

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

Norman B. Blumenthal (State Bar #068687)
Kyle R. Nordrehaug (State Bar #205975)
Aparajit Bhowmik (State Bar #248066)
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**

BRADLEY LUTAT, an individual, on
behalf of herself and on behalf of all
persons similarly situated,

Plaintiff,

vs.

BARRY'S BOOTCAMP, LLC, a
California Limited Liability Company;
BARRY'S BOOTCAMP SAN DIEGO
LLC, a California Limited Liability
Company; BARRY'S BAY AREA, LLC,
a Limited Liability Company; and Does 1
through 50, Inclusive,

Defendants.

CASE No. 37-2020-00044771-CU-OE-CTL

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

Hearing Date: January 20, 2023
Hearing Time: 9:00 a.m.
[Hearing scheduled by Order dated September 16,
2022]

Judge: Hon. Eddie C. Sturgeon
Dept: 67

Action Filed: December 7, 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	-7-
4.	There Are No Objections and No Requests for Exclusion	-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	-13-

TABLE OF AUTHORITIES

Cases:

Page:

<i>7-Eleven Owners for Fair Fran. v. Southland Corp.</i> , 85 Cal. App. 4th 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. 4th 1004 (2012)	-9-
<i>Browning v. Yahoo!, Inc.</i> , 2007 U.S. Dist. LEXIS 86266 (N.D. Cal. 2007)	-10-
<i>Cacho v. Eurostar, Inc.</i> , 43 Cal. App. 5th 885, 256 Cal. Rptr. 3d 547 (2019)	-10-
<i>Cellphone Termination Fee Cases</i> , 180 Cal. App. 4th 1110 (2009)	-5-
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996)	-5-, -6-
<i>Dunleavy v. Nadler</i> , 213 F.3d 454 (9th Cir. 2000)	-13-
<i>Duran v. U.S. Bank National Assn.</i> , 59 Cal. 4th 1 (2014)	-10-, -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) .	-7-, -12-
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	-9-
<i>Hopson v. Hanesbrands Inc.</i> , 2009 U.S. Dist. LEXIS 33900 (N.D. Cal. 2009)	-9-
<i>Huens v. Tatum</i> , 52 Cal. App. 4th 259 (1997)	-4-
<i>In re Austrian & German Bank Holocaust Litigation</i> , 80 F. Supp. 2d 164 (S.D.N.Y. 2000)	-8-
<i>In re Mego Financial Corp. Securities Litigation</i> , 213 F.3d 454 (9th Cir. 2000)	-12-
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116 (2008)	-6-

1	<i>Laskey v. Int'l Union,</i>	
2	638 F.2d 954 (6th Cir. 1981)	-8-
3	<i>Ling v. P.F. Chang's China Bisto, Inc.,</i>	
4	245 Cal. App. 4th 1242 (2016)	-13-
5	<i>Louie v. Kaiser Foundation Health Plan, Inc.,</i>	
6	2008 U.S. Dist. LEXIS 78314 (S.D. Cal. 2008)	-10-
7	<i>Ma v. Covidien Holding, Inc.,</i>	
8	2014 WL 2472316 (C.D. Cal. 2014)	-13-
9	<i>Maldonado v. Epsilon Plastics, Inc.,</i>	
10	22 Cal. App. 5th 1308 (2018)	-13-
11	<i>Malibu Outrigger Bd. of Governors v. Superior Court,</i>	
12	103 Cal. App. 3d 573 (1980)	-5-
13	<i>Munoz v. BCI Coca-Cola Bottling Co. of L. A.,</i>	
14	186 Cal. App. 4th 399 (2010)	-6-
15	<i>Nordstrom Commission Cases,</i>	
16	186 Cal. App. 4th 576 (2010)	-13-
17	<i>Officers for Justice v. Civil Service Com'n,</i>	
18	688 F.2d 615 (9th Cir. 1982)	-5-
19	<i>Stoetznor v. U.S. Steel Corp.,</i>	
20	897 F.2d 115 (3d Cir. 1990)	-8-
21	<i>Stovall-Gusman v. W.W. Granger, Inc.,</i>	
22	2015 U.S. Dist. LEXIS 78671 (N.D. Cal. 2015)	-13-
23	<i>Viceral v. Mistras Grp., Inc.,</i>	
24	2016 WL 5907869 (N.D. Cal. 2016)	-13-
25	<i>Wershba v. Apple Computer,</i>	
26	91 Cal. App. 4th 224 (2001)	-5-
27		
28		
	Statutes, Rules and Regulations:	
	Cal. Labor Code § 203	-13-
	Cal. Labor Code § 226	-13-
	Cal. Labor Code § 2698	-4-
	Cal. Labor Code § 2699(i)	-4-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Secondary Sources:

Newberg & Conte, *Newberg on Class Actions*, (3d ed. 1992) -5-

1 **I. INTRODUCTION**

2 The parties to this action have reached a Settlement and the Court preliminarily approved the
3 Class Action Settlement Agreement (the “Agreement”), a true and correct copy of which is attached
4 as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In accordance with the
5 Preliminary Approval Order dated September 16, 2022 (“Preliminary Approval Order”), the approved
6 Class Notice has been disseminated to the Class.²

7 The purpose of this hearing is to determine whether the proposed settlement of the litigation
8 should be finally approved. Plaintiff Bradley Lutat ("Plaintiff") respectfully submit 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. After disseminating the notice to the
12 members of the Class, currently there have been **no objections and no requests for exclusion**, which
13 means that at this time, the entire Class has elected to participate in the Settlement.³ Blumenthal Decl.
14 ¶4. This is a positive response from the Class evidencing their collective approval of the settlement.
15 As a result, Plaintiff respectfully submits that the class settlement should be finally approved for the
16 same reasons that the Court preliminarily approved the settlement as fair, reasonable, and adequate.

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

18 Plaintiff and Defendants Barry's Bootcamp, LLC; Barry's Bootcamp San Diego LLC and
19 Barry's Bay Area, LLC (“Defendants”) reached a full and final settlement of the above-captioned
20 action, which is embodied in the Agreement filed concurrently with the Court. As consideration for
21 this Settlement, the Gross Settlement Amount to be paid by Defendants is Seven Hundred Thousand

22 _____
23 ¹ Capitalized terms are defined in the Agreement.

24 ² The “Class” is defined as “all individuals who worked for Defendants in California as non-exempt
25 employees at any time during the Class Period.” The “Class Period” is defined as “October 1, 2019
26 through August 12, 2021.” (Preliminary Approval Order at 3:15-17.)

27 ³ The deadline for objections and exclusions is December 27, 2022, and this motion is being filed
28 in advance of this deadline. Plaintiff will submit the Declaration of Madely Nava (Settlement
 Administrator) after the December 27, 2022 deadline and in advance of the hearing, which declaration
 will provide the Court with the final details of the notice process.

1 Dollars (\$700,000). (Agreement at ¶¶ I(T) & III(B.) Under the Settlement, the Gross Settlement
2 Amount consists of the following elements: (1) Class Settlement Shares to the Participating Class
3 Members, (2) Settlement Administration Expenses, (3) Class Counsel Fees Payment, (4) Class Counsel
4 Litigation Expenses Payment, (5) Class Representative Service Payment, and (6) the PAGA Payment,
5 and excluding any employer payroll taxes, if any, due on the portion of the Class Settlement Shares
6 allocated to wages which shall not be paid from the Gross Settlement and shall be the separate
7 additional obligation of Defendants. (Agreement at ¶ I(T) and III(B).) Blumenthal Decl. ¶3(a).

8 The Gross Settlement Amount does not include Defendants' share of payroll taxes. (Agreement
9 at ¶ 40.) The Gross Settlement Amount shall be all-in with no reversion to Defendants. (Agreement
10 at ¶ 40.) Blumenthal Decl. ¶3(b).

11 Following final approval, Defendants shall fund the Gross Settlement Amount and the amount
12 necessary to pay Defendants' share of payroll taxes within fifteen (15) days of the Effective Date.
13 (Agreement at ¶ III(F)(9).) Within fifteen (15) days after Defendants fund the Gross Settlement
14 Amount, the Settlement Administrator will make payment of all Class Settlement Shares to
15 Participating Class Members. (Agreement at ¶ III(F)(9).) Blumenthal Decl. ¶3(c).

16 The Net Settlement Amount shall equal the Gross Settlement Amount less the Court approved
17 amounts for the Class Representative Service Payments, the Class Counsel Fees Payment, Class
18 Counsel Litigation Expenses Payment, the PAGA Payment, and the Settlement Administration
19 Expenses.. (Agreement at ¶ I(V).) The Net Settlement Amount will be distributed as the Class
20 Settlement Shares to each Participating Class Member defined at ¶II(Z) as a Class Member who does
21 not submit a valid and timely Election Not to Participate in Settlement. (Agreement at ¶¶ III(D)(1).)
22 The Class Settlement Share will be calculated as follows: (i) Defendants shall provide the Settlement
23 Administrator with the Class Data; (ii) the Settlement Administrator shall then divide the Net
24 Settlement Amount by the total number of pay periods included in the Class Data to determine a dollar
25 amount per pay period ("Pay Period Rate"); and (iii) the Settlement Administrator shall then take the
26 number of pay periods worked by each Participating Class Member and multiply it by the Pay Period
27 Rate to calculate their Class Settlement Share. (Agreement at ¶ III(D)(2).) Blumenthal Decl. ¶ 3(d).

28 Class Members were sent the Court approved Class Notice using the procedure approved by the

1 Court by mailing the notice packets after updating class members' addresses using the National Change
2 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
3 any forwarding address provided or updated address located. See Declaration of Madely Nava ("Nava
4 Decl."). Class Members were provided with the opportunity to opt-out of the Settlement by following
5 the directions in the Class Notice. (Agreement at ¶ III(F)(4)), Ex. A.) Currently, there have been no
6 Class Members who submitted valid requests for exclusion and no objections. That said, at this time
7 all Class Members are deemed Participating Class Members who are bound by the Settlement and will
8 be entitled to receive a Settlement Share. (Agreement at ¶ III(F)(4)), Ex. A.) The Class Notice also
9 advised the Class Members of their right to object to the Settlement and/or dispute their Pay Periods.
10 (Agreement at ¶ III(F)(4)(b)), Ex. A; Nava Decl., Exh. A.) The final results of the notice process will
11 be documents in the forthcoming Declaration of Nava to be filed after the December 27, 2022 deadline
12 and in advance of the final approval hearing. Blumenthal Decl. ¶ 3(e).

13 A Participating Class Member must cash his or her Class Settlement Share check within 180
14 days after it is mailed. (Agreement at ¶ III(F)(10).) The Settlement Administrator will send a reminder
15 to Participating Class Members who have not cashed their checks within 120 days after its last mailing
16 to the affected individual. (Agreement at ¶ III(F)(10).) Any settlement checks not cashed within 180
17 days will be voided and any the funds from such uncashed checks will be paid to the California State
18 Controller's Unclaimed Property Fund in the name of and for the benefit of the individual who did not
19 cash their check. (Agreement at ¶ III(F)(10).) Blumenthal Decl. ¶ 3(f).

20 ILYM Group was appointed by the Court as the Settlement Administrator for the Settlement.
21 (Preliminary Approval Order at ¶ 10, Agreement at ¶ III(E).) From the Gross Settlement Amount, the
22 Settlement Administrator shall be paid for the expenses of administering the Settlement in an amount
23 not to exceed \$15,000. (Agreement at ¶ III(C)(2).) The Settlement Administration Expenses, including
24 fees and costs incurred to-date, as well as anticipated fees and costs for completion of the settlement
25 administration, will be set forth in the Declaration of Nava. Blumenthal Decl. ¶ 3(g).

26 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
27 to exceed one-third (1/3) of the Gross Settlement Amount, as the Class Counsel Fees Payment.
28 (Agreement at ¶ III(C)(2).) Class Counsel will also be allowed to apply separately for an award of

1 Class Counsel Litigation Expenses Payment in an amount not to exceed \$15,000. (Agreement at ¶
2 III(C)(2).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000
3 to the Plaintiff as the Class Representative Service Payment. (Agreement at ¶ III(C)(1).) In support of
4 this separate motion for attorneys' fees, reimbursement of expenses and service awards, Class Counsel
5 is providing evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

6 Subject to Court approval, Twenty-Five Thousand Dollars (\$25,000) will be paid from the
7 Gross Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal.
8 Labor Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code §
9 2699(i), the PAGA Payment shall be allocated as follows: 75% (\$18,750) to the LWDA as the LWDA's
10 share of the PAGA Payment pursuant to PAGA and 25% (\$6,250) will be distributed to the Aggrieved
11 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at ¶
12 III(C)(3).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be subject
13 to the release of the PAGA Released Claims, whether or not they opt out of the Settlement. (Agreement
14 at ¶ III(C)(3).) As set forth in the accompanying proof of service, the LWDA has been served with this
15 motion and the Agreement. Blumenthal Decl. ¶3(i).

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

24 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL** 25 **OF CLASS ACTION SETTLEMENTS**

26 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
27 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
28 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*

1 v. *Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
2 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

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

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

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

26 The Court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v.*
27 *Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); see also *Officers for Justice v. Civil Service*
28 *Com'n*, 688 F.2d 615, 625 (9th Cir. 1982). The purpose of the requirement is "the protection of those

1 class members, including the named plaintiffs, whose rights may not have been given due regard by
2 the negotiating parties." *Dunk, supra*, at 1801.

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

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

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

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

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

24 Over the course of two years of litigation, the Parties engaged in the investigation of the claims,
25 including the production of documents, class data, and other information, allowing for the full and
26 complete analysis of liabilities and defenses to the claims in this Action. The procedural history and
27 investigation performed was detailed at length in support of the motion for preliminary approval. The
28 Settlement was the product of one arms-length mediation and contentious negotiations through an

1 all-day mediation presided over by Jeffrey Krivis, Esq., a respected and experience mediator of wage
2 and hour class actions. The details of the litigation are set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(g).

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

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

12 The Parties attended an arms-length mediation session with Jeffrey Krivis, a respected and
13 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
14 for the mediation, Defendants provided Class Counsel with necessary information for the members of
15 the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiff
16 analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and submitted
17 a mediation brief and damage valuation to the Mediator. Following this all-day mediation, the Parties
18 agreed to this Settlement. 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 September 2021 to February 2022, the Agreement and exhibits thereto were drafted,
26 finalized and executed. The Agreement was thereafter finalized and executed and then presented by
27 motion to this Court for preliminary approval. On September 16, 2022, the Court issued its Order
28 granting preliminary approved of the settlement as fair and reasonable to the Class. Blumenthal Decl.

¶7(c).

3. Class Counsel is Experienced in Similar Litigation

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

4. There Are No Objections and No Requests for Exclusion

The reaction of the Class unequivocally supports approval of the Settlement. On November 10, 2022, the Settlement Administrator mailed the Court-approved Class Notice to the Class Members, which provided each class member with the terms of the Settlement, including notice of the claims at issue and the financial terms of the settlement, including the attorneys' fees, costs, and service award that were being sought, how individual settlement awards would be calculated, and the specific, estimated payment amount to that individual. In disseminating the notice, the Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary Approval Order. As of the date of this motion, there have been no objections and no valid requests to opt-out. The final results and details of the notice process will be documented in the Declaration of Nava to be filed after the December 27, 2022 response deadline and in advance of the final approval hearing. Blumenthal Decl.

¶4.

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

1 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
2 settlement should be considered when determining fairness of settlement). Here, where there are no
3 objections, the approval of the class is evident.

4 5. The Strength of Plaintiff's Case

5 The Action generally alleges that Plaintiff and other Class Members were not properly paid all
6 overtime wages for hours worked, were not provided meal and rest periods, were not timely paid earned
7 wages, were not provided reimbursement for required expenses, were not provided accurate itemized
8 wage statements, were not paid all wages at the time of termination. The Action seeks unpaid wages,
9 penalties, attorney fees, litigation costs, and any other equitable or legal relief allegedly due and owing
10 to Plaintiff and the other Class Members by virtue of the foregoing claims. Blumenthal Decl. ¶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 Defendants present serious threats to the claims of the Plaintiff and the other Class Members, including
14 that the Class Members all signed arbitration agreements and, as a result, the class claims would be
15 have been dismissed if this case proceeded with litigation. There is also a question of collectability, as
16 pandemic-related shut downs and business slowdowns impacted the fitness industry significantly,
17 including Defendants. Defendants also asserted that Defendants' practices complied with all applicable
18 Labor laws. Defendants contended that their meal and rest period policies fully complied with
19 California law and that although Defendants' timekeeping system recorded meal periods, all meal
20 periods were provided and many facial violations seemed to have been paid by a penalty. Further,
21 Defendants argued that Defendants were not required to record rest periods. Finally, Defendants could
22 argue that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened
23 Plaintiff's claims, on liability, value, and class certifiability as to the meal and rest period claims.
24 Defendants also argue that based on their facially lawful practices, they acted in good faith and without
25 willfulness, which if accepted would negate the claims for waiting time penalties and/or inaccurate
26 wage statements. In fact, under the current state of the law, it is questionable whether these penalties
27 could be awarded at all based upon the alleged meal and rest period violations. If successful,
28 Defendants' defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiff

1 believes that these defenses could be overcome, Defendants maintain these defenses have merit and
2 therefore present a serious risk to recovery by the Class. Blumenthal Decl. ¶8(a).

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

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

10 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
11 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
12 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
13 approval."). As recognized in a federal decision approving settlement of an overtime wage class action:

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

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

20 There was also a significant risk that, if the Actions were not settled, Plaintiff would be unable
21 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
22 Defendants also argued that the individual experience of each putative class member varied with respect
23 to the claims. Defendants could also contest class certification by arguing injury and good faith were
24 case by case determinations that precluded class certification. Plaintiff is aware of cases where class
25 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885, 256
26 Cal. Rptr. 3d 547 (2019) (denying certification of meal and rest break claims). Defendants also
27 contended that individual differences in work experiences not only impacted damages but would also
28

1 impact certification. Finally, even if class certification was successful, as demonstrated by the
2 California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there
3 are significant hurdles to overcome for a class wide recovery even where the class has been certified.
4 While other cases have approved class certification in wage and hour claims, class certification in this
5 action would have been hotly disputed and was by no means a foregone conclusion. Blumenthal Decl.
6 ¶8(b).

7 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
8 recovery, particularly when viewed in light of the fact that the Defendants asserted serious and
9 substantial defenses both to liability and to class certification. The maximum and average class
10 member allocations will be documented in the Declaration of Nava. Given the complexities of this
11 case, the defenses, along with the uncertainties of proof and appeal, the proposed Settlement is fair,
12 reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

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

1 Class. Blumenthal Decl. ¶8(c).

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

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

14 *Id.* at *12.

15 7. The Amount Offered in Settlement

16 The Settlement in this case is fair, reasonable and adequate considering Defendants' defenses
17 to Plaintiff's claims. As set forth in the Declaration of Nordrehaug in support of preliminary approval
18 which discussed the value of the class claims in detail, the Gross Settlement Amount compares
19 favorably to the value of the claims.

20 The calculations to compensate for the amount due to the Class Members at the time this
21 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
22 mediation. For the individuals whose claims are at issue in this Actions, Plaintiff analyzed the data for
23 putative class members and determined the potential maximum damages for the class claims. For the
24 Class, Plaintiff determined that the unpaid wages due to the alleged failure to pay overtime wages based
25 on off the clock allegations to be \$630,661, the maximum rest period damages were estimated to be
26 \$2,002,739, maximum meal period damages were estimated to be \$406,459 at a 17.8% violation rate,
27 and the maximum damages for unreimbursed expenses were estimated to be \$142,106 at a rate of \$30
28 of unreimbursed expenses incurred each month. In total, the damages for the Class were calculated to
have a maximum total value of \$3,181,965. In addition, Plaintiff calculated that the maximum value
of the waiting time penalties were \$2,963,690 and the maximum value of the wage statement penalties
to be \$873,950, however, these wage statement and waiting time penalties claims potentially have a

1 much smaller value, even if damages were awarded, to the extent that they are only derivative of the
2 meal and rest break claims.⁴ Blumenthal Decl. ¶8(d).

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

10 **V. CONCLUSION**

11 Plaintiff respectfully submits that the proposed settlement satisfies the standard of fairness
12 established in California law and should therefore be finally approved as fair, reasonable and adequate
13 and requests entry of the Final Approval Order and Judgment, submitted herewith.

14
15 ⁴ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
16 226, at mediation Plaintiff recognized that these claims were subject to various defenses asserted by
17 Defendants, including, but not limited to, a good faith dispute defense as to whether any premium
18 wages for meal or rest periods or other wages were owed given Defendants' position that Plaintiff were
19 properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There
20 is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether
21 and when the wages were due."). Additionally, prior to mediation in this case, Courts have held that
22 violations of the meal and rest period regulations, which require payment of a "premium wage" for each
23 improper meal period, do **not** give rise to claims under sections 203 and 226. *See Ling v. P.F. Chang's*
24 *China Bisto, Inc.*, 245 Cal. App. 4th 1242, 1261 (2016) and *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.
25 App. 5th 1308, 1336 (2018). As a result, the viability of Plaintiff's claims on these theories was
26 uncertain at the time of mediation.

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

29 ⁶ *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
30 approving settlement which represented "roughly one-sixth of the potential recovery"; *Stovall-Gusman*
31 *v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval
32 where "the proposed Total Settlement Amount represents approximately 10% of what class might have
33 been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D.
34 Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value);
35 *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class
36 action settlement worth "somewhere between 9% and 18%" of full verdict value).

1 Dated: December 23, 2022

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

2 By: /s/ Kyle Nordrehaug
3 Kyle R. Nordrehaug, Esq.
4 Attorneys for Plaintiff
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28