

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

Norman B. Blumenthal (State Bar #068687)
Kyle R. Nordrehaug (State Bar #205975)
Aparajit Bhowmik (State Bar #248066)
Jeffrey S. Herman (State Bar #280058)
2255 Calle Clara
La Jolla, CA 92037
Telephone: (858)551-1223
Facsimile: (858) 551-1232
Email: norm@bamlawca.com
Website: www.bamlawca.com

Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO**

SANDY MURILLO, an individual, on
behalf of herself and on behalf of all
persons similarly situated,

Plaintiff,

vs.

7 ELEVEN, INC., a Corporation; and
DOES 1 through 10, inclusive,

Defendants.

SANDY MURILLO, on behalf of the
State of California, as a private attorney
general,

Plaintiff,

vs.

7 ELEVEN, INC., a Corporation; and
DOES 1 through 10, inclusive,
Defendants.

Case No. 37-2020-00043637-CU-OE-CTL
(Consolidated with Case No.
37-2021-00002324-CU-OE-CTL)

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

Hearing Date: May 12, 2023
Hearing Time: 8:30 a.m.

*[Hearing scheduled by Order dated October 5, 2022
at paragraph 13]*

Dept.: C-65
Judge: Hon. Ronald Frazier

Action Filed: November 30, 2020
Trial Date: Not Set

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE SETTLEMENT BEFORE THE COURT	1
III.	GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL OF CLASS ACTION SETTLEMENTS.....	4
IV.	THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.....	5
A.	The Settlement Satisfies the California Test for Fairness.....	6
1.	The Investigation and Analysis of Documents are Sufficient to Allow Counsel and the Court to Act Intelligently.....	6
2.	The Settlement was Reached Through Arm's Length Bargaining	7
3.	Class Counsel is Experienced in Similar Litigation	8
4.	There Are No Objections and Only One Opt-Out	8
5.	The Strength of Plaintiff's Case	9
6.	The Risk, Expense, Complexity, and Likely Duration of Further Litigation	11
7.	The Amount Offered in Settlement.....	12
V.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases:

Page:

<i>7-Eleven Owners for Fair Fran. v. Southland Corp.</i> , 85 Cal. App. 4 th 1135 (2000).....	4, 5
<i>Alberto v. GMRI, Inc.</i> , 252 F.R.D. 652 (E.D. Cal. Jun 24, 2008)	7
<i>Barcia v. Contain-A-Way, Inc.</i> , 2009 U.S. Dist. LEXIS 17118 (S. D. Cal. 2009)	10
<i>Brinker v. Superior Court</i> , 53 Cal. 4 th 1004 (2012)	9
<i>Browning v. Yahoo!, Inc.</i> , 2007 U.S. Dist. LEXIS 86266 (N.D. Cal. Nov. 16, 2007)	10
<i>Cacho v. Eurostar, Inc.</i> , 43 Cal. App. 5 th 885 (2019)	10
<i>Cellphone Termination Fee Cases</i> , 180 Cal. App. 4 th 1110 (2009)	6
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4 th 1794 (1996)	5, 6
<i>Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)</i> , 213 F.3d 454 (9 th Cir. 2000)	12, 13
<i>Duran v. U.S. Bank National Assn.</i> , 59 Cal. 4 th 1 (2014)	11
<i>Glass v. UBS Fin. Servs.</i> , 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330 (N.D. Cal. 2007); <i>aff'd</i> 2009 U.S. App. LEXIS 10328 (9 th Cir. May 14, 2009)	7, 12
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9 th Cir. 1998)	9
<i>Hopson v. Hanesbrands Inc.</i> , 2009 U.S. Dist. LEXIS 33900 (N.D. Cal. 2009)	10
<i>Huens v. Tatum</i> , 52 Cal. App. 4 th 259 (1997)	4
<i>In re Austrian & German Bank Holocaust Litigation</i> , 80 F. Supp. 2d 164 (S.D.N.Y. 2000)	8
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4 th 116 (2008)	6
<i>Laskey v. Int'l Union</i> , 638 F.2d 954 (6 th Cir. 1981)	9

1	<i>Louie v. Kaiser Foundation Health Plan, Inc.,</i>	
2	2008 U.S. Dist. LEXIS 78314 (S.D. Cal. 2008)	10
3	<i>Ma v. Covidien Holding, Inc.,</i>	
4	2014 WL 2472316, (C.D. Cal. 2014)	13
5	<i>Malibu Outrigger Bd. of Governors v. Superior Court,</i>	
6	103 Cal. App. 3d 573 (1980)	5
7	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles,</i>	
8	186 Cal. App. 4th 399 (2010).	6
9	<i>Nordstrom Commission Cases,</i>	
10	186 Cal. App. 4th 576 (2010)	13
11	<i>Officers for Justice v. Civil Service Com'n,</i>	
12	688 F.2d 615 (9th Cir. 1982)	5
13	<i>Reber v. AIMCO/Bethesda Holdings, Inc.,</i>	
14	2008 WL 4384147 (C.D. Cal. Aug. 25, 2008)	13
15	<i>Stoetznner v. U.S. Steel Corp.,</i>	
16	897 F.2d 115 (3d. Cir. 1990)	9
17	<i>Viceral v. Mistras Grp., Inc.,</i>	
18	2016 WL 5907869 (N.D. Cal. 2016)	13
19	<i>Wershba v. Apple Computer,</i>	
20	91 Cal. App. 4 th 224 (2001).	5
21	<u>Statutes, Rules and Regulations:</u>	
22	Cal. Labor Code §203.	13
23	Cal. Labor Code §226.	13

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 October 5, 2022 (“Preliminary Approval Order”), the approved Class
6 Notice has been disseminated to the Class.²

7 The purpose of this hearing is to determine whether the proposed settlement of the litigation
8 should be finally approved. Plaintiff Sandy Murillo (“Plaintiff”) respectfully submits this memorandum
9 in support of the unopposed motion for final approval and the proposed entry of the Final Approval
10 Order and Judgment, submitted herewith. The settlement represents an excellent result for the Class
11 and avoids the delays, risks, and costs of further litigation. Notice was disseminated to the Class and,
12 to date, there are no objections and only four (4) requests for exclusion, which means that nearly the
13 entire Class (99.9%) has elected to participate in the Settlement. Blumenthal Decl. ¶4. This is a positive
14 response from the Class evidencing their collective approval of the settlement. As a result, Plaintiff
15 respectfully submits that the class settlement should be finally approved for the same reasons that the
16 Court preliminarily approved the settlement as fair, reasonable, and adequate.

17
18 **II. THE SETTLEMENT BEFORE THE COURT**

19 Plaintiff and Defendant 7 Eleven, Inc. ("Defendant") reached a full and final settlement of the
20 above-captioned action, which is embodied in the Agreement filed concurrently with the Court. As
21 consideration for this Settlement, the Gross Settlement Amount is Two Million Nineteen Thousand
22 Eight Hundred Ninety-Seven Dollars and Seventy-Six Cents (\$2,019,897.76) (Agreement at ¶¶ I(19)
23 and III(39).) The Gross Settlement Amount increased from \$1,990,000 to \$2,019,897.76 pursuant to
24

25 ¹ Capitalized terms are defined in the Agreement.

26 ² The “Class” is “all individuals who are or previously were employed by Defendant in California
27 who were classified as non-exempt employees at any time during the Class Period excluding persons
28 who have previously settled claims otherwise covered by this settlement” The “Class Period” is from
November 30, 2016 through April 27, 2022. (Preliminary Approval Order, ¶ 5)

1 the Agreement's escalator clause due to an increase of 14,378 total workweeks worked by the Class
2 Members. (Agreement at ¶¶ III(41)(e); Nava Decl. ¶ 14. Under the Settlement, the Gross Settlement
3 Amount consists of the following elements: (1) Settlement Shares to the Participating Class Members,
4 (2) Settlement Administration Expenses, (3) Class Counsel Fees Payment, (4) Class Counsel Litigation
5 Expenses Payment, (5) Class Representative Service Payment, and (5) the PAGA Payment, and
6 excluding any employer payroll taxes, if any, due on the portion of the Settlement Shares allocated to
7 wages which shall not be paid from the Gross Settlement and shall be the separate additional obligation
8 of Defendant.. (Agreement at ¶¶ I(19) and III(39)-(40).) The Gross Settlement Amount does not
9 include Defendant's share of payroll taxes. (Agreement at ¶ III(39).) Blumenthal Decl. ¶3(a). The
10 Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement at ¶ III(39).)
11 Blumenthal Decl. ¶3(b).

12 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay
13 Defendant's share of payroll taxes within twenty-one (21) calendar days of the Effective Date.
14 (Agreement at ¶ III(46).) Within fifteen (15) calendar days after Defendant funds the Gross Settlement
15 Amount, the Settlement Administrator will make payment of all Settlement Shares to Participating
16 Class Members. (Agreement at ¶ III(46).) Blumenthal Decl. ¶3(c).

17 The Net Settlement Amount shall equal the Gross Settlement Amount less the Court approved
18 amounts for the Class Representative Service Payment, the Class Counsel Fees Payment, Class Counsel
19 Litigation Expenses Payment, the PAGA Payment, and the Settlement Administration Expenses.
20 (Agreement at ¶ I(21).) The Net Settlement Amount will be distributed as the Settlement Shares to the
21 Class Members who do not timely request exclusion ("Participating Class Member"). (Agreement at
22 ¶¶ III(41).) The Settlement Share will be calculated as follows: (a) the Settlement Administrator shall
23 divide the Net Settlement Amount by the total number of weeks included in the dates of employment
24 to determine a dollar amount per week ("Weekly Rate"); and (b) the Settlement Administrator shall
25 then take the number of weeks worked by each Participating Class Member and multiply it by the
26 Weekly Rate to calculate their Settlement Share. (Agreement at ¶ III(41)(b).) Workweeks will initially
27 be based on Defendant's records, however Class Members will have the right to challenge their
28 workweeks. Blumenthal Decl. ¶ 3(d).

1 Class Members were sent the Court approved Class Notice using the procedure approved by the
2 Court by mailing the notice packets after updating class members' addresses using the National Change
3 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
4 any forwarding address provided or updated address located. (Agreement at ¶ III(43)(c), Ex. A.) Class
5 Members were provided with the opportunity to exclude themselves or "opt out" if they did not want
6 to participate in the settlement. (Agreement at ¶ III(43)(c), Ex. A.) All Aggrieved Employees will still
7 be paid their allocation of the PAGA Payment, respectively, and will remain bound by the release of
8 the Released PAGA Claims. (Agreement at ¶ III(43)(c)(iii).) The Class Notice also advised Class
9 Members of their right to object to the Settlement and/or dispute their workweeks. (Agreement at ¶
10 III(43)(c), Ex. A.) Blumenthal Decl. ¶ 3(e).

11 A Participating Class Member must cash his or her Settlement Share check within 180 days
12 after it is mailed. (Agreement at ¶ III(47).) The Settlement Administrator will send a reminder to
13 Participating Class Members who have not cashed their checks within 120 days after its last mailing
14 to the affected individual. (Agreement at ¶ III(47).) Any settlement checks not cashed within 180 days
15 will be voided and any the funds from such uncashed checks will be paid to the California State
16 Controller's Unclaimed Property Fund in the name of and for the benefit of the individual who did not
17 cash their check. (Agreement at ¶ III(47).) Blumenthal Decl. ¶ 3(f).

18 ILYM Group was appointed as the Settlement Administrator. (Agreement at ¶ III(42);
19 Preliminary Approval Order at ¶ 9.) From the Gross Settlement Amount, the Settlement Administrator
20 shall be paid for the expenses of administering the Settlement in an amount not to exceed \$40,000.
21 (Agreement at ¶ III(40)(d).) As set forth in the Nava Decl. at ¶ 15, the Settlement Administration
22 Expenses, including fees and costs incurred to-date, as well as anticipated fees and costs for completion
23 of the settlement administration, are \$40,000. Blumenthal Decl. ¶ 3(g).

24 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
25 to exceed one-third (1/3) of the Gross Settlement Amount as the Class Counsel Fees Payment.
26 (Agreement at ¶ III(40)(b).) Class Counsel will also be allowed to apply separately for an award of
27 Class Counsel Litigation Expenses Payment in an amount not to exceed \$25,000. (Agreement at ¶
28 III(40)(b).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000

1 to the Plaintiff as the Class Representative Service Payment. (Agreement at ¶ III(40)(a).) In support
2 of this separate motion for attorneys' fees, reimbursement of expenses and service awards, Class
3 Counsel is providing evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

4 The Parties will seek approval from the Court for the PAGA Payment of \$250,000 out of the
5 Gross Settlement Amount, which shall be allocated 75% (\$187,500) to the LWDA as the LWDA's share
6 of the PAGA Payment pursuant to PAGA and 25% (\$62,500) will be distributed to the Aggrieved
7 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at ¶
8 III(40)(c).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be subject
9 to the release of the PAGA Released Claims, whether or not they opt out of the Settlement. (Agreement
10 at ¶ III(40)(c).) As set forth in the accompany proof of service, the LWDA has been served with this
11 motion and the Agreement. Blumenthal Decl. ¶3(i).

12 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
13 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
14 is "fair, adequate and reasonable". (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
15 at Two Million Nineteen Thousand Eight Hundred Ninety-Seven Dollars and Seventy-Six Cents
16 (\$2,019,897.76) is an excellent result for the Class. This result is particularly favorable in light of the
17 fact that liability was far from certain in light of the defenses asserted by Defendant. Given the
18 complexities of this case and the defenses asserted, along with the uncertainties of proof at trial and
19 appeal, the proposed settlement is fair, reasonable and adequate, and should be finally approved.
20 Blumenthal Decl. ¶3(j).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 The Parties attended an arms-length mediation session with Michael E. Dickstein, Esq., a
11 respected and experienced mediator of wage and hour class actions, in order to reach this Settlement.
12 In preparation for the mediation sessions, Defendant provided Class Counsel with necessary
13 information for the members of the Class, including time data, payroll data and data concerning the
14 composition of the Class. Plaintiff analyzed the data with the assistance of damages expert, Berger
15 Consulting Group, and prepared and submitted a mediation brief and damage valuation to the
16 Mediator. Following the mediation, the Parties were able to agree to settle the Action based upon a
17 mediator's proposal which was memorialized in the form of a Memorandum of Understanding.
18 Blumenthal Decl. ¶7(b).

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

25 From January 2022 to May 2022, the settlement agreement and exhibits thereto were finalized
26 and executed, and presented to this Court on for preliminary approval. The Court granted preliminary
27 approval on September 16, 2022, and the Preliminary Approval Order was entered by this Court on
28 October 5, 2022. Blumenthal Decl. ¶7(c).

1 3. Class Counsel is Experienced in Similar Litigation

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

12 4. There Are No Objections And Few Opt-Outs

13 The reaction of the Class unequivocally supports approval of the Settlement. On December 9,
14 2022, the Settlement Administrator mailed the Court-approved Class Notice to the Class Members,
15 which provided each class member with the terms of the Settlement, including notice of the claims at
16 issue and the financial terms of the settlement, including the attorneys' fees, costs, and service awards
17 that were being sought, how individual settlement awards would be calculated, and the specific,
18 estimated payment amount to that individual. See Nava Decl. ¶ 7, Exh. A. In disseminating the notices,
19 the Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary
20 Approval Order. Significantly, there have been no objections and only four (4) opt-outs. Nava Decl.
21 ¶¶ 11-12. As a result, nearly the entire Class will participate in the Settlement and will be sent a
22 settlement check, representing 99.92% of the Class. See Nava Decl. at ¶¶ 13-14. Blumenthal Decl. ¶4.

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

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

3 5. The Strength of Plaintiff's Case

4 The Action generally alleges that Plaintiff and other Class Members were not provided all
5 minimum wages and overtime compensation and at the correct rate, were not provided and/or paid for
6 meal and rest periods, were not reimbursed for reasonable business expenses, were not provided
7 suitable seating, and were not provided accurate itemized wage statements. The Action seeks unpaid
8 wages, penalties, attorney fees, litigation costs, and any other equitable or legal relief allegedly due and
9 owing to Plaintiff and the other Class Members by virtue of the foregoing claims. Blumenthal Decl.
10 ¶5.

11 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
12 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
13 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
14 also asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued
15 that all work time was paid for and that the regular rate was properly calculated. Defendant contended
16 that their meal and rest period policies fully complied with California law, that Defendant's
17 timekeeping system recorded meal periods, and that all meal periods were provided. Further,
18 Defendant argued that Defendant was not required to record rest periods. Defendant also maintained
19 that an on premise policy for meals and rest periods is not illegal. Defendant could argue that the
20 Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiff's
21 claims, on liability, value, and class certifiability as to the meal and rest period claims. As to expenses
22 reimbursement, Defendant maintained that employees were not required to use their cell phones and
23 any use of their cell phone was voluntary for their convenience and therefore not subject to Labor Code
24 §2802. Finally, Defendant also argues that based on their facially lawful practices, they acted in good
25 faith and without willfulness, which if accepted would negate the claims for waiting time penalties
26 and/or inaccurate wage statements. In fact, under the state of the law at the time of mediation, it was
27 questionable whether these penalties could be awarded at all based upon the alleged meal and rest
28 period violations. If successful, Defendant's defenses could eliminate or substantially reduce any

1 recovery to the Class. While Plaintiff believes that these defenses could be overcome, Defendant
2 maintains these defenses have merit and therefore present a serious risk to recovery by the Class.
3 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 Action was not settled, Plaintiff would be unable
26 to obtain class certification and thereby not recover on behalf of any employees other than herself.
27 Defendant argued that the individual experience of each putative class member varied with respect to
28 the claims. Defendant could also contest class certification by arguing injury and good faith were case
by case determinations that precluded class certification. Plaintiff is aware of cases where class
certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885, 256
Cal. Rptr. 3d 547 (2019) (denying certification of meal and rest break claims). Defendant also

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

8 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
9 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
10 substantial defenses. Currently, the maximum and average class member allocation are \$2,203.15 and
11 \$209.20, respectively. *See Nava Decl. ¶14.* Given the complexities of this case, the defenses, along
12 with the uncertainties of proof and appeal, the proposed Settlement is fair, reasonable and adequate,
13 and should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

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

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

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

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

15 *Id.* at *12.

16 7. The Amount Offered in Settlement

17 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
18 to Plaintiff's claims. As set forth in the Declaration of Kyle Nordrehaug filed in support of preliminary
19 approval which discussed the value of the class claims in detail, the Gross Settlement Amount compares
20 favorably to the value of the claims. For the 5,177 Class members who worked 139,378 work weeks,
21 the Gross Settlement Amount provides an average value of \$390 per Class Member and \$14 per
22 workweek, and after deductions, the Net Settlement Amount provides an average recovery of \$197 per
23 Class Member and \$7.32 per work week. Blumenthal Decl. ¶8(d).

24 The calculations to compensate for the amount due to the Class Members at the time this
25 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting Group, in advance
26 of mediation. As to the Class whose claims are at issue in this Action, Plaintiff used an expert to
27 analyze the data and determine the potential unpaid wages for the employees. For the Class, Plaintiff
28 determined that the unpaid wages due to the alleged failure to pay overtime wages based on a regular
rate miscalculation to be \$6,803, the alleged failure to pay meal break premiums based on a regular rate
miscalculation is \$2,097, the maximum potential rest period damages were estimated to be \$5,817,124
based upon a 100% violation rate from on premise policy, the maximum meal period damages at a 28%

1 violation rate were estimated to be \$1,627,437 after deducting the meal period premiums paid by
2 Defendant, and the maximum damages for unreimbursed expenses were estimated to be \$295,130 at
3 a rate of \$10 of unreimbursed cell phone expense incurred each month. In total, the damages for the
4 Class were calculated to have a maximum total value of \$7,748,582. In addition, Plaintiff calculated
5 that the maximum value of the waiting time penalties were between \$543,937 and \$5,471,365
6 depending on the predicate violation, and the maximum value of the wage statement penalties to be
7 \$2,219,650, however, these wage statement and waiting time penalties claims potentially have a much
8 smaller value, even if damages were awarded, to the extent that they are only derivative of the meal and
9 rest break claims.³ Blumenthal Decl. ¶8(d).

10 Consequently, the Gross Settlement Amount represents more than 25% of the value of the
11 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
12 proven in full at trial.⁴ The above maximum calculations should then be adjusted in consideration for
13 both the risk of certification and the risk of establishing class-wide liability on all claims. Defendant
14 disputes Plaintiff's estimates and believes the amount Plaintiff can recover for the Class, if anything
15 at all, is actually much lower. Given the amount of the Settlement as compared to the potential value
16
17
18

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

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

1 of the claims, the Settlement is most certainly fair and reasonable.⁵ Blumenthal Decl. ¶8(d). Clearly,
2 the goal of this litigation has been met.

3 **V. CONCLUSION**

4 Plaintiff respectfully submits 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: April 19, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

9 By: /s/ Kyle Nordrehaug
10 Kyle R. Nordrehaug
11 Attorney for Plaintiff
12
13
14
15
16
17
18
19
20

21 ⁵ See e.g. *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. 2007) (approving a
22 settlement where the settlement amount constituted approximately 25% of the estimated overtime
23 damages for the class); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12
24 (N.D. Cal. 2015) (granting final approval where “the proposed Total Settlement Amount represents
25 approximately 10% of what class might have been awarded had they succeeded at trial.”); *Dunleavy*
26 *v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement
27 which represented “roughly one-sixth of the potential recovery”); *Stovall-Gusman v. W.W. Granger,*
28 *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).