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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO**

AL-JERONE GREEN, TIFFANY
MANJARES and DOANYA
PUCCINI, individuals, on behalf of
themselves and on behalf of all persons
similarly situated,

Plaintiffs,

vs.

FIVE KEYS SCHOOLS AND
PROGRAMS, a California Corporation,
and DOES 1 through 50, inclusive,

Defendants.

AL-JERONE GREEN, TIFFANY
MANJARES and DOANYA PUCCINI,
on behalf of the State of California, as
private attorney generals

Plaintiffs,

vs.

FIVE KEYS SCHOOLS AND
PROGRAMS, a California Corporation,
and DOES 1 through 50, inclusive,

Defendants

Case No. CGC-21-596165
(Consolidated with Case No. CGC-21-596167)

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

Hearing Date: October 4, 2023

Hearing Time: 9:30 a.m.

*[Hearing scheduled by Order dated March 29, 2023
at paragraph 12; and rescheduled by Order dated
August 3, 2023]*

Judge: Hon. Richard B. Ulmer
Dept: 302

Action Filed: October 20, 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 Settlement Agreement (the “Agreement”), a true and correct copy of which is attached
4 as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In accordance with the
5 Preliminary Approval Order dated March 29, 2023 (“Preliminary Approval Order”) and the Order dated
6 August 3, 2023, 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. Plaintiffs Al-Jerone Green, Tiffany Manjares, and Doanya Puccini
9 (“Plaintiffs”) respectfully submit this memorandum in support of the unopposed motion for final
10 approval and the proposed entry of the Final Approval Order and Judgment, submitted herewith. The
11 settlement represents an excellent result for the Class and avoids the delays, risks, and costs of further
12 litigation. The Class Notice was disseminated to the Class, and there were no objections and only one
13 (1) request for exclusion, which means that nearly the entire Class (99.95%) has elected to participate
14 in the Settlement. Blumenthal Decl. ¶4. This is a positive response from the Class evidencing their
15 collective approval of the settlement. As a result, Plaintiffs respectfully submits that the class settlement
16 should be finally approved for the same reasons that the Court preliminarily approved the settlement
17 as fair, reasonable, and adequate.

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

19 Plaintiffs and Defendant Five Keys Schools and Programs (“Defendant”) reached a full and
20 final settlement of the above-captioned action, which is embodied in the Agreement filed concurrently
21 with the Court. As consideration for this Settlement, the Gross Settlement Amount is Two Million Four
22 Hundred Fifty Thousand Dollars (\$2,450,000.00). (Agreement at ¶ I(19).) Under the Settlement, the
23 Gross Settlement Amount consists of the following elements: (1) payment of the Settlement Shares to
24 _____

25 ¹ Capitalized terms are defined in the Agreement.

26 ² The “Class” is defined as “all individuals who are or previously were employed by Defendant in
27 California who were classified as hourly, non-exempt employees at any time during the Class Period.”
28 The “California Class Period” is October 20, 2017 through August 11, 2022. (Preliminary Approval
 Order, ¶ 5)

1 the Class; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3)
2 Settlement Administration Expenses; (4) Class Representative Service Payments to the Plaintiffs; and
3 (5) the PAGA Payment. (Agreement at ¶ I(19).) Blumenthal Decl. ¶3(a). The following is a table of
4 the key financial terms of the Settlement and the proposed deductions:

5 **\$2,450,000** (Gross Settlement Amount)

- 6 - \$30,000 (Plaintiffs' proposed service awards - not to exceed \$10,000 each)
- 7 - \$17,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- 8 - \$816,666 (Class Counsel Fees Payment - not to exceed amount)
- 9 - \$50,000 (PAGA Payment - 75% to LWDA / 25% to Aggrieved Employees)
- 10 - \$25,000 (Administration Expenses Payment - not to exceed amount)

11 **\$1,511,334** (Net Settlement Amount)

12 The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement
13 at ¶ III(39).) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement
14 at ¶ III(39).) Blumenthal Decl. ¶3(b).

15 Defendant shall fund the Gross Settlement Amount and the amount necessary to pay
16 Defendant's share of payroll taxes within fifteen (15) days of the Effective Date. (Agreement at ¶
17 III(46).) The Settlement Shares to Participating Class Members will be mailed by the Settlement
18 Administrator fifteen (15) days after Defendant fully funds the Gross Settlement Amount. (Agreement
19 at ¶ III(46).) Blumenthal Decl. ¶3(c).

20 The Net Settlement Amount shall equal the net amount available for payment to the Class after
21 deducting the Court-approved amounts for the Class Representative Service Payments, the Class
22 Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, the PAGA Payment, and the
23 Settlement Administration Expenses. (Agreement at ¶ I(21).) The Net Settlement Amount will be
24 distributed as the Settlement Shares to the Class Members who do not timely request exclusion
25 ("Participating Class Members"). (Agreement at ¶¶ I(24), III(41).) The Settlement Share will be
26 calculated as follows: (a) the Settlement Administrator shall divide the Net Settlement Amount by the
27 total number of weeks included in the dates of employment to determine a dollar amount per week
28 ("Weekly Rate"); and (b) the Settlement Administrator shall then take the number of weeks worked by
each Participating Class Member and multiply it by the Weekly Rate to calculate their Settlement
Share. (Agreement at ¶ III(41)(b).) Workweeks were based on Defendant's records, however Class
Members had the right to challenge the number of workweeks. Blumenthal Decl. ¶ 3(d).

1 Class Members were sent the Court approved Class Notice using the procedure approved by the
2 Court by mailing the notice packets after updating class members' addresses using the National Change
3 of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
4 any forwarding address provided or updated address located. (Agreement at ¶ III(43)(c), Ex. A.) Class
5 Members were provided with the opportunity to exclude themselves or "opt out" if they did not want
6 to participate in the settlement. (Agreement at ¶ III (43)(c), Ex. A.) The Class Notice also advised
7 Class Members of their right to object to the Settlement and/or dispute their workweeks. (Agreement
8 at ¶ III(43)(c), Ex. A.) Blumenthal Decl. ¶ 3(e).

9 A Participating Class Member must cash his or her Settlement Share check within 180 days
10 after it is mailed. (Agreement at ¶ III(47).) The Settlement Administrator will send a reminder to
11 Participating Class Members who have not cashed their checks 60 days before the expiration date.
12 (Agreement at ¶ III(47).) Any settlement checks not cashed within 180 days will be voided and any
13 funds from such uncashed checks will be paid to the California State Controller's Unclaimed Property
14 Fund in the name of the individual who failed to cash their check. (Agreement at ¶ III(47).)
15 Blumenthal Decl. ¶3(f).

16 ILYM Group was appointed as the Settlement Administrator. (Agreement at ¶ III(42);
17 Preliminary Approval Order at ¶ 9.) From the Gross Settlement Amount, the Settlement Administrator
18 shall be paid for the expenses of administering the Settlement in an amount not to exceed \$25,000.
19 (Agreement at ¶ III(40)(d); Preliminary Approval Order at ¶ 9.) The final Settlement Administration
20 Expenses will be set forth in the forthcoming Cassandra Polites Declaration ["Polites Dec."], including
21 fees and costs incurred to-date, as well as anticipated fees and costs for completion of the settlement
22 administration. Blumenthal Decl. ¶3(g).

23 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
24 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement
25 at ¶ III(40)(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
26 Litigation Expenses Payment in an amount not to exceed \$17,000. (Agreement at ¶ III(40)(b).) Subject
27 to Court approval, the Agreement provides for a payment of no more than \$10,000 to each of the
28 Plaintiffs as the Class Representative Service Payments. (Agreement at ¶ III(40)(a).) In support of this

1 separate motion for attorneys' fees, reimbursement of expenses and service award, Class Counsel is
2 providing evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

3 The Parties will seek approval from the Court for the PAGA Payment of \$50,000 out of the
4 Gross Settlement Amount, which shall be allocated 75% (\$37,500) to the LWDA as the LWDA's share
5 of the PAGA Payment pursuant to PAGA and 25% (\$12,500) will be distributed to the Aggrieved
6 Employees based on their respective pay periods worked during the PAGA Period. (Agreement at ¶
7 III(40)(c).) All Aggrieved Employees will be sent their share of the PAGA Payment and will be subject
8 to the release of the Released PAGA Claims, whether or not they opt out of the Settlement. (Agreement
9 at ¶ III(40)(c).) As set forth in the accompanying proof of service, the LWDA has been served with
10 this motion and the Agreement. Blumenthal Decl. ¶3(i).

11 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
12 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
13 is "fair, adequate and reasonable". (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
14 at Two Million Four Hundred Fifty Thousand Dollars (\$2,450,000) is an excellent result for the Class.
15 This result is particularly favorable in light of the fact that liability was far from certain in light of the
16 defenses asserted by Defendant. Given the complexities of this case and the defenses asserted, along
17 with the uncertainties of proof at trial and appeal, the proposed settlement is fair, reasonable and
18 adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

19 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL**
20 **OF CLASS ACTION SETTLEMENTS**

21 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
22 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
23 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*
24 *v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
25 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

26 "[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
27 action requires court approval." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (citing
28 *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579 (1980).) The

1 court must decide whether the proposed settlement falls within the range of reasonable settlements,
2 taking into account that settlements are compromises between the parties reflecting subjective,
3 unquantifiable judgments concerning the risks and possible outcomes of litigation. *See Wershba v.*
4 *Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) (“The proposed settlement is not to be judged
5 against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed
6 at trial.”) In *Wershba*, appellants argued that the settlement was too low given the “clear” liability,
7 however, the Court rejected this argument and held that “the merits of the underlying class claims are
8 not a basis for upsetting the settlement of a class action.” *Id.*; *see also 7-Eleven, supra*, at 1150.

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

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

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

26 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*
27 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that the
28 trial court should consider in evaluating the reasonableness of a class action settlement agreement

1 include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further
2 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the
3 extent of discovery completed and the stage of the proceedings, the experience and views of counsel,
4 the presence of a governmental participant, and the reaction of the class members to the proposed
5 settlement.'” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (internal citations
6 omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L. A.*, 186 Cal. App. 4th 399, 408 (2010).

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

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

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

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

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

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

27 This Settlement is the result of extensive and hard-fought litigation as well as negotiations
28 before an experienced and well-respected mediator. Defendant has expressly denied and continue to

1 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiffs and
2 Class Counsel have determined it is desirable and beneficial to the Class to resolve the Released Class
3 Claims in accordance with this Settlement. Class Counsel are experienced and qualified to evaluate
4 the class claims, the viability of the defenses asserted, and the risks and benefits of trial and settlement,
5 and Class Counsel are experienced in wage and hour employment law class actions, as Class Counsel
6 has previously litigated and certified similar claims against other employers. Blumenthal Decl. ¶7(a).

7 The Parties attended an arms-length mediation session with Louis Marlin, Esq., a respected and
8 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
9 for the mediation sessions, Defendant provided Class Counsel with necessary information for the
10 members of the Class, including time data, payroll data and data concerning the composition of the
11 Class. Plaintiffs analyzed the data with the assistance of damages expert, Berger Consulting Group,
12 and prepared and submitted a mediation brief and damage valuation to the Mediator. Following the
13 mediation, the Parties were able to agree to settle the Action based upon a mediator's proposal which
14 was memorialized in the form of a Memorandum of Understanding. Blumenthal Decl. ¶7(b).

15 The fact that the settlement was negotiated with the assistance of an experienced mediator
16 supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS*
17 *Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal.
18 2007) (“The settlement was negotiated and approved by experienced counsel on both sides of the
19 litigation, with the assistance of a well-respected mediator with substantial experience in employment
20 litigation[, and] this factor supports approval of the settlement”).

21 From July 2022 to November 2022, the Agreement and exhibits thereto were drafted, finalized
22 and executed, and presented to this Court on for preliminary approval on March 29, 2023. The Court
23 granted preliminary approval on March 29, 2023, and the Preliminary Approval Order was entered by
24 this Court that same date. The Final Approval Hearing was continued to October 4, 2023 in order to
25 provide Class Notice to 60 individuals who were inadvertently omitted from the Class List. Blumenthal
26 Decl. ¶7(c).

27 3. Class Counsel is Experienced in Similar Litigation

28 Class Counsel in this matter has extensive class action experience and has represented thousands

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

10 4. There Are No Objections And One Request for Exclusion

11 The reaction of the Class unequivocally supports approval of the Settlement. On April 26, 2023,
12 the Settlement Administrator mailed the Court-approved Class Notice to the Class Members, which
13 provided each class member with the terms of the Settlement, including notice of the claims at issue
14 and the financial terms of the settlement, including the attorneys' fees, costs, and service awards that
15 were being sought, how individual settlement awards would be calculated, and the specific, estimated
16 payment amount to that individual. See Polites Decl. ¶ 6, Exh. A. In disseminating the notices, the
17 Settlement Administrator followed the notice procedures authorized by the Court in its Preliminary
18 Approval Order. Significantly, there have been no objections and only one opt-out. As a result, nearly
19 the entire Class will participate in the Settlement and will be sent a settlement check, representing
20 99.95% of the Class. See Polites Decl. Blumenthal Decl. ¶4.

21 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
22 Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
23 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
24 indicative of the adequacy of the settlement."); *Stoetznier v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
25 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l*
26 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
27 settlement should be considered when determining fairness of settlement). Here, where there are no
28 objections, the approval of the class is evident.

1 5. The Strength of Plaintiff's Case

2 The Action generally alleges that Plaintiffs and other Class Members were not provided all
3 minimum wages and overtime compensation and at the correct rate, were not provided and/or paid for
4 meal and rest periods, were not reimbursed for reasonable business expenses, and were not provided
5 accurate itemized wage statements. The Action seeks unpaid wages, penalties, attorney fees, litigation
6 costs, and any other equitable or legal relief allegedly due and owing to Plaintiffs and the other Class
7 Members by virtue of the foregoing claims. Blumenthal Decl. ¶5.

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

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

27 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
28 Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service
Associates were misclassified as exempt. In addition to the uncertainties raised by

1 Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,
2 Defendants notes that the question of an employer's duty to provide rest and meal
3 periods is an open one, signaling even less certainty for Plaintiffs. [...T]he gross
4 settlement amount and the Class Members' expected net recovery, after fees and other
5 costs are deducted, appear to be a reasonable compromise, in light of the risks of
6 litigation.

7 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
8 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) (“In considering the strength of Plaintiff's case, legal
9 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
10 approval.”). As recognized in a federal decision approving settlement of an overtime wage class action:

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

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

21 There was also a significant risk that, if the Actions were not settled, Plaintiffs would be unable
22 to obtain class certification and thereby not recover on behalf of any employees other than themselves.
23 Defendant argued that the individual experience of each putative class member varied with respect to
24 the claims. Defendant could also contest class certification by arguing injury and good faith were case
25 by case determinations that precluded class certification. Plaintiffs are aware of other cases where class
26 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
27 (2019) (denying certification of rest break claims). Finally, even if class certification was successful,
28 as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59
Cal. 4th 1 (2014), there are significant hurdles to overcome for a class wide recovery even where the
class has been certified. While other cases have approved class certification in wage and hour claims,
class certification in this action would have been hotly disputed and was by no means a foregone
conclusion. Blumenthal Decl. ¶8(b).

In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
recovery, particularly when viewed in light of the fact that the Defendant asserted serious and

1 substantial defenses. Currently, the maximum and average class member allocation are \$3,838.65 and
2 \$718.94, respectively. *See* Polites Decl. Given the complexities of this case, the defenses, along with
3 the uncertainties of proof and appeal, the proposed Settlement is fair, reasonable and adequate, and
4 should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

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

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

26 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,
27 and likely duration of further litigation likewise favors the settlement. Regardless of
28 how this Court might have ruled on the merits of the legal issues, the losing party likely
would have appealed, and the parties would have faced the expense and uncertainty of
litigating an appeal. "The expense and possible duration of the litigation should be

1 considered in evaluating the reasonableness of [a] settlement." See *In re Mego Financial*
2 *Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further
litigation is substantial.

3 *Id.* at *12.

4 7. The Amount Offered in Settlement

5 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
6 to Plaintiffs' claims. As set forth in the Declaration of Kyle Nordrehaug filed in support of preliminary
7 approval which discussed the value of the class claims in detail, the Gross Settlement Amount compares
8 favorably to the value of the claims. For the 2,106 Participating Class members who worked 99,050
9 workweeks, the Gross Settlement Amount provides an average value of \$1,163 per Class Member and
10 \$24 per workweek, and after deductions, the Net Settlement Amount provides an average recovery of
11 \$717.63 per Class Member and \$15.25 per work week. Blumenthal Decl. ¶8(d).

12 The calculations to compensate for the amount due to the Class Members at the time this
13 Settlement was negotiated were calculated by Plaintiffs' expert, Berger Consulting Group, in advance
14 of mediation. As to the Class whose claims are at issue in this Action, Plaintiffs used an expert to
15 analyze the data and determine the potential unpaid wages for the employees. For the Class, Plaintiffs
16 evaluated that the claim for unpaid wages due to the miscalculation of the regular rate was potentially
17 \$739,992, the allege unpaid wages due to Ferra miscalculation as to sick pay and meal periods was
18 \$193,382, the maximum potential meal period damages, after deducting meal premiums paid by
19 Defendant, wages were estimated to be \$233,330, the maximum potential rest period damages were
20 estimated to be \$402,511, the maximum potential damages for off the clock work were estimated to be
21 \$664,566, and the maximum potential damages for failure to provide expense reimbursement for were
22 calculated to be \$934,400. In total, the damages for the Class were calculated to have a maximum
23 potential total value of \$3,168,181. In addition, Plaintiffs calculated that the maximum value of the
24 potential waiting time penalties were between \$2,707,502 and \$4,605,866, depending on the predicate
25 violation, and the maximum value of the potential wage statement penalties were \$2,822,200. These
26 wage statement and waiting time penalties claims potentially have a much smaller value or no value,
27
28

1 even if damages were awarded, to the extent that they are only derivative of the rest break claims.³
2 Blumenthal Decl. ¶8(d).

3 Consequently, the Gross Settlement Amount represents more than 77% of the value of the
4 potential maximum damages at issue for the Class in this case, assuming these amounts could all be
5 proven in full at trial.⁴ The above maximum calculations should then be adjusted in consideration for
6 both the risk of class certification and the risk of establishing class-wide liability on all claims.

7 Defendant disputes Plaintiffs' estimates and believes the amount Plaintiffs can recover for the
8 Class, if anything at all, is actually much lower. Given the amount of the Settlement as compared to
9 the potential value of the claims, the Settlement is most certainly fair and reasonable.⁵ Blumenthal

10
11 ³ While Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
12 226, at mediation Plaintiffs recognized that these claims were subject to various defenses asserted by
13 Defendant, including, but not limited to, a good faith dispute defense as to whether any premium wages
14 for meal or rest periods or other wages were owed given Defendant's position that Plaintiffs were
15 properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There
16 is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether
17 and when the wages were due."). Additionally, at the time of mediation, Courts had held that violations
18 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 e.g. 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 Plaintiffs' claims on these theories was
uncertain at the time the settlement was negotiated, even though the Supreme Court subsequently ruled
on May 23, 2022 that meal and rest period violations could give rise to a claim under Section 203.

19 ⁴ Because the PAGA claim does not provide a recovery to the Class, Plaintiffs have not included
20 the PAGA claim in this discussion of the class claim valuation. The PAGA claim was addressed in the
Motion for Preliminary Approval in the Decl. Nordrehaug at ¶ 33.

21 ⁵ *See e.g. Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. 2007) (approving a
22 settlement where the settlement amount constituted approximately 25% of the estimated overtime
23 damages for the class); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12
24 (N.D. Cal. 2015) (granting final approval where "the proposed Total Settlement Amount represents
approximately 10% of what class might have been awarded had they succeeded at trial."); *Dunleavy*
v. Nadler (In re Mego Fin. Corp. Sec. Litig.), 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement
25 which represented "roughly one-sixth of the potential recovery"); *Stovall-Gusman v. W.W. Granger,*
Inc., 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval where "the
26 proposed Total Settlement Amount represents approximately 10% of what class might have been
awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D. Cal.
27 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value); *Ma*
v. Covidien Holding, Inc., 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class action
28 settlement worth "somewhere between 9% and 18%" of full verdict value).

1 Decl. ¶8(d). Clearly, the goal of this litigation has been met.

2 **V. CONCLUSION**

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

6 Respectfully submitted,

7 Dated: September 8, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
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