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

14 **IN AND FOR THE COUNTY OF SANTA CLARA**

15 TAMIKA WALKER and SHANNON
16 PEETE, individuals, on behalf of
17 themselves and on behalf of all persons
18 similarly situated,

19 Plaintiff,

20 vs.

21 DJO, LLC, a Limited Liability Company;
22 and DOES 1 through 50, inclusive,

23 Defendants.

Case No. 22CV400335

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

Hearing Date: August 10, 2023

Hearing Time: 1:30 p.m.

Judge: Hon. Sunil R. Kulkarni
Dept: 1

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Trial Date: Not set

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1 **I. INTRODUCTION**

2 Plaintiffs Tamika Walker and Shannon Peete (“Plaintiffs”) respectfully submits this
3 memorandum in support of the unopposed motion for preliminary approval of the proposed class action
4 settlement with Defendant DJO, LLC (“Defendant”), and seeks entry of an order: (1) preliminarily
5 approving the proposed settlement of this class action with Defendant; (2) for settlement purposes only,
6 conditionally certifying the Class, which is comprised of “all individuals who currently or previously
7 have worked for Defendant in California, including both Defendant's employees and temporary workers
8 employed by third-party staffing agencies and assigned to work for Defendant, in non-exempt positions
9 at any time during the Class Period” of August 2, 2018 to July 11, 2023; (3) provisionally appointing
10 Plaintiffs as the representatives of the Class; (4) provisionally appointing Norman B. Blumenthal, Kyle
11 R. Nordrehaug, Aparajit Bhowmik, Nicholas J. DeBlouw, and Christine T. LeVu of Blumenthal
12 Nordrehaug Bhowmik De Blouw LLP as Class Counsel for the Class; (5) approving the form and
13 method for providing class-wide notice; (6) directing that notice of the proposed settlement be given
14 to the Class; (7) appointing ILYM Group as the Administrator; and (8) scheduling a final approval
15 hearing date proposed for January 18, 2024 to consider Plaintiffs’ motion for final approval of the
16 settlement and entry of the Judgment, and Plaintiffs’ motion for approval of attorneys' fees and
17 expenses. Plaintiffs and Defendant (collectively the “Parties”) have reached a full and final settlement
18 of the above-captioned action, which is set forth in the Class Action and PAGA Settlement Agreement
19 ("Agreement") filed concurrently with the Court.¹ A copy of the fully executed Agreement is attached
20 as Exhibit #1 to the Declaration of Kyle Nordrehaug (“Decl. Nordrehaug”), served and filed herewith,
21 and the form of the Agreement is based on the Los Angeles Superior Court model form for class and
22 PAGA settlements.

23 As consideration for this Settlement, the Gross Settlement Amount is One Million Five Hundred
24 Thousand Dollars (\$1,500,000) to be paid by Defendant, as set forth in the Agreement. The Gross
25 Settlement Amount will settle all issues pending in the Action between the Parties and will be made
26 in settlement of the Released Class Claims. The Gross Settlement Amount includes all payments of
27

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

1 Individual Class Payments to the Participating Class Members, Administration Expenses Payment,
2 Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, Class Representative
3 Service Payments, and the PAGA Penalties. The Gross Settlement Amount does not include the
4 employer's share of payroll taxes which will be separately paid by Defendant. The Settlement is all-in
5 with no reversion to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶3.

6 The following is a table of the key financial terms of the Settlement and the proposed
7 deductions:

8 **\$1,500,000** (Gross Settlement Amount)

- 9 - \$20,000 (Plaintiffs' proposed service awards not to exceed \$10,000 each)
- \$21,500 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- 10 - \$500,000 (Class Counsel Fees Payment - not to exceed one-third of settlement)
- \$150,000 (PAGA Penalties - 75% to LWDA / 25% to Aggrieved Employees)
- 11 - \$15,000 (Administration Expenses Payment - not to exceed amount)

12 **\$793,500** (Net Settlement Amount)

13 Based upon 458 Class Members who collectively worked and estimated 37,000 Workweeks
14 (Agreement at ¶4.1), the Gross Settlement Amount provides a value of \$3,275 per Class Member and
15 \$40 per Workweek and after deductions, the Net Settlement Amount provides an average recovery of
\$1,732 per Class Member and a recovery of \$20.44 per Workweek. Decl. Nordrehaug at ¶6.

16 On February 2, 2023, the Parties participated in an all-day mediation session presided over by
17 Mark Rudy, Esq., a respected and experienced mediator of wage and hour class actions. At this
18 mediation, the Parties reached an agreement to settle the Action based upon a mediator's proposal.
19 Decl. Nordrehaug at ¶5. The Settlement is fair, reasonable and adequate, and should be preliminarily
20 approved because there is a substantial monetary payment, and there are substantial litigation and
21 class-certification risks. Therefore, Plaintiffs respectfully request that this Court grant preliminary
22 approval of the Agreement and enter the proposed order submitted herewith.

23 **II. DESCRIPTION OF THE SETTLEMENT**

24 The Gross Settlement Amount is One Million Five Hundred Thousand Dollars (\$1,500,000).
25 (Agreement at ¶1.22.) Under the Settlement, the Gross Settlement Amount consists of the following
26 elements: (1) payment of the Individual Class Payments to the Participating Class Members; (2) Class
27 Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3) Administration Expenses
28 Payment; (4) the Class Representative Service Payments to Plaintiffs; and (5) the PAGA Penalties

1 payment. (Agreement at ¶ 1.22.) The Gross Settlement Amount does not include Defendant's share
2 of payroll taxes. (Agreement at ¶ 3.1.) The Gross Settlement Amount shall be all-in with no reversion
3 to Defendant. (Agreement at ¶ 3.1.) Decl. Nordrehaug at ¶15.

4 Within thirty (30) days after Final Approval of the Settlement, Defendant shall deposit the Gross
5 Settlement Amount with the Administrator. (Agreement at ¶ 4.3.) The distribution of Individual Class
6 Payments to Participating Class Members along with the other Court-approved distributions shall be
7 made by the Administrator within fourteen (14) days after Defendant fully funds the Gross Settlement
8 Amount. (Agreement at ¶ 5.1.) Decl. Nordrehaug at ¶16.

9 The amount remaining in the Gross Settlement Amount after the deduction of Court-approved
10 amounts for Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service
11 Payments, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the
12 Administration Expenses Payment (called the "Net Settlement Amount") shall be allocated to Class
13 Members as their Individual Class Payments. (Agreement at ¶¶ 1.28 and 3.2.) From the Net Settlement
14 Amount, the Individual Class Payment for each Participating Class Member will be calculated by (a)
15 dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating
16 Class Members during the Class Period and (b) multiplying the result by each Participating Class
17 Member's Workweeks. (Agreement at ¶ 3.2(e).) Workweeks will initially be based on Defendant's
18 records; however, Class Members will have the right to challenge the number of Workweeks. Decl.
19 Nordrehaug at ¶17.

20 Class Members may choose to opt-out of the Settlement by following the directions in the Class
21 Notice. (Agreement at ¶ 8.5, Ex. A.) All Class Members who do not "opt out" will be deemed
22 Participating Class Members who will be bound by the Settlement and will be entitled to receive an
23 Individual Class Payment. (Agreement at ¶ 8.5(c).) All Aggrieved Employees, including those who
24 submit an opt-out request, will still be paid their allocation of the PAGA Penalties and will remain
25 subject to the release of the Released PAGA Claims regardless of their request for exclusion.
26 (Agreement at ¶¶ 6.3 and 8.5(d).) Finally, the Class Notice will advise the Class Members of their right
27 to object to the Settlement and/or dispute their Workweeks. (Agreement at ¶¶ 8.6 and 8.7, Ex. A.)
28 Decl. Nordrehaug at ¶18.

1 A Participating Class Member must cash his or her Individual Class Payment check within 180
2 days after it is mailed. (Agreement at ¶ 5.2.) Any settlement checks not cashed within 180 days will
3 be voided and any funds represented by such checks to the California Controller's Unclaimed Property
4 Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to the requirements
5 of California Code of Civil Procedure Section 384 (b). (Agreement at ¶ 5.4.) Decl. Nordrehaug at ¶19.

6 Subject to Court approval, the Parties have agreed on ILYM Group to administer the settlement
7 in this action ("Administrator"). (Agreement at ¶ 1.2.) The Administrator will be paid for settlement
8 administration in an amount not to exceed \$15,000. (Agreement at ¶ 3.2(c).) Decl. Nordrehaug at ¶20.

9 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
10 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement
11 at ¶ 3.2(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
12 Litigation Expenses Payment in an amount not to exceed \$21,500. (Agreement at ¶ 3.2(b).) Subject
13 to Court approval, the Agreement provides for a payment of no more than \$10,00 each to the Plaintiffs
14 as the Class Representative Service Payments. (Agreement at ¶ 3.2(a).) Decl. Nordrehaug at ¶21.

15 Subject to Court approval, One Hundred Fifty Thousand Dollars (\$150,000) will be paid from
16 the Gross Settlement Amount for PAGA penalties under the California Private Attorneys General Act,
17 Cal. Labor Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code
18 § 2699(i), the PAGA Payment shall be allocated as follows: 75% (\$112,500) shall be allocated to the
19 Labor Workforce Development Agency ("LWDA") as its share of the civil penalties and 25% (\$37,500)
20 allocated to the Individual PAGA Payments to the Aggrieved Employees based on the number of their
21 respective PAGA Pay Periods. (Agreement at ¶ 3.2(d).) As set forth in the accompanying proof of
22 service, the LWDA has been served with this motion and the Agreement. Decl. Nordrehaug at ¶22.

23 **III. CASE BACKGROUND**

24 The description of the case and claims, along with the procedural history, is set forth in the
25 Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the
26 exchange of documents and information in connection with the Action which permitted Class Counsel
27 to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and 14. The Parties participated
28 in mediation on February 2, 2023 with Mark Rudy, Esq., which after arm's length negotiations, resulted

1 in this Settlement. Decl. Nordrehaug, ¶12.

2 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO**
3 **GRANT PRELIMINARY APPROVAL**

4 When a proposed class-wide settlement is reached, the settlement must be submitted to the court
5 for approval. 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87.
6 California "[p]ublic policy generally favors the compromise of complex class action litigation."
7 *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) quoting *Cellphone Termination Fee*
8 *Cases*, 180 Cal.App.4th 1110, 1117-18 (2009). Class action settlements are approved where the
9 proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
10 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert.
11 denied, 459 U.S. 1217 (1983)).

12 Preliminary approval is the first of three steps that comprise the approval procedure for
13 settlements of class actions. The second step is the dissemination of notice of the settlement to all class
14 members. The third step is a final settlement approval hearing, at which evidence and argument
15 concerning the fairness, adequacy, and reasonableness of the settlement may be presented, and class
16 members may be heard regarding the settlement. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
17 1801 (1996); *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of Court, rule 3.769.

18 The primary question presented on an application for preliminary approval of a proposed class
19 action settlement is whether the proposed settlement is "within the range of possible approval."
20 *Manual for Complex Litigation, Second* §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th
21 Cir. 1982).² Preliminary approval is merely the prerequisite to giving notice so that "the proposed
22 settlement... may be submitted to members of the prospective Class for their acceptance or rejection."
23 *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is
24 "a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining."

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

1 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v.*
2 *Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's
3 determination that settlement was "fair, reasonable and adequate" where the settlement "provided
4 valuable benefits to the class ... that were 'particularly valuable in light of the risks plaintiff would have
5 faced if she proceeded to litigate her case.'"); *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate
6 question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the
7 settlement is given to the class members and a final settlement hearing is held by the Court.

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

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

16 In considering a potential settlement for preliminary approval purposes, the trial court does not
17 have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the
18 dispute, and need not engage in a trial on the merits. *Wershba, supra*, 91 Cal.App.4th at 239-40; *Dunk*,
19 *supra*, 48 Cal.App. 4th at 1807. The Ninth Circuit explains, "the very essence of a settlement is
20 compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688
21 F.2d at 624. The question whether a proposed settlement is fair, reasonable and adequate necessarily
22 requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "the
23 terms of the compromise with the likely rewards of litigation.'" *Weinberger v. Kendrick*, 698 F.2d 61,
24 73 (2d Cir. 1982), *cert. denied* 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders*
25 *of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). Thus, when analyzing the
26 settlement, the amount is "not to be judged against a hypothetical or speculative measure of what might
27 have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625, 628.

28 With regard to class action settlements, the opinions of counsel should be given considerable

weight both because of counsel's familiarity with this litigation and previous experience with cases such as these. *Officers for Justice*, 688 F.2d at 625; *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988); *Weinberger*, 698 F.2d at 74. "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

B. Factors To Be Considered In Granting Preliminary Approval

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

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

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

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

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

This settlement is the result of extensive and hard-fought litigation as well as negotiations before an experienced and well-respected mediator. Defendant has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiffs and Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released

1 Class Claims of the Class in accordance with this Settlement.³

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

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

20 As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is
21 One Million Five Hundred Thousand Dollars (\$1,500,000). The Settlement is all-in with no reversion
22 to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

23
24 ³ The release applicable to the Class is tethered to allegations in the Action as the "Released Class
25 Claims," which are "all class claims pled, or that could have been pled, in the Operative Complaint and
26 PAGA Notice, based on the factual allegations contained therein which occurred during the Class
27 Period. Except as expressly set forth in this Agreement, Participating Class Members do not release any
28 other claims, including claims for vested benefits, wrongful termination, violation of the California Fair
Employment and Housing Act, unemployment insurance, disability, social security, workers'
compensation, or claims based on facts occurring outside the Class Period." (Agreement at ¶¶ 1.39 and
6.2.)

1 Class Counsel has conducted a thorough investigation into the facts of the class action. Over
2 the course of more than a year, Class Counsel diligently evaluated the Class Members' claims against
3 Defendant. Prior to the settlement negotiations, counsel for Defendant provided Class Counsel with
4 all necessary information for the Class and the claims alleged. In addition, Class Counsel previously
5 negotiated settlements with other employers in actions involving nearly identical issues and analogous
6 defenses. Based on the foregoing data and their own independent investigation, evaluation and
7 experience, Class Counsel believes that the settlement with Defendant on the terms set forth in the
8 Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known
9 facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and
10 potential appellate issues. Decl. Nordrehaug at ¶ 14.

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

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

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

25 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
26 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
27 receive payment according to the same formula. (Agreement at ¶ 3.2(e).) Based upon 458 Class
28 Members who collectively worked and estimated 37,000 Workweeks (Agreement at ¶4.1), the Gross

1 Settlement Amount provides a value of \$3,275 per Class Member and \$40 per Workweek and after
2 deductions, the Net Settlement Amount provides an average recovery of \$1,732 per Class Member and
3 a recovery of \$20.44 per Workweek. Decl. Nordrehaug, ¶6.

4 The calculations to compensate for the amount due to the Class Members at the time this
5 Settlement was negotiated were calculated by Plaintiffs' expert, Berger Consulting, in advance of
6 mediation. Class Counsel analyzed the data for putative class members and determined the potential
7 maximum damages for the class claims. For the Class, the maximum value of the claim for unpaid
8 overtime wages due to the alleged miscalculation of the regular rate was \$79,744, the maximum
9 potential damages for underpaid meal period premiums were estimated to be \$83,359, the maximum
10 potential rest period damages were estimated to be \$794,390 based upon one missed rest period per
11 week, and the maximum potential damages for failure to provide expense reimbursement were
12 calculated to be \$46,250. In total, the damages for the Class were calculated to have a maximum
13 potential total value of \$1,003,743. In addition, Plaintiff calculated that the maximum value of the
14 potential waiting time penalties were \$434,270, and the maximum value of the potential wage statement
15 penalties were \$496,450.⁴ Decl. Nordrehaug, ¶6.

16 Consequently, the Gross Settlement Amount represents more than the potential maximum
17 damages at issue for the Class in this case, assuming these amounts could all be proven in full at trial.⁵
18 The above maximum calculations should then be adjusted in consideration for both the risk of class
19 certification and the risk of establishing class-wide liability on all claims. Given the amount of the
20 Settlement as compared to the potential value of the claims, the Settlement is most certainly fair and
21

22 ⁴ While Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and
23 226, at mediation Plaintiffs recognized that these claims were subject to additional, separate defenses
24 asserted by Defendant, including, a good faith dispute defense as to whether any premium wages for
25 meal or rest periods or other wages were owed given Defendant's position that Plaintiffs and Class
26 Members were properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584
27 (2010) ("There is no willful failure to pay wages if the employer and employee have a good faith
28 dispute as to whether and when the wages were due.").

27 ⁵ Because the PAGA claim does not provide a recovery to the Class, Plaintiff did not include the
28 PAGA claim in this discussion of the class claim valuation. The PAGA claim is addressed in the Decl.
Nordrehaug at ¶ 33.

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

2 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
3 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
4 Defendant present serious threats to the claims of the Plaintiffs and the other Class Members.
5 Defendant asserted that Defendant's practices complied with all applicable Labor laws. Defendant
6 argued that all work time was properly recorded and paid for and that there was no miscalculation of
7 the regular rate. Defendant contends that its meal and rest period policies fully complied with
8 California law, and Defendant did not fail to provide the opportunity for legally required rest breaks.
9 As to meal periods, Defendant established that it paid meal period premiums for any missed meal
10 periods, and Defendant contended that it did not underpay such meal period premiums paid to the Class.
11 As to expense reimbursement, Defendant contended that it did not fail to provide reimbursement for
12 necessary business expenses and that claimed expenses were incurred voluntarily and/or for the
13 convenience of employees and is therefore not required reimbursement. Defendant argued that the
14 decisions in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), *Lockheed Martin Corp. v. Superior*
15 *Ct.*, 29 Cal. 4th 1096, 1108 (2003), and *Salazar v. See's Candy Shops Inc.*, 64 Cal.App.5th 85 (2021),
16 weakened Plaintiffs' claims, on liability, value, and class certifiability as to the meal and rest period
17 claims. Defendant also argues that based on its facially lawful practices, it acted in good faith and
18 without willfulness, which if accepted would negate the claims for waiting time penalties and/or
19 inaccurate wage statements. If successful, Defendant's defenses could eliminate or substantially reduce
20 any recovery to the Class. While Plaintiffs believes that these defenses could be overcome, Defendant
21 maintains these defenses have merit and therefore present a serious risk to recovery by the Class. Decl.
22 Nordrehaug, ¶ 24.

23
24 ⁶ See *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
25 approving settlement which represented "roughly one-sixth of the potential recovery"); *Stovall-Gusman*
26 *v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval
27 where "the proposed Total Settlement Amount represents approximately 10% of what class might have
28 been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D.
Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value);
Ma v. Covidien Holding, Inc., 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class
action settlement worth "somewhere between 9% and 18%" of full verdict value).

1 There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable
2 to obtain class certification and thereby not recover on behalf of any employees other than himself.
3 Defendant argued that the individual experience of each putative class member varied with respect to
4 the claims. Defendant could also contest class certification by arguing injury and good faith were case-
5 by-case determinations that precluded class certification. Plaintiffs are aware of other cases where class
6 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
7 (2019) (denying certification of rest break claims). Finally, even if class certification was successful,
8 as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59
9 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class wide recovery even where the
10 class has been certified. While other cases have approved class certification in wage and hour claims,
11 class certification in this action would have been hotly disputed and was by no means a foregone
12 conclusion. Decl. Nordrehaug, ¶ 25.

13 After arm's length negotiations between experienced and informed counsel, the Parties
14 recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of
15 \$1,500,000.00. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

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

22 2007 WL 221862, at *4 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458
23 (9th Cir. 2000)).

24 3. **The Settlement Does Not Improperly Grant Preferential Treatment To** 25 **Class Representatives or Segments of The Class**

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

Plaintiffs will apply to the Court for Class Representative Service Payments in consideration

1 for their service and for the risks undertaken on behalf of the class. (Agreement at ¶ 3.2(a).) Plaintiffs
2 performed their duties admirably by working with Class Counsel. Decl. Nordrehaug at ¶27.
3 Declarations of the Plaintiffs are presented in support. For purposes of this preliminary approval stage,
4 the requested service award of \$10,000 is well within the accepted range of awards for purposes of
5 preliminary approval. *See e.g. Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S. Dist. LEXIS 71386 (E.D.
6 Cal. 2018) (awarding \$12,500 where average class member payment was \$351); *Holman v. Experian*
7 *Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving \$10,000 service
8 award where class member recovery was \$375); *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008
9 WL 4473183, *7 (S.D.Cal. 2008) (awarding \$25,000 service award to each of six plaintiffs in overtime
10 class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. 2007) (awarding \$25,000
11 service award in overtime class action and a pool of \$100,000 in enhancements). As explained in
12 *Glass*, service awards are routinely awarded to class representatives to compensate the employees for
13 the time and effort expended on the case, for the risk of litigation, for the fear of suing an employer and
14 retaliation therefrom, and to serve as an incentive to vindicate the statutory rights of all employees.
15 2007 WL 221862 at *16-17.

16 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit** 17 **Preliminary Approval Of The Settlement**

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

27 Based on the foregoing data and their own independent investigation and evaluation, Class
28 Counsel is of the opinion that the Settlement with Defendant for the consideration and on the terms set

1 forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light
2 of all known facts and circumstances, including the risk of significant delay, defenses asserted by
3 Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both
4 parties possessed sufficient information to make an informed judgment regarding the likelihood of
5 success on the merits and the results that could be obtained through further litigation. Decl.
6 Nordrehaug at ¶29.

7 In *Glass*, the Northern District of California granted final approval of an overtime wage action
8 although in *Glass* no formal discovery had been conducted prior to the settlement:

9 Here, no formal discovery took place prior to settlement. As the Ninth Circuit has
10 observed, however, '[i]n the context of class action settlements, 'formal discovery is not
11 a necessary ticket to the bargaining table' where the parties have sufficient information
12 to make an informed decision about settlement.'"

13 *Glass*, 2007 U.S. Dist. LEXIS 8476 at *14 (quoting *In re Mego Financial Corp. Securities Litigation*,
14 213 F.3d at 459).

15 Here, Class Counsel was in a equally sufficient position to evaluate the fairness of this
16 Settlement because Class Counsel received a full production of documents through informal discovery,
17 received all necessary information which was evaluated with the assistance of an expert, and performed
18 independent investigations and due diligence to confirm the accuracy of the information supplied by
19 Defendant.

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

21 Plaintiffs contend that the proposed settlement meets all of the requirements for class
22 certification under California Code of Civil Procedure § 382 as demonstrated below, and therefore, the
23 Court may appropriately approve the Class as defined in the Agreement. This Court should
24 conditionally certify the Class for settlement purposes only, defined as follows:

25 All individuals who currently or previously have worked for Defendant in California,
26 including both Defendant's employees and temporary workers employed by third-party
27 staffing agencies and assigned to work for Defendant, in non-exempt positions at any
28 time during the Class Period.

(Agreement at ¶ 1.5.)

The "Class Period" is from August 2, 2018 to July 11, 2023. (Agreement at ¶ 1.13.)

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

2 Plaintiffs seek certification of this Class for settlement purposes under California Code of Civil
3 Procedure § 382. The California Supreme Court has summarized the standard for determining whether
4 class certification is appropriate as follows:

5 Code of Civil Procedure Section 382 authorizes class actions “when the question is one
6 of a common or general interest, of many persons, or when the parties are numerous,
7 and it is impracticable to bring them all before the court....” The party seeking
8 certification has the burden to establish the existence of both an ascertainable class and
9 a well-defined community of interest among class members. (*citations omitted*). The
“community of interest” requirement embodies three factors: (1) predominant common
questions of law or fact; (2) class representatives with claims or defenses typical of the
class; and (3) class representatives who can adequately represent the class.

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

11 While Defendant reserves all rights to dispute that the Plaintiffs can satisfy these requirements,
12 the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
13 for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
14 this settlement only. (Agreement at ¶ 2.8.)

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

16 Plaintiffs bring this Action on behalf of a Class of individuals in non-exempt positions who
17 worked for Defendant during the applicable Class Period. Plaintiffs assert that all of these individuals
18 are ascertainable because the class members can readily be determined through examination of
19 Defendant’s files. Given that the Class consists of approximately 458 members, Plaintiffs maintain that
20 numerosity is clearly satisfied. *See Bowles v. Superior Court*, 44 Cal.2d 574 (1955) (class with 10
21 members sufficiently numerous); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981) (class of
22 48 members satisfies numerosity requirement.) Here, Plaintiffs assert that the 458 individuals who
23 comprise the Class can be identified based on Defendant’s records and are sufficiently numerous for
24 class certification. Decl. Nordrehaug at ¶30.

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

26 Predominance of common issues of law or fact does not require that the common issues be
27 dispositive of the entire controversy or even that they be dispositive of all liability issues. 1 *Newberg*
28 *on Class Actions*, Section 4.25 at 4-82, 4-83 (1992). “Predominance is a comparative concept, and ‘the

1 necessity for class members to individually establish eligibility and damages does not mean individual
2 fact questions predominate.” *Sav-On*, 34 Cal. 4th at 334.

3 Commonality exists if there is a predominant common legal question regarding how an
4 employer’s policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,
5 1536 (2008) (“[T]he common legal question remains the overall impact of Diva's policies on its
6 drivers.”) Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the
7 certification stage since the question is “essentially a procedural one that does not ask whether an action
8 is legally or factually meritorious.” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

9 Here, Plaintiff contends that common questions of law and fact are present, and specifically the
10 common questions of whether Defendant’s practices were lawful, whether Defendant properly
11 calculated overtime wages, whether Defendant properly paid meal period premiums, whether the
12 Defendant failed to provide all legally required rest periods to class members, whether Defendant failed
13 to provide required expense reimbursement, and whether Class Members are entitled to damages and
14 penalties as a result of these practices. Decl. Nordrehaug, ¶30. Defendant disputes that common
15 questions predominate but will not oppose such a finding for purposes of this Settlement only.

16 **D. The Claims of the Plaintiffs Are Typical of the Class Claims**

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

23 In the instant case, Plaintiffs contend that there can be little doubt that the typicality requirement
24 is satisfied. The Plaintiffs worked for Defendant in a non-exempt position during the Class Period.
25 Plaintiffs contend that, like every other member of the Class, theyr was subject to the same practices
26 and policies of Defendant and was subject to the same defenses. Thus, Plaintiffs assert that the claims
27 of the Plaintiffs and the Class Members arise from the same course of conduct by the Defendant,
28 involve the same employment policies and practices of Defendant, and are based on the same legal

1 theories. Decl. Nordrehaug at ¶30. For purposes of settlement, Plaintiffs maintain that the typicality
2 requirement is met as to the common issues presented in this case. Defendant disputes typicality but
3 Defendant does not oppose a finding of typicality for purposes of this Settlement only.

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

5 Plaintiffs contend that the Class Members are adequately represented here because Plaintiffs
6 and representing counsel (a) do not have any conflicts of interest with other class members, and (b) will
7 prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is
8 met here. First, Plaintiffs are well aware of their duties as the representatives of the Class and have
9 actively participated in the prosecution of this case to date. Plaintiffs effectively communicated with
10 counsel, provided documents to counsel and participated in the investigation and negotiations in the
11 Action. Second, Plaintiffs retained competent counsel who are experienced in employment class
12 actions and who have no conflicts. Decl. Nordrehaug at ¶ 31. Third, there is no antagonism between
13 the interests of the Plaintiffs and those of the Class. Both the Plaintiffs and the Class Members seek
14 monetary relief under the same set of facts and legal theories. Defendant disputes that the adequacy
15 requirement is satisfied but will not oppose such a finding for purposes of this Settlement only.

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

17 To certify a class, the Court must also determine that a class action is superior to other available
18 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of
19 common issues will reduce litigation costs and promote greater efficiency, a class action may be
20 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
21 1996). As courts have previously observed:

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

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

Here, Plaintiffs contend that a class action is the superior mechanism for resolution of the claims
as pled by the Plaintiffs. While Defendant disputes that class treatment is superior, Defendant does not

1 dispute a finding of superiority in this action for purposes of this Settlement only.

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

3 The Court has broad discretion in approving a practical notice program. *7- Eleven Owners for*
4 *Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1164 (2000). The Parties have agreed
5 upon procedures by which the Class Members will be provided with written notice of the Settlement
6 similar to those approved and utilized in hundreds of class action settlements. In accordance with the
7 Agreement, Defendant will provide to the Administrator a confidential electronic spreadsheet
8 containing the Class Data. (Agreement at ¶ 4.2.) Within 14 days after receiving the Class Data, the
9 Administrator will mail the Class Notice to all Class Members via first-class U.S. Mail using the most
10 current mailing address information available. (Agreement at ¶ 8.4(b).) The Class Notice will include
11 a Spanish translation. (Agreement at ¶ 1.11.)

12 The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel
13 and to be approved by the Court, includes all relevant information. (*See Exhibit “A”* to the Agreement.)
14 The Class Notice will include, among other information: (i) information regarding the Action; (ii) the
15 impact on the rights of the Class Members if they do not opt out, including a description of the
16 applicable release; (iii) information to the Class Members regarding how to opt out and how to object
17 to the Settlement; (iv) the estimated Individual Class Payment for each of the Class Members; (iii) the
18 amount of attorneys’ fees and expenses to be sought; (v) the amount of the Plaintiffs’ service award
19 request; and (vi) the anticipated expenses of the Administrator. Decl. Nordrehaug at ¶32.

20 The Class Notice will state that the Class Members shall have sixty (60) days from the date that
21 the Notice is mailed to them (the “Response Deadline”) to request exclusion (opt-out) or to submit an
22 objection, which Response Deadline shall be extended by 14 days in the event of a re-mailing.
23 (Agreement at ¶¶ 1.43, 8.5, 8.7.) Class Members shall be given the opportunity to object to the
24 Settlement and/or requests for attorneys’ fees and expenses and to appear at the Final Approval
25 Hearing. (Agreement at ¶ 8.7.) Class Members who do not submit a timely and proper request to opt-
26 out will automatically receive a payment of their Individual Class Payment. This notice program was
27 designed to meaningfully reach the Class Members and it advises them of all pertinent information
28 concerning the Settlement. Decl. Nordrehaug at ¶32. The mailing and distribution of the Class Notice

1 satisfies the requirements of due process and is the best notice practicable under the circumstances and
2 complies with Rules of Court 3.766 and 3.769(f).

3 **VII. CONCLUSION**

4 Plaintiffs respectfully request that the Court preliminarily approve the proposed settlement and
5 sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final
6 fairness hearing for the proposed date of January 18, 2024.

7 Dated: July 17, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
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10 Kyle R. Nordrehaug, Esq.
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