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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

TRACEY DEAL, an individual, on behalf
of herself and on behalf of all persons
similarly situated,

Plaintiff,

vs.

GENEX SERVICES, LLC, a Limited
Liability Company; and DOES 1 through
50, inclusive,

Defendants.

CASE NO.: **37-2021-00010974-CU-OE-CTL**

[Consolidated with Case No.
37-2021-00010977-CU-OE-CTL]

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

Hearing Date: April 28, 2023

Hearing Time: 9:00 a.m.

Judge: Hon. Joel R. Wohlfeil

Dept.: 73

Action Filed: March 11, 2021

Trial Date: Not set

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1 **Statutes, Rules and Regulations:**

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9 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) 5, 6, 8, 16

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(Agreement at ¶ 1.22.) The Gross Settlement Amount does not include the employer's share of payroll taxes which will be separately paid by Defendant. (Id.) The Settlement is all-in with no reversion to Defendant and no need to submit a claim form. (Id.) Decl. Nordrehaug at ¶3.

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

\$1,200,000	(Gross Settlement Amount)
- \$10,000	(Plaintiff's proposed service award not to exceed \$10,000)
- \$25,000	(Class Counsel Litigation Expenses Payment - not to exceed amount)
- \$400,000	(Class Counsel Fees Payment - not to exceed 1/3 of settlement)
- \$377,500	(PAGA Payment - 75% to LWDA / 25% to Aggrieved Employees)
- \$10,000	(Administration Expenses Payment - not to exceed amount)
\$377,500	(Net Settlement Amount)

Based upon 166 Class Members who collectively worked 19,366 Workweeks, the Gross Settlement Amount provides an average value of \$7,228 per Class Member and \$61 per Workweek and after deductions the Net Settlement Amount provides an average recovery of \$2,274 per Class Member and a recovery of \$19.49 per Workweek. Decl. Nordrehaug at ¶6.

On June 23, 2022, the Parties participated in an all-day mediation session presided over by Jeffrey A Ross, a respected and experienced mediator of wage and hour class actions. Following the mediation, the Parties continued to negotiate through the mediator, and eventually agreed on the basic terms of a settlement pursuant to a mediator's proposal which was memorialized in the form of a Memorandum of Understanding. Decl. Nordrehaug at ¶5. The Settlement is fair, reasonable and adequate, and should be preliminarily approved because there is a substantial monetary payment, and there are significant litigation and class-certification risks. Therefore, Plaintiff respectfully requests that this Court grant preliminary approval of the Agreement and enter the proposed order submitted herewith.

II. DESCRIPTION OF THE SETTLEMENT

The Gross Settlement Amount is One Million Two Hundred Thousand Dollars (\$1,200,000). (Agreement at ¶ 1.22.) 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

1 payments (to the LWDA and to Class Members). (Agreement at ¶ 1.22.) The Gross Settlement
2 Amount does not include Defendant's share of payroll taxes. (Agreement at ¶ 3.1.) The Gross
3 Settlement Amount shall be all-in with no reversion to Defendant. (Agreement at ¶ 3.1.) Decl.
4 Nordrehaug at ¶15.

5 Within thirty (30) days of the Effective Date, Defendant shall deposit the Gross Settlement
6 Amount with the Administrator. (Agreement at ¶ 4.3.) The distribution of Individual Class Payments
7 to Participating Class Members along with the other Court-approved distributions shall be made by the
8 Administrator within fourteen (14) days after Defendant funds the Gross Settlement Amount.
9 (Agreement at ¶ 5.1.) Decl. Nordrehaug at ¶16.

10 The amount remaining in the Gross Settlement Amount after the deduction of Court-approved
11 amounts for Individual PAGA Payments, the LWDA PAGA Payment, the Class Representative Service
12 Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the
13 Administration Expenses Payment (called the "Net Settlement Amount") shall be allocated to Class
14 Members as their Individual Class Payments. (Agreement at ¶¶ 1.23, 1.28 and 3.2.) From the Net
15 Settlement Amount, the Individual Class Payment for each Participating Class Member will be
16 calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by
17 all Participating Class Members during the Class Period and (b) multiplying the result by each
18 Participating Class Member's Workweeks. (Agreement at ¶ 3.2(e).) Workweeks will be based on
19 Defendant's records, however, Class Members will have the right to challenge the number of
20 Workweeks. Decl. Nordrehaug at ¶17.

21 Class Members may choose to opt-out of the Settlement by following the directions in the Class
22 Notice, but they may not opt out of the PAGA settlement. (Agreement at ¶ 8.5, Ex. A.) All Class
23 Members who do not "opt out" will be deemed Participating Class Members who will be bound by the
24 Settlement and will be entitled to receive an Individual Class Payment. (Agreement at ¶ 8.5(c).) All
25 Aggrieved Employees/Class Members (they are the same group), including those who submit an opt-
26 out request, will still be paid their allocation of the PAGA Penalties and will remain subject to the
27 release of the Released PAGA Claims regardless of their request for exclusion. (Agreement at ¶¶ 6.3
28 and 8.5(d).) Finally, the Class Notice will advise the Class Members of their right to object to the Class

1 portion of the Settlement and/or dispute their Workweeks. (Agreement at ¶¶ 8.6 and 8.7, Ex. A.) Decl.
2 Nordrehaug at ¶18.

3 A Participating Class Member must cash his or her Individual Class Payment check within 180
4 days after it is mailed. (Agreement at ¶ 5.2.) Any settlement checks not cashed within 180 days will
5 be voided and any funds from such uncashed checks to a court-approved Cy Pres beneficiary consistent
6 with California Code of Civil Procedure § 384 ("Cy Pres Recipient"). The Parties propose Children's
7 Advocacy Institute, which is a not-for-profit child advocacy organization, as the Cy Pres Recipient for
8 this Settlement. (Agreement at ¶ 5.4.) Decl. Nordrehaug at ¶19.

9 Subject to Court approval, the Parties have agreed on ILYM Group to administer the settlement
10 in this action ("Administrator"). (Agreement at ¶ 1.2.) The Administrator will be paid for settlement
11 administration in an amount not to exceed \$10,000. (Agreement at ¶ 3.2(c).) Decl. Nordrehaug at ¶20.

12 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
13 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement
14 at ¶ 3.2(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
15 Litigation Expenses Payment in an amount not to exceed \$25,000. (Agreement at ¶ 3.2(b).) Subject
16 to Court approval, the Agreement provides for a payment of no more than \$10,000 to the Plaintiff as
17 the Class Representative Service Payment. (Agreement at ¶ 3.2(a).) Decl. Nordrehaug at ¶21.

18 Subject to Court approval, the PAGA Penalties will be paid from the Gross Settlement Amount
19 for PAGA penalties under the California Private Attorneys General Act, Cal. Labor Code Section 2698,
20 *et seq.* ("PAGA"). The PAGA Penalties are one-half (50%) of the following: the Gross Settlement
21 Amount less the Class Representative Service Payment, the Class Counsel Fees Payment, the Class
22 Counsel Litigation Expenses Payment, and the Administration Expenses Payment, which amount is
23 presently estimated to be \$377,500. Pursuant to the express requirements of Labor Code § 2699(i), the
24 PAGA Payment shall be allocated as follows: 75% shall be allocated to the Labor Workforce
25 Development Agency ("LWDA") as its share of the civil penalties and 25% allocated to the Individual
26 PAGA Payments to be distributed to the Aggrieved Employees based on the number of their respective
27 PAGA Pay Periods. (Agreement at ¶ 3.2(d).) As set forth in the accompany proof of service, the LWDA
28 has been served with this motion and the Agreement. Decl. Nordrehaug at ¶22.

1 **III. CASE BACKGROUND**

2 The description of the case and claims, along with the procedural history is set forth in the
3 Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the
4 exchange of documents and information in connection with the Action over two years which permitted
5 Class Counsel to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and 14. The
6 Parties participated in mediation on June 23, 2022 with Jeffrey Ross, which after arms' length
7 negotiations during the mediation, resulted in this Settlement. Decl. Nordrehaug, ¶12.

8 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO**
9 **GRANT PRELIMINARY APPROVAL**

10 When a proposed class-wide settlement is reached, the settlement must be submitted to the court
11 for approval. 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87.
12 California "[p]ublic policy generally favors the compromise of complex class action litigation."
13 *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) quoting *Cellphone Termination Fee*
14 *Cases*, 180 Cal.App.4th 1110, 1117-18 (2009). Class action settlements are approved where the
15 proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
16 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert.
17 denied, 459 U.S. 1217 (1983)).

18 California Rule of Court 3.769 requires court approval of the settlement of class action lawsuits.
19 Preliminary approval is the first of three steps that comprise the approval procedure for settlements of
20 class actions. The second step is the dissemination of notice of the settlement to all class members.
21 The third step is a final settlement approval hearing, at which evidence and argument concerning the
22 fairness, adequacy, and reasonableness of the settlement may be presented, and class members may be
23 heard regarding the settlement. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996);
24 *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of Court, rule 3.769.

25 The primary question presented on an application for preliminary approval of a proposed class
26 action settlement is whether the proposed settlement is "within the range of possible approval."
27 *Manual for Complex Litigation, Second* §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th
28

1 Cir. 1982).² Preliminary approval is merely the prerequisite to giving notice so that “the proposed
2 settlement... may be submitted to members of the prospective Class for their acceptance or rejection.”
3 *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is
4 “a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining.”
5 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v.*
6 *Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's
7 determination that settlement was “fair, reasonable and adequate” where the settlement “provided
8 valuable benefits to the class . . . that were ‘particularly valuable in light of the risks plaintiff would have
9 faced if she proceeded to litigate her case.’”); *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate
10 question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the
11 settlement is given to the class members and a final settlement hearing is held by the Court.

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

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

20 In considering a potential settlement for preliminary approval purposes, the trial court does not
21 have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the
22 dispute, and need not engage in a trial on the merits. *Wershba, supra*, 91 Cal.App.4th at 239-40; *Dunk*,
23 *supra*, 48 Cal.App. 4th at 1807. The Ninth Circuit explains, “the very essence of a settlement is
24 compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Officers for Justice*, 688

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 F.2d at 624. The question whether a proposed settlement is fair, reasonable and adequate necessarily
2 requires a judgment and evaluation by the attorneys for the parties based upon a comparison of “the
3 terms of the compromise with the likely rewards of litigation.” *Weinberger v. Kendrick*, 698 F.2d 61,
4 73 (2d Cir. 1982), *cert. denied* 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders*
5 *of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). Thus, when analyzing the
6 settlement, the amount is “not to be judged against a hypothetical or speculative measure of what might
7 have been achieved by the negotiators.” *Officers for Justice*, 688 F.2d at 625, 628.

8 With regard to class action settlements, the opinions of counsel should be given considerable
9 weight both because of counsel’s familiarity with this litigation and previous experience with cases
10 such as these. *Officers for Justice*, 688 F.2d at 625; *In re Wash. Public Power Supply System Sec.*
11 *Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal.
12 1988); *Weinberger*, 698 F.2d at 74. “The recommendations of plaintiffs’ counsel should be given a
13 presumption of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As
14 a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat’l Rural*
15 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

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

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

24 If the proposed settlement appears to be the product of serious, informed, noncollusive
25 negotiations, has no obvious deficiencies, does not improperly grant preferential
26 treatment to class representatives or segments of the class, and falls within the range of
27 possible approval, then the court should direct that notice be given to the class members
28 of a formal fairness hearing, at which evidence may be presented in support of and in
opposition to the settlement.

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

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

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

4 This settlement is the result of extensive and hard-fought litigation as well as negotiations
5 before an experienced and well-respected mediator. The negotiations have been, at all times,
6 adversarial and non-collusive in nature. *See, 4 Newberg on Class Actions*, § 13:45 (5th ed.) (due to the
7 preference of settlement over litigation, “a court will presume that a proposed class action settlement
8 is fair when certain factors are present, particularly evidence that the settlement is the product of
9 arms-length negotiation, untainted by collusion.”). Defendant has expressly denied and continues to
10 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and
11 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released
12 Class Claims of the Class in accordance with this Settlement.³

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

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22 ³ The release applicable to the Class is appropriately tethered to allegations in the Action and the
23 “Released Class Claims” are narrowly defined as “all class claims pled or could have been pled based
24 on the factual allegations contained in any complaint filed in any Action. Released Class Claims
25 include unfair competition in violation of California Business and Professions Code §§ 17200 et seq.,
26 failure to pay wages (including minimum wage), failure to pay overtime compensation, failure to
27 provide required meal periods and rest breaks, failure to pay meal and rest premiums, failure to provide
28 accurate pay statements, failure to reimburse business expenses, failure to pay wages upon employment
termination, and all claims for violations of California Labor Code §§ 201, 202, 203, 204 et seq., 210,
226, 226.7, 351, 510, 512, 1194, 1197, 1197.1 1198 et seq., and 2802 and the provisions of California's
Wage Orders. Participating Class Members do not release claims for vested benefits, wrongful
termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability,
social security, or workers' compensation.” (Agreement at ¶¶ 1.37 and 6.2.)

1 The Parties attended an arms-length mediation session with Jeffrey Ross, a respected and
2 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
3 for the mediation, Defendant provided Class Counsel with payroll and employment data and other
4 information regarding the Class Members, various internal documents, and other compensation and
5 employment-related materials. Class Counsel analyzed the data with the assistance of damages expert
6 Berger Consulting and prepared and submitted a mediation brief to the mediator. The final settlement
7 terms were negotiated and set forth in the Agreement now presented for this Court's approval. Decl.
8 Nordrehaug at ¶ 5. Importantly, Plaintiff and Class Counsel believe that this Settlement is fair,
9 reasonable and adequate. Class Counsel will be submitting the Settlement Agreement to the LWDA
10 concurrently with the filing of this motion pursuant to Labor Code § 2699(1)(2). Decl. Nordrehaug at
11 ¶38.

12 As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is
13 One Million Two Hundred Thousand Dollars (\$1,200,000). The Settlement is all-in with no reversion
14 to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

15 Class Counsel conducted an investigation into the facts of the class action. Class Counsel
16 engaged in a thorough review and analysis of the relevant documents and data with the assistance of
17 an expert. Accordingly, the agreement to settle did not occur until Class Counsel possessed sufficient
18 information to make an informed judgment regarding the likelihood of success on the merits and the
19 results that could be obtained through further litigation. In addition, Class Counsel previously
20 negotiated settlements with other employers in actions involving nearly identical issues and analogous
21 defenses. Based on the foregoing data and their own independent investigation, evaluation and
22 experience, Class Counsel believes that the settlement with Defendant on the terms set forth in the
23 Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known
24 facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and
25 potential appellate issues. Decl. Nordrehaug at ¶ 14.

26 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and trying
27 this Action against Defendant through possible appeals which could take several years. Class Counsel
28 has also taken into account the uncertain outcome and risk of litigation, especially in complex class

1 actions such as this Action. Class Counsel is also mindful of and recognize the inherent problems of
2 proof under, and alleged defenses to, the claims asserted in the Action. Based upon their evaluation,
3 Plaintiff and Class Counsel have determined that the Settlement set forth in the Agreement is in the best
4 interest of the Class Members. Decl. Nordrehaug, ¶ 23.

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

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

12 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
13 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
14 receive payment according to the same formula. (Agreement at ¶ 3.2(e).) Based upon 166 Class
15 Members who collectively worked 19,366 Workweeks, the Gross Settlement Amount provides an
16 average value of \$7,228 per Class Member and \$61 per Workweek and after deductions the Net
17 Settlement Amount provides an average recovery of \$2,274 per Class Member and a recovery of \$19.49
18 per Workweek.

19 The calculations to compensate for the amount due for the Class at the time of the mediation
20 were calculated by Berger Consulting, Plaintiff’s damage expert. As to the Class whose claims are at
21 issue in this Action, Plaintiff used the expert to analyze the data and determine the potential unpaid
22 wages for the employees. The maximum potential damages were calculated to be \$9,963,000 for the
23 alleged unpaid wages due to off the clock work based upon 9 hours of assumed overtime per week,
24 \$917,950 for alleged meal period damages based upon a 25% assumed potential violation rate for shifts
25 worked, \$922,500 for alleged rest period damages based upon a 25% assumed potential violation rate,
26 \$34,090 for alleged unreimbursed business expenses for assumed personal cell phone usage at \$10 per
27 month. Decl. Nordrehaug, ¶6. As a result, the total damage valuation was calculated that Defendant
28 was subject to a maximum damage claim in the amount of \$11,837,540. As to potential penalties,

1 Plaintiff calculated that potential waiting time penalties were a maximum of \$627,000 and potential
2 wage statement penalties were \$648,000. Defendant vigorously disputed Plaintiff's calculations and
3 exposure theories. Decl. Nordrehaug, ¶6.

4 A number of defenses asserted by Defendant, however, present serious threats to the claims of
5 the Plaintiff and the other Class Members. Defendant vigorously contested liability, the amount of
6 claimed damages, and the propriety of class certification. In particular, Defendant contends that all
7 Class Member worked on a salary basis which properly compensated for all time worked, were properly
8 classified as exempt from mandatory meal and rest breaks, and there is therefore no liability for alleged
9 overtime or meal/rest period violations. Even if Plaintiffs and the other Class Members were not
10 properly classified, Defendant contended that its meal and rest period policies fully complied with
11 California law and Defendant did not fail to provide the opportunity for legally required meal and rest
12 breaks, Defendant further contended that there was no failure to pay for business expenses and any cell
13 phone usage was merely convenient and voluntary such that reimbursement was not legally required.
14 Finally, Defendant could argue that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal.
15 4th 1004 (2012), weakened Plaintiff's claims, on liability, value, and class certifiability as to the meal
16 and rest period claims. Defendant also argues that based on its facially lawful practices, Defendant
17 acted in good faith and without willfulness, which if accepted would negate the claims for waiting time
18 penalties and/or inaccurate wage statements. If successful, Defendant's defenses could eliminate or
19 substantially reduce any recovery to the Class. Decl. Nordrehaug, ¶ 24.

20 In additional, there was also a significant risk that, if the Action was not settled, Plaintiff would
21 be unable to obtain a certified class and maintain the certified class through trial, and thereby not
22 recover on behalf of any employees other than herself. Defendant maintained that arbitration
23 agreements signed by members of the Class would preclude or limit class certification. At the time of
24 the mediation, Defendant forcefully opposed the propriety of class certification, arguing that individual
25 issues precluded class certification. Further, as demonstrated by the California Supreme Court decision
26 in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome
27 for a class-wide recovery even where the class has been certified. While other cases have approved
28 class certification in wage and hour claims, class certification in this action was hotly disputed and the

1 maintenance of a certified class through trial was by no means a foregone conclusion. Decl.
2 Nordrehaug, ¶ 25.

3 Given these uncertainties, the Gross Settlement Amount of \$1,200,000 is fair and reasonable.
4 This amount represents more than 10% of the maximum value of the alleged damages at issue in this
5 case at the time this Settlement was negotiated.⁴ In addition, the above maximum calculations should
6 then be adjusted in consideration for both the risk of class certification and the risk of establishing
7 class-wide liability on all claims. In this case, the above valuations certainly overstate the value of the
8 claims because off-the-clock assumes 9 hours of unpaid overtime in every week, and the meal and rest
9 period valuation is based on both a meal and a rest break violation in 25% of all shifts worked. Given
10 the amount of the settlement as compared to the potential value of claims in this case and the defenses
11 asserted by Defendant, this settlement is fair and reasonable.⁵ Clearly, the goal of this litigation has
12 been met. Decl. Nordrehaug, ¶6.

13 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
14 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). After arm's length negotiations between
15 experienced and informed counsel, the Parties recognized the potential risks and agreed on the
16 Settlement with a Gross Settlement Amount of \$1,200,000. As the Court held in *Glass*, where the
17 parties faced uncertainties similar to those here:

18 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,
19

20 ⁴ Because the PAGA claim is not a class claim and primarily is paid to the State of California,
21 Plaintiff has not included the PAGA claim in this discussion of the value of the class claims. The
22 PAGA claim is addressed in the Decl. Nordrehaug at ¶33.

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

1 and likely duration of further litigation likewise favors the settlement. Regardless of
2 how this Court might have ruled on the merits of the legal issues, the losing party likely
3 would have appealed, and the parties would have faced the expense and uncertainty of
litigating an appeal. 'The expense and possible duration of the litigation should be
considered in evaluating the reasonableness of [a] settlement.'"

4 2007 WL 221862, at *4 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458
5 (9th Cir. 2000)).

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

8 The relief provided in the Settlement will benefit all members of the Class. The Settlement does
9 not grant preferential treatment to Plaintiff or segments of the Class in any way. Payments to the Class
10 Members are all determined under a neutral methodology. Each Participating Class Member will
11 receive the same opportunity to participate in and receive payment through a neutral formula that is
12 based upon the Workweeks for that individual. Decl. Nordrehaug, ¶4.

13 Plaintiff will apply to the Court for Class Representative Service Payment in consideration for
14 his service and for the risks undertaken on behalf of the class. (Agreement at ¶ 3.2(a).) Plaintiff
15 performed her duties admirably by working with Class Counsel for two years. The Declaration of the
16 Plaintiff is submitted herewith in support. Decl. Nordrehaug at ¶27. At this stage, the requested service
17 award of \$10,000 is well within the accepted range of awards for purposes of preliminary approval.
18 *See e.g. Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S. Dist. LEXIS 71386 (E.D. Cal. 2018) (awarding
19 \$12,500 where average class member payment was \$351); *Holman v. Experian Info. Solutions, Inc.*,
20 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving \$10,000 service award where class
21 member recovery was \$375); *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008 WL 4473183, *7
22 (S.D.Cal. Oct. 06, 2008) (awarding \$25,000 service award to each of six plaintiffs in overtime class
23 action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. Jan. 27 2007) (awarding
24 \$25,000 service award in overtime class action and a pool of \$100,000 in enhancements). As
25 explained in *Glass*, service awards are routinely awarded to class representatives to compensate the
26 employees for the time and effort expended on the case, for the risk of litigation, for the fear of suing
27 an employer and retaliation there from, and to serve as an incentive to vindicate the statutory rights of
28 all employees. 2007 WL 221862 at *16-17.

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

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

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

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

21 Certification is appropriate when the moving party has demonstrated the existence of an
22 ascertainable class and a well-defined community of interest among the class. *See, e.g., Brinker*
23 *Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012). Plaintiff contends that the proposed
24 settlement meet all of the requirements for class certification under California Code of Civil Procedure
25 § 382 as demonstrated below, and therefore, the Court may appropriately approve the Class as defined
26 in the Agreement. This Court should conditionally certify the Class for settlement purposes only,
27 defined as follows:

28 All individuals employed in an exempt telephonic or field case manager position at any
point starting March 11, 2020 and ending July 1, 2022.

(Agreement at ¶ 1.5.)

A. California Code of Civil Procedure § 382

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

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

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

Defendant does not dispute, for settlement purposes only, that all of the elements for class certification are met here. Defendant does not concede that certification is appropriate outside of this Settlement and preserves all rights to oppose certification if, for any reason, the settlement does not become effective. While Defendant reserves 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 ¶ 2.8.)

B. The Proposed Class Is Ascertainable and Numerous

Plaintiff brings this action on behalf of a Class of exempt employees of Defendant during the Class Period. Plaintiff asserts that all of these individuals are ascertainable because the class members can readily be determined through examination of Defendant’s files. Given that the Class consists of 166 members, Plaintiff maintains that numerosity is clearly satisfied. *See Bowles v. Superior Court*, 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiff asserts that the 166 current and former employees that comprise the Class can be identified based on Defendant’s records and are sufficiently numerous for class certification. Decl. Nordrehaug at ¶30.

C. Common Issues of Law and Fact Predominate

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

6 Commonality exists if there is a predominant common legal question regarding how an
7 employer’s policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,
8 1536 (2008) (“[T]he common legal question remains the overall impact of Diva's policies on its
9 drivers.”) Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the
10 certification stage since the question is “essentially a procedural one that does not ask whether an action
11 is legally or factually meritorious.” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

12 Here, Plaintiff contends that common questions of law and fact are present, specifically the
13 common questions of whether Defendant’s employment practices were lawful, whether Class Members
14 were properly classified as exempt, whether Defendant failed to provide meal and rest periods to Class
15 Members, whether Class members were lawfully compensated for all hours worked, whether Defendant
16 failed to provide required expense reimbursement, and whether Class Members are entitled to damages
17 and penalties as a result of these practices. Plaintiff contends that certification of this Class is
18 appropriate because Defendant allegedly engaged in uniform practices with respect to the Class
19 Members. As a result, these common questions of liability could be answered on a class wide basis.
20 Decl. Nordrehaug, ¶30. Defendant disputes that common questions predominate but will not oppose
21 such a finding for purposes of this Settlement only.

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

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

1 In the instant case, Plaintiff contends that the typicality requirement is fully satisfied. Plaintiff,
2 like every other member of the Class, was employed by Defendant in an exempt telephonic or field case
3 manager position, and, like every other member of the Class, was subject to the same employment
4 practices. Plaintiff, like every other member of the Class, also claims owed compensation as a result
5 of the Defendant's uniform company policies and practices. Thus, the claims of Plaintiff and the
6 members of the Class arise from the same course of conduct by Defendant, involve the same issues, and
7 are based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of settlement, Plaintiff
8 asserts that the typicality requirement is met as to the common issues presented in this case. Defendant
9 does not oppose a finding of typicality for purposes of this Settlement only.

10 **E. The Class Representation Fairly and Adequately Protected the Class**

11 Plaintiff contends that the Class Members are adequately represented here because Plaintiff and
12 representing counsel (a) do not have any conflicts of interest with other class members, and (b) will
13 prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is
14 met here. First, Plaintiff is well aware of her duties as the representative of the Class and has actively
15 participated in the prosecution of this case to date. Plaintiff effectively communicated with Class
16 Counsel, provided documents and information to Class Counsel, and participated in the investigation
17 and resolution of the Action. The personal involvement of the Plaintiff was essential to the prosecution
18 of the Action and the monetary settlement reached. Second, Plaintiff retained competent counsel who
19 are experienced in employment class actions and who have no conflicts. Decl. Nordrehaug at ¶ 31.
20 Third, there is no antagonism between the interests of the Plaintiff and those of the Class. Both the
21 Plaintiff and the Class Members seek monetary relief under the same set of facts and legal theories.
22 Under such circumstances, there can be no conflicts of interest, and adequacy of representation is
23 satisfied. *Reaves v. Ketoro, Inc.*, 2020 U.S. Dist. Lexis 167926, *23 (C.D. Cal. 2020). Defendant
24 disputes that the adequacy requirement is satisfied but will not oppose such a finding for purposes of
25 this Settlement only.

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

27 To certify a class, the Court must also determine that a class action is superior to other available
28 methods for the fair and efficient adjudication of the controversy. "Where classwide litigation of

1 common issues will reduce litigation costs and promote greater efficiency, a class action may be
2 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
3 1996). As courts have previously observed:

4 Absent class treatment, each individual plaintiff would present in separate, duplicative
5 proceedings the same or essentially the same arguments and evidence, including expert
6 testimony. The result would be a multiplicity of trials conducted at enormous expense
7 to both the judicial system and the litigants. “It would be neither efficient nor fair to
8 anyone, including defendants, to force multiple trials to hear the same evidence and
9 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 Defendant disputes that class treatment is superior, Defendant does 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, Defendant will provide to the Administrator a confidential electronic spreadsheet
19 containing the Class Data. (Agreement at ¶ 4.2.) Within 14 days after receiving the Class Data, the
20 Administrator will mail the Class Notice to all Class Members via first-class U.S. Mail using the most
21 current mailing address information available. (Agreement at ¶ 8.4(b).)

22 The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel
23 and to be approved by the Court, includes all relevant information. (*See Exhibit “A”* to the Agreement.)
24 The Class Notice will include, among other information: (i) information regarding the Action; (ii) the
25 impact on the rights of the Class Members if they do not opt out, including a description of the
26 applicable release; (iii) information to the Class Members regarding how to opt out and how to object
27 to the Settlement; (iv) the estimated Individual Class Payment for each of the Class Members; (iii) the
28 amount of attorneys’ fees and expenses to be sought; (v) the amount of the Plaintiff’s service award
request; and (vi) the anticipated expenses of the Administrator. Decl. Nordrehaug at ¶32.

The Class Notice will state that the Class Members shall have forty-five (45) days from the date

1 that the Notice is mailed to them (the “Response Deadline”) to request exclusion (opt-out) or to submit
2 an objection. (Agreement at ¶¶ 1.42, 8.5, 8.7.) Class Members shall be given the opportunity to object
3 to the Settlement and/or requests for attorneys’ fees and expenses and to appear at the Final Approval
4 Hearing. (Agreement at ¶ 8.7.) Class Members who do not submit a timely and proper request to opt-
5 out will automatically receive a payment of their Individual Class Payment. This notice program was
6 designed to meaningfully reach the Class Members and it advises them of all pertinent information
7 concerning the Settlement. Decl. Nordrehaug at ¶32. The mailing and distribution of the Class Notice
8 satisfies the requirements of due process and is the best notice practicable under the circumstances and
9 complies with Rules of Court 3.766 and 3.769(f).

10 **VII. CONCLUSION**

11 Plaintiff respectfully request that the Court preliminarily approve the proposed settlement and
12 sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final
13 approval hearing for the proposed date of September 8, 2023, which is a date that is at least one
14 hundred twenty (120) days from the date of Preliminary Approval.

15 Dated: April 5, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

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