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

14 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

15 MATTHEW LUCCHESI and JULIO
16 CHAVEZ, individuals, on behalf of
17 themselves, and on behalf of all persons
18 similarly situated,

19 Plaintiffs,

20 v.

21 KONE, INC., a Corporation; and Does 1
22 through 50, inclusive,

23 Defendants.

Case No.: **CGC-20-588225**

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

Hearing Date: May 4, 2022

Hearing Time: 9:30 a.m.

Dept: 302

Judge: Hon. Richard B. Ulmer Jr.

Action Filed: November 16, 2020

Trial Date: Not Set

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1 **I. INTRODUCTION**

2 Plaintiffs Matthew Lucchese, Julio Chavez, and David Chang (“Plaintiffs”) respectfully submit
3 this memorandum in support of the unopposed motion for preliminary approval of the proposed class
4 action settlement with Defendant Kone, Inc. (“Defendant”), and seek entry of an order:
5 (1) preliminarily approving the proposed settlement of this class action with Defendant; (2) for
6 settlement purposes only, conditionally certifying the Class, which is comprised of “all individuals who
7 are or previously were employed by Defendant in California who were classified as non-exempt
8 employees during the Class Period” of November 16, 2016 through February 28, 2022;” (3)
9 provisionally appointing Plaintiffs as the representatives of the Class; (4) provisionally appointing
10 Norman B. Blumenthal, Kyle R. Nordrehaug, Aparajit Bhowmik of Blumenthal Nordrehaug Bhowmik
11 De Blouw LLP and Samuel A. Wong, Kashif Haque, and Jessica L. Campbell as Class Counsel for the
12 Class; (5) approving the form and method for providing class-wide notice; (6) directing that notice of
13 the proposed settlement be given to the class; (7) appointing ILYM 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 Joint Stipulation of Settlement ("Agreement")
19 filed concurrently with the Court.¹ A copy of the fully executed Agreement is attached as Exhibit #1
20 to the Declaration of Kyle Nordrehaug (“Decl. Nordrehaug”), served and filed herewith.

21 As consideration for this Settlement, the Gross Settlement Amount is Three Million One
22 Hundred Thousand Dollars (\$3,100,000.00) to be paid by Defendant, as set forth in the Agreement.
23 The Gross Settlement Amount is all-inclusive of all payments contemplated in this resolution,
24 excluding any employer-side payroll taxes on the portion of the Individual Settlement Payments
25 allocated to wages which shall be separately paid by Defendant to the Settlement Administrator. The
26 Settlement is all-in with no reversion to Defendant and no need to submit a claim form. Decl.

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

1 Nordrehaug at ¶3.

2 On October 20, 2021, the Parties participated in an all-day mediation presided over by David
3 A. Rotman, a respected mediator of wage and hour representative and class actions. During the
4 mediation, each side, represented by its respective counsel, was able to agree to settle the Claims, which
5 settlement was memorialized in a Memorandum of Understanding. Decl. Nordrehaug at ¶5. The
6 Settlement is fair, reasonable and adequate, and should be preliminarily approved because there is a
7 substantial monetary payment, and there are substantial litigation and class-certification risks.
8 Therefore, Plaintiffs respectfully request that this Court grant preliminary approval of the Agreement
9 and enter the proposed order submitted herewith.

10 **II. DESCRIPTION OF THE SETTLEMENT**

11 The Gross Settlement Amount is Three Million One Hundred Thousand Dollars (\$3,100,000.00)
12 (Agreement at ¶I(N).) Under the Settlement, the Gross Settlement Amount includes all Individual
13 Settlement Amounts to Participating Class Members, all Settlement Administration Costs, Class
14 Counsel's attorney's fees and costs, PAGA Settlement Amount, and the Incentive Payments.
15 (Agreement at ¶ I(N) and III(3.06(a).) The Gross Settlement Amount does not include Defendant's
16 share of payroll taxes. (Agreement at ¶¶ I(N) and III(3.06(a)).) The Gross Settlement Amount shall
17 be all-in with no reversion to Defendant. (Agreement at ¶¶ I(N) and III(3.06(a).) Decl. Nordrehaug
18 at ¶15.

19 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay
20 Defendant's share of payroll taxes within thirty (30) days of the Effective Date. (Agreement at ¶
21 III(3.06(a).) Within ten (10) days after Defendant funds the Gross Settlement Amount, the Settlement
22 Administrator will pay the Individual Settlement Payments to Participating Class Members, Class
23 Counsel's attorneys' fees and costs, LWDA Payment, the Incentive Awards, and employer and
24 employee tax withholdings applicable to the Net Settlement Amount allocated to wages.(Agreement
25 at ¶ III(3.06(a).) Decl. Nordrehaug at ¶16.

26 The Net Settlement Amount shall equal the Gross Settlement Amount less Court approved
27 Settlement Administration Costs, Class Counsels' attorney's fees and costs, Incentive Awards, and
28 LWDA Payment. (Agreement at ¶ I(v).) The Net Settlement Amount will be distributed as the

1 Individual Settlement Payments to each Participating Class Member defined at ¶I(bb) as a Class
2 Member who does not timely exclude himself or herself from the Settlement and will therefore receive
3 his or her share of the Net Settlement Amount automatically without the need to return a claim form.
4 (Agreement at ¶¶ I(v).) The Individual Settlement Payment will be calculated as follows: the Net
5 Settlement Amount will be divided by the total number of Qualifying Workweeks by all Class Members
6 during the Class Period and then allocated on a pro rata basis. Qualifying Workweeks will be rounded
7 up to the next whole integer. Each Class Member's approximate Individual Settlement Payment amount
8 will be included in his or her Notice Packet. After final approval by the Court, the Net Settlement
9 Amount will be dispersed to Participating Class Members (those who did not exclude themselves) on
10 a pro rata basis based on the individual Qualifying Workweeks worked during the Class Period by each
11 Participating Class Member. (Agreement at ¶ III(3.06(f).) Workweeks will be based on Defendant's
12 records, however Class Members will have the right to challenge their workweeks. Decl. Nordrehaug
13 at ¶17.

14 Class Members may choose to opt-out of the Settlement by following the directions in the Class
15 Notice. (Agreement at ¶ III(3.03)), Ex. A.) All Class Members who do not "opt out" will be deemed
16 Participating Class Members who will be bound by the Settlement and will be entitled to receive an
17 Individual Settlement Payment. A PAGA Group Member who opts out the Settlement will still be paid
18 their allocation of the PAGA Settlement Amount and will remain subject to the release of the PAGA
19 claims, regardless of their request for exclusion. (Agreement at ¶ III(3.04(c).) Finally, the Class Notice
20 will also advise the Class Members of their right to object to the Settlement and/or dispute their
21 workweeks. (Agreement at ¶ III(3.04)(a)), Ex. A.) Decl. Nordrehaug at ¶18.

22 A Participating Class Member must cash his or her Individual Settlement Payment check within
23 180 days after it is mailed. (Agreement at ¶III(3.06)(f).) The Settlement Administrator will send a
24 reminder to Participating Class Members who have not cashed their checks within 120 days after its
25 last mailing to the affected individual. (Agreement at ¶ III(3.06)(f).) Any settlement checks not
26 cashed within 180 days will be voided and any the funds from such uncashed checks will be paid to the
27 California State Controller's Unclaimed Property Fund in the name of and for the benefit of the
28 individual who did not cash their check. (Agreement at ¶ III(3.06)(f).) Decl. Nordrehaug at ¶19.

1 The Parties have agreed to use ILYM as the Settlement Administrator. (Agreement at ¶ I(ii).)
2 From the Gross Settlement Amount, the Settlement Administrator shall be paid for the expenses of
3 administering the Settlement in an amount not to exceed \$12,500. (Agreement at ¶ III(3.06(b).) Decl.
4 Nordrehaug at ¶20.

5 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
6 to exceed one-third (1/3) of the Gross Settlement Amount, as the Class Counsel Fees Payment.
7 (Agreement at ¶ III(3.06(b).) Class Counsel will also be allowed to apply separately for an award of
8 Class Counsel Litigation Expenses Payment in an amount not to exceed \$30,000. (Agreement at ¶
9 III(3.06)(b).) Subject to Court approval, the Agreement provides for a payment of no more than
10 \$10,000 to each of the Plaintiffs as the Incentive Awards. (Agreement at ¶ III(3.06)(d).) Decl.
11 Nordrehaug at ¶21.

12 The Parties will seek approval from the Court for the PAGA Settlement Amount of \$75,000 out
13 of the Gross Settlement Amount, which shall be allocated 75% (\$56,250) to the LWDA as the LWDA's
14 share of the PAGA Settlement Amount pursuant to PAGA and 25% (\$18,750) will be distributed to the
15 PAGA Group Members based on their respective pay periods worked during the PAGA Period.
16 (Agreement at ¶ III(3.06)(e).) All PAGA Group Members will be sent their share of the PAGA
17 Settlement Amount and will be subject to the release of the PAGA claims, whether or not they opt out
18 of the Settlement. (Agreement at ¶ III(3.06)(e).) As set forth in the accompany proof of service, the
19 LWDA has been served with this motion and the Agreement. Decl. Nordrehaug at ¶22.

20 **III. CASE BACKGROUND**

21 The description of the case and claims, along with the procedural history is set forth in the
22 Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the
23 exchange of documents and information in connection with the Action which permitted Class Counsel
24 to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and 14. The Parties participated
25 in mediation with David A. Rotman on October 20, 2021, which after arm's length negotiations,
26 resulted in this Settlement. Decl. Nordrehaug, ¶12.

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

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

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

17 The primary question presented on an application for preliminary approval of a proposed class
18 action settlement is whether the proposed settlement is "within the range of possible approval."
19 *Manual for Complex Litigation, Second* §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th
20 Cir. 1982).² Preliminary approval is merely the prerequisite to giving notice so that "the proposed
21 settlement... may be submitted to members of the prospective Class for their acceptance or rejection."
22 *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is
23 "a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining."
24 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v.*

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

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

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

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

27 With regard to class action settlements, the opinions of counsel should be given considerable
28 weight both because of counsel's familiarity with this litigation and previous experience with cases

1 such as these. *Officers for Justice*, 688 F.2d at 625; *In re Wash. Public Power Supply System Sec.*
2 *Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal.
3 1988); *Weinberger*, 698 F.2d at 74. "The recommendations of plaintiffs' counsel should be given a
4 presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As
5 a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat'l Rural*
6 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

7 **B. Factors To Be Considered In Granting Preliminary Approval**

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

15 If the proposed settlement appears to be the product of serious, informed, noncollusive
16 negotiations, has no obvious deficiencies, does not improperly grant preferential
17 treatment to class representatives or segments of the class, and falls within the range of
18 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.

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

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

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

22 This settlement is the result of extensive and hard-fought litigation as well as negotiations
23 before an experienced and well-respected mediator. Defendant has expressly denied and continues to
24 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiffs and
25 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the class claims
26
27
28

1 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; Declaration of Jessica Campbell at ¶7. The
6 view of qualified and well-informed counsel that a class action settlement is fair, adequate, and
7 reasonable is entitled to significant weight. See *Kullar v. Foot Locker*, 168 Cal. App. 4th 116, 133
8 (2008) (the trial court "undoubtedly should continue to place reliance on the competence and integrity
9 of counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement.");
10 *Dunk*, 48 Cal. App. 4th at 1802.

11 The Parties attended an arms-length mediation session with David A. Rotman, a respected and
12 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
13

14 ³ The release applicable to the Class is appropriately tethered to solely to the allegations in the
15 Action at Section 5.01 as the "Released Claims by Class Members" are "all claims that were actually
16 asserted or which could have been asserted in the Action based on the factual allegations contained in
17 the operative complaints which occurred during the Class Period, including without limitation claims
18 for: (1) unfair competition in violation of Cal. Bus. & Prof. Code §§ 17200, et seq. predicated on the
19 violations alleged in the Action; (2) failure to pay minimum wages in violation of Cal. Lab. Code §§
20 1194, 1197, & 1197.1; (3) failure to pay overtime wages in violation of Cal. Lab. Code §§ 510, et seq.;
21 (4) failure to provide required meal periods in violation of Cal. Lab. Code §§ 226.7 & 512 and the
22 applicable IWC Wage Order; (5) failure to provide required rest periods in violation of Cal. Lab. Code
23 §§ 226.7 & 512 and the applicable IWC Wage Order; (6) failure to provide accurate itemized wage
24 statements in violation of Cal. Lab. Code § 226; (7) failure to provide wages when due violation of Cal.
25 Lab. Code §§ 201, 202, and 203; (8) failure to reimburse business expenses in violation of Cal. Lab.
26 Code § 2802; and (9) failure to pay all wages due upon separation of employment (collectively, the
27 "Released Claims"). The term "Released Claims" also includes the Named Plaintiffs' claims that
28 Defendant is liable for the attorneys' fees incurred to prosecute this Action on behalf of themselves and
the Class Members, including fees incurred for the services of Class Counsel, and any claim that
Defendant is liable for any other remedies, civil penalties, statutory penalties, or interest under
California law based on the facts alleged in the operative complaint. The term "Released Claims" also
includes all claims that the Class Members may have against the Released Parties relating to: (a) the
payment, taxation and allocation of attorneys' fees and costs to Class Counsel pursuant to this
Settlement Agreement; (b) the payment, taxation, and allocation of the Named Plaintiffs' Service
Awards; and (c) the payment, taxation, and allocation of penalties for settlement of the PAGA claim.
Claims for vested benefits, wrongful termination, unemployment insurance, disability benefits, social
security benefits, workers' compensation benefits, and class claims outside of the Class Period are
expressly excluded.

1 for the mediation, Defendant provided Class Counsel with necessary information for the members of
2 the Class, including time data, payroll data and data concerning the composition of the Class. Class
3 Counsel analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and
4 submitted a mediation brief and damage valuation to the Mediator. At the conclusion of the all-day
5 mediation, the Parties agreed to this Settlement. Decl. Nordrehaug at ¶ 5. Importantly, Plaintiffs and
6 Class Counsel believe that this Settlement is fair, reasonable and adequate.

7 As consideration for this Settlement, the Gross Settlement Amount is Three Million One
8 Hundred Thousand Dollars (\$3,100,000.00). The Settlement is all-in with no reversion to Defendant
9 and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

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

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

27 Here, there can be no dispute that the litigation has been hard-fought with aggressive and
28 capable advocacy on both sides. The Parties were represented by experienced and capable counsel who

1 zealously advocated their positions. Accordingly, “[t]here is likewise every reason to conclude that
2 settlement negotiations were vigorously conducted at arms’ length and without any suggestion of undue
3 influence.” *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. at 1392.

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

6 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
7 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
8 receive payment according to the same formula. (Agreement at ¶ III(3.06(f).) The Gross Settlement
9 Amount provides an average value of \$3,974.36 per Class Member and \$26.34 per workweek, and
10 after deductions, the Net Settlement Amount provides an average recovery of \$2,498.93 per Class
11 Member and \$16.56 per work week. Decl. Nordrehaug, ¶6.

12 The calculations to compensate for the amount due to the Class Members at the time this
13 Settlement was negotiated were calculated by Plaintiffs’ expert, Berger Consulting, in advance of
14 mediation. For the individuals whose claims are at issue in this Actions, Plaintiffs analyzed the data for
15 putative class members and determined the potential maximum damages for the class claims. For the
16 Class, Plaintiffs determined that the unpaid wages due to the alleged failure to pay potential rest period
17 damages at a 20% violation was \$5,961,849.84 and the off the clock claim for an unpaid hour of work
18 a week was \$7,235,253.71. There was no significant value assigned to the overtime or meal period
19 claims given that Labor Code Section 514 preempts overtime claims for employees like the Class
20 Members here who are covered by collective bargaining agreements and Labor Code Section 512
21 preempts meal period claims for employees like the Class Members here who are covered by collective
22 bargaining agreements for work in the construction industry.

23 In total, the damages for the Class were calculated to have a maximum total value of
24 \$13,197,103.60. In addition, Plaintiffs calculated that the maximum value of the waiting time penalties
25 were \$3,474,988.80 and the maximum value of the wage statement penalties to be \$4,459,250,
26 however, these wage statement and waiting time penalties claims potentially have a much smaller
27 value, even if damages were awarded, to the extent that they are only derivative of the off the clock and
28

1 rest break claims.⁴ Decl. Nordrehaug, ¶6.

2 Consequently, the Gross Settlement Amount represents more than 23% of the value of the
3 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
4 proven in full at trial.⁵ The above maximum calculations should then be adjusted in consideration for
5 both the risk of certification and the risk of establishing class-wide liability on all claims. Given the
6 amount of the Settlement as compared to the potential value of the claims, the Settlement is most
7 certainly fair and reasonable.⁶ Clearly, the goal of this litigation has been met. Decl. Nordrehaug, ¶6.

8 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
9 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
10 Defendant present serious threats to the claims of the Plaintiffs and the other Class Members, including
11 that the collective bargaining agreements could have subjected all the claims at issue here to the binding
12 grievance and arbitration procedures set forth therein. This argument could have eliminated Plaintiffs'
13 ability to seek class certification for any of the claims asserted in this case. Defendant also asserted that

15 ⁴ While Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
16 226, Plaintiffs recognized that these claims were subject to various defenses asserted by Defendant,
17 including, but not limited to, a good faith dispute defense as to whether any premium wages for meal
18 or rest periods or other wages were owed given Defendant's position that Plaintiffs were properly
19 compensated. See *Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is no
20 willful failure to pay wages if the employer and employee have a good faith dispute as to whether and
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.
24 4th 1242, 1261 (2016) and *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1336 (2018).
25 As a result, the viability of Plaintiffs' claims on these theories is uncertain.

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

28 ⁶ See *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).

1 Defendant's practices complied with all applicable Labor laws. Even if liability was found, Plaintiffs
2 would have faced the daunting challenge of ascertaining the amount of damages owed for violations
3 that are not reflected in any written records for the off the clock and rest period claims. Defendant also
4 contended that their wage and hour policies fully complied with California law and that the collective
5 bargaining agreements permitted Defendant's practices. Further, Defendant argued that Defendant was
6 not required to record rest periods. Finally, Defendant could argue that the Supreme Court decision
7 in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiffs' claims, on liability, value,
8 and class certifiability as to the meal and rest period claims. Defendant also argues that based on their
9 facially lawful practices, they acted in good faith and without willfulness, which if accepted would
10 negate the claims for waiting time penalties and/or inaccurate wage statements. In fact, under the
11 current state of the law, it is questionable whether these penalties could be awarded at all based upon
12 the alleged rest period violations. If successful, Defendant's defenses could eliminate or substantially
13 reduce any recovery to the Class. While Plaintiffs believe that these defenses could be overcome,
14 Defendant maintains these defenses have merit and therefore present a serious risk to recovery by the
15 Class. Decl. Nordrehaug, ¶ 24.

16 Defendant also argued that the individual experience of each putative class member varied with
17 respect to the claims. Defendant could also contest class certification by arguing injury and good faith
18 were case by case determinations that precluded class certification. Plaintiffs are aware of cases where
19 class certification of similar claims was denied. See e.g. *Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th
20 885, 256 Cal. Rptr. 3d 547 (2019) (denying certification of meal and rest break claims). Defendant also
21 contended that individual differences in work experiences not only impacted damages but would also
22 impact certification. Finally, even if class certification was successful, as demonstrated by the
23 California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there
24 are significant hurdles to overcome for a class wide recovery even where the class has been certified.
25 While other cases have approved class certification in wage and hour claims, class certification in this
26 action would have been hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug,
27 ¶ 25.

28 After arm's length negotiations between experienced and informed counsel, the Parties

1 recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of
2 \$3,100,000.00. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

3 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,
4 and likely duration of further litigation likewise favors the settlement. Regardless of
5 how this Court might have ruled on the merits of the legal issues, the losing party likely
6 would have appealed, and the parties would have faced the expense and uncertainty of
7 litigating an appeal. ‘The expense and possible duration of the litigation should be
8 considered in evaluating the reasonableness of [a] settlement.’”

9 2007 WL 221862, at *4 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458
10 (9th Cir. 2000).)

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

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

18 Plaintiffs will apply to the Court for an Incentive Award in consideration for the service and for
19 the risks undertaken on behalf of the class. (Agreement at ¶ I(o).) Plaintiffs performed their duty
20 admirably by working with Class Counsel. Decl. Nordrehaug at ¶27. At this stage, the requested
21 service award of \$10,000 is well within the accepted range of awards for purposes of preliminary
22 approval. See e.g. *Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S. Dist. LEXIS 71386 (E.D. Cal. 2018)
23 (awarding \$12,500 where average class member payment was \$351); *Holman v. Experian Info.*
24 *Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving \$10,000 service award
25 where class member recovery was \$375); *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008 WL
26 4473183, *7 (S.D.Cal. 2008) (awarding \$25,000 service award to each of six plaintiffs in overtime
27 class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. 2007) (awarding \$25,000
28 service award in overtime class action and a pool of \$100,000 in enhancements). As explained in
29 *Glass*, service awards are routinely awarded to class representatives to compensate the employees for
30 the time and effort expended on the case, for the risk of litigation, for the fear of suing an employer and
31 retaliation there from, and to serve as an incentive to vindicate the statutory rights of all employees.

1 2007 WL 221862 at *16-17.

2 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit**
3 **Preliminary Approval Of The Settlement**

4 The stage of the proceedings at which this Settlement was reached also militates in favor of
5 preliminary approval and ultimately, final approval of the Settlement. Class Counsel has conducted
6 a thorough investigation into the facts of the class action. Class Counsel began investigating the Class
7 Members' claims before the Action was filed. Class Counsel conducted a review and analysis of the
8 relevant documents and data. Class Counsel was also experienced with the claims at issue here, as
9 Class Counsel previously litigated and settled similar claims in other actions. Accordingly, the
10 agreement to settle did not occur until Class Counsel possessed sufficient information to make an
11 informed judgment regarding the likelihood of success on the merits and the results that could be
12 obtained through further litigation. Decl. Nordrehaug at ¶28.

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

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

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

25 *Glass*, 2007 U.S. Dist. LEXIS 8476 at *14 (quoting *In re Mego Financial Corp. Securities Litigation*,
26 213 F.3d at 459).

27 Here, Class Counsel was in a far superior position to evaluate the fairness of this Settlement
28 because Class Counsel performed formal discovery, received all necessary information which was

1 evaluated with the assistance of an expert, and also performed independent investigations and due
2 diligence to confirm the accuracy of the information supplied by Defendant.

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

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

8 All individuals who are or previously were employed by Defendant in California and
9 were classified as non-exempt employees at any time during the Class Period.

10 (Agreement at ¶ I(c).)

11 The “Class Period” is from November 16, 2016 to February 28, 2022. (Agreement at ¶ I(g).)

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

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

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

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

22 While Defendant reserve all rights to dispute that the Plaintiffs can satisfy these requirements,
23 the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
24 for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
settlement only. (Agreement at ¶ IV(4.01).)

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

26 Plaintiffs bring this action on behalf of a Class of individuals during the applicable Class Period.
27 Plaintiffs assert that all of these individuals are ascertainable because the class members can readily be
28 determined through examination of Defendant’s files. Given that the Class consists of approximately

1 780 members, Plaintiffs maintain that numerosity is clearly satisfied. *See Bowles v. Superior Court*,
2 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126
3 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiffs
4 assert that the 780 current and former employees that comprise the Class can be identified based on
5 Defendant's records and are sufficiently numerous for class certification. Decl. Nordrehaug at ¶30.

6 **C. Common Issues of Law and Fact Predominate**

7 Predominance of common issues of law or fact does not require that the common issues be
8 dispositive of the entire controversy or even that they be dispositive of all liability issues. 1 *Newberg*
9 *on Class Actions*, Section 4.25 at 4-82, 4-83 (1992). "Predominance is a comparative concept, and 'the
10 necessity for class members to individually establish eligibility and damages does not mean individual
11 fact questions predominate.'" *Sav-On*, 34 Cal. 4th at 334.

12 Commonality exists if there is a predominant common legal question regarding how an
13 employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,
14 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its
15 drivers.") Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the
16 certification stage since the question is "essentially a procedural one that does not ask whether an action
17 is legally or factually meritorious." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

18 Here, Plaintiffs contend that common questions of law and fact are present, and specifically the
19 common questions of whether Defendant properly paid wages for all hours worked, whether the
20 Defendant failed to provide rest periods, and whether Class Members are entitled to damages and
21 penalties as a result of these practices. Decl. Nordrehaug, ¶30. Defendant disputes that common
22 questions predominate but will not oppose such a finding for purposes of this Settlement only.

23 **D. The Claims of the Plaintiffs Are Typical of the Class Claims**

24 The typicality requirement requires the Plaintiffs to demonstrate that the members of the class
25 have the same or similar claims as the Plaintiffs. "The typicality requirement is met when the claims
26 of the [p]laintiff arise from the same event or are based on the same legal theories." *Tate v.*
27 *Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In *Hanlon, supra*, 150 F.3d at 1020, the Ninth
28 Circuit held that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are

1 reasonably coextensive with those of absent class members; they need not be substantially identical.”

2 In the instant case, Plaintiffs contend that there can be little doubt that the typicality requirement
3 is satisfied. The Plaintiffs, like every other member of the Class, worked for Defendant as non-exempt
4 employees during the Class Period. Plaintiffs contend that, like every other member of the Class, they
5 were subject to the same practices and policies of Defendant and are subject to the same defenses. Thus,
6 Plaintiffs assert that the claims of the Plaintiffs and the Class Members arise from the same course of
7 conduct by the Defendant, involve the same employment policies and practices of Defendant, and are
8 based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of settlement, Plaintiffs assert
9 that the typicality requirement is met as to the common issues presented in this case. Defendant does
10 not oppose a finding of typicality for purposes of this Settlement only.

11 **E. The Class Representation Fairly and Adequately Protects the Class**

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

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

25 To certify a class, the Court must also determine that a class action is superior to other available
26 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of
27 common issues will reduce litigation costs and promote greater efficiency, a class action may be
28 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.

1996). As courts have previously observed:

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

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

VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE

The Court has broad discretion in approving a practical notice program. The Parties have agreed upon procedures by which the Class Members will be provided with written notice of the Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance with the Agreement, Defendant will provide to the Settlement Administrator an electronic database containing each Class Member’s Class Data. (Agreement at ¶ III(3.03).) Within ten (10) days after receiving the Class Data, the Settlement Administrator will mail the Class Notice Packets to all Class Members via first-class U.S. Mail using the most current mailing address information available. (Agreement at ¶ III(3.03).) The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel and to be approved by the Court, includes all relevant information. (See Exhibit “A” to the Agreement.) The Class Notice will include, among other information: (i) information regarding the Action; (ii) the impact on the rights of the Class Members if they do not opt out; (iii) information to the Class Members regarding how to opt out and how to object to the Settlement; (iv) the estimated Individual Settlement Payment for each of the Class Members; (iii) the amount of attorneys’ fees and expenses to be sought; (v) the amount of the Plaintiffs’ service award request; and (vi) the anticipated expenses of the Settlement Administrator. The Parties agree that the Class Notice Packet will also include a Spanish translation of the Class Notice. Decl. Nordrehaug at ¶32.

The Class Notice will state that the Class Members shall have sixty (60) days from the date that the Notice is mailed to them to request exclusion (opt-out) or to submit an objection. (Agreement at

¶ III(3.03).) In the event of a re-mailing, the Response Deadline will be extended by an additional 15 days. (Agreement at ¶ III(3.03).). Class Members shall be given the opportunity to object to the Settlement and/or requests for attorneys' fees and expenses and to appear at the Final Approval Hearing. (Agreement at ¶ III(3.03).) Class Members who do not submit a timely and proper request to opt-out will automatically receive a payment of their Individual Settlement Payment. This notice program was designed to meaningfully reach the Class Members and it advises them of all pertinent information concerning the Settlement. Decl. Nordrehaug at ¶32. The mailing and distribution of the Class Notice satisfies the requirements of due process and is the best notice practicable under the circumstances and complies with Rules of Court 3.766 and 3.769(f).

VIII. CONCLUSION

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

Dated: April 11, 2022

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

By: /s/ Kyle Nordrehaug
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Attorney for Plaintiffs