

1 **BLUMENTHAL NORDREHAUG BHOWMIK**
2 **DE BLOUW LLP**

3 Norman B. Blumenthal (State Bar #068687)

4 Kyle R. Nordrehaug (State Bar #205975)

5 Aparajit Bhowmik (State Bar #248066)

6 2255 Calle Clara

7 La Jolla, CA 92037

8 Telephone: (858)551-1223

9 Facsimile: (858) 551-1232

10 Email: norm@bamlawca.com

11 Website: www.bamlawca.com

12 Attorneys for Plaintiff

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

15 DENNIS EBERWEIN, an individual, on
16 behalf of himself and on behalf of all
17 persons similarly situated, and on behalf
18 of the State of California, as a private
19 attorney general,

20 Plaintiff,

21 vs.

22 PSG CALIFORNIA LLC, a Limited
23 Liability Company; and DOES 1 through
24 50, inclusive,

25 Defendants.

Case No. CIVSB2207161

[Consolidated with CIVSB2211719]

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

Hearing Date: October 31, 2023

Hearing Time: 1:30 p.m.

[Hearing scheduled by Order dated June 20, 2023]

Judge: Hon. Joseph T. Ortiz

Dept: 17

Date Filed: April 8, 2022

Trial Date: Not set

TABLE OF CONTENTS

I.	INTRODUCTION	-1-
II.	THE SETTLEMENT BEFORE THE COURT	-1-
III.	GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL OF CLASS ACTION SETTLEMENTS.....	-2-
IV.	THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.....	-3-
A.	The Settlement Satisfies the California Test for Fairness.....	-4-
1.	The Investigation and Analysis of Documents are Sufficient to Allow Counsel and the Court to Act Intelligently	-4-
2.	The Settlement was Reached Through Arm's Length Bargaining.....	-4-
3.	Class Counsel is Experienced in Similar Litigation	-5-
4.	There Are No Objections and five (5) Requests for Exclusion	-6-
5.	The Strength of Plaintiff's Case	-6-
6.	The Risk, Expense, Complexity, and Likely Duration of Further Litigation.....	-9-
7.	The Amount Offered in Settlement.....	-10-
V.	THE REQUESTED ATTORNEYS' FEES, COSTS AND SERVICE AWARD SHOULD BE APPROVED	-11-
A.	The Attorneys' Fees are Reasonable and Supported by the Percentage of the Fund Method.....	-11-
B.	The Reimbursement of Litigation Expenses.....	-14-
C.	The Service Award Is Reasonable and Should be Approved.....	-14-
VI.	CONCLUSION.....	-15-

TABLE OF AUTHORITIES

Cases:	Page:
<i>7-Eleven Owners for Fair Fran. v. Southland Corp.</i> , 85 Cal. App. 4th 1135 (2000)	-3-
<i>Alberto v. GMRI, Inc.</i> , 252 F.R.D. 652 (E.D. Cal. Jun 24, 2008)	-5-
<i>Barbosa v. Cargill Meat Solutions Corp.</i> , 297 F.R.D. 431 (E.D. Cal. 2013)	-12-
<i>Barcia v. Contain-A-Way, Inc.</i> , 2009 U.S. Dist. LEXIS 17118 (S.D. Cal. 2009)	-8-
<i>Bellinghausen v. Tractor Supply Co.</i> , 306 F.R.D. 245 (N.D. Cal. 2015)	-15-
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980)	-11-
<i>Brinker v. Superior Court</i> , 53 Cal. 4th 1004 (2012)	-7-
<i>Browning v. Yahoo!, Inc.</i> , 2007 U.S. Dist. LEXIS 86266 (N.D. Cal. 2007)	-8-
<i>Cacho v. Eurostar, Inc.</i> , 43 Cal. App. 5th 885 (2019)	-8-
<i>Cellphone Termination Fee Cases</i> , 180 Cal. App. 4th 1110 (2009)	-3-
<i>Chavez v. Netflix, Inc.</i> , 162 Cal.App.4th 43 (2008)	-13-
<i>City of Detroit v. Grinnell Corp</i> 495 F.2d 448 (2d Cir. 1974)	-13-
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996)	-3-, -4-
<i>Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)</i> , 213 F.3d 454 (9th Cir. 2000)	-10-, -11-
<i>Duran v. U.S. Bank National Assn.</i> , 59 Cal. 4th 1 (2014)	-8-, -9-
<i>Gaskill v. Gordon</i> , 160 F.3d 361 (7th Cir. 1998)	-12-
<i>Glass v. UBS Fin. Servs.</i> , 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330 (N.D. Cal. 2007)	-5-, -9-

1	<i>Hanlon v. Chrysler Corp.</i> ,	
	150 F.3d 1011 (9th Cir. 1998)	-7-
2	<i>Holman v. Experian Info. Solutions, Inc.</i> ,	
3	2014 U.S. Dist. LEXIS 173698	-15-
4	<i>Hopson v. Hanesbrands Inc.</i> ,	
	2009 U.S. Dist. LEXIS 33900 (N.D. Cal. 2009)	-7-
5	<i>Huens v. Tatum</i> ,	
6	52 Cal. App. 4th 259 (1997)	-2-
7	<i>In re Austrian & German Bank Holocaust Litigation</i> ,	
	80 F. Supp. 2d 164 (S.D.N.Y. 2000).	-6-
8	<i>In re Sutter Health Uninsured Pricing Cases</i> ,	
9	171 Cal.App.4th 495 (2009)	-13-
10	<i>Kullar v. Foot Locker Retail, Inc.</i> ,	
	168 Cal. App. 4th 116 (2008)	-4-
11	<i>Laffitte v. Robert Half Int'l</i> ,	
12	1 Cal. 5th 480 (2016)	-11-, -13-
13	<i>Laskey v. Int'l Union</i> ,	
	638 F.2d 954 (6th Cir. 1981)	-6-
14	<i>Lockheed Martin Corp. v. Superior Ct.</i> ,	
15	29 Cal. 4th 1096 (2003)	-7-
16	<i>Louie v. Kaiser Foundation Health Plan, Inc.</i> ,	
	2008 U.S. Dist. LEXIS 78314 (S.D. Cal. 2008).	-8-
17	<i>Ma v. Covidien Holding, Inc.</i> ,	
18	2014 WL 2472316 (C.D. Cal. 2014).	-11-
19	<i>Mathein v. Pier 1 Imps.</i> ,	
	2018 U.S. Dist. LEXIS 71386, 168 Lab. Cas. (CCH) P36,620 (E.D. Cal. 2018)	-15-
20	<i>Munoz v. BCI Coca-Cola Bottling Co. of L. A.</i> ,	
21	186 Cal. App. 4th 399 (2010)	-4-
22	<i>Officers for Justice v. Civil Service Com'n</i> ,	
	688 F.2d 615 (9th Cir. 1982)	-3-
23	<i>Pellegrino v. Robert Half Intern., Inc.</i> ,	
24	182 Cal.App.4th 278 (2010)	-13-
25	<i>Rutti v. Lojack Corp., Inc.</i> ,	
	2012 WL 3151077 (C.D. Cal. 2012).	-14-
26	<i>Salazar v. See's Candy Shops Inc.</i> ,	
27	64 Cal.App.5th 85 (2021)	-7-
28		

1	<i>Serrano v. Priest</i> ,	
2	20 Cal. 3d 25 (Cal. 1977)	-11-
3	<i>Stanger v. China Elec. Motor, Inc.</i> ,	
4	812 F.3d 734 (9th Cir. 2016)	-13-
5	<i>Stetson v. Grissom</i> ,	
6	821 F.3d 1157 (9th Cir. 2016)	-13-, -14-
7	<i>Stoetzner v. U.S. Steel Corp.</i> ,	
8	897 F.2d 115 (3d Cir. 1990)	-6-
9	<i>Stovall-Gusman v. W.W. Granger, Inc.</i> ,	
10	2015 U.S. Dist. LEXIS 78671 (N.D. Cal. 2015)	-11-
11	<i>Swedish Hospital v. Shalala</i> ,	
12	1 F.3d 1261 (D.C. Cir. 1993)	-12-
13	<i>Taylor v. Fedex Freight, Inc.</i> ,	
14	2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016).	-13-
15	<i>Viceral v. Mistras Grp., Inc.</i> ,	
16	2016 WL 5907869 (N.D. Cal. 2016)	-11-
17	<i>Vincent v. Hughes Air West, Inc.</i> ,	
18	557 F.2d 759 (9th Cir. 1997)	-11-
19	<i>Vizcaino v. Microsoft Corp.</i> ,	
20	290 F.3d 1043 (9th Cir. 2002)	-13-
21	<i>Wershba v. Apple Computer</i> ,	
22	91 Cal. App. 4th 224 (2001)	-3-, -11-, -13-

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 June 20, 2023 (“Preliminary Approval Order”),
6 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 Dennis Eberwein (“Plaintiff”) respectfully submit 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. After disseminating the notice to
12 the members of the Class, there were **no objections and only five (5) requests for exclusion**, which
13 means that nearly 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 The following is a table of the key financial terms of the Settlement and the proposed
19 deductions:

20 **\$1,400,000** (Gross Settlement Amount)
21 - \$10,000 (Plaintiff’s proposed service award not to exceed \$10,000)
22 - \$25,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
23 - \$466,666 (Class Counsel Fees Payment - not to exceed one-third of settlement)
24 - \$30,000 (PAGA Penalties - 75% to LWDA / 25% to Aggrieved Employees)
25 - \$11,000 (Administration Expenses Payment - not to exceed amount)
26 **\$857,334** (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 in California who were classified as hourly, non-exempt employees at any time during the Class Period.” (Preliminary Approval Order at 3:10-31.) The “Class Period” is defined as “April 8, 2018 through February 21, 2023.” (Order Granting Joint Stipulation re: Amendment to Class Action and PAGA Settlement Agreement)

1 Plaintiff and Defendant PSG California LLC (“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 One
4 Million Four Hundred Thousand Dollars (\$1,400,000). (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 payment. (Agreement at ¶
9 1.22.) Blumenthal Decl. ¶3(a). The Gross Settlement Amount does not include Defendant’s share of
10 payroll 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.) The distribution of Individual Class Payments
14 to Participating Class Members along with the other Court-approved distributions shall be made by the
15 Administrator within fourteen (14) days after funding. (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 \$1,400,000 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**

28 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,

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

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

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

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

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

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

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

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

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

17 Over the course of more than one year and a half of litigation, the Parties engaged in the
18 investigation of the claims, including the production of documents, class data, and other information,
19 allowing for the full and complete analysis of liabilities and defenses to the claims in this Action. The
20 procedural history and investigation performed was detailed at length in support of the motion for
21 preliminary approval. The Settlement was the product of one arms-length mediation and contentious
22 negotiations through an all-day mediation presided over by Tripper Ortman, Esq., a respected and
23 experience mediator of wage and hour class actions. The details of the litigation are set forth in the
24 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 in accordance with this Settlement. Class Counsel are experienced and qualified to
3 evaluate the class claims, the viability of the defenses asserted, and the risks and benefits of trial and
4 settlement, and Class Counsel are experienced in wage and hour class actions, as Class Counsel has
5 previously litigated and certified similar claims against other employers. Blumenthal Decl. ¶7(a).

6 The Parties attended an arms-length mediation session with Tripper Ortman, a respected and
7 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
8 for the mediation, Defendant provided Class Counsel with necessary information for the members of
9 the Class, including payroll data and data concerning the composition of the Class. Plaintiff analyzed
10 the data with the assistance of damages expert, Berger Consulting, and prepared and submitted a
11 mediation brief and damage valuation to the Mediator. Following this all-day mediation, the Parties
12 agreed to this Settlement, which was memorialized in the form of a Memorandum of Understanding.
13 Blumenthal Decl. ¶7(b).

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

20 From February 2023 to April 2023, the settlement agreement and exhibits thereto were
21 finalized and executed, and then presented by motion to this Court for preliminary approval. On June
22 20, 2023, the Court issued its Order granting preliminary approved of the settlement as fair and
23 reasonable to the Class. Blumenthal Decl. ¶7(c).

24 3. Class Counsel is Experienced in Similar Litigation

25 Class Counsel in this matter has extensive class action experience and has represented thousands
26 of persons in class actions including employment litigation, wage and hour class actions, and complex
27 litigation. Class Counsel has previously litigated wage and hour class actions involving employees and
28 claims similar to this case and have been approved as experienced class counsel during contested

1 motions in state and federal courts throughout California. As such, Class Counsel is experienced and
2 knowledgeable in this area of law. A list of class action cases managed and settled by the Class
3 Counsel in this action is provided to the Court as Exhibit #1 to the Blumenthal Decl. Class Counsel
4 have participated in every aspect of the settlement discussions and have concluded the settlement is fair,
5 adequate and reasonable and in the best interests of the Class. Blumenthal Decl. ¶ 3(j).

6 4. There Are No Objections and five (5) Requests for Exclusion

7 The reaction of the Class unequivocally supports approval of the Settlement. On July 19, 2023,
8 the Administrator mailed the Court-approved Class Notice to the Class Members, which provided each
9 class member with the terms of the Settlement, including notice of the claims at issue and the financial
10 terms of the settlement, including the attorneys' fees, costs, and service award that were being sought,
11 how individual settlement awards would be calculated, and the specific, estimated payment amount to
12 that individual. See Declaration of Chantal Soto-Najera ("Soto-Najera Decl.") ¶ 7, Exh. A. In
13 disseminating the notice, the Administrator followed the notice procedures authorized by the Court in
14 its Preliminary Approval Order. Significantly, there have been no objections and only five (5) valid
15 requests to opt-out. Soto-Najera Decl. ¶¶10, 12. As such, nearly the entire Class will participate in
16 the Settlement and will be sent a settlement check. See Soto-Najera Decl. at ¶ 13; Blumenthal Decl. ¶4.

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

25 5. The Strength of Plaintiff's Case

26 The Action generally alleges that Plaintiff and other Class Members were not properly paid all
27 overtime wages for hours worked, were not provided meal and rest periods, were not timely paid earned
28 wages, were not provided reimbursement for required expenses, were not provided accurate itemized

1 wage statements, were not paid all wages at the time of termination. The Action seeks unpaid wages,
2 penalties, attorney fees, litigation costs, and any other equitable or legal relief allegedly due and owing
3 to Plaintiff and the other Class Members by virtue of the foregoing claims. Blumenthal Decl. ¶5.

4 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
5 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
6 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
7 asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued that all
8 work time was properly recorded. Defendant contends that its meal and rest period policies fully
9 complied with California law and Defendant did not fail to provide the opportunity for legally required
10 meal and rest breaks. Defendant could show that meal period premiums were paid in instances where
11 there was a potential violation to show the lawfulness of their meal period practices. As to expense
12 reimbursement, Defendant contended that it did not fail to provide reimbursement for necessary
13 business expenses and that there were no such expenses that had not already been reimbursed or that
14 claimed expenses were incurred voluntarily and/or for the convenience of employees and is therefore
15 not required reimbursement. Defendant argued that the decisions in *Brinker v. Superior Court*, 53 Cal.
16 4th 1004 (2012), *Lockheed Martin Corp. v. Superior Ct.*, 29 Cal. 4th 1096, 1108 (2003), and *Salazar*
17 *v. See's Candy Shops Inc.*, 64 Cal.App.5th 85 (2021), weakened Plaintiff's claims, on liability, value,
18 and class certifiability as to the meal and rest period claims. Defendant also argues that based on its
19 facially lawful practices, it acted in good faith and without willfulness, which if accepted would negate
20 the claims for waiting time penalties and/or inaccurate wage statements. If successful, Defendant's
21 defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiff believes that
22 these defenses could be overcome, Defendant maintains these defenses have merit and therefore present
23 a serious risk to recovery by the Class. Blumenthal Decl. ¶8(a).

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

26 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
27 Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service
28 Associates were misclassified as exempt. In addition to the uncertainties raised by
Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,
Defendants notes that the question of an employer's duty to provide rest and meal

1 periods is an open one, signaling even less certainty for Plaintiffs. [...T]he gross
2 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.

3 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007
4 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) (“In considering the strength of Plaintiff's case, legal
5 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
6 approval.”). As recognized in a federal decision approving settlement of an overtime wage class action:

7 The potential complexity and possible duration of trial also weigh in favor of granting
8 final approval. Plaintiffs acknowledge the difficulties of proving damages, recognize the
uncertainty of outcome, and believe defendant would appeal in the event of adverse
9 judgment. A post-judgment appeal would require many years to resolve and delay
payment to class members. Plaintiffs believe the benefits of a guaranteed recovery today
10 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
11 recovery through full adjudication.

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

14 There was also a significant risk that, if the Action was not settled, Plaintiff would be unable
15 to obtain class certification and thereby not recover on behalf of any employees other than himself.
16 Defendant argued that the individual experience of each putative class member varied with respect to
17 the claims. Defendant could also contest class certification by arguing injury and good faith were case-
18 by-case determinations that precluded class certification. Plaintiff is aware of other cases where class
19 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
20 (2019) (denying certification of rest break claims). Finally, even if class certification was successful,
21 as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59
22 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class wide recovery even where the
23 class has been certified. While other cases have approved class certification in wage and hour claims,
24 class certification in this action would have been hotly disputed and was by no means a foregone
25 conclusion. Blumenthal Decl. ¶8(b).

26 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
27 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
28 substantial defenses both to liability and to class certification. Currently, the maximum and average

1 class member allocation are \$4,187.42 and \$1,900.73, respectively. *See* Soto-Najera Decl. ¶15. Given
2 the complexities of this case, the defenses, along with the uncertainties of proof and appeal, the
3 proposed Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl.
4 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 Plaintiff 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. Plaintiff and Class Counsel believe that the
19 Settlement confers substantial benefits upon the Class. Based upon their evaluation, Plaintiff and Class
20 Counsel have determined that the Settlement set forth in the Agreement is in the best interest of the
21 Class. Blumenthal Decl. ¶8(c).

22 Although Plaintiff and Class Counsel believe that their case has merit, which Defendant
23 continue 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 Plaintiff's claims. As set forth in the Declaration of Nordrehaug in support of preliminary approval
7 which discussed the value of the class claims in detail, the Gross Settlement Amount compares
8 favorably to the value of the claims.

9 The calculations to compensate for the amount due to the Class Members at the time this
10 Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of
11 mediation. Class Counsel analyzed the data for putative class members and determined the potential
12 maximum damages for the class claims. For the Class, the maximum value of the claim for unpaid
13 wages due to alleged off-the-clock work was \$1,825,575, the maximum potential damages for unpaid
14 meal premiums were estimated to be \$2,137,354 based upon a 38% violation rate and after deduction
15 for meal premiums paid, the maximum potential rest period damages were estimated to be \$2,220,658
16 based upon the same 53% violation rate, and the maximum potential damages for failure to provide
17 expense reimbursement were calculated to be \$132,900. In total, the damages for the Class were
18 calculated to have a maximum potential total value of \$6,316,487. In addition, Plaintiff calculated that
19 the maximum value of the potential waiting time penalties were \$1,013,800, and the maximum value
20 of the potential wage statement penalties were \$1,040,100.³ Defendant vigorously disputed Plaintiff's
21 calculations and exposure theories. Blumenthal Decl. ¶8(d).

22 Consequently, the Gross Settlement Amount represents more than 22% of the potential
23 maximum damages at issue for the Class in this case, assuming these amounts could all be proven in

24
25 ³ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
26 226, at mediation Plaintiff recognized that these claims were subject to additional, separate defenses
27 asserted by Defendant, including, a good faith dispute defense as to whether any premium wages for
28 meal or rest periods or other wages were owed given Defendant's position that Plaintiff and Class
Members were 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.").

1 full at trial.⁴ The above maximum calculations should then be adjusted in consideration for both the
2 risk of class certification and the risk of establishing class-wide liability on all claims. Given the
3 amount of the Settlement as compared to the potential value of the claims, the Settlement is most
4 certainly fair and reasonable.⁵ Clearly, the goal of this litigation has been met. Blumenthal Decl. ¶8(d).

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

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

9 Class Counsel seeks a fee award calculated at one-third (1/3) of the total value of the settlement
10 for the successful prosecution and resolution of this action. California state and federal courts have
11 recognized that an appropriate method for determining award of attorneys' fees is based on a
12 percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple*
13 *Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (Cal. 1977);
14 *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759,
15 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment to the Class
16 and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary
17 does not bear the entire burden alone." *Vincent*, 557 F.2d at 769.

18 The California Supreme Court has provided guidance regarding the award of attorneys' fees in
19 wage and hour class action settlements. Under California law, the award of attorneys' fees in common
20 fund wage and hour class action settlements should start with the percentage method. See *Laffitte v.*
21 *Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state

22 ⁴ Because the PAGA claim does not provide a recovery to the Class, Plaintiff did not included the
23 PAGA claim in this discussion of the class claim valuation. The PAGA claim was addressed in the
24 Motion for Preliminary Approval in the Declaration of Nordrehaug at ¶ 33.

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

1 courts in holding that when class action litigation establishes a monetary fund for the benefit of the
2 class members, and the trial court in its equitable powers awards class counsel a fee out of that fund,
3 the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
4 fund created”). Under the percentage of the fund method, a court’s objective remains to “mimic the
5 market” in fixing a reasonable fee. See *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998).

6 First, the fee award representing one-third of the fund clearly falls within that range and is
7 consistent with other rulings of other courts and comprehensive surveys of class action settlements and
8 fee awards. Attorneys’ fees awards of one-third of the fund are within the expected range in the market
9 in legal services. See Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Award*,
10 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that
11 “[m]ost fee awards were between 25 percent and 35 percent”). Such similar awards by other Courts
12 are set forth in the Blumenthal Decl. ¶11.

13 Second, the results delivered by Class Counsel also support the requested percentage of the
14 fund. Here, Plaintiffs and their counsel secured a \$1,400,000 settlement for the benefit of the Class and
15 no Class Members chose to object. The Settlement was possible only because Class Counsel was able
16 to convince Defendant that Plaintiff could potentially prevail on the contested issues regarding liability,
17 maintain class certification, overcome difficulties in proof as to monetary relief and take the case to trial
18 if need be. Blumenthal Decl. ¶10(f). In successfully navigating these hurdles Class Counsel displayed
19 the necessary skills in both wage and hour and class action litigation. Moreover, as discussed above,
20 there were significant risks to the contingent litigation. See *Barbosa v. Cargill Meat Solutions Corp.*,
21 297 F.R.D. 431, 449 (E.D. Cal. 2013) (“**Like this case, where recovery is uncertain, an award of**
22 **one-third of the common fund as attorneys' fees has been found to be appropriate.**”)

23 Third, “the response of the class members to attorneys’ fee notice, though not decisive, is
24 relevant to the ... reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d 1261,
25 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s “approximation of the
26 market” for fees is well supported. *Id.* at 1269. Here, the Class Notice specifically notified the Class
27 that Class Counsel would be seeking a one-third fee award. Again, there were no objections.

28 Fourth, it is recognized that one of the primary factors justifying an enhanced attorney’s fees

1 reward is the attendant risks inherent in the litigation. As observed in *City of Detroit v. Grinnell Corp.*:

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

6 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of \$2,600,000 has been created.
7 For Class Counsel, the fees here were wholly contingent in nature and the case presented far more risk
8 than the usual contingent fee case. Among the risks was the cost inherent in class action litigation, as
9 well as a long battle with a corporate Defendant who had retained a premier and highly experienced
10 defense firm. **Counsel retained on a contingency fee basis, whether in private matters or in class
11 action litigation, is entitled to a premium above their hourly rate in order to compensate for both
12 the risks and the delay in payment.** See e.g. *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741
(9th Cir. 2016) (courts "must" apply a risk enhancement); *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th
13 Cir. 2016) (abuse of discretion not to apply risk multiplier).

14 Fifth, the requested fee award is supported by the lodestar cross-check. The reasonableness of
15 the requested attorneys' fee of one-third equal to \$466,666 is also established by reference to Class
16 Counsel's lodestar in this matter. The contemporaneous billing records for Class Counsel evidence that
17 through October 5, 2023, Class Counsel's total lodestar is \$222,580.00, with significant additional fees
18 still to be incurred to complete final approval and the settlement process. (Blumenthal Decl. at ¶12 and
19 Exhibits #3 and 4.) The requested fee award is therefore currently equivalent to Class Counsel's total
20 lodestar with a multiplier of less than 2.1, and there will be additional lodestar incurred by Class
21 Counsel to complete the settlement process and manage the settlement distribution and reports.
22 (Blumenthal Decl. at ¶12.) Such a multiplier is below the range of multipliers approved in other cases
23 such as *Laffitte and Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002).⁶

24 ⁶ 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 For such reasons, Class Counsel's request for attorneys' fees in the amount of one-third is fair, of
2 the common fund is reasonable and should be approved.

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

4 The Agreement provides at paragraph 3.2(b), that Class Counsel may seek a "Class Counsel
5 Litigation Expenses Payment of not more than \$25,000." Class Counsel requests reimbursement for
6 incurred litigation expenses and costs in the amount of \$22,593.15 based upon counsel's billing records.
7 The requested expense reimbursement is less than the not-to-exceed amount identified in the
8 Agreement and the difference will remain in the Net Settlement Amount for distribution to the Class.
9 These litigation expenses include the expenses incurred for filing fees, mediation expenses, expert fees
10 (Berger Consulting Group), attorney service charges (Knox, One Legal), and CourtCall charges, all of
11 which are costs normally billed to and paid by the client.⁷ The details of the litigation expenses
12 incurred are set forth the Blumenthal Decl. at ¶13 and Exhibits #3 and 4. These costs were reasonably
13 incurred in the prosecution of the Action. (Blumenthal Decl. at ¶13.) Because these costs were
14 reasonable and necessary to the successful prosecution of these claims, the request is reasonable and
15 should be granted.

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

17 Plaintiff respectfully submit that for his service as the class representative, Plaintiff should be
18 awarded the agreed service award of \$10,000, in accordance with the Agreement for his time, risk and
19 effort expended on behalf of the Class as the class representative. (Agreement at ¶ 3.2(a).) Defendant
20 has agreed to this payment and there have been no objections to the requested service award. The
21 Blumenthal Decl., at ¶14, provides a long list of equivalent service awards approved in California in
22 similar cases, which further supports the request in this case. The Declarations of Plaintiff is submitted
23 in support of this request and is attached as Exhibit #5 to the Blumenthal Decl.

24 As the sole representative of the Class, Plaintiff performed his duty to the Class admirably and

25
26 ⁷ 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 without exception. Plaintiff worked extensively with Class Counsel during the course of the litigation,
2 responding to numerous requests, searching for documents, working with counsel, and reviewing the
3 settlement documentation. (Blumenthal Decl. at ¶ 14.) As set forth in the Agreement, the Plaintiff is
4 also providing a comprehensive release as part of the Settlement, far beyond the class release. The
5 Declaration of Plaintiff details the involvement, stress and risks he undertook as a result of this Action.
6 Plaintiff also assumed the serious risk that she might possibly be liable for costs and fees to Defendant,
7 as well as the reputational risk of being “blacklisted” by other future employers for having filed a class
8 action on behalf of fellow former employees. (Blumenthal Decl. at ¶15.) Without the Plaintiff’s
9 participation, cooperation and information, no other employees would be receiving any benefit.
10 (Blumenthal Decl. at ¶¶ 15-16).

11 The payment of service awards to successful class representatives is appropriate and the amount
12 of \$10,000 is well within the currently awarded range for similar settlements. *See e.g. Mathein v. Pier*
13 *1 Imps.*, 2018 U.S. Dist. LEXIS 71386, 168 Lab. Cas. (CCH) P36,620 (E.D. Cal. 2018) (approving two
14 service awards of \$12,500 each); *Holman v. Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS
15 173698 (approving \$10,000 service award where class member recovery was \$375); *Bellinghausen v.*
16 *Tractor Supply Co.*, 306 F.R.D. 245, 268 (N.D. Cal. 2015) (approving \$10,000 award). Accordingly,
17 Class Counsel respectfully request approval of the requested Class Representative Service Payment in
18 accordance with the Agreement.

19 **VI. CONCLUSION**

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

23 Respectfully submitted,

24 Dated: October 5, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

25 By: /s/ Kyle Nordrehaug
26 Kyle R. Nordrehaug, Esq.
27 Attorneys for Plaintiff
28