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

15 CHAMARIE SPEARS, an individual, and
16 KATHLEEN LEONARD, an individual on
17 behalf of herself and on behalf of all persons
18 similarly situated,

19 Plaintiffs,

20 vs.

21 VITALANT, a Corporation; and DOES 1
22 through 50, inclusive,

23 Defendants.

CASE NO.: **22-CIV-03291**

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

Hearing Date: March 21, 2024
Hearing Time: 9:00 a.m.

Judge: Hon. Susan L. Greenberg
Dept.: 3

Action Filed: September 27, 2022
Trial Date: Not set

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1 **I. INTRODUCTION**

2 Plaintiffs ChaMarie Spears and Kathleen Leonard (“Plaintiffs”) respectfully submit this
3 memorandum in support of the unopposed motion for preliminary approval of the proposed class action
4 settlement with Defendant Vitalant (“Defendant”), and seek 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 consists of both the California Class and the FCRA Class, with
7 the California Class defined as all individuals who were employed by Defendant in California and
8 classified as non-exempt at any time during the California Class Period, and the FCRA Class defined
9 as all individuals who applied to work for Defendant who were classified as either exempt or
10 non-exempt in the United States during the FCRA Class Period for whom background checks were run
11 using the same federal FCRA form as that contained on page 2 of the forms provided to Plaintiff
12 Spears; (3) provisionally appointing Plaintiffs as the representatives of the Class; (4) provisionally
13 appointing Norman B. Blumenthal, Kyle R. Nordrehaug, Aparajit Bhowmik, Nicholas J. De Blouw,
14 Jeffrey S. Herman, and Sergio J. Puche of Blumenthal Nordrehaug Bhowmik De Blouw LLP as Class
15 Counsel; (5) approving the form and method for providing class-wide notice; (6) directing that notice
16 of the proposed settlement be given to the class; (7) appointing ILYM Group as Administrator, and
17 (8) scheduling a final approval hearing date, proposed for July 25, 2024 which is at least 120 days from
18 preliminary approval, to consider Plaintiffs’ motion for final approval of the settlement and for approval
19 of attorneys’ fees and expenses. Plaintiffs and Defendant (collectively the “Parties”) have reached a
20 full and final settlement of the above-captioned action, which is embodied in the Class Action and
21 PAGA Settlement Agreement (“Agreement”) filed concurrently with the Court.¹ A copy of the fully
22 executed Agreement is attached as Exhibit #1 to the Declaration of Kyle Nordrehaug (“Decl.
23 Nordrehaug”), served and filed herewith. The form of the Agreement is based upon the Los Angeles
24 County Superior Court model form for a class and PAGA settlement.

25 As consideration for this Settlement, the non-reversionary Total Settlement Amount of Two
26 Million Dollars (\$2,000,000) (the “Total Settlement Amount”) is to be paid by Defendant, as set forth

27
28 ¹ Capitalized terms shall have the same meaning as defined in the Agreement.

1 in the Agreement. The Total Settlement Amount will settle all issues pending in the Action between
2 the Parties and will be made in full and final settlement of the Released Class Claims in exchange for
3 the payments to Participating Class Members from the Net Settlement Amount, and includes (a) the
4 costs of administration of the settlement, (b) all attorneys' fees and costs, (c) Class Representative
5 Service Payments, and (d) the PAGA Payment allocated 75% to the LWDA and 25% to the PAGA
6 Members. (Agreement at ¶ 1.25.) Decl. Nordrehaug at ¶3.

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

9 **\$2,000,000** (Total Settlement Amount)

- 10 - \$25,000 (Plaintiffs' proposed service awards not to exceed \$12,500 each)
- 11 - \$20,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- 12 - \$666,666 (Class Counsel Fees Payment - not to exceed 1/3 of settlement)
- 13 - \$50,000 (PAGA Payment - 75% to LWDA / 25% to PAGA Members)
- 14 - \$40,000 (Administration Expenses Payment - not to exceed amount)

12 **\$1,198,334** (Net Settlement Amount)

- 13 - \$62,422.50 (Individual FCRA Class Payments = \$17.50 each to 3,567 members)

13 **\$1,135,911.50** (Payable to California Class as Individual Class Payments)

14 Based upon 1,212 California Class Members who collectively worked 125,657 Workweeks, the Total
15 Settlement Amount provides an average value of \$1,598 per California Class Member and \$15 per
16 Workweek and after deductions the Net Settlement Amount provides an average recovery of \$937.22
17 per California Class Member and a recovery of \$9.03 per Workweek. Decl. Nordrehaug at ¶6.

18 On April 28, 2023, the Parties participated in an all-day mediation session presided over David
19 A. Rotman, Esq., a respected jurist and experienced mediator of wage and hour class actions.
20 Following the mediation, the Parties agreed on the basic terms of a settlement pursuant to a mediator's
21 proposal which was memorialized in the form of a Memorandum of Understanding. Decl. Nordrehaug
22 at ¶5. The Settlement is fair, reasonable and adequate, and should be preliminarily approved because
23 there is a substantial monetary payment, and there are significant litigation and class-certification risks.
24 Therefore, Plaintiffs respectfully request that this Court grant preliminary approval of the Agreement
25 and enter the proposed order submitted herewith.

26 **II. DESCRIPTION OF THE SETTLEMENT**

27 The Total Settlement Amount is Two Million Dollars (\$2,000,000). (Agreement at ¶ 1.25.)
28 Under the Settlement, the Total Settlement Amount consists of the following elements: (1) payment

1 of the Individual Class Payments to the Participating Class Members; (2) payment of Individual FCRA
2 Class Payments to the Participating FCRA Class Members; (3) Class Counsel Fees Payment and Class
3 Counsel Litigation Expenses Payment; (4) Administration Expenses Payment; (5) the Class
4 Representative Service Payments to the Plaintiffs; and (6) the PAGA Payment. (Agreement at ¶ 3.1.)
5 The Total Settlement Amount does not include Defendant's share of payroll taxes. (Agreement at ¶
6 3.1.) The Total Settlement Amount shall be all-in with no reversion to Defendant. (Agreement at ¶
7 3.1.) Decl. Nordrehaug at ¶15.

8 Within fifteen (15) days of the Effective Date, Defendant shall deposit the Total Settlement
9 Amount with the Administrator. (Agreement at ¶ 4.3.) The distribution of Individual Class Payments
10 to Participating Class Members along with the other Court-approved distributions shall be made by the
11 Administrator within fourteen (14) days after Defendant funds the Total Settlement Amount.
12 (Agreement at ¶ 5.1.) Decl. Nordrehaug at ¶16.

13 The amount remaining in the Total Settlement Amount after the deduction of Court-approved
14 amounts for Individual PAGA Payments, the LWDA PAGA Payment, the Class Representative Service
15 Payments, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the
16 Administration Expenses Payment (called the "Net Settlement Amount") shall be allocated to Class
17 Members. (Agreement at ¶¶ 1.28 and 3.2.) First, for the Participating FCRA Class Members, the
18 allocation of payment of the Individual FCRA Class Payments will be \$17.50 per person for what is
19 estimated to be approximately 3,567 persons for an approximate total of \$62,422.50. (Agreement at
20 ¶ 3.2(e).) Second, from the Net Settlement Amount, the Individual Class Payment for each
21 Participating Class Member will be calculated by (a) dividing the Net Settlement Amount by the total
22 number of Workweeks worked by all Participating Class Members during the California Class Period
23 and (b) multiplying the result by each Participating Class Member's Workweeks during the California
24 Class Period. (Agreement at ¶ 3.2(e).) Workweeks will be based on Defendant's records, however,
25 Class Members will have the right to challenge the number of Workweeks. Decl. Nordrehaug at ¶17.

26 Class Members may choose to opt-out of the Settlement by following the directions in the Class
27 Notice. (Agreement at ¶ 8.5, Ex. A.) All Class Members who do not "opt out" will be deemed
28 Participating Class Members who will be bound by the Settlement and will be entitled to receive an

1 Individual Class Payment. (Agreement at ¶ 8.5(c).) All PAGA Members, including those who submit
2 an opt-out request, will still be paid their allocation of the PAGA Payment (Individual PAGA Payment)
3 and will remain subject to the release of the Released PAGA Claims regardless of their request for
4 exclusion from the class action settlement. (Agreement at ¶¶ 6.3 and 8.5(d).) Finally, the Class Notice
5 will advise the Class Members of their right to object to the Settlement and/or dispute their Workweeks
6 and/or PAGA Pay Periods. (Agreement at ¶¶ 8.6 and 8.7, Ex. A.) Decl. Nordrehaug at ¶18.

7 A Participating Class Member must cash his or her Individual Class Payment check within 180
8 days after it is mailed. (Agreement at ¶ 5.2.) Any settlement checks not cashed within 180 days will
9 be voided and any funds represented by such checks sent to the California Controller's Unclaimed
10 Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to the
11 requirements of C.C.P. § 384(b). (Agreement at ¶ 5.4.) Decl. Nordrehaug at ¶19.

12 Subject to Court approval, the Parties have agreed on ILYM Group to administer the settlement
13 in this action ("Administrator"). (Agreement at ¶ 1.2.) The Administrator will be paid for settlement
14 administration in an amount not to exceed \$40,000. (Agreement at ¶ 3.2(c).) Decl. Nordrehaug at ¶20.

15 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
16 to exceed one-third of the Total Settlement Amount, as the Class Counsel Fees Payment. (Agreement
17 at ¶ 3.2(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
18 Litigation Expenses Payment in an amount not to exceed \$20,000. (Agreement at ¶ 3.2(b).) Subject
19 to Court approval, the Agreement provides for a payment of no more than \$12,500 each to the Plaintiffs
20 as the Class Representative Service Payments. (Agreement at ¶ 3.2(a).) Decl. Nordrehaug at ¶21.

21 Subject to Court approval, the PAGA Payment will be paid from the Total Settlement Amount
22 for settlement of all claims for civil penalties under the California Private Attorneys General Act, Cal.
23 Labor Code Section 2698, *et seq.* ("PAGA"). The PAGA Payment is \$50,000. (Agreement at ¶¶ 1.36
24 and 3.2(d).) Pursuant to the express requirements of Labor Code § 2699(i), the PAGA Payment shall
25 be allocated as follows: 75% shall be allocated to the Labor Workforce Development Agency
26 ("LWDA") as its share of the civil penalties (LWDA PAGA Payment) and 25% allocated to the
27 Individual PAGA Payments to be distributed to the PAGA Members based on the number of their
28 respective PAGA Pay Periods. (Agreement at ¶ 3.2(d).) As set forth in the accompanying proof of

1 service, the LWDA has been served with this motion and the Agreement. Decl. Nordrehaug at ¶22.

2 **III. CASE BACKGROUND**

3 The description of the case and claims, along with the procedural history is set forth in the
4 Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the
5 exchange of documents and information in connection with the Action for more than a year which
6 permitted Class Counsel to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and
7 14. The Parties participated in mediation on April 28, 2023 with David A. Rotman, Esq., which after
8 arms' length negotiations both during and after the mediation, resulted in this Settlement. Decl.
9 Nordrehaug, ¶12.

10 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO 11 GRANT PRELIMINARY APPROVAL**

12 California "[p]ublic policy generally favors the compromise of complex class action litigation."
13 *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) quoting *Cellphone Termination Fee*
14 *Cases*, 180 Cal.App.4th 1110, 1117-18 (2009). Class action settlements are approved where the
15 proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
16 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert.
17 denied, 459 U.S. 1217 (1983)).

18 Preliminary approval is the first of three steps that comprise the approval procedure for
19 settlements of class actions. The second step is the dissemination of notice of the settlement to all class
20 members. The third step is a final settlement approval hearing, at which evidence and argument
21 concerning the fairness, adequacy, and reasonableness of the settlement may be presented, and class
22 members may be heard regarding the settlement. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
23 1801 (1996); *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of Court, rule 3.769.

24 The primary question presented on an application for preliminary approval of a proposed class
25 action settlement is whether the proposed settlement is "within the range of possible approval."
26 *Manual for Complex Litigation, Second* §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th
27
28

1 Cir. 1982).² Preliminary approval is merely the prerequisite to giving notice so that “the proposed
2 settlement... may be submitted to members of the prospective Class for their acceptance or rejection.”
3 *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is
4 “a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining.”
5 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v.*
6 *Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's
7 determination that settlement was “fair, reasonable and adequate” where the settlement “provided
8 valuable benefits to the class . . . that were ‘particularly valuable in light of the risks plaintiff would have
9 faced if she proceeded to litigate her case.’”); *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate
10 question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the
11 settlement is given to the class members and a final settlement hearing is held by the Court.

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

13 The approval of a proposed settlement of a class action suit is a matter within the broad
14 discretion of the trial court. *Wershba, supra*, 91 Cal.App.4th at 234-235; *Dunk*, 48 Cal.App.4th 1794.
15 In considering a potential settlement for preliminary approval purposes, the trial court does not have
16 to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute,
17 and need not engage in a trial on the merits. *Wershba, supra*, 91 Cal.App.4th at 239-40; *Dunk, supra*,
18 48 Cal.App. 4th at 1807. The Ninth Circuit explains, “the very essence of a settlement is compromise,
19 ‘a yielding of absolutes and an abandoning of highest hopes.’” *Officers for Justice*, 688 F.2d at 624.
20 Thus, when analyzing the settlement, the amount is “not to be judged against a hypothetical or
21 speculative measure of what might have been achieved by the negotiators.” *Officers for Justice*, 688
22 F.2d at 625, 628.

23 With regard to class action settlements, the opinions of counsel should be given considerable
24 weight both because of counsel’s familiarity with this litigation and previous experience with cases

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 such as these. *Officers for Justice*, 688 F.2d at 625. As a result, courts hold that the recommendation
2 of counsel is entitled to significant weight. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221
3 F.R.D. 523, 528 (C.D. Cal. 2004).

4 **B. Factors To Be Considered In Granting Preliminary Approval**

5 A number of factors are to be considered in evaluating a settlement for purposes of preliminary
6 approval. In determining whether to grant preliminary approval, the court considers whether the "(1)
7 the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2)
8 has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives
9 or segments of the class, and (4) falls within the range of possible approval." *In re Tableware Antitrust*
10 *Litig.*, 484 F.Supp. 2d 1078, 1079 (N.D. Cal. 2007). Courts hold that "a presumption of fairness exists
11 where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery
12 are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
13 litigation; and (4) the percentage of objectors is small." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.
14 App. 4th 116, 128 (2008). Here, the Settlement meets all of these criteria for preliminary approval and
15 therefore the presumption applies.

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

18 This settlement is the result of extensive and hard-fought litigation as well as negotiations
19 before an experienced and well-respected mediator. Defendant has expressly denied and continues to
20 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiffs and
21 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released
22 Class Claims of the Class in accordance with this Settlement.³

23 Class Counsel are experienced and qualified to evaluate the class claims, the defenses asserted,
24 and the risks and benefits of trial and settlement, and Class Counsel are particularly experienced in
25 wage and hour employment class actions, as Class Counsel has previously litigated and certified similar

26 ³ The release applicable to the Class is appropriately tethered to allegations in the Action as the
27 "Released Class Claims" are defined as "all wage and hour Class claims that were alleged, or
28 reasonably could have been alleged, based on the wage and hour factual or legal theories alleged in
the Operative Complaint". (Agreement at ¶¶ 1.43 and 6.2.)

1 claims against other employers. Decl. Nordrehaug at ¶31. The view of qualified and well-informed
2 counsel that a class action settlement is fair, adequate, and reasonable is entitled to significant weight.
3 *See Kullar v. Foot Locker*, 168 Cal. App. 4th 116, 133 (2008) (the trial court "undoubtedly should
4 continue to place reliance on the competence and integrity of counsel, the involvement of a qualified
5 mediator, and the paucity of objectors to the settlement."); *Dunk*, 48 Cal. App. 4th at 1802.

6 The Parties attended an arms-length mediation session with David A. Rotman, Esq., a respected
7 and experienced mediator of wage and hour class actions, in order to reach this Settlement. In
8 preparation for the mediation, Defendant provided Class Counsel with payroll and employment data
9 and other information regarding the Class Members, various internal documents, and other
10 compensation and employment-related materials. Class Counsel analyzed the data with the assistance
11 of damages expert Berger Consulting and prepared and submitted a mediation brief to the mediator. The
12 final settlement terms were negotiated and set forth in the Agreement now presented for this Court's
13 approval. Decl. Nordrehaug at ¶ 5. Importantly, Plaintiffs and Class Counsel believe that this
14 Settlement is fair, reasonable and adequate.

15 As consideration for this Settlement, the Total Settlement Amount to be paid by Defendant is
16 Two Million Dollars (\$2,000,000). The Settlement is all-in with no reversion to Defendant and no need
17 to submit a claim form. Decl. Nordrehaug at ¶ 3.

18 Class Counsel has conducted an investigation into the facts of the class action. Informal
19 discovery was obtained, which included the production of hundreds of pages of relevant documents.
20 Class Counsel engaged in a thorough review and analysis of the relevant documents and data with the
21 assistance of an expert. Accordingly, the agreement to settle did not occur until Class Counsel
22 possessed sufficient information to make an informed judgment regarding the likelihood of success on
23 the merits and the results that could be obtained through further litigation. In addition, Class Counsel
24 previously negotiated settlements with other employers in actions involving nearly identical issues and
25 analogous defenses. Based on the foregoing data and their own independent investigation, evaluation
26 and experience, Class Counsel believes that the settlement with Defendant on the terms set forth in the
27 Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known
28 facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and

1 potential appellate issues. Decl. Nordrehaug at ¶ 14.

2 Plaintiffs and Class Counsel recognize the expense and length of continuing to litigate and
3 trying this Action against Defendant through possible appeals which could take several years. Class
4 Counsel has also taken into account the uncertain outcome and risk of litigation, especially in complex
5 class actions such as this Action. Class Counsel is also mindful of and recognize the inherent problems
6 of proof under, and alleged defenses to, the claims asserted in the Action. Based upon their evaluation,
7 Plaintiffs and Class Counsel have determined that the Settlement set forth in the Agreement is in the
8 best interest of the Class Members. Decl. Nordrehaug, ¶ 23.

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

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

16 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
17 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
18 receive payment according to the same formula. (Agreement at ¶ 3.2(e).) Based upon 1,212 California
19 Class Members who collectively worked 125,657 Workweeks, the Total Settlement Amount provides
20 an average value of \$1,598 per California Class Member and \$15 per Workweek and after deductions
21 the Net Settlement Amount provides an average recovery of \$937.22 per California Class Member and
22 a recovery of \$9.03 per Workweek. Decl. Nordrehaug, ¶6.

23 The calculations to compensate for the amount due for the Class at the time of the mediation
24 were calculated by Berger Consulting, Plaintiffs’ damage expert. As to the Class whose claims are at
25 issue in this Action, Plaintiffs used the expert to analyze the data and determine the potential unpaid
26 wages for the employees. The maximum potential damages were calculated to be \$78,442 for the
27 alleged unpaid wages due to rounding practices which ended in October 2020, \$3,130,235 for the
28 alleged unpaid wages due to alleged off-the-clock work at 10 minutes per shift, \$828,971 for alleged

1 meal period damages based upon a 16.7% potential violation rate for shifts worked and after deducting
2 the meal premiums (\$1,339,827) actually paid by Defendant, \$2,354,409 for alleged rest period
3 damages based upon the same potential 16.7% violation rate observed for meal periods, \$795,930 for
4 alleged unreimbursed business expenses for personal cell phone usage at \$30 per month. Decl.
5 Nordrehaug, ¶6. As a result, the total damage valuation was calculated that Defendant was subject to
6 a maximum damage claim in the amount of \$7,187,986. As to potential penalties, Plaintiffs calculated
7 that potential waiting time penalties were a maximum of between \$1,277,620 and \$4,435,375,
8 depending on the predicate violation giving rise to the penalty, and potential maximum wage statement
9 penalties were \$2,072,950.⁴ Defendant vigorously disputed Plaintiffs' calculations and exposure
10 theories. Consequently, the Total Settlement Amount of \$2,000,000, after deducting the \$62,422.50
11 allocated to FCRA payments, represents more than 26% of the maximum value of the alleged damages
12 at issue in this case at the time this Settlement was negotiated.⁵ The above maximum calculations
13 should then be adjusted in consideration for both the risk of class certification and the risk of
14 establishing class-wide liability on all claims. Decl. Nordrehaug, ¶6.

15 As to the FCRA Class, FCRA provides for statutory damages of \$100 to \$1,000 per willful
16 violation. 15 U.S.C. § 1681n. This means the maximum value of the FCRA claim for the 3,567
17 individuals in the FCRA Class is between \$356,700 and \$3,567,000. In this Settlement, the allocation
18 is \$17.50 for each Participating FCRA Class Member. A comparison of approved FCRA settlements
19 involving similar facts further confirms the reasonableness of this Settlement. In *Greco v. Selection*
20 *Mgmt. Sys.*, San Diego County Superior Court, a FCRA settlement of \$11.97 per class member was
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
(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.").

27 ⁵ Because the PAGA claim is not a class claim and primarily is paid to the State of California,
28 Plaintiffs did not include the PAGA claim in this discussion of the value of the class claims. The
PAGA claim is addressed in the Decl. Nordrehaug at ¶33.

1 approved; in *Fernandez v. Home Depot USA, Inc.*, United States District Court C.D. Cal., a FCRA
2 settlement of \$12.71 per class member was approved; and in *Aceves v. Autozone, Inc.*, United States
3 District Court C.D. Cal., a FCRA settlement of \$20 per class member was approved.⁶ Here, the
4 Settlement allocation of \$17.50 per FCRA Class Member is certainly fair and reasonable given the prior
5 approved FCRA settlements. Given the amount of the settlement as compared to the potential value
6 of claims in this case and the defenses asserted by Defendant, this settlement is fair and reasonable.⁷
7 Clearly, the goal of this litigation has been met. Decl. Nordrehaug, ¶6.

8 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
9 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
10 Defendant present serious threats to the claims of the Plaintiffs and the other Class Members.
11 Defendant asserted that Defendant's practices complied with all applicable Labor laws. Defendant
12 argued that Class Members were paid for all time worked, that all work time was properly recorded,
13 and that any rounding was facially neutral and was lawful at the time. Defendant contends that its meal
14 and rest period policies fully complied with California law and Defendant did not fail to provide the
15 opportunity for legally required meal and rest breaks. Defendant could argue that its payment of
16 significant meal period premiums is evidence of lawful practices. Defendant contends that there was

18 ⁶ See also *Moore v. Aerotek, Inc.*, 2017 WL 2838148, at *4 (S.D. Ohio 2017) (per-capita gross
19 recovery of \$25 in FCRA case); *Aceves v. Autozone Inc.*, No. 5:14-cv-2032, ECF No. 58 (C.D. Cal.
20 2016) (approval of FCRA settlement with gross recovery of \$20 per class member); *Patrick v.*
21 *Interstate Mgmt. Co., LLC*, No. 8:15-cv-1252, ECF No. 42 (M.D.Fla. 2016) (approval of FCRA claim
where class members received \$9 each); *Landrum v. Acadian Ambulance Serv., Inc.*, No. 14-cv-1467,
ECF No. 37 (S.D. Tex. 2015) (approval of FCRA disclosure settlement of \$10 per person).

22 ⁷ See *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. 2007) (approving a
23 settlement where the settlement amount constituted approximately 25% of the estimated overtime
24 damages for the class); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12
25 (N.D. Cal. 2015) (granting final approval where "the proposed Total Settlement Amount represents
approximately 10% of what class might have been awarded had they succeeded at trial."); *Dunleavy*
26 *v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (affirming approval
of a class settlement which represented "roughly one-sixth of the potential recovery".) See also *Viceral*
27 *v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D. Cal. 2016) (approving wage and hour class action
settlement amounting to 8.1% of full value); *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, (C.D.
28 Cal. 2014) (approving wage and hour class action settlement worth "somewhere between 9% and 18%"
of maximum valuation).

1 no failure to pay for business expenses and any cell phone usage was merely convenient and voluntary
2 such that reimbursement was not legally required. Finally, Defendant could argue that the Supreme
3 Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiffs' claims, on
4 liability, value, and class certifiability as to the meal and rest period claims. Defendant also argues that
5 based on its facially lawful practices, Defendant acted in good faith and without willfulness, which if
6 accepted would negate the claims for waiting time penalties and/or inaccurate wage statements. As to
7 FCRA claim, Defendant argued that its forms complied with FCRA in all respects. *Coleman v. Kohl's*
8 *Dep't Stores, Inc.*, 2015 U.S. Dist. LEXIS 135746, *17 (N.D. Cal. 2015) (holding a release in a separate
9 document does not violate FCRA); *Luna v. Hansen & Adkins Auto Transp., Inc.*, 2018 U.S. Dist.
10 LEXIS 100055, *18-*19 & n.6 (C.D. Cal. 2018). Finally, the court may find remitter/reduction of the
11 statutory damages appropriate. *See e.g. Klingensmith v. Max & Erma's Restaurants, Inc.*, 2007 U.S.
12 Dist. LEXIS 81029, 2007 WL 3118505, at *5 (E.D.Pa. 2007). If successful, Defendant's defenses could
13 eliminate or substantially reduce any recovery to the Class. While Plaintiffs believe that these defenses
14 could be overcome, Defendant maintains these defenses have merit and therefore present a serious risk
15 to recovery by the Class. Decl. Nordrehaug, ¶ 24.

16 There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable
17 to obtain a certified class and maintain the certified class through trial, and thereby not recover on
18 behalf of any employees other than themselves. At the time of the mediation, Defendant forcefully
19 opposed the propriety of class certification, arguing that individual issues precluded class certification.
20 Further, as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National*
21 *Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class-wide recovery even
22 where the class has been certified. While other cases have approved class certification in wage and
23 hour claims, class certification in this action was hotly disputed and the maintenance of a certified class
24 through trial was by no means a foregone conclusion. Decl. Nordrehaug, ¶ 25.

25 After arm's length negotiations between experienced and informed counsel, the Parties
26 recognized the potential risks and agreed on the Settlement with a Total Settlement Amount of
27 \$2,000,000. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:
28

1 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,
2 and likely duration of further litigation likewise favors the settlement. Regardless of
3 how this Court might have ruled on the merits of the legal issues, the losing party likely
4 would have appealed, and the parties would have faced the expense and uncertainty of
5 litigating an appeal. ‘The expense and possible duration of the litigation should be
6 considered in evaluating the reasonableness of [a] settlement.’”

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

7 **3. The Settlement Does Not Improperly Grant Preferential Treatment To 8 Class Representatives or Segments Of The Class**

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

14 Plaintiffs will apply to the Court for Class Representative Service Payments in consideration
15 for their service and for the risks undertaken on behalf of the Class. (Agreement at ¶ 3.2(a).) Plaintiffs
16 performed their duties admirably by working with Class Counsel over the course of litigation. The
17 Declarations of the Plaintiffs are submitted herewith in support. Decl. Nordrehaug at ¶27. At this
18 stage, the requested service award not to exceed of \$12,500 is well within the accepted range of awards
19 for purposes of preliminary approval. *See e.g. Andrews v. Plains All Am. Pipeline L.P.*, 2022 U.S. Dist.
20 LEXIS 172183, at *11 (C.D. Cal. 2022) (finding that the requested service awards of \$15,000 each are
21 appropriate); *Reynolds v. Direct Flow Med., Inc.*, 2019 U.S. Dist. LEXIS 149865, at *19 (N.D. Cal.
22 2019) (granting request for \$12,500 service award); *Mathein v. Pier 1 Imps. (U.S.), Inc.*, 2018 U.S.
23 Dist. LEXIS 71386 (E.D. Cal. 2018) (awarding \$12,500 where average class member payment was
24 \$351); *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008 WL 4473183, *7 (S.D. Cal. Oct. 06, 2008)
25 (awarding \$25,000 service award to each of six plaintiffs in overtime class action); *Glass v. UBS Fin.*
26 *Servs.*, 2007 WL 221862, *16-17 (N.D. Cal. Jan. 27 2007) (awarding \$25,000 service award in
27 overtime class action and a pool of \$100,000 in enhancements). As explained in *Glass*, service awards
28 are routinely awarded to class representatives to compensate the employees for the time and effort
expended on the case, for the risk of litigation, for the fear of suing an employer and retaliation there

1 from, and to serve as an incentive to vindicate the statutory rights of all employees. 2007 WL 221862
2 at *16-17.

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

5 The stage of the proceedings at which this Settlement was reached also militates in favor of
6 preliminary approval and ultimately, final approval of the Settlement. Class Counsel has conducted
7 a thorough investigation into the facts of the class action. Class Counsel began investigating the Class
8 Members' claims before the Action was filed, and during the course of litigation, Class Counsel
9 engaged in informal discovery to obtain necessary information. Class Counsel conducted a review and
10 analysis of the relevant documents and data. Class Counsel was also experienced with the claims at
11 issue here, as Class Counsel previously litigated and settled similar claims in other actions.
12 Accordingly, the agreement to settle did not occur until Class Counsel possessed sufficient information
13 to make an informed judgment regarding the likelihood of success on the merits and the results that
14 could be obtained through further litigation. Decl. Nordrehaug at ¶28.

15 Based on the foregoing data and their own independent investigation and evaluation, Class
16 Counsel is of the opinion that the Settlement with Defendant for the consideration and on the terms set
17 forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light
18 of all known facts and circumstances, including the risk of significant delay, defenses asserted by
19 Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both
20 parties possessed sufficient information to make an informed judgment regarding the likelihood of
21 success on the merits and the results that could be obtained through further litigation. Decl.
22 Nordrehaug at ¶29.

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

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

28 All individuals who were employed by Defendant in California and classified as
non-exempt at any time during the California Class Period.

1 (Agreement at ¶ 1.6.)

2 The California Class Period is August 11, 2018 through July 28, 2023. (Agreement at ¶ 1.5.) This
3 Court should also conditionally certify the FCRA Class for settlement purposes only, defined as
4 follows:

5 All individuals who applied to work for Defendant who were classified as either exempt
6 or non-exempt in the United States during the FCRA Class Period for whom
7 background checks were run using the same federal FCRA form as that contained on
page 2 of the forms provided to Plaintiff Spears.

8 (Agreement at ¶ 1.6.)

9 The FCRA Class Period is August 11, 2020 through December 9, 2022. (Agreement at ¶ 1.22.)

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

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

14 Code of Civil Procedure Section 382 authorizes class actions “when the question is one
15 of a common or general interest, of many persons, or when the parties are numerous,
16 and it is impracticable to bring them all before the court....” The party seeking
17 certification has the burden to establish the existence of both an ascertainable class and
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.

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

19 While Defendant reserves all rights to dispute that the Plaintiffs can satisfy these requirements,
20 the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
21 for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
22 settlement only. (Agreement at ¶ 2.12.)

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

24 Plaintiffs bring this action on behalf of a Class of employees and employment applicants of
25 Defendant during the Class Period. Plaintiffs assert that all of these individuals are ascertainable
26 because the class members can readily be determined through examination of Defendant’s files. Given
27 that the California Class consists of 1,212 individuals and the FCRA Class consists of 3,567
28 individuals, Plaintiffs maintain that numerosity is clearly satisfied. *See Bowles v. Superior Court*, 44

1 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126
2 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.) Here, Plaintiff
3 asserts that the 1,212 current and former employees that comprise the California Class, and the 3,567
4 individuals in the FCRA Class, can be identified based on Defendant's records and are sufficiently
5 numerous for class certification. Decl. Nordrehaug at ¶30.

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

7 Predominance of common issues of law or fact does not require that the common issues be
8 dispositive of the entire controversy or even that they be dispositive of all liability issues. 1 *Newberg*
9 *on Class Actions*, Section 4.25 at 4-82, 4-83 (1992). "Predominance is a comparative concept, and 'the
10 necessity for class members to individually establish eligibility and damages does not mean individual
11 fact questions predominate.'" *Sav-On*, 34 Cal. 4th at 334.

12 Commonality exists if there is a predominant common legal question regarding how an
13 employer's policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,
14 1536 (2008) ("[T]he common legal question remains the overall impact of Diva's policies on its
15 drivers.") Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the
16 certification stage since the question is "essentially a procedural one that does not ask whether an action
17 is legally or factually meritorious." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

18 Here, Plaintiffs contend that common questions of law and fact are present, specifically the
19 common questions of whether Defendant's employment practices were lawful, whether Defendant
20 failed to provide meal and rest periods to Class Members, whether Class members were lawfully
21 compensated for all hours worked, whether Defendant correctly recorded work time, whether
22 Defendant failed to provide required expense reimbursement, whether Defendant violated the FCRA
23 in performing background checks, and whether Class Members are entitled to damages and penalties
24 as a result of these practices. Plaintiffs contend that certification of this Class is appropriate because
25 Defendant allegedly engaged in uniform practices with respect to the Class Members. As a result, these
26 common questions of liability could be answered on a class wide basis. Decl. Nordrehaug, ¶30.
27 Defendant disputes that common questions predominate but will not oppose such a finding for purposes
28 of this Settlement only.

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

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

8 In this Action, Plaintiffs contend that the typicality requirement is fully satisfied. Plaintiffs, like
9 every other member of the Class, were employed by Defendant as non-exempt employees, and, like
10 every other member of the Class, were subject to the same alleged employment practices. Plaintiffs,
11 like every other member of the Class, also claim owed compensation as a result of the Defendant’s
12 uniform company policies and practices. They also contend that Plaintiff Spears received the same
13 background check forms as every other member of the FCRA Class. Thus, the claims of Plaintiffs and
14 the members of the Class arise from the same course of conduct by Defendant, involve the same issues,
15 and are based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of settlement,
16 Plaintiffs assert that the typicality requirement is met as to the common issues presented in this case.
17 Defendant does not oppose a finding of typicality for purposes of this Settlement only.

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

19 Plaintiffs contend that the Class Members are adequately represented here because Plaintiffs
20 and representing counsel (a) do not have any conflicts of interest with other class members, and (b) will
21 prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is
22 met here. First, Plaintiffs are well aware of their duties as the representatives of the Class and have
23 actively participated in the prosecution of this case to date. Plaintiffs effectively communicated with
24 Class Counsel, provided documents and information to Class Counsel, and participated in the
25 investigation and resolution of the Action. The personal involvement of the Plaintiffs was essential to
26 the prosecution of the Action and the monetary settlement reached. Second, Plaintiffs retained
27 competent counsel who are experienced in employment class actions and who have no conflicts. Decl.
28 Nordrehaug at ¶ 31. Third, there is no antagonism between the interests of the Plaintiffs and those of

1 the Class. Both the Plaintiffs and the Class Members seek monetary relief under the same set of facts
2 and legal theories. Under such circumstances, there can be no conflicts of interest, and adequacy of
3 representation is satisfied. *Reaves v. Ketoro, Inc.*, 2020 U.S. Dist. Lexis 167926, *23 (C.D. Cal. 2020).
4 Defendant disputes that the adequacy requirement is satisfied but will not oppose such a finding for
5 purposes of this Settlement only.

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

7 To certify a class, the Court must also determine that a class action is superior to other available
8 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of
9 common issues will reduce litigation costs and promote greater efficiency, a class action may be
10 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
11 1996). As courts have previously observed:

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

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

19 Here, Plaintiffs contend that a class action is the superior mechanism for resolution of the claims
20 as pled by the Plaintiffs. While Defendant disputes that class treatment is superior, Defendant does not
21 dispute a finding of superiority in this action for purposes of this Settlement only.

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

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

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

9 The Class Notice will state that the Class Members shall have sixty (60) days from the date that
10 the Class Notice is mailed to them (the “Response Deadline”) to request exclusion (opt-out) or to
11 submit a written objection. (Agreement at ¶¶ 1.47, 8.5, 8.7.) Class Members shall be given the
12 opportunity to object to the Settlement and/or requests for attorneys’ fees and expenses and to appear
13 at the Final Approval Hearing. (Agreement at ¶ 8.7.) Class Members who do not submit a timely and
14 proper request to opt-out will automatically receive a payment of their Individual Class Payment. This
15 notice program was designed to meaningfully reach the Class Members and it advises them of all
16 pertinent information concerning the Settlement. Decl. Nordrehaug at ¶32. The mailing and
17 distribution of the Class Notice satisfies the requirements of due process and is the best notice
18 practicable under the circumstances and complies with Rules of Court 3.766 and 3.769(f).

19 VII. CONCLUSION

20 Plaintiffs respectfully request that the Court preliminarily approve the proposed settlement and
21 sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final
22 approval hearing for the proposed date of July 25, 2024, which date is at least one hundred twenty (120)
23 days from the date of Preliminary Approval.

24 Dated: February 26, 2024

BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP
By: /s/ Kyle Nordrehaug
Kyle R. Nordrehaug, Esq.
Attorney for Plaintiff