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

14 **IN AND FOR THE COUNTY OF MONTEREY**

15 RATI GANDHALE, an individual, on
16 behalf of herself and on behalf of all
17 persons similarly situated,

18 Plaintiff,

19 v.

20 SELECT REHABILITATION LLC, a
21 Limited Liability Company and DOES 1
22 through 50, Inclusive,

23 Defendants.

CASE No. **20CV002240**

(Consolidated with Case No. 21CV000740)

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

Hearing Date: October 28, 2022

Hearing Time: 8:30 a.m.

[Hearing scheduled by Order dated June 10, 2022]

Dept.: 14

Judge: Hon. Carrie M. Panetta

Action Filed: August 25, 2020

Trial Date: Not set

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1 **I. INTRODUCTION**

2 The parties to this action have reached a Settlement and the Court preliminarily approved the
3 Class Action Settlement Agreement (“Agreement”), a true and correct copy of which is attached as
4 Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In accordance with the
5 Preliminary Approval Order dated June 10, 2022 (“Preliminary Approval Order”), the approved Class
6 Notice has been disseminated to the Class.²

7 The purpose of this hearing is to determine whether the proposed settlement of the litigation
8 should be finally approved. Plaintiff Rati Gandhale ("Plaintiff") respectfully submits this memorandum
9 in support of the unopposed motion for final approval and the proposed entry of the Final Approval
10 Order and Judgment, submitted herewith. The settlement represents an excellent result for the Class
11 and avoids the delays, risks, and costs of further litigation. After disseminating notice to the members
12 of the Class, there were **no objections and only one (1) request for exclusion**, which means that
13 nearly the entire Class has elected to participate in the Settlement. Blumenthal Decl. ¶4. This is a
14 positive response from the Class evidencing their collective approval of the settlement. As a result,
15 Plaintiff respectfully submits 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 Plaintiff and Defendant Select Rehabilitation, LLC ("Defendant") reached a full and final
19 settlement of the above-captioned action, which is embodied in the Agreement filed concurrently with

21 ¹ Capitalized terms are defined in the Agreement.

22 ² The “Class” is “[a]ll individuals who are or previously were employed by Defendant in California
23 in one or more of the Covered Positions during Class Period.” “Covered Positions” are the following
24 job positions: Cluster Program Manager (OT); Certified Occupational Therapy Assistant; Occupational
25 Therapist; Program Assistant; Program Director—OT; Program Director—PT; Program Manager;
26 Program Manager Backup—COTA; Program Manager Backup—OT; Program Manager Backup—PT;
27 Program Manager Backup—PTA; Program Manager Backup—Rehab Tech; Program Manager
28 Backup—RT; Program Manager Backup—SLP; Program Manager—COTA; Program Manager—OT;
 Program Manager—PT; Program Manager—PTA; Program Manager—SLP; Physical Therapist;
 Physical Therapist Assistant; Rehab Technician; Speech Language Pathology; Wellness Coordinator.
 The “Class Period” is from August 25, 2016 through December 28, 2021. (Preliminary Approval Order
 ¶ 5.)

1 the Court. As consideration for this Settlement, the Gross Settlement Amount is One Million Eight
2 Hundred Fifty Thousand Dollars (\$1,850,000) to be paid by Defendant. (Agreement at ¶I(19).) Under
3 the Settlement, the Gross Settlement Amount includes all Settlement Shares to Participating Class
4 Members, all Settlement Administration Expenses, Class Counsel Fees Payment and Class Counsel
5 Litigation Expenses Payment, PAGA Payment, and the Class Representative Service Payments.
6 (Agreement at ¶ III(39)-(40).) Blumenthal Decl. ¶3(a).

7 The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement
8 at ¶ III(39).) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement
9 at ¶ III(39).) Blumenthal Decl. ¶3(b).

10 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay
11 Defendant's share of payroll taxes within fifteen (15) days of the Effective Date. (Agreement at
12 ¶ III(44)(i).) Within fifteen (15) days after Defendant funds the Gross Settlement Amount, the
13 Settlement Administrator will pay the Settlement Shares to Participating Class Members, Class
14 Counsel's attorneys' fees and costs, the PAGA Payment, the Class Representative Service Payment,
15 and employer and employee tax withholdings applicable to the Net Settlement Amount allocated to
16 wages. (Agreement at ¶ III(44)(i).) Blumenthal Decl. ¶3(c).

17 The Net Settlement Amount shall equal the Gross Settlement Amount less the Court-approved
18 Class Representative Service Payment, the Class Counsel Fees Payment, Class Counsel Litigation
19 Expenses Payment, the PAGA Payment, and the Settlement Administration Expenses. (Agreement at
20 ¶ I(21).) The Net Settlement Amount will be distributed as the Settlement Shares to each Participating
21 Class Member defined at ¶I(24) as a Class Member who does not timely exclude himself or herself
22 from the Settlement and will therefore receive his or her share of the Net Settlement Amount
23 automatically without the need to return a claim form. (Agreement at ¶¶ III(42).) The Settlement
24 Shares for Class Members will be calculated as follows: the Settlement Administrator shall divide the
25 Net Settlement Amount by the total number of weeks included in the dates of employment to determine
26 a dollar amount per week ("Weekly Rate"); and (iii) the Settlement Administrator shall then take the
27 number of weeks worked by each Participating Class Member and multiply it by the Weekly Rate to
28 calculate their Settlement Share. (Agreement at ¶ III(42(b)).) Blumenthal Decl. ¶ 3(d).

1 Class Members were sent the Court approved Class Notice using the procedure approved by the
2 Court by mailing the notice packets after updating class members' addresses using the National Change
3 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
4 any forwarding address provided or updated address located. Class Members were provided with the
5 opportunity to exclude themselves or "opt out" if they did not want to participate in the settlement.
6 (Agreement at ¶ III(44)(c).) Only one Class Member submitted an request to opt-out and all the other
7 Class Members are deemed Participating Class Members who are bound by the Settlement and will be
8 entitled to receive a Settlement Share. (Agreement at ¶ III(44)(c).) A PAGA Group Member who opts
9 out the Settlement will still be paid their allocation of the PAGA Settlement Amount and will remain
10 subject to the release of the PAGA claims, regardless of their request for exclusion. (Agreement at ¶
11 III(40)(c).) The Class Notice also advised Class Members of their right to object to the Settlement
12 and/or dispute their workweeks. (Agreement at ¶ III(44)(c), Ex. A.) The final results are documented
13 in the Declaration of Stephen Gomez (Settlement Administrator), filed with this Motion. Blumenthal
14 Decl. ¶ 3(e).

15 A Participating Class Member must cash his or her Settlement Share check within 180 days
16 after it is mailed. (Agreement at ¶ III(44)(j).) The Settlement Administrator will send a reminder to
17 Participating Class Members who have not cashed their checks within 120 days after its last mailing
18 to the affected individual. (Agreement at ¶ III(44)(j)).) Any settlement checks not cashed within 180
19 days will be voided and any the funds from such uncashed checks will be paid *cy pres* to a charity to
20 be ordered by the Court pursuant to California Code of Civil Procedure section 384. The Parties have
21 selected Children's Advocacy Institute, and are submitting a stipulation to provide for this charity to
22 be the *cy pres* beneficiary. Blumenthal Decl. ¶3(f).

23 Simpluris was appointed by the Court as the Settlement Administrator for the Settlement.
24 (Agreement at ¶ III(43).) From the Gross Settlement Amount, the Settlement Administrator shall be
25 paid for the expenses of administering the Settlement. (Agreement at ¶ III(40)(d).) The final
26 administration expenses are \$15,000 as set forth in the Declaration of Stephen Gomez at ¶15.
27 Blumenthal Decl. ¶3(g).

28 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not

1 to exceed one-third (1/3) of the Gross Settlement Amount, as the Class Counsel Fees Payment.
2 (Agreement at ¶ III(40)(b).) Class Counsel will also be allowed to apply separately for an award of
3 Class Counsel Litigation Expenses Payment in an amount not to exceed \$25,000. (Agreement at
4 ¶ III(44)(b).) Subject to Court approval, the Agreement provides for a payment to the Plaintiff as the
5 Class Representative Service Payment, which at preliminary approval this Court reduced to \$8,000.
6 (Agreement at ¶ III(44)(a).) In support of this separate motion for attorneys' fees, reimbursement of
7 expenses and service awards, Class Counsel is providing evidentiary support, for these requests,
8 including lodestar. Blumenthal Decl. ¶3(h).

9 The Parties will seek approval from the Court for the PAGA Payment of \$40,000 out of the
10 Gross Settlement Amount, which shall be allocated 75% (\$30,000) to the LWDA as the LWDA's share
11 of the PAGA Payment pursuant to PAGA and 25% (\$10,000) will be distributed to the Aggrieved
12 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at
13 ¶ III(40)(c).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be
14 subject to the release of the PAGA claims, whether or not they opt out of the Settlement. (Agreement
15 at ¶ III(40)(c).) As set forth in the accompany proof of service, the LWDA has been served with this
16 motion and the Agreement. Blumenthal Decl. ¶3(i).

17 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
18 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
19 is "within the range of possible final approval." (Preliminary Approval Order at ¶ 3.) In sum, the
20 Settlement valued at \$1,850,000 is an excellent result for the Class. This result is particularly favorable
21 in light of the fact that liability and class certification in this case were far from certain in light of the
22 defenses asserted by Defendant. Given the complexities of this case, the defenses asserted, the
23 uncertainty of class certification, along with the uncertainties of proof at trial and appeal, the proposed
24 settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

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

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

1 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*
2 *v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
3 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

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

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

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

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

1 Com'n, 688 F.2d 615, 625 (9th Cir. 1982). The purpose of the requirement is "the protection of those
2 class members, including the named plaintiffs, whose rights may not have been given due regard by
3 the negotiating parties." *Dunk, supra*, at 1801.

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

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

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

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

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

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

1 The Settlement was the product of one arms-length mediation and contentious negotiations through an
2 all-day mediation presided over by David A. Rotman, a respected and experience mediator of wage and
3 hour class actions. The details of the litigation are set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(i).

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

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

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

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

26 From November 2021 to May 2022, the settlement agreement and exhibits thereto were drafted,
27 finalized and executed, and presented to this Court for preliminary approval. On June 10, 2022, the
28 Court issued its Order granting preliminary approved of the settlement as fair and reasonable to the

1 Class. Blumenthal Decl. ¶7(c).

2 3. Class Counsel is Experienced in Similar Litigation

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

13 4. There Are No Objections and Only One Opt-Out

14 The reaction of the Class unequivocally supports approval of the Settlement. On July 22, 2022,
15 the Settlement Administrator mailed the Court-approved Class Notice to the Class Members, which
16 provided each class member with the terms of the Settlement, including notice of the claims at issue
17 and the financial terms of the settlement, including the attorneys' fees, costs, and service awards that
18 were being sought, how individual settlement awards would be calculated, and the specific, estimated
19 payment amount to that individual. See Declaration of Stephen Gomez at ¶8. In disseminating the
20 notices, the Settlement Administrator followed the notice procedures authorized by the Court in its
21 Preliminary Approval Order. Significantly, there have been no objections and only one (1) opt-out.
22 Declaration of Stephen Gomez at ¶¶ 11-14 As a result, nearly the entire Class will participate in the
23 Settlement and will be sent a settlement check, representing 99.94% of the Class. The notice process
24 is documented in the Declaration of Stephen Gomez, filed with this motion. 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

1 indicative of the adequacy of the settlement.”); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
2 (3d. Cir. 1990) (29 objections out of 281 member class “strongly favors settlement”); *Laskey v. Int’l*
3 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
4 settlement should be considered when determining fairness of settlement). Here, where there are no
5 objections, the approval of the class is evident.

6 5. The Strength of Plaintiff’s Case

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

13 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
14 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
15 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
16 asserted that Defendant’s practices complied with all applicable Labor laws. Defendant argued that all
17 work time was recorded and paid, and that there was no miscalculation of the regular rate. Defendant
18 contended that its meal and rest period policies fully complied with California law, that Defendant’s
19 timekeeping system recorded meal periods, and that all meal periods were provided. Defendant paid
20 some meal premiums and could therefore argue that any missed meals were compensated. Further,
21 Defendant argued that Defendant was not required to record rest periods and that there was no evidence
22 that rest periods were not provided given the facially lawful policies. Finally, Defendant could argue
23 that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakens
24 Plaintiff’s claims, on liability, value, and class certifiability as to the meal and rest period claims.
25 Defendant also argues that based on its facially lawful practices, it acted in good faith and without
26 willfulness, which if accepted would negate the claims for waiting time penalties and/or inaccurate
27 wage statements. In fact, under the current state of the law, it is questionable whether these penalties
28

1 could be awarded at all based upon the alleged meal and rest period violations. If successful,
2 Defendant's defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiff
3 believes that these defenses could be overcome, Defendant maintains these defenses have merit and
4 therefore present a serious risk to recovery by the Class. Blumenthal Decl. ¶8(a).

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

7 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
8 Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service
9 Associates were misclassified as exempt. In addition to the uncertainties raised by
10 Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,
11 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.

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

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

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

23 There was also a significant risk that, if the Actions were not settled, Plaintiff would be unable
24 to obtain class certification and thereby not recover on behalf of any employees other than herself.
25 Defendant argued that the individual experience of each putative class member varied with respect to
26 the claims. Defendant could also contest class certification by arguing injury and good faith were case
27 by case determinations that precluded class certification. Plaintiff is aware of cases where class
28 certification of similar claims was denied. See e.g. *Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885, 256

1 Cal. Rptr. 3d 547 (2019) (denying certification of meal and rest break claims). Defendant also
2 contended that individual differences in work experiences not only impacted damages but would also
3 impact certification. Finally, even if class certification was successful, as demonstrated by the
4 California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there
5 are significant hurdles to overcome for a class wide recovery even where the class has been certified.
6 While other cases have approved class certification in wage and hour claims, class certification in this
7 action would have been hotly disputed and was by no means a foregone conclusion. Blumenthal Decl.
8 ¶8(b).

9 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
10 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
11 substantial defenses both to liability and to class certification. The maximum and average class
12 member allocations are \$673 and \$2,342, respectively, as set forth in the Declaration of Stephen Gomez
13 at ¶10. Given the complexities of this case, the defenses, along with the uncertainties of proof and
14 appeal, the proposed Settlement is fair, reasonable and adequate, and should be finally approved.
15 Blumenthal Decl. at ¶8(e).

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

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

23 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and trying
24 these Actions against Defendant through possible appeals which could take several years. Class
25 Counsel has also taken into account the uncertain outcome and risk of litigation, especially in complex
26 class actions such as these Action. Class Counsel is also mindful of and recognize the inherent
27 problems of proof under, and alleged defenses to, the claims asserted in the Action. Based upon their
28

1 evaluation, Plaintiff and Class Counsel have determined that the Settlement set forth in the Agreement
2 is in the best interest of the Class Members. Blumenthal Decl. ¶8(c).

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

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

15 *Id.* at *12.

16 7. The Amount Offered in Settlement

17 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
18 to Plaintiff's claims. As set forth in the Declaration of Kyle Nordrehaug, filed on or around May 10,
19 2022, in support of preliminary approval which discussed the value of the class claims in detail, the
20 Gross Settlement Amount compares favorably to the value of the claims.

21 The calculations to compensate for the amount due to the Class Members at the time this
22 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
23 mediation. For the individuals whose claims are at issue in this Actions, Plaintiff analyzed the data for
24 putative class members and determined the potential maximum damages for the class claims. For the
25 Class, Plaintiff determined that the maximum potential unpaid overtime due to the alleged
26 miscalculation of the regular rate was \$47,215, the potential off-the-clock damages were \$2,850,384
27 for an alleged 30 min each week, the maximum potential meal period damages were estimated to be
28 \$7.2 million, after deducting premiums actually paid by Defendant, the maximum rest period damages
were estimated to be \$7.66 million, and the maximum damages for unreimbursed expenses were
estimated to be \$187,950 based upon \$5 per month for cell phone usage. In total, the damages for the
Class were calculated to have a maximum total value of \$17,945,549. In addition, Plaintiff calculated

1 that the maximum value of the waiting time penalties were between \$395,247 and \$3,582,996
2 depending on the predicate violation giving rise to the penalties, and the maximum value of the wage
3 statement penalties were \$4,925,300, however, these wage statement and waiting time penalties claims
4 potentially have a much smaller value, even if damages were awarded, to the extent that they are only
5 derivative of the meal and rest break claims.³ Blumenthal Decl. ¶8(d).

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

14 ³ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
15 226, Plaintiff recognized that these derivative claims were subject to additional defenses asserted by
16 Defendant, including, but not limited to, a good faith dispute defense as to whether any premium wages
17 for meal or rest periods or other wages were owed given Defendant's position that Plaintiff was properly
18 compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is no
19 willful failure to pay wages if the employer and employee have a good faith dispute as to whether and
20 when the wages were due."). Additionally, Courts have held that violations of the meal and rest period
regulations, which require payment of a "premium wage" for each improper meal period, do not give
rise to claims under sections 203 and 226. *See Ling v. P.F. Chang's China Bisto, Inc.*, 245 Cal. App.
4th 1242, 1261 (2016) and *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1336 (2018).
As a result, the viability of Plaintiff's claims on these theories is uncertain.

21 ⁴ Because the PAGA claim does not provide a recovery to the Class, Plaintiff has not included the
22 PAGA claim in this discussion. The PAGA claim was addressed in the Declaration of Nordrehaug in
support of the Motion for Preliminary Approval at ¶ 33, filed on May 10, 2022.

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

1 **V. CONCLUSION**

2 Plaintiff respectfully submits 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: October 4, 2022

6 **BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

7 By: /s/ Kyle Nordrehaug
8 Kyle R. Nordrehaug, Esq.
 Attorney for Plaintiff