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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA**

RAYMOND HUERTA, an individual,
on behalf of himself and on behalf of
all persons similarly situated,

Plaintiffs,

vs.

SPLAY, INC., a California
Corporation; and DOES 1 through 50,
inclusive,

Defendants.

CASE No. **RG21102661**

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

Hearing Date: December 13, 2022
Hearing Time: 3:00 p.m.
[Hearing scheduled by Order dated August 9, 2022]
Reservation # A-21102661-001

ASSIGNED FOR ALL PURPOSES TO
JUDGE: Hon. Brad Seligman
DEPARTMENT 23

Action Filed: June 23, 2021
Trial Date: None 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 Settlement Agreement with the Stipulation to Modify the Agreement (collectively the
4 “Agreement”), a true and correct copy of which is attached as Exhibit #2 to the Declaration of Norman
5 Blumenthal (“Blumenthal Decl.”).¹ In accordance with the Preliminary Approval Order dated August
6 9, 2022 (“Preliminary Approval Order”), the approved Class Notice has been disseminated to the
7 Class.²

8 The purpose of this hearing is to determine whether the proposed settlement of the litigation
9 should be finally approved. Plaintiff Raymond Huerta (“Plaintiff”) respectfully submits this
10 memorandum in support of the unopposed motion for final approval and the proposed entry of the Final
11 Approval Order and Judgment, submitted herewith. The settlement represents an excellent result for
12 the Class and avoids the delays, risks, and costs of further litigation. After disseminating the notice to
13 the members of the Class, there were **no objections and only one (1) request for exclusion**, which
14 means that almost the entire Class has elected to participate in the Settlement. Blumenthal Decl. ¶4.
15 This is a positive response from the Class evidencing their collective approval of the settlement. As
16 a result, Plaintiff respectfully submits that the class settlement should be finally approved for the same
17 reasons that the Court preliminarily approved the settlement as fair, reasonable, and adequate.

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

19 Plaintiff and Defendant Splay, Inc. (“Defendant”) reached a full and final settlement of the
20 above-captioned action, which is embodied in the Agreement filed concurrently with the Court. As
21

22 ¹ Capitalized terms are defined in the Agreement.

23 ² The “Class” is defined as “all individuals who are or previously were employed by Defendant
24 Splay, Inc. in California who were classified as non-exempt employees at any time during the Class
25 Period.” (Preliminary Approval Order at 3:13-16). The “Class Period” is June 23, 2017 through March
26 24, 2022, which end date was modified by the Agreement to keep within the cap of 75,000 workweeks.
27 Paragraph III(36)(m) of the Agreement provides that in the event the cap of 75,000 workweeks is
28 exceeded, “the Release date will be moved back to only cover the Class and PAGA Periods during
 which no more than 75,000 weekly pay periods were worked by the Class Members”. The proposed
 Final Approval Order and Judgment reflects this March 24, 2022 end date, and the Class List and
 Notice was already conformed to this March 24, 2022 end date.

1 consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is One Million
2 Seven Hundred Thousand Dollars (\$1,700,000). (Agreement at ¶¶ II(19) and III(34).) Under the
3 Settlement, the Gross Settlement Amount consists of the following elements: (1) payment of the
4 Settlement Shares to the Class; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses
5 Payment; (3) Settlement Administration Expenses; (4) Class Representative Service Payment to the
6 Plaintiff; and (5) the PAGA Payment. (Agreement at ¶ III(34)-(36).) The Gross Settlement Amount
7 does not include Defendant's share of payroll taxes. (Agreement at ¶ III(34).) The Gross Settlement
8 Amount shall be all-in with no reversion to Defendant. (Agreement at ¶ III(34).) Blumenthal Decl.
9 ¶3(a).

10 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay
11 Defendant's share of payroll taxes in two installments. (Agreement at ¶ III(34).) Within thirty (30)
12 days following final approval of the settlement, Defendant shall pay the Settlement Administrator
13 \$850,000 of the Gross Settlement Amount, and then twelve (12) months following the payment of the
14 First Installment to the Settlement Administrator, Defendant shall pay the remaining \$850,000 of the
15 Gross Settlement Amount to the Settlement Administrator. (Agreement at ¶ III(34).) The Settlement
16 Shares to Participating Class Members will be mailed by the Settlement Administrator upon the receipt
17 of all funds. (Agreement at ¶ III(41).) Blumenthal Decl. ¶3(c).

18 The Net Settlement Amount shall equal the net amount available for payment to the Class after
19 deducting the Court-approved amounts for the Class Representative Service Payment, the Class
20 Counsel Fees Payment, Class Counsel Litigation Expenses Payment, the PAGA Payment, and the
21 Settlement Administration Expenses. (Agreement at ¶ I(21).) The Net Settlement Amount will be
22 distributed as the Settlement Shares to the Class Members who do not timely request exclusion
23 ("Participating Class Members"). (Agreement at ¶¶ I(24) and III(36)(i).) The Settlement Share will be
24 calculated as follows: (a) the Settlement Administrator shall divide the Net Settlement Amount by the
25 total number of weeks included in the dates of employment to determine a dollar amount per week
26 ("Weekly Rate"); and (iii) the Settlement Administrator shall then take the number of weeks worked
27 by each Participating Class Member and multiply it by the Weekly Rate to calculate their Settlement
28 Share. (Agreement at ¶ III(36)(j).) Workweeks will be based on Defendant's records, however Class

1 Members will have the right to challenge the number of workweeks. Blumenthal Decl. ¶ 3(d).

2 Class Members were sent the Court approved Class Notice using the procedure approved by the
3 Court by mailing the notice packets after updating class members' addresses using the National Change
4 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
5 any forwarding address provided or updated address located. Declaration of Madely Nava ("Nava
6 Decl.") ¶ 7. Class Members were provided with the opportunity to exclude themselves or "opt out" if
7 they did not want to participate in the settlement. (Agreement at ¶ 44(c), Ex. A.) Nava Decl. ¶ 5, Exh.
8 A. One (1) Class Member submitted a valid request for exclusion. Nava Decl. ¶ 11. The remaining
9 Class Members are deemed Participating Class Members who are bound by the Settlement and will be
10 entitled to receive a Settlement Share. (Agreement at ¶ III(38)(c)(iii).) All Aggrieved Employees will
11 be paid their allocation of the PAGA Payment and will remain bound by the release of the PAGA
12 Released Claims regardless of their request for exclusion. (Agreement at ¶ III(38)(c)(iii).) The Class
13 Notice also advised Class Members of their right to object to the Settlement and/or dispute their
14 workweeks. (Agreement at ¶ III(38)(c); Nava Decl. ¶ 7, Exh. A.) Blumenthal Decl. ¶ 3(e).

15 A Participating Class Member must cash his or her Settlement Share check within 180 days
16 after it is mailed. (Agreement at ¶ III(42).) The Settlement Administrator will send a reminder to
17 Participating Class Members who have not cashed their checks 60 days before the expiration date.
18 (Agreement at ¶ III(42).) Pursuant to the modification by Stipulation, any settlement checks not cashed
19 within 180 days will be voided and any funds from such uncashed checks will be paid to o a
20 Court-approved cy pres beneficiary consistent with California Code of Civil Procedure § 384, which
21 the Parties propose to be the Children's Advocacy Institute . (Agreement at ¶ III(42).) Blumenthal
22 Decl. ¶3(f).

23 IYLM Group was appointed by the Court as the Settlement Administrator for the Settlement.
24 (Preliminary Approval Order at ¶9; Agreement at ¶ III(37).) From the Gross Settlement Amount, the
25 Settlement Administrator shall be paid for the expenses of administering the Settlement in an amount
26 not to exceed \$20,000. (Agreement at ¶ III(35)(h). As set forth in the Nava Decl. at ¶15, the Settlement
27 Administration Expenses, including fees and costs incurred to-date, as well as anticipated fees and costs
28 for completion of the settlement administration, are \$15,990. Blumenthal Decl. ¶3(g).

1 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
2 to exceed thirty percent (30%) of the Gross Settlement Amount, as the Class Counsel Fees Payment.
3 (Agreement at ¶ III(35)(f).) Class Counsel will also be allowed to apply separately for an award of
4 Class Counsel Litigation Expenses Payment in an amount not to exceed \$20,000. (Agreement at ¶
5 III(35)(f).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000
6 to the Plaintiff as the Class Representative Service Payment. (Agreement at ¶ III(35)(e).) In support
7 of this separate motion for attorneys' fees, reimbursement of expenses and service awards, Class
8 Counsel is providing evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

9 Subject to Court approval, Fifty Thousand Dollars (\$50,000) will be paid from the Gross
10 Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal. Labor
11 Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code § 2699(i),
12 the PAGA Payment shall be allocated as follows: 75% (\$37,500) to the LWDA as the LWDA's share
13 of the PAGA Payment pursuant to PAGA and 25% (\$12,500) will be distributed to the Aggrieved
14 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at ¶
15 III(35)(g).) As set forth in the accompanying proof of service, the LWDA has been served with this
16 motion and the Agreement. Blumenthal Decl. ¶3(i).

17 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
18 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
19 is "fair, adequate, and reasonable". (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
20 at \$1,700,000 is an excellent result for the Class. This result is particularly favorable in light of the fact
21 that liability and class certification in this case were far from certain in light of the defenses asserted
22 by Defendant. Given the complexities of this case, the defenses asserted, the uncertainty of class
23 certification, along with the uncertainties of proof at trial and appeal, the proposed settlement is fair,
24 reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

25 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL** 26 **OF CLASS ACTION SETTLEMENTS**

27 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
28 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly

appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran. v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation.")

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

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

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

The Court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); see also *Officers for Justice v. Civil Service*

1 Com'n, 688 F.2d 615, 625 (9th Cir. 1982). The purpose of the requirement is "the protection of those
2 class members, including the named plaintiffs, whose rights may not have been given due regard by
3 the negotiating parties." *Dunk, supra*, at 1801.

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

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

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

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

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

25 Over the course of over a year of litigation, the Parties engaged in thorough investigation and
26 the exchange of documents and information in connection with the Action over the last year which
27 permitted Class Counsel to perform a thorough analysis of the claims. The procedural history and
28 investigation performed was detailed at length in support of the motion for preliminary approval. The

1 Settlement was the product of one arms-length mediation and contentious negotiations through an
2 all-day mediation presided over by Louis Marlin, Esq., a respected and experience mediator of wage
3 and hour class actions. The details of the litigation are set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(g).

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

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

13 The Parties attended an arms-length mediation session with Louis Marlin, a respected and
14 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
15 for the mediation, Defendant provided Class Counsel with necessary information for the members of
16 the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiff
17 analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and submitted
18 a mediation brief and damage valuation to the Mediator. At the conclusion of the all-day mediation,
19 the Parties agreed to this Settlement. Blumenthal Decl. ¶7(b).

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

26 From January 2022 to March 2022, the Class Action Settlement Agreement and exhibits thereto
27 were drafted, finalized and executed. In response to the Court’s initial ruling on preliminary approval
28 on July 12, 2022, the Plaintiff submitted a supplemental declaration which addressed the issues

1 identified by the Court. On August 9, 2022, the Court issued its Order granting preliminary approved
2 of the settlement as fair and reasonable to the Class. Blumenthal Decl. ¶7(c).

3 3. Class Counsel is Experienced in Similar Litigation

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

13 4. There Are No Objections and Only One Requests for Exclusion

14 The reaction of the Class unequivocally supports approval of the Settlement. On September 22,
15 2022, the Settlement Administrator mailed the Court-approved Class Notice to the Class Members,
16 which provided each class member with the terms of the Settlement, including notice of the claims at
17 issue and the financial terms of the settlement, including the attorneys' fees, costs, and service award
18 that were being sought, how individual settlement awards would be calculated, and the specific,
19 estimated payment amount to that individual. See Nava Decl. ¶ 7, Exh. A. In disseminating the notice,
20 the Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary
21 Approval Order. Significantly, there have been no objections and only one (1) valid request for
22 exclusion. Nava Decl. ¶¶ 11, 12. As such, nearly the entire Class will participate in the Settlement and
23 will be sent a settlement check. See Nava Decl. at ¶¶ 13, 14; Blumenthal Decl. ¶4.

24 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
25 Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
26 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
27 indicative of the adequacy of the settlement."); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
28 (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 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
14 asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued that all
15 work time was paid for and that the rounding practice was lawful. Defendant contend that their meal
16 and rest period policies fully complied with California law and that Defendant's timekeeping system
17 recorded meal periods, and was not required to record rest periods. Defendant's records also evidence
18 the payment of missed meal premiums, and could therefore argue that any meal period violations were
19 compensated. Finally, Defendant could argue that the Supreme Court decision in *Brinker v. Superior*
20 *Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiff's claims, on liability, value, and class certifiability
21 as to the meal and rest period claims. Defendant also argues that based on their facially lawful
22 practices, they acted in good faith and without willfulness, which if accepted would negate the claims
23 for waiting time penalties and/or inaccurate wage statements. In fact, under the current state of the law,
24 it is questionable whether these penalties could be awarded at all based upon the alleged meal and rest
25 period violations. If successful, Defendant's defenses could eliminate or substantially reduce any
26 recovery to the Class. While Plaintiff believes that these defenses could be overcome, Defendant
27 maintains these defenses have merit and therefore present a serious risk to recovery by the Class.
28 Blumenthal Decl. ¶8(a).

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

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

8 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
9 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
10 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
11 approval."). As recognized in a federal decision approving settlement of an overtime wage class action:

12 The potential complexity and possible duration of trial also weigh in favor of granting
13 final approval. Plaintiffs acknowledge the difficulties of proving damages, recognize the
14 uncertainty of outcome, and believe defendant would appeal in the event of adverse
15 judgment. A post-judgment appeal would require many years to resolve and delay
16 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.

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

19 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
20 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
21 Defendant argued that the individual experience of each putative class member varied with respect to
22 the claims. Defendant could also contest class certification by arguing injury and good faith were case
23 by case determinations that precluded class certification. Plaintiff is aware of cases where class
24 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
25 (2019) (denying certification of meal and rest break claims). Defendant also contended that individual
26 differences in work experiences not only impacted damages but would also impact certification.
27 Finally, even if class certification was successful, as demonstrated by the California Supreme Court
28 decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to

1 overcome for a class wide recovery even where the class has been certified. While other cases have
2 approved class certification in wage and hour claims, class certification in this action would have been
3 hotly disputed and was by no means a foregone conclusion. Blumenthal Decl. ¶8(b).

4 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
5 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
6 substantial defenses both to liability and to class certification. Currently, the maximum and average
7 class member allocation are \$3,670 and \$1,627, respectively. See Nava Decl. ¶14. Given the
8 complexities of this case, the defenses, along with the uncertainties of proof and appeal, the proposed
9 Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

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

27 Although Plaintiff and Class Counsel believe that their case has merit, which Defendant
28 continues to vigorously deny, they recognized the potential risks both sides would face if litigation of

1 these Actions continued. As the federal court held in *Glass*, where the parties faced uncertainties
2 similar to those in this litigation:

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

11 *Id.* at *12.

12 7. The Amount Offered in Settlement

13 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
14 to Plaintiff's claims. As set forth in the Declaration of Nordrehaug and the Supplemental Declaration
15 of Kyle Nordrehaug submitted in support of preliminary approval which discussed the value of the class
16 claims in thorough detail, the Gross Settlement Amount compares favorably to the value of the claims.

17 The calculations to compensate for the amount due to the Class Members at the time this
18 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
19 mediation. For the individuals whose claims are at issue in this Actions, Plaintiff analyzed the data for
20 putative class members and determined the potential maximum damages for the class claims. For the
21 Class, Plaintiff determined that the unpaid minimum and overtime wages due to the alleged illegal
22 rounding was \$628,976, the maximum potential meal period damages were estimated to be \$2,730,136
23 based upon an 47% potential violation rate and after deducted in the meal premiums actually paid, the
24 maximum potential rest period damages were estimated to be \$5,697,827 based on a 100% violation
25 from an allege on duty policy, and, the maximum damages for unreimbursed expenses were estimated
26 to be \$84,991. In total, the damages for the Class were calculated to have a maximum total value of
27 \$9,111,600. In addition, Plaintiff calculated that the maximum value of the waiting time penalties were
28 \$1,174,663 and the maximum value of the wage statement penalties were between \$446,200 and
\$1,082,400, depending on the predicate violation giving rise to the penalty. These wage statement and
waiting time penalties claims potentially have a much smaller value, even if damages were awarded,

1 to the extent that they are only derivative of the meal and rest break claims.³ Blumenthal Decl. ¶8(d).

2 Consequently, the Gross Settlement Amount represents more than 18% of the value of the
3 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
4 proven in full at trial.⁴ The above maximum calculations should then be adjusted in consideration for
5 both the risk of certification and the risk of establishing class-wide liability on all claims. Given the
6 amount of the Settlement as compared to the potential value of the claims, the Settlement is most
7 certainly fair and reasonable.⁵ Clearly, the goal of this litigation has been met.

8 **V. CONCLUSION**

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

14 ³ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
15 226, at mediation Plaintiff recognized that these claims were subject to various defenses asserted by
16 Defendant, including, but not limited to, a good faith dispute defense as to whether any premium wages
17 for meal or rest periods or other wages were owed given Defendant's position that Plaintiff were
18 properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There
19 is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether
20 and when the wages were due."). Additionally, at the time of mediation, Courts had held that violations
of the meal and rest period regulations, which require payment of a "premium wage" for each improper
meal period, do **not** give rise to claims under sections 203 and 226. *See Ling v. P.F. Chang's China*
Bisto, Inc., 245 Cal. App. 4th 1242, 1261 (2016) and *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App.
5th 1308, 1336 (2018). As a result, the viability of Plaintiff's claims on these theories was uncertain.

21 ⁴ Because the PAGA claim does not provide a recovery to the Class, Plaintiff has not included the
22 PAGA claim in this discussion. The PAGA claim and the reasonableness of the resolution of the
23 PAGA claim was addressed in the Declaration of Nordrehaug at ¶ 33 submitted in support of the
motion for preliminary approval.

24 ⁵ *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
25 approving settlement which represented "roughly one-sixth of the potential recovery"; *Stovall-Gusman*
v. W.W. Granger, Inc., 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval
26 where "the proposed Total Settlement Amount represents approximately 10% of what class might have
27 been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D.
28 Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value);
Ma v. Covidien Holding, Inc., 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class
action settlement worth "somewhere between 9% and 18%" of full verdict value).

1 Dated: November 14, 2022

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