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

16 DAMMION MYLES, an individual, on
17 behalf of himself and on behalf of all
18 persons similarly situated,

19 Plaintiff,

20 vs.

21 BUILDERS CONCRETE, INC., a
22 California Corporation; VIKING
23 READY MIX CO., INC., a California
24 Corporation; and DOES 1 through 50,
25 inclusive,

26 Defendants

Case No. BCV-20-102375

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

Hearing Date: October 23, 2023
Hearing Time: 8:30 a.m.
*[Hearing scheduled by Order dated July 10, 2023
at paragraph 14]*

Judge: Hon. Bernard Barmann, Jr.
Courtroom: Div. H

Action Filed: October 9, 2020
Trial Date: Not Set

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1 **I. INTRODUCTION**

2 The parties to this action have reached a Settlement and the Court preliminarily approved the
3 Class Action and PAGA Settlement Agreement (the “Agreement”), a true and correct copy of which
4 is attached as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In
5 accordance with the Preliminary Approval Order dated July 10, 2023 (“Preliminary Approval Order”),
6 the approved 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 Dammion Myles (“Plaintiff”) respectfully submits this
9 memorandum in support of the unopposed motion for final approval and the proposed entry of the Final
10 Approval Order and Judgment, submitted herewith. The settlement represents an excellent result for
11 the Class and avoids the delays, risks, and costs of further litigation. The Class Notice was
12 disseminated to the Class. While the notice process is ongoing until October 13, 2023 (“Response
13 Deadline”), the final results will be provided to the Court by way of the Administrator’s declaration in
14 advance of the final approval hearing. Blumenthal Decl. ¶4. Plaintiff respectfully submits that the class
15 settlement should be finally approved for the same reasons that the Court preliminarily approved the
16 settlement as fair, reasonable, and adequate.

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

18 Plaintiff and Defendants Builders Concrete, Inc. and Viking Ready Mix Co., Inc.
19 (“Defendants”) reached a full and final settlement of the above-captioned action, which is embodied
20 in the Agreement filed concurrently with the Court. As consideration for this Settlement, the Gross
21 Settlement Amount is Nine Hundred Seventy-Five Thousand Dollars (\$975,000) (the “Gross Settlement
22

23 ¹ Capitalized terms are defined in the Agreement.

24 ² The “Class” consists of both the “California Class” and the “FCRA Class.” The “California Class”
25 is defined as “all individuals who were employed by Defendants in California and classified as a
26 non-exempt employee at any time during the California Class Period.” The “California Class Period”
27 is April 1, 2018 through March 14, 2023. The “FCRA Class” is defined as “all individuals who applied
28 for employment or were employed by Defendants in the United States for whom background checks
 were run during the FCRA Class Period.” The “FCRA Class Period” is October 9, 2015 through March
 14, 2023. (Preliminary Approval Order, ¶ 6.)

Amount”). (Agreement at ¶ 1.25). Under the Settlement, the Gross Settlement Amount consists of the following elements: (1) payment of the Individual Class Payments to the Participating Class Members; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3) Administration Expenses Payment; (4) the Class Representative Service Payment to Plaintiff; and (5) the PAGA Penalties payment. (Agreement at ¶ 1.25.) Blumenthal Decl. ¶3(a).

The following is a table of the key financial terms of the Settlement and the proposed deductions:

\$975,000 (Gross Settlement Amount)

- \$10,000 (Plaintiff’s proposed service award not to exceed \$10,000)
- \$33,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- \$325,000 (Class Counsel Fees Payment - not to exceed amount)
- \$25,000 (PAGA Penalties payment - 75% to LWDA / 25% to Aggrieved Employees)
- \$13,000 (Administration Expenses Payment - not to exceed amount)

\$569,000(Net Settlement Amount)

- \$25,000 FCRA allocation to 216 FCRA Class Members (\$115 each)

\$544,000 (Allocation to California Class)

Based upon 338 California Class Members who collectively worked 44,513 Workweeks, the Gross Settlement Amount provides a value of \$2,810 per Class Member and \$21 per Workweek and the Net Settlement Amount provides an average recovery of \$1,609.46 per Class Member and a recovery of \$12.22 per Workweek.

The Gross Settlement Amount does not include the employer’s share of payroll taxes which will be separately paid by Defendant. (Agreement at ¶ 3.1.) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement at ¶ 3.1.) Blumenthal Decl. ¶3(b).

Within twenty-one (21) days of the Effective Date, Defendants shall deposit the Gross Settlement Amount with the Administrator. (Agreement at ¶ 4.3.) The distribution of Individual Class Payments to Participating Class Members along with the other Court-approved distributions shall be made by the Administrator within fourteen (14) days after Defendants fully fund the Gross Settlement Amount. (Agreement at ¶ 5.1.) Blumenthal Decl. ¶3(c).

The amount remaining in the Gross Settlement Amount after the deduction of Court-approved amounts for Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment (called the “Net Settlement Amount”) shall be allocated to Class

1 Members as their Individual Class Payments. (Agreement at ¶¶ 1.31 and 3.2.) \$25,000 will be
2 allocated from the Net Settlement Amount to the FCRA Class so at least \$100 will be paid to each of
3 the 188 FCRA Class Members, whose share of the \$25,000 payment shall be split equally between the
4 Participating Class Members for the FCRA Class. The balance of the Net Settlement Amount will be
5 allocated to the Participating Class Members for the California Class who will be paid based on the
6 number of workweeks worked during the California Class Period. An Individual Class Payment for the
7 California Class is calculated by (a) dividing the Net Settlement Amount (less the \$25,000 allocated
8 to the FCRA Class) by the total number of Workweeks worked by all Participating California Class
9 Members during the California Class Period and (b) multiplying the result by each Participating
10 California Class Member's Workweeks. (Agreement at ¶ 3.2(e).) Workweeks were based on
11 Defendants' records; however, Class Members had the right to challenge the number of Workweeks.
12 Blumenthal Decl. ¶ 3(d).

13 Class Members were sent the Court approved Class Notice using the procedure approved by the
14 Court by mailing the notice packets after updating class members' addresses using the National Change
15 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
16 any forwarding address provided or updated address located. (Agreement at ¶ 8.5, Ex. A.) Class
17 Members were provided with the opportunity to exclude themselves or "opt out" if they did not want
18 to participate in the settlement. (Agreement at ¶ 8.5 (c), Ex. A.) All Aggrieved Employees, including
19 those who submit an opt-out request, will still be paid their allocation of the PAGA Penalties and will
20 remain subject to the release of the Released PAGA Claims regardless of their request for exclusion.
21 (Agreement at ¶¶ 6.3 and 8.5(d).) The Class Notice also advised Class Members of their right to object
22 to the Settlement and/or dispute their workweeks. (Agreement at ¶¶ 8.6 and 8.7, Ex. A.) Blumenthal
23 Decl. ¶ 3(e).

24 A Participating Class Member must cash his or her Individual Class Payment check within 180
25 days after it is mailed. (Agreement at ¶ 5.2.) Any settlement checks not cashed within 180 days will
26 be voided and any funds represented by such checks to the California Controller's Unclaimed Property
27 Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to the requirements
28 of California Code of Civil Procedure Section 384. (Agreement at ¶ 5.4.) Blumenthal Decl. ¶3(f).

1 ILYM Group was appointed as the Administrator. (Preliminary Approval Order at ¶ 11.) From
2 the Gross Settlement Amount, The Administrator will be paid for settlement administration in an
3 amount not to exceed \$13,000. (Agreement at ¶ 3.2(c); Preliminary Approval Order at ¶ 11.) The final
4 amount for Settlement Administration Expenses, including fees and costs incurred to-date, will be set
5 forth in the forthcoming declaration of the Administrator. Blumenthal Decl. ¶3(g).

6 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
7 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement
8 at ¶ 3.2(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
9 Litigation Expenses Payment in an amount not to exceed \$33,000. (Agreement at ¶ 3.2(b).) Subject
10 to Court approval, the Agreement provides for a payment of no more than \$10,000 to the Plaintiff as
11 the Class Representative Service Payment. (Agreement at ¶ 3.2(a).) In support of this separate motion
12 for attorneys' fees, reimbursement of expenses and service award, Class Counsel is providing
13 evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

14 Subject to Court approval, Twenty-Five Thousand Dollars (\$25,000) will be paid from the
15 Gross Settlement Amount for PAGA penalties under the California Private Attorneys General Act
16 ("PAGA"), Cal. Labor Code Section 2698, *et seq.* Pursuant to the express requirements of Labor Code
17 § 2699(i), the PAGA Penalties shall be allocated as follows: 75% (\$18,750) shall be allocated to the
18 Labor Workforce Development Agency ("LWDA") as its share of the civil penalties and 25% (\$6,250)
19 allocated to the Individual PAGA Payments to be distributed to the Aggrieved Employees based on the
20 number of their respective PAGA Pay Periods. (Agreement at ¶ 3.2(d).) As set forth in the
21 accompanying proof of service, the LWDA has been served with this motion and the Agreement.
22 Blumenthal Decl. ¶3(i).

23 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
24 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
25 is "fair, adequate and reasonable". (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
26 at Nine Hundred Seventy-Five Thousand Dollars (\$975,000) is an excellent result for the Class. This
27 result is particularly favorable in light of the fact that liability was far from certain in light of the
28 defenses asserted by Defendants. Given the complexities of this case and the defenses asserted, along

1 with the uncertainties of proof at trial and appeal, the proposed settlement is fair, reasonable and
2 adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

3 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL**
4 **OF CLASS ACTION SETTLEMENTS**

5 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
6 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
7 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*
8 *v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
9 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

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

21 In these cases, courts have repeatedly emphasized that there is a strong initial presumption that
22 the compromise is fair and reasonable. *Wershba*, 91 Cal. App. 4th at 245. Courts should not substitute
23 their judgment for that of the parties who negotiated the settlement. *Id.* at 246. The presumption of
24 fairness exists where: (1) investigation and discovery are sufficient to allow counsel and the court to
25 act intelligently; (2) the settlement is reached through arm's-length bargaining; (3) counsel is
26 experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App. 4th
27 at 1801, citing Newberg & Conte, *Newberg on Class Actions*, (3d ed. 1992) §11.41, pp. 11-91. Here,
28 all of these factors support a presumption of fairness. The essential evaluation is whether, given the

1 risks of litigation and the range of probable results, the settlement, taken as a whole, is fair, reasonable
2 and adequate to all concerned. Here, the facts and circumstances compel the conclusion that the
3 proposed settlement satisfies that standard and should be finally approved.

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

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

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

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

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

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

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

4 Over the course of litigation, the Parties engaged in the investigation of the claims, including
5 formal discovery, production of documents, class data, and other information, allowing for the full and
6 complete analysis of liabilities and defenses to the claims in this Action. The procedural history and
7 investigation performed was detailed at length in support of the motion for preliminary approval. The
8 Settlement was the product of one arms-length mediation and contentious negotiations presided over
9 by Louis Marlin, Esq., a respected and experience mediator of wage and hour class actions. The details
10 of the litigation are set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(h).

11 2. The Settlement was Reached Through Arm's Length Bargaining

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

21 The Parties attended an arms-length mediation session with Louis Marlin, Esq., a respected and
22 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
23 for the mediation sessions, Defendants provided Class Counsel with necessary information for the
24 members of the Class, including time data, payroll data and data concerning the composition of the
25 Class. Plaintiff analyzed the data with the assistance of damages expert, Berger Consulting Group, and
26 prepared and submitted a mediation brief and damage valuation to the Mediator. Following this
27 mediation, the Parties reached an agreement to settle the Action, which was memorialized in the form
28 of a Memorandum of Understanding. Blumenthal Decl. ¶7(b).

1 The fact that the settlement was negotiated with the assistance of an experienced mediator
2 supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS*
3 *Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
4 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the
5 litigation, with the assistance of a well-respected mediator with substantial experience in employment
6 litigation[, and] this factor supports approval of the settlement”).

7 From February 2023 to April 2023, the Agreement and exhibits thereto were drafted, finalized
8 and executed, and then was presented to this Court on for preliminary approval. The Order granting
9 preliminary approval was entered by this Court on July 10, 2023. Blumenthal Decl. ¶7(c).

10 3. Class Counsel is Experienced in Similar Litigation

11 Class Counsel in this matter has extensive class action experience and has represented thousands
12 of persons in class actions including employment litigation, wage and hour class actions, and complex
13 litigation. Class Counsel has previously litigated wage and hour class actions involving employees and
14 claims similar to this case and have been approved as experienced class counsel during contested
15 motions in state and federal courts throughout California. As such, Class Counsel is experienced and
16 knowledgeable in this area of law. The experience of counsel and class action cases managed and
17 settled by the Class Counsel in this action is provided to the Court in the Blumenthal Decl. at Exhibit
18 #1. Class Counsel have participated in every aspect of the settlement discussions and have concluded
19 the settlement is fair, adequate and reasonable and in the best interests of the Class. Blumenthal Decl.
20 ¶ 3(j).

21 4. There Are No Objections And No Opt-Outs

22 The reaction of the Class supports approval of the Settlement. On August 14, 2023, the
23 Administrator mailed the Court-approved Class Notice to the Class Members, which provided each
24 class member with the terms of the Settlement, including notice of the claims at issue and the financial
25 terms of the settlement, including the attorneys' fees, costs, and service awards that were being sought,
26 how individual settlement awards would be calculated, and the specific, estimated payment amount to
27 that individual. In disseminating the notices, the Administrator followed the notice procedures
28 authorized by the Court in its Preliminary Approval Order. Currently, there have been no objections

1 and no opt-outs, and while the notice process is ongoing until October 13, 2023, the final results will
2 be provided to the Court in advance of the final approval hearing in the declaration of the
3 Administrator. Blumenthal Decl. ¶4.

4 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
5 Settlement. *See In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
6 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
7 indicative of the adequacy of the settlement."); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
8 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l*
9 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
10 settlement should be considered when determining fairness of settlement). Here, where there are no
11 objections, the approval of the class is evident.

12 5. The Strength of Plaintiff's Case

13 The Action generally alleges that Plaintiff and other Class Members were not provided all
14 minimum wages and overtime compensation and at the correct rate, were not provided and/or paid for
15 meal and rest periods, were not reimbursed for reasonable business expenses, were not provided
16 accurate itemized wage statements, were not paid used sick pay at the correct rate, and were not
17 provided compliant FCRA disclosures and/or authorizations. The Action seeks unpaid wages,
18 penalties, attorney fees, litigation costs, and any other equitable or legal relief allegedly due and owing
19 to Plaintiff and the other Class Members by virtue of the foregoing claims. Blumenthal Decl. ¶5.

20 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
21 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
22 Defendants present serious threats to the claims of the Plaintiff and the other Class Members.
23 Defendants asserted that Defendants' practices complied with all applicable Labor laws. Defendants
24 argued that all work time was properly paid for and that there was no overtime owed. Defendants
25 contended that its meal and rest period policies fully complied with California law. Defendants also
26 argued that employees subject to a CBA could not bring many of the claims because of CBA
27 preemption under Labor Code § 514, and Defendants also asserted exemptions applicable to the
28 construction industry. As to expense reimbursement, Defendants contended that it did not fail to

1 provide reimbursement for necessary business expenses and that there were no such expenses that had
2 not already been reimbursed or that claimed expenses were incurred voluntarily and/or for the
3 convenience of employees and is therefore not required reimbursement. Defendants argued that the
4 decisions in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), *Lockheed Martin Corp. v. Superior*
5 *Ct.*, 29 Cal. 4th 1096, 1108 (2003), and *Salazar v. See's Candy Shops Inc.*, 64 Cal.App.5th 85 (2021),
6 weakened Plaintiff's claims, on liability, value, and class certifiability as to the meal and rest period
7 claims. Defendants also argues that based on its facially lawful practices, they acted in good faith and
8 without willfulness, which if accepted would negate the claims for waiting time penalties and/or
9 inaccurate wage statements. As to the background check claim, Defendants argued that the forms
10 complied with FCRA in all respects. *Coleman v. Kohl's Dep't Stores, Inc.*, 2015 U.S. Dist. LEXIS
11 135746, *17 (N.D. Cal. 2015) (holding a release in a separate document does not violate FCRA); *Luna*
12 *v. Hansen & Adkins Auto Transp., Inc.*, 2018 U.S. Dist. LEXIS 100055, *18-*19 & n.6 (C.D. Cal.
13 2018). Finally, the court may find remitter/reduction of the statutory damages appropriate. *See e.g.*
14 *Klingensmith v. Max & Erma's Restaurants, Inc.*, 2007 U.S. Dist. LEXIS 81029, 2007 WL 3118505,
15 at *5 (E.D.Pa. 2007). If successful, Defendants' defenses could eliminate or substantially reduce any
16 recovery to the Class. While Plaintiff believe that these defenses could be overcome, Defendants
17 maintains these defenses have merit and therefore present a serious risk to recovery by the Class.
18 Blumenthal Decl. ¶8(a).

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

21 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
22 Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service
23 Associates were misclassified as exempt. In addition to the uncertainties raised by
24 Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,
25 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.

26 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
27 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
28 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor

1 approval.”). As recognized in a federal decision approving settlement of an overtime wage class action:

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

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

12 There was also a significant risk that, if the Actions were not settled, Plaintiff would be unable
13 to obtain class certification and thereby not recover on behalf of any employees other than himself.
14 Defendants argued that the individual experience of each putative class member varied with respect to
15 the claims. Defendants could also contest class certification by arguing injury and good faith were case-
16 by-case determinations that precluded class certification. Plaintiff is aware of other cases where class
17 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
18 (2019) (denying certification of rest break claims). Finally, even if class certification was successful,
19 as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59
20 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class wide recovery even where the
21 class has been certified. While other cases have approved class certification in wage and hour claims,
22 class certification in this action would have been hotly disputed and was by no means a foregone
23 conclusion. Blumenthal Decl. ¶8(b).

24 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
25 recovery, particularly when viewed in light of the fact that Defendants asserted serious and substantial
26 defenses. The maximum and average class member allocations will be detailed in the forthcoming
27 declaration of the Administrator to be filed after the October 13, 2023 Response Deadline. Given the
28 complexities of this case, the defenses, along with the uncertainties of proof and appeal, the proposed
29 Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

31 As demonstrated by the decision in *Duran*, the complexities and duration of further litigation

1 cannot be overstated. There is little doubt that Defendants would post a bond and appeal in the event
2 of an adverse judgment. A post-judgment appeal by Defendants would have required many more years
3 to resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the
4 case could have dragged on for years after the appeal. The benefits of a guaranteed recovery today
5 outweigh an uncertain result three or more years in the future. Blumenthal Decl. ¶8(c).

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

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

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

25 *Id.* at *12.

26 7. The Amount Offered in Settlement

27 The Settlement in this case is fair, reasonable and adequate considering Defendants' defenses
28 to Plaintiff's claims. As set forth in the Declaration of Kyle Nordrehaug filed in support of preliminary

1 approval which discussed the value of the class claims in detail, the Gross Settlement Amount compares
2 favorably to the value of the claims. Excluding the Background Class Amount valued at \$25,000 total
3 (discussed below), for the 338 California Class Members who collectively worked 44,513 Workweeks,
4 the Gross Settlement Amount provides a value of \$2,810 per Class Member and \$21 per Workweek and
5 the Net Settlement Amount provides an average recovery of \$1,609.46 per Class Member and a
6 recovery of \$12.22 per Workweek. Blumenthal Decl. ¶8(d).

7 The calculations to compensate for the amount due to the Class Members at the time this
8 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting Group, in advance
9 of mediation. As to the Class whose claims are at issue in this Action, Plaintiff used an expert to
10 analyze the data and determine the potential unpaid wages for the employees. For the California Class,
11 the maximum value of the claim for unpaid wages due to the alleged miscalculation of the regular rate
12 was potentially \$70,789, the maximum value of the claim for unpaid wages due to off the clock work
13 was potentially \$1,209,990, the maximum potential damages for unpaid meal premiums were estimated
14 to be \$2,960,477 based upon an alleged 100% violation rate and after credit for meal premiums paid
15 but excluding employees subject to a CBA for whom this claim is preempted, the maximum potential
16 rest period damages were estimated to be \$4,839,960 based upon the same alleged 100% violation rate,
17 and the maximum potential damages for failure to provide expense reimbursement were calculated to
18 be \$295,680. In total, the damages for the Class were calculated to have a maximum potential total
19 value of \$9,376,896. In addition, Plaintiff calculated that the maximum value of the potential waiting
20 time penalties were between \$451,860 and \$735,964, depending on the predicate violation, and the
21 maximum value of the potential wage statement penalties were \$1,348,250.³ Blumenthal Decl. ¶8(d).

22 Consequently, the Gross Settlement Amount represents more than 10% of the potential
23 maximum damages at issue for the California Class in this case, assuming these amounts could all be
24

25 ³ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
26 226, at mediation Plaintiff recognized that these claims were subject to additional, separate defenses
27 asserted by Defendants, including, a good faith dispute defense as to whether any wages were owed
28 given Defendants' position that Plaintiff were properly compensated and classified. *See Nordstrom*
Commission Cases, 186 Cal. App. 4th 576, 584 (2010) ("There is no willful failure to pay wages if the
employer and employee have a good faith dispute as to whether and when the wages were due.").

1 proven in full at trial.⁴ The above maximum calculations should then be adjusted in consideration for
2 both the risk of class certification and the risk of establishing class-wide liability on all claims.
3 Defendants dispute Plaintiff's estimates and believes the amount Plaintiff can recover for the Class, if
4 anything at all, is actually much lower. Given the amount of the Settlement as compared to the
5 potential value of the claims, the Settlement is most certainly fair and reasonable.⁵ Blumenthal Decl.
6 ¶8(d). Clearly, the goal of this litigation has been met.

7 As to the FCRA Class, FCRA provides for statutory damages of \$100 to \$1,000 per willful
8 violation. 15 U.S.C. § 1681n. This means the maximum value of the FCRA claim for the 216
9 individuals in the FCRA Class is between \$21,600 and \$216,000. A comparison of approved FCRA
10 settlements involving similar facts further confirms the reasonableness of this Settlement. The Court
11 in *Pietras v. Sentry Ins. Co.*, 513 F. Supp. 2d 983, 985 (N.D. Ill 2007), "cited eighteen cases, which
12 settled for an average of \$34.59 per class member." Similarly, in *Bailes v. Lineage Logistics, LLC*,
13 2016 U.S. Dist. LEXIS 110943 (D. Kan 2016), the District Court approved a FCRA class settlement
14 which provided for a fund of \$149,205 for a class of 3,430, which correlates to \$43.50 per person. In
15 *Feist v. Petco Animal Supplies, Inc.*, 2018 U.S. Dist. LEXIS 98686 (S.D. Cal. 2018), Judge Marilyn
16 Huff granted preliminary approval to an FCRA class settlement of \$1.2 million for a class of 37,000,
17 which equates to \$32.43 per person. Here, the Settlement allocation of \$115 per FCRA Class Member

18
19 ⁴ Because the PAGA claim does not provide a recovery to the Class, Plaintiff did not included the
20 PAGA claim in this discussion of the class claim valuation. The PAGA claim is addressed in the Decl.
Nordrehaug at ¶ 33 filed in support of Plaintiff Preliminary Approval Motion.

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
approximately 10% of what class might have been awarded had they succeeded at trial."); *Dunleavy*
v. Nadler (In re Mego Fin. Corp. Sec. Litig.), 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement
25 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
26 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.
27 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
28 settlement worth "somewhere between 9% and 18%" of full verdict value).

1 is certainly fair and reasonable given the prior approved FCRA settlements and the defenses asserted
2 by Defendants. *Id.*

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: September 26, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

By: /s/ Kyle Nordrehaug

Kyle R. Nordrehaug
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