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

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

15 BRADLEY LUTAT, on behalf of the State
16 of California, as a private attorney general,

17 Plaintiff,

18 vs.

19 BARRY'S BOOTCAMP, LLC, a California
20 Limited Liability Company; BARRY'S
21 BOOTCAMP SAN DIEGO LLC, a
22 California Limited Liability Company;
23 BARRY'S BAY AREA, LLC, a Limited
24 Liability Company; and Does 1 through 50,
25 inclusive,

26 Defendants.

Case No.: 37-2020-00044771-CU-OE-CTL

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

Hearing Date: September 16, 2022
Hearing Time: 9:00 a.m.

Dept.: C-67
Judge: Hon. Eddie C. Sturgeon

Action Filed: December 7, 2020

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1 **I. INTRODUCTION**

2 Plaintiff Bradley Lutat (“Plaintiff”) respectfully submits this memorandum in support of the
3 unopposed motion for preliminary approval of the proposed class action settlement with Defendants
4 Barry's Bootcamp, LLC; Barry's Bootcamp San Diego LLC; Barry's Bay Area, LLC (“Defendants”),
5 and seeks entry of an order: (1) preliminarily approving the proposed settlement of this class action
6 with Defendants; (2) for settlement purposes only, conditionally certifying the Class, which is
7 comprised of “all individuals who worked for Defendants in California as non-exempt employees at
8 any time during the Class Period”, which is of October 1, 2019 to August 12, 2021; (3) provisionally
9 appointing Plaintiff as the representative of the Class; (4) provisionally appointing Norman B.
10 Blumenthal, Kyle R. Nordrehaug, Aparajit Bhowmik, Nicholas J. De Blouw, Jeffrey S. Herman,
11 Christine T. LeVu, and Andrew G. Ronan of Blumenthal Nordrehaug Bhowmik De Blouw LLP as
12 Class Counsel for the Class; (5) approving the form and method for providing class-wide notice; (6)
13 directing that notice of the proposed settlement be given to the class; (7) appointing ILYM as
14 Settlement Administrator, and (8) scheduling a final approval hearing date to consider Plaintiff’s
15 motion for final approval of the settlement and entry of the Judgment, and Plaintiff’s motion for
16 approval of attorneys' fees and expenses. As part of this Settlement, Plaintiff submitted a stipulation
17 for leave to file a First Amended Complaint on March 15, 2022, and so Plaintiff also requests that the
18 Court grant this stipulation.

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

23 As consideration for this Settlement, the Gross Settlement Amount is Seven Hundred Thousand
24 Dollars (\$700,000) to be paid by Defendants, as set forth in the Agreement. The Gross Settlement
25 Amount is all-inclusive of all payments contemplated in this resolution, excluding any employer-side
26 payroll taxes on the portion of the Class Settlement Shares allocated to wages which shall be separately

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

1 paid by Defendants to the Settlement Administrator. The Settlement is all-in with no reversion to
2 Defendants and no need to submit a claim form. Decl. Nordrehaug at ¶3.

3 On August 12, 2021, the Parties participated in an all-day mediation presided over by Jeffrey
4 Krivis, a respected mediator of wage and hour representative and class actions. During the mediation,
5 each side, represented by its respective counsel, was able to agree to settle the claims, which settlement
6 was memorialized in a Memorandum of Understanding. Decl. Nordrehaug at ¶5. The Settlement is
7 fair, reasonable and adequate, and should be preliminarily approved because there is a substantial
8 monetary payment, and there are substantial litigation and class-certification risks. Therefore, Plaintiff
9 respectfully requests that this Court grant preliminary approval of the Agreement and enter the
10 proposed order submitted herewith.

11 **II. DESCRIPTION OF THE SETTLEMENT**

12 The Gross Settlement Amount is Seven Hundred Thousand Dollars (\$700,000) (Agreement at
13 ¶I(T) & III(B).) Under the Settlement, the Gross Settlement Amount consists of the following
14 elements: (1) Class Settlement Shares to the Participating Class Members, (2) Settlement
15 Administration Expenses, (3) Class Counsel Fees Payment, (4) Class Counsel Litigation Expenses
16 Payment, (5) Class Representative Service Payment, and (6) the PAGA Payment, and excluding any
17 employer payroll taxes, if any, due on the portion of the Class Settlement Shares allocated to wages
18 which shall not be paid from the Gross Settlement and shall be the separate additional obligation of
19 Defendants. (Agreement at ¶ I(T) and III(B).) The Gross Settlement Amount shall be all-in with no
20 reversion to Defendants. (Agreement at ¶¶ I(T) and III(B).) Decl. Nordrehaug at ¶15.

21 Defendants shall fund the Gross Settlement Amount and the amount necessary to pay
22 Defendants' share of payroll taxes within fifteen (15) days of the Effective Date. (Agreement at ¶
23 III(F)(9).) Within fifteen (15) days after Defendants fund the Gross Settlement Amount, the Settlement
24 Administrator will make payment of all Class Settlement Shares to Participating Class Members.
25 (Agreement at ¶ III(F)(9).) Decl. Nordrehaug at ¶16.

26 The Net Settlement Amount shall equal the Gross Settlement Amount less the Court approved
27 amounts for the Class Representative Service Payments, the Class Counsel Fees Payment, Class
28 Counsel Litigation Expenses Payment, the PAGA Payment, and the Settlement Administration

1 Expenses.. (Agreement at ¶ I(V).) The Net Settlement Amount will be distributed as the Class
2 Settlement Shares to each Participating Class Member defined at ¶I(Z) as a Class Member who does
3 not submit a valid and timely Election Not to Participate in Settlement. (Agreement at ¶¶ III(D)(1).)
4 The Class Settlement Share will be calculated as follows: (i) Defendants shall provide the Settlement
5 Administrator with the Class Data; (ii) the Settlement Administrator shall then divide the Net
6 Settlement Amount by the total number of pay periods included in the Class Data to determine a dollar
7 amount per pay period ("Pay Period Rate"); and (iii) the Settlement Administrator shall then take the
8 number of pay periods worked by each Participating Class Member and multiply it by the Pay Period
9 Rate to calculate their Class Settlement Share. (Agreement at ¶ III(D)(2).) Pay periods will be based
10 on Defendants' records, however Class Members will have the right to challenge their pay periods.
11 Decl. Nordrehaug at ¶17.

12 Class Members may choose to opt-out of the Settlement by following the directions in the Class
13 Notice. (Agreement at ¶ III(F)(4)), Ex. A.) All Class Members who do not "opt out" will be deemed
14 Participating Class Members who will be bound by the Settlement and will be entitled to receive a
15 Class Settlement Share. An Aggrieved Employee who opts out the Settlement will still be paid their
16 allocation of the PAGA Payment and will remain subject to the release of the PAGA Released Claims,
17 regardless of their request for exclusion. (Agreement at ¶ III(F)(4)(c).) Finally, the Class Notice will
18 also advise the Class Members of their right to object to the Settlement and/or dispute their Pay Periods.
19 (Agreement at ¶ III(F)(4)(b)), Ex. A.) Decl. Nordrehaug at ¶18.

20 A Participating Class Member must cash his or her Class Settlement Share check within 180
21 days after it is mailed. (Agreement at ¶III(F)(10).) The Settlement Administrator will send a reminder
22 to Participating Class Members who have not cashed their checks within 120 days after its last mailing
23 to the affected individual. (Agreement at ¶ III(F)(10).) Any settlement checks not cashed within 180
24 days will be voided and any the funds from such uncashed checks will be paid to the California State
25 Controller's Unclaimed Property Fund in the name of and for the benefit of the individual who did not
26 cash their check. (Agreement at ¶ III(F)(10).) Decl. Nordrehaug at ¶19.

27 The Parties have agreed to use ILYM Group as the Settlement Administrator. (Agreement at
28 ¶ III(E).) From the Gross Settlement Amount, the Settlement Administrator shall be paid for the

1 expenses of administering the Settlement in an amount not to exceed \$15,000. (Agreement at ¶
2 III(C)(4).) Decl. Nordrehaug at ¶20.

3 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
4 to exceed one-third (1/3) of the Gross Settlement Amount, as the Class Counsel Fees Payment.
5 (Agreement at ¶ III(C)(2).) Class Counsel will also be allowed to apply separately for an award of
6 Class Counsel Litigation Expenses Payment in an amount not to exceed \$15,000. (Agreement at ¶
7 III(C)(2).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000
8 to the Plaintiff as the Class Representative Service Payment. (Agreement at ¶ III(C)(1).) Decl.
9 Nordrehaug at ¶21.

10 The Parties will seek approval from the Court for the PAGA Payment of \$25,000 out of the
11 Gross Settlement Amount, which shall be allocated 75% (\$18,750) to the LWDA as the LWDA's share
12 of the PAGA Payment pursuant to PAGA and 25% (\$6,250) will be distributed to the Aggrieved
13 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at ¶
14 III(C)(3).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be subject
15 to the release of the PAGA Released Claims, whether or not they opt out of the Settlement. (Agreement
16 at ¶ III(C)(3).) As set forth in the accompany proof of service, the LWDA has been served with this
17 motion and the Agreement. Decl. Nordrehaug at ¶22.

18 **III. CASE BACKGROUND**

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

25 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO** 26 **GRANT PRELIMINARY APPROVAL**

27 When a proposed class-wide settlement is reached, the settlement must be submitted to the court
28 for approval. 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87.

1 California "[p]ublic policy generally favors the compromise of complex class action litigation."
2 *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) quoting *Cellphone Termination Fee*
3 *Cases*, 180 Cal.App.4th 1110, 1117-18 (2009). Class action settlements are approved where the
4 proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
5 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert.
6 denied, 459 U.S. 1217 (1983)).

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

13 The primary question presented on an application for preliminary approval of a proposed class
14 action settlement is whether the proposed settlement is "within the range of possible approval."
15 *Manual for Complex Litigation, Second* §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th
16 Cir. 1982).² Preliminary approval is merely the prerequisite to giving notice so that "the proposed
17 settlement... may be submitted to members of the prospective Class for their acceptance or rejection."
18 *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is
19 "a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining."
20 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v.*
21 *Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's
22 determination that settlement was "fair, reasonable and adequate" where the settlement "provided
23 valuable benefits to the class . . . that were 'particularly valuable in light of the risks plaintiff would have
24 faced if she proceeded to litigate her case.'"); *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate

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 question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the
2 settlement is given to the class members and a final settlement hearing is held by the Court.

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

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

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

23 With regard to class action settlements, the opinions of counsel should be given considerable
24 weight both because of counsel’s familiarity with this litigation and previous experience with cases
25 such as these. *Officers for Justice*, 688 F.2d at 625; *In re Wash. Public Power Supply System Sec.*
26 *Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal.
27 1988); *Weinberger*, 698 F.2d at 74. “The recommendations of plaintiffs’ counsel should be given a
28 presumption of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As

1 a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat'l Rural*
2 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

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

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

11 If the proposed settlement appears to be the product of serious, informed, noncollusive
12 negotiations, has no obvious deficiencies, does not improperly grant preferential
13 treatment to class representatives or segments of the class, and falls within the range of
14 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.

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

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

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

18 This settlement is the result of extensive and hard-fought litigation as well as negotiations
19 before an experienced and well-respected mediator. Defendants have expressly denied and continue
20 to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and
21 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released
22 Class Claims in accordance with this Settlement upon full funding of the Settlement.³

23 Class Counsel are experienced and qualified to evaluate the class claims, the defenses asserted,
24

25 ³ The release applicable to the Class is appropriately tethered to solely to the allegations in the
26 Action as the "Released Class Claims" are "any and all claims that were pled or could have been pled
27 based on the factual allegations contained in the operative FAC, including claims under the Fair Labor
28 Standards Act, which occurred during the Class Period, and expressly excluding all other claims,
including claims for wrongful termination, unemployment insurance, disability, social security, and
workers' compensation, and claims outside of the Class Period". (Agreement at ¶(III)(G)(1).)

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

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

16 As consideration for this Settlement, the Gross Settlement Amount is Seven Hundred Thousand
17 Dollars (\$700,000) . The Settlement is all-in with no reversion to Defendants and no need to submit
18 a claim form. Decl. Nordrehaug at ¶ 3.

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

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

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

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

15 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
16 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
17 receive payment according to the same formula. (Agreement at ¶ III(D)(2).) The Gross Settlement
18 Amount provides an average value of \$1,030.93 per Class Member and \$77.10 per Pay Period, and
19 after deductions, the Net Settlement Amount provides an average recovery of \$606.28 per Class
20 Member and \$45.34 per Pay Period. Decl. Nordrehaug, ¶6.

21 The calculations to compensate for the amount due to the Class Members at the time this
22 Settlement was negotiated were calculated by Plaintiff’s expert, Berger Consulting, in advance of
23 mediation. For the individuals whose claims are at issue in this Actions, Plaintiff analyzed the data for
24 putative class members and determined the potential maximum damages for the class claims. For the
25 Class, Plaintiff determined that the unpaid wages due to the alleged failure to pay overtime wages based
26 on off the clock allegations to be \$630,661, the maximum rest period damages were estimated to be
27 \$2,002,739, maximum meal period damages were estimated to be \$406,459 at a 17.8% violation rate,
28 and the maximum damages for unreimbursed expenses were estimated to be \$142,106 at a rate of \$30

1 of unreimbursed expenses incurred each month. In total, the damages for the Class were calculated to
2 have a maximum total value of \$3,181,965. In addition, Plaintiff calculated that the maximum value
3 of the waiting time penalties were \$2,963,690 and the maximum value of the wage statement penalties
4 to be \$873,950, however, these wage statement and waiting time penalties claims potentially have a
5 much smaller value, even if damages were awarded, to the extent that they are only derivative of the
6 meal and rest break claims.⁴ Decl. Nordrehaug, ¶6.

7 Consequently, the Gross Settlement Amount represents more than 22% of the value of the
8 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
9 proven in full at trial.⁵ The above maximum calculations should then be adjusted in consideration for
10 both the risk of certification and the risk of establishing class-wide liability on all claims. Given the
11 amount of the Settlement as compared to the potential value of the claims, the Settlement is most
12 certainly fair and reasonable.⁶ Clearly, the goal of this litigation has been met. Decl. Nordrehaug, ¶6.

13 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
14

15 ⁴ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
16 226, Plaintiff recognized that these claims were subject to various defenses asserted by Defendants,
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 Defendants' position that Plaintiff 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 Plaintiff's claims on these theories is uncertain.

26 ⁵ Because the PAGA claim does not provide a recovery to the Class, Plaintiff has not included the
27 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 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
2 Defendants present serious threats to the claims of the Plaintiff and the other Class Members, including
3 that the Class Members all signed arbitration agreements and, as a result, the class claims would be
4 have been dismissed if this case proceeded with litigation. There is also a question of collectability, as
5 pandemic-related shut downs and business slowdowns impacted the fitness industry significantly,
6 including Defendants. Defendants also asserted that Defendants' practices complied with all applicable
7 Labor laws. Defendants contended that their meal and rest period policies fully complied with
8 California law and that although Defendants' timekeeping system recorded meal periods, all meal
9 periods were provided and many facial violations seemed to have been paid by a penalty. Further,
10 Defendants argued that Defendants were not required to record rest periods. Finally, Defendants could
11 argue that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened
12 Plaintiff's claims, on liability, value, and class certifiability as to the meal and rest period claims.
13 Defendants also argue that based on their facially lawful practices, they acted in good faith and without
14 willfulness, which if accepted would negate the claims for waiting time penalties and/or inaccurate
15 wage statements. In fact, under the current state of the law, it is questionable whether these penalties
16 could be awarded at all based upon the alleged meal and rest period violations. If successful,
17 Defendants' defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiff
18 believes that these defenses could be overcome, Defendants maintain these defenses have merit and
19 therefore present a serious risk to recovery by the Class. Decl. Nordrehaug, ¶ 24.

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

1 While other cases have approved class certification in wage and hour claims, class certification in this
2 action would have been hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug,
3 ¶ 25.

4 After arm's length negotiations between experienced and informed counsel, the Parties
5 recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of
6 \$700,000. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

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.'"

13 2007 WL 221862, at *4 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458
14 (9th Cir. 2000).)

15 **3. The Settlement Does Not Improperly Grant Preferential Treatment To** 16 **Class Representatives or Segments Of The Class**

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

22 Plaintiff will apply to the Court for a Class Representative Service Payment in consideration
23 for the service and for the risks undertaken on behalf of the class. (Agreement at ¶ III(C)(1).) Plaintiff
24 performed his duty admirably by working with Class Counsel. Decl. Nordrehaug at ¶27. At this stage,
25 the requested service award of \$10,000 is well within the accepted range of awards for purposes of
26 preliminary approval. *See e.g. Mathein v. Pier I Imps. (U.S.), Inc.*, 2018 U.S. Dist. LEXIS 71386 (E.D.
27 Cal. 2018) (awarding \$12,500 where average class member payment was \$351); *Holman v. Experian*
28 *Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving \$10,000 service
award where class member recovery was \$375); *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008
WL 4473183, *7 (S.D.Cal. 2008) (awarding \$25,000 service award to each of six plaintiffs in overtime
class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. 2007) (awarding \$25,000

1 service award in overtime class action and a pool of \$100,000 in enhancements). As explained in
2 *Glass*, service awards are routinely awarded to class representatives to compensate the employees for
3 the time and effort expended on the case, for the risk of litigation, for the fear of suing an employer and
4 retaliation there from, and to serve as an incentive to vindicate the statutory rights of all employees.
5 2007 WL 221862 at *16-17.

6 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit**
7 **Preliminary Approval Of The Settlement**

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

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

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

27 Here, no formal discovery took place prior to settlement. As the Ninth Circuit has
28 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."

1 *Glass*, 2007 U.S. Dist. LEXIS 8476 at *14 (quoting *In re Mego Financial Corp. Securities Litigation*,
2 213 F.3d at 459).

3 Here, Class Counsel was in a far superior position to evaluate the fairness of this Settlement
4 because Class Counsel performed formal discovery, received all necessary information which was
5 evaluated with the assistance of an expert, and also performed independent investigations and due
6 diligence to confirm the accuracy of the information supplied by Defendants.

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

8 Plaintiff contends that the proposed settlement meet all of the requirements for class
9 certification under California Code of Civil Procedure § 382 as demonstrated below, and therefore, the
10 Court may appropriately approve the Class as defined in the Agreement. This Court should
11 conditionally certify the Classes for settlement purposes only, defined as follows:

12 All individuals who worked for Defendants in California as non-exempt employees at
13 any time during the Class Period.

14 (Agreement at ¶ I(C).)

15 The “Class Period” is from October 1, 2019 to August 12, 2021. (Agreement at ¶ I(J).)

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

17 Plaintiff seeks certification of this Class for settlement purposes under California Code of Civil
18 Procedure § 382. The California Supreme Court has summarized the standard for determining whether
19 class certification is appropriate as follows:

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

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

While Defendants reserve all rights to dispute that the Plaintiff can satisfy these requirements,
the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
settlement only. (Agreement at ¶ III(J)(1).)

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

2 Plaintiff brings this action on behalf of a Class of individuals during the applicable Class Period.
3 Plaintiff asserts that all of these individuals are ascertainable because the class members can readily be
4 determined through examination of Defendants' files. Given that the Class consists of approximately
5 679 members, Plaintiff maintains that numerosity is clearly satisfied. *See Bowles v. Superior Court*,
6 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126
7 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiff
8 asserts that the 679 current and former employees that comprise the Class can be identified based on
9 Defendants' records and are sufficiently numerous for class certification. Decl. Nordrehaug at ¶30.

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

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

16 Commonality exists if there is a predominant common legal question regarding how an
17 employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,
18 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its
19 drivers.") Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the
20 certification stage since the question is "essentially a procedural one that does not ask whether an action
21 is legally or factually meritorious." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

22 Here, Plaintiff contends that common questions of law and fact are present, and specifically the
23 common questions of whether Defendants miscalculated the regular rate, whether Defendants properly
24 paid wages for all hours worked, whether the Defendants failed to provide meal and rest periods,
25 whether Defendants failed to provide required expense reimbursement, and whether Class Members
26 are entitled to damages and penalties as a result of these practices. Decl. Nordrehaug, ¶30. Defendants
27 dispute that common questions predominate but will not oppose such a finding for purposes of this
28 Settlement only.

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

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

8 In the instant case, Plaintiff contends that there can be little doubt that the typicality requirement
9 is satisfied. The Plaintiff, like every other member of the Class, worked for Defendants as a non-
10 exempt employee during the Class Period. Plaintiff contends that, like every other member of the
11 Class, he was subject to the same practices and policies of Defendants and are subject to the same
12 defenses. Thus, Plaintiff asserts that the claims of the Plaintiff and the Class Members arise from the
13 same course of conduct by the Defendants, involve the same employment policies and practices of
14 Defendants, and are based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of
15 settlement, Plaintiff asserts that the typicality requirement is met as to the common issues presented in
16 this case. Defendants do not oppose a finding of typicality for purposes of this Settlement only.

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

18 Plaintiff contends that the Class Members are adequately represented here because Plaintiff and
19 representing counsel (a) do not have any conflicts of interest with other class members, and (b) will
20 prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is
21 met here. First, Plaintiff is well aware of his duties as the representatives and has actively participated
22 in the prosecution of this case to date. He effectively communicated with counsel, provided documents
23 to counsel and participated in the investigation and negotiations in the Action. Second, Plaintiff
24 retained competent counsel who are experienced in employment class actions and who have no
25 conflicts. Decl. Nordrehaug at ¶31. Third, there is no antagonism between the interests of the Plaintiff
26 and those of the Class. Both the Plaintiff and the Class Members seek monetary relief under the same
27 set of facts and legal theories. Defendants dispute that the adequacy requirement is satisfied but will
28 not oppose such a finding for purposes of this Settlement only.

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

2 To certify a class, the Court must also determine that a class action is superior to other available
3 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of
4 common issues will reduce litigation costs and promote greater efficiency, a class action may be
5 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
6 1996). As courts have previously observed:

7 Absent class treatment, each individual plaintiff would present in separate, duplicative
8 proceedings the same or essentially the same arguments and evidence, including expert
9 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.”

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

11 Here, Plaintiff contends that a class action is the superior mechanism for resolution of the claims
12 as pled by the Plaintiff. While Defendants dispute that class treatment is superior, Defendants do not
13 dispute a finding of superiority in this action for purposes of this Settlement only.

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

15 The Court has broad discretion in approving a practical notice program. The Parties have
16 agreed upon procedures by which the Class Members will be provided with written notice of the
17 Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance
18 with the Agreement, Defendants will provide to the Settlement Administrator an electronic database
19 containing each Class Member’s Class Data. (Agreement at ¶ III(F)(3)(a).) Within 14 days after
20 receiving the Class Data, the Settlement Administrator will mail the Class Notice Packets to all Class
21 Members via first-class U.S. Mail using the most current mailing address information available.
22 (Agreement at ¶ III(F)(3)(b).) The Class Notice, drafted jointly and agreed upon by the Parties through
23 their respective counsel and to be approved by the Court, includes all relevant information. (See Exhibit
24 “A” to the Agreement.) The Class Notice will include, among other information: (i) information
25 regarding the Action; (ii) the impact on the rights of the Class Members if they do not opt out; (iii)
26 information to the Class Members regarding how to opt out and how to object to the Settlement; (iv)
27 the estimated Class Settlement Share for each of the Class Members; (iii) the amount of attorneys’ fees
28

1 and expenses to be sought; (v) the amount of the Plaintiff's service award request; and (vi) the
2 anticipated expenses of the Settlement Administrator. The Parties agree that the Class Notice Packet
3 will also include a Spanish translation of the Class Notice. Decl. Nordrehaug at ¶32.

4 The Class Notice will state that the Class Members shall have forty-five (45) days from the date
5 that the Notice is mailed to them to request exclusion (opt-out) or to submit an objection. (Agreement
6 at ¶ III(F)(4)(a).) In the event of a re-mailing, the Response Deadline will be extended by an additional
7 15 days. (Agreement at ¶ III(F)(4)(a).) Class Members shall be given the opportunity to object to the
8 Settlement and/or requests for attorneys' fees and expenses and to appear at the Final Approval
9 Hearing. (Agreement at ¶ III(F)(4)(a).) Class Members who do not submit a timely and proper request
10 to opt-out will automatically receive a payment of their Class Settlement Share. This notice program
11 was designed to meaningfully reach the Class Members and it advises them of all pertinent information
12 concerning the Settlement. Decl. Nordrehaug at ¶32. The mailing and distribution of the Class Notice
13 satisfies the requirements of due process and is the best notice practicable under the circumstances and
14 complies with Rules of Court 3.766 and 3.769(f).

15 **VIII. CONCLUSION**

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

20 Dated: March 15, 2022

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

21 By: /s/ Kyle Nordrehaug
22 Kyle R. Nordrehaug, Esq.
23 Attorney for Plaintiff
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