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

14 **IN AND FOR THE COUNTY OF ALAMEDA**

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

18 Plaintiffs,

19 vs.

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

22 Defendants.

Case No. RG21102661

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

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

Hearing Date: July 12, 2022

Hearing Time: 3:00 p.m.

Reservation No. 583206789808

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Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiff Raymond Huerta (“Plaintiff”) respectfully submits this memorandum in support of the
3 unopposed motion for preliminary approval of the proposed class and PAGA action settlement with
4 Defendant Splay, Inc. (“Defendant”), and seeks entry of an order: (1) preliminarily approving the
5 proposed settlement of this class action and PAGA action with Defendant; (2) for settlement purposes
6 only, conditionally certifying the Class, which is comprised of “all individuals who are or previously
7 were employed by Defendant in California who were classified as non-exempt employees at any time
8 during the Class Period, and who have previously not released their claims” of June 23, 2017 through
9 April 6, 2022; (3) provisionally appointing Plaintiff as the representative of the Class; (4) provisionally
10 appointing Norman B. Blumenthal, Kyle R. Nordrehaug, and Aparajit Bhowmik of Blumenthal
11 Nordrehaug Bhowmik De Blouw LLP as Class Counsel for the Class; (5) approving the form and
12 method for providing class-wide notice; (6) directing that notice of the proposed settlement be given
13 to the class; (7) appointing ILYM Group as Settlement Administrator, and (8) scheduling a final
14 approval hearing date to consider Plaintiff’s motion for final approval of the settlement and entry of the
15 Judgment, and Plaintiff’s motion for approval of attorneys’ fees and expenses.

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

20 As consideration for this Settlement, the Gross Settlement Amount is One Million Seven
21 Hundred Thousand Dollars (\$1,700,000) to be paid by Defendant in two installments, as set forth in
22 the Agreement. The Gross Settlement Amount will settle all issues pending in the Action between the
23 Parties, including both the class claims the PAGA claim, and will be made in full and final settlement
24 of the Released Class Claims. The Gross Settlement Amount includes all payments of Settlement
25 Shares to the Participating Class Members, Settlement Administration Expenses, Class Counsel Fees
26 Payment, Class Counsel Litigation Expenses Payment, Class Representative Service Payment, and the

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

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

4 On December 7, 2021, the Parties participated in an all-day mediation session presided over by
5 Louis Marlin, Esq., a respected and experienced mediator of wage and hour class actions. At the
6 conclusion of the mediation, the Parties reached an agreement to settle the Action based upon a
7 mediator's proposal. Decl. Nordrehaug at ¶5. The Settlement is fair, reasonable and adequate, and
8 should be preliminarily approved because there is a substantial monetary payment, and there are
9 substantial litigation and class-certification risks. Therefore, Plaintiff respectfully requests that this
10 Court grant preliminary approval of the Agreement and enter the proposed order submitted herewith.

11 **II. DESCRIPTION OF THE SETTLEMENT**

12 The Gross Settlement Amount is One Million Seven Hundred Thousand Dollars (\$1,700,000).
13 (Agreement at ¶ I(19).) Under the Settlement, the Gross Settlement Amount consists of the following
14 elements: (1) payment of the Settlement Shares to the Class; (2) Class Counsel Fees Payment and Class
15 Counsel Litigation Expenses Payment; (3) Settlement Administration Expenses; (4) Class
16 Representative Service Payment to the Plaintiff; and (5) the PAGA Payment. (Agreement at ¶ III(34)-
17 (36).) The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement
18 at ¶ III(34).) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement
19 at ¶ III(34).) Decl. Nordrehaug at ¶15.

20 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay
21 Defendant's share of payroll taxes in two installments. (Agreement at ¶ III(34).) Within thirty (30)
22 days following final approval of the settlement, Defendant shall pay the Settlement Administrator
23 \$850,000 of the Gross Settlement Amount, and then twelve (12) months following the payment of the
24 First Installment to the Settlement Administrator, Defendant shall pay the remaining \$850,000 of the
25 Gross Settlement Amount to the Settlement Administrator. (Agreement at ¶ III(34).) The Settlement
26 Shares to Participating Class Members will be mailed by the Settlement Administrator upon the receipt
27 of all funds. (Agreement at ¶ III(41).) Decl. Nordrehaug at ¶16.

28 The Net Settlement Amount shall equal the net amount available for payment to the Class after

1 deducting the Court-approved amounts for the Class Representative Service Payment, the Class
2 Counsel Fees Payment, Class Counsel Litigation Expenses Payment, the PAGA Payment, and the
3 Settlement Administration Expenses. (Agreement at ¶ I(21).) The Net Settlement Amount will be
4 distributed as the Settlement Shares to the Class Members who do not timely request exclusion
5 (“Participating Class Members”). (Agreement at ¶¶ I(24) and III(36)(i).) The Settlement Share will be
6 calculated as follows: (a) the Settlement Administrator shall divide the Net Settlement Amount by the
7 total number of weeks included in the dates of employment to determine a dollar amount per week
8 (“Weekly Rate”); and (iii) the Settlement Administrator shall then take the number of weeks worked
9 by each Participating Class Member and multiply it by the Weekly Rate to calculate their Settlement
10 Share. (Agreement at ¶ III(36)(j).) Workweeks will be based on Defendant’s records, however Class
11 Members will have the right to challenge the number of workweeks. Decl. Nordrehaug at ¶17.

12 Class Members may choose to opt-out of the Settlement by following the directions in the Class
13 Notice. (Agreement at ¶ III(38)(c)(iii), Ex. A.) All Class Members who do not "opt out" will be
14 deemed Participating Class Members who will be bound by the Settlement and will be entitled to
15 receive a Settlement Share. Aggrieved Employee who opt out the Settlement will still be paid their
16 allocation of the PAGA Payment, respectively, and will remain bound by the release of the Released
17 PAGA Claims, regardless of their request for exclusion. (Agreement at ¶ III(38)(c)(iii).) Finally, the
18 Class Notice will also advise the Class Members of their right to object to the Settlement and/or dispute
19 their workweeks. (Agreement at ¶ III(38)(c), Ex. A) Decl. Nordrehaug at ¶18.

20 A Participating Class Member must cash his or her Settlement Share check within 180 days
21 after it is mailed. (Agreement at ¶ III(42).) The Settlement Administrator will send a reminder to
22 Participating Class Members who have not cashed their checks 60 days before the expiration date.
23 (Agreement at ¶ III(42).) Any settlement checks not cashed within 180 days will be voided and any
24 funds from such uncashed checks will be paid to the California State Controller’s Unclaimed Property
25 Fund in the name of the Participating Class Member. (Agreement at ¶ III(42).) Decl. Nordrehaug at
26 ¶19.

27 The Parties have agreed to use ILYM Group as the Settlement Administrator. (Agreement at
28 ¶ III(37).) From the Gross Settlement Amount, the Settlement Administrator shall be paid for the

1 expenses of administering the Settlement in an amount not to exceed \$20,000. (Agreement at ¶
2 III(35)(h).) Decl. Nordrehaug at ¶20.

3 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
4 to exceed thirty percent (30%) of the Gross Settlement Amount, as the Class Counsel Fees Payment.
5 (Agreement at ¶ III(35)(f).) Class Counsel will also be allowed to apply separately for an award of
6 Class Counsel Litigation Expenses Payment in an amount not to exceed \$20,000. (Agreement at ¶
7 III(35)(f).) Subject to Court approval, the Agreement provides for a payment of no more than \$10,000
8 to the Plaintiff as the Class Representative Service Payment. (Agreement at ¶ III(35)(e).) Decl.
9 Nordrehaug at ¶21.

10 The Parties will seek approval from the Court for the PAGA Payment of \$50,000 out of the
11 Gross Settlement Amount, which shall be allocated 75% (\$37,500) to the LWDA as the LWDA's share
12 of the PAGA Payment pursuant to PAGA and 25% (\$12,500) will be distributed to the Aggrieved
13 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at ¶
14 III(35)(g).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be subject
15 to the release of the Released PAGA Claims, whether or not they opt out of the Settlement. (Agreement
16 at ¶ III(35)(g).) As set forth in the accompany proof of service, the LWDA is being served with this
17 motion and the Agreement. Decl. Nordrehaug at ¶22.

18 **III. CASE BACKGROUND**

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

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

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

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

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

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

25
26 ² California courts look to federal authority on class actions. *Vasquez v. Superior Court*, 4 Cal.3d
27 800, 821 (1971). "It is well established that in the absence of relevant state precedents trial courts are
28 urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure for
conducting class actions." *Frazier v. City of Richmond*, 184 Cal. App.3d 1491, 1499 (1986), citing
Green v. Obledo, 29 Cal.3d 126, 145-146 (1981).

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

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

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

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

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

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

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

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

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

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

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

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

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

23
24 ³ The release applicable to the Class is appropriately tethered to allegations in the Action and the
25 "Released Class Claims" are "all class claims that were pled in the operative complaint in the Action
26 or could have been plead based on the factual allegations contained in the operative complaint in the
27 Action that occurred during the Class Period, which includes the following claims based upon the facts
28 alleged in the operative complaint in the Action that occurred during the Class Period: (i) all claims for
unpaid overtime; (ii) all claims for meal and rest break violations; (iii) all claims for unpaid wages,
including minimum wages; (iv) all claims for failure to timely pay wages upon termination; (v) all
claims for the failure to reimburse necessary business expenses; (vi) all claims for failure to timely pay

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

9 The Parties attended an arms-length mediation session with Louis Marlin, a respected and
10 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
11 for the mediation, Defendant provided Class Counsel with necessary information for the members of
12 the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiff
13 analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and submitted
14 a mediation brief and damage valuation to the Mediator. At the conclusion of the all-day mediation,
15 the Parties agreed to this Settlement. The final settlement terms were negotiated and set forth in the
16 Agreement now presented for this Court's approval. Decl. Nordrehaug at ¶ 5. Importantly, Plaintiff
17 and Class Counsel believe that this Settlement is fair, reasonable and adequate.

18 As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is
19 One Million Seven Hundred Thousand Dollars (\$1,700,000). The Settlement is all-in with no reversion
20 to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

21 Class Counsel has conducted a thorough investigation into the facts of the class action. Over
22 the course of the litigation, Class Counsel has diligently evaluated the Class Members' claims against
23 Defendant. Prior to the settlement negotiations, counsel for Defendant provided Class Counsel with
24 access to necessary information for the Class. In addition, Class Counsel previously negotiated
25 _____
26 wages during employment; (vii) all claims for wage statement violations; (viii) all claims asserted
27 through California Business & Professions Code sections 17200, et seq., and expressly excluding all
28 other claims, including claims for wrongful termination, vested benefits, unemployment insurance,
disability, social security, and workers' compensation, and claims outside of the Class Period".
(Agreement at ¶ III(44)(a).)

1 settlements with other employers in actions involving nearly identical issues and analogous defenses.
2 Based on the foregoing data and their own independent investigation, evaluation and experience, Class
3 Counsel believes that the settlement with Defendant on the terms set forth in the Agreement is fair,
4 reasonable, and adequate and is in the best interest of the Class in light of all known facts and
5 circumstances, including the risk of significant delay, defenses asserted by Defendant, and potential
6 appellate issues. Decl. Nordrehaug at ¶ 14.

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

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

19 **2. The Settlement Has No "Obvious Deficiencies" and Falls Well Within** 20 **the Range for Approval**

21 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
22 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
23 receive payment according to the same formula. (Agreement at ¶ III(36).) The Gross Settlement
24 Amount provides an average value of \$2,668 per Class Member and \$25 per workweek, and after
25 deductions, the Net Settlement Amount provides an average recovery of \$1,711 per Class Member and
26 \$16 per work week. Decl. Nordrehaug, ¶6.

27 The calculations to compensate for the amount due to the Class Members at the time this
28 Settlement was negotiated were calculated by Plaintiff’s expert, Berger Consulting, in advance of

1 mediation. For the individuals whose claims are at issue in this Action, Plaintiff analyzed the data for
2 putative class members and determined the potential maximum damages for the class claims. For the
3 Class, Plaintiff determined that the unpaid minimum and overtime wages due to the alleged illegal
4 rounding was \$628,976, the maximum potential meal period damages were estimated to be \$2,730,136
5 based upon an 47% potential violation rate and after deducted in the meal premiums actually paid, the
6 maximum potential rest period damages were estimated to be \$5,697,827 based on a 100% violation
7 from an allege on duty policy, and, the maximum damages for unreimbursed expenses were estimated
8 to be \$84,991. In total, the damages for the Class were calculated to have a maximum total value of
9 \$9,111,600. In addition, Plaintiff calculated that the maximum value of the waiting time penalties were
10 \$1,174,663 and the maximum value of the wage statement penalties were between \$446,200 and
11 \$1,082,400, depending on the predicate violation giving rise to the penalty. These wage statement and
12 waiting time penalties claims potentially have a much smaller value, even if damages were awarded,
13 to the extent that they are only derivative of the meal and rest break claims.⁴ Decl. Nordrehaug, ¶6.

14 Consequently, the Gross Settlement Amount represents more than 18% of the value of the
15 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
16 proven in full at trial.⁵ The above maximum calculations should then be adjusted in consideration for
17 both the risk of certification and the risk of establishing class-wide liability on all claims. Given the
18 amount of the Settlement as compared to the potential value of the claims, the Settlement is most
19

20 ⁴ While Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
21 226, at mediation Plaintiffs recognized that these claims were subject to various defenses asserted by
22 Defendant, including, but not limited to, a good faith dispute defense as to whether any premium wages
23 for meal or rest periods or other wages were owed given Defendant's position that Plaintiffs were
24 properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There
25 is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether
26 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.

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

1 certainly fair and reasonable.⁶ Clearly, the goal of this litigation has been met. Decl. Nordrehaug, ¶6.

2 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
3 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
4 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
5 asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued that all
6 work time was paid for and that the rounding practice was lawful. Defendant contend that their meal
7 and rest period policies fully complied with California law and that Defendant's timekeeping system
8 recorded meal periods, and was not required to record rest periods. Defendant's records also evidence
9 the payment of missed meal premiums, and could therefore argue that any meal period violations were
10 compensated. Finally, Defendant could argue that the Supreme Court decision in *Brinker v. Superior*
11 *Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiff's claims, on liability, value, and class certifiability
12 as to the meal and rest period claims. Defendant also argues that based on their facially lawful
13 practices, they acted in good faith and without willfulness, which if accepted would negate the claims
14 for waiting time penalties and/or inaccurate wage statements. In fact, under the current state of the law,
15 it is questionable whether these penalties could be awarded at all based upon the alleged meal and rest
16 period violations. If successful, Defendant's defenses could eliminate or substantially reduce any
17 recovery to the Class. While Plaintiff believes that these defenses could be overcome, Defendant
18 maintains these defenses have merit and therefore present a serious risk to recovery by the Class. Decl.
19 Nordrehaug, ¶ 24.

20 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
21 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
22 Defendant argued that the individual experience of each putative class member varied with respect to
23

24 ⁶ 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*
26 *v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval
27 where "the proposed Total Settlement Amount represents approximately 10% of what class might have
28 been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D.
Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value);
Ma v. Covidien Holding, Inc., 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class
action settlement worth "somewhere between 9% and 18%" of full verdict value).

1 the claims. Defendant could also contest class certification by arguing injury and good faith were case
2 by case determinations that precluded class certification. Plaintiff is aware of cases where class
3 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
4 (2019) (denying certification of meal and rest break claims). Defendant also contended that individual
5 differences in work experiences not only impacted damages but would also impact certification.
6 Finally, even if class certification was successful, as demonstrated by the California Supreme Court
7 decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to
8 overcome for a class wide recovery even where the class has been certified. While other cases have
9 approved class certification in wage and hour claims, class certification in this action would have been
10 hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug, ¶ 25.

11 After arm's length negotiations between experienced and informed counsel, the Parties
12 recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of
13 \$1,700,000. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

14 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,
15 and likely duration of further litigation likewise favors the settlement. Regardless of
16 how this Court might have ruled on the merits of the legal issues, the losing party likely
17 would have appealed, and the parties would have faced the expense and uncertainty of
18 litigating an appeal. 'The expense and possible duration of the litigation should be
19 considered in evaluating the reasonableness of [a] settlement.'"

2007 WL 221862, at *4 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458
21 (9th Cir. 2000)).

22 **3. The Settlement Does Not Improperly Grant Preferential Treatment To** 23 **Class Representatives or Segments Of The Class**

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

Plaintiff will apply to the Court for Class Representative Service Payment in consideration for
the service and for the risks undertaken on behalf of the class. (Agreement at ¶ III(35)(e).) Plaintiff
performed their duty admirably by working with Class Counsel. Decl. Nordrehaug at ¶27. At this

1 stage, the requested service award of \$10,000 is well within the accepted range of awards for purposes
2 of preliminary approval. Decl. Nordrehaug at ¶35. See e.g. *Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018
3 U.S. Dist. LEXIS 71386 (E.D. Cal. 2018) (awarding \$12,500 where average class member payment was
4 \$351); *Holman v. Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014)
5 (approving \$10,000 service award where class member recovery was \$375); *Louie v. Kaiser*
6 *Foundation Health Plan, Inc.*, 2008 WL 4473183, *7 (S.D. Cal. 2008) (awarding \$25,000 service
7 award to each of six plaintiffs in overtime class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862,
8 *16-17 (N.D. Cal. 2007) (awarding \$25,000 service award in overtime class action and a pool of
9 \$100,000 in enhancements). As explained in *Glass*, service awards are routinely awarded to class
10 representatives to compensate the employees for the time and effort expended on the case, for the risk
11 of litigation, for the fear of suing an employer and retaliation there from, and to serve as an incentive
12 to vindicate the statutory rights of all employees. 2007 WL 221862 at *16-17.

13 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit** 14 **Preliminary Approval Of The Settlement**

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

24 Based on the foregoing data and their own independent investigation and evaluation, Class
25 Counsel is of the opinion that the Settlement with Defendant for the consideration and on the terms set
26 forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light
27 of all known facts and circumstances, including the risk of significant delay, defenses asserted by
28 Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both

1 parties possessed sufficient information to make an informed judgment regarding the likelihood of
2 success on the merits and the results that could be obtained through further litigation. Decl.
3 Nordrehaug at ¶29.

4
5 **V. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES ONLY**

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

10 All individuals who are or previously were employed by Defendant in California who
11 were classified as non-exempt employees at any time during the Class Period, and who
have previously not released their claims.

12 (Agreement at ¶ I(3).)

13 The “Class Period” is from June 23, 2017 through April 6, 2022. (Agreement at ¶ I(10).)

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

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

18 Code of Civil Procedure Section 382 authorizes class actions “when the question is one
19 of a common or general interest, of many persons, or when the parties are numerous,
20 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
21 a well-defined community of interest among class members. (*citations omitted*). The
“community of interest” requirement embodies three factors: (1) predominant common
22 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.

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

24 While Defendant reserves all rights to dispute that the Plaintiff can satisfy these requirements,
25 the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
26 for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
27 settlement only. (Agreement at ¶ II(33).)

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

2 Plaintiff brings this action on behalf of a Class of individuals during the applicable Class Period.
3 Plaintiff asserts that all of these individuals are ascertainable because the class members can readily be
4 determined through examination of Defendant’s files. Given that the Class consists of approximately
5 669 members, Plaintiffs maintain that numerosity is clearly satisfied. *See Bowles v. Superior Court*,
6 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126
7 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiffs
8 assert that the 669 current and former employees that comprise the Class can be identified based on
9 Defendant’s records and are sufficiently numerous for class certification. Decl. Nordrehaug at ¶30.

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

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

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

22 Here, Plaintiff contends that common questions of law and fact are present, and specifically the
23 common questions of whether Defendant’s rounding practice was lawful, whether the Defendant failed
24 to provide meal and rest periods, whether class members were lawfully compensated for all hours
25 worked, whether Defendant failed to provide required expense reimbursement, and whether Class
26 Members are entitled to damages and penalties as a result of these practices. Decl. Nordrehaug, ¶30.
27 Defendant disputes that common questions predominate but will not oppose such a finding for purposes
28 of this Settlement only.

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

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

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

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

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

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

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

7 Absent class treatment, each individual plaintiff would present in separate, duplicative
8 proceedings the same or essentially the same arguments and evidence, including expert
9 testimony. The result would be a multiplicity of trials conducted at enormous expense
10 to both the judicial system and the litigants. “It would be neither efficient nor fair to
11 anyone, including defendants, to force multiple trials to hear the same evidence and
12 decide the same issues.”

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

14 Here, Plaintiff contends that a class action is the superior mechanism for resolution of the claims
15 as pled by the Plaintiff. While Defendant disputes that class treatment is superior, Defendant does not
16 dispute a finding of superiority in this action for purposes of this Settlement only.

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

18 The Court has broad discretion in approving a practical notice program. The Parties have
19 agreed upon procedures by which the Class Members will be provided with written notice of the
20 Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance
21 with the Agreement, Defendant will provide to the Settlement Administrator a confidential electronic
22 spreadsheet containing the Class Data. (Agreement at ¶ III(38)(b).) Within 14 days after receiving the
23 Class Data, the Settlement Administrator will mail the Class Notice Packets to all Class Members via
24 first-class U.S. Mail using the most current mailing address information available. (Agreement at ¶
25 III(38)(b)(ii).) The Class Notice, drafted jointly and agreed upon by the Parties through their respective
26 counsel and to be approved by the Court, includes all relevant information. (See Exhibit “A” to the
27 Agreement.) The Class Notice will include, among other information: (i) information regarding the
28 Action; (ii) the impact on the rights of the Class Members if they do not opt out; (iii) information to the
Class Members regarding how to opt out and how to object to the Settlement; (iv) the estimated
Settlement Share for each of the Class Members; (iii) the amount of attorneys’ fees and expenses to be

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

4 The Class Notice will state that the Class Members shall have forty-five (45) days from the date
5 that the Notice is mailed to them to request exclusion (opt-out) or to submit an objection. (Agreement
6 at ¶ III(38)(c).) In the event of a re-mailing, this deadline will be extended by an additional 15 days.
7 Class Members shall be given the opportunity to object to the Settlement and/or requests for attorneys'
8 fees and expenses and to appear at the Final Approval Hearing. (Agreement at ¶ III(38)(c).) Class
9 Members who do not submit a timely and proper request to opt-out will automatically receive a
10 payment of their Settlement Share. This notice program was designed to meaningfully reach the Class
11 Members and it advises them of all pertinent information concerning the Settlement. Decl. Nordrehaug
12 at ¶32. The mailing and distribution of the Class Notice satisfies the requirements of due process and
13 is the best notice practicable under the circumstances and complies with Rules of Court 3.766 and
14 3.769(f).

15 **VII. CONCLUSION**

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

20
21 Dated: May 26, 2022

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

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