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

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

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

20 Plaintiff,

21 vs.

22 METAL CONTAINER CORPORATION, a
23 California Corporation; and Does 1 through
24 50, inclusive,

25 Defendants.

Case No.: **RIC2003235**
consolidated with RIC2004156

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

Hearing Date: March 30, 2022

Hearing Time: 8:30 a.m.

Reservation ID: 024028159622

Dept.: 6

Judge: Hon. Sunshine S. Sykes

Action Filed: August 17, 2020

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1 **I. INTRODUCTION**

2 Plaintiffs Oscar Noguera, Valerie Campos Flores, Daniel Martinez, Vera, Howard and Edmundo
3 Flores (collectively “Plaintiffs”) respectfully submit this memorandum in support of the unopposed
4 motion for preliminary approval of the proposed class action settlement with Defendant Metal
5 Container Corporation (“Defendant”), and seek entry of an order: (1) preliminarily approving the
6 proposed settlement of this class and PAGA action with Defendant; (2) for settlement purposes only,
7 conditionally certifying the Class, which is comprised of “all individuals who are current or former
8 non-exempt employees employed by Defendant in California at any time during the Class Period ” of
9 August 17, 2016 to September 1, 2021; (3) provisionally appointing Plaintiffs as the representatives
10 of the Class; (4) provisionally appointing Norman B. Blumenthal, Kyle R. Nordrehaug, and Aparajit
11 Bhowmik of Blumenthal Nordrehaug Bhowmik De Blouw LLP as Class Counsel for the Class; (5)
12 approving the form and method for providing class-wide notice; (6) directing that notice of the
13 proposed settlement be given to the class; (7) appointing CPT Group as Settlement Administrator, and
14 (8) scheduling a final approval hearing date to consider Plaintiffs’ motion for final approval of the
15 settlement and entry of the Judgment, and Plaintiffs’ motion for approval of attorneys' fees and
16 expenses.

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

21 As consideration for this Settlement, the Gross Settlement Amount is One Million One Hundred
22 Fifty Thousand Dollars (\$1,150,000) to be paid by Defendant, as set forth in the Agreement. The Gross
23 Settlement Amount will settle all issues pending in the Action between the Parties and will be made
24 in full and final settlement of the Released Class Claims. The Gross Settlement Amount includes all
25 payments of Class Settlement Shares to the Participating Class Members, Settlement Administration
26 Expenses, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, Class

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

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

5 On April 29, 2021, the Parties participated in an all-day mediation presided over by Louis
6 Marlin, a respected mediator of wage and hour representative and class actions. During the mediation,
7 each side, represented by its respective counsel, were able to agree to settle the Claims, which
8 settlement was memorialized in a Memorandum of Understanding and finalized in the Class and PAGA
9 Settlement Agreement. Decl. Nordrehaug at ¶5. As set forth in the accompanying proof of service, this
10 Motion with the Agreement was submitted to the Labor and Workforce Development Agency
11 ("LWDA") on March 3, 2022, as required by California Labor Code section 2966(l). The Settlement
12 is fair, reasonable and adequate, and should be preliminarily approved because there is a substantial
13 monetary payment, and there are substantial litigation and class-certification risks. Therefore, Plaintiffs
14 respectfully request that this Court grant preliminary approval of the Agreement and enter the proposed
15 order submitted herewith.

16 **II. DESCRIPTION OF THE SETTLEMENT**

17 The Gross Settlement Amount is One Million One Hundred Fifty Thousand Dollars
18 (\$1,150,000.00). (Agreement at ¶ II(41).) Under the Settlement, the Gross Settlement Amount consists
19 of the following elements: (1) all payments of Class Settlement Shares to the Participating Class
20 Members; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3)
21 Settlement Administration Expenses; (4) Class Representative Service Payments to the Plaintiffs; and
22 (5) the PAGA Payment. (Agreement at ¶ II(42).) The Gross Settlement Amount does not include
23 Defendant's share of payroll taxes. (Agreement at ¶ II(41).) The Gross Settlement Amount shall be
24 all-in with no reversion to Defendant. (Agreement at ¶ II(41).) Decl. Nordrehaug at ¶15.

25 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay
26 Defendant's share of payroll taxes within fifteen (15) business days of the Effective Date. (Agreement
27 at ¶ II(50).) Within fifteen (15) business days after Defendant funds the Gross Settlement Amount, the
28 Settlement Administrator will make payment of all Class Settlement Shares to Participating Class

Members . (Agreement at ¶ II(50).) Decl. Nordrehaug at ¶16.

The Net Settlement Amount shall equal the Gross Settlement Amount less the Court approved amounts for the Class Representative Service Payments, the Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, the PAGA Payment, and the Settlement Administration Expenses. (Agreement at ¶ I(19).) The Net Settlement Amount will be distributed as the Class Settlement Shares to the Class Members who do not timely request exclusion (“Participating Class Member”). (Agreement at ¶¶ II(43).) The Settlement Share will be calculated as follows: (i) Defendant shall provide the Settlement Administrator with the Class Data; (ii) the Settlement Administrator shall then divide the Net Settlement Amount by the total number of weeks worked by the Participating Class Members to determine a dollar amount per week (“Weekly Rate”); and (iii) the Settlement Administrator shall then take the number of weeks worked by each Participating Class Member and multiply it by the Weekly Rate to calculate their Class Settlement Share. (Agreement at ¶ II(43)(b).) Workweeks will be based on Defendants’ records, however Class Members will have the right to challenge the number of workweeks. Decl. Nordrehaug at ¶17.

Class Members may choose to opt-out of the Settlement by following the directions in the Class Notice. (Agreement at ¶ II(44)(c)(iii)), Ex. A.) All Class Members who do not "opt out" will be deemed Participating Class Members who will be bound by the Settlement and will be entitled to receive a Settlement Share. A PAGA Member who opts out the Settlement will still be paid their allocation of the PAGA Payment, respectively, and will remain bound by the release of the PAGA Released Claims, regardless of their request for exclusion. (Agreement at ¶ II(44)(c)(iii).) Finally, the Class Notice will also advise the Class Members of their right to object to the Settlement and/or dispute their workweeks. (Agreement at ¶ II(44)(c)(i)), Ex. A.) Decl. Nordrehaug at ¶18.

A Participating Class Member must cash his or her Settlement Share check within 180 days after it is mailed. (Agreement at ¶II(51).) The Settlement Administrator will send a reminder to Participating Class Members who have not cashed their checks within 120 days after its last mailing to the affected individual. (Agreement at ¶ II(51).) Any settlement checks not cashed within 180 days will be voided and any funds from such uncashed checks will be redistributed to the Participating Class Members who cashed their checks in proportion to their credited workweeks if the residue is above

1 \$20,000; and, if the residue is less than \$20,000, then the residue will be distributed by cy pres in
2 accordance with Code of Civil Procedure § 384. (Agreement at ¶ II(F)(51)(a)-(b).) Decl. Nordrehaug
3 at ¶19.

4 The Parties have agreed to use CPT Group as the Settlement Administrator. (Agreement at ¶
5 I(29) & II(43(f).) From the Gross Settlement Amount, the Settlement Administrator shall be paid for
6 the expenses of administering the Settlement in an amount not to exceed \$15,000. (Agreement at ¶
7 II(42)(d).) Decl. Nordrehaug at ¶20.

8 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
9 to exceed 33% of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement at
10 ¶ II(42)(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
11 Litigation Expenses Payment in an amount not to exceed \$16,000. (Agreement at ¶ II(42)(b).) Subject
12 to Court approval, the Agreement provides for a payment of no more than \$10,000 to each of the
13 Plaintiffs as the Class Representative Service Payment. (Agreement at ¶ II(42)(a).) Decl. Nordrehaug
14 at ¶21.

15 The Parties will seek approval from the Court for the PAGA Payment of \$25,000 out of the
16 Gross Settlement Amount, which shall be allocated 75% (\$18,750) to the LWDA as the LWDA's share
17 of the PAGA Payment pursuant to PAGA and 25% (\$6,250) will be distributed to the PAGA Members
18 based on their respective pay periods worked during the PAGA Period. (Agreement at ¶ II(42)(c).)
19 All PAGA Members will be sent their share of the PAGA Payment and will be subject to the release
20 of the PAGA Released Claims, whether or not they opt out of the Settlement. (Agreement at ¶
21 II(42)(c).) As set forth in the accompany proof of service, the LWDA has been served with this motion
22 and the Agreement. Decl. Nordrehaug at ¶22.

23 **III. CASE BACKGROUND**

24 The description of the case and claims, along with the procedural history is set forth in the
25 Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the
26 exchange of documents and information in connection with the Action over more than two years which
27 permitted Class Counsel to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and
28 14. The Parties participated in mediation on April 29, 2021 with Louis Marlin, which after arm's length

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

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

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

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

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

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

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

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

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

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

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

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

B. Factors To Be Considered In Granting Preliminary Approval

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

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

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

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

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

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

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

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

10 The Parties attended an arms-length mediation session with Louis Marlin, a respected and
11 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
12 for the mediation, Defendant provided Class Counsel with necessary information for the members of
13 the Class, including time data, payroll data and data concerning the composition of the Class. Class
14 Counsel analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and
15 submitted a mediation brief and damage valuation to the Mediator. At the conclusion of the all-day
16 mediation, the Parties agreed to this Settlement. Decl. Nordrehaug at ¶ 5. Importantly, Plaintiffs and

18 ³ The release applicable to the Class is tethered to allegations in the Action and the "Released
19 Claims" are "any and all claims for wages, damages, unpaid costs, penalties, liquidated damages,
20 benefits, fringes, interest, attorney fees, litigation costs, restitution, or equitable relief, that were pled
21 or that could have been pled against the Released Parties based on the factual allegations,
22 circumstances, and/or primary rights set forth in the Action and PAGA Letters, including all claims
23 under the California Labor Code, Industrial Welfare Commission Wage Orders and applicable law for:
24 failure to pay wages (including minimum, regular, and overtime wages); regular rate of pay violations;
25 failure to pay reporting time pay and/or split shift pay; failure to provide compliant meal and/or rest
26 periods and associated premium payments; failure to pay wages timely during employment and upon
27 termination; failure to maintain time and payroll records; failure to provide legally-compliant wage
28 statements, failure to reimburse business expenses; all claims for violation of California Business and
Professions Code §§ 17200, et seq., arising from the above-referenced claims; and all claims for
penalties under PAGA alleged in the PAGA Letters. Except it shall not include claims for wrongful
termination in violation of public policy or violation of the California Government Code § 12940." (Agreement at ¶ II(53)(a).) As of the Effective Date and funding, Participating Class Members shall
be deemed to have released and discharged the Released Parties of and from all Released Claims arising
during the Class Period, except those asserted under PAGA ("Released Class Claims"). (Agreement
at ¶(52)(b).)

1 Class Counsel believe that this Settlement is fair, reasonable and adequate.

2 As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is
3 One Million One Hundred Fifty Thousand Dollars (\$1,150,000.00). The Settlement is all-in with no
4 reversion to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

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

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

22 Here, there can be no dispute that the litigation has been hard-fought with aggressive and
23 capable advocacy on both sides. The Parties were represented by experienced and capable counsel who
24 zealously advocated their positions. Accordingly, "[t]here is likewise every reason to conclude that
25 settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue
26 influence." *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. at 1392.

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

1 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
2 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
3 receive payment according to the same formula. (Agreement at ¶ II(43)(b).) The Gross Settlement
4 Amount provides an average value of \$3,795.38 per Class Member and \$22 per workweek, and after
5 deductions, the Net Settlement Amount provides an average recovery of \$2,193.07 per Class Member
6 and \$12 per work week. This means that a Class Member who worked the entire Class Period (107
7 weeks) will have a net recovery of \$1,284, and a Class Member who worked only a single week in the
8 Class Period will have a new recovery of \$12. Decl. Nordrehaug, ¶4.

9 The calculations to compensate for the amount due to the Class Members at the time this
10 Settlement was negotiated were calculated by Plaintiffs' expert, Berger Consulting, in advance of
11 mediation. For the individuals whose claims are at issue in this Actions, Plaintiffs analyzed the data for
12 putative class members and determined the potential maximum damages for the class claims. For the
13 Class, Plaintiffs determined that the unpaid wages due to the alleged failure to pay overtime wages
14 based on regular rate violations to be \$409,866, maximum potential off-the-clock damages to be
15 \$460,582, maximum potential rest period damages at a 20% violation rate were estimated to be
16 \$1,103,267.80, maximum meal period damages at a 95% violation rate were estimated to be
17 \$5,236,577, and the maximum damages for unreimbursed expenses were estimated to be \$156,962 at
18 a rate of \$5 of unreimbursed expenses incurred each month. In total, the damages for the Class were
19 calculated to have a maximum total value of \$7,367,254.80. In addition, Plaintiff calculated that the
20 maximum value of the waiting time penalties were \$742,682 and the maximum value of the wage
21 statement penalties to be \$1,020,000, however, these wage statement and waiting time penalties claims
22 potentially have a much smaller value, even if damages were awarded, to the extent that they are only
23 derivative of the meal and rest break claims.⁴ Decl. Nordrehaug, ¶6.

24
25 ⁴ While Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
26 226, Plaintiffs recognized that these claims were subject to various defenses asserted by Defendant,
27 including, but not limited to, a good faith dispute defense as to whether any premium wages for meal
28 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

1 Consequently, the Gross Settlement Amount represents more than 16% of the value of the
2 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
3 proven in full at trial.⁵ The above maximum calculations should then be adjusted in consideration for
4 both the risk of certification and the risk of establishing class-wide liability on all claims. Given the
5 amount of the Settlement as compared to the potential value of the claims, the Settlement is most
6 certainly fair and reasonable.⁶ Clearly, the goal of this litigation has been met. Decl. Nordrehaug, ¶6.

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

20 _____
21 when the wages were due."). Additionally, Courts have held that violations of the meal and rest period
22 regulations, which require payment of a "premium wage" for each improper meal period, do **not** give
23 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 is uncertain.

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

26 ⁶ See *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
27 approving settlement which represented "roughly one-sixth of the potential recovery"; *Stovall-Gusman*
28 *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.")

1 these penalties could be awarded at all based upon the alleged meal and rest period violations. If
2 successful, Defendant's defenses could eliminate or substantially reduce any recovery to the Class.
3 While Plaintiffs believe that these defenses could be overcome, Defendant maintains these defenses
4 have merit and therefore present a serious risk to recovery by the Class. Decl. Nordrehaug, ¶ 24.

5 There was also a significant risk that, if the Actions were not settled, Plaintiffs would be unable
6 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
7 Defendant argued that the individual experience of each putative class member varied with respect to
8 the claims. Defendant could also contest class certification by arguing injury and good faith were case
9 by case determinations that precluded class certification. Plaintiffs are aware of cases where class
10 certification of similar claims was denied. See e.g. *Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885, 256
11 Cal. Rptr. 3d 547 (2019) (denying certification of meal and rest break claims). Defendant also
12 contended that individual differences in work experiences not only impacted damages but would also
13 impact certification. Finally, even if class certification was successful, as demonstrated by the
14 California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there
15 are significant hurdles to overcome for a class wide recovery even where the class has been certified.
16 While other cases have approved class certification in wage and hour claims, class certification in this
17 action would have been hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug,
18 ¶ 25.

19 After arm's length negotiations between experienced and informed counsel, the Parties
20 recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of
21 \$1,150,000. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

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

28 2007 WL 221862, at *4 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458
(9th Cir. 2000)).

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

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

6 Plaintiffs will apply to the Court for a Class Representative Service Payment in consideration
7 for the service and for the risks undertaken on behalf of the class. (Agreement at ¶ II(42)(a).) Plaintiffs
8 performed their duty admirably by working with Class Counsel. Decl. Nordrehaug at ¶27. At this
9 stage, the requested service award of \$10,000 is well within the accepted range of awards for purposes
10 of preliminary approval. See e.g. *Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S. Dist. LEXIS 71386
11 (E.D. Cal. 2018) (awarding \$12,500 where average class member payment was \$351); *Holman v.*
12 *Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving \$10,000
13 service award where class member recovery was \$375); *Louie v. Kaiser Foundation Health Plan, Inc.*,
14 2008 WL 4473183, *7 (S.D.Cal. 2008) (awarding \$25,000 service award to each of six plaintiffs in
15 overtime class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. 2007) (awarding
16 \$25,000 service award in overtime class action and a pool of \$100,000 in enhancements). As
17 explained in *Glass*, service awards are routinely awarded to class representatives to compensate the
18 employees for the time and effort expended on the case, for the risk of litigation, for the fear of suing
19 an employer and retaliation there from, and to serve as an incentive to vindicate the statutory rights of
20 all employees. 2007 WL 221862 at *16-17.

21 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit**
22 **Preliminary Approval Of The Settlement**

23 The stage of the proceedings at which this Settlement was reached also militates in favor of
24 preliminary approval and ultimately, final approval of the Settlement. Class Counsel has conducted
25 a thorough investigation into the facts of the class action. Class Counsel began investigating the Class
26 Members' claims before the Action was filed. Class Counsel engaged in formal discovery and
27 conducted a review and analysis of the relevant documents and data. Class Counsel was also
28 experienced with the claims at issue here, as Class Counsel previously litigated and settled similar

1 claims in other actions. Accordingly, the agreement to settle did not occur until Class Counsel
2 possessed sufficient information to make an informed judgment regarding the likelihood of success on
3 the merits and the results that could be obtained through further litigation. Decl. Nordrehaug at ¶28.

4 Based on the foregoing data and their own independent investigation and evaluation, Class
5 Counsel is of the opinion that the Settlement with Defendant for the consideration and on the terms set
6 forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light
7 of all known facts and circumstances, including the risk of significant delay, defenses asserted by
8 Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both
9 parties possessed sufficient information to make an informed judgment regarding the likelihood of
10 success on the merits and the results that could be obtained through further litigation. Decl.
11 Nordrehaug at ¶29.

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

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

18 *Glass*, 2007 U.S. Dist. LEXIS 8476 at *14 (quoting *In re Mego Financial Corp. Securities Litigation*,
19 213 F.3d at 459).

20 Here, Class Counsel was in far superior position to evaluate the fairness of this Settlement
21 because Class Counsel performed formal discovery, received all necessary information which was
22 evaluated with the assistance of an expert, and also performed independent investigations and due
23 diligence to confirm the accuracy of the information supplied by Defendant.

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

25 Plaintiffs contend that the proposed settlement meet all of the requirements for class
26 certification under California Code of Civil Procedure § 382 as demonstrated below, and therefore, the
27 Court may appropriately approve the Class as defined in the Agreement. This Court should
28 conditionally certify the Classes for settlement purposes only, defined as follows:

All individuals who are current or former non-exempt employees employed by
Defendant in California at any time during the Class Period.

1 (Agreement at ¶ I(3).)

2 The “Class Period” is from August 17, 2016 through September 1, 2021. (Agreement at ¶ I(10).)

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

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

7 Code of Civil Procedure Section 382 authorizes class actions “when the question is one
8 of a common or general interest, of many persons, or when the parties are numerous,
9 and it is impracticable to bring them all before the court....” The party seeking
10 certification has the burden to establish the existence of both an ascertainable class and
11 a well-defined community of interest among class members. (*citations omitted*). The
12 “community of interest” requirement embodies three factors: (1) predominant common
13 questions of law or fact; (2) class representatives with claims or defenses typical of the
14 class; and (3) class representatives who can adequately represent the class.

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

16 While Defendant reserve all rights to dispute that the Plaintiff can satisfy these requirements,
17 the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
18 for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
19 settlement only. (Agreement at ¶ I(40).)

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

21 Plaintiff brings this action on behalf of a Class of individuals during the applicable Class Period.
22 Plaintiff asserts that all of these individuals are ascertainable because the class members can readily be
23 determined through examination of Defendant’s files. Given that the Class consists of approximately
24 303 members, Plaintiff maintains that numerosity is clearly satisfied. *See Bowles v. Superior Court*,
25 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126
26 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiff
27 asserts that the 303 current and former employees that comprise the Class can be identified based on
28 Defendant’s records and are sufficiently numerous for class certification. Decl. Nordrehaug at ¶30.

C. Common Issues of Law and Fact Predominate

Predominance of common issues of law or fact does not require that the common issues be
dispositive of the entire controversy or even that they be dispositive of all liability issues. 1 *Newberg*

1 on Class Actions, Section 4.25 at 4-82, 4-83 (1992). “Predominance is a comparative concept, and ‘the
2 necessity for class members to individually establish eligibility and damages does not mean individual
3 fact questions predominate.’” *Sav-On*, 34 Cal. 4th at 334.

4 Commonality exists if there is a predominant common legal question regarding how an
5 employer’s policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,
6 1536 (2008) (“[T]he common legal question remains the overall impact of Diva's policies on its
7 drivers.”) Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the
8 certification stage since the question is “essentially a procedural one that does not ask whether an action
9 is legally or factually meritorious.” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

10 Here, Plaintiffs contend that common questions of law and fact are present, and specifically the
11 common questions of whether Defendant properly paid wages for all hours worked, whether the
12 Defendant failed to provide meal and rest periods, whether Defendant failed to provide required
13 expense reimbursement, and whether Class Members are entitled to damages and penalties as a result
14 of these practices. Decl. Nordrehaug, ¶30. Defendant disputes that common questions predominate
15 but will not oppose such a finding for purposes of this Settlement only.

16 **D. The Claims of the Plaintiff Are Typical of the Class Claims**

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

23 In the instant case, Plaintiffs contend that there can be little doubt that the typicality requirement
24 is satisfied. The Plaintiffs, like every other member of the Class, worked for Defendant as non-exempt
25 employees during the Class Period. Plaintiffs contend that, like every other member of the Class, they
26 were subject to the same practices and policies of Defendant and are subject to the same defenses. Thus,
27 Plaintiffs assert that the claims of the Plaintiffs and the Class Members arise from the same course of
28 conduct by the Defendant, involve the same employment policies and practices of Defendant, and are

1 based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of settlement, Plaintiffs assert
2 that the typicality requirement is met as to the common issues presented in this case. Defendant does
3 not oppose a finding of typicality for purposes of this Settlement only.

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

5 Plaintiffs contend that the Class Members are adequately represented here because Plaintiffs
6 and representing counsel (a) do not have any conflicts of interest with other class members, and (b) will
7 prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is
8 met here. First, Plaintiffs are well aware of their duties as the representatives and have actively
9 participated in the prosecution of this case to date. They effectively communicated with counsel,
10 provided documents to counsel and participated in the investigation and negotiations in the Action.
11 Second, Plaintiffs retained competent counsel who are experienced in employment class actions and
12 who have no conflicts. Decl. Nordrehaug at ¶ 31. Third, there is no antagonism between the interests
13 of the Plaintiff and those of the Class. Both the Plaintiffs and the Class Members seek monetary relief
14 under the same set of facts and legal theories. Defendant disputes that the adequacy requirement is
15 satisfied but will not oppose such a finding for purposes of this Settlement only.

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

17 To certify a class, the Court must also determine that a class action is superior to other available
18 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of
19 common issues will reduce litigation costs and promote greater efficiency, a class action may be
20 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
21 1996). As courts have previously observed:

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

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

Here, Plaintiffs contend that a class action is the superior mechanism for resolution of the claims
as pled by the Plaintiffs. While Defendant disputes that class treatment is superior, Defendant does not

1 dispute a finding of superiority in this action for purposes of this Settlement only.

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

3 The Court has broad discretion in approving a practical notice program. The Parties have
4 agreed upon procedures by which the Class Members will be provided with written notice of the
5 Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance
6 with the Agreement, Defendant will provide to the Settlement Administrator each Class Member's
7 Class Data. (Agreement at ¶ II(44)(b)(i).) Within 14 days after receiving the Class Data, the
8 Settlement Administrator will mail the Class Notice Packets to all Class Members via first-class U.S.
9 Mail using the most current mailing address information available. (Agreement at ¶ II(44)(b)(ii).) The
10 Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel and to be
11 approved by the Court, includes all relevant information. (See Exhibit "A" to the Agreement.) The
12 Class Notice will include, among other information: (i) information regarding the Action; (ii) the
13 impact on the rights of the Class Members if they do not opt out; (iii) information to the Class Members
14 regarding how to opt out and how to object to the Settlement; (iv) the estimated Settlement Share for
15 each of the Class Members; (v) the amount of attorneys' fees and expenses to be sought; (v) the
16 amount of the Plaintiffs' service awards requests; and (vi) the anticipated expenses of the Settlement
17 Administrator. The Parties agree that the Class Notice Packet does not need a Spanish translation
18 because Class Members were required to read and speak English as part of their employment, which
19 included employment documents in English. Decl. Nordrehaug at ¶32.

20 The Class Notice will state that the Class Members shall have forty-five (45) days from the date
21 that the Notice is mailed to them to request exclusion (opt-out) or to submit an objection. (Agreement
22 at ¶ II(44)(c)(iii).) In the event of a re-mailing, the Response Deadline will be extended by an
23 additional 15 days. (Agreement at ¶ II(44)(c)(iii).) Class Members shall be given the opportunity to
24 object to the Settlement and/or requests for attorneys' fees and expenses and to appear at the Final
25 Approval Hearing. (Agreement at ¶ II(44)(c)(i).) Class Members who do not submit a timely and
26 proper request to opt-out will automatically receive a payment of their Settlement Share. This notice
27 program was designed to meaningfully reach the Class Members and it advises them of all pertinent
28 information concerning the Settlement. Decl. Nordrehaug at ¶32. The mailing and distribution of the

1 Class Notice satisfies the requirements of due process and is the best notice practicable under the
2 circumstances and complies with Rules of Court 3.766 and 3.769(f).

3 **VIII. CONCLUSION**

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

8 Dated: March 3, 2022

**BLUMENTHAL NORDREHAUG BHOWMIK
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9
10 By: /s/ Kyle Nordrehaug
11 Kyle R. Nordrehaug, Esq.
12 Attorney for Plaintiffs
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