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

23 The Court has broad discretion in approving a practical notice program. The Parties have
24 agreed upon procedures by which the Class Members will be provided with written notice of the
25 Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance
26 with the Agreement, Defendant will provide to the Settlement Administrator an electronic database
27 containing each Class Member’s Class Data. (Agreement at ¶ III(52)(b)(i).) Within 14 days after
28 receiving the Class Data, the Settlement Administrator will mail the Class Notice Packets to all Class

Members via first-class U.S. Mail using the most current mailing address information available. (Agreement at ¶ III(52)(b)(ii).) The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel and to be approved by the Court, includes all relevant information. (See Exhibit “A” to the Agreement.) The Class Notice will include, among other information: (i) information regarding the Action; (ii) the impact on the rights of the Class Members if they do not opt out; (iii) information to the Class Members regarding how to opt out and how to object to the Settlement; (iv) the estimated Settlement Share for each of the Class Members; (iii) the amount of attorneys’ fees and expenses to be sought; (v) the amount of the Plaintiffs’ service award requests; and (vi) the anticipated expenses of the Settlement Administrator. Decl. Nordrehaug at ¶32.

The Class Notice will state that the Class Members shall have forty-five (45) days from the date that the Notice is mailed to them to request exclusion (opt-out), to submit an objection, or to dispute the weeks they were employed by Defendant during the Class Period. (Agreement at ¶ III(42)(c).) In the event of a re-mailing, this deadline will be extended by an additional 15 days. Class Members shall be given the opportunity to object to the Settlement and/or requests for attorneys’ fees and expenses and to appear at the Final Approval Hearing. (Agreement at ¶ III(42)(c)(i).) Class Members who do not submit a timely and proper request to opt-out will automatically receive a payment of their Settlement Share. This notice program was designed to meaningfully reach the Class Members and it advises them of all pertinent information concerning the Settlement. Decl. Nordrehaug at ¶32. The mailing and distribution of the Class Notice satisfies the requirements of due process and is the best notice practicable under the circumstances and complies with Rules of Court 3.766 and 3.769(f).

VII. CONCLUSION

Plaintiffs respectfully request that the Court preliminarily approve the proposed settlement and sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final fairness hearing for a date that is one hundred twenty (120) days from the date of Preliminary Approval.

Dated: January 19, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
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By: /s/ Kyle Nordrehaug
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