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13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **IN AND FOR THE COUNTY OF RIVERSIDE**
16

17 OSCAR NOGUERA, VALERIE
18 CAMPOS FLORES, DANIEL
19 MARTINEZ, VERA, HOWARD and
20 EDMUNDO FLORES, individuals, on
21 behalf of themselves, and on behalf of all
22 persons similarly situated,

23 Plaintiff,

24 vs.

25 METAL CONTAINER CORPORATION,
26 a California Corporation; and Does 1
27 through 50, inclusive,

28 Defendants.

CASE No. **RIC2003235**
consolidated with RIC2004156

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

Hearing Date: September 22, 2022
Hearing Time: 8:30 a.m.
[Hearing scheduled by Order dated May 24, 2022]

Judge: Hon. Harold W. Hopp
Dept: 10

Action Filed: August 17, 2020
Trial Date: Not Set

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1 **I. INTRODUCTION**

2 The parties to this action have reached a Settlement and the Court preliminarily approved the
3 First Amended Class and PAGA Settlement Agreement (the “Agreement”), a true and correct copy of
4 which is attached as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In
5 accordance with the Preliminary Approval Order dated May 24, 2022 (“Preliminary Approval Order”),
6 the approved Class Notice has been disseminated to the Class.²

7 The purpose of this hearing is to determine whether the proposed settlement of the litigation
8 should be finally approved. Plaintiffs Oscar Noguera, Valerie Campos Flores, Daniel Martinez, Vera,
9 Howard and Edmundo Flores (collectively "Plaintiffs") respectfully submit this memorandum in
10 support of the unopposed motion for final approval and the proposed entry of the Final Approval Order
11 and Judgment, submitted herewith. The settlement represents an excellent result for the Class and
12 avoids the delays, risks, and costs of further litigation. After disseminating the notice to the members
13 of the Class, there were **no objections and only one (1) request for exclusion**, which means that
14 almost the entire Class has elected to participate in the Settlement. Blumenthal Decl. ¶4. This is a
15 positive response from the Class evidencing their collective approval of the settlement. As a result,
16 Plaintiffs respectfully submit that the class settlement should be finally approved for the same reasons
17 that the Court preliminarily approved the settlement as fair, reasonable, and adequate.

18 **II. THE SETTLEMENT BEFORE THE COURT**

19 Plaintiffs and Defendant Metal Container Corporation (“Defendant”) reached a full and final
20 settlement of the above-captioned action, which is embodied in the Agreement filed concurrently with
21 the Court. As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant
22 is One Million One Hundred Fifty Thousand Dollars (\$1,150,000). (Agreement at ¶¶ II(41).) Under
23 the Settlement, the Gross Settlement Amount consists of the following elements: (1) all payments of
24 Class Settlement Shares to the Participating Class Members; (2) Class Counsel Fees Payment and Class

25
26 ¹ Capitalized terms are defined in the Agreement.

27 ² The “Class” is defined as “all individuals who are current or former non-exempt employees
28 employed by Defendant in California at any time during the Class Period.” The “Class Period” is
 defined as “August 17, 2016 through September 1, 2021” (Preliminary Approval Order at ¶ 5.)

1 Counsel Litigation Expenses Payment; (3) Settlement Administration Expenses; (4) Class
2 Representative Service Payments to the Plaintiffs; and (5) the PAGA Payment. (Agreement at ¶ II(42).)
3 Blumenthal Decl. ¶3(a).

4 The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement
5 at ¶ II(41).) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement
6 at ¶ II(41).) Blumenthal Decl. ¶3(b).

7 Following final approval, Defendant shall fund the Gross Settlement Amount and the amount
8 necessary to pay Defendant's share of payroll taxes within fifteen (15) business days of the Effective
9 Date. (Agreement at ¶ II(50).) Within fifteen (15) business days after Defendant funds the Gross
10 Settlement Amount, the Settlement Administrator will make payment of all Class Settlement Shares
11 to Participating Class Members . (Agreement at ¶ II(50).) Blumenthal Decl. ¶3(c).

12 The Net Settlement Amount shall equal the Gross Settlement Amount less the Court approved
13 amounts for the Class Representative Service Payments, the Class Counsel Fees Payment, Class
14 Counsel Litigation Expenses Payment, the PAGA Payment, and the Settlement Administration
15 Expenses. (Agreement at ¶ I(19).) The Net Settlement Amount will be distributed as the Class
16 Settlement Shares to the Class Members who do not timely request exclusion ("Participating Class
17 Member"). (Agreement at ¶¶ II(43).) The Settlement Share will be calculated as follows: (i) Defendant
18 shall provide the Settlement Administrator with the Class Data; (ii) the Settlement Administrator shall
19 then divide the Net Settlement Amount by the total number of weeks worked by the Participating Class
20 Members to determine a dollar amount per week ("Weekly Rate"); and (iii) the Settlement
21 Administrator shall then take the number of weeks worked by each Participating Class Member and
22 multiply it by the Weekly Rate to calculate their Class Settlement Share. (Agreement at ¶ II(43)(b).)
23 Blumenthal Decl. ¶ 3(d).

24 Class Members were sent the Court approved Class Notice using the procedure approved by the
25 Court by mailing the notice packets after updating class members' addresses using the National Change
26 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
27 any forwarding address provided or updated address located. Declaration of Tim Cunningham
28 ("Cunningham Decl.") ¶ 6. Class Members were provided with the opportunity to exclude themselves

1 or "opt out" if they did not want to participate in the settlement. (Agreement at ¶ II(44)(c)(iii)), Ex. A.)
2 Cunningham Decl. ¶ 7, Exh. A. One (1) Class Member submitted a valid request for exclusion.
3 Cunningham Decl. ¶ 9. The remaining Class Members are deemed Participating Class Members who
4 are bound by the Settlement and will be entitled to receive a Settlement Share. (Agreement at ¶
5 II(44)(c)(iii).) All PAGA Members will be paid their allocation of the PAGA Payment and will remain
6 bound by the release of the PAGA Released Claims regardless of their request for exclusion.
7 (Agreement at ¶ II(44)(c)(iii).) The Class Notice also advised Class Members of their right to object
8 to the Settlement and/or dispute their workweeks. (Agreement at ¶ II(44)(c)(i); Cunningham Decl.
9 ¶ 7, Exh. A.) Blumenthal Decl. ¶ 3(e).

10 A Participating Class Member must cash his or her Settlement Share check within 180 days
11 after it is mailed. (Agreement at ¶ II(51).) The Settlement Administrator will send a reminder to
12 Participating Class Members who have not cashed their checks within 120 days after its last mailing
13 to the affected individual. (Agreement at ¶ II(51).) Any settlement checks not cashed within 180 days
14 will be voided and any funds from such uncashed checks will be redistributed to the Participating Class
15 Members who cashed their checks in proportion to their credited workweeks if the residue is above
16 \$20,000; and, if the residue is less than \$20,000, then the residue will be distributed by cy pres in
17 accordance with Code of Civil Procedure § 384. (Agreement at ¶ II(F)(51)(a)-(b).) Blumenthal Decl.
18 ¶ 3(f).

19 CPT Group was appointed by the Court as the Settlement Administrator for the Settlement.
20 (Agreement at ¶ I(29) & II(43(f)). From the Gross Settlement Amount, the Settlement Administrator
21 shall be paid for the expenses of administering the Settlement in an amount not to exceed \$15,000.
22 (Agreement at ¶ II(42)(d).) As set forth in the Cunningham Decl. at ¶ 15, the Settlement Administration
23 Expenses, including fees and costs incurred to-date, as well as anticipated fees and costs for completion
24 of the settlement administration, are \$11,500. Blumenthal Decl. ¶ 3(g).

25 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
26 to exceed 33% of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement at
27 ¶ II(42)(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
28 Litigation Expenses Payment in an amount not to exceed \$16,000. (Agreement at ¶ II(42)(b).) Subject

1 to Court approval, the Agreement provides for a payment of no more than \$10,000 to each of the
2 Plaintiffs as the Class Representative Service Payment. (Agreement at ¶ II(42)(a).) In support of this
3 separate motion for attorneys' fees, reimbursement of expenses and service awards, Class Counsel is
4 providing evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

5 Subject to Court approval, Twenty Five Thousand Dollars (\$25,000) will be paid from the Gross
6 Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal. Labor
7 Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code § 2699(i),
8 the PAGA Payment shall be allocated as follows: 75% (\$18,750) to the LWDA as the LWDA's share
9 of the PAGA Payment pursuant to PAGA and 25% (\$6,250) will be distributed to the PAGA Members
10 based on their respective pay periods worked during the PAGA Period. (Agreement at ¶ II(42)(c).)
11 As set forth in the accompanying proof of service, the LWDA has been served with this motion and the
12 Agreement. Blumenthal Decl. ¶3(i).

13 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
14 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
15 is "fair, adequate, and reasonable". (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
16 at \$1,150,000 is an excellent result for the Class. This result is particularly favorable in light of the fact
17 that liability and class certification in this case were far from certain in light of the defenses asserted
18 by Defendant. Given the complexities of this case, the defenses asserted, the uncertainty of class
19 certification, along with the uncertainties of proof at trial and appeal, the proposed settlement is fair,
20 reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

21 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL**
22 **OF CLASS ACTION SETTLEMENTS**

23 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
24 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
25 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*
26 *v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
27 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

28 "[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class

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

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

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

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

28 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*

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

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

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

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

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

21 Over the course of more than two years of litigation, the Parties engaged in the investigation
22 of the claims, including the production of documents, class data, and other information, allowing for
23 the full and complete analysis of liabilities and defenses to the claims in this Action. The procedural
24 history and investigation performed was detailed at length in support of the motion for preliminary
25 approval. The Settlement was the product of one arms-length mediation and contentious negotiations
26 through an all-day mediation presided over by Louis Marlin, Esq., a respected and experience mediator
27 of wage and hour class actions. The details of the litigation are set forth in the Blumenthal Decl. at ¶¶
28 6(a)-6(g).

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

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

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

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

24 From November 2021 to January 2022, the settlement agreement and exhibits thereto were
25 finalized and executed and then presented by motion to this Court for preliminary approval. In an
26 Order dated March 30, 2022, the Court issued a tentative ruling identifying issues to be addressed by
27 the Parties. The Parties corrected the issues and finalized and executed the First Amended Class and
28 PAGA Settlement Agreement. On May 24, 2022, the Court issued its Order granting preliminary

1 approved of the settlement as fair and reasonable to the 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. A list of class action cases managed and settled by the Class
9 Counsel in this action is provided to the Court as Exhibit #1 to the Blumenthal Decl. Class Counsel
10 have participated in every aspect of the settlement discussions and have concluded the settlement is fair,
11 adequate and reasonable and in the best interests of the Class. Blumenthal Decl. ¶ 3(j).

12 4. There Are No Objections and Only One Request for Exclusion

13 The reaction of the Class unequivocally supports approval of the Settlement. On June 21, 2022,
14 the Settlement Administrator mailed the Court-approved Class Notice to the Class Members, which
15 provided each class member with the terms of the Settlement, including notice of the claims at issue
16 and the financial terms of the settlement, including the attorneys' fees, costs, and service award that
17 were being sought, how individual settlement awards would be calculated, and the specific, estimated
18 payment amount to that individual. See Cunningham Decl. ¶ 7, Exh. A. In disseminating the notice,
19 the Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary
20 Approval Order. Significantly, there have been no objections and only one (1) request for exclusion.
21 Cunningham Decl. ¶¶ 9-10. As such, nearly the entire Class will participate in the Settlement and will
22 be sent a settlement check. See Cunningham Decl. at ¶ 11; Blumenthal Decl. ¶4.

23 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
24 Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
25 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
26 indicative of the adequacy of the settlement."); *Stoetznier v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
27 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l*
28 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed

1 settlement should be considered when determining fairness of settlement). Here, where there are no
2 objections, the approval of the class is evident.

3 5. The Strength of Plaintiffs' Case

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

11 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
12 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
13 Defendant present serious threats to the claims of the Plaintiffs and the other Class Members.
14 Defendant asserted that Defendant's practices complied with all applicable Labor laws. Defendant
15 argued that all work time was paid for and that the regular was properly calculated for purposes of
16 overtime. Defendant contended that their meal and rest period policies fully complied with California
17 law and that Defendant's timekeeping system recorded meal periods and all meal periods were
18 provided. Further, Defendant argued that Defendant was not required to record rest periods. Finally,
19 Defendant could argue that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004
20 (2012), weakened Plaintiffs' claims, on liability, value, and class certifiability as to the meal and rest
21 period claims. Defendant also argues that based on their facially lawful practices, they acted in good
22 faith and without willfulness, which if accepted would negate the claims for waiting time penalties
23 and/or inaccurate wage statements. In fact, under the current state of the law, it is questionable whether
24 these penalties could be awarded at all based upon the alleged meal and rest period violations. If
25 successful, Defendant's defenses could eliminate or substantially reduce any recovery to the Class.
26 While Plaintiffs believe that these defenses could be overcome, Defendant maintains these defenses
27 have merit and therefore present a serious risk to recovery by the Class. Blumenthal Decl. ¶8(a).

28 In a similar wage and hour case, the federal district court in *Hopson v. Hanesbrands Inc.*, 2009

1 U.S. Dist. LEXIS 33900 (N.D. Cal. 2009), explained in approving an overtime class action settlement:

2 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
3 Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service
4 Associates were misclassified as exempt. In addition to the uncertainties raised by
5 Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,
6 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.

7 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007

8 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
9 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
10 approval."). As recognized in a federal decision approving settlement of an overtime wage class action:

11 The potential complexity and possible duration of trial also weigh in favor of granting
12 final approval. Plaintiffs acknowledge the difficulties of proving damages, recognize the
13 uncertainty of outcome, and believe defendant would appeal in the event of adverse
14 judgment. A post-judgment appeal would require many years to resolve and delay
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.

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

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

1 While other cases have approved class certification in wage and hour claims, class certification in this
2 action would have been hotly disputed and was by no means a foregone conclusion. Blumenthal Decl.
3 ¶8(b).

4 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
5 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
6 substantial defenses both to liability and to class certification. Currently, the maximum and average
7 class member allocation are \$3,097.06 and \$2,113.92, respectively. See Cunningham Decl. ¶12. Given
8 the complexities of this case, the defenses, along with the uncertainties of proof and appeal, the
9 proposed Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl.
10 at ¶8(e).

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

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

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

28 Although Plaintiffs and Class Counsel believe that their case has merit, which Defendant

continues to vigorously deny, they recognized the potential risks both sides would face if litigation of these Actions continued. As the federal court held in *Glass*, where the parties faced uncertainties similar to those in this litigation:

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." See *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial.

Id. at *12.

7. The Amount Offered in Settlement

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

The calculations to compensate for the amount due to the Class Members at the time this Settlement was negotiated were calculated by Plaintiffs' expert, Berger Consulting, in advance of mediation. For the individuals whose claims are at issue in this Actions, Plaintiffs analyzed the data for putative class members and determined the potential maximum damages for the class claims. For the Class, Plaintiffs determined that the unpaid wages due to the alleged failure to pay overtime wages based on regular rate violations to be \$409,866, maximum potential off-the-clock damages to be \$460,582, maximum potential rest period damages at a 20% violation rate were estimated to be \$1,103,267.80, maximum meal period damages at a 95% violation rate were estimated to be \$5,236,577, and the maximum damages for unreimbursed expenses were estimated to be \$156,962 at a rate of \$5 of unreimbursed expenses incurred each month. In total, the damages for the Class were calculated to have a maximum total value of \$7,367,254.80. In addition, Plaintiff calculated that the maximum value of the waiting time penalties were \$742,682 and the maximum value of the wage statement penalties to be \$1,020,000, however, these wage statement and waiting time penalties claims potentially have a much smaller value, even if damages were awarded, to the extent that they are only

derivative of the meal and rest break claims.³ Blumenthal Decl. ¶8(d).

Consequently, the Gross Settlement Amount represents more than 16% of the value of the potential maximum damages at issue for the Class in this case, assuming these amounts could all be proven in full at trial. The above maximum calculations should then be adjusted in consideration for both the risk of certification and the risk of establishing class-wide liability on all claims. Given the amount of the Settlement as compared to the potential value of the claims, the Settlement is most certainly fair and reasonable.⁴ Blumenthal Decl. ¶8(d). Clearly, the goal of this litigation has been met.

V. CONCLUSION

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

Dated: August 26, 2022

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

By: /s/ Kyle Nordrehaug
Kyle R. Nordrehaug, Esq.
Attorneys for Plaintiffs

³ Importantly, while Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and 226, at mediation Plaintiffs recognized that these claims were subject to various defenses asserted by Defendant, including, but not limited to, a good faith dispute defense as to whether any premium wages for meal or rest periods or other wages were owed given Defendant's position that Plaintiffs were properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages were due."). Additionally, at the time of mediation Courts had 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 Plaintiffs' claims on these theories was uncertain.

⁴ *See e.g. Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement which represented "roughly one-sixth of the potential recovery"); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval where "the proposed Total Settlement Amount represents approximately 10% of what class might have been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D. Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value); *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class action settlement worth "somewhere between 9% and 18%" of full verdict value).