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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **IN AND FOR THE COUNTY OF YOLO**

16 **HILARY CEARLY and YEKATERINA**
17 **KUCHEROVA, et al.,**

18 Plaintiffs,

19 vs.

20 **UNIVERSITY RETIREMENT**
21 **COMMUNITY AT DAVIS, INC., a**
22 **Corporation; PACIFIC RETIREMENT**
23 **SERVICES, INC., a Corporation; and**
24 **DOES 1 through 50, inclusive,**

25 Defendants.

Case No. CV2021-0524

[Consolidated with Case No. CV2021-0531]

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

Hearing Date: February 15, 2023

Hearing Time: 9:00 a.m.

[Hearing scheduled by Order dated September 28,
2022 at paragraph 12]

Judge: Hon. Samuel T. McAdam

Dept: 10

Action Filed: March 26, 2021

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 (the “Agreement”), a true and correct copy of which is attached
4 as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In accordance with the
5 Preliminary Approval Order dated September 28, 2022 (“Preliminary Approval Order”), the approved
6 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 Hilary Cearley and Yekaterina Kucherova (“Plaintiffs”)
9 respectfully submit this memorandum in support of the unopposed motion for final approval and the
10 proposed entry of the Final Approval Order and Judgment, submitted herewith. The settlement
11 represents an excellent result for the Class and avoids the delays, risks, and costs of further litigation.
12 After disseminating notice to the members of the Class, there were **no objections and no requests for**
13 **exclusion**, which means that the entire Class (100%) has elected to participate in the Settlement.
14 Blumenthal Decl. ¶4. This is a positive response from the Class evidencing their collective approval
15 of the settlement. As a result, Plaintiffs respectfully submit that the class settlement should be finally
16 approved for the same reasons that the Court preliminarily approved the settlement as fair, reasonable,
17 and adequate.

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

20 Plaintiffs and Defendants University Retirement Community at Davis, Inc., and Pacific
21 Retirement Services, Inc. ("Defendants") reached a full and final settlement of the above-captioned
22 action, which is embodied in the Agreement filed concurrently with the Court. As consideration for
23 this Settlement, the Gross Settlement Amount is Seven Hundred Thousand Dollars (\$700,000.00).
24 (Agreement at ¶ I(19).) Under the Settlement, the Gross Settlement Amount consists of the following

25 _____
26 ¹ Capitalized terms are defined in the Agreement.

27 ² The “Class” is “all individuals who are or previously were employed by Defendants in California
28 who were classified as hourly, non-exempt employees at any time during the Class Period.” The “Class
 Period” is from March 26, 2017 through May 1, 2022. (Preliminary Approval Order at ¶ 5.)

elements: (1) payment of the Settlement Shares to the Class; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3) Settlement Administration Expenses; (4) Class Representative Service Payments to the Plaintiffs; and (5) the PAGA Payment. (Agreement at ¶ I(19).) Blumenthal Decl. ¶3(a). The Gross Settlement Amount does not include Defendants' share of payroll taxes. (Agreement at ¶ III(35).) The Gross Settlement Amount shall be all-in with no reversion to Defendants. (Agreement at ¶ III(35).) Blumenthal Decl. ¶3(b).

Defendants shall fund the Gross Settlement Amount within fifteen (15) days of the Effective Date. (Agreement at ¶ III(42).) The Settlement Shares to Participating Class Members will be mailed by the Settlement Administrator fifteen (15) days after Defendants fully fund the Gross Settlement Amount. (Agreement at ¶ III(42).) Blumenthal Decl. ¶3(c).

The Net Settlement Amount equals the net amount available for payment to the Class after deducting the Court-approved amounts for the Class Representative Service Payments, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, the PAGA Payment, and the Settlement Administration Expenses. (Agreement at ¶ I(21).) The Net Settlement Amount will be distributed as the Settlement Shares to the Class Members who do not timely request exclusion ("Participating Class Members"). (Agreement at ¶¶ I(24), III(37).) The Settlement Share will be calculated as follows: (a) the Settlement Administrator shall divide the Net Settlement Amount by the total number of weeks included in the dates of employment 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 Settlement Share. (Agreement at ¶ III(37)(b).) Workweeks are based on Defendants' records, however Class Members have the right to challenge the number of workweeks. Blumenthal Decl. ¶ 3(d).

Class Members were sent the Court approved Class Notice using the procedure approved by the Court by mailing the notice packets after updating class members' addresses using the National Change of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to any forwarding address provided or updated address located. (Declaration of Madely Nava ("Nava Decl.") ¶¶ 6-8.) Class Members were provided with the opportunity to exclude themselves or "opt out" if they did not want to participate in the settlement. (Agreement at ¶ III(39)(d), Ex. A; Nava Decl.

¶11, Exh. A.) No Class Members submitted a request for exclusion, which means that all Class Members are deemed Participating Class Members who are bound by the Settlement and will be entitled to receive a Settlement Share. (Agreement at ¶ III(39)(d); Nava Decl. ¶11) All Aggrieved Employees will be paid their allocation of the PAGA Payment, respectively, and will remain bound by the release of the Released PAGA Claims. (Agreement at ¶ III(39)(d)(iii).) The Class Notice also advised Class Members of their right to object to the Settlement and/or dispute their workweeks. (Agreement at ¶ III(39)(d), Ex. A.; Nava Decl. ¶ 12, Exh. A.) Blumenthal Decl. ¶ 3(e).

A Participating Class Member must cash his or her Settlement Share check within 180 days after it is mailed. (Agreement at ¶ III(43).) The Settlement Administrator will send a reminder to Participating Class Members who have not cashed their checks 60 days before the expiration date. (Agreement at ¶ III(43).) Any settlement checks not cashed within 180 days will be voided and any funds from such uncashed checks will be paid to the California State Controller's Unclaimed Property Fund in the name of the individual who failed to cash their check. (Agreement at ¶ III(43).) Checks to Aggrieved Employees shall be handled in the same manner. Blumenthal Decl. ¶3(f).

ILYM Group was appointed by the Court as the Settlement Administrator for the Settlement. (Agreement at ¶ III(38); Preliminary Approval Order at ¶ 9). From the Gross Settlement Amount, the Settlement Administrator shall be paid for the expenses of administering the Settlement in an amount not to exceed \$15,000. (Agreement at ¶ III(36)(d).) As set forth in the Nava Decl. at ¶ 15, the Settlement Administration Expenses, including fees and costs incurred to-date, as well as anticipated fees and costs for completion of the settlement administration, are \$11,370. Blumenthal Decl. ¶3(g).

Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement at ¶ III(36)(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel Litigation Expenses Payment in an amount not to exceed \$20,000. (Agreement at ¶ III(36)(b).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000 each to Plaintiffs as the Class Representative Service Payments. (Agreement at ¶ III(36)(a).) In support of this separate motion for attorneys' fees, reimbursement of expenses and service awards, Class Counsel is providing evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

1 The Parties will seek approval from the Court for the PAGA Payment of \$15,000 out of the
2 Gross Settlement Amount, which shall be allocated 75% (\$11,250) to the LWDA as the LWDA's share
3 of the PAGA Payment pursuant to PAGA and 25% (\$3,750) will be distributed to the Aggrieved
4 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at ¶
5 III(36)(c).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be subject
6 to the release of the Released PAGA Claims, whether or not they opt out of the Settlement. (Agreement
7 at ¶ III(36)(c).) As set forth in the accompany proof of service, the LWDA has been served with this
8 motion and the Agreement. Blumenthal Decl. ¶3(i).

9 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
10 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
11 is "fair, adequate and reasonable". (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
12 at \$700,000 is an excellent result for the Class. This result is particularly favorable in light of the fact
13 that liability was far from certain in light of the defenses asserted by Defendants. Given the
14 complexities of this case and the defenses asserted, along with the uncertainties of proof at trial and
15 appeal, the proposed settlement is fair, reasonable and adequate, and should be finally approved.
16 Blumenthal Decl. ¶3(j).

17 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL** 18 **OF CLASS ACTION SETTLEMENTS**

19 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
20 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
21 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*
22 *v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
23 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

24 "[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
25 action requires court approval." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (citing
26 *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579 (1980).) The
27 court must decide whether the proposed settlement falls within the range of reasonable settlements,
28 taking into account that settlements are compromises between the parties reflecting subjective,

1 unquantifiable judgments concerning the risks and possible outcomes of litigation. *See Wershba v.*
2 *Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) (“The proposed settlement is not to be judged
3 against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed
4 at trial.”) In *Wershba*, appellants argued that the settlement was too low given the “clear” liability,
5 however, the Court rejected this argument and held that “the merits of the underlying class claims are
6 not a basis for upsetting the settlement of a class action.” *Id.*; *see also 7-Eleven, supra*, at 1150.

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

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

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

24 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*
25 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that the
26 trial court should consider in evaluating the reasonableness of a class action settlement agreement
27 include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further
28 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the

1 extent of discovery completed and the stage of the proceedings, the experience and views of counsel,
2 the presence of a governmental participant, and the reaction of the class members to the proposed
3 settlement.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (internal citations
4 omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L. A.*, 186 Cal. App. 4th 399, 408 (2010).

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

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

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

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

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

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

26 This Settlement is the result of extensive and hard-fought litigation as well as negotiations
27 before an experienced and well-respected mediator. Defendants have expressly denied and continue
28 to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiffs and

1 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released
2 Claims of the Class in accordance with this Settlement. Class Counsel are experienced and qualified
3 to evaluate the class claims, the viability of the defenses asserted, and the risks and benefits of trial and
4 settlement, and Class Counsel are experienced in wage and hour employment law class actions, as Class
5 Counsel has previously litigated and certified similar claims against other employers. Blumenthal Decl.
6 ¶7(a).

7 The Parties attended an arms-length mediation session with Tripper Ortman, Esq., a respected
8 and experienced mediator of wage and hour class actions, in order to reach this Settlement. In
9 preparation for the mediation, Defendants provided Class Counsel with necessary information for the
10 members of the Class, including time data, payroll data and data concerning the composition of the
11 Class. Plaintiffs analyzed the data with the assistance of damages expert, Berger Consulting, and
12 prepared and submitted a mediation brief and damage valuation to the Mediator. Following mediation,
13 the Parties agreed to this Settlement through a mediator's proposal. Blumenthal Decl. ¶7(b).

14 The fact that the settlement was negotiated with the assistance of an experienced mediator
15 supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS*
16 *Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
17 2007) ("The settlement was negotiated and approved by experienced counsel on both sides of the
18 litigation, with the assistance of a well-respected mediator with substantial experience in employment
19 litigation[, and] this factor supports approval of the settlement").

20 From March 2022 to July 2022, the settlement agreement and exhibits thereto were finalized
21 and executed, and then presented to this Court in the motion for preliminary approval. On September
22 28, 2022, the Court issued its Order granting preliminary approved of the settlement as fair and
23 reasonable to the Class. Blumenthal Decl. ¶7(c).

24 3. Class Counsel is Experienced in Similar Litigation

25 Class Counsel in this matter has extensive class action experience and has represented thousands
26 of persons in class actions including employment litigation, wage and hour class actions, and complex
27 litigation. Class Counsel has previously litigated wage and hour class actions involving employees and
28 claims similar to this case and have been approved as experienced class counsel during contested

1 motions in state and federal courts throughout California. As such, Class Counsel is experienced and
2 knowledgeable in this area of law. The experience of counsel and class action cases managed and
3 settled by the Class Counsel in this action is provided to the Court in the Blumenthal Decl. at Exhibit
4 #1. Class Counsel have participated in every aspect of the settlement discussions and have concluded
5 the settlement is fair, adequate and reasonable and in the best interests of the Class. Blumenthal Decl.
6 ¶ 3(j).

7 4. There Are No Objections and No Opt-Outs

8 The reaction of the Class unequivocally supports approval of the Settlement. On November 1,
9 2022, the Settlement Administrator mailed the Court-approved Class Notice to the Class Members,
10 which provided each class member with the terms of the Settlement, including notice of the claims at
11 issue and the financial terms of the settlement, including the attorneys' fees, costs, and service awards
12 that were being sought, how individual settlement awards would be calculated, and the specific,
13 estimated payment amount to that individual. See Nava Decl. ¶ 7, Exh. A. In disseminating the notices,
14 the Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary
15 Approval Order. Significantly, there have been no objections and no opt-outs. Nava Decl. ¶¶ 11-12.
16 As a result, the entire Class will participate in the Settlement and will be sent a settlement check,
17 representing 100.00% of the Class. See Nava Decl. at ¶¶ 13-14; Blumenthal Decl. ¶4.

18 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
19 Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
20 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
21 indicative of the adequacy of the settlement."); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
22 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l*
23 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
24 settlement should be considered when determining fairness of settlement). Here, where there are no
25 objections, the approval of the class is evident.

26 5. The Strength of Plaintiffs' Case

27 The Action generally alleges that Plaintiffs and other Class Members were not provided all
28 overtime compensation and at the correct rate, were not provided and/or paid for meal and rest periods,

1 were not reimbursed for all required business expenses, and were not provided accurate itemized wage
2 statements. The Action seeks unpaid wages, penalties, attorney fees, litigation costs, and any other
3 equitable or legal relief allegedly due and owing to Plaintiffs and the other Class Members by virtue
4 of the foregoing claims. Blumenthal Decl. ¶5.

5 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
6 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
7 Defendants present serious threats to the claims of the Plaintiffs and the other Class Members.
8 Defendants asserted that Defendants' practices complied with all applicable Labor laws. Defendants
9 argued that all work time was paid for and that the regular rate was properly calculated when paying
10 wages. Defendants contend that their meal and rest period policies fully complied with California law
11 and that Defendants' timekeeping system recorded meal periods, and was not required to record rest
12 periods. Defendants argued that the fact they paid significant meal and rest period premiums
13 establishes that their practices were compliant when a meal or rest was missed. Plaintiffs' theory of
14 liability for rest breaks was based upon an on premise restriction, which Defendants disputed and
15 argued that this theory has been rejected by Courts as sufficient alone to establish liability for on-duty
16 rest breaks. See, e.g., *Ritenour v. Carrington Mortg. Servs., LLC*, 2018 WL 5858658, at *7 (C.D. Cal.
17 2018) (holding that defendant's on-premises rest period policy was facially valid and legal); *Hubbs v.*
18 *Big Lots Stores, Inc.*, 2018 WL 5264141, at *5 (C.D. Cal. 2018) (citing *Augustus* and dismissing
19 on-premises rest period claims for failure to state a claim); *Bell v. Home Depot U.S.A., Inc.*, 2017 WL
20 1353779, at *2 (E.D. Cal. 2017) (declaring defendant's argument that *Augustus* implied on-premises
21 rest periods were legal as "more persuasive and accurate" than plaintiff's argument to the contrary). As
22 to expenses reimbursement, Defendants contended that it did not fail to pay for business expenses and
23 any cell phone usage was merely convenient and voluntary such that reimbursement was not legally
24 required. Finally, Defendants could argue that the Supreme Court decision in *Brinker v. Superior*
25 *Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiffs' claims, on liability, value, and class certifiability
26 as to the meal and rest period claims. Defendants also argue that based on their facially lawful
27 practices, they acted in good faith and without willfulness, which if accepted would negate the claims
28 for waiting time penalties and/or inaccurate wage statements. If successful, Defendants' defenses could

1 eliminate or substantially reduce any recovery to the Class. While Plaintiffs believe that these defenses
2 could be overcome, Defendants maintain these defenses have merit and therefore present a serious risk
3 to recovery by the Class. Blumenthal Decl. ¶8(a).

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

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

11 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
12 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
13 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
14 approval."). As recognized in a federal decision approving settlement of an overtime wage class action:

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

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

25 There was also a significant risk that, if the Actions were not settled, Plaintiffs would be unable
26 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
27 Defendants argued that the individual experience of each putative class member varied with respect to
28 the claims. Defendants could also contest class certification by arguing injury and good faith were case
by case determinations that precluded class certification. Plaintiffs are aware of other cases where class
certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
(2019) (denying certification of rest break claims). Finally, even if class certification was successful,

1 as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59
2 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class wide recovery even where the
3 class has been certified. While other cases have approved class certification in wage and hour claims,
4 class certification in this action would have been hotly disputed and was by no means a foregone
5 conclusion. Blumenthal Decl. ¶8(b).

6 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
7 recovery, particularly when viewed in light of the fact that the Defendants asserted serious and
8 substantial defenses. Currently, the maximum and average class member allocation are \$2,133.62 and
9 \$861.51, respectively. See Nava Decl. ¶14. Given the complexities of this case, the defenses, along
10 with the uncertainties of proof and appeal, the proposed Settlement is fair, reasonable and adequate,
11 and should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

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

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

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

13 *Id.* at *12.

14 7. The Amount Offered in Settlement

15 The Settlement in this case is fair, reasonable and adequate considering Defendants' defenses
16 to Plaintiffs' claims. As set forth in the Declaration of Kyle Nordrehaug, filed August 30, 2022, in
17 support of preliminary approval which discussed the value of the class claims in detail, the Gross
18 Settlement Amount compares favorably to the value of the claims. For the 469 Class members who
19 worked 50,384 work weeks, the Gross Settlement Amount provides an average value of \$1,492 per
20 Class Member and \$13.89 per work week, and after deductions, the Net Settlement Amount provides
21 an average recovery of \$861 per Class Member and \$7.94 per work week. Blumenthal Decl. ¶8(d).

22 The calculations to compensate for the amount due to the Class Members at the time this
23 Settlement was negotiated were calculated by Plaintiffs' expert, Berger Consulting, in advance of
24 mediation. For the Class, Plaintiffs evaluated that the claim for unpaid wages due to the alleged
25 miscalculation of the regular rate was potentially \$6,861, the maximum potential meal period damages,
26 after deducting meal premiums paid by Defendants, wages were estimated to be \$221,841, the
27 maximum potential rest period damages, after deducting rest period premiums paid by Defendants,
28 were estimated to be \$3,310,842 based upon a 100% violation predicated on a premise restriction
theory, the maximum potential damages for off the clock work for Covid testing were estimated to be
\$11,610, and the maximum potential damages for failure to provide expense reimbursement for cell-
phones was calculated to be \$123,029. In total, the damages for the Class were calculated to have a

1 maximum potential total value of \$3,674,184. In addition, Plaintiffs calculated that the maximum value
2 of the potential waiting time penalties were between \$293,085 and \$1,069,365, depending on the
3 predicate violation, and the maximum value of the potential wage statement penalties were \$879,800.
4 These wage statement and waiting time penalties claims potentially have a much smaller value or no
5 value, even if damages were awarded, to the extent that they are only derivative of the rest break
6 claims.³ Blumenthal Decl. ¶8(d).

7 Consequently, the Gross Settlement Amount represents more than 19% of the value of the
8 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
9 proven in full at trial.⁴ The above maximum calculations should then be adjusted in consideration for
10 both the risk of class certification and the risk of establishing class-wide liability on all claims. In
11 addition, because a prior class settlement resolved one year of the five years in Plaintiffs' valuation,
12 the above valuations could be overstated by 20% across the board. Given the amount of the Settlement
13 as compared to the potential value of the claims, the Settlement is most certainly fair and reasonable.⁵

14
15 ³ While Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
16 226, at mediation Plaintiffs recognized that these claims were subject to various defenses asserted by
17 Defendants, including, but not limited to, a good faith dispute defense as to whether any premium
18 wages for meal or rest periods or other wages were owed given Defendants' position that Plaintiffs
19 were properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010)
20 ("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, prior to the May 2022 decision in *Naranjo*
v. Spectrum, Courts had expressed doubt that violations of the meal and rest period regulations would
give rise to claims under sections 203 and 226. As a result, at the time of mediation the viability of
Plaintiffs' claims on these theories was uncertain.

21 ⁴Because the PAGA claim is not a class claim and primarily is paid to the State of California,
22 Plaintiffs have not included the PAGA claim in this discussion of the value of the class claims. The
23 PAGA claim was addressed in the Declaration of Kyle Nordrehaug at ¶33 filed in support of Plaintiffs'
Motion for Preliminary Approval of Class Action Settlement.

24 ⁵ *See e.g. Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. 2007) (approving a
25 settlement where the settlement amount constituted approximately 25% of the estimated overtime
26 damages for the class); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12
27 (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."); *Dunleavy*
v. Nadler (In re Mego Fin. Corp. Sec. Litig.), 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement
28 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

1 Blumenthal Decl. ¶8(d). Clearly, the goal of this litigation has been met.

2
3 **V. CONCLUSION**

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

7 Respectfully submitted,

8 Dated: January 23, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
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9
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26 proposed Total Settlement Amount represents approximately 10% of what class might have been
27 awarded had they succeeded at trial.”); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D. Cal.
28 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).