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SUPERIOR COURT OF CALIFORNIA

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 PLAINTIFF'S
MOTION FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT

Date: July 27, 2022

Time: 9:00 a.m.

Dept.: 12

Judge: Charles S. Treat

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1 **I. INTRODUCTION.**

2 Plaintiffs Angelo Kalaveras and Emad Missreezadah (collectively “Plaintiffs”), negotiated a
3 resolution of pending wage and hour claims asserted on behalf of themselves and other similarly
4 situated current and former hourly paid, non-exempt California employees of Defendant NCR
5 Corporation (“Defendant” or “NCR”) between June 25, 2019 and July 19, 2022 (the “Class”) that
6 provides a total (increased) Gross Settlement Amount of \$1,009,480.28 (\$959,480.28 allocated to
7 resolve Class Claims and \$50,000 to resolve PAGA Claims) to be shared amongst 777 individuals as
8 compensation for alleged failures to 1) calculate the “regular rate of pay” for overtime and sick pay
9 wages resulting in underpaid wages, 2) provide meal and rest periods and associated premiums, 3)
10 reimburse all business expenses, including personal cell phones, 4) pay all wages due and owing on
11 separation, and 5) furnish accurate itemized wage statements (derivative of the wage errors and stand-
12 alone)—**a settlement expected to provide an average of nearly \$740 to each Class Member.**

13 Plaintiffs now seek final approval of the Parties’ Class Action Settlement Agreement (the
14 “Settlement” or “SA”).¹

15 The Settlement, which was preliminarily approved by this Court on February 28, 2023, (1) is
16 the product of arms-length negotiations, (2) was negotiated by experienced class action attorneys with
17 the help of an experienced and respected wage and hour mediator, (3) was reached subsequent to
18 undertaking sufficient investigation, including substantial formal and informal discovery and analysis
19 and expert review, in order to evaluate the Class’ claims, and (4) reflects a logical balancing of the
20 strength and value of the Class’ claims and the inherent risks of continued litigation, including
21 potential defeat at certification, on the merits, and/or on appeal. When the benefits of the Settlement
22 are assessed against the risks of continued, protracted litigation, the fairness, adequacy, and
23 reasonableness of the Settlement is clear and this Court should grant final approval of the Settlement
24 such that Class Members can receive their cognizable resultant distributions.

25 ///

26
27
28 ¹ Capitalized terms herein shall have the same meaning as in the Class Action Settlement Agreementn (“Settlement Agreement”, “Settlement”, or “SA”), a copy of which is attached as **Exhibit 1** to the Declaration of Jenny D. Baysinger (“JDB Dec.”) filed concurrently herewith.

1 **II. SUMMARY OF THE CASE.**

2 **A. Plaintiffs' Claims.**

3 Plaintiffs contend NCR failed to properly pay them and other non-exempt California
4 employees for all hours worked because (among other things) they failed to properly calculate and pay
5 overtime and sick pay by miscalculating the “regular rate of pay”, failed to provide meal and rest
6 periods, failed to reimburse employee cellular phone expenses, failed to issue accurate itemized wage
7 statements, failed to timely pay wages owed on separation, and engaged in unfair business practices
8 (the “Class Claims”). Plaintiffs also assert a cause of action to assess and collect civil penalties based
9 on the Class Claims (the “PAGA Claim”) during a period of time co-extensive with the Class Period.

10 **1. The Class.**

11 The Class consists of all hourly paid, non-exempt California employees of Defendant NCR
12 Corporation (“Defendant” or “NCR”) between June 25, 2019 and July 19, 2022. SA ¶ 3. There are
13 777 Participating Class Members (a 100% participation rate). Declaration of Stephen Gomez
14 Regarding Notice and Settlement Administration (“Admin. Dec.”) ¶¶ 6, 14.

15 **B. Procedural History.**

16 On June 25, 2020, Plaintiff Kalaveras filed the instant action asserting claims on a class-wide
17 basis. JDB Dec. ¶ 4; Declaration of Kyle Nordrehaug in Support of Motion for Final Approval (“KRN
18 Dec.”) ¶ 6. On October 5, 2020, the matter was removed to the United States District Court, Northern
19 District of California and the Class Claims were dismissed. JDB Dec. ¶ 5. On January 19, 2021,
20 Plaintiff Missreezadah filed a class action complaint in the Superior Court of California, County of Los
21 Angeles Case No. 21STCV01836 (the “Missreezadah LA Action”); Defendant removed that action to
22 the United States District Court, Central District of California. *Id.* ¶ 7. In March 2021, Kalaveras filed
23 a motion to remand the then PAGA-only action back to this Court—the matter was remanded April 22,
24 2021. *Id.* ¶ 5. Thereafter, counsel for Kalaveras and counsel for Missreezadah began working together.
25 In October 2021, Missreezadah was added to the instant action as an additional named plaintiff/LWDA
26 proxy. *Id.* ¶ 11. In order to facilitate the Settlement, a stipulated Fourth Amended Complaint (“4th
27 AC”) was filed on August 18, 2022 to re-plead the Class Claims that had been previously dismissed
28 from this matter and the Missreezadah LA Action. *Id.* ¶ 24. The 4th AC is the operative complaint.

1 **C. Identifying the Claims, Marshalling the Evidence, Creating a Damages Model and**
2 **Developing a Strategy for Mediation.**

3 Through independent inquiry, research, and informal discovery, Class Counsel thoroughly
4 and diligently investigated and pursued the claims. This process has included, but not been limited
5 to, (1) obtaining and reviewing Plaintiffs’ personnel files, payroll records, and time records through
6 informal discovery; (2) identifying, researching, and pleading the appropriate claims, including
7 amending the Lawsuit to assert additional claims as they ripened and/or were discovered; (3)
8 exhausting administrative remedies; (4) identifying, requesting, securing, and reviewing pertinent
9 policies, practices, and procedures; (5) identifying, requesting, and securing the payroll and time
10 records for 736 individual Class Members (nearly the entirety of the 777 member Class) (6)
11 propounding formal and informal discovery to secure relevant policy documents and numerical
12 information regarding the size of the class and the scope of the claims, (7) retaining an expert to
13 analyze the payroll and time data provided by Defendant and personally conducting spot checks to
14 ensure the accuracy of the damages calculations; (8) researching and evaluating the scope of
15 additional and/or previous actions and their potential impact on the Class Claims; (9) creating a
16 reliable damages model; and (10) developing and implementing a strategy for mediation and
17 settlement. JDB Dec. ¶¶ 12-18; KRN Dec. ¶¶ 10-12.

18 **D. Settlement Negotiations.**

19 At all times, the Parties’ negotiations were adversarial, non-collusive, and at arms’ length. JDB
20 Dec. ¶ 22; KRN Dec. ¶ 10. Between October 2021 and execution of the SA in October 2022,
21 Defendant provided hundreds of pages of documents and more than 1,000,000 line items of data
22 relating to the time and payroll records of 736 Class Members—nearly the entire Class. JDB Dec. ¶ 18.
23 In conjunction with those same negotiations, the Parties spoke at length about the strengths and
24 weaknesses of each sides’ claims and defenses, including Defendant’s contentions Class Members
25 executed arbitration agreements with valid and enforceable class waivers, NCR had lawful time-
26 keeping and wage payment policies, that they had lawful meal/rest period policies, that all “non-
27 discretionary” bonuses were included in the regular rate of pay and additional remuneration not
28 included was discretionary and appropriately excluded, that Class Members actually took meal periods

1 and rest periods or any missed were voluntarily foregone, that there was no requirement for personal
2 cellular phone usage, and that derivative wage statement claims did not cause harm, . *Id.* ¶¶ 47, 53-62.
3 On April 19, 2022, the Parties participated in an all-day mediation with Mark Rudy, reached an
4 agreement in principle, and executed a Memorandum of Understanding on May 9, 2022. *Id.* ¶ 22.
5 Following months of additional negotiation, a long-form settlement agreement was signed in October
6 2022. *Id.* ¶ 23, Exh. 1.

7 **E. This Court Granted Preliminary Approval of the Settlement.**

8 On February 28, 2023, this Court granted preliminary approval of the Settlement. Having
9 reviewed the substantive terms of the Settlement, the Court (1) found the proposed Class appropriate
10 for conditional certification, (2) found the Class meets the requirements of California Code of Civil
11 Procedure section 382, (3) found the terms of the Settlement appeared fair, adequate, and reasonable;
12 (4) preliminarily approved the amount allocated to resolve PAGA Claims as fair, adequate, and
13 reasonable; (5) preliminarily found the investigation and research conducted prior to the Settlement
14 sufficient to allow the Parties to reasonably evaluate the claims; (6) found the notice and manner of
15 notice proposed satisfied due process, and (7) scheduled a final approval hearing. Order After
16 Hearing Granting Motion for Preliminary Approval (“PAO”) at ¶ 3-8, 12.

17 **III. SUMMARY OF THE PROPOSED SETTLEMENT.**

18 **A. Monetary Relief Under the Settlement.**

19 Pursuant to the Settlement, NCR is to remit an increased GSA of \$1,009,480.28², on an all-in,
20 non-reversionary basis, to resolve the Released Claims—\$50,000 of the GSA is allocated to resolve
21 PAGA Claims and \$959,480.28 is allocated to resolve Class Claims. SA ¶¶ 19, 25.

22 After deducting the administration costs (\$10,520), Plaintiffs’ Service Payments (\$20,000 total),
23 the fees (\$333,333.33) and costs (\$21,000) of Class Counsel, and the payment to the LWDA relating to
24 the PAGA Claims (\$37,500), a \$587,126.95 net amount (\$574,626.95 for Class Claims and \$12,500
25 attributable to PAGA Claims) will ultimately be distributed to the 777 participating Class Members.
26 SA ¶ 19, 22; JDB Dec. ¶¶ 27, 82. Each Participating Class Member is expected to actually receive an

27 _____
28 ² The GSA was increased from what was expected at preliminary approval as the escalator clause in the SA, negotiated to protect the Class, was triggered and mandated the increased payment. SA ¶ 50.c; JDB Dec. ¶¶ 26-27.

1 average of nearly \$740 (\$739.54) (calculated as \$7.87/workweek employed by NCR during the Class
2 Period) in resolution of Class Claims. Admin. Dec. ¶ 11; JDB Dec. ¶¶ 31, 52.

3 **B. Scope Of Release And Final Judgment.**

4 Upon full funding of the GSA, Participating Class Members will forever and completely release
5 and discharge NCR and the Released Parties from the Released Class Claims. SA ¶¶ 29, 58.a.
6 Additionally, Plaintiffs will each release NCR and the Released Parties from any and all claims and
7 will execute a Civil Code section 1542 waiver. SA ¶ 58.c. The Released Claims were narrowly
8 tailored to track the factual bases for the Class Claims pled and do not include a Civil Code 1542
9 waiver. SA ¶¶ 29, 58.a; JDB Dec. ¶ 65.

10 **C. Settlement of the PAGA Claims.**

11 NCR's payment of \$50,000 will resolve all claims for civil penalties arising out of the Class
12 Claims. SA ¶¶ 29-30, 58.b. The LWDA was advised of the Settlement and its PAGA allocation and
13 has not raised any concern or objection to date. JDB Dec. ¶ 83, Exh. 3.

14 **D. Class Representative Service Payments.**

15 Plaintiffs each request a \$10,000 Service Payment. SA ¶¶ 11, 49.a. Each award is less than
16 1% of the increased GSA (1.98% total) and is fair, reasonable and appropriate under the
17 circumstances, including each Plaintiffs' provision of a general release and Civil Code section 1542
18 waiver. Critically, no Class Member has objected to the requested Service Payments. Admin. Dec. ¶
19 14; JDB Dec. ¶ 89.

20 **E. Class Counsel's Attorneys' Fees And Costs.**

21 Class Counsel requests attorneys' fees in the amount of 1/3 of the original \$1,000,000 GSA,
22 or \$333,333.33, and declared litigation costs of \$21,000. The propriety of the sought fees and costs
23 are discussed in detail in Plaintiff's concurrently filed Motion for Attorneys' Fees, Costs, and Service
24 Payments ("Fee Motion"). Class Members have been apprised of the requests and not one objection
25 has been raised. Admin. Dec. ¶ 14, Exh. A.

26 **IV. FINAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

27 As a prerequisite to granting final approval, this Court must evaluate and determine whether
28 the Class is suitable for certification. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019.

1 As outlined in Plaintiff’s Motion for Preliminary Approval of Class Settlement, and reiterated below,
2 the Class meets the requirements of California Code of Civil Procedure section 382. Courts have
3 broad discretion to certify a class for purposes of settlement. *Luckey v. Sup. Ct.* (2014) 228
4 Cal.App.4th 81, 93-94; *Zinser v. Accuflix Research Inst., Inc.* (9th Cir. 2001) 253 F.3d 1180, 1186;
5 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n. 19. To be certified, a settlement class
6 must satisfy all of the following: (1) the individuals are so numerous that joinder would be
7 impractical; (2) there is common interest between plaintiffs and class members; (3) plaintiffs’ claims
8 are typical of the claims of the class; and (4) plaintiffs and counsel will fully and adequately represent
9 class members’ interests. Code. Civ. Proc. § 382; Fed. R. Civ. P. 23(a)³; *Sav-on Drug Stores, Inc. v.*
10 *Sup. Court* (2004) 34 Cal.4th 319, 326-27. Since this Court already found these criteria satisfied and
11 nothing material has changed, certification in the context of final approval is proper.

12 **A. The Numerosity Requirement Continues To Be Met.**

13 Numerosity is easily satisfied as there are 777 class members here. Admin. Dec. ¶¶ 8, 11.
14 Courts generally find numerosity when a class exceeds 40 individuals, or where joinder would
15 impose financial burdens and clog the court’s docket—numerosity exists here. *Millan v. Cascade*
16 *Water Svcs., Inc.* (E.D. Cal. 2015) 310 F.R.D. 593, 603 (class of 40 or more sufficiently numerous).

17 **B. The Commonality Requirement Continues To Be Met.**

18 Commonality is met if questions of law and fact that are common to the class predominate
19 and the theory of recovery is “amenable to class treatment.” *Sav-On Drug Stores*, 34 Cal.4th p.
20 327; *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033. The claims of Plaintiffs
21 and each of the Class Members flow from the same facts and legal claims, i.e. Plaintiffs contend
22 Defendant uniformly failed to include non-discretionary bonuses/shift differentials when
23 calculating “regular rate of pay” for overtime and sick leave, uniformly applied facially deficient
24 meal period policies and rest period practices, uniformly failed to provide any reimbursement for
25 necessary personal cellular phone use, and uniformly provided wage statements that fail to identify
26 “total hours worked” and include multiple various categories of hours such that total hours worked
27

28 ³ California courts use FRCP 23 and cases applying it for guidance on class issues. See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, federal case law will be cited.

1 cannot be ascertained by looking at the wage statements alone. JDB Dec. ¶¶ 37-40, 56-62.
2 Factually, the policies and practices alleged to underscore the Class Claims apply class-wide and
3 Defendant's liability can be determined by facts, and applicable California law, common to all
4 Class Members—common issues undeniably predominate.

5 There is similarly no question that resolving the claims of Class Members through this
6 single action is superior to individual litigation or any alternative resolution method that may exist.
7 It is expected that individual claims are worth less than \$10,000 (Defendant's data reveals a
8 maximum average liability of only \$9,254.98) and such a small amount is not likely to motivate
9 individual representation and/or prosecution. *Shroyer v. New Singular Wireless Svcs., Inc.* (9th Cir.
10 2007) 498 F.3d 976, 986; *Wolin v. Jaguar Land Rover N.A., LLC* (9th Cir. 2010) 617 F.3d 1168,
11 1175-1176; JDB Dec. ¶¶ 73, 79. This is particularly true given that individual Class Members
12 would likely be forced into individual arbitration on these low-value claims. Class treatment is, by
13 far, the superior procedure. Class treatment provides the best, most cognizable avenue to secure
14 fair, adequate, and reasonable recovery—the commonality prong continues to be met.

15 **C. Plaintiffs' Claims Continue To Be Typical Of The Class.**

16 Each and every Class Member, including each named Plaintiff, has typical, overtime, meal and
17 rest break, reimbursement, stand-alone wage statement, and derivative claims because they arise from
18 the same factual bases and uniform application of policies and procedures, and are based upon the same
19 legal theories applicable to all Class Members. *Wehner v. Syntex Corp.* (N.D. Cal. 1987) 117 F.R.D.
20 641, 644. Typicality continues to be satisfied.

21 **D. Plaintiffs and Class Counsel Continue To Be Adequate Representatives.**

22 When considering adequacy, courts focus on 1) whether the representative and his/her counsel
23 have any conflicts of interest (adverse interests) with the Class and 2) whether the representative will
24 vigorously prosecute the action on behalf of the Class. E.g. *Staton v. Boeing, Inc.* (9th Cir. 2003) 327
25 F.3d 938, 957; *Lao v. H&M Hennes & Mauritz, L.P.* (N.D. Cal. 2018) 2018 WL 3753708 * 9; *McGhee*
26 *v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450-51. Plaintiffs' interests in prosecuting this Class Action
27 and obtaining the most beneficial recovery possible fully comport with the interests of the Class. There
28 are no conflicts between any of the Plaintiffs and the other Class Members, and each is a member of the

1 Class. *Hanlon*, 150. F 3d 1021. In addition, throughout this case Plaintiffs and Class Counsel have
2 demonstrated their commitment to prosecuting this lawsuit on behalf of the Class. Such is reflected by
3 Class Counsel's experience in wage and hour cases and the cognizable benefits they have and will
4 continue to confer upon Class Members, including securing the increased GSA. JDB Dec. ¶¶ 43-44,
5 49, 52, 63, 105-108; KRN Dec. ¶¶ 3-5, 6-13.

6 **V. THE CLASS NOTICE WAS SUCCESSFULLY DISTRIBUTED.**

7 The Court-approved Class Notice meets all of the requirements of procedural due process and
8 California Rules of Court 3.769(f) by: (1) identifying the Parties and describing the Class Claims in a
9 straightforward manner; (2) succinctly describing the essential terms of the Settlement, including the
10 GSA, the amount Class Counsel will request for attorneys' fees and costs, and Plaintiffs' requested
11 Service Awards; (3) clearly identifying Released Class Claims and Released Parties; (4) providing
12 Class Members with information on how to participate in, opt out of, and/or object to the Settlement,
13 and how to contest the workweek calculation; (5) providing all applicable deadlines; and (6)
14 informing Class Members of the consequences if they decide to opt out, object, or participate in the
15 Settlement. Further, the Class Notice clearly explains resources to obtain further information (e.g.,
16 from Class Counsel or the Administrator, or through the court's website) and that the Final Approval
17 Hearing may be moved without notice. Ex. A to Admin Dec. The Class Notice provided sufficient
18 information for Class Members to make an informed decision on how to proceed. E.g *Hoffman-La*
19 *Roche, Inc. v. Sperling* (1989) 493 U.S. 165, 171.

20 On April 14, 2023, after completion of a National Change of Address search, notices were
21 mailed via first class mailed to 777 Class Members. Although 65 of those Notices were initially
22 returned as undeliverable, the Administrator was able to locate new addresses for 61 of those
23 individuals and re-mail their Class Notices. As of the filing of this Motion, only 4 notices remain
24 undeliverable. Admin Dec. ¶¶ 8-9; Ex. A; JDB Dec. ¶ 74. This constitutes an over 99% (99.48%)
25 successful mailing rate. *Dorsette v. TA Operating, LLC* (C.D. Cal. 2010) 2010 WL 11583002 * 5
26 (92% successful mail rate acceptable).

27 ///

28 ///

1 **VI. THE CLASS HAS EXPRESSED ITS APPROVAL OF THE SETTLEMENT.**

2 The Class has shown its support of the Settlement. **Not one of the 777 Class Members has**
3 **filed an objection OR elected to opt-out to date.** Admin. Dec. ¶ 14.

4 **VII. FINAL APPROVAL OF THE SETTLEMENT SHOULD BE GRANTED.**

5 **A. Legal Standards for Approval of Class Action Settlements.**

6 A class action may not be dismissed, compromised or settled without Court approval. Cal. R.
7 Court 3.769(a); Fed. R. Civ. P. 23(e). The decision to approve a proposed settlement is committed to
8 this Court's sound and broad discretion. *Dunk*, 48 Cal.App.4th 1801. Whenever a proposed class
9 action settlement is 1) reached through arm's-length bargaining, 2) negotiated after sufficient
10 investigation and discovery, 3) negotiated by experienced counsel, and 4) subjected to minimal
11 objection by class members, a presumption of fairness arises. *Id.* 1802. All factors are present here.

12 **B. The Settlement Terms are Fair, Reasonable, and Adequate.**

13 Law and public policy strongly favor settlement prior to trial, particularly in class actions
14 where substantial resources can be conserved by avoiding the time, expense and rigors of litigation.
15 *Churchill Village, LLC v. General Electric Co.* (9th Cir. 2004) 361 F.3d 566, 576; *Class Plaintiffs v.*
16 *City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276. Accordingly, Courts have "wide discretion in
17 assessing the weight and applicability of each factor." California courts recognize that "the trial
18 court's determination [of fairness] is nothing more than an amalgam of delicate balancing, gross
19 approximations, and rough justice." *Dunk*, 48 Cal.App.4th 1801, quoting *Officers for Justice v. Civ.*
20 *Svc. Commn.* (9th Cir. 1982) 688 F.2d 615, 625. To that end, the court's inquiry "into what is
21 otherwise a private consensual agreement negotiated between parties to a lawsuit must be limited to
22 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
23 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
24 whole is fair, reasonable and adequate to all concerned". *Officers for Justice*, 688 F.2d 626.

25 In passing on a class action settlement, a Court must determine whether it is "fair, adequate
26 and reasonable." In doing so, courts consider a number of factors, including: (1) the strength of the
27 plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk
28 of maintaining class action status through trial; (4) the amount offered; (5) the extent of discovery

1 completed and the procedural stage; (6) the experience and views of counsel; and (7) the reaction of
2 class members to the settlement. *Hanlon*, 150 F.3d 1026; *Dunk*, 48 Cal.App.4th 1802. Adequate
3 notice is also critical. *Ibid*. The factors are non-exclusive, not all need be shown, and the court is free
4 to engage in a balancing and weighing of factors depending on the circumstances of each case.
5 *Churchill Village*, 361 F.3d 576 n. 7; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,
6 245. One factor alone may prove determinative. See *Torrise v. Tucson Elec. Power Co.* (9th Cir.
7 1993) 8 F.3d 1370, 1376 (upholding settlement where one factor predominated). All factors support
8 the Settlement here.

9 **1. The Strengths and Weaknesses of the Class' Claims and the Risks of**
10 **Proceeding With Litigation Strongly Support Final Approval.**

11 This Court should reaffirm its observation on preliminary approval that the Settlement is fair,
12 adequate, and reasonable. PAO pp. 5:22-23, 6:14-7:2. Approval of a class settlement is proper
13 when “there are significant barriers plaintiffs must overcome in making their case.” *Chun-Hoon*
14 *v. McKee Foods Corp.* (N.D. Cal. 2010) 716 F.Supp.2d 848, 851 (parties’ acknowledgment of
15 potential decertification supports approval); see also *Rodriguez v. West Publishing Corp.* (2009)
16 563 F.3d 948, 966 (risks of litigating weigh in favor of class settlement approval).

17 While Class Counsel believes evidence exists from which the trier of fact could
18 conclude NCR engaged in a pattern and practice of failing to properly reimburse employee
19 expenses, calculate and pay overtime and sick leave, or provide meal and rest breaks or associated
20 premiums (and that such derelictions resulted in derivative wage statement deficiencies and failures
21 to pay wages on separation), continued litigation is guaranteed to be costly, time consuming and
22 uncertain. NCR asserted numerous legal and factual grounds to defend against the substance of the
23 Class Claims and/or certification including, but not limited to, 1) they have a valid, enforceable
24 arbitration agreement and class action waiver, 2) employees were always authorized and permitted to
25 take meal and rest breaks because they had substantial control over their own schedules and nearly
26 all executed written waivers, 3) any missed breaks were the result of individual choice/election, 4)
27 derivative wage statement and waiting time penalty claims cannot be predicated on meal and rest
28 period violations (or the law was at least unsettled until 2022), 5) there was no injury caused by the

1 failure to include a total hours worked and 6) NCR did not “require” employees to use personal cell
2 phones for business purposes and thus no reimbursement was required. JDB Dec. ¶¶ 53-64; KRN
3 Dec. ¶¶ 11-12. Although Class Counsel is confident certification and success on the merits were
4 feasible, continued litigation was guaranteed to be costly, time consuming, and uncertain—potential
5 appellate proceedings would only further delay and jeopardize Class recovery. The uncertainty of
6 recovery was further compounded by the existence of arbitration agreements and the uncertainty
7 with how those may impact PAGA standing. JDB Dec. ¶¶ 64, 70.

8 Considering the strengths and weaknesses of the Class Claims, combined with the risks of
9 continued litigation, weighs strongly in favor of final approval of the Settlement.

10 **2. The Risk of Maintaining Class Action Status Favors Approval.**

11 As set forth above, Plaintiffs faced myriad risks maintaining class action status. Not only did
12 NCR contend that they have valid, enforceable arbitration agreements and class waivers, but claims
13 based on alleged meal and rest break violations are notoriously difficult to secure and maintain class
14 certification of. E.g. *Ortiz v. CVS Caremark Corp.* (N.D. Cal. 2013) 2013 WL 6236743 *12; *Lusk v.*
15 *Five Guys Enterprises, LLC* (E.D. Cal. 2019) 2019 WL 7048791 *6. The existence of these risks
16 with respect to class certification further underscore the propriety of the Settlement.

17 **3. The Amount Offered to Settle the Class’ Claims is Substantial and Weighs in**
18 **Favor of Final Approval.**

19 While it is generally accepted that “[t]he most important factor is the strength of the case
20 for plaintiffs on the merits, balanced against the amount offered in settlement,” a court must be
21 mindful that its function is limited solely to determining whether the settlement falls within the range
22 of acceptable under the circumstances. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010)
23 186 Cal.App.4th 399, 407-409. Indeed, “[t]he proposed settlement is not to be judged against a
24 hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at
25 trial,” *Wershba*, 91 Cal.App.4th 246. Moreover, the fact “the settlement could have been better . . .
26 does not mean the settlement presented was not fair, reasonable or adequate.” *Hanlon*, 150 F.3d
27 1027. Here, the Settlement will result in substantial benefits to all Class Members.

28 ///

1 The portion of the increased GSA allocated to Class Claims (\$959,480.28) represents nearly
2 25% of the realistic recovery (13.3% of the *maximum* potential recovery and almost 25% of the
3 maximum non-penalty recovery). JDB Dec. ¶¶ 43, 49. This is a positive result and within the range of
4 reasonableness, especially considering the uncertainties involved with litigation, including the existence
5 of potentially enforceable arbitration agreements, and Defendant’s defenses. See e.g., *Jabbari v. Wells*
6 *Fargo & Co.* (N.D. Cal. 2017) 2017 WL 5157608 *5 (dispute over arbitration agreement and class
7 waiver made settlement more fair in context); *In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213
8 F.3d 454, 459 (settlement of 16.67% of potential recovery fair). While the increased GSA represents
9 only a fraction of NCR’s maximum exposure, it represents a fair compromise given the substantive
10 risks outlined in the preceding section and the very real possibility Class Members would secure
11 nothing if left to pursue the claims individually. JDB Dec. ¶¶ 47, 43; KRN Dec. ¶¶ 11-12; *Galvan v.*
12 *Superior Tank Co, Inc.* (N.D. Cal. 2016) 2016 WL 11502115 * 6-7 (substantial reduction of more than
13 65% appropriate in light of risk employer could compel individual arbitrations); *Lee v. JPMorgan*
14 *Chase & Co.* (C.D. Cal. 2015) 2015 WL 12711659 * 4. Considering all of the circumstances, the
15 Settlement represents a fair, reasonable, and adequate outcome that affords Class Members cognizable
16 recovery they are unlikely to realize absent the negotiated resolution and should be approved. JDB
17 Dec. ¶¶ 33, 43-44, 49, 52, 63; see also, *In re Wachovia Corp. “Pick-A-Payment” Mortgage Mktg. &*
18 *Sales Practices Litig.* (N.D. Cal. 2011) 2011 WL 1877630 *3 (belief of “counsel, who are experienced
19 attorneys . . . that the settlement is extremely favorable to the class” supports approval).

20 **4. Class Counsel Had Extensive Information that Permitted Them to Calculate**
21 **Damages and Make Informed Settlement Decisions.**

22 Courts look to the amount of exchanged information to determine whether the parties
23 made an informed decision to settle. *Linney v. Cellular Alaska P’ship*, (9th Cir. 1998) 151 F.3d
24 1234. Here, Class Counsel received formal discovery responses as well as the informal production of
25 the time and wage data for 736 of the 777 Class Members. JDB Dec. ¶¶ 12, 18. Such extensive data
26 allowed Class Counsel’s retained expert to identify violation rates and other important data points and
27 confidently extrapolate those figures (minimal extrapolation was required) to encompass the entire
28 Class and the entire Class Period. Class Counsel also had policy documents and the benefit of

1 discussion with Plaintiffs to better understand the nature of the claims and be in a position to evaluate
2 their strengths and weaknesses. Ultimately, the Settlement was only reached after more than a year of
3 active litigation (in two forums), substantive analysis of data by a retained expert, a full day
4 mediation, and additional months of negotiations to finalize a long-form settlement agreement. *Id.* ¶¶
5 3-19; KRN Dec. ¶ 11.

6 The comprehensive information exchange, as well as the protracted arms-length
7 settlement discussions, underscore the conclusion the Settlement was based on reasoned and
8 informed analysis.

9 **5. The Settlement is Supported by Skilled and Experienced Class Counsel.**

10 “‘Great weight’ is accorded to the recommendation of counsel, who are most closely
11 acquainted with the facts of the underlying litigation. This is because ‘[p]arties represented by
12 competent counsel are better positioned than courts to produce a settlement that fairly reflects each
13 party’s expected outcome in the litigation.’ Thus, ‘the trial judge, absent fraud, collusion, or the like,
14 should be hesitant to substitute its own judgment for that of counsel.’” *Nat’l Rural Telecomms. Coop.*
15 *v. DIRECTV, Inc.* (2004) 221 F.R.D. 523, 528.

16 Class Counsel, having demonstrated a high degree of competence in the litigation of this case
17 and numerous other employment class actions and PAGA representative actions, strongly believes the
18 proposed Settlement properly balances the realistic monetary relief available to the Class against the
19 magnitude of the risks of continued litigation. JDB Dec. ¶¶ 33, 43-44, 46-63 KRN Dec. ¶¶ 3-5; *In re*
20 *Wachovia Corp. “Pick-A-Payment” Mortgage Mktg. & Sales Practices Litig.*, 2011 WL 1877630, *3
21 This factor further favors approval.

22 **6. The Absence of Any Objections Or Opt-Out Supports Approval.**

23 Multiple courts make clear that the number or percentage of class members who object to
24 or opt out of a settlement is a factor of great significance and that “the absence of a large number
25 of objections to a proposed class action settlement raises a strong presumption that the terms of a
26 proposed class action settlement are favorable to the class members.” *Dunk*, 48 Cal. App.4th 1802;
27 *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. 528-29. **Not one of the 777 Class Members has**
28 **objected OR opted out** which “. . . strongly supports the fairness, reasonableness, and adequacy

1 of the settlement.” *Williams v. Costco Wholesale Corp.* (S.D. Cal. 2010) 2010 WL 2721452 * 5.
2 Admin Dec. ¶ 14. This overwhelming support strongly substantiate the propriety of final approval.

3 **D. The Settlement Administrator’s Fees are Reasonable.**

4 The Parties selected Simpluris to serve as Administrator. Simpluris has substantial experience
5 in administering class action settlements and has already handled distribution of the Class Notice.
6 Following final approval, the Administrator will handle distribution and mailing of all individual
7 Settlement Shares and Individual PAGA Payments⁴, calculating of all applicable taxes, and distribution
8 to the LWDA, Class Counsel, and Plaintiffs’ Service Payments. Plaintiffs seek final approval of the
9 Administrator’s fees and costs of \$10,520, less than the \$12,000 capped bid initially communicated, to
10 be paid out of the increased GSA.

11 **E. Class Counsel’s Fees and Costs and the Service Payments to Plaintiffs Are**
12 **Reasonable.**

13 Plaintiffs seek attorneys’ fees of 1/3 of the original GSA, or \$333,333.33, declared costs of
14 \$21,000, and a \$10,000 Service Payment to each Plaintiff (\$20,000 total). As set forth in Plaintiff’s
15 concurrently filed Motion for Attorneys’ Fees, Costs, and Service Payments, the sought fees, costs,
16 and Service Payments should be approved because they are reasonable, within the range commonly
17 awarded by state and federal courts in wage and hour class actions, and because Class Counsel and
18 Plaintiffs conferred significant monetary benefits upon Class. Again, not a single Class Member
19 has objected to the requested fees, costs, or Service Payments. Admin. Dec. ¶ 14.

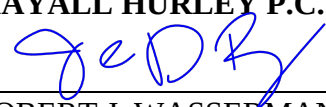
20 **VII. CONCLUSION.**

21 For all the reasons stated above, Plaintiffs’ unopposed Motion should be granted.

22 **DATED:** July 3, 2023

MAYALL HURLEY P.C.

23 By _____


24 ROBERT J. WASSERMAN
25 JENNY D. BAYSINGER

Attorneys for Plaintiffs and the Putative Class

26 _____
27 _____
28 ⁴ Two distributions are contemplated in light of the protracted nature of the funding of the MSA. JDB Dec. ¶¶ 45-46. Presently, the Parties anticipate an initial pro-rata distribution in and around August 2024 and a second/final distribution in and around April 2026. *Ibid.*