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13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **IN AND FOR THE COUNTY OF SAN BERNARDINO**
16

17 KEELAIN GONZALEZ, on behalf of
18 himself and on behalf of all persons
19 similarly situated, and on behalf of the
20 State of California, as a private attorney
21 general,

22 Plaintiff,

23 vs.

24 PACIFIC WESTERN BANK, a
25 California Corporation; DOES 1 through
26 50, inclusive,

27 Defendants.

CASE No. **CIVSB2127657**
[Related Case: CIVSB2127696]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR FINAL APPROVAL OF CLASS
SETTLEMENT, ATTORNEYS' FEES, COSTS
AND SERVICE AWARD**

Hearing Date: June 20, 2023
Hearing Time: 10:00 a.m.
[Hearing scheduled by Order dated February 6,
2023]

Judge: Hon. David Cohn
Dept.: S26

Action Filed: September 29, 2021
Trial Date: Not Set

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1 **I. INTRODUCTION**

2 The parties to this action have reached a Settlement and the Court preliminarily approved the
3 Class Action and PAGA Settlement Agreement (the “Agreement”), a true and correct copy of which
4 is attached as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In
5 accordance with the Preliminary Approval Order dated February 6, 2023 (“Preliminary Approval
6 Order”), the approved Class Notice has been disseminated to the Class.²

7 The purpose of this hearing is to determine whether the proposed settlement of the litigation
8 should be finally approved. Plaintiff Keelain Gonzalez (“Plaintiff”) respectfully submits moves for
9 final approval, including attorneys’ fees, costs and the service award, and the proposed entry of the
10 Final Approval Order and Judgment, submitted herewith. The settlement represents an excellent result
11 for the Class and avoids the delays, risks, and costs of further litigation. After disseminating the notice
12 to the members of the Class, there were **no objections and only two (2) requests for exclusion**, which
13 means that almost the entire Class has elected to participate in the Settlement. Blumenthal Decl. ¶4.
14 This is a positive response from the Class evidencing their collective approval of the settlement. As
15 a result, Plaintiff respectfully submits that the class settlement should be finally approved for the same
16 reasons that the Court preliminarily approved the settlement as fair, reasonable, and adequate.

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

18 Pursuant to the Court’s instructions, the following is a table of the key financial terms of the
19 Settlement and the proposed deductions:

20 **\$2,600,000** (Gross Settlement Amount)
21 - \$10,000 (Plaintiff’s proposed service award not to exceed \$10,000)
22 - \$22,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
23 - \$866,666 (Class Counsel Fees Payment - not to exceed 1/3 amount)
24 - \$60,000 (PAGA Payment - 75% to LWDA / 25% to Aggrieved Employees)
25 - \$22,990 (Settlement Administration Expenses)
26 **\$1,618,344** (Net Settlement Amount)

27 ¹ Capitalized terms are defined in the Agreement.

28 ² The “Class” is defined as “all individuals who are or previously were employed by Defendant
Pacific Western Bank in California who were classified by hourly, non-exempt employees at any time
during the Class Period.” The “Class Period” is defined as “October 1, 2018 through November 3,
2022.” (Preliminary Approval Order at 3:16-19.)

1 Plaintiff and Defendant Pacific Western Bank (“Defendant”) reached a full and final settlement
2 of the above-captioned action, which is embodied in the Agreement filed concurrently with the Court.
3 As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is Two
4 Million Six Hundred Thousand Dollars (\$2,600,000). (Agreement at ¶¶ 1.22 and 3.1.) Under the
5 Settlement, the Gross Settlement Amount consists of the following elements: (1) payment of the
6 Individual Class Payments to the Participating Class Members; (2) Class Counsel Fees Payment and
7 Class Counsel Litigation Expenses Payment; (3) Administration Expenses Payment; (4) the Class
8 Representative Service Payment to Plaintiff; and (5) the PAGA Penalties. (Agreement at ¶ 1.22.)
9 Blumenthal Decl. ¶3(a). The Gross Settlement Amount does not include Defendant’s share of payroll
10 taxes. (Agreement at ¶ 3.1.) The Gross Settlement Amount shall be all-in with no reversion to
11 Defendant. (Agreement at ¶ 3.1.) Blumenthal Decl. ¶3(b).

12 Within fifteen (15) days of the Effective Date, Defendant shall deposit the Gross Settlement
13 Amount with the Administrator. (Agreement at ¶ 4.3.) Thereafter, the distribution of Individual Class
14 Payments to Participating Class Members shall be made by the Administrator within fourteen (14) days
15 after Defendant funds the Gross Settlement Amount. (Agreement at ¶ 5.1.) Blumenthal Decl. ¶3(c).

16 The specific details of the Settlement terms were discussed in the Motion for Preliminary
17 Approval and are set forth again in the Declaration of Blumenthal at ¶¶ 3(d)-3(i).

18 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
19 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
20 is “fair, adequate, and reasonable”. (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
21 at \$2,600,000 is an excellent result for the Class. This result is particularly favorable in light of the fact
22 that liability and class certification in this case were far from certain in light of the defenses asserted
23 by Defendant. Given the complexities of this case, the defenses asserted, the uncertainty of class
24 certification, along with the uncertainties of proof at trial and appeal, the proposed settlement is fair,
25 reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

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

1 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
2 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
3 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*
4 *v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
5 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

6 The court must decide whether the proposed settlement falls within the range of reasonable
7 settlements, taking into account that settlements are compromises between the parties reflecting
8 subjective, unquantifiable judgments concerning the risks and possible outcomes of litigation. *See*
9 *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) ("The proposed settlement is not to be
10 judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs
11 prevailed at trial.") In *Wershba*, the Court explained that "the merits of the underlying class claims are
12 not a basis for upsetting the settlement of a class action." *Id.*; *see also 7-Eleven, supra*, at 1150.

13 In these cases, courts have repeatedly emphasized that there is a strong initial presumption that
14 the compromise is fair and reasonable. *Wershba*, 91 Cal. App. 4th at 245. Courts should not substitute
15 their judgment for that of the parties who negotiated the settlement. *Id.* at 246. The presumption of
16 fairness exists where: (1) investigation and discovery are sufficient to allow counsel and the court to
17 act intelligently; (2) the settlement is reached through arm's-length bargaining; (3) counsel is
18 experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk v. Ford Motor Co.*,
19 48 Cal. App. 4th 1794, 1801 (1996). Here, the facts and circumstances compel the conclusion that the
20 proposed settlement satisfies that standard and the presumption applies.

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

22 The Court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v.*
23 *Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); *see also Officers for Justice v. Civil Service*
24 *Com'n*, 688 F.2d 615, 625 (9th Cir. 1982). The trial court has broad discretion to determine whether
25 the settlement is fair. *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). "The
26 well-recognized factors that the trial court should consider in evaluating the reasonableness of a class
27 action settlement agreement include 'the strength of plaintiffs' case, the risk, expense, complexity and
28 likely duration of further litigation, the risk of maintaining class action status through trial, the amount

1 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
2 experience and views of counsel, the presence of a governmental participant, and the reaction of the
3 class members to the proposed settlement.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116,
4 128 (2008) (internal citations omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L. A.*, 186 Cal.
5 App. 4th 399, 408 (2010).

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

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

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

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

18 Over the course of more than one year of litigation, the Parties engaged in the investigation of
19 the claims, including the production of documents, class data, and other information, allowing for the
20 full and complete analysis of liabilities and defenses to the claims in this Action. The procedural history
21 and investigation performed was detailed at length in support of the motion for preliminary approval.
22 The Settlement was the product of one arms-length mediation and contentious negotiations through an
23 all-day mediation presided over by Louis Marlin, Esq., a respected and experience mediator of wage
24 and hour class actions. The details of the litigation are set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(g).

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

26 This settlement is the result of extensive and hard-fought litigation as well as negotiations
27 before an experienced and well-respected mediator. Defendant has expressly denied and continues to
28 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and

1 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released
2 Class Claims of the Class in accordance with this Settlement, based upon the experience of Class
3 Counsel who has previously litigated similar claims against other employers. Blumenthal Decl. ¶7(a).

4 The Parties attended an arms-length mediation session with Louis Marlin, a respected and
5 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
6 for the mediation, Defendant provided to Plaintiff and Class Counsel payroll and employment data and
7 other information regarding the Class Members, various internal documents, and other compensation
8 and employment-related materials. Class Counsel analyzed the data with the assistance of damages
9 expert Berger Consulting and prepared and submitted a mediation brief to the mediator. Following this
10 all-day mediation, the Parties agreed to this Settlement. Blumenthal Decl. ¶7(b).

11 The fact that the settlement was negotiated with the assistance of an experienced mediator
12 supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS*
13 *Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
14 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the
15 litigation, with the assistance of a well-respected mediator with substantial experience in employment
16 litigation[, and] this factor supports approval of the settlement”).

17 From October 2022 to December 2022, the settlement agreement and exhibits thereto were
18 finalized and executed. On February 6, 2023, the Court issued its Order granting preliminary approved
19 of the settlement as fair and reasonable to the Class. Blumenthal Decl. ¶7(c).

20 3. Class Counsel is Experienced in Similar Litigation

21 Class Counsel in this matter has extensive class action experience and has represented thousands
22 of persons in class actions including employment litigation, wage and hour class actions, and complex
23 litigation. Class Counsel has previously litigated wage and hour class actions involving employees and
24 claims similar to this case and have been approved as experienced class counsel during contested
25 motions in state and federal courts throughout California. The experience of counsel and class action
26 cases managed and settled by the Class Counsel in this action is provided to the Court in the
27 Blumenthal Decl. at Exhibit #1. Class Counsel have participated in every aspect of the settlement
28

1 discussions and have concluded the settlement is fair, adequate and reasonable and in the best interests
2 of the Class. Blumenthal Decl. ¶ 3(j).

3 4. There Are No Objections and Only Two Requests for Exclusion

4 The reaction of the Class unequivocally supports approval of the Settlement. On March 6, 2023,
5 the Administrator mailed the Court-approved Class Notice to the Class Members, which provided each
6 class member with the terms of the Settlement, including notice of the claims at issue and the financial
7 terms of the settlement, including the attorneys' fees, costs, and service award that were being sought,
8 how individual settlement awards would be calculated, and the specific, estimated payment amount to
9 that individual. See Nava Decl. ¶ 7, Exh. A. In disseminating the notice, the Administrator followed
10 the notice procedures authorized by the Court in its Preliminary Approval Order. Significantly, there
11 have been no objections and only two (2) valid requests to opt-out. Nava Decl. ¶¶ 11-12. As such,
12 nearly the entire Class will participate in the Settlement and will be sent a settlement check. *See* Nava
13 Decl. at ¶¶ 11-12; Blumenthal Decl. ¶4.

14 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
15 Settlement. *See In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
16 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
17 indicative of the adequacy of the settlement."); *Stoetznier v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
18 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l*
19 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
20 settlement should be considered when determining fairness of settlement). Here, where there are no
21 objections, the approval of the class is evident.

22 5. The Strength of Plaintiff's Case

23 The Action generally alleges that Plaintiff and other Class Members were not properly paid all
24 overtime wages for hours worked, were not provided meal and rest periods, were not timely paid earned
25 wages, were not provided reimbursement for required expenses, were not provided accurate itemized
26 wage statements, were not paid all wages at the time of termination. The Action seeks unpaid wages,
27 penalties, attorney fees, litigation costs, and any other equitable or legal relief allegedly due and owing
28 to Plaintiff and the other Class Members by virtue of the foregoing claims. Blumenthal Decl. ¶5.

1 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
2 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
3 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
4 asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued that all
5 work time was paid for and that the regular rate was properly calculated when paying wages.
6 Defendant contend that their meal and rest period policies fully complied with California law and that
7 Defendant's timekeeping system recorded meal periods, and was not required to record rest periods.
8 As to expenses reimbursement, Defendant contended that it did not fail to pay for business expenses
9 and any cell phone usage was merely convenient and voluntary such that reimbursement was not legally
10 required. Finally, Defendant could argue that the Supreme Court decision in *Brinker v. Superior Court*,
11 53 Cal. 4th 1004 (2012), weakened Plaintiff's claims, on liability, value, and class certifiability as to
12 the meal and rest period claims. Defendant also argues that based on their facially lawful practices,
13 they acted in good faith and without willfulness, which if accepted would negate the claims for waiting
14 time penalties and/or inaccurate wage statements. If successful, Defendant's defenses could eliminate
15 or substantially reduce any recovery to the Class. While Plaintiff believes that these defenses could be
16 overcome, Defendant maintains these defenses have merit and therefore present a serious risk to
17 recovery by the Class. Blumenthal Decl. ¶8(a).

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

20 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
21 Defendants strongly deny liability for Plaintiffs' principal claim... [...T]he gross
22 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.

23 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
24 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
25 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
26 approval."). As recognized in a federal decision approving settlement of an overtime wage class action:

27 The potential complexity and possible duration of trial also weigh in favor of granting
28 final approval. Plaintiffs acknowledge the difficulties of proving damages, recognize the
uncertainty of outcome, and believe defendant would appeal in the event of adverse

1 judgment. A post-judgment appeal would require many years to resolve and delay
2 payment to class members. Plaintiffs believe the benefits of a guaranteed recovery today
3 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.

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

6 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
7 to maintain a certified class through trial or demonstrate that the PAGA claim is manageable, and
8 thereby not recover on behalf of any employees other than himself. At the time of the mediation,
9 Defendant continued to forcefully oppose the propriety of class certification, arguing that individual
10 issues precluded such findings. Further, as demonstrated by the California Supreme Court decision in
11 *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome for
12 a class-wide recovery even where the class has been certified. While other cases have approved class
13 certification in wage and hour claims, class certification in this action was hotly disputed and the
14 maintenance of a certified class through trial was by no means a foregone conclusion. Blumenthal
15 Decl. ¶8(b).

16 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
17 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
18 substantial defenses both to liability and to class certification. The maximum and average class
19 member allocation (including their Individual PAGA Payment) are \$2,527.30 and \$1,180.16,
20 respectively. *See* Nava Decl. ¶14. Given the complexities of this case, the defenses, along with the
21 uncertainties of proof and appeal, the proposed Settlement is fair, reasonable and adequate, and should
22 be finally approved. Blumenthal Decl. at ¶8(e).

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

24 As demonstrated by the decision in *Duran*, the complexities and duration of further litigation
25 cannot be overstated. There is little doubt that Defendant would post a bond and appeal in the event
26 of an adverse judgment. A post-judgment appeal by Defendant would have required many more years
27 to resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the
28

1 case could have dragged on for years after the appeal. The benefits of a guaranteed recovery today
2 outweigh an uncertain result three or more years in the future. Blumenthal Decl. ¶8(c).

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

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

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

24 *Id.* at *12.

25 7. The Amount Offered in Settlement

26 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
27 to Plaintiff's claims. As set forth in the Declaration of Nordrehaug in support of preliminary approval
28 which discussed the value of the class claims in detail, the Gross Settlement Amount compares
favorably to the value of the claims. Based upon 1,381 Class Members who collectively worked
131,808 work weeks, the Net Settlement Amount provides an average recovery of \$1,171 per Class
Member and a recovery of \$12.27 per work week. The 25% allocation of the PAGA Penalties will be

1 distributed to the 1,139 Aggrieved Employees who worked 38,532 pay periods during the PAGA
2 Period, resulting in an average Individual PAGA Payment of \$13.16 per Aggrieved Employee and
3 \$0.38 per PAGA Pay Period. Blumenthal Decl. at ¶8(d).

4 The calculations to compensate for the amount due for the Class at the time of the mediation
5 were calculated by Berger Consulting, Plaintiff's damage expert. As to the Class whose claims are at
6 issue in this Action, Plaintiff used the expert to analyze the data and determine the potential unpaid
7 wages for the employees. The maximum potential damages were calculated to be \$141,966 for the
8 alleged unpaid wages due to the regular rate calculation, \$8,522 for the alleged unpaid meal premiums
9 due to the regular rate calculation, \$45,334 for alleged unpaid sick pay due to the regular rate
10 calculation, \$4,284,995 for alleged meal period damages based upon a 25% violation rate, \$4,420,961
11 for alleged rest period damages based upon the same 25% violation rate, \$717,024 for alleged unpaid
12 off-the-clock work, \$346,453 for alleged time rounding deficiencies, \$346,580 for alleged
13 unreimbursed business expenses. As a result, the total damage valuation was therefore calculated that
14 Defendant was subject to a maximum damage claim in the amount of \$10,311,835. As to potential
15 penalties, Plaintiff calculated that wage statement penalties were a maximum of \$2,685,000 and
16 potential waiting time penalties were \$2,591,802. Blumenthal Decl. ¶8(d).

17 Consequently, the Gross Settlement Amount of \$2,600,000 represents more than 25% of the
18 maximum value of the alleged damages at issue in this case at the time this Settlement was negotiated,
19 assuming these amounts could all be proved in full at trial.³ Given the amount of the settlement as
20 compared to the potential value of claims in this case and the defenses asserted by Defendant, this
21 settlement is fair and reasonable.⁴ Blumenthal Decl. ¶8(d).

22
23 ³ The PAGA claim was addressed in the motion for preliminary approval in the Declaration of
24 Nordrehaug at ¶33.

25 ⁴ See *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. 2007) (approving a
26 settlement where the settlement amount constituted approximately 25% of the estimated overtime
27 damages for the class); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12
28 (N.D. Cal. 2015) (granting final approval where "the proposed Total Settlement Amount represents
approximately 10% of what class might have been awarded had they succeeded at trial."); *Dunleavy
v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (affirming approval
of a class settlement which represented "roughly one-sixth of the potential recovery".) See also *Viceral*

1 **V. THE REQUESTED ATTORNEYS' FEES, COSTS AND SERVICE AWARD SHOULD**
2 **BE APPROVED**

3 **A. The Attorneys' Fees are Reasonable and Supported by the Percentage of the Fund**
4 **Method**

5 Class Counsel seeks a fee award calculated at one-third (1/3) of the total value of the settlement
6 for the successful prosecution and resolution of this action. California state and federal courts have
7 recognized that an appropriate method for determining award of attorneys' fees is based on a
8 percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple*
9 *Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977; *Boeing*
10 *Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th
11 Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment to the Class and to
12 "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does
13 not bear the entire burden alone." *Vincent*, 557 F.2d at 769.

14 The California Supreme Court has provided guidance regarding the award of attorneys' fees in
15 wage and hour class action settlements. Under California law, the award of attorneys' fees in common
16 fund wage and hour class action settlements should start with the percentage method. See *Laffitte v.*
17 *Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state
18 courts in holding that when class action litigation establishes a monetary fund for the benefit of the
19 class members, and the trial court in its equitable powers awards class counsel a fee out of that fund,
20 the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
21 fund created"). Under the percentage of the fund method, a court's objective remains to "mimic the
22 market" in fixing a reasonable fee. See *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998).

23 First, the fee award representing one-third of the fund clearly falls within that range and is
24 consistent with other rulings of other courts and comprehensive surveys of class action settlements and
25 fee awards. Attorneys' fees awards of one-third of the fund are within the expected range in the market

26 _____
27 *v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D. Cal. 2016) (approving wage and hour class action
28 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 in legal services. See Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Award*,
2 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that
3 “[m]ost fee awards were between 25 percent and 35 percent”). Such similar awards by other Courts
4 are set forth in the Blumenthal Decl. ¶11.

5 Second, the results delivered by Class Counsel also support the requested percentage of the
6 fund. Here, Plaintiffs and their counsel secured a \$2,600,000 settlement for the benefit of the Class and
7 only 0.14% of the Class chose to opt out. Zero Class Members chose to object. The Settlement was
8 possible only because Class Counsel was able to convince Defendant that Plaintiff could potentially
9 prevail on the contested issues regarding liability, maintain class certification, overcome difficulties
10 in proof as to monetary relief and take the case to trial if need be. Blumenthal Decl. ¶10(f). In
11 successfully navigating these hurdles Class Counsel displayed the necessary skills in both wage and
12 hour and class action litigation. Moreover, as discussed above, there were significant risks to the
13 contingent litigation. See *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal.
14 2013) (“**Like this case, where recovery is uncertain, an award of one-third of the common fund**
15 **as attorneys' fees has been found to be appropriate.**”)

16 Third, “the response of the class members to attorneys’ fee notice, though not decisive, is
17 relevant to the ... reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d 1261,
18 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s “approximation of the
19 market” for fees is well supported. *Id.* at 1269. Here, the Class Notice specifically notified the Class
20 that Class Counsel would be seeking a one-third fee award. Again, there were no objections.

21 Fourth, it is recognized that one of the primary factors justifying an enhanced attorney’s fees
22 reward is the attendant risks inherent in the litigation. As observed in *City of Detroit v. Grinnell Corp.*:

23 No one expects a lawyer whose compensation is contingent upon his success to charge, when
24 successful, as little as he would charge a client who had agreed to pay for his services,
regardless of success. Nor, particularly in complicated cases producing large recoveries, is it
25 just to make a fee depend solely on the reasonable amount of time expended.

26 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of \$2,600,000 has been created.
27 For Class Counsel, the fees here were wholly contingent in nature and the case presented far more risk
28 than the usual contingent fee case. Among the risks was the cost inherent in class action litigation, as

1 well as a long battle with a corporate Defendant who had retained a premier and highly experienced
2 defense firm. **Counsel retained on a contingency fee basis, whether in private matters or in class**
3 **action litigation, is entitled to a premium above their hourly rate in order to compensate for both**
4 **the risks and the delay in payment.** See e.g. *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741
5 (9th Cir. 2016) (courts "must" apply a risk enhancement); *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th
6 Cir. 2016) (abuse of discretion not to apply risk multiplier).

7 Fifth, the requested fee award is supported by the lodestar cross-check. The reasonableness of
8 the requested attorneys' fee of one-third equal to \$866,666 is also established by reference to Class
9 Counsel's lodestar in this matter. **The contemporaneous billing records for Class Counsel evidence**
10 **that through May 23, 2023, Class Counsel's total lodestar is \$219,641**, with significant additional
11 fees still to be incurred to complete final approval and the settlement process. (Blumenthal Decl. at ¶12
12 and Exhibits #3 and 4.) The requested fee award is therefore currently equivalent to Class Counsel's
13 total lodestar with a multiplier of 3.9, and there will be additional lodestar incurred by Class Counsel
14 to complete the settlement process and manage the settlement distribution and reports. (Blumenthal
15 Decl. at ¶12.) Such a multiplier is within the range of multipliers approved in other cases such as
16 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002).⁵

17 For such reasons, Class Counsel's request for attorneys' fees in the amount of one-third is fair, of
18 the common fund is reasonable and should be approved.

19 **B. The Reimbursement of Litigation Expenses**

20 The Agreement provides at paragraph 3.2(b), that Class Counsel may seek a "Class Counsel
21 Litigation Expenses Payment of not more than \$22,000." Class Counsel requests reimbursement for
22 incurred litigation expenses and costs in the amount of \$21,470.33 based upon counsel's billing records.

23
24 ⁵ See *Laffitte, supra*, 1 Cal. 5th at 487 (approving 1/3 fee award with multiplier of 2.13); *Vizcaino*
25 *supra*, at 1051 (3.65 multiplier approved); *Pellegrino v. Robert Half Intern., Inc.*, 182 Cal.App.4th 278
26 (2010) (in class actions reasonable multipliers of 2.0 to 4.0 are often applied); *Wershba v. Apple*
27 *Computer*, 91 Cal. App. 4th 224, 255 (2001) ("multipliers can range from 2 to 4 or even higher."); *In*
28 *re Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512 (2009) (affirming multiplier of
2.52 as "fair and reasonable"); *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66 (2008) (affirming
multiplier of 2.53 as well within the approved range of 2 to 4); *Taylor v. Fedex Freight, Inc.*, 2016 U.S.
Dist. LEXIS 142202 (E.D. Cal. 2016) (2.26 multiplier).

1 This requested amount is less than the not-to-exceed amount identified in the Agreement and the
2 difference will remain in the Net Settlement Amount for distribution to the Class. These litigation
3 expenses include the expenses incurred for filing fees, mediation expenses, expert expenses (Berger
4 Consulting), and attorney service charges (Knox, Onelegal, CaseAnywhere), and appearance fees, all
5 of which are costs normally billed to and paid by the client.⁶ The details of the litigation expenses
6 incurred are set forth the Blumenthal Decl. at ¶13 and Exhibits #3 and 5. These costs were reasonably
7 incurred in the prosecution of the Action.(Blumenthal Decl. at ¶13.) Because these costs were
8 reasonable and necessary to the successful prosecution of these claims, the request is reasonable and
9 should be granted.

10 **C. The Service Award Is Reasonable and Should be Approved**

11 Plaintiff respectfully submit that for his service as the class representative, Plaintiff should be
12 awarded the agreed service award of \$10,000, in accordance with the Agreement for her time, risk and
13 effort expended on behalf of the Class as the class representative. (Agreement at ¶ 3.2(a).) Defendant
14 has agreed to this payment and there have been no objections to the requested service award. The
15 Blumenthal Decl., at ¶14, provides a long list of equivalent service awards approved in California in
16 similar cases, which further supports the request in this case. The Declarations of Plaintiff is submitted
17 in support of this request and is attached as Exhibit #6 to the Blumenthal Decl.

18 As the representative of the Class, Plaintiff performed his duty to the Class admirably and
19 without exception. Plaintiff worked extensively with Class Counsel during the course of the litigation,
20 responding to numerous requests, searching for documents, working with counsel, and reviewing the
21 settlement documentation. (Blumenthal Decl. at ¶ 14.) As set forth in the Agreement, the Plaintiff is
22 also providing a comprehensive release as part of the Settlement, far beyond the class release. The
23 Declaration of Plaintiff details the involvement, stress and risks he undertook as a result of this Action.
24 Plaintiff also assumed the serious risk that she might possibly be liable for costs and fees to Defendant,

25
26 ⁶ Nontaxable costs are properly awarded where authorized by the parties' agreement. *Stetson*, 821
27 F.3d at 1165. Accordingly, "[e]xpenses such as reimbursement for travel, meals, lodging,
28 photocopying, long-distance telephone calls, computer legal research, postage, courier service,
mediation, exhibits, documents scanning, and visual equipment are typically recoverable." *Rutti v.*
Lojack Corp., Inc., 2012 WL 3151077, at *12 (C.D. Cal. 2012).

1 as well as the reputational risk of being “blacklisted” by other future employers for having filed a class
2 action on behalf of fellow former employees. (Blumenthal Decl. at ¶15.) Without the Plaintiff’s
3 participation, cooperation and information, no other employees would be receiving any benefit.
4 (Blumenthal Decl. at ¶¶ 15-16).

5 The payment of service awards to successful class representatives is appropriate and the amount
6 of \$10,000 is well within the currently awarded range for similar settlements. *See e.g. Mathein v. Pier*
7 *1 Imps.*, 2018 U.S. Dist. LEXIS 71386, 168 Lab. Cas. (CCH) P36,620 (E.D. Cal. 2018) (approving two
8 service awards of \$12,500 each); *Holman v. Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS
9 173698 (approving \$10,000 service award where class member recovery was \$375); *Bellinghausen v.*
10 *Tractor Supply Co.*, 306 F.R.D. 245, 268 (N.D. Cal. 2015) (approving \$10,000 award). Accordingly,
11 Class Counsel respectfully request approval of the requested Class Representative Service Payment in
12 accordance with the Agreement.

13 **VI. CONCLUSION**

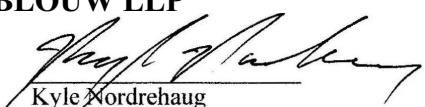
14 Plaintiff respectfully submits that the proposed settlement satisfies the standard of fairness
15 established in California law and should therefore be finally approved as fair, reasonable and adequate
16 and requests entry of the Final Approval Order and Judgment, submitted herewith.

17 Respectfully submitted,

18 Dated: May 23, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

19 By:


20 Kyle Nordrehaug

21 Attorneys for Plaintiff
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