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

16 VICTOR HERNANDEZ, on behalf of
17 himself and on behalf of all persons
18 similarly situated,

19 Plaintiff,

20 vs.

21 MITSUBISHI CEMENT
22 CORPORATION, a Corporation; and
23 DOES 1 through 50, inclusive,

24 Defendants.

Case No. CIVSB2125260

[Consolidated with Case No. CIVSB2133252]

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

Hearing Date: October 17, 2023
Hearing Time: 1:30 p.m.

*[Hearing scheduled by Order dated May 31, 2023 at
paragraph 14]*

Judge: Hon. Joseph T. Ortiz
Dept: 17

Date Filed: August 11, 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 the Class Action and PAGA Action Settlement Agreement (the “Agreement”), a true and correct copy
4 of which is attached as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹
5 In accordance with the Preliminary Approval Order dated May 31, 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 Victor Hernandez (“Plaintiff”) respectfully submits this
9 memorandum in support of the unopposed motion for final approval and the proposed entry of the Final
10 Approval Order and Judgment, submitted herewith. The settlement represents an excellent result for
11 the Class and avoids the delays, risks, and costs of further litigation. The Class Notice was
12 disseminated to the Class and, there are no objections and no requests for exclusion, which means that
13 currently the entire Class has elected to participate in the Settlement. Blumenthal Decl. ¶4. This is a
14 positive response from the Class evidencing their collective approval of the settlement. As a result,
15 Plaintiff respectfully submits that the class settlement should be finally approved for the same reasons
16 that the Court preliminarily approved the settlement as fair, reasonable, and adequate.

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

18 Plaintiff and Defendant Mitsubishi Cement Corporation (“Defendant”) reached a full and final
19 settlement of the above-captioned action, which is embodied in the Agreement filed concurrently with
20 the Court. As consideration for this Settlement, the Gross Settlement Amount is Two Million Fifty
21 Thousand Dollars (\$2,050,000). (Agreement at ¶ 1.22.) Under the Settlement, the Gross Settlement
22 Amount consists of the following elements: (1) payment of the Individual Class Payments to the
23 Participating Class Members; (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses
24 Payment; (3) Administration Expenses Payment; (4) the Class Representative Service Payment to

25
26 ¹ Capitalized terms are defined in the Agreement.

27 ² The “Class” is defined as “all individuals who are or previously were employed by Defendant and
28 classified as non-exempt employees at any time during the Class Period..” The “Class Period” is August
11, 2017 through April 16, 2023. (Preliminary Approval Order, ¶ 6)

1 Plaintiff; and (5) the PAGA Penalties payment. (Agreement at ¶ 1.22.) Blumenthal Decl. ¶3(a). The
2 following is a table of the key financial terms of the Settlement and the proposed deductions:

3 **\$2,050,000** (Gross Settlement Amount)

- 4 - \$10,000 (Plaintiff's proposed service award not to exceed \$10,000)
- 5 - \$16,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- 6 - \$683,333 (Class Counsel Fees Payment - not to exceed one-third of settlement)
- 7 - \$50,000 (PAGA Penalties payment - 75% to LWDA / 25% to Aggrieved Employees)
- 8 - \$12,000 (Administration Expenses Payment - not to exceed amount)

9 **\$1,278,667** (Net Settlement Amount)

10 The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement
11 at ¶ 3.1.) The Gross Settlement Amount shall be all-in with no reversion to Defendant. *Id.* Blumenthal
12 Decl. ¶3(b).

13 Within thirty (30) days of the Effective Date, Defendant shall deposit the Gross Settlement
14 Amount with the Administrator. (Agreement at ¶ 4.3.) The distribution of Individual Class Payments
15 to Participating Class Members along with the other Court-approved distributions shall be made by the
16 Administrator within fourteen (14) days after Defendant fully funds the Gross Settlement Amount.
17 (Agreement at ¶ 5.1.) Blumenthal Decl. ¶3(c).

18 The amount remaining in the Gross Settlement Amount after the deduction of Court-approved
19 amounts for Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service
20 Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the
21 Administration Expenses Payment (called the "Net Settlement Amount") shall be allocated to Class
22 Members as their Individual Class Payments. (Agreement at ¶¶ 1.28 and 3.2.) From the Net Settlement
23 Amount, the Individual Class Payment for each Participating Class Member will be calculated by (a)
24 dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating
25 Class Members during the Class Period and (b) multiplying the result by each Participating Class
26 Member's Workweeks. (Agreement at ¶ 3.2(e).) Workweeks are based on Defendant's records;
27 however, Class Members had the right to challenge the number of Workweeks. Blumenthal Decl. ¶3(d).

28 Class Members were sent the Court approved Class Notice using the procedure approved by the
Court by mailing the notice packets after updating class members' addresses using the National Change
of Address database and, for any notice packets returned as undeliverable, re-mailing such notices to
any forwarding address provided or updated address located. (Agreement at ¶ 8.5, Ex. A.) Class

1 Members were provided with the opportunity to exclude themselves or “opt out” if they did not want
2 to participate in the settlement. (Agreement at ¶ 8.5(c), Ex. A.) All Aggrieved Employees, including
3 those who submit an opt-out request, will still be paid their allocation of the PAGA Penalties and will
4 remain subject to the release of the Released PAGA Claims regardless of their request for exclusion.
5 (Agreement at ¶¶ 6.3 and 8.5(d).) The Class Notice also advised Class Members of their right to object
6 to the Settlement and/or dispute their workweeks. (Agreement at ¶¶ 8.6 and 8.7, Ex. A.) Blumenthal
7 Decl. ¶ 3(e).

8 A Participating Class Member must cash his or her Individual Class Payment check within 180
9 days after it is mailed. (Agreement at ¶ 5.2.) Any settlement checks not cashed within 180 days will
10 be voided and any funds represented by such checks to the California Controller's Unclaimed Property
11 Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to the requirements
12 of California Code of Civil Procedure Section 384, subd. (b). (Agreement at ¶ 5.4.) Blumenthal Decl.
13 ¶3(f).

14 ILYM Group was appointed as the Settlement Administrator. (Agreement at ¶ 1.2; Preliminary
15 Approval Order at ¶ 11.) From the Gross Settlement Amount, the Settlement Administrator shall be
16 paid for the expenses of administering the Settlement in an amount not to exceed \$12,000. (Agreement
17 at ¶ 3.2(c); Preliminary Approval Order at ¶ 9.) The Administration Expenses Payment, including fees
18 and costs incurred, as well as anticipated fees and costs for completion of the settlement administration,
19 is \$10,250 as set forth in the Declaration of Nicole Bench (“Bench Decl.”) at ¶20. Blumenthal Decl.
20 ¶3(g).

21 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
22 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement
23 at ¶ 3.2(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
24 Litigation Expenses Payment in an amount not to exceed \$16,000. (Agreement at ¶ 3.2(b).) Subject
25 to Court approval, the Agreement provides for a payment of no more than \$10,000 to the Plaintiff as
26 the Class Representative Service Payment. (Agreement at ¶ 3.2(a).) In support of this separate motion
27 for attorneys’ fees, reimbursement of expenses and service award, Class Counsel is providing
28 evidentiary support, for these requests, including lodestar. Blumenthal Decl. ¶3(h).

1 Subject to Court approval, Fifty Thousand Dollars (\$50,000) will be paid from the Gross
2 Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal. Labor
3 Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code § 2699(i),
4 the PAGA Penalties shall be allocated as follows: 75% (\$37,500) shall be allocated to the Labor
5 Workforce Development Agency ("LWDA") as its share of the civil penalties and 25% (\$12,500)
6 allocated to the Individual PAGA Payments to be distributed to the Aggrieved Employees based on the
7 number of their respective PAGA Pay Periods. (Agreement at ¶ 3.2(d).) As set forth in the
8 accompanying proof of service, the LWDA has been served with this motion and the Agreement.
9 Blumenthal Decl. ¶3(i).

10 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
11 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
12 is "fair, adequate and reasonable". (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
13 at Two Million Fifty Thousand Dollars (\$2,050,000) is an excellent result for the Class. This result is
14 particularly favorable in light of the fact that liability was far from certain in light of the defenses
15 asserted by Defendant. Given the complexities of this case and the defenses asserted, along with the
16 uncertainties of proof at trial and appeal, the proposed settlement is fair, reasonable and adequate, and
17 should be finally approved. Blumenthal Decl. ¶3(j).

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

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

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

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

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

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

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

25 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*
26 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The well-recognized factors that the
27 trial court should consider in evaluating the reasonableness of a class action settlement agreement
28 include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further

1 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the
2 extent of discovery completed and the stage of the proceedings, the experience and views of counsel,
3 the presence of a governmental participant, and the reaction of the class members to the proposed
4 settlement.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (internal citations
5 omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L. A.*, 186 Cal. 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 litigation, the Parties engaged in the investigation of the claims, including
19 formal discovery, production of documents, class data, and other information, allowing for the full and
20 complete analysis of liabilities and defenses to the claims in this Action. The procedural history and
21 investigation performed was detailed at length in support of the motion for preliminary approval. The
22 Settlement was the product of one arms-length mediation and contentious negotiations presided over
23 by Louis Marlin, Esq., a respected and experience mediator of wage and hour class actions. The details
24 of the litigation are set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(h).

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 continue 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. Class Counsel are experienced and
3 qualified to evaluate the class claims, the viability of the defenses asserted, and the risks and benefits
4 of trial and settlement, and Class Counsel are experienced in wage and hour employment law class
5 actions, as Class Counsel has previously litigated and certified similar claims against other employers.
6 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. Plaintiff analyzed the data with the assistance of damages expert, Berger Consulting Group, and
12 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 February 2023 to April 2023, the Agreement and exhibits thereto were drafted, finalized
22 and executed, and presented to this Court on for preliminary approval. The Court issued a Tentative
23 Ruling in advance of the preliminary approval hearing, which was to grant Plaintiff’s Motion. The Court
24 granted preliminary approval and the Preliminary Approval Order was entered by this Court on May
25 31, 2023. Blumenthal Decl. ¶7(c).

26 3. Class Counsel is Experienced in Similar Litigation

27 Class Counsel in this matter has extensive class action experience and has represented thousands
28 of persons in class actions including employment litigation, wage and hour class actions, and complex

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

8 4. There Are No Objections And No Opt-Outs

9 The reaction of the Class unequivocally supports approval of the Settlement. On July 5, 2023,
10 the Settlement Administrator mailed the Court-approved Class Notice to the Class Members, which
11 provided each class member with the terms of the Settlement, including notice of the claims at issue
12 and the financial terms of the settlement, including the attorneys' fees, costs, and service awards that
13 were being sought, how individual settlement awards would be calculated, and the specific, estimated
14 payment amount to that individual. See Bench Decl. at ¶8, Exh. A. In disseminating the notices, the
15 Administrator followed the notice procedures authorized by the Court in its Preliminary Approval
16 Order. To date, there have been no objections and no opt-outs. Bench Decl. at ¶¶ 14-15.³ Blumenthal
17 Decl. ¶4.

18 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
19 Settlement. *See In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
20 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
21 indicative of the adequacy of the settlement."); *Stoetznner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119 (3d.
22 Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l Union*,
23 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
24

25 ³ The Response Deadline for the Class was September 5, 2023. Defendant discovered nine Class
26 members who were inadvertently excluded from the Class list, and Class Notice has been mailed to
27 these nine individuals. The Response Deadline for these nine Class Members is October 20, 2023. See
28 Bench Decl. at ¶¶ 13-15. Plaintiff will submit a supplemental declaration from the Administrator
verifying that there are no changes to the final results documented in the Bench Decl., at which time the
Final Approval Order and Judgment can be entered.

1 settlement should be considered when determining fairness of settlement). Here, where there are no
2 objections, the approval of the class is evident.

3 5. The Strength of Plaintiff's Case

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

10 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
11 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
12 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
13 asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued that all
14 work time was properly recorded and paid for and that there was no miscalculation of the regular rate.
15 Defendant contends that its meal and rest period policies fully complied with California law and
16 Defendant did not fail to provide the opportunity for legally required meal and rest breaks. Plaintiff's
17 theory of liability for meal and rest period violations was based upon an on premise restriction, which
18 Defendant disputed and argued that this theory has been rejected by Courts as sufficient alone to
19 establish liability for on-duty rest breaks. *See, e.g., Ritenour v. Carrington Mortg. Servs., LLC*, 2018
20 WL 5858658, at *7 (C.D. Cal. 2018) (holding that defendant's on-premises rest period policy was
21 facially valid and legal); *Hubbs v. Big Lots Stores, Inc.*, 2018 WL 5264141, at *5 (C.D. Cal. 2018)
22 (citing *Augustus* and dismissing on-premises rest period claims for failure to state a claim); *Bell v.*
23 *Home Depot U.S.A., Inc.*, 2017 WL 1353779, at *2 (E.D. Cal. 2017) (declaring defendant's argument
24 that *Augustus* implied on-premises rest periods were legal as "more persuasive and accurate" than
25 plaintiff's argument to the contrary). As to expenses reimbursement, Defendant contended that it did
26 not fail to provide reimbursement for necessary business expenses and that there were no such expenses
27 that had not already been reimbursed or that claimed expenses were incurred voluntarily and/or for the
28 convenience of employees and is therefore not required reimbursement. Defendant argued that the

1 decisions in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), *Lockheed Martin Corp. v. Superior*
2 *Ct.*, 29 Cal. 4th 1096, 1108 (2003), and *Salazar v. See's Candy Shops Inc.*, 64 Cal.App.5th 85 (2021),
3 weakened Plaintiff's claims, on liability, value, and class certifiability as to the meal and rest period
4 claims. Defendant also argues that based on its facially lawful practices, it acted in good faith and
5 without willfulness, which if accepted would negate the claims for waiting time penalties and/or
6 inaccurate wage statements. If successful, Defendant's defenses could eliminate or substantially reduce
7 any recovery to the Class. While Plaintiff believes that these defenses could be overcome, Defendant
8 maintains these defenses have merit and therefore present a serious risk to recovery by the Class.
9 Blumenthal Decl. ¶8(a).

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

12 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
13 Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service
14 Associates were misclassified as exempt. In addition to the uncertainties raised by
15 Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,
16 Defendants notes that the question of an employer's duty to provide rest and meal
periods is an open one, signaling even less certainty for Plaintiffs. [...]he gross
settlement amount and the Class Members' expected net recovery, after fees and other
costs are deducted, appear to be a reasonable compromise, in light of the risks of
litigation.

17 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
18 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
19 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
20 approval."). As recognized in a federal decision approving settlement of an overtime wage class action:

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

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

There was also a significant risk that, if the Action was not settled, Plaintiff would be unable

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

12 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
13 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
14 substantial defenses. The Participating Class Members will receive an estimated average gross payment
15 of \$5,927.85, with the estimated highest gross payment being \$10,658.31. Bench Decl. at ¶19. Given
16 the complexities of this case, the defenses, along with the uncertainties of proof and appeal, the
17 proposed Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl.
18 at ¶8(e).

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

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

26 Plaintiff and Class Counsel recognize the expense and length of a trial against Defendant
27 through possible appeals which could take at least another two or three years. Class Counsel also have
28 taken into account the uncertain outcome, the risk of litigation, especially in complex actions such as

1 this one. Class Counsel are also mindful of and recognize the inherent problems of proof under, and
2 alleged defenses to, the claims asserted in the Action. Moreover, post-trial motions and appeals would
3 have been inevitable. Costs would have mounted and recovery would have been delayed if not denied,
4 thereby reducing the benefits of an ultimate victory. Plaintiff and Class Counsel believe that the
5 Settlement confers substantial benefits upon the Class. Based upon their evaluation, Plaintiff and Class
6 Counsel have determined that the Settlement set forth in the Agreement is in the best interest of the
7 Class. Blumenthal Decl. ¶8(c).

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

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

20 *Id.* at *12.

21 7. The Amount Offered in Settlement

22 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
23 to Plaintiff's claims. As set forth in the Declaration of Kyle Nordrehaug filed in support of preliminary
24 approval which discussed the value of the class claims in detail, the Gross Settlement Amount compares
25 favorably to the value of the claims. For the 216 Class members who worked 35,594 workweeks, the
26 Gross Settlement Amount provides an average value of \$9,490 per Class Member and \$57 per
27 workweek, and after deductions, the Net Settlement Amount provides an average recovery of \$5,919
28 per Class Member and \$35.97 per work week. Blumenthal Decl. ¶8(d).

The calculations to compensate for the amount due to the Class Members at the time this
Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting Group, in advance
of mediation. As to the Class whose claims are at issue in this Action, Plaintiff used an expert to analyze

1 the data and determine the potential unpaid wages for the employees For the Class, the maximum value
2 of the claim for unpaid wages due to alleged off-the-clock work was \$1,216,644, the maximum value
3 of the claim for unpaid wages due to alleged miscalculation of the regular rate was potentially \$107,095,
4 the maximum potential damages for unpaid meal premiums were estimated to be \$3,806,907 based
5 upon a 80% violation rate and after deduction for meal premiums paid, the maximum potential rest
6 period damages were estimated to be \$3,893,229 based upon the same 80% violation rate, and the
7 maximum potential damages for failure to provide expense reimbursement were calculated to be
8 \$43,750. In total, the damages for the Class were calculated to have a maximum potential total value
9 of \$9,067,625. In addition, Plaintiff calculated that the maximum value of the potential waiting time
10 penalties were between \$334,272 and \$501,409, and the maximum value of the potential wage
11 statement penalties were \$583,000.⁴ Blumenthal Decl. ¶8(d).

12 Consequently, the Gross Settlement Amount represents more than 22% of the potential
13 maximum damages at issue for the Class in this case, assuming these amounts could all be proven in
14 full at trial.⁵ The above maximum calculations should then be adjusted in consideration for both the
15 risk of class certification and the risk of establishing class-wide liability on all claims. Defendant
16 disputes Plaintiff's estimates and believes the amount Plaintiff can recover for the Class, if anything at
17 all, is actually much lower. Given the amount of the Settlement as compared to the potential value of
18 the claims, the Settlement is most certainly fair and reasonable.⁶ Blumenthal Decl. ¶8(d). Clearly, the
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20 ⁴ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and 226,
21 at mediation Plaintiff recognized that these claims were subject to additional, separate defenses asserted
22 by Defendant, including, a good faith dispute defense as to whether any premium wages for meal or rest
23 periods or other wages were owed given Defendant's position that Plaintiff and Class Members were
24 properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There
is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether
and when the wages were due.").

25 ⁵ Because the PAGA claim does not provide a recovery to the Class, Plaintiff did not included the
26 PAGA claim in this discussion of the class claim valuation. The PAGA claim was addressed in the
Declaration of Nordrehaug at ¶ 33 in support of Plaintiff's Motion for Preliminary Approval.

27 ⁶ *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
28 approving settlement which represented "roughly one-sixth of the potential recovery"); *Stovall-Gusman*
v. W.W. Granger, Inc., 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval

1 goal of this litigation has been met.

2 **V. CONCLUSION**

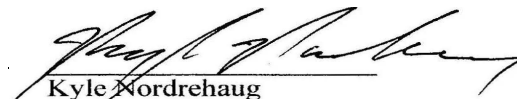
3 Plaintiff respectfully submits that the proposed settlement satisfies the standard of fairness
4 established in California law and should therefore be finally approved as fair, reasonable and adequate
5 and requests entry of the Final Approval Order and Judgment, submitted herewith.

6 Respectfully submitted,

7 Dated: September 19, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

9 By:


Kyle Nordrehaug
Attorney for Plaintiff

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26 where “the proposed Total Settlement Amount represents approximately 10% of what class might have
27 been awarded had they succeeded at trial.”); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D. Cal.
28 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).